

RELIEF FROM REMOVAL

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RELIEF FROM REMOVAL

ASYLUM, WITHHOLDING OF REMOVAL, AND THE CONVENTION AGAINST TORTURE

I. THE CONTEXT

The heart of United States asylum law is the protection of refugees fleeing persecution. This court has recognized “the importance of independent judicial review” in asylum cases, “an area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death.” *Rodriguez-Roman v. INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J. concurring); see *id.* at 433 (Reinhardt & Hawkins, JJ., specially concurring) (joining Judge Kozinski’s concurrence on this point).

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

The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

8 U.S.C. § 1101(a)(42)(A); see also 8 C.F.R. § 1208.13 (asylum eligibility regulation); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (quoting 8 U.S.C. § 1101(a)(42)(A)); *Garcia v. Wilkinson*, 988 F.3d 1136, 1142–43 (9th Cir. 2021) (“A ‘refugee’ is defined as any person who is unwilling or unable to return to her home country ‘because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.’” (quoting 8 U.S.C. § 1101(a)(42)(A))); *Parada v. Sessions*, 902 F.3d 901, 909 (9th Cir. 2018) (“To be eligible for asylum, Quiroz Parada must establish that he is a refugee—namely, that he is unable or unwilling to return to El

Salvador because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” (internal quotation marks and citation omitted)); *Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018) (“To be statutorily eligible for asylum, a petitioner must show that he is a refugee.” (citation modified)); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc) (“An applicant qualifies as a refugee if he is unable or unwilling to return to his home country because of a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” (citation modified)).

An applicant may apply for asylum if she is “physically present in the United States” or “arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters).” 8 U.S.C. § 1158(a)(1). Individuals seeking protection from outside the United States may apply for refugee status under 8 U.S.C. § 1157.

The Supreme Court heard argument in *Mullin v. Al Otro Lado*, No. 25-5, on March 24, 2026. The Court is considering the following question presented:

The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, provides that an alien who “arrives in the United States” may apply for asylum and must be inspected by an immigration officer. 8 U.S.C. 1158(b)(1)(A), 1225(a)(1) and (3). The question presented is whether an alien who is stopped on the Mexican side of the U.S.-Mexico border “arrives in the United States” within the meaning of those provisions.

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

the applicant can show past persecution on account of a protected ground. Once past persecution is demonstrated, then fear of future persecution is presumed, and the burden shifts to the government to show, by a preponderance of the evidence, that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or the applicant could avoid

future persecution by relocating to another part of the applicant's country. An applicant may also qualify for asylum by actually showing a well-founded fear of future persecution, again on account of a protected ground.

Deloso v. Ashcroft, 393 F.3d 858, 863–64 (9th Cir. 2005) (citation modified); *see also Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc) (“An applicant may establish a well-founded fear of future persecution in two ways: by proving past persecution, or by demonstrating that he has a subjectively genuine and objectively reasonable fear of future persecution.” (citation modified)).

In enacting the Refugee Act of 1980, “one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

When interpreting the definition of “refugee,” the courts may be guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/IP/4/Eng./REV.2 (ed. 1992) (1979) (“UNHCR Handbook”). *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (“The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts.”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) (“We view the UNHCR Handbook as persuasive authority in interpreting the scope of refugee status under domestic asylum law.” (citation modified)).

II. ASYLUM [§ 1158]

A. Burden of Proof

An applicant bears the burden of establishing that she is eligible for asylum. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (“The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title.”); 8 C.F.R. § 208.13(a) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section

101(a)(42) of the Act.”); *see also* [Plancarte Saucedo v. Garland](#), 23 F.4th 824, 832 (9th Cir. 2022) (“An applicant for asylum and withholding of removal bears the burden of establishing eligibility.”); [Davila v. Barr](#), 968 F.3d 1136, 1141 (9th Cir. 2020) (“An applicant for asylum and withholding of removal bears the burden of establishing eligibility.”); [Aguilar Fermin v. Barr](#), 958 F.3d 887, 892 (9th Cir. 2020) (“Aguilar bears the burden to establish eligibility for relief.” (citing 8 C.F.R. § 208.13(a))).

“To be eligible for asylum, a petitioner has the burden to demonstrate a likelihood of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” [Sharma v. Garland](#), 9 F.4th 1052, 1059 (9th Cir. 2021) (internal quotation marks omitted); *see* [Garcia v. Wilkinson](#), 988 F.3d 1136, 1142–43 (9th Cir. 2021) (“Garcia bears the burden of demonstrating asylum eligibility by showing that she is a refugee within the meaning of the Immigration & Nationality Act”); [Duran-Rodriguez v. Barr](#), 918 F.3d 1025, 1028 (9th Cir. 2019) (“Duran-Rodriguez bears the burden of proving eligibility for asylum and must demonstrate that he has suffered past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

“An applicant alleging past persecution has the burden of establishing that (1) his treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control.” [Baghdasaryan v. Holder](#), 592 F.3d 1018, 1023 (9th Cir. 2010); *accord* [Villegas Sanchez v. Garland](#), 990 F.3d 1173, 1179 (9th Cir. 2021) (same); [Guo v. Sessions](#), 897 F.3d 1208, 1213 (9th Cir. 2018) (same); [Bringas-Rodriguez v. Sessions](#), 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc) (same).

Past persecution “triggers a rebuttable presumption of a well-founded fear of future persecution.” [Garcia-Martinez v. Ashcroft](#), 371 F.3d 1066, 1073 (9th Cir. 2004). When an asylum applicant has established that he suffered past persecution, the burden is on the government to show by a preponderance of the evidence that the applicant either no longer has a well-founded fear of persecution in the country of his nationality, or that he can reasonably relocate internally to an area of

safety. *Afriyie v. Holder*, 613 F.3d 924, 934 (9th Cir. 2010)[, *overruled on other grounds by Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1070 (9th Cir. 2017) (en banc)]; 8 C.F.R. § 1208.13(b)(1)(i).

Singh v. Whitaker, 914 F.3d 654, 659 (9th Cir. 2019); *accord Davila v. Barr*, 968 F.3d 1136, 1141–42 (9th Cir. 2020) (same); *Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018) (same).

Proof of an applicant’s identity is an element of an asylum claim. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003) (citing identity as a “key” element of asylum application); *cf. Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1015 n.5 (9th Cir. 2008) (noting that the government bears the burden of establishing a noncitizen’s identity and alienage in proving removability).

An applicant need not prove his or her identity by a “heightened standard of proof.” *Kalouma v. Gonzales*, 512 F.3d 1073, 1079 (9th Cir. 2008); *see id. at 1078–79* (holding that the IJ erred by construing 8 U.S.C. § 1158(d)(5)(A), which states that “asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum,” as imposing “a duty on the part of the asylum-seeker to provide information so that the Attorney General and Secretary of State could carry out their statutory responsibilities” under the statute). The court held that § 1158(d)(5)(A) “imposes duties on the Attorney General and the Secretary of State,” but it imposes “[n]o new burden for the asylum-seeker.” *Id. at 1078*.

In proceedings to terminate a grant of asylum, the Department of Homeland Security (DHS) must establish the grounds for termination by a preponderance of the evidence. *See Urooj v. Holder*, 734 F.3d 1075, 1078 (9th Cir. 2013) (“In proceedings to terminate a grant of asylum, DHS must establish the grounds for termination by a preponderance of the evidence.” (citing 8 C.F.R. § 1208.24(f))); *see also Grigoryan v. Barr*, 959 F.3d 1233, 1242 (9th Cir. 2020) (“DHS bears the initial burden of proving, by a preponderance of the evidence, fraud in Petitioner’s application such that he was not eligible for asylum at the time it was granted.” (citation modified)). “In other words, DHS must not only show that certain

documents submitted with Petitioner’s original application for asylum were fraudulent. The government’s burden here is much higher: It must show that Petitioner would not have been granted asylum . . . *but for* the fraudulent documents.” [Grigoryan v. Barr](#), 959 F.3d 1233, 1242 (9th Cir. 2020). “If, and only if, the government meets this heavy burden, does the burden shift to the [petitioners] to prove they are entitled to relief from deportation.” *Id.*

In [Urooj](#), the court held that the government cannot satisfy its burden of establishing grounds for termination through impeachment evidence alone; substantive evidence of a fraudulent asylum application is required. *See Urooj v. Holder*, 734 F.3d 1075, 1078–79 (9th Cir. 2013) (holding that “DHS did not meet its burden of establishing the grounds for termination of asylum by a preponderance of the evidence” based solely on the petitioner’s refusal to testify; “[i]mpeachment evidence alone cannot satisfy DHS’ burden where there was no substantive evidence and thus nothing to impeach”).

In [Grigoryan](#), the court granted the petition for review and remanded the case to the BIA where the only evidence of fraud in the petitioner’s asylum application was a Report of Investigation (ROI) prepared by DHS that was unreliable and improperly admitted. *See Grigoryan v. Barr*, 959 F.3d 1233, 1242–43 (9th Cir. 2020).

B. Defining Persecution

The term “persecution” is not defined by the Immigration and Nationality Act.

“Our caselaw characterizes persecution as an extreme concept, marked by the infliction of suffering or harm . . . in a way regarded as offensive.” [Li v. Ashcroft](#), 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (alteration in original) (internal quotation marks omitted); *see also Sharma v. Garland*, 9 F.4th 1052, 1060 (9th Cir. 2021) (“Persecution . . . is an extreme concept that means something considerably more than discrimination or harassment.” (internal quotation marks omitted)); [Kaur v. Wilkinson](#), 986 F.3d 1216, 1222 (9th Cir. 2021) (“Persecution is an extreme concept and has been defined as the infliction of suffering or harm . . . in a way regarded as offensive.” (alteration in original) (internal quotation marks omitted)), *abrogated on other grounds by Urias-Orellana v. Bondi*, 146 S. Ct. 845,

850 n.3 (2026); *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (“Persecution is an extreme concept that does not include every sort of treatment our society regards as offensive.” (internal quotation marks omitted)); *Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018) (“Persecution is an extreme concept and has been defined as the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.” (internal quotation marks omitted)).

Minor disadvantages or trivial inconveniences do not rise to the level of persecution. See *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

Because it is an extreme concept, persecution “does not include every sort of treatment our society regards as offensive.” *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (citation omitted); see also *Al-Safer v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001), *amended*, 355 F.3d 1140 (9th Cir. 2004). This means that “some circumstances that cause petitioners physical discomfort or loss of liberty do not qualify as persecution, despite the fact that such conditions have caused the petitioners some harm.” *Mihalev v. Ashcroft*, 388 F.3d 722, 729 (9th Cir. 2004). Simply stated, “not all negative treatment equates with persecution.” *Lanza v. Ashcroft*, 389 F.3d 917, 934 (9th Cir. 2004).

Sharma v. Garland, 9 F.4th 1052, 1060–61 (9th Cir. 2021).

In *Sharma*, the court identified seven non-exhaustive factors, to be considered cumulatively, relevant to the court’s review of the agency’s determination that past harm failed to rise to the level of persecution: “physical violence and resulting serious injuries, frequency of harm, specific threats combined with confrontation, length and quality of detention, harm to family and close friends, economic deprivation, and general societal turmoil.” See *Sharma*, 9 F.4th at 1061–63; see also *Fon v. Garland*, 34 F.4th 810, 813–14 (9th Cir. 2022) (referencing the “seven non-exhaustive factors” identified in *Sharma* in reviewing a past-persecution determination).

The INA “requires application of the substantial-evidence standard to the agency’s conclusion that a given set of undisputed facts does not constitute persecution.” *Urias-Orellana v. Bondi*, 146 S. Ct. 845, 848 (2026); *id.* at 851

(“[T]he statute as it reads today requires substantial-evidence review for the entirety of the persecution determination.”).

Urias-Orellana resolved an intracircuit split as to whether the applicable standard of review was substantial evidence or de novo. See, e.g., *Singh v. Garland*, 57 F.4th 643, 650–52 (9th Cir. 2023) (recognizing intracircuit split); *Flores Molina v. Garland*, 37 F.4th 626, 633 n.2 (9th Cir. 2022) (same); *Fon v. Garland*, 34 F.4th 810, 813 n.1 (9th Cir. 2022) (same).

Cross-reference: Asylum, Forms of Persecution.

1. Cumulative Effect of Harms

The cumulative effect of harms and abuses that might not individually rise to the level of persecution may support an asylum claim. Accordingly, the BIA errs where it fails to conduct a cumulative-effect review in assessing evidence of past persecution. See *Lapadat v. Bondi*, 145 F.4th 942, 952 (9th Cir. 2025) (“We assess a past-persecution finding by ‘looking at the cumulative effect of all the incidents [that the] [p]etitioner has suffered.’” (alterations in original) (quoting *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998))); *Salguero-Sosa v. Garland*, 55 F.4th 1213, 1218 (9th Cir. 2022) (“[W]hen determining whether a petitioner’s past mistreatment rises to the level of persecution, the BIA must apply cumulative-effect review.”); *id.* at 1220 (granting petition for review and remanding where the BIA failed to conduct a cumulative-effect review); *Sharma v. Garland*, 9 F.4th 1052, 1061 (9th Cir. 2021) (in determining whether the facts compel a conclusion of past persecution, “[t]he key question is whether, looking at the cumulative effect of all the incidents that a Petitioner has suffered, the treatment he received rises to the level of persecution” (alteration in original) (internal quotation marks omitted))); *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (“We look at the totality of the circumstances in deciding whether a finding of persecution is compelled.”); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (“The key question is whether, looking at the cumulative effect of all the incidents a petitioner has suffered, the treatment she received rises to the level of persecution.”).

Cases applying cumulative-effects review include the following. See *Singh v. Blanche*, No. 24-815, 2025 WL 4725632, at *6 (9th Cir. May 15, 2026) (“One

vague threat by unknown people, two apparently unrelated assaults by unknown people, and a brief detention by police over an eleven-month period do not compel us to reverse the BIA.”); *Lapadat v. Bondi*, 145 F.4th 942, 953 (9th Cir. 2025) (“The shooting, the attempted kidnapping and the rape and death threats—accompanied by the Lapadats’ credible testimony regarding an ongoing pattern of serious maltreatment—collectively compel a finding of harm rising to the level of persecution.”); *Hussain v. Rosen*, 985 F.3d 634, 647 (9th Cir. 2021) (“Even considered cumulatively,” the petitioner’s “claims of generalized physical attacks, contradictory testimony of death threats, unspecified economic harm, and unsubstantiated psychological harm do not rise to the level of targeted persecution.”); *Guo v. Sessions*, 897 F.3d 1208, 1212–17 (9th Cir. 2018) (“record as a whole” compelled the conclusion that petitioner suffered past religious persecution); *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (“Where an asylum applicant suffers [physical harm] on more than one occasion, and . . . victimized at different times over a period of years, the cumulative effect of the harms is severe enough that no reasonable fact-finder could conclude that it did not rise to the level of persecution.”); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005) (“The combination of sustained economic pressure, physical violence and threats against Petitioner and her close associates, and the restrictions on Petitioner’s ability to practice her religion cumulatively amount to persecution.”); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120–21 (9th Cir. 2004) (“Viewed cumulatively, Zakia’s evidence of a death threat, violent physical attacks against her husband and sons, a near-confrontation with a violent mob, vandalism, economic harm and emotional trauma compels a finding of past persecution.”); *Narayan v. Ashcroft*, 384 F.3d 1065, 1066–67 (9th Cir. 2004) (holding that any reasonable fact-finder would be compelled to find that the acts against petitioner cumulatively amounted to persecution where petitioner “was physically harmed on several occasions, repeatedly robbed, and . . . not aided by the police”); *Faruk v. Ashcroft*, 378 F.3d 940, 943–44 (9th Cir. 2004) (evidence established past persecution where mixed-race, mixed-religion Fijian couple was beaten, attacked, verbally assaulted, assailed with rocks, repeatedly threatened, and denied a marriage certificate); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, economic hardship, violence, and discrimination against Israeli Arab and his family; “When analyzed in the aggregate, the physical assaults and economic harassment endured by Baballah compel a finding of persecution.”); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (persecution

established where, considering the past harm cumulatively, Ukrainian Jew witnessed violent attacks and suffered extortion, harassment, and threats by anti-Semitic ultra-nationalists)); *Surita v. INS*, 95 F.3d 814, 819–21 (9th Cir. 1996) (evidence established past persecution where Indo-Fijian was robbed multiple times, compelled to quit her job, afraid to leave home, threatened with rape and murder, and had her parents’ home looted at gunpoint); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (Indo-Fijian family harassed, assaulted, and threatened in Fiji).

The cumulative effects requirement applies to withholding of removal as well as asylum. See *Vitug v. Holder*, 723 F.3d 1056, 1065 (9th Cir. 2013) (presuming that the petitioner was eligible for withholding of removal where “no reasonable factfinder could conclude that the harm Vitug suffered did not rise to the level of persecution in light of the cumulative effect of multiple instances of physical harm and victimization”).

2. Subjective Intent to Harm Not Required

A subjective intent to harm or punish an applicant is not required for a finding of persecution. See *Pitcherskaia v. INS*, 118 F.3d 641, 646–48 (9th Cir. 1997) (Russian government’s attempt to “cure” lesbian applicant established persecution); see also *Mohammed v. Gonzales*, 400 F.3d 785, 796 n.15 (9th Cir. 2005) (holding that female genital mutilation constituted persecution even though the practice was “widespread” and culturally accepted).

Harm can constitute persecution even if the persecutor had an “entirely rational and strategic purpose behind it.” *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

3. Forms of Persecution

a. Physical Violence

“The first, and often a significant consideration [in determining whether a petitioner has suffered past persecution], is whether the petitioner was subject to ‘significant physical violence,’ and, relatedly, whether he suffered serious injuries that required medical treatment. . . . [W]hen we have granted petitions for review

because the record compelled a finding of past persecution, the petitioner often experienced serious physical violence, among other indicators of persecution.” *Sharma v. Garland*, 9 F.4th 1052, 1061–63 (9th Cir. 2021).

“The hallmarks of persecutory conduct include, but are not limited to, the violation of bodily integrity and bodily autonomy.” *Kaur v. Wilkinson*, 986 F.3d 1216, 1222 (9th Cir. 2021), *abrogated on other grounds by Urias-Orellana v. Bondi*, 146 S. Ct. 845, 850 n.3 (2026).

Various forms of physical violence amount to persecution, including rape, torture, assault, and beatings. See *Chand v. INS*, 222 F.3d 1066, 1073–74 (9th Cir. 2000) (“Physical harm has consistently been treated as persecution.”); see also *Sharma v. Garland*, 9 F.4th 1052, 1061 (9th Cir. 2021) (“The first, and often a significant consideration, is whether the petitioner was subject to significant physical violence, and, relatedly, whether he suffered serious injuries that required medical treatment.” (internal quotation marks omitted)); *Aden v. Wilkinson*, 989 F.3d 1073, 1082 (9th Cir. 2021) (recognizing that the court has consistently held that physical harm has been treated as persecution); *Song v. Sessions*, 882 F.3d 837, 841 (9th Cir. 2017) (no dispute that Song experienced past persecution at the hands of the local government where he was tortured and beaten by police and by his cell mates at the encouragement of the police, forced to stay in a squatting position all night, and, when he refused to cooperate with interrogators, he was beaten until he could not walk); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) (“There is no dispute that the brutal beatings and rapes that Bringas suffered as a child rise to the level of persecution.”); cf. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015) (CAT relief) (holding that petitioner was tortured where she was “raped, forced to perform oral sex, beaten severely, and threatened”).

The cultural practice of female genital mutilation constitutes persecution. See *Benyamin v. Holder*, 579 F.3d 970, 976 (9th Cir. 2009) (“It is well-settled in this circuit that female genital mutilation constitutes persecution sufficient to warrant asylum relief.”); *Abebe v. Gonzales*, 432 F.3d 1037, 1042 (9th Cir. 2005) (en banc) (“It is well-settled that FGM constitutes persecution sufficient to warrant a grant of asylum.”).

An applicant need not seek medical treatment for her injuries. *See Lopez v. Ashcroft*, 366 F.3d 799, 803 (9th Cir. 2004) (“That Lopez did not seek medical treatment for the burns he suffered is hardly the touchstone of whether his treatment by guerrillas amounted to persecution.”); *id.* (holding that the petitioner suffered past persecution where he “had been placed in a burning warehouse by guerrillas, bound so he could not escape absent help, and had suffered additional threats on his life from the same group”); *see also Guo v. Sessions*, 897 F.3d 1208, 1215 (9th Cir. 2018) (“[A] beating may constitute persecution, even when there are no long-term effects and the [petitioner] does not seek medical attention.” (second alteration in original) (internal quotation marks omitted))).

Serious bodily injury is not necessarily required. *See, e.g., Singh v. Garland*, 57 F.4th 643, 657 (9th Cir. 2023) (holding that past harm rose to the level of persecution despite the absence of “life-threatening physical injuries” where the petitioner was “targeted for his political views, threatened (including a death threat), assaulted (leaving physical wounds), and compelled to flee his home”); *Guo v. Sessions*, 897 F.3d 1208, 1215 (9th Cir. 2018) (beating alone may have amounted to persecution where petitioner “suffered no permanent injuries” but “the repeated baton blows to various parts of his body left him unable to stand on his own” and the petitioner “felt it necessary to be examined at a hospital immediately upon his release, two days after the beating”); *Quan v. Gonzales*, 428 F.3d 883, 888–89 (9th Cir. 2005) (“Using an electrically-charged baton on a prisoner . . . may constitute persecution, even when there are no long-term effects and the prisoner does not seek medical attention.”); *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004) (although petitioner “suffered no serious bodily injury and required no medical attention,” his “10-day detention, accompanied by daily beatings and hard labor,” compelled a finding of past persecution).

“[S]ome forms of physical violence are so extreme that even *attempts* to commit them constitute persecution.” *Kaur v. Wilkinson*, 986 F.3d 1216, 1223 (9th Cir. 2021), *abrogated on other grounds by Urias-Orellana v. Bondi*, 146 S. Ct. 845, 850 n.3 (2026). Crimes falling within this category include attempted murder, *see id.* (“[A]ttempted murder constitutes persecution.”); attempted kidnapping, *see id.* (“[B]ecause kidnapping involves the extreme loss of bodily autonomy, attempted kidnapping can constitute persecution.”); and attempted rape, *see id.* at 1224 (“Similar to attempted murder and attempted kidnapping, attempted rape almost always constitutes persecution.”).

(i) Physical Violence Sufficient to Constitute Persecution

See *Lapadat v. Bondi*, 145 F.4th 942, 952–53 (9th Cir. 2025) (shooting alone constituted past persecution, even without additional evidence of persecution that included the attempted kidnapping of daughters; denial of healthcare, work, and access to public pools and restaurants; police beatings; and criminal threats over a period of years); *Aden v. Wilkinson*, 989 F.3d 1073, 1083–84 (9th Cir. 2021) (evidence compelled a finding of past persecution where “[t]en members of Al-Shabaab raided the theater that [petitioner] and his brother operated, physically beat [petitioner], and cudged him on the head with the butt of a rifle, causing him to bleed profusely,” and “members of Al-Shabaab kept tabs on him by contacting his brother and warned they would kill [him] and his brother if they continued to disobey Al-Shabaab’s command” to stop featuring American and Hindi movies and sport); *Parada v. Sessions*, 902 F.3d 901, 909–10 (9th Cir. 2018) (petitioner’s “brother’s assassination, the murder of his neighbor as a result of his own family being targeted, his experience being captured and beaten to the point of unconsciousness, repeated forced home invasions, and specific death threats toward his family” amounted to past persecution); *Guo v. Sessions*, 897 F.3d 1208, 1215 (9th Cir. 2018) (petitioner suffered past persecution where police officers beat him with batons, leaving him unable to stand, and prohibited him from practicing his religion); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) (“There is no dispute that the brutal beatings and rapes that Bringas suffered as a child rise to the level of persecution”); *Song v. Sessions*, 882 F.3d 837, 841 (9th Cir. 2017) (petitioner suffered past persecution where he “was tortured and beaten by police, and by his cell mates at the encouragement of the police, . . . “[h]e was forced to stay in a squatting position all night, and, when he refused to cooperate with interrogators, he was beaten until he could not walk”); *Bondarenko v. Holder*, 733 F.3d 899, 908–09 (9th Cir. 2013) (evidence established past persecution where petitioner “was detained three times because of his political activism against the Chechen war,” “[d]uring his second detention, he was severely beaten,” “[d]uring the protest that led to his third detention, he was hit in the head by the police with such force that he was hospitalized for three days,” and “[a]fter he was released from his third detention, he was dismissed from the university where he had been studying”); *Vitug v. Holder*, 723 F.3d 1056, 1065–66 (9th Cir. 2013) (evidence compelled a finding of past persecution where petitioner “was beaten multiple times over a period of years,” including two severe beatings, and

“was unable to find a job in the Philippines because of his sexual orientation”); *Benyamin v. Holder*, 579 F.3d 970, 977 (9th Cir. 2009) (“[T]he female genital mutilation that Annisa endured undoubtedly constitutes past persecution.”); *Li v. Holder*, 559 F.3d 1096, 1107–08 (9th Cir. 2009) (evidence established past persecution where petitioner was repeatedly hit by police officers in the face, kicked in the head and stomach, left bloodied, handcuffed, and exposed to freezing temperatures, and endured police-sanctioned beatings during 15 days of confinement at a labor camp); *Ahmed v. Keisler*, 504 F.3d 1183, 1193–94 (9th Cir. 2007) (native of Bangladesh suffered past persecution where he was “beaten and jailed by the army and the police because of his participation in a hunger strike and two political demonstrations”; “Where an asylum applicant suffers [physical] harm on more than one occasion, and, as in this case, is victimized at different times over a period of years, the cumulative effect of the harms is severe enough that no reasonable fact-finder could conclude that it did not rise to the level of persecution.”); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007) (Ukrainian national experienced beatings and death threats rising to the level of persecution); *Guo v. Ashcroft*, 361 F.3d 1194, 1197, 1203 (9th Cir. 2004) (evidence established past persecution where petitioner was detained and beaten on two occasions and coerced into signing a document saying he would no longer believe in Christianity); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1134 (9th Cir. 2004) (holding that “any reasonable fact-finder would be compelled to conclude that the repeated beatings, arrests, and threats suffered by Mamouzian constitute persecution within the meaning of the asylum statute”); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1075–76 (9th Cir. 2004) (evidence established past persecution where members of the Guatemalan military raped petitioner in the course of targeting her village for its perceived affiliation with the guerilla movement); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (evidence compelled a finding of past persecution where Bangladeshi was kidnapped, beaten and stabbed on account of political opinion); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (evidence compelled a finding of past persecution where Ethiopian was raped by soldiers as part of a regular program of searches to which her family was subjected); *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (evidence compelled a finding of past persecution where petitioner was subjected to a “crude and aggressive” pregnancy examination and told that she could be subjected to the same sort of test at any time in the future and that she would be subject to forced abortion and her boyfriend sterilized if she were to

become pregnant); *Lopez v. Ashcroft*, 366 F.3d 799, 802–03 (9th Cir. 2004) (evidence compelled a finding of past persecution where guerillas tried to kill petitioner three times, including by locking him in a burning warehouse, causing him to suffer burns on his hands and back); *Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (Guatemalan was kidnapped and wounded by guerillas and her husband and brother were killed); *Agbuya v. INS*, 241 F.3d 1224, 1227–28 (9th Cir. 2001) (Filipino was kidnapped by New People’s Army, held captive for a week, blindfolded, threatened with a gun, physically abused, and ransomed); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (Indian Sikh arrested on two occasions by Indian police, detained for three days following the second arrest, and beaten and subjected to electric shock torture by members of the Indian police force), *abrogated on other grounds by Garland v. Ming Dai*, 593 U.S. 357, 364–65 (2021); *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000) (Indo-Fijian assaulted in front of family, held captive for a week, and beaten unconscious), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–41 (9th Cir. 2009); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (politically active Nigerian arrested on four occasions, held incommunicado, tortured, and scarred); *Shoafera v. INS*, 228 F.3d 1070, 1072–74 (9th Cir. 2000) (ethnic Amhara Ethiopian beaten and raped at gunpoint); *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (police beat Iranian repeatedly and repeatedly demanded his confession to a crime he did not commit); *Chand v. INS*, 222 F.3d 1066, 1073–74 (9th Cir. 2000) (Indo-Fijian attacked repeatedly by military, robbed, and forced to leave home); *Maini v. INS*, 212 F.3d 1167, 1174 (9th Cir. 2000) (inter-faith Indian family subjected to physical attacks, death threats, and harassment at home, school, and work); *Chanchavac v. INS*, 207 F.3d 584, 589–90 (9th Cir. 2000) (the Guatemalan military “engaged in repeated violent attacks against Chanchavac’s family and community,” including breaking into his home and beating him so severely that he was bedridden for two days, beating his father, pointing their guns at his sister, killing two of his close relatives, searching his papers, copying down his name, and persecuting others in his village); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161–62 (9th Cir. 1999) (Indian who was conscripted into Guatemalan military “witnessed and was the object of repeated beatings and severe verbal harassment by his Hispanic superiors”); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (Indo-Fijian jailed twice, beaten, subjected to sadistic and degrading treatment, and lost job); *Lopez-Galarza v. INS*, 99 F.3d 954, 960 (9th Cir. 1996) (Nicaraguan imprisoned, raped, abused, deprived of food, and subjected to forced

labor by Sandinista soldiers based on perceived political opposition to the Sandinista regime).

(ii) Physical Violence Insufficient to Constitute Persecution

“We have repeatedly denied petitions for review when, among other factors, the record did not demonstrate significant physical harm.” *Sharma v. Garland*, 9 F.4th 1052, 1061, 1063 (9th Cir. 2021) (holding “the harm perpetrated against Sharma, while disgraceful, does not compel a finding of past persecution” where, although petitioner experienced verbal and some physical abuse, he was detained only once and suffered no serious bodily harm); *see, e.g., Singh v. Blanche*, No. 24-815, 2025 WL 4725632, at *5 (9th Cir. May 15, 2026) (two assaults without serious injuries did not compel past-persecution finding, even though petitioner was knocked unconscious and hospitalized); *Gu v. Gonzales*, 454 F.3d 1014, 1019–21 (9th Cir. 2006) (brief detention, beating, and interrogation did not compel a finding of past persecution by Chinese police on account of unsanctioned religious practice); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1153 (9th Cir. 2005) (no past persecution where “Nahrvani suffered no physical harm nor was he ever detained”); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (harassment, threats, and one beating unconnected with any particular threat did not compel finding that ethnic Albanian suffered past persecution in Kosovo); *Al-Safer v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (detention for 5–6 days, where petitioner was not beaten, tortured, or threatened prior to his escape, did not compel finding of past persecution); *Prasad v. INS*, 47 F.3d 336, 339–40 (9th Cir. 1995) (minor abuse of Indo-Fijian during 4–6 hour detention did not compel finding of past persecution).

b. Torture

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

shown where petitioner “was tortured by the police because they thought he was a supporter of the Sikh separatists”).

c. Threats

“[W]e have repeatedly held that threats may be compelling evidence of past persecution, particularly when they are specific and menacing and are accompanied by evidence of violent confrontations, near-confrontations and vandalism.” *Flores Molina v. Garland*, 37 F.4th 626, 634 (9th Cir. 2022) (internal quotation marks omitted) (citing *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119 (9th Cir. 2004) (holding that a single written death threat was “strong evidence of persecution” particularly in light of the broader violence and escalating harm)); see *Antonio v. Garland*, 58 F.4th 1067, 1073 (9th Cir. 2023) (explaining that immigration judge failed to recognize that threats may be compelling evidence of past persecution in concluding that a community’s verbal and physical harassment and death threats to petitioner “amounted simply to threats”); *Sharma v. Garland*, 9 F.4th 1052, 1062 (9th Cir. 2021) (“Petitioners often point to threats made against them in support of their claims of past persecution.”); *Baballah v. Ashcroft*, 367 F.3d 1067, 1074 (9th Cir. 2004) (“Threats and attacks can constitute persecution even where an applicant has not been beaten or physically harmed.” (citations omitted)); *Ruano v. Ashcroft*, 301 F.3d 1155, 1160–61 (9th Cir. 2002) (past persecution established where petitioner experienced multiple death threats and “near face-to-face confrontations” with armed persecutors, and persecutors directly confronted his family); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (past persecution established where members of the petitioner’s family had been killed by guerrilla forces and the petitioner received two threatening notes related to their killings).

“[W]e have ‘consistently held that death threats alone can constitute persecution.’” *Flores Molina v. Garland*, 37 F.4th 626, 634 (9th Cir. 2022) (quoting *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000)); *Kaur v. Wilkinson*, 986 F.3d 1216, 1223 (9th Cir. 2021) (“Because murder is perhaps the ultimate threat to bodily integrity, in certain cases, we have held that death threats can constitute a primary part of a past persecution claim.” (citation modified)), *abrogated on other grounds by Urias-Orellana v. Bondi*, 146 S. Ct. 845 (2026); *id.* at 1227 (“Death threats alone can constitute persecution”); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (collecting cases).

“We generally look at all of the surrounding circumstances to determine whether . . . threats are actually credible and rise to the level of persecution.” *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019). “We have been most likely to find persecution where threats are repeated, specific and ‘combined with confrontation or other mistreatment.’” *Id.* (quoting *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000)); accord *Sharma v. Garland*, 9 F.4th 1052, 1062 (9th Cir. 2021) (court has “been most likely to find persecution where threats are repeated, specific and combined with confrontation or other mistreatment”).

“Unfulfilled threats are very rarely sufficient to rise to the level of persecution” *Hussain v. Rosen*, 985 F.3d 634, 647 (9th Cir. 2021); see *Villegas Sanchez v. Garland*, 990 F.3d 1173, 1179 (9th Cir. 2021) (“Mere threats, without more, do not necessarily compel a finding of past persecution.”); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats received by ethnic Albanian “constitute harassment rather than persecution”).

But the fact that threats are unfulfilled is not dispositive:

[T]hat none of the threats against Petitioners have yet to be carried out does not render their fear unreasonable. Threats on one’s life, within a context of political and social turmoil or violence, have long been held sufficient to satisfy a petitioner’s burden of showing an objective basis for fear of persecution. *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988). “What matters is whether the group making the threat has the will or the ability to carry it out.” *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984).

Kaiser v. Ashcroft, 390 F.3d 653, 658–59 (9th Cir. 2004); see *Aden v. Wilkinson*, 989 F.3d 1073, 1083 (9th Cir. 2021) (“What matters, in assessing the sufficiency of the threat to establish persecution, is whether the group making the threat has the will or the ability to carry it out—not whether it is, in fact, carried out.” (internal quotation marks and citation omitted)).

“[B]eing forced to flee from one’s home in the face of an immediate threat of severe physical violence or death is squarely encompassed within the rubric of persecution.” *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314 (9th Cir. 2012).

(i) Cases Holding Threats Establish Persecution

See *Flores Molina v. Garland*, 37 F.4th 626, 636 (9th Cir. 2022) (“Any reasonable adjudicator would be compelled to hold that the repeated and specific death threats that Flores Molina experienced, amid the violence and menacing confrontations to which he was subjected, amount to persecution.”); *Aden v. Wilkinson*, 989 F.3d 1073, 1083–84 (9th Cir. 2021) (evidence compelled the conclusion that Aden suffered past persecution in Somalia where, in addition to physically beating Aden, members of Al-Shabaab kept tabs on him by contacting his brother and threatened they would kill Aden and his brother if they continued to disobey Al-Shabaab’s command to close their theater); *Kaur v. Wilkinson*, 986 F.3d 1216, 1227 (9th Cir. 2021) (attempted rape of petitioner, in addition to death threats and violence against parents, demonstrated past persecution), *abrogated on other grounds by Urias-Orellana v. Bondi*, 146 S. Ct. 845, 850 n.3 (2026); *Parada v. Sessions*, 902 F.3d 901, 909–10 (9th Cir. 2018) (harm petitioner suffered, such as “his brother’s assassination, the murder of his neighbor as a result of his own family being targeted, his experience being captured and beaten to the point of unconsciousness, repeated forced home invasions, and specific death threats toward his family” amounted to persecution); *Vitug v. Holder*, 723 F.3d 1056, 1065–66 (9th Cir. 2013) (beaten multiple times over a period of years and threatened and harassed by police in the Philippines); *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (native of Bangladesh suffered beatings by police or army on three occasions, combined with detentions and threats); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007) (Ukrainian national experienced beatings and death threats rising to the level of persecution); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 745 (9th Cir. 2006) (Peruvian national who received anonymous death threats fifteen years earlier demonstrated an at least 10% chance of future persecution sufficient to establish a well-founded fear); *Ndom v. Ashcroft*, 384 F.3d 743, 751–52 (9th Cir. 2004) (Senegalese native subjected to severe death threats coupled with two lengthy detentions without formal charges), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Deloso v. Ashcroft*, 393 F.3d 858, 860–61 (9th Cir. 2005) (Filipino applicant was attacked, threatened with death, followed, and had store ransacked); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (threats, combined with anguish suffered as a result of torture and killing of fellow Burmese Christian preacher); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, violence, and discrimination against Israeli Arab and family

amounted to persecution); *Ruano v. Ashcroft*, 301 F.3d 1155, 1160–61 (9th Cir. 2002) (Guatemalan faced multiple death threats at home and business, was “closely confronted,” and was actively chased); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074–75 (multiple death threats, harm to family, and murders of counterparts by Shining Path guerillas), *as amended by* 290 F.3d 964 (9th Cir. 2002); *Chouchkov v. INS*, 220 F.3d 1077, 1083–84 (9th Cir. 2000) (Russian who suffered harassment, including threats, attacks on family, intimidation, and thefts); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (Indian applicant’s politically active husband was killed, and she and her family were threatened repeatedly); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (“we have consistently held that death threats alone can constitute persecution;” Salvadoran was threatened and shot at, his family members were killed, and his mother was beaten); *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) (“[T]he determination that actions rise to the level of persecution is very fact-dependent, ... though threats of violence and death are enough.”); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (multiple death threats faced by Colombian prosecutor); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (two death threats from Salvadoran guerillas, and petitioner’s cousins and their families were killed); *Garrovillas v. INS*, 156 F.3d 1010, 1016–17 (9th Cir. 1998) (if credible, three death threat letters received by former Filipino military agent would appear to constitute past persecution); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1295–96 (9th Cir. 1997) (suggesting that threats to life and business based on opposition to Shining Path constituted past persecution), *as amended by* 133 F.3d 726 (9th Cir. 1998); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (Indian Sikh threatened and had home burglarized, and his father was beaten); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (Nicaraguan was threatened with death by Sandinistas, her house was marked, her ration card appropriated, and her family was harassed); *see also Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314–15 (9th Cir. 2012) (holding that petitioner was persecuted as an infant when her mother was forced to flee home in the face of an immediate threat of violence or death).

(ii) Cases Holding Threats Not Persecution

See Singh v. Blanche, No. 24-815, 2025 WL 4725632, at *5 (9th Cir. May 15, 2026) (“The first threat itself—leave the Mann party or ‘otherwise the consequences will be bad’—was not a ‘specific’ or ‘menacing’ statement placing Singh in imminent fear of harm.”); *Sharma v. Garland*, 9 F.4th 1052, 1064 (9th

Cir. 2021) (anonymous and vague telephonic threats received over a period of years, which did not appear to affect Sharma’s behavior or prevent him departing and returning to India, did not constitute persecution; “While no doubt ‘unpleasant,’ the threats evidently did not cause ‘significant actual suffering or harm.’” (citing *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000))); *Villegas Sanchez v. Garland*, 990 F.3d 1173, 1180 (9th Cir. 2021) (substantial evidence supported the BIA’s determination that petitioner’s unfulfilled threats were not so extreme as to constitute past persecution); *Hussain v. Rosen*, 985 F.3d 634, 647 (9th Cir. 2021) (“While [petitioner’s] father was once threatened by a group of Sunni Muslims (not the Taliban), no harm ever came to his father, mother, or siblings,” and petitioner’s testimony and documentation did not support assertion on appeal that he received death threats); *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (evidence of a threat over the phone, and another in person, over the course of two days, by men believed to be hitmen, did not compel the conclusion that petitioner suffered past persecution); *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1171–72 (9th Cir. 2006) (vague and conclusory allegations regarding threats insufficient to establish a well-founded fear of persecution); *Ramadan v. Gonzales*, 479 F.3d 646, 658 (9th Cir. 2007) (threats of harm too speculative to meet high threshold for withholding of removal), *abrogated on other grounds as stated in Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1153–54 (9th Cir. 2005) (two “serious” but anonymous threats coupled with harassment and de minimis property damage insufficient to establish past persecution); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 n.6 (9th Cir. 2003) (“unspecified threats” received by Mexican national not “sufficiently menacing to constitute past persecution”); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats received by ethnic Albanian “constitute harassment rather than persecution”); *Lim v. INS*, 224 F.3d 929, 936–37 (9th Cir. 2000) (mail and telephone threats received by former Filipino intelligence officer insufficient to establish past persecution); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (anonymous threat received by Salvadoran military musician insufficient to establish well-founded fear of persecution).

d. Detention

Detention and confinement may constitute persecution. “The length and quality of a petitioner’s detention, if any, is . . . a relevant consideration.” *Sharma*

v. Garland, 9 F.4th 1052, 1062 (9th Cir. 2021) (providing examples of cases in which petitioners were detained).

Detention establishing persecution: *see Bondarenko v. Holder*, 733 F.3d 899, 908–09 (9th Cir. 2013) (past persecution established where petitioner was detained three times, severely beaten, and hit in the head with such force that he was hospitalized for three days); *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (native of Bangladesh suffered “detentions, beatings, and threats” that were disproportionate to his political activities and rose to the level of persecution); *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (Senegalese applicant established persecution where he was threatened and detained twice under harsh conditions for a total of 25 days), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004) (imprisonment in over-crowded Congolese jail cell with harsh, unsanitary, and life-threatening conditions established past persecution); *see also Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (suggesting that forced institutionalization of Russian lesbian could amount to persecution).

Detention not establishing persecution: *see Singh v. Blanche*, No. 24-815, 2025 WL 4725632, at *6 (9th Cir. May 15, 2026) (evidence did not compel finding of past persecution where petitioner was detained for a single night and not physically harmed); *Sharma*, 9 F.4th at 1063–64 (“Sharma’s period of incarceration of less than one day, the fact that he was only detained once, and the lack of any resulting serious bodily harm support our view that, under the substantial evidence standard, the record does not compel a finding of past persecution.”); *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007) (suggesting that potential detention for 72 hours upon removal to El Salvador under that country’s “Mano Duro” laws on account of suspected gang affiliation would not amount to persecution); *Hanna v. Keisler*, 506 F.3d 933, 939 (9th Cir. 2007) (severity of past persecution in Iraq, where petitioner was detained for over one month and tortured, was not sufficient to qualify for humanitarian asylum based on past persecution); *Khup v. Ashcroft*, 376 F.3d 898, 903–04 (9th Cir. 2004) (evidence did not compel finding that one day of forced portage suffered by Burmese Christian preacher amounted to persecution); *Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (Iraqi’s five- to six-day detention not persecution), *as amended by* 355 F.3d 1140 (9th Cir. 2004); *Khourassany v. INS*, 208 F.3d 1096,

1100–01 (9th Cir. 2000) (Palestinian-Israeli’s short detentions not persecution); *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (Iranian’s brief detention not persecution); *Mendez-Efrain v. INS*, 813 F.2d 279, 283 (9th Cir. 1987) (Salvadoran’s four-day detention not persecution).

e. Mental, Emotional, and Psychological Harm

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

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

Confinement to an abusive mental hospital can constitute persecution. See *Lemus-Escobar v. Bondi*, 158 F.4th 944, 968–70 (9th Cir. 2025) (agency’s denials of asylum, withholding of removal, and CAT relief were not supported by substantial evidence where the petitioner presented evidence that he would be hospitalized based on severe mental illness if returned to Guatemala and that “institutionalized mentally ill persons in Guatemala are significantly mistreated”).

f. Harm to Family Members or Close Friends

Harms that have befallen a petitioner’s family members or close friends may be relevant to establishing past persecution. See *Sharma v. Garland*, 9 F.4th 1052, 1062 (9th Cir. 2021) (“Another recurring factor that arises in our cases is harms that have befallen a petitioner’s family members or close friends.”).

See, e.g., *Singh v. Garland*, 57 F.4th 643, 654 (9th Cir. 2022) (“The determination that Singh’s experiences constitute serious harm is further compelled by the fact that Singh’s brother . . . also experienced physical violence and was forced to flee India because ‘harms that have befallen a petitioner’s family

members or close friends’ strengthen an applicant’s past-persecution claim.”) (citing *Sharma*, 9 F.4th at 1062)); *Baballah v. Ashcroft*, 367 F.3d 1067, 1074–76 (9th Cir. 2004) (considering violence against petitioner’s brother as one factor supporting the determination that petitioner established past persecution); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1075 (9th Cir. 2002) (evidence that guerillas beat petitioner’s mother and father when they could not find petitioner supported a finding of past persecution).

“Harm to a child can amount to past persecution of the parent when that harm is, at least in part, directed against the parent ‘on account of’ or ‘because of’ *the parent’s* race, religion, nationality, membership in a particular social group, or political opinion.” *Sumolang v. Holder*, 723 F.3d 1080, 1084 (9th Cir. 2013) (delay in treating petitioner’s daughter was relevant to whether petitioner suffered past persecution).

This court has affirmed “the legal rule that injuries to a family must be considered in an asylum case where events that form the basis of the past persecution claim were perceived when petitioner was a child.” *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1046 (9th Cir. 2007); *see also Rusak v. Holder*, 734 F.3d 894, 897 (9th Cir. 2013) (“The abuses endured by Ms. Rusak’s parents constituted persecution of them, and Ms. Rusak was entitled to rely on these events to establish her own claim of past persecution because she was a child at the time.”); *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312–15 (9th Cir. 2012) (recognizing that an infant can be the victim of persecution even if he has no present recollection of the events).

g. Substantial Economic Deprivation

“Economic harm can . . . factor into the past persecution analysis. But its relevance . . . depends on the severity of the deprivation in connection with the record as a whole. Thus, ‘substantial economic deprivation that constitutes a threat to life or freedom can constitute persecution.’” *Sharma v. Garland*, 9 F.4th 1052, 1062 (9th Cir. 2021) (quoting *Zehatye v. Gonzales*, 453 F.3d 1182, 1186 (9th Cir. 2006)).

The absolute inability to support one’s family is not required. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (“The IJ erred as a matter of law

by requiring that Baballah show an absolute inability to support his family.”); *see also He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014) (defining economic persecution as “substantial economic deprivation that interferes with the applicant’s livelihood” and concluding that petitioner failed to establish economic persecution).

But “mere economic disadvantage alone does not rise to the level of persecution.” *Gormley v. Ashcroft*, 364 F.3d 1172, 1178 (9th Cir. 2004); *see also Castro-Martinez v. Holder*, 674 F.3d 1073, 1082 (9th Cir. 2011) (“Generalized economic disadvantage does not rise to the level of persecution.” (citation and internal quotation marks omitted)), *overruled on other grounds by Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc).

For cases considering economic deprivation as part of a claim of past persecution, *see Hussain v. Rosen*, 985 F.3d 634, 647 (9th Cir. 2021) (although petitioner undoubtedly experienced hardship when his shop burned, and he lost jewelry stock during a convoy attack, substantial evidence supported BIA’s determination that petitioner did not suffer persecution based on economic harm) *Vitug v. Holder*, 723 F.3d 1056, 1065 (9th Cir. 2013) (“Vitug also faced the ‘deprivation of . . . employment,’ which the IJ noted the BIA has found to be another form of persecution.” (alteration in original)); *Zehatye v. Gonzales*, 453 F.3d 1182, 1186 (9th Cir. 2006) (Eritrean government’s seizure of father’s business, along with some degree of social ostracism, did not rise to the level of persecution); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1106 (9th Cir. 2004) (Egyptian Coptic Christian had a “potentially viable” asylum claim based on government-imposed economic sanctions); *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (as amended) (granting withholding of removal to stateless Palestinians born in Kuwait based on likelihood of extreme state-sponsored economic discrimination); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, violence, and discrimination made it virtually impossible for Israeli Arab to earn a living); *Gormley v. Ashcroft*, 364 F.3d 1172, 1178 (9th Cir. 2004) (loss of employment pursuant to South Africa’s affirmative action plan did not amount to persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003) (employment discrimination faced by Ukrainian Christian did not rise to level of persecution); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (forced closing of Palestinian Israeli’s restaurant, when he continued to operate other businesses, did not constitute persecution); *Surita v. INS*, 95 F.3d 814, 819–21 (9th

Cir. 1996) (Indo-Fijian suffered past persecution where she was robbed, threatened, compelled to quit her job, and had her house looted by soldiers); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (threats by Sandinistas, violence against family, seizure of family land, seizure of ration card, and inability to buy business inventory established past persecution); *Ubau-Marengo v. INS*, 67 F.3d 750, 755 (9th Cir. 1995) (confiscation of Nicaraguan family business by Sandinistas may not be enough to support finding of economic persecution), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Desir v. Ilchert*, 840 F.2d 723, 727–29 (9th Cir. 1988) (considering impact of extortion by government security forces on Haitian fisherman’s ability to earn livelihood); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1985) (denial of food discounts and special work permit by Sandinistas did not amount to persecution); *Samimi v. INS*, 714 F.2d 992, 995 (9th Cir. 1983) (seizure of land and livelihood could contribute to a finding of persecution); *Raass v. INS*, 692 F.2d 596 (9th Cir. 1982) (asylum claim filed by Tonga Islanders required more than “generalized economic disadvantage”); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (persecution may encompass “a deliberate imposition of substantial economic disadvantage”).

h. Discrimination and Harassment

Persecution generally “does not include mere discrimination, as offensive as it may be.” *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (brief detention and searches of Iranian women accused of violating dress and conduct rules did not constitute persecution); *see also Truong v. Holder*, 613 F.3d 938, 941 (9th Cir. 2010) (although IJ stated that petitioners suffered harassment rising to the level required for persecution, substantial evidence supported agency’s determination that petitioners failed to show harassment suffered as Vietnamese citizens in Italy was at the hands of the government or another group that the government was unable to control); *Halim v. Holder*, 590 F.3d 971, 976 (9th Cir. 2009) (reported incidents of harassment did not constitute persecution and were further undermined where record supported IJ’s determination that petitioner exaggerated their impact); *Wakkary v. Holder*, 558 F.3d 1049, 1059–60 (9th Cir. 2009) (withholding of removal) (petitioner’s experiences where he was beaten by Indonesian youth, robbed of his sandals and pocket money, and accosted by a threatening mob were instances of discriminatory mistreatment that did not amount to past persecution); *Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005)

(harassment on the way to weekly Catholic services in Bangladesh did not rise to the level of persecution); *Mansour v. Ashcroft*, 390 F.3d 667, 673 (9th Cir. 2004) (discrimination against Coptic Christians in Egypt did not constitute persecution); *Padash v. INS*, 358 F.3d 1161, 1166 (9th Cir. 2004) (discrimination by isolated individuals against Indian Muslims did not amount to past persecution); *Halaim v. INS*, 358 F.3d 1128, 1132 (9th Cir. 2004) (discrimination against Ukrainian sisters on account of Pentecostal Christian religion did not compel a finding of past persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016–17 (9th Cir. 2003) (record did not compel a finding of past persecution where Ukrainian Pentecostal Christian was “teased, bothered, discriminated against and harassed”); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1201–02 (9th Cir. 2000) (harassment of ethnic Armenian in Russia, inability to get a job, and violence against friend did not rise to level of past persecution but did support her well-founded fear of future persecution); *Singh v. INS*, 134 F.3d 962, 969 (9th Cir. 1998) (repeated vandalism of Indo-Fijian’s property, with no physical injury or threat of injury, not persecution).

But discrimination *in combination with other harms* may establish persecution. See *Kotas v. INS*, 31 F.3d 847, 853 (9th Cir. 1994) (“Proof that the government or other persecutor has discriminated against a group to which the petitioner belongs is, accordingly, *always* relevant to an asylum claim.”); see also *Salguero Sosa v. Garland*, 55 F.4th 1213, 1220 (9th Cir. 2022) (agency failed to consider petitioner’s past harm cumulatively where it “tick[ed] off each of Salguero Sosa’s categories of harm on an individual basis and [found] that each amounted only to discrimination”); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2004) (anti-Semitic harassment, sustained economic and social discrimination, and violence against Russian Jew and her family compelled a finding of past persecution); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (discrimination, harassment, and violence against Ukrainian Jew can constitute persecution); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1239 (9th Cir. 1996) (persecution established where Nicaraguan school teacher was branded as a traitor, harassed, and threatened; had his home vandalized; and had a relative imprisoned for refusing to teach Sandinista doctrine); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (discrimination, harassment, and violence against Indo-Fijian family can constitute persecution).

And *severe and pervasive* discriminatory measures can amount to persecution. See *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (noting that the

BIA has held that severe and pervasive discrimination can constitute persecution in “extraordinary cases”); *see also El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (as amended) (granting withholding of removal based on the extreme state-sponsored economic discrimination faced by stateless Palestinians born in Kuwait); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161–62 (9th Cir. 1999) (rejecting BIA’s determination that Guatemalan soldier suffered discrimination, rather than persecution, where he was subjected to repeated beatings, severe verbal harassment, and race-based insults).

4. Age of the Victim

“Age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution.” *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) (citation and internal quotation marks omitted). “[A] child’s reaction to injuries to his family is different from an adult’s. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting.” *Id.* (joining the Second, Sixth, and Seventh Circuits in holding that injuries to a family must be considered in an asylum case where events that form the basis of the past persecution claim were perceived when petitioner was a child); *see also Rusak v. Holder*, 734 F.3d 894, 897 (9th Cir. 2013) (“The abuses endured by Ms. Rusak’s parents constituted persecution of them, and Ms. Rusak was entitled to rely on these events to establish her own claim of past persecution because she was a child at the time.”); *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312–15 (9th Cir. 2012) (recognizing that even an infant can be the victim of persecution, even if he has no present recollection of the events).

C. Source or Agent of Persecution; Unwilling or Unable to Protect

For persecution to qualify as asylum, the source of the persecution must be the government or persons or groups that the government is unwilling or unable to control. *See Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000).

The fact that financial considerations may account for the state’s inability to stop the persecution is not relevant. *See Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir. 2000). But an unsuccessful government investigation does not necessarily demonstrate that the government was unwilling or unable to control the

source or agent of persecution. *See, e.g., Truong v. Holder*, 613 F.3d 938, 941 (9th Cir. 2010) (“[T]he Truongs’ professed belief that the Italian government was complicit in or unwilling to stop their harassment is undermined by the fact that the Truongs repeatedly sought assistance from the Italian police, who dutifully made reports after each incident and indicated that they would investigate. Without more, we are reluctant to infer government complicity or indifference from the mere fact that Italian police were unable to locate the Truongs’ unknown assailants.”); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (German police took reports and investigated the incidents but were unable to solve the crimes).

“[P]olice officers are the prototypical state actor for asylum purposes.” *Ming Dai v. Sessions*, 884 F.3d 858, 870 (9th Cir. 2018) (citation and internal quotation marks omitted), *vacated on other grounds and remanded sub nom. Garland v. Ming Dai*, 593 U.S. 357 (2021).

Affirmative state action is not necessary to establish a well-founded fear of persecution if the government is unable or unwilling to control the agents of persecution. *Siong v. INS*, 376 F.3d 1030, 1039 (9th Cir. 2004).

“[W]here non-governmental actors are responsible for persecution,” the court considers “whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors.” *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004); *see also Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069 (9th Cir. 2017) (en banc) (“Whether a victim has reported or attempted to report violence or abuse to the authorities is a factor that may be considered, as is credible testimony or documentary evidence explaining why a victim did not report.”); *see, e.g., Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (failure to report non-governmental persecution due to belief that police would do nothing did not establish that government was unwilling or unable to control agent of persecution).

But, as discussed below, reporting is not required, and “[a] government’s inability or unwillingness to control violence by private parties can be established in other ways—for example, by demonstrating that a country’s laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection.” *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010), *overruled*

on other grounds by *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069–70 (9th Cir. 2017) (en banc).

“Some official responsiveness to complaints of violence, although relevant, does not automatically equate to governmental ability and willingness.” *J.R. v. Barr*, 975 F.3d 778, 782 (9th Cir. 2020).

Willingness to control persecutors notwithstanding, authorities may nevertheless be “powerless to stop” them because of a “lack of . . . resources or because of the character or pervasiveness of the persecution.” . . . Conversely, authorities may simply be *unwilling* to control persecutors, where, for instance, they themselves harbor animus towards a protected group. In other words, the question on this step is whether the government both “could *and* would provide protection.”

J.R., 975 F.3d at 782 (first alteration in original) (citations omitted) (holding that substantial evidence did not support the BIA’s conclusion that the El Salvadoran government was both able and willing to control the Mara-18 gang whose members attacked J.R. and killed his son).

The BIA errs when it focuses on only the government’s willingness to control the persecutors, not its ability to do so. *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (holding the BIA erred by “focus[ing] only on the Mexican government’s willingness to control Los Zetas, not its *ability* to do so”); *see also J.R.*, 975 F.3d at 782.

The court may remand where the record indicates the agency did not consider all probative evidence of the government’s inability or unwillingness to protect an applicant from persecution. *See Antonio v. Garland*, 58 F.4th 1067, 1077–78 (9th Cir. 2023) (remanding where agency may have failed to analyze all probative evidence).

“[T]he agency’s finding that the government ‘would acquiesce’ in Petitioner’s torture necessarily includes the determination that the government would be unable or unwilling to stop Petitioner’s future persecution, a less severe form of mistreatment than torture.” *Rodriguez Tornes v. Garland*, 993 F.3d 743, 754 (9th Cir. 2021).

The question is whether the government was unable or unwilling to protect the petitioner at the time the alleged past persecution occurred, not whether it would be able or willing to do so today. See *Lemus-Escobar v. Bondi*, 158 F.4th 944, 967–68 (9th Cir. 2025).

1. Harm Inflicted by Relatives

“There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it.” *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) (mixed-race, mixed-religion couple in Fiji suffered persecution at the hand of family members and others); see also *Mohammed v. Gonzales*, 400 F.3d 785, 796 n.15 (9th Cir. 2005) (consent or acquiesce of petitioner’s parents in practice of female genital mutilation would not change court’s analysis).

2. Reporting of Persecution Not Always Required

When the government is responsible for the persecution, there is no need to inquire whether applicant sought help from the police. See *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (Israeli Arab persecuted by Israeli Marines; “when the government is responsible for persecution, the third prong of our asylum inquiry is satisfied without further analysis”); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) (gay Mexican man persecuted by police).

With respect to non-governmental actors, reporting is not required where it would be futile or endanger the petitioner. See *Guevara-Serrano v. Bondi*, 164 F.4th 1133, 1136–37 (9th Cir. 2026) (record compelled the conclusion that reporting beatings by petitioner’s partner, a gang member, would have been futile, and would have resulted in further harm to petitioner, where abuser threatened to kill petitioner if she tried to file a police report, police had arrested the abuser for beating a man but had released him almost immediately, evidence showed that police were even less likely to hold abuser accountable for beating a woman, and country conditions report documented uncontrollable violence against women in Honduras); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069 (9th Cir. 2017) (en banc) (“An applicant need not have reported the persecution to the authorities if he can convincingly establish that doing so would have been futile or would have subjected him to further abuse.” (citation modified)); *Vitug v. Holder*, 723

F.3d 1056, 1063–64 (9th Cir. 2013) (“While Vitug did not report these attacks, he credibly testified that it is well known in the Philippines that police harass gay men and turn a blind eye to hate crimes committed against gay men.”); *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010) (reporting of private persecution is a relevant consideration but not an essential element to establish that government is unwilling or unable to control persecutors), *overruled on other grounds by Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069–70 (9th Cir. 2017) (en banc); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006) (government officials and employees tacitly accepted abuse applicant suffered; “an applicant who seeks to establish eligibility for [withholding] of removal under § 1231(b)(3) on the basis of past persecution at the hands of private parties the government is unwilling or unable to control need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse”); *cf. Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (applicant failed to provide evidence sufficient to justify the failure to report alleged abuse).

Where the petitioner failed to report the non-governmental actor to the police, the petitioner need not establish the government’s inability or unwillingness under a heightened standard of proof:

Rahimzadeh [*v. Holder*, 613 F.3d 916 (9th Cir. 2010),] and *Afriyie* [*v. Holder*, 613 F.3d 924 (9th Cir. 2010),] unnecessarily introduced the construct that the failure to report creates a “gap” in the evidence, because our law is clear that the agency, and we, upon review, must examine all the evidence in the record that bears on the question of whether the government is unable or unwilling to control a private persecutor. Framing the question of nonreporting as a “failure” that creates an evidentiary “gap” had the inadvertent effect of heightening the evidentiary standard beyond the traditional types of proof, accepted in every prior precedent, that we have deemed sufficient to demonstrate governmental inability or unwillingness to protect victims of persecution. To the extent that our cases’ discussion of gap filling suggested that the burden of proof on governmental inability or unwillingness to protect was something beyond the standard we use for other elements—proof by a preponderance of the evidence, considering

all the evidence in the record—we supersede those cases by clarifying that there is no heightened proof requirement.

Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1069–70 (9th Cir. 2017) (en banc); see also *Davila v. Barr*, 968 F.3d 1136, 1143 (9th Cir. 2020) (although whether a victim has reported or attempted to report violence or abuse to authorities is a factor that may be considered, the BIA erred by requiring petitioner to make an additional report of subsequent abuse).

“[C]hildren who suffer sexual abuse are generally unlikely to report that abuse to authorities. Because they are unlikely to report, it is similarly unlikely that country reports or other evidence will be able to document the police response, or lack thereof, to the sexual abuse of children.” *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1071 (9th Cir. 2017) (en banc).

3. Cases Discussing Source or Agent of Persecution

See *Antonio v. Garland*, 58 F.4th 1067, 1077–78 (9th Cir. 2023) (remanding where agency may have failed to analyze all probative evidence of whether the government was unwilling or unable to protect petitioner from non-state actors); *Rahimzadeh v. Holder*, 613 F.3d 916, 923 (9th Cir. 2010) (substantial evidence supported determination that Dutch authorities were willing and able to control extremists that attacked Rahimzadeh), *overruled on other grounds by Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069–70 (9th Cir. 2017) (en banc); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1056–58 (9th Cir. 2006) (remanding to the BIA where applicant was arrested by Mexican police, raped by family members and family friends, and abused by co-workers on account of sexual orientation); *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (applicant who was raped by boyfriend in Honduras failed to show that the Honduran government was unwilling or unable to control rape); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120–22 (9th Cir. 2004) (ethnic Afghan family in Germany attacked by anti-foreigner mobs that German government was unable or unwilling to control); *Deloso v. Ashcroft*, 393 F.3d 858, 861 (9th Cir. 2005) (attacks by a Filipino Communist party henchman); *Jahed v. INS*, 356 F.3d 991, 998–99 (9th Cir. 2004) (extortion by member of the Iranian Revolutionary Guard); *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1239–40 (9th Cir. 2001) (fear of violence from cousin in El Salvador not sufficient); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (rape by

Ethiopian government official where government never prosecuted the perpetrator); *Mgoian v. INS*, 184 F.3d 1029, 1036–37 (9th Cir. 1999) (state action not required to establish persecution of Kurdish-Moslem family in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1042–43 (9th Cir. 1999) (Azerbaijani government did not protect ethnic Armenian); *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc) (non-state actors in the Philippines), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998) (ultra-nationalist anti-Semitic Ukrainian group); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (Fijian government encouraged discrimination, harassment, and violence against Indo-Fijians); *Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (persecution of Nicaraguan by a government-sponsored group); *Gomez-Saballos v. INS*, 79 F.3d 912, 916–17 (9th Cir. 1996) (fear of former Nicaraguan National Guard members); *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (denying petition because Egyptian Coptic Christian feared harms not “condoned by the state nor the prevailing social norm”); *Desir v. Ilchert*, 840 F.2d 723, 727–28 (9th Cir. 1988) (persecution by quasi-official Haitian security force); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434–35 (9th Cir. 1987) (persecution by Salvadoran army sergeant), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc).

D. Past Persecution

As noted above, an applicant may qualify as a refugee in two ways:

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

Deloso v. Ashcroft, 393 F.3d 858, 863–64 (9th Cir. 2005) (citations and internal quotation marks omitted); *see also Ratnam v. INS*, 154 F.3d 990, 994 (9th Cir. 1998) (“Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum.”); 8 C.F.R. § 1208.13(b).

“The regulations implementing the INA provide that past persecution must have occurred ‘in the proposed country of removal.’” *Gonzalez-Medina v. Holder*, 641 F.3d 333, 337 (9th Cir. 2011) (quoting 8 C.F.R. § 1208.16(b)(1)(i)) (holding that BIA’s construction of regulation mandating that past persecution occur in proposed country of removal was permissible and thus, that abuse petitioner suffered in the United States did not establish past persecution).

“To establish past persecution, an applicant bears the burden of showing that (1) his or her treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government or by forces that the government was unable or unwilling to control.” *Guevara-Serrano v. Bondi*, 164 F.4th 1133, 1136 (9th Cir. 2026); *see also Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc); *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000) (“In order to establish eligibility for asylum on the basis of past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is ‘on account of’ one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either ‘unable or unwilling’ to control.” (footnotes omitted)).

Under the second element (nexus requirement), the applicant must show that the persecutor was motivated by one of the five statutory grounds. *See, e.g., Hussain v. Rosen*, 985 F.3d 634, 646 (9th Cir. 2021) (“[A]n applicant must show he was individually targeted on account of a protected ground rather than simply the victim of generalized violence.”).

But the applicant need not establish that she was singled out: “proof of particularized persecution is not required to establish past persecution.” *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004) (Serb petitioners suffered past persecution because their town was specifically targeted for bombing, invasion, occupation and ethnic cleansing by Croat military). In other words, “even in situations of widespread civil strife, it is irrelevant whether one person, twenty

persons, or a thousand persons were targeted or placed at risk so long as there is a nexus to a protected ground.” *Ndom v. Ashcroft*, 384 F.3d 743, 754 (9th Cir. 2004) (citation and internal quotation marks omitted), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *see also Ahmed v. Keisler*, 504 F.3d 1183, 1194–95 n.19 (9th Cir. 2007) (even where there is generalized violence as a result of civil strife, the relevant analysis is still whether the “persecutor was motivated by one of five statutory grounds”).

“Harm to a child can amount to past persecution of the parent when that harm is, at least in part, directed against the parent ‘on account of’ or ‘because of’ *the parent’s* race, religion, nationality, membership in a particular social group, or political opinion.” *Sumolang v. Holder*, 723 F.3d 1080, 1083–84 (9th Cir. 2013) (delay in treating petitioner’s daughter was relevant to whether petitioner suffered past persecution).

Where the applicant asserts that she was persecuted on account of his membership in a particular social group, his burden includes: “(1) ‘demonstrating the existence of a cognizable particular social group,’ (2) ‘his membership in that particular social group,’ and (3) ‘a risk of persecution on account of his membership in the specified particular social group.’ The third element is often referred to as the ‘nexus’ requirement.” *Reyes v. Lynch*, 842 F.3d 1125, 1132 n.3 (9th Cir. 2016).

1. Presumption of a Well-Founded Fear

“If past persecution is established, a rebuttable presumption of a well-founded fear arises, 8 C.F.R. § 208.13(b)(1), and the burden shifts to the government to demonstrate that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear.” *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (internal quotation marks omitted); *see also Sharma v. Garland*, 9 F.4th 1052, 1060 (9th Cir. 2021) (showing of past persecution gives rise to a rebuttable presumption of future persecution); *Aden v. Wilkinson*, 989 F.3d 1073, 1085 (9th Cir. 2021) (“Because Aden has shown that he suffered past persecution, he enjoys a presumption that if he returns to Somalia, he will be persecuted in the future.”); *Singh v. Whitaker*, 914 F.3d 654, 659 (9th Cir. 2019) (“Past persecution triggers a rebuttable presumption

of a well-founded fear of future persecution.” (citation omitted)); *Guo v. Sessions*, 897 F.3d 1208, 1217 (9th Cir. 2018) (remanding for the BIA to apply the presumption of a well-founded fear of future persecution); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062, 1075–76 (9th Cir. 2017) (en banc) (“Examining all the evidence in the record, and applying long-standing precedent, substantial evidence compels the conclusion that Bringas has proven past persecution due to his identification as a gay individual, and he need not additionally provide evidence specific to him as a gay child. He is therefore entitled to the presumption of a well-founded fear of future persecution.”).

“The presumption only applies to fear of persecution ‘on the basis of the original claim,’ such that if the fear of future persecution is ‘unrelated to the past persecution,’ the petitioner bears the burden of establishing he has a well-founded fear.” *Parada v. Sessions*, 902 F.3d 901, 911–12 (9th Cir. 2018); see also *Ali*, 637 F.3d at 1029–30 (noting that the presumption “only applies to fear based on the original claim and not to fear of persecution from a new source”); 8 C.F.R. § 1208.13(b)(1) (“If the applicant’s fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.”).

Past persecution need not be atrocious to give rise to the presumption of future persecution. See *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (past persecution by Sandinistas).

2. Rebutting the Presumption of a Well-Founded Fear

a. Fundamental Change in Circumstances

Under 8 C.F.R. § 1208.13(b)(1)(i) & (ii), the government may rebut the presumption of a well-founded fear by showing “by a preponderance of the evidence” that there has been a “fundamental change in circumstances such that the applicant no longer has a well-founded fear.” See *Singh v. Whitaker*, 914 F.3d 654, 659 (9th Cir. 2019) (“When an asylum applicant has established that he suffered past persecution, the burden is on the government to show by a preponderance of the evidence that the applicant either no longer has a well-founded fear of persecution in the country of his nationality, or that he can reasonably relocate internally to an area of safety.”); *Parada v. Sessions*, 902 F.3d

901, 911–14 (9th Cir. 2018) (holding that the presumption of future persecution was not rebutted and remanding for the Attorney General to exercise discretion as to whether to grant asylum); *Kamalyan v. Holder*, 620 F.3d 1054, 1057 (9th Cir. 2010) (to rebut presumption of a well-founded fear, government must show by a preponderance of the evidence that a fundamental change in country conditions has dispelled any well-founded fear); *Hanna v. Keisler*, 506 F.3d 933, 938 (9th Cir. 2007) (substantial evidence did not support the BIA’s finding of changed circumstances rebutting the presumption of a well-founded fear of future persecution where the government “did not make any showing regarding whether Hanna would likely fear religious persecution from others in post-Saddam Hussein Iraq”); *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (“[O]ur precedent compels the conclusion that genital mutilation, like forced sterilization, is a ‘permanent and continuing’ act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.”); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (“Because we conclude that substantial evidence does not support the IJ’s determination that Khup failed to demonstrate a well-founded fear of future persecution . . . the question of whether the government has rebutted the presumption based on past persecution is of no practical significance.”); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (government failed to meet burden); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161 (9th Cir. 2002) (1996 State Department report insufficient to establish changed country conditions in Guatemala); *Gui v. INS*, 280 F.3d 1217, 1228 (9th Cir. 2002) (State Department report insufficient to establish changed country conditions in Romania).

If the government does not rebut the presumption, the applicant is statutorily eligible for asylum. See *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004).

b. Government’s Burden

“When the petitioner establishes past persecution, the government bears the burden of establishing that changed country conditions have removed the petitioner’s presumptive well-founded fear of future persecution.” *Mousa v. Mukasey*, 530 F.3d 1025, 1029 (9th Cir. 2008) (concluding government failed to meet burden where it submitted a single newspaper article that in no way suggested Chaldean Christians would be safe in Iraq); see, e.g., *Kamalyan v. Holder*, 620 F.3d 1054, 1057–58 (9th Cir. 2010) (government failed to establish a fundamental

change in country conditions by a preponderance of the evidence); *Mutuku v. Holder*, 600 F.3d 1210, 1213–14 (9th Cir. 2010) (reviewing denial of withholding of removal and concluding that factual findings regarding changed country conditions in Kenya were not supported by substantial evidence).

To meet its burden under 8 C.F.R. § 208.13(b)(1), the government is “obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant’s specific grounds for his well-founded fear of future persecution.” *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001) (internal quotation marks omitted) (Bulgaria). “If past persecution is shown, the BIA cannot discount it merely on a say-so. Rather, our precedent establishes that in such a case the BIA must provide an individualized analysis of how changed conditions will affect the specific petitioner’s situation.” *Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004) (citation and internal quotation marks omitted) (Guatemala); *see also Parada v. Sessions*, 902 F.3d 901, 912 (9th Cir. 2018) (“[T]he IJ must make an ‘individualized determination’ of how the changed circumstances affect the alien’s specific situation.”). “Information about general changes in the country is not sufficient.” *Garrovillas v. INS*, 156 F.3d 1010, 1017 (9th Cir. 1998) (Philippines); *see also Smolniakova v. Gonzales*, 422 F.3d 1037, 1052 (9th Cir. 2005) (Russia).

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

(i) State Department Report

Where past persecution has been established, generalized information from a State Department report on country conditions may not be sufficient to rebut the presumption of future persecution. *See Parada v. Sessions*, 902 F.3d 901, 912 (9th Cir. 2018) (El Salvador); *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002) (Guatemala). Because State Department reports are generally “not amenable to an individualized analysis tailored to an asylum applicant’s particular situation,” a “State Department report on country conditions, standing alone, is not sufficient to rebut the presumption of future persecution.” *Kamalyan v. Holder*, 620 F.3d

1054, 1057 (9th Cir. 2010) (internal quotation marks omitted) (remanding where country reports were inconclusive regarding the significance or permanence of the improvements identified). “Instead, we have required an individualized analysis of how changed conditions will affect the specific petitioner’s situation.” *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1074 (9th Cir. 2004) (internal quotation marks omitted); *see also Lopez v. Ashcroft*, 366 F.3d 799, 805–06 (9th Cir. 2004) (remanding for individualized analysis of changed country conditions).

But a State Department report may be sufficient. *See, e.g., Singh v. Holder*, 753 F.3d 826, 832–33 (9th Cir. 2014) (State Department report was sufficiently individualized to address petitioner’s persecution claim; substantial evidence supported determination that there had been a fundamental change in circumstances in India to overcome presumption that life or freedom would be threatened if he was removed); *Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008) (rejecting petitioner’s contention that “generalized materials” found in State Department country report did not support conclusion that fear of persecution in Sierra Leone had been rebutted, and explaining that State country reports are appropriate and “perhaps the best resource on political situations”); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 998–1001 (9th Cir. 2003) (Guatemala) (“[W]here the BIA rationally construes an ambiguous or somewhat contradictory country report and provides an ‘individualized analysis of how changed conditions will affect the specific petitioner’s situation,’ substantial evidence will support the agency determination. That is what happened here.”); *Marcu v. INS*, 147 F.3d 1078, 1081–82 (9th Cir. 1998) (presumption of well-founded fear rebutted by individualized analysis of State Department letter and report regarding sweeping changes in Romania).

“[R]eliance on significantly or materially outdated country reports cannot suffice to rebut the presumption of future persecution.” *Parada*, 902 F.3d at 912 (agency’s determination that government rebutted presumption of future persecution was not supported by substantial evidence where country reports at issue were already a half-decade out of date by the time of the IJ hearing, and reported conditions that were not current).

(ii) Administrative Notice of Changed Country Conditions

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

If an IJ takes administrative notice of changed country conditions during the hearing, there is no violation of due process if the applicant has an adequate opportunity to respond with rebuttal evidence. See *Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995) (Lithuania); *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993) (Polish Solidarity supporters “had ample opportunity to argue before the immigration judges and before the [BIA] that their fear of persecution remained well-founded”); *Kotas v. INS*, 31 F.3d 847, 855 n.13 (9th Cir. 1994) (applicants given ample opportunity to discuss changes in Hungary).

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

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

See *Parada v. Sessions*, 902 F.3d 901, 913 (9th Cir. 2018) (“Because the agency’s determination that the government successfully rebutted the presumption of future persecution is unsupported by substantial evidence, we hold that the presumption has not been rebutted and that [petitioner] is statutorily eligible for asylum and entitled to withholding of removal, and remand for the Attorney General to exercise his discretion under 8 U.S.C. § 1158(b) as to whether to grant asylum.”); *Kamalyan v. Holder*, 620 F.3d 1054, 1057–58 (9th Cir. 2010) (determining that the government failed to establish a fundamental change in country conditions in Armenia by a preponderance of the evidence, and remanding for further proceedings as to whether a fundamental change in country conditions has overcome the presumption that petitioner has a well-founded fear of future persecution); *Mousa v. Mukasey*, 530 F.3d 1025, 1029–30 (9th Cir. 2008) (Iraq); *Hanna v. Keisler*, 506 F.3d 933, 938 (9th Cir. 2007) (Iraq); *Ahmed v. Keisler*, 504 F.3d 1183, 1197–98 (9th Cir. 2007) (Bangladesh); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078–79 (9th Cir. 2004) (Israel); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161–62 (9th Cir. 2002) (Guatemala); *Rios v. Ashcroft*, 287 F.3d 895, 901–02 (9th Cir. 2002) (Guatemala); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1076–77 (Peru), as amended by 290 F.3d 964 (9th Cir. 2002); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (Romania); *Popova v. INS*, 273 F.3d 1251, 1259–60 (9th Cir. 2001) (Bulgaria); *Lal v. INS*, 255 F.3d 998, 1010–11 (9th Cir. 2001) (Fiji), as amended by 268 F.3d 1148 (9th Cir. 2001); *Agbuya v. INS*, 241 F.3d 1224, 1230–31 (9th Cir. 2001) (past persecution by New People’s Army in the Philippines); *Kataria v. INS*, 232 F.3d 1107, 1115–16 (9th Cir. 2000) (State Department report stating that arrests and killings had declined significantly in India not sufficient), superseded by statute on other grounds as stated by *Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009); *Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000) (past persecution of religious minority in Iran); *Chand v. INS*, 222 F.3d 1066, 1078–79 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (Colombia); *Tarubac v. INS*, 182 F.3d 1114, 1119–20 (9th Cir. 1999) (State Department’s mixed assessment of human rights conditions in the Philippines insufficient); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (El Salvador); *Meza-Manay v. INS*, 139 F.3d 759, 765–66 (9th Cir. 1998)

(Peru); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1239–40 (9th Cir. 1996) (Nicaragua); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (Fiji).

d. Cases Where Changed Circumstances Sufficient to Rebut Well-Founded Fear

See *Ruiz v. Bondi*, 163 F.4th 586, 600 (9th Cir. 2025) (withholding of removal) (substantial evidence supported conclusion of changed circumstances sufficient to rebut fear of future persecution where Sandinista regime was no longer in power in Nicaragua, petitioner and his family had been able to live safely in Nicaragua after the civil war ended in 1990, and, although Ortega returned to the presidency in 2007, there was no evidence that the current regime had any interest in harming petitioner).

e. Internal Relocation

“The asylum regulation makes asylum unavailable if ‘[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so.’” *Akosung v. Barr*, 970 F.3d 1095, 1101 (9th Cir. 2020) (quoting 8 C.F.R. § 1208.13(b)(1)(i)(B)).

“When an asylum applicant has established that he suffered past persecution, the burden is on the government to show by a preponderance of the evidence that the applicant either no longer has a well-founded fear of persecution in the country of his nationality, or that he can reasonably relocate internally to an area of safety.” *Singh v. Whitaker*, 914 F.3d 654, 659 (9th Cir. 2019); see also *Kaur v. Wilkinson*, 986 F.3d 1216, 1230 (9th Cir. 2021) (“If, on remand, the BIA concludes that Kaur’s past persecution was at the hands of her government, she will be presumed to have a fear of future persecution. The BIA must then determine whether the government can rebut this presumption by showing either a fundamental change in circumstance or that Kaur ‘could avoid future persecution by relocating’ internally within India.” (citation and internal quotation marks omitted)), *abrogated on other grounds* by *Urias-Orellana v. Bondi*, 146 S. Ct. 845 (2026); *Silaya v. Mukasey*, 524 F.3d 1066, 1073 (9th Cir. 2008) (remanding for application of the proper burden of proof and consideration of evidence related to reasonableness factors where it was unclear if the BIA held the government to its burden of proof);

Mashiri v. Ashcroft, 383 F.3d 1112, 1122–23 (9th Cir. 2004) (IJ erred by placing the burden of proof on ethnic Afghan to show “that the German government was unable or unwilling to control anti-foreigner violence ‘on a countrywide basis’”).

“Relocation is generally not unreasonable solely because the country at large is subject to generalized violence.” *Hussain v. Rosen*, 985 F.3d 634, 648 (9th Cir. 2021).

Relocation analysis consists of two steps: (1) “whether an applicant could relocate safely,” and (2) “whether it would be reasonable to require the applicant to do so.” . . . For an applicant to be able to safely relocate internally, “there must be an area of the country where he or she has no well-founded fear of persecution.”

Singh, 914 F.3d at 659 (citations omitted) (remanding where BIA failed to conduct a sufficiently individualized analysis of Singh’s ability to relocate within India).

“The reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and family ties.” *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214–15 (9th Cir. 2004) (citing 8 C.F.R. § 1208.13(b)(3)) (remanding for determination of whether internal relocation would be reasonable for elderly Serbian couple from Bosnia); *see also Singh*, 914 F.3d at 659.

For purposes of determining whether the applicant could avoid future persecution by relocating to another part of the applicant’s country, “adjudicators should consider the totality of the relevant circumstances regarding an applicant’s prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.” 8 C.F.R. § 1208.13(b)(3).

Applying a former version of § 1208.13(b)(3), the court said that, “[t]o determine the reasonableness of relocation, factors to consider include potential

harm in the suggested relocation area, ongoing civil strife in the country, and social and cultural constraints, among others. The factors may not all be relevant in a specific case, and they ‘are not necessarily determinative of whether it would be reasonable for the applicant to relocate.’” *Singh v. Whitaker*, 914 F.3d 654, 659 (9th Cir. 2019).

Relocating to another part of the country does not mean living in hiding. See *Akosung*, 970 F.3d at 1102.

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

In *Brezilien v. Holder*, 569 F.3d 403, 414 (9th Cir. 2009), the court noted that it was unclear under BIA precedent whether the IJ’s determination on internal relocation was a factual question, reviewed by the BIA for clear error, or a legal question, reviewed by the BIA de novo.

For cases addressing internal location, see *Singh v. Blanche*, No. 24-815, 2025 WL 4725632, at *8 (9th Cir. May 15, 2026) (even if petitioner had established past persecution, government could easily show internal relocation was possible where country conditions evidence suggested that there was at least one area within India where Sikhs could relocate without facing fear of persecution); *Gonzalez-Medina v. Holder*, 641 F.3d 333, 338 (9th Cir. 2011) (statements that petitioner would never be able to escape husband in Mexico and that he would force her to be with him again were insufficient on their own to meet her burden of proof); *Afriyie v. Holder*, 613 F.3d 924, 935–36 (9th Cir. 2010) (remanding to the BIA to ensure that the proper burden of proof was applied and requisite regulatory factors considered in evaluating the relocation issue), *overruled on other grounds* by *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1070 (9th Cir. 2017) (en banc); *Ahmed v. Keisler*, 504 F.3d 1183, 1197 (9th Cir. 2007) (government failed to meet burden where petitioner could not reasonably relocate to another part of Bangladesh, particularly because he was not required to suppress his political

interests and activities); *Mashiri*, 383 F.3d at 1123 (relocation was not reasonable given evidence of anti-foreigner violence throughout Germany, financial and logistical barriers, and family ties in the U.S.); *Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002) (discussing reasonableness in light of threats in Peru).

E. Well-Founded Fear of Persecution

Even in the absence of past persecution, an applicant may be eligible for asylum based on a well-founded fear of future persecution. See 8 C.F.R. § 1208.13(b). “Absent evidence of past persecution, [an applicant] must establish a well-founded fear of future persecution by showing both a subjective fear of future persecution, as well as an objectively ‘reasonable possibility’ of persecution upon return to the country in question.” *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1029 (9th Cir. 2019). A well-founded fear must be subjectively genuine and objectively reasonable. See *Parada v. Sessions*, 902 F.3d 901, 909 (9th Cir. 2018); *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007); *Montecino v. INS*, 915 F.2d 518, 520–21 (9th Cir. 1990) (noting the importance of the applicant’s subjective state of mind).

An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

8 C.F.R. § 1208.13(b)(2)(i).

A “‘well-founded fear’ . . . can only be given concrete meaning through a process of case-by-case adjudication.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

“An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country of nationality or, if stateless, another part of the applicant’s country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.” 8 C.F.R. § 1208.13(b)(2)(ii); see *Hussain v. Rosen*, 985 F.3d 634, 648 (9th Cir. 2021) (“But ‘[a]n applicant does not have a well-founded fear of [future] persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country,’ unless doing so would be unreasonable under the applicant’s circumstances.” (quoting 8 C.F.R. § 1208.13(b)(2)(ii))); *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1029 (9th Cir. 2019); *Kaiser v. Ashcroft*, 390 F.3d 653, 659 (9th Cir. 2004).

In cases where the applicant has not established past persecution, the applicant bears the burden of establishing that it would be either unsafe or unreasonable for him to relocate, unless the persecution is by a government or is government sponsored. See *Hussain*, 985 F.3d at 649 (citing 8 C.F.R. § 1208.13(b)(3)(i)) (where petitioner never claimed to fear the government or a government-sponsored group, burden was on him to demonstrate why relocation was unreasonable); *Duran-Rodriguez*, 918 F.3d at 1029 (relocation possible and reasonable where there was no evidence that drug traffickers sought petitioner after he left his hometown to live with his aunt in Hermosillo for two weeks or that he could not safely relocate to Hermosillo or another part of Mexico, especially where petitioner ceased working as a police officer).

1. Past Persecution Not Required

A showing of past persecution is not required to qualify for asylum. See *Sharma v. Garland*, 9 F.4th 1052, 1065 (9th Cir. 2021); *Hussain v. Rosen*, 985 F.3d 634, 645–46 (9th Cir. 2021) (“A petitioner who cannot show past persecution might nevertheless be eligible for relief if he instead shows a well-founded fear of future persecution along with the other elements.”); *Halim v. Holder*, 590 F.3d 971, 976 (9th Cir. 2009) (“In the absence of past persecution, an applicant may still be eligible for asylum based on a well-founded fear of future persecution.”); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 (9th Cir. 2003); *Velarde v. INS*, 140 F.3d 1305, 1309 (9th Cir. 1998) (“Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum.”),

superseded by statute on other grounds as stated in [Falcon Carriche v. Ashcroft](#), 350 F.3d 845, 854 n.9 (9th Cir. 2003).

Past harm that does not amount to past persecution may nevertheless serve as evidence of an applicant's reasonable fear of future persecution. *See [Avetova-Elisseva v. INS](#), 213 F.3d 1192, 1198 (9th Cir. 2000)* (harassment of ethnic Armenian in Russia, inability to get a job, and violence against friend did not rise to the level of past persecution but did support petitioner's well-founded fear of future persecution); *see also [Lim v. INS](#), 224 F.3d 929, 935 (9th Cir. 2000)* (explaining that past threats, although insufficient to establish past persecution, were relevant to a well-founded fear of future persecution).

2. Subjective Prong

The subjective prong of the well-founded fear test is satisfied by an applicant's credible testimony that he or she genuinely fears harm. *See [Parada v. Sessions](#), 902 F.3d 901, 909 (9th Cir. 2018)* (El Salvador); *[Ahmed v. Keisler](#), 504 F.3d 1183, 1191 (9th Cir. 2007)* (native of Bangladesh and a Bihari); *[Sael v. Ashcroft](#), 386 F.3d 922, 924 (9th Cir. 2004)* (Indonesian of Chinese descent); *[Singh v. Moschorak](#), 53 F.3d 1031, 1034 (9th Cir. 1995)* (Indian Sikh).

"[F]ortitude in face of danger" does not denote an "absence of fear." *Moschorak*, 53 F.3d at 1034; *see [Lolong v. Gonzales](#), 484 F.3d 1173, 1178–79 (9th Cir. 2007)* (en banc) (subjective fear established where petitioner described fears and gave specific examples of violent incidents involving friends and family); *cf. [Mejia-Paiz v. INS](#), 111 F.3d 720, 723–24 (9th Cir. 1997)* (no subjective fear where testimony of Nicaraguan who claimed to be a Jehovah's Witness was not credible); *[Berroteran-Melendez v. INS](#), 955 F.2d 1251, 1257–58 (9th Cir. 1992)* (Nicaraguan who "failed to present 'candid, credible and sincere testimony' demonstrating a genuine fear of persecution, . . . failed to satisfy the subjective component of the well-founded fear standard").

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

3. Objective Prong

The objective prong of the well-founded fear analysis can be satisfied in either of two ways: “One way to satisfy the objective component is to prove persecution in the past, giving rise to a rebuttable presumption that a well-founded fear of future persecution exists. The second way is to show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. The objective requirement can be met by either through the production of specific documentary evidence or by credible and persuasive testimony.” *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (citations and internal quotation marks omitted), *overruled on other grounds by* *Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc); *see also* *Parada v. Sessions*, 902 F.3d 901, 909 (9th Cir. 2018) (“The objective component can be established in two different ways, one of which is to prove past persecution.”); *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013) (“The objective element may be established either by the presentation of ‘credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution,’ or through a showing by an asylum applicant that he or she has suffered persecution in the past.”).

“A well-founded fear does not require certainty of persecution or even a probability of persecution.” *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003). “[E]ven a ten percent chance of persecution may establish a well-founded fear.” *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001); *see also* *Halim v. Holder*, 590 F.3d 971, 977 (9th Cir. 2009) (concluding that record did not compel a finding of even a ten percent chance of persecution).

Objective circumstances “must be determined in the political, social and cultural milieu of the place where the petitioner lived.” *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

A claim based solely on general civil strife or widespread random violence is not sufficient. *See, e.g., Lolong v. Gonzales*, 484 F.3d 1173, 1179 (9th Cir. 2007) (en banc) (“[A] general, undifferentiated claim of [violence on Chinese or on Christians in Indonesia] does not render an alien eligible for asylum.”); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Christian Armenians fearful of

Azeris); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese-Filipino); *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986) (El Salvador).

But the existence of general civil unrest does not preclude asylum eligibility. See *Sinha v. Holder*, 564 F.3d 1015, 1022 (9th Cir. 2009) (explaining “the existence of civil unrest does not undercut an individual’s claim of persecution based on incidents specific to him”); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (“[T]he fact that the individual resides in a country where the lives and freedom of a large number of persons has been threatened may make the threat *more* serious or credible.” (internal quotation marks and alterations omitted)); *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (“[T]he existence of civil strife does not . . . make a particular asylum claim less compelling.”), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009).

Evidence of current country conditions may inform whether the applicant has demonstrated an objectively reasonable fear of future persecution. See *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002) (“When, as here, a petitioner has *not* established past persecution, there is no presumption to overcome . . . [and] the IJ and the BIA are entitled to rely on all relevant evidence in the record, including a State Department report.”); see also *Flores Molina v. Garland*, 37 F.4th 626, 637–38 (9th Cir. 2022) (remanding where the BIA failed to consider highly probative country conditions evidence contextualizing the Nicaraguan government’s actions and petitioner’s fears in determining that his fear of future persecution was speculative).

In determining whether an applicant’s fear of future persecution is objectively reasonable in light of current country conditions, the agency must conduct an individualized analysis of how such conditions will affect the applicant’s specific situation. See *Marcos v. Gonzales*, 410 F.3d 1112, 1120–21 (9th Cir. 2005) (applicant established a well-founded fear of future persecution); see also *Rodriguez-Zuniga v. Garland*, 69 F.4th 1012, 1022 (9th Cir. 2023) (country conditions reports did not compel the conclusion of that petitioner’s fear of future persecution was objectively reasonable).

4. Demonstrating a Well-Founded Fear

a. Targeted for Persecution

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

b. Family Ties

Acts of violence against an applicant’s family members and friends may establish a well-founded fear of persecution. *See Korablina v. INS*, 158 F.3d 1038, 1044–45 (9th Cir. 1998) (Jewish citizen of the Ukraine); *see also Zhang v. Ashcroft*, 388 F.3d 713, 718 (9th Cir. 2004) (arrest and detention of family members who also practiced Falun Gong, among other factors, compelled a finding that applicant is entitled to withholding of removal); *Njuguna v. Ashcroft*, 374 F.3d 765, 769 (9th Cir. 2004) (persecution of family in Kenya); *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999) (violence and harassment against Kurdish Muslim family in Armenia); *Gonzalez v. INS*, 82 F.3d 903, 909–10 (9th Cir. 1996) (Nicaraguan family suffered violence for supporting Somoza) (“The violence actually committed against other members of Mrs. Gallegos’s family, and repetition of threats to her, made her fear of violence well founded.”); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 515 (9th Cir. 1985) (Salvadoran applicant presented prima facie eligibility for asylum based on the persecution of her family), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009).

The violence must “create a pattern of persecution closely tied to the petitioner.” *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (Guatemala). “The death of one family member does not automatically trigger a sweeping entitlement to asylum eligibility for all members of her extended family. Rather, when evidence regarding a family history of persecution is considered, the relationship that exists between the persecution of family members and the circumstances of the applicant must be examined.” *Navas v. INS*, 217 F.3d 646, 659 n.18 (9th Cir. 2000) (citation modified); cf. *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1198, 1200 (9th Cir. 2023) (record did not compel the conclusion that petitioner would be targeted for persecution based on his father’s earlier political activity where father was arrested, beaten, and forced into military service in the 1980s by the Sandinista government for his opposition to the regime).

In some circumstances, “[t]he ongoing safety of family members in the petitioner’s native country undermines a reasonable fear of future persecution.” *Sharma v. Garland*, 9 F.4th 1052, 1066 (9th Cir. 2021).

But the safety of family members is irrelevant if those family members are not similarly situated to the asylum applicant. See *Kumar v. Gonzales*, 444 F.3d 1043, 1055 (9th Cir. 2006) (irrelevant that petitioner’s parents were not harmed after petitioner left India where they were not “similarly situated”); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (family in Burma not similarly situated because they “didn’t do anything against the government”); *Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (where petitioner was singled out for persecution, the situation of remaining relatives in Iran is “manifestly irrelevant”); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (evidence of the condition of the applicant’s family is relevant only when the family is similarly situated to the applicant); *Rios v. Ashcroft*, 287 F.3d 895, 902 (9th Cir. 2002) (Guatemala); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (Philippines); see also *Tamang v. Holder*, 598 F.3d 1083, 1094 (9th Cir. 2010) (analyzing withholding of removal claim and concluding that petitioner’s fear of future persecution, which was based on threats received by his family, was not objectively reasonable where his family voluntarily returned to Nepal and continued to live there unharmed).

Cross-reference: Asylum, Well-Founded Fear of Persecution, Continued Presence of Family

c. Pattern and Practice of Persecution

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

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

8 C.F.R. § 1208.13(b)(2)(iii); *see also Sarkar v. Garland*, 39 F.4th 611, 622–23 (9th Cir. 2022) (holding, in the context of a motion to reopen, that petitioner’s new evidence—which lacked “direct” or “specific” facts establishing a reasonable fear of persecution—did not demonstrate that he would be subject to a “pattern or practice” of persecution based on his political affiliation with the Jatiya party); *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013) (“While Ms. Rusak’s own direct experiences in Belarus may not rise to the level of persecution on this ground as well, she is not required to demonstrate that she individually suffered persecution if she can establish a ‘pattern or practice . . . of persecution of groups of persons similarly situated’ and that she is a member of the group ‘such that [her] fear of persecution upon return is reasonable.’” (citation omitted)); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) (pattern and practice of Croats ethnically cleansing Bosnian Serbs); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *cf. Wakkary v. Holder*, 558 F.3d 1049, 1060–62 (9th Cir. 2009) (record did not compel conclusion that there exists a pattern and practice of persecution against Chinese and Christians in Indonesia); *Lolong v. Gonzales*, 484 F.3d 1173, 1180–81 (9th Cir. 2007) (en banc) (evidence did not establish pattern or practice of persecution against Chinese Christen women in Indonesia where the petitioner failed to show that the Indonesian government was unable or unwilling to control the perpetrators of violence against such women).

Although pattern-or-practice claims and particular-social-group claims both address group-based harm, the two inquiries are distinct: “this ‘group’ of similarly situated persons is not necessarily the same as the more limited ‘social group’ category mentioned in the asylum statute.” *Mgoian*, 184 F.3d at 1036.

d. Membership in Disfavored Group

In the Ninth Circuit, a member of a “disfavored group” that is not subject to a pattern or practice of persecution may also demonstrate a well-founded fear. See *Kotasz v. INS*, 31 F.3d 847, 853–54 (9th Cir. 1994) (opponents of the Hungarian Communist Regime); see also *Lapadat v. Bondi*, 145 F.4th 942, 958–61 (9th Cir. 2025) (“This record compels a finding that the Roma are a disfavored group in Romania.”); *Tampubolon v. Holder*, 610 F.3d 1056, 1060 (9th Cir. 2010) (Christian Indonesians); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007) (Bihari in Bangladesh); *Sael v. Ashcroft*, 386 F.3d 922, 927 (9th Cir. 2004) (Indonesia’s ethnic Chinese minority); *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (as amended) (stateless Palestinians born in Kuwait are members of a persecuted minority); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182–83 (9th Cir. 2003) (ethnic Albanians in Kosovo); *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996) (Indo-Fijians).

In determining whether an applicant has established a well-founded fear of persecution based on membership in a disfavored group, “this court will look to (1) the risk level of membership in the group (*i.e.*, the extent and the severity of persecution suffered by the group) and (2) the alien’s individual risk level (*i.e.*, whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution).” *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). “The relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be.” *Id.*; see also *Halim v. Holder*, 590 F.3d 971, 979 (9th Cir. 2009) (concluding “that [petitioner] failed to make the minimal showing necessary to require that the agency reconsider its denial of relief . . . based on (1) the relative weakness of the claim of disfavored status, (2) the lack of evidence of government approval of the alleged discrimination, and (3) Halim’s minimal showing of individual risk.”); *Sael*, 386 F.3d at 927 (stating that members of the

significantly disfavored group comprising ethnic Chinese Indonesians need demonstrate a “comparatively low” level of particularized risk).

The “disfavored group analysis does not alter the *quantitative* standard of proof. Rather, it determines what sorts of evidence can be used to meet that standard, and quite generally, in what proportions.” *Wakkary v. Holder*, 558 F.3d 1049, 1065 (9th Cir. 2009).

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

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

“The BIA ‘commit[s] legal error when it fail[s] to analyze [a petitioner’s] individualized threat of persecution’ as part of a disfavored group.” *Nababan v. Garland*, 18 F.4th 1090, 1094–95 (9th Cir. 2021) (quoting *Salim v. Lynch*, 831 F.3d 1133, 1140 (9th Cir. 2016)).

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

5. Internal Relocation

“An applicant is ineligible for asylum if the evidence establishes that ‘the applicant could avoid persecution by relocating to another part of the applicant’s country of nationality . . . if under all the circumstances it would be reasonable to expect the applicant to do so.’” *Kaiser v. Ashcroft*, 390 F.3d 653, 659 (9th Cir. 2004) (quoting 8 C.F.R. § 1208.13(b)(2)(ii)); see also *Hussain v. Rosen*, 985 F.3d

634, 648 (9th Cir. 2021) (“But ‘[a]n applicant does not have a well-founded fear of [future] persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country,’ unless doing so would be unreasonable under the applicant’s circumstances.” (quoting 8 C.F.R. § 1208.13(b)(2)(ii))); *Singh v. Whitaker*, 914 F.3d 654, 661 (9th Cir. 2019) (granting petition for review in part because BIA failed to conduct a sufficiently individualized analysis of petitioner’s ability to relocate within India); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003). “Specifically, the IJ may deny eligibility for asylum to an applicant who has otherwise demonstrated a well-founded fear of persecution where the evidence establishes that internal relocation is a reasonable option under all of the circumstances.” *Melkonian*, 320 F.3d at 1069 (remanding for a determination of the reasonableness of internal relocation in Georgia); *see also Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) (“The Immigration and Nationality Act . . . defines a ‘refugee’ in terms of a person who cannot return to a ‘country,’ not a particular village, city, or area within a country.”).

The inquiry into internal relocation or countrywide persecution is twofold. “[W]e must first ask whether an applicant could relocate safely to another part of the applicant’s country of origin.” *Kaiser*, 390 F.3d at 660 (holding that Pakistani couple could not safely relocate where threats occurred even after petitioners moved to the opposite side of the country). “If the evidence indicates that the applicant could relocate safely, we next ask whether it would be reasonable to require the applicant to do so.” *Id.* at 659; *see also Rodriguez Tornes v. Garland*, 993 F.3d 743, 755 (9th Cir. 2021) (“For purposes of asylum and withholding of removal, assessing Petitioner’s ability to relocate consists of two steps: (1) whether [she] could relocate safely, and (2) whether it would be reasonable to require [her] to do so.” (internal quotation marks omitted)); *Singh*, 914 F.3d at 659 (setting forth two-step relocation analysis). A previous successful internal relocation may undermine the well-founded fear of future persecution. *See Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005).

In cases where the applicant has not established past persecution, the applicant bears the burden of establishing that it would be either unsafe or unreasonable for him to relocate, unless the persecution is by a government or a government-sponsored group. *Hussain*, 985 F.3d at 649 (where petitioner never claimed to fear the government or a government-sponsored group, burden was on him to demonstrate why relocation was unreasonable); *Duran-Rodriguez v. Barr*,

918 F.3d 1025, 1029 (9th Cir. 2019) (petitioner did not meet his burden of proving that internal relocation would not be possible or reasonable where there was no evidence that the drug traffickers pursued him after he left his hometown to live with his aunt in Hermosillo for two weeks or that he could not safely relocate to Hermosillo or another part of Mexico, especially where he ceased working as a police officer); 8 C.F.R. § 1208.13(b)(3)(i) (“In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.”).

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

Regulations effective on December 31, 2025 state that, for purposes of determining the reasonableness of internal relocation, “adjudicators should consider the totality of the relevant circumstances regarding an applicant’s prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant’s demonstrated

ability to relocate to the United States in order to apply for asylum.” 8 C.F.R. § 1208.13(b)(3).

The former version of this regulation stated that

adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

8 C.F.R. § 1208.13(b)(3) (2019); see *Singh*, 914 F.3d at 659 (explaining that “[t]he factors [set out in the former regulation] may not all be relevant in a specific case, and they are not necessarily determinative of whether it would be reasonable for the applicant to relocate” (internal quotation marks and citation omitted)); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090 (9th Cir. 2005) (explaining that the former version of this regulation precluded relocation when a petitioner’s age, limited job prospects, and lack of family or cultural connections to the proposed place of relocation militated against a finding that relocation would be reasonable); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214 (9th Cir. 2004) (setting aside the IJ’s determination that it would be reasonable to require the Knezevics to relocate internally to Serb-held Bosnia-Herzegovina and remanding to the BIA for reconsideration).

6. Continued Presence of Applicant

An applicant’s continued presence in her country of persecution before flight, while relevant, does not necessarily undermine a well-founded fear. See, e.g., *Canales-Vargas v. Gonzales*, 441 F.3d 739, 746 (9th Cir. 2006) (“We do not fault Canales-Vargas for remaining in Peru until the quantity and severity of the threats she received eclipsed her breaking point.”); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (post-threat harmless period did not undermine well-founded fear of former Filipino police officer).

There is no “rule that if the departure was a considerable time after the first threat, then the fear was not genuine or well founded.” *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996); *see also Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (eight-year stay in Nicaragua after release from prison did not negate claim based on severe past persecution); *Turcios v. INS*, 821 F.2d 1396, 1401–02 (9th Cir. 1987) (remaining in El Salvador for several months after release from prison did not negate fear); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (two-year stay in Nicaragua after release not determinative); *cf. Lata v. INS*, 204 F.3d 1241, 1245 (9th Cir. 2000) (Indo-Fijian’s fear undermined by two-year stay in Fiji after incidents of harm); *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) (asylum denied where applicant remained in Nicaragua for more than five years following interrogation, without further harm or contacts from authorities).

7. Continued Presence of Family

The continued presence of family members in the country of origin does not necessarily rebut an applicant’s well-founded fear, unless there is evidence that the family was similarly situated or subject to similar risk. *See Zhao v. Mukasey*, 540 F.3d 1027, 1031 (9th Cir. 2008) (explaining that the well-being of others who have stayed behind in a country is relevant only when those others are similarly situated to the petitioners); *Kumar v. Gonzales*, 444 F.3d 1043, 1055 (9th Cir. 2006) (irrelevant that petitioner’s parents were not harmed after petitioner left India, where they were not “similarly situated”); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (family in Burma not similarly situated because they “didn’t do anything against the government”); *Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (where petitioner was singled out for persecution, the situation of remaining relatives in Iran is “manifestly irrelevant”); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (evidence of the condition of the applicant’s family is relevant only when the family is similarly situated to the applicant); *Rios v. Ashcroft*, 287 F.3d 895, 902 (9th Cir. 2002) (Guatemala); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (Philippines); *see also Tamang v. Holder*, 598 F.3d 1083, 1094 (9th Cir. 2010) (withholding of removal) (petitioner’s fear of future persecution, which was based on threats received by his family, was not objectively reasonable where his family voluntarily returned to Nepal and continued to live there unharmed).

Cf. Li v. Ashcroft, 378 F.3d 959, 964 (9th Cir. 2004) (claim that applicant’s family was so afraid of being arrested that it was forced to go deep into hiding was

inconsistent with wife's travel to hometown without trouble), *superseded by statute on other grounds as stated in Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) ("An applicant's claim of persecution upon return is weakened, even undercut, when similarly-situated family members continue to live in the country without incident, . . . or when the applicant has returned to the country without incident." (citation and internal quotation marks omitted)), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007), *abrogated on other grounds as stated in Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (Israel); *Aruta v. INS*, 80 F.3d 1389, 1395 (9th Cir. 1996) (sister remained in the Philippines without incident); *Rodriguez-Rivera v. U.S. Dep't of Immigr. & Naturalization*, 848 F.2d 998, 1006 (9th Cir. 1988) (family unmolested in El Salvador); *Mendez-Efrain v. INS*, 813 F.2d 279, 282 (9th Cir. 1987) (continued and unmolested presence of family in El Salvador undermined well-founded fear).

8. Possession of Passport or Travel Documents

Possession of a valid passport does not necessarily undermine the subjective or objective basis of an applicant's fear. See *Zhao v. Mukasey*, 540 F.3d 1027, 1031 (9th Cir. 2008) (petitioners' ability to acquire a passport and travel to Beijing for a visa interview despite travel restriction did not undermine claim of a well-founded fear of persecution); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1137 (9th Cir. 2004) ("A petitioner's ability to escape her persecutors does not undermine her claim of a well-founded fear of future persecution, even when she succeeds in obtaining government documents that permit her to depart."); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (possession and renewal of Burmese passport did not undermine petitioner's subjective fear of persecution); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (ethnic Albanian from Kosovo who obtained passport had well-founded fear because "Serbian authorities actively supported an Albanian exodus instead of opposing it"); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1200 (9th Cir. 2000) (limited significance of Russian passport issuance); *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987) (rejecting IJ's presumption that Salvadoran government would not persecute an individual that was allowed to leave the country); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (obtaining passport through a friend did not undermine fear); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985).

But “[t]he ability to ‘travel freely’ and to ‘leave . . . without hindrance’ undermines a reasonable fear of future persecution.” *Sharma v. Garland*, 9 F.4th 1052, 1066 (9th Cir. 2021) (quoting *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000)); see also *Khourassany*, 208 F.3d at 1101 (denying, in part, because Palestinian retained Israeli passport and was able to travel freely); *Rodriguez-Rivera v. U.S. Dep’t of Immigr. & Naturalization*, 848 F.2d 998, 1006 (9th Cir. 1988) (ability to obtain passport is a relevant factor); *Espinoza-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985) (acquisition of Nicaraguan passport without difficulty cut against asylum claim).

9. Safe Return to Country of Persecution

Return trips can be considered as one factor, among others, that rebut the presumption of a nationwide threat of persecution. See *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (presumption of nationwide threat of persecution was rebutted when petitioner made three return trips, there had been two favorable changes in government, and 15 years elapsed between the past persecution and the asylum request); see also *Sharma v. Garland*, 9 F.4th 1052, 1066 (9th Cir. 2021) (voluntary return to India undermined reasonable fear of future persecution); *Loho v. Mukasey*, 531 F.3d 1016, 1017–18 (9th Cir. 2008) (same); cf. *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9th Cir. 2005) (petitioner’s repeated return trips to Mexico to gather enough income to flee permanently did not rebut the presumption of a well-founded fear of persecution).

10. Cases Finding No Well-Founded Fear

See *Gonzalez-Lara v. Garland*, 104 F.4th 1109, 1116 (9th Cir. 2024) (BIA’s finding on well-founded fear supported by substantial evidence where gangs did not target or harm petitioner when she previously lived in El Salvador and there was no evidence that gangs had shown interest in her, her former partner, or her family since she left El Salvador seven years earlier); *Sharma v. Garland*, 9 F.4th 1052, 1065–66 (9th Cir. 2021) (substantial evidence supported BIA’s decision that petitioner did not have a well-founded fear of persecution); *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1029 (9th Cir. 2019) (petitioner failed to establish well-founded fear of persecution where, “[e]ven assuming Duran-Rodriguez has a subjective fear of future persecution, he has not demonstrated that the record compels reversal of the agency’s internal relocation finding”); *Halim v. Holder*,

590 F.3d 971, 977 (9th Cir. 2009) (record did not compel a finding of even a 10 percent chance of persecution); *Lolong v. Gonzales*, 484 F.3d 1173, 1179–81 (9th Cir. 2007) (en banc) (ethnic Chinese Christian petitioner did not establish an individualized risk or a pattern or practice of persecution in Indonesia); *Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005) (fear of persecution in Bangladesh undermined by prior successful internal relocation and current country conditions); *Nagoulko v. INS*, 333 F.3d 1012, 1018 (9th Cir. 2003) (possibility of future persecution in Ukraine too speculative); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (no well-founded fear of persecution in Ethiopia on account of imputed political opinion); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Armenians from Nagorno-Karabakh region did not establish past persecution or a well-founded fear of future persecution by Azeris); *Acewicz v. INS*, 984 F.2d 1056, 1059–61 (9th Cir. 1993) (BIA properly took administrative notice of changed political conditions in Poland); *Rodriguez-Rivera v. U.S. Dep’t of Immigr. & Naturalization*, 848 F.2d 998, 1006 (9th Cir. 1988) (no well-founded fear of Salvadoran guerillas where, inter alia, potential persecutor was dead).

F. Nexus to the Five Statutorily Protected Grounds

Pre-REAL ID Act applications: “Motivated at least in part.” For applications filed before May 11, 2005, the past or anticipated persecution must be “on account of” one or more of the five grounds enumerated in 8 U.S.C.

§ 1101(a)(42)(A): race, religion, nationality, membership in a particular social group, or political opinion. *See, e.g., INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992). That standard required the applicant provide some “evidence from which it is reasonable to believe that the persecutor’s actions were motivated at least in part by a protected ground.” *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (pre-REAL ID Act).

Post-REAL ID Act applications: “At least one central reason.” For applications filed on or after May 11, 2005, the REAL ID Act of 2005, Pub. L. No. 109-113, 119 Stat. 231, created a new nexus standard, requiring that an applicant establish that “race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added); *see also Aden v. Wilkinson*, 989 F.3d 1073, 1084 (9th Cir. 2021) (“To meet this ‘nexus’ requirement, an applicant must show that the protected ground was ‘at least one

central reason’ the applicant was persecuted.”); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc) (post-REAL ID Act); *Regalado-Escobar v. Holder*, 717 F.3d 724, 732 (9th Cir. 2013) (“Under the REAL ID Act, the applicant bears the burden to show nexus by showing that a protected ground was “one central reason” for his persecution.”); *Zetino v. Holder*, 622 F.3d 1007, 1015 (9th Cir. 2010) (“The REAL ID Act of 2005 places an additional burden on Zetino to demonstrate that one of the five protected grounds will be at least one central reason for his persecution.”); *Sinha v. Holder*, 564 F.3d 1015, 1021 n.3 (9th Cir. 2009) (applying pre-REAL ID Act standard).

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

Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009).

There are at least two ways to demonstrate the causal link required to meet the “one central reason” standard. First, a motive is a central reason if the persecutor would not have harmed the applicant if such motive did not exist and the motive was more than incidental or tangential. Second, a motive is a central reason if that motive, standing alone, would have led the persecutor to harm the applicant.

Corpeno-Romero v. Garland, 120 F.4th 570, 581 (9th Cir. 2024) (citations and internal quotation marks omitted).

Withholding of Removal: “A Reason.” While a post-REAL ID Act *asylum* “applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant,” 8 U.S.C. § 1158(b)(1)(B)(i), the standard for *withholding of removal* is not as demanding, *Barajas-Romero v. Lynch*, 846 F.3d

351, 358 (9th Cir. 2017) (explaining that the withholding statute uses only “a reason” in contrast to the asylum statute which states “one central reason”).

1. Standards of Review

“[T]he BIA reviews the IJ’s underlying factual findings, such as what a persecutor’s motive may be, for clear error. But the BIA must review de novo whether a persecutor’s motives meet the nexus legal standards, i.e., whether a protected ground was ‘one central reason’ (for asylum) or ‘a reason’ (for withholding of removal) for the past or feared harm.” *Umana-Escobar v. Garland*, 69 F.4th 544, 552 (9th Cir. 2023) (citations omitted) (remanding where the BIA erroneously reviewed the IJ’s nexus determination de novo rather than for clear error).

The court reviews the agency’s finding as to a persecutor’s actual motive for substantial evidence. *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 893 (9th Cir. 2021).

2. Proving a Nexus

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

An applicant’s uncontroverted credible testimony as to the persecutor’s motivations may be sufficient to establish nexus. See, e.g., *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (pre-REAL ID Act) (Parada’s credible testimony establishes that the persecution he and his family suffered was “on account of” his family’s government and military service, and also on account of imputed political opinion); *Antonyan v. Holder*, 642 F.3d 1250, 1254 (9th Cir. 2011) (pre-REAL ID Act) (accepting Antonyan’s factual testimony as undisputed and concluding the BIA erred in finding no nexus); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1026 (9th Cir. 2010) (pre-REAL ID Act) (“Baghdasaryan’s testimony that he was harassed, threatened, arrested, and beaten by the government compels the conclusion that he was harmed, at least in part, due to his political opinion expressed through his opposition to government corruption.”); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076–77 (9th Cir. 2004) (accepting applicant’s testimony that the Guatemalan government persecuted applicant’s entire village based on imputed

political opinion); *Shoafera v. INS*, 228 F.3d 1070, 1074–75 (9th Cir. 2000) (Ethiopian applicant established through her credible testimony and witness testimony that the perpetrator was motivated to rape her based, in part, on her Amhara ethnicity); *Maini v. INS*, 212 F.3d 1167, 1175–76 (9th Cir. 2000) (evidence compelled a finding that Indian family was persecuted on account of interfaith marriage based on credible witness testimony and statements by attackers).

a. Direct Evidence

Direct proof of motivation may include statements made by the persecutor to the victim or by the victim to the persecutor. *See, e.g., Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (soldiers stated that rape was because of Kebede’s family’s position in prior Ethiopian regime); *Lopez v. Ashcroft*, 366 F.3d 799, 804 (9th Cir. 2004) (Guatemalan guerillas told applicant that he should not work for the wealthy); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 2000) (en banc) (applicant articulated her political opposition to the NPA), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Gonzalez-Neyra v. INS*, 122 F.3d 1293, 1295 (9th Cir. 1997) (applicant told Shining Path that he would not submit to extortion because of opposition), *as amended by* 133 F.3d 726 (9th Cir. 1998).

b. Circumstantial Evidence

“Although it is [petitioner’s] burden to establish his eligibility for asylum, he may satisfy this burden with circumstantial evidence.” *Madrigal v. Holder*, 716 F.3d 499, 505 (9th Cir. 2013) (post-REAL ID Act).

Circumstantial proof of motivation may consist of severe or disproportionate punishment for violations of laws or other evidence that the persecutor generally regards those who resist as political enemies. *See, e.g., Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (severe punishment for illegal departure). Circumstantial evidence of motive may also include, inter alia, the timing of the persecution and signs or emblems left at the site of persecution. *See Deloso v. Ashcroft*, 393 F.3d 858, 865–66 (9th Cir. 2005).

Statements made by the persecutor may constitute circumstantial evidence of motive. See *Gafoor v. INS*, 231 F.3d 645, 651–52 (9th Cir. 2000) (holding that Fijian “soldiers’ statements to Gafoor [to ‘go back to India’ were] unmistakable circumstantial evidence that they were motivated by his race and imputed political opinion”), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009).

“In some cases, the factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of political opinion, or one of the other protected grounds. Indeed, this court has held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue.” *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) (citation omitted); see also *Li v. Holder*, 559 F.3d 1096, 1099 (9th Cir. 2009) (pre-REAL ID Act) (“[W]hen a petitioner violates no Chinese law, but instead comes to the aid of refugees in defiance of China’s unofficial policy of discouraging such aid, a BIA finding that the petitioner is a mere criminal subject to legitimate prosecution is not supported by substantial evidence.”); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 744–45 (9th Cir. 2006) (pre-REAL ID Act) (anonymous threats began several weeks after applicant spoke out against Shining Path guerillas at a political rally).

“[I]f there is no evidence of a legitimate prosecutorial purpose for a government’s harassment of a person . . . there arises a presumption that the motive for harassment is political.” *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (second alteration in original) (internal quotation marks omitted); see also Imputed Political Opinion, below.

The court has considered the treatment of similarly situated family members in determining whether the petitioner established the requisite nexus between the treatment suffered and a protected ground. See *Sinha v. Holder*, 564 F.3d 1015, 1022 (9th Cir. 2009) (pre-REAL ID Act) (petitioner’s argument that the attacks directed at him were motivated by his race were bolstered by the racial harassment experienced by his similarly situated wife during the same period).

3. Mixed-Motive Cases

A persecutor may have multiple motives for inflicting harm on an applicant.

Pre-REAL ID Act applications: With respect to pre-REAL ID Act claims (applications filed before May 11, 2005), as long as the applicant produces evidence from which it is reasonable to believe that the persecutor’s action was motivated, *at least in part*, by a protected ground, the applicant is eligible for asylum. See [Parada v. Sessions](#), 902 F.3d 901, 910 (9th Cir. 2018) (pre-REAL ID Act); [Borja v. INS](#), 175 F.3d 732, 736–37 (9th Cir. 1999) (en banc) (Filipino targeted for extortion plus political motives), *superseded by statute as stated by* [Parussimova v. Mukasey](#), 555 F.3d 734, 739–40 (9th Cir. 2009); [Briones v. INS](#), 175 F.3d 727, 729 (9th Cir. 1999) (en banc), *superseded by statute as stated by* [Parussimova v. Mukasey](#), 555 F.3d 734, 739–40 (9th Cir. 2009).

See, e.g., [Antonyan v. Holder](#), 642 F.3d 1250, 1256 (9th Cir. 2011) (pre-REAL ID Act) (mixed motives do not render the opposition any less political or the opponent any less deserving of asylum); [Baghdasaryan v. Holder](#), 592 F.3d 1018, 1026 (9th Cir. 2010) (pre-REAL ID Act) (explaining that mixed motives do not negate a legitimate nexus to political opinion; while some of the harm petitioner experienced may have been due to personal reasons, the testimony compelled the conclusion that that he was harmed at least in part due to his political opinion); [Sinha v. Holder](#), 564 F.3d 1015, 1021 (9th Cir. 2009) (pre-REAL ID Act) (petitioner was targeted at least in part on account of his race); [Zhu v. Mukasey](#), 537 F.3d 1034, 1044–45 (9th Cir. 2008) (pre-REAL ID Act) (applicant who was raped by her factory manager was repeatedly sought by police at least in part on account of political opinion imputed to her as the result of her whistleblowing); [Fedunyak v. Gonzales](#), 477 F.3d 1126, 1130 (9th Cir. 2007) (pre-REAL ID Act) (“While some of the persecution suffered by [petitioner] may have been motivated by the personal greed of local officials, [petitioner’s] testimony that he was harassed, threatened and assaulted for raising complaints about the extortion scheme adequately establishes that persecution was—at least in part—a response to his political opinion expressed through his whistleblowing.”); [Nuru v. Gonzales](#), 404 F.3d 1207, 1227–28 (9th Cir. 2005) (Eritrean army deserter had well-founded fear of future persecution on account of political opinion and as punishment for desertion); [Deloso v. Ashcroft](#), 393 F.3d 858, 864–66 (9th Cir. 2005) (Filipino anti-communist targeted on account of political opinion and revenge); [Mihalev v. Ashcroft](#), 388 F.3d 722, 727–30 (9th Cir. 2004) (Bulgarian gypsy established that police persecuted her, in part, based on her Roma ethnicity); [Mamouzian v. Ashcroft](#), 390 F.3d 1129, 1134 (9th Cir. 2004) (“That [petitioner’s] supervisor might also have been motivated by personal dislike . . . does not

undermine [petitioner's] claim of persecution.”); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (gang rape by Guatemalan soldiers motivated in part by imputed political opinion); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (Bangladeshi targeted based on “political jealousy” and political opinion); *Jahed v. INS*, 356 F.3d 991, 999 (9th Cir. 2004) (Iranian National Guard’s motive was “inextricably intertwined with petitioner’s past political affiliation” even though he was motivated in part by his desire for money); *Gafoor v. INS*, 231 F.3d 645, 652–54 (9th Cir. 2000) (Indo-Fijian targeted for race, for political opinion, and as personal vendetta), *superseded by statute on other grounds as stated by* *Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Shoafera v. INS*, 228 F.3d 1070, 1075–76 (9th Cir. 2000) (rape by Ethiopian government official motivated in part by ethnicity); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (“revenge plus” motive of guerillas to harm former Filipino police officer who testified against the NPA); *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (at least one motive was the imputation of pro-guerilla political opinion to Salvadoran applicant); *Maini v. INS*, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000) (persecution of Indian family motivated by religious and economic grounds); *Tarubac v. INS*, 182 F.3d 1114, 1118–19 (9th Cir. 1999) (NPA persecution based on political opinion and economic motives); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (“Torture in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation even if the torture served intelligence gathering purposes.”).

Post-REAL ID Act applications: For applications filed on or after May 11, 2005, § 101(a)(3) of the REAL ID Act provides that an applicant must establish that “race, religion, nationality, membership in a particular social group, or political opinion, was or will be *at least one central reason* for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added); *see also* *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc) (post-REAL ID Act) (“Because Bringas applied for asylum after the passage of the REAL ID Act of 2005 he must show that his sexual orientation was ‘one central reason’ for his persecution.”); *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (post-REAL ID Act) (“[I]f a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is ‘one central reason’ for his persecution.”); *Sinha v. Holder*, 564 F.3d 1015, 1021 n.3 (9th Cir. 2009)

(explaining that the REAL ID Act superseded the “at least in part” standard was superseded by the REAL ID Act’s “one central reason” standard).

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

Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009) (applying REAL ID Act); *see also Garcia v. Wilkinson*, 988 F.3d 1136, 1144 (9th Cir. 2021) (quoting *Parussimova*).

Assessing whether an asylum applicant has met [the one central reason] standard often requires acknowledging the possibility that persecutors may have mixed motives for their actions. When the record reveals mixed motives for persecution, the one central reason standard requires the protected ground to be primary, essential, or principal. The protected ground cannot play a minor role—that is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm. But a motive may be a central reason even if the protected ground was not the only reason for persecution. Indeed, that an unprotected ground also constitutes a central reason for persecution does not bar asylum.

Corpeno-Romero v. Garland, 120 F.4th 570, 581 (9th Cir. 2024) (citations and internal quotation marks omitted).

The legislative history of the REAL ID Act suggests that the addition of the “at least one central reason” standard was motivated, at least in part, by the Ninth Circuit’s mixed-motive caselaw. *See* Conference Committee Statement, 151 Cong. Rec. H2869 (daily ed. May 3, 2005) (suggesting that this court’s decisions in *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995), *superseded by statute on other*

grounds as stated by *Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009), *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988), and *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985), violated Supreme Court precedent requiring asylum applicants to provide evidence of motivation and improperly shifted the burden to the government to prove legitimate purpose, adverse credibility, or some other statutory bar to relief).

“Because mixed motive analysis exists in cases governed by the REAL ID Act, a petitioner may have been persecuted both because of legitimate investigatory reasons *and* because of his political opinion (imputed or actual), his religion, or other protected ground.” *Singh v. Holder*, 764 F.3d 1153, 1162 (9th Cir. 2014) (petitioner established nexus between imputed political opinion and persecution in post-REAL ID Act case).

Although a petitioner must show that a protected ground was one central reason for the persecution, the “‘persecution may be caused by more than one central reason, and [he] need not prove which reason was dominant.’” *Bringas-Rodriguez*, 850 F.3d at 1062 (quoting *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009)). “[T]he petitioner need not show that the protected ground was the *only* reason for persecution.” *Garcia*, 988 F.3d at 1143.

“Although mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim, if a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is ‘one central reason’ for his persecution.” *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (citation omitted) (post-REAL ID Act).

See, e.g., Corpeno-Romero v. Garland, 120 F.4th 570, 581–83 (9th Cir. 2024) (where petitioners sought asylum on the grounds that their removal to El Salvador would result in persecution on account of their status as immediate family members of an individual, which they contended qualified as a particularly social group, the court held that the record compelled the conclusion that petitioners’ family relationship was one central reason for their past persecution where that relationship was a “reason of primary importance” to the gang members and “essential to their decision” to target and threaten petitioners).

4. Shared Identity Between Victim and Persecutor

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

5. General Civil Strife and Motive

Although widespread civil unrest does not, on its own, establish asylum eligibility, neither does the existence of general civil strife preclude relief. See *Sinha v. Holder*, 564 F.3d 1015, 1022–23 (9th Cir. 2009) (IJ’s suggestion “that the violence directed against one individual is somehow *less* ‘on account of’ his race because many other individuals of his ethnic group are *also* being targeted on account of their race” was illogical and had no support in case law); *Ahmed v. Keisler*, 504 F.3d 1183, 1194–95 n.9 (9th Cir. 2007) (“[E]ven though generalized violence as a result of civil strife does not necessarily qualify as persecution, neither does civil strife eliminate the possibility of persecution.”); *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (“[T]he existence of civil strife does not alter our normal approach to determining refugee status or make a particular asylum claim less compelling.”), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009). “The difficulty of determining motive in situations of general civil unrest should not . . . diminish the protections of asylum for persons who have been punished because of their actual or imputed political views, as opposed to their criminal or violent conduct.” *Arulampalam v. Ashcroft*, 353 F.3d 679, 685 n.4 (9th Cir. 2003) (internal quotation marks omitted). “In certain contexts, . . . the existence of civil strife supports a finding that claimed persecution was on account of a protected ground.” *Ndom*, 384 F.3d at 753 (armed conflict between Senegalese forces and secessionist rebels).

See also *Zetino v. Holder*, 622 F.3d 1007, 1016 (9th Cir. 2010) (applicant’s “desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground”); *Mengstu v.*

Holder, 560 F.3d 1055, 1058–59 (9th Cir. 2009) (holding that IJ’s finding that no nexus to a protected ground existed was not supported by substantial evidence where Ethiopian government targeted only Eritreans for deportation and denationalization), *superseded by statute on other grounds as stated by* *Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004) (Guatemalan civil war); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211–12 (9th Cir. 2004) (distinguishing between displaced persons fleeing the ravages of war and refugees fleeing ethnic cleansing); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (widespread political violence in Bangladesh “says very little about” whether applicant could demonstrate a persecutory motive).

6. Resistance to Discriminatory Government Action

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

7. The Protected Grounds

a. Race

Claims of race- and nationality-based persecution often overlap. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1160 n.5 (9th Cir. 1999) (Quiche Indian from Guatemala). Recent cases refer to “ethnicity,” “which falls somewhere between and within the protected grounds of race and nationality.” *Shoafera v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotation marks omitted) (ethnic Amhara in Ethiopia); *see also Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.10 (9th Cir. 2004) (Arab Israeli). Individuals forced to flee ethnic cleansing by hostile military forces are refugees who fear persecution on account of ethnicity. *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211–12 (9th Cir. 2004) (distinguishing displaced persons).

(i) Cases Finding Racial or Ethnic Persecution

See *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312–15 (9th Cir. 2012) (concluding that petitioner established persecution where his mother, when pregnant with him, was persecuted on account of her ethnicity); *Sinha v. Holder*, 564 F.3d 1015, 1022–23 (9th Cir. 2009) (concluding that incidents petitioner described amounted to violence with a distinct racial slant, and were more than mere acts of random violence); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119–20 (9th Cir. 2004) (past persecution of ethnic Afghans in Germany); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (mixed-race, mixed-religion couple from Fiji suffered past persecution); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211–14 (9th Cir. 2004) (Serbian couple from Bosnia-Herzegovina established past persecution and a well-founded fear of future persecution on account of ethnicity because their town was targeted for bombing, invasion, occupation, and a “systematic campaign of ethnic cleansing by the Croats”); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (Armenian applicant was eligible for asylum because Abkhazian separatists specifically targeted him for conscription based on his ethnicity and religion); *Gafoor v. INS*, 231 F.3d 645, 651–52 (9th Cir. 2000) (Indo-Fijian persecuted on account of race and imputed political opinion), *superseded in part by statute as stated by* *Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Shoafera v. INS*, 228 F.3d 1070, 1075–76 (9th Cir. 2000) (rape motivated in part by Amhara ethnicity); *Chand v. INS*, 222 F.3d 1066, 1076 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197–98 (9th Cir. 2000) (well-founded fear of persecution on the basis of Armenian ethnicity); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem in Armenia); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161–63 (9th Cir. 1999) (past persecution of Quiche Indian from Guatemala); *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996) (past persecution of Indo-Fijian).

(ii) Cases Finding No Racial or Ethnic Persecution

See *Parussimova v. Mukasey*, 555 F.3d 734, 742 (9th Cir. 2009) (post-REAL ID Act case) (“utterance of an ethnic slur” during attack, standing alone, did not compel conclusion that ethnicity was a central reason for attack); *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) (random criminal acts in South Africa bore no nexus to race); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir.

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

b. Religion

Persecution on account of religion may assume various forms, including:

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

Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, U.N. Doc. HCR/IP/4/Eng./REV.3 (ed. 2011) (“UNHCR Handbook”), para. 72.

“The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience, and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.” UNHCR Handbook, para. 71.

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

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

(i) Cases Finding Religious Persecution

See *Guo v. Sessions*, 897 F.3d 1208, 1215–17 (9th Cir. 2018) (past religious persecution based on totality of circumstances where petitioner suffered physical harm and was forced to abandon religious worship); *Rusak v. Holder*, 734 F.3d 894, 898 (9th Cir. 2013) (“Ms. Rusak has made a showing of past persecution on the basis of religion, and she is thus entitled to a presumption of well-founded fear of future persecution.”); *Kamalyan v. Holder*, 620 F.3d 1054, 1057–58 (9th Cir. 2010) (petitioner, a Jehovah’s Witness who was a native of the U.S.S.R. and citizen of Armenia, demonstrated past persecution on account of religion); *Zhao v. Mukasey*, 540 F.3d 1027, 1029–31 (9th Cir. 2008) (petitioners demonstrated a well-founded fear of future persecution on account of their Falun Gong practice); *Hanna v. Keisler*, 506 F.3d 933, 936–39 (9th Cir. 2007) (Chaldean Catholic, a native and citizen of Iraq, persecuted on account of religion); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (petitioner established clear probability of persecution in China on account of his practice of Falun Gong); *Malty v. Ashcroft*, 381 F.3d 942, 948 (9th Cir. 2004) (BIA erred in denying motion to reopen where Egyptian Coptic Christian demonstrated prima facie eligibility for asylum); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (mixed-race, mixed-religion couple from Fiji suffered past persecution); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (Burmese Seventh Day Adventist minister); *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (Chinese Christian was persecuted on account of his religion when he was arrested, detained, physically abused, and forced to sign an affidavit renouncing his religion after he participated in illegal religious activities and attempted to stop an officer from removing a cross from a tomb); *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.9 (9th Cir. 2004) (noting strong correlation between ethnicity and religion in the Middle East); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (Armenian applicant eligible for asylum because Abkhazian separatists specifically targeted him for conscription based on his ethnicity and religion); *Popova v. INS*, 273 F.3d 1251, 1257–58 (9th Cir. 2001) (harassment and threats in Bulgaria based on applicant’s religious surname and political opinion); *Lal v. INS*, 255 F.3d 998, 1003, 1009–10 (9th Cir. 2001) (Indo-Fijian faced religious and political persecution), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (past persecution of Christian who attempted interfaith dating in Iran); *Ladha v. INS*, 215 F.3d 889, 902–03 (9th Cir. 2000) (if credible, past persecution of Shia Muslims by Sunni Muslims in Pakistan), *overruled on other grounds by* *Abebe v. Mukasey*, 554 F.3d

1203, 1208 (9th Cir. 2009) (en banc); *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) (“[P]ersecution aimed at stamping out an interfaith marriage is without question persecution on account of religion.”); *Korablina v. INS*, 158 F.3d 1038, 1044–45 (9th Cir. 1998) (past persecution of Jewish citizen of the Ukraine); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (arrest of family member at church may provide basis for eligibility); *Hartooni v. INS*, 21 F.3d 336, 341–42 (9th Cir. 1994) (if credible, Christian Armenian in Iran eligible for asylum).

(ii) Cases Finding No Religious Persecution

See *Rios v. Lynch*, 807 F.3d 1123, 1126 (9th Cir. 2015) (insufficient nexus between murders of relatives and their religious beliefs); *Benyamin v. Holder*, 579 F.3d 970, 977 (9th Cir. 2009) (mixed-religion marriage); *Padash v. INS*, 358 F.3d 1161, 1166 (9th Cir. 2004) (Indian Muslim was not eligible for asylum based on two incidents of religious-inspired violence at his father’s restaurant); *Halaim v. INS*, 358 F.3d 1128, 1132 (9th Cir. 2004) (discrimination against Ukrainian sisters on account of Pentecostal Christian religion did not compel a finding of past persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016–18 (9th Cir. 2003) (past harassment of Christian in Ukraine not persecution; future fear too speculative); *Hakeem v. INS*, 273 F.3d 812, 817 (9th Cir. 2001) (Ahmadi in Pakistan not eligible for withholding), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007), *abrogated on other grounds as stated in Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025); *Tecun-Florian v. INS*, 207 F.3d 1107, 1110 (9th Cir. 2000) (past torture by Guatemalan guerillas had no nexus to applicant’s religious beliefs); *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996) (conscripted of Nicaraguan Jehovah’s Witness); *Abedini v. INS*, 971 F.2d 188, 191–92 (9th Cir. 1992) (prosecution of Iranian for distribution of Western videos); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (applicant’s violation of restrictive dress and conduct rules did not establish persecution on account of religion or political opinion); *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (prejudice and discrimination against Egyptian Coptic Christian insufficient); *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (religious objection to service in the Salvadoran military insufficient to establish a nexus); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1991) (religious converts in Egypt).

c. Nationality

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

d. Membership in a Particular Social Group

The “phrase ‘particular social group’ is ambiguous.” *Conde Quevedo v. Barr*, 947 F.3d 1238, 1242 (9th Cir. 2020) (citation omitted); see also *Plancarte Saucedo v. Garland*, 23 F.4th 824, 833 (9th Cir. 2022); *Nguyen v. Barr*, 983 F.3d 1099, 1103 (9th Cir. 2020); *Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013) (remanding for the BIA in light of *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc)). Over time, the BIA has “refin[ed] the contours of this ambiguous statutory provision,” *Reyes v. Lynch*, 842 F.3d 1125, 1134 (9th Cir. 2016), and this court’s case law examining claims based on membership in particular social groups “continues to evolve,” *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010).

(i) Three-Prong Cognizability Analysis

The BIA has interpreted the phrase “particular social group” as referring to a group that is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” *Akosung v. Barr*, 970 F.3d 1095, 1103 (9th Cir. 2020) (citing *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014)).

In *Reyes v. Lynch*, this court accorded *Chevron* deference to the BIA’s reasonable interpretation of the ambiguous phrase “particular social group,” “including the BIA’s articulation of the ‘particularity’ and ‘social distinction’ requirements” in its precedential decisions *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014), and *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014), 842

F.3d 1125, 1135 (9th Cir. 2016); *see also* *Villegas Sanchez v. Garland*, 990 F.3d 1173, 1180 (9th Cir. 2021) (explaining the court in *Reyes v. Lynch* endorsed *Matter of W-G-R-* and *Matter of M-E-V-G-*, the companion Board decisions that “clarified the elements underlying the particular social group analysis”); *Nguyen*, 983 F.3d at 1103 (same); *Conde Quevedo*, 947 F.3d at 1242 (noting that *Reyes v. Lynch* accorded *Chevron* deference to the BIA’s interpretation of “particular social group”).

Although *Chevron* is no longer good law, this court has held that decisions deferring to the BIA’s reasonable interpretations of ambiguous provisions of the INA remain controlling circuit precedent under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc). *See Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024).

(A) Immutable Characteristic

“The common immutable characteristic has been defined [by the BIA] as one ‘that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.’” *Nguyen v. Barr*, 983 F.3d 1099, 1103 (9th Cir. 2020); *see also Plancarte Saucedo*, 23 F.4th at 833 (“The ‘critical requirement’ is that the defining characteristic of the group be something that ‘either cannot be changed’ or ‘should not be required to [be] change[d] in order to avoid persecution.’” (internal citations omitted)).

(B) Particularity

“The particularity element requires characteristics that ‘provide a clear benchmark for determining who falls within the group,’ wherein the relevant society must have a ‘commonly accepted definition[]’ of the group.” *Nguyen v. Barr*, 983 F.3d 1099, 1103 (9th Cir. 2020) (citation omitted); *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1081–84 (9th Cir. 2014) (discussing definition of particular social groups); *Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1164 (9th Cir. 2013) (“A social group is particular if it can accurately be described in a manner sufficiently distinct that the group would be recognized . . . as a discrete class of persons.” (citation and internal quotation marks omitted)); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (en banc) (“The ultimate question is whether a group ‘can accurately be described in a manner sufficiently distinct that

the group would be recognized, in the society in question, as a discrete class of persons.’” (citation omitted)).

In determining that the BIA’s articulation of the “particularity” requirement in *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014), and *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014), was “reasonable and entitled to *Chevron* deference,” this court explained:

[t]he BIA’s statement of the purpose and function of the ‘particularity’ requirement does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations. Nor is it contrary to the principle that diversity within a proposed particular social group may not serve as the *sine qua non* of the particularity analysis. *Cordoba v. Holder*, 726 F.3d 1106, 1116 (9th Cir. 2013); *Henriquez-Rivas*, 707 F.3d at 1093–94. Rather, the BIA imposes the “particularity” requirement in order to distinguish between social groups that are discrete and those that are amorphous.

Reyes v. Lynch, 842 F.3d 1125, 1135–37 (9th Cir. 2016).

(C) Social Distinction

[The social distinction] requirement refers to general social perception, which can be assessed from the perspective of “the society in question as a whole,” “the residents of a particular region,” or “members of a different social group,” depending o[n] the facts of the case. . . . It is not, however, assessed from the perspective of the persecutors.

Diaz-Torres v. Barr, 963 F.3d 976, 980 (9th Cir. 2020) (quoting *Cordoba*, 726 F.3d at 1115, and *Conde Quevedo v. Barr*, 947 F.3d 1238, 1242 (9th Cir. 2020)).

To make the social-distinction determination, the agency must perform an “evidence-based” inquiry into “whether the relevant society recognizes [the petitioner’s] proposed social group.” *Pirir-Boc*, 750 F.3d at 1084. “Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group

exists and is perceived as ‘distinct’ or ‘other’ in a particular society.” *Id.* (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. at 244). Because the inquiry is based on country-specific evidence, the inquiry is necessarily conducted case-by-case, country-by-country, and, in some cases, region-by-region.

Diaz-Torres, 963 F.3d at 980; *see also Acevedo Granados v. Garland*, 992 F.3d 755, 763–64 (9th Cir. 2021) (recognizing that evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as distinct or other in a particular society).

Social distinction requires “those with a common immutable characteristic [to be] set apart, or distinct, from other persons within the society in some significant way.” *Matter of M-E-V-G-*, 26 I. & N. Dec. at 238. Specifically, social distinction requires “evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.” *Matter of W-G-R-*, 26 I. & N. Dec. at 217. “[T]he social group must exist independently of the fact of persecution” because “the persecutors’ perception is not itself enough to make a group socially distinct.” *Matter of M-E-V-G-*, 26 I. & N. Dec. at 236 n.11, 242.

Villegas Sanchez, 990 F.3d at 1180–81. Persecutory action taken toward a group may be relevant to a group’s social distinction, because persecution itself may be the catalyst that causes society to distinguish a group and consider it distinct. *See Villegas Sanchez*, 990 F.3d at 1181; *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1083 (9th Cir. 2020).

Earlier BIA case law referred to this prong of the social group analysis as “social visibility,” but the BIA renamed it “social distinction” to clarify that “ocular” or “on sight” visibility is not required. *See Akosung v. Barr*, 970 F.3d 1095, 1103 (9th Cir. 2020) (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 240 (BIA 2014)). The BIA also clarified that recognition of a particular social group is determined by the perception of the society in question, rather than by the perception of the persecutor, as had been suggested in this court’s earlier decision in *Henriquez-Rivas*, 707 F.3d 1081, 1087 (9th Cir. 2013) (en banc). *See Rios v.*

Lynch, 807 F.3d 1123, 1127 (9th Cir. 2015) (explaining that the BIA’s approach contrasts with the focus on the perpetrator in *Henriquez-Rivas*); *see also Conde Quevedo*, 947 F.3d at 1242.

(ii) Cases Predating Three-Prong Cognizability Analysis

A particular social group “implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.” *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576–77 (9th Cir. 1986) (stating that a family is a “prototypical example” of a social group, but young working-class urban males of military age are not), *abrogated on other grounds by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc). “[A] ‘particular social group’ is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000) (stating, “appropriate ‘particular social group’ in this case is composed of gay men with female sexual identities in Mexico”), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc), *judgment vacated by Gonzales v. Thomas*, 547 U.S. 183 (2006); *see also Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (BIA erred in rejecting “women in Guatemala” as a cognizable social group solely based on the broad nature of the group, without assessing ‘innate characteristic’ analysis); UNHCR’s Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002). Large, internally diverse, demographic groups rarely constitute distinct social groups. *See Sanchez-Trujillo*, 801 F.2d at 1576–77 (“Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct ‘social group’ for the purposes of establishing refugee status.”), *abrogated in part by Henriquez-Rivas*, 707 F.3d 1081, 1093–94 (9th Cir. 2013) (en banc) (overruling cases that made “considerations of diversity of lifestyle and origin the *sine qua non* of ‘particularity’ analysis”) *as recognized in Cordoba v. Holder*, 726 F.3d 1106, 1116 (9th Cir. 2013).

(iii) Review of Particular Social Group Determinations

The court reviews de novo the legal question of whether a particular social group is cognizable, except to the extent that deference is owed to the BIA's interpretation of the governing statutes and regulations. *Conde Quevedo v. Barr*, 947 F.3d 1238, 1241–42 (9th Cir. 2020). The court reviews findings of fact, including determinations of social distinction, for substantial evidence. *Id.* at 1242.

Prior to *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the BIA's determination in a precedential decision that a group is or is not a "particular social group" was entitled to *Chevron* deference. See *Ramos-Lopez v. Holder*, 563 F.3d 855, 858–59 (9th Cir. 2009), *abrogated in part on other grounds by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc); see also *Nguyen*, 983 F.3d at 1103 ("[T]he IJ's and the Board's interpretation of [particular social group] is entitled to *Chevron* deference, so long as it is reasonable.").

Under the pre-*Loper Bright* regime, *Skidmore* deference was owed where the BIA issued an unpublished decision by one member of the BIA. See *Cordoba*, 726 F.3d at 1114; *Soriano v. Holder*, 569 F.3d 1162, 1164 n.1 (9th Cir. 2009) (affording *Skidmore* deference to BIA decision concluding that group comprised of government informants was not a valid social group for asylum purposes), *abrogated in part on other grounds by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc) (limiting *Soriano* to the extent it made considerations of diversity of lifestyle and origin the sine qua non of 'particularity' analysis).

"[N]either the BIA nor the Ninth Circuit is authorized to undertake the initial factfinding necessary to determine the viability of the group." *Alanniz v. Barr*, 924 F.3d 1061, 1069 (9th Cir. 2019). In *Alanniz*, the court remanded the asylum application to the agency for further factfinding, where the IJ mischaracterized the proposed social group, and *Alanniz* was entitled to have the IJ first consider the facts that defined his proposed group. *Id.*; see also *Honcharov v. Barr*, 924 F.3d 1293, 1297 (9th Cir. 2019) ("[T]he Board did not err when it declined to consider *Honcharov*'s proposed particular social groups that were raised for the first time on appeal.").

“[T]he conclusion that a proposed social group is impermissibly circular may not be reached summarily merely because the proposed group mentions harm.” *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1086 (9th Cir. 2020). Instead, the BIA must consider on a case-by-case basis whether the group is cognizable “if it is defined without reference to the fact of persecution.” *Id.* at 1080.

Even assuming a proposed particular social group is cognizable, an applicant must show satisfy the nexus requirement—i.e., that persecution was on account of membership in that group. See *Ayala v. Holder*, 640 F.3d 1095, 1098 (9th Cir. 2011).

Cross-reference: Proving Nexus

(iv) Types of Social Groups

(A) Family and Clan

“[I]n some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes.” *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002) (evidence did not compel a finding that Guatemalan applicant was persecuted on account of family membership); see *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (“[T]he family remains the quintessential particular social group.” (citation omitted)).

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

For cases addressing family social groups, see, e.g., *Corpeno-Romero v. Garland*, 120 F.4th 570, 581–83 (9th Cir. 2024) (where petitioners sought asylum on the grounds that their removal to El Salvador would result in persecution on account of their status as immediate family members of a certain individual, the record compelled the conclusion that petitioners’ family relationship was one central reason for their past persecution where that relationship was a “reason of primary importance” to the gang members and “essential to their decision” to target and threaten petitioners); *Lopez v. Garland*, 116 F.4th 1032, 1046 (9th Cir.

2024) (substantial evidence supported the agency’s conclusion that petitioner did not demonstrate a likelihood of persecution based on family membership where there was no evidence that petitioner’s father or paternal relatives had any interest in harming him as adult; as to past persecution, although the petitioner suffered harm in utero when his mother was abused during pregnancy, petitioner was not the direct target of that abuse); *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1200 (9th Cir. 2023) (“While it is generally accepted that ‘the family remains the quintessential particular social group,’ . . . the record does not compel the conclusion that Gutierrez would be targeted for persecution based on his father’s opposition to the Sandinista government in the 1980s.” (citations omitted)); *Santos-Ponce v. Wilkinson*, 987 F.3d 886, 890 (9th Cir. 2021) (petitioner failed to establish a nexus between the alleged persecution and his proposed social group based on his familial relation); *Garcia v. Wilkinson*, 988 F.3d 1136, 1148 (9th Cir. 2021) (concluding that the BIA erred in its nexus analysis, and remanding for the agency to clarify its decision and to analyze in the first instance whether Garcia’s family membership was a cognizable social group); *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (“[T]he family remains the quintessential particular social group.” (citation omitted)); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (same); *Lin v. Ashcroft*, 377 F.3d 1014, 1028–29 (9th Cir. 2004) (family membership may be a plausible basis for protected social group refugee status in the context of families who have violated China’s coercive population control policy); *De Valle v. INS*, 901 F.2d 787, 792–93 (9th Cir. 1990) (family members of Salvadoran military deserter not a particular social group); *Sanchez-Trujillo v. INS*, 801 F.2d 1572, 1576–77 (9th Cir. 1986) (family is a “prototypical example” of a social group), *overruled on other grounds by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

Some cases involve proposed social groups defined as *a collection* of families that share a common characteristic. *See, e.g., Rodriguez-Zuniga v. Garland*, 69 F.4th 1012, 1016–17 (9th Cir. 2023) (substantial evidence supported agency determination that proposed particular social group of “Guatemalan families that lack an immediate protector” not socially distinct).

(B) Gender-Related Claims

“Gender” is not a protected ground in the refugee definition, but particular social groups may be defined by gender or gender-specific harm.

(1) Gender-Defined Particular Social Groups

Gender-based characteristics may define particular social groups. *See, e.g., Antonio v. Garland*, 58 F.4th 1067, 1076–77 (9th Cir. 2023) (remanding for the agency to determine whether women in Guatemala perceived to be lesbian constitute a particular social group); *Akosung v. Barr*, 970 F.3d 1095, 1103–04 (9th Cir. 2020) (remanding where BIA’s determination that “women resistant to forced marriage proposals” lacked social distinction may have erroneously required ocular visibility); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1090 (9th Cir. 2020) (remanding to BIA to consider whether particular social group of “indigenous women in Guatemala who are unable to leave their relationship” is cognizable without reference to the persecution); *Mohammed v. Gonzales*, 400 F.3d 785, 796–98 (9th Cir. 2005) (concluding that petitioner’s claim that she was subjected to female genital mutilation ““on account of” her membership in a [particular] social group, whether it be defined as the [particular] social group comprised of Somalian females, or a more narrowly circumscribed group, such as young girls in the Benadiri clan, not only reflects a plausible construction of our asylum law, but the only plausible construction”); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (holding that “gay men with female sexual identities in Mexico” constitute a particular social group), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc), *judgment vacated by Gonzales v. Thomas*, 547 US 183 (2006); *see also Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (rejecting the BIA’s conclusion that “women in Guatemala” could not constitute a cognizable social group and remanding for reconsideration); *Fisher v. INS*, 79 F.3d 955, 965–66 (9th Cir. 1996) (en banc) (Canby, J., concurring) (although petitioner did not establish persecution on account of religion or political opinion based on her violation of restrictive dress and conduct rules, eligibility on account of membership in a particular social group was not argued, and thus not foreclosed); *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (en banc) (granting asylum based on a gender-defined social group of “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by the tribe, and who oppose the practice”).

Cf. Villegas Sanchez v. Garland, 990 F.3d 1173, 1183 (9th Cir. 2021) (holding that petitioner’s proposed social groups—“Salvadoran women who refuse

to be girlfriends of MS gang members” and “Salvadoran women who refuse to be victims of violent sexual predation of gang members”—were not socially distinct).

(2) Gender-Specific Harm

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

Female genital mutilation (FGM) constitutes persecution on account of membership in a particular social group. [Mohammed v. Gonzales](#), 400 F.3d 785, 798 (9th Cir. 2005) (particular social group comprised of young girls in the Benadiri clan or Somalian females). FGM is a “permanent and continuing” act of persecution that cannot be rebutted. *Id.* at 801; *see also* [Edu v. Holder](#), 624 F.3d 1137, 1147 & n.25 (9th Cir. 2010) (remanding for BIA to consider FGM claim as a separate, additional basis for CAT relief).

As to whether parents can claim asylum based on a fear of FMG of their daughters, *compare* [Abebe v. Gonzales](#), 432 F.3d 1037, 1041–43 (9th Cir. 2005) (en banc) (remanding for consideration of whether U.S. citizen daughter’s fear of FGM could be imputed to her parents), *and* [Azanor v. Ashcroft](#), 364 F.3d 1013, 1018–21 (9th Cir. 2004) (remanding CAT claim based on petitioner’s past FGM in Nigeria, and fear that her daughter would suffer FGM if returned), *with* *Matter of A-K-*, 24 I &N Dec. 275, 279 (BIA 2007) (stating “there is no statutory basis for a grant of derivative asylum status to a parent based on the grant of asylum to his child” and denying withholding of removal based on fear that U.S. citizen daughters will be forced to undergo FGM upon return to home country).

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

(C) Sexual Orientation

Sexual orientation and sexual identity can be the basis for establishing a particular social group. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (stating “that *all* alien homosexuals are members of a ‘particular social group’”); *see also Antonio v. Garland*, 58 F.4th 1067, 1076–77 (9th Cir. 2023) (recognizing that this court has discussed, but not explicitly recognized, perceived or imputed sexual orientation as a cognizable social group, and remanding for the agency to determine whether women in Guatemala perceived to be lesbian constitute a particular social group); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) (no dispute that Bringas’s sexual orientation was at least one central reason for his persecution); *Castro-Martinez v. Holder*, 674 F.3d 1073, 1080 (9th Cir. 2011) (recognizing that “[h]omosexual men in Mexico can constitute a social group for the purpose of an asylum claim,” but concluding that petitioner failed to establish eligibility for asylum), *overruled on other grounds by Bringas-Rodriguez*, 850 F.3d 1051; *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088–89 (9th Cir. 2005) (Mexican homosexual man forced to perform nine sex

acts on a police officer and threatened with death was persecuted on account of sexual orientation); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000) (“appropriate ‘particular social group’ in this case is composed of gay men with female sexual identities in Mexico”), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc), *judgment vacated by Gonzales v. Thomas*, 547 US 183 (2006); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (BIA 1990) (Cuban homosexual man established membership in a particular social group).

(D) Current or Former Status or Occupation

An applicant’s status, based on her current or former occupations, associations, or shared experiences, may be the basis for a social group claim. *See, e.g., Plancarte Saucedo v. Garland*, 23 F.4th 824, 834 (9th Cir. 2022) (explaining that petitioner lacked the power to change the immutable characteristic of her medical knowledge and nursing skills, and remanding for consideration of other required characteristics for proposed particular social group of “female nurses”); *Reyes v. Lynch*, 842 F.3d 1125, 1138 (9th Cir. 2016) (substantial evidence supported BIA’s determination that proposed social group of former members of the Mara 18 gang in El Salvador who have renounced their membership lacked social distinction); *Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013) (landownership may be the basis of a particular social group); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091–93 (9th Cir. 2013) (en banc) (witnesses who testify against gang members may constitute a particular social group); *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010) (rejecting contention that former material witnesses for the government constitute a particular social group), *overruled by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

Several decisions address whether current or former members of the police or military may be members of a particular social group. *See Sanjaa v. Sessions*, 863 F.3d 1161, 1165 (9th Cir. 2017) (post-REAL ID Act) (“The BIA . . . did not err in its conclusion that Sanjaa was not persecuted on account of his membership in the particular social group of former police officers.”); *Madrigal v. Holder*, 716 F.3d 499, 503–04 (9th Cir. 2013) (“[M]istreatment suffered while Tapia Madrigal was in the army cannot support his claim of past persecution on account of a particular social group because he was not a *former* soldier at that time and his particular social group is comprised of only former soldiers. Mistreatment suffered

while an applicant was an active military member does not by itself provide a basis for asylum because active duty members of the military do not constitute a social group.”); *Ayala v. Holder*, 640 F.3d 1095, 1097 (9th Cir. 2011) (group of former officers may be a cognizable social group); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1028–29 (9th Cir. 2000) (noting that “[p]ersons who are persecuted because of their status as a former police or military officer, for example, may constitute a cognizable social group under the INA,” but holding that current police or military are not a social group); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (former servicemen in Guatemalan military not a particular social group).

(ii) Cases Involving Imputed Membership in a Particular Social Group

See *Antonio v. Garland*, 58 F.4th 1067, 1076–77 (9th Cir. 2023) (remanding for agency to determine whether women in Guatemala perceived to be lesbian constitutes a particular social group); *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1200 (9th Cir. 2023) (claim failed for lack of social distinction where petitioner “offered nothing beyond his own speculation to suggest Nicaragua views ‘those perceived as gang members’ as a distinct social identity”); *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 896–98 (9th Cir. 2021) (remanding for the BIA to consider in the first instance whether *perceived* gang members constitutes a cognizable particular social group); cf. *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (holding that *actual* gang members cannot constitute a particular social group).

(iii) Cases Denying Particular Social Group Claims

See *Lopez v. Garland*, 116 F.4th 1032, 1046 (9th Cir. 2024) (substantial evidence supported the agency’s conclusion that petitioner did not demonstrate a likelihood of persecution based on family membership where there was no evidence that petitioner’s father or paternal relatives had any interest in harming him as adult; as to past persecution, although the petitioner suffered harm in utero when his mother was abused during pregnancy, petitioner was not the direct target of that abuse); *Rodriguez-Zuniga v. Garland*, 69 F.4th 1012, 1017 (9th Cir. 2023) (substantial evidence supported agency’s determination that proposed particular social group of “Guatemalan families that lack an immediate family male protector” was not socially distinct); *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1200 (9th Cir. 2023) (claim failed for lack of social distinction where petitioner

“offered nothing beyond his own speculation to suggest Nicaragua views ‘those perceived as gang members’ as a distinct social identity”); *Aguilar-Osorio v. Garland*, 991 F.3d 997, 999–1000 (9th Cir. 2021) (petitioner failed to show that proposed social group—witnesses who could testify against gang members—was socially recognizable and distinct), *abrogated on other grounds by Wilkinson v. Garland*, 601 U.S. 209 (2024); *Macedo Templos v. Wilkinson*, 987 F.3d 877, 881–83 (9th Cir. 2021) (proposed particular social group of Mexican wealthy business owners who do not comply with extortion attempts not cognizable); *Conde Quevedo v. Barr*, 947 F.3d 1238, 1243 (9th Cir. 2020) (“Substantial evidence supports the BIA’s conclusion that ‘the record is devoid of any society specific evidence, such as country reports, background documents, or news articles, which would establish that persons who report the criminal activity of gangs to the police are perceived or recognized as a group by society in Guatemala.’”); *Barbosa v. Barr*, 926 F.3d 1053, 1060 (9th Cir. 2019) (proposed particular social group of individuals returning to Mexico from the United States who are believed to be wealthy too broad to qualify as a cognizable “particular social group”); *Reyes v. Lynch*, 842 F.3d 1125, 1138 (9th Cir. 2016) (substantial evidence supported BIA’s determination that proposed social group of former members of the Mara 18 gang in El Salvador who have renounced their membership lacked social distinction); *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1228–29 (9th Cir. 2016) (perceived wealthy Americans do not constitute a particular social group); *Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1165 (9th Cir. 2013) (“[A]n inadequate healthcare system is not persecution and is not harm inflicted because of membership in a particular social group.”); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010) (proposed social group of Mexicans returning from the United States was too broad to be cognizable); *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010) (rejecting proposed social group of former material witnesses for the government), *overruled by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc); *Barrios v. Holder*, 581 F.3d 849, 854–55 (9th Cir. 2009) (rejecting petitioner’s claim that he was a member of a particular social group as a young man in Guatemala who was targeted for gang recruitment but refused to join), *abrogated in part by Henriquez-Rivas*, 707 F.3d at 1093; *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009) (concluding that “a ‘government informant’ is not a member of a particular social group for purposes of asylum”), *abrogated in part by Henriquez-Rivas*, 707 F.3d 1081 (limiting *Soriano* to the extent it made considerations of diversity of lifestyle and origin the sine qua non of ‘particularity’

analysis); *Ramos-Lopez v. Holder*, 563 F.3d 855, 858–62 (9th Cir. 2009) (rejecting petitioner’s claim that he was in a particular social group as a young Salvadoran man who was recruited by gangs and refused to join), *abrogated in part by Henriquez-Rivas*, 707 F.3d 1081 (limiting *Ramos-Lopez* to the extent that the case mischaracterized the “social visibility” requirement by requiring “on-sight” visibility); *Donchev v. Mukasey*, 553 F.3d 1206, 1220 (9th Cir. 2009) (rejecting Bulgarian’s claim that he was in a particular social group as a friend of the Roma people); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744–46 (9th Cir. 2008) (petitioner’s proposed social group of young Salvadoran men who resist gang violence lacked the particularity and social visibility required for a social group), *abrogated by Henriquez-Rivas*, 707 F.3d at 1093; *Toufighi v. Mukasey*, 538 F.3d 988, 997 (9th Cir. 2008) (explaining that the court had not “recognized pro-Western as a social group protected against persecution”); *Arteaga v. Mukasey*, 511 F.3d 940, 945–46 (9th Cir. 2007) (membership in violent criminal gang was not membership in a social group); *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (business owners in Colombia who rejected demands by narco-traffickers to participate in illegal activity was too broad a category to qualify as a particular social group), *abrogated by Henriquez-Rivas*, 707 F.3d 1081; *Pedro-Mateo v. INS*, 224 F.3d 1147, 1050–51 (9th Cir. 2000) (Kanjobal Indians comprising large percentage of population in a given area not a particular social group); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (persons of low economic status in China not a particular social group); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (former servicemen in Guatemalan military not a particular social group); *De Valle v. INS*, 901 F.2d 787, 792–93 (9th Cir. 1990) (family members of Salvadoran military deserter not a particular social group).

e. Political Opinion

“[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted ‘on account of’ a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted him (or that he faces the prospect of such persecution) *because of* his political opinion.” *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (citation omitted); *see also Rodriguez Tornes v. Garland*, 993 F.3d 743, 752–53 (9th Cir. 2021) (concluding that feminism qualified as a political opinion, and that petitioner was persecuted because of that political opinion); *Khudaverdyan v. Holder*, 778 F.3d 1101, 1106

(9th Cir. 2015) (applying REAL ID Act and holding that perceived whistleblowing is a form of imputed political opinion); *Soriano v. Holder*, 569 F.3d 1162, 1165 (9th Cir. 2009) (petitioner failed to establish persecution on account of political opinion where his “only act in opposition to organized crime was informing the police after his arrest about two individuals who had engaged in criminal activities”), *overruled on other grounds by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc) (overruling *Soriano* to the extent it made “considerations of diversity of lifestyle and origin the *sine qua non* of ‘particularity’ analysis”); *Ahmed v. Keisler*, 504 F.3d 1183, 1193 (9th Cir. 2007) (petitioner was persecuted on account of his political opinion where “it [was] because Ahmed ma[de] no secret of his beliefs and because he [was] an outspoken organizer and leader of Biharis in refugee camps that he was beaten, detained, and threatened”).

“[P]olitical opinion encompasses more than electoral politics or formal political ideology or action.” *Ahmed*, 504 F.3d at 1192; *see, e.g., Rodriguez Tornes*, 993 F.3d at 751 (concluding that feminism qualifies as a political opinion); *Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (recognizing that an applicant’s statements regarding the unfair distribution of food in Iraq resulted in the imputation of an anti-government political opinion), *as amended by* 355 F.3d 1140 (9th Cir. 2004); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (refusal to pay revolutionary tax to the Philippine New People’s Army (NPA) in the face of threats constitutes an expression of political belief), *superseded by statute on other grounds as stated by* *Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009).

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

That an applicant holds a political opinion “is not, by itself, enough to establish that any future persecution would be ‘on account’ of this opinion. He must establish that the political opinion would motivate his potential persecutors.” *Njuguna v. Ashcroft*, 374 F.3d 765, 770 (9th Cir. 2004).

“Direct and indirect evidence can show that persecution was on account of a political opinion.” *Rodriguez Tornes*, 993 F.3d at 752.

(i) Organizational Membership

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

(ii) Refusal to Support Organization

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

But see Rodriguez-Zuniga v. Garland, 69 F.4th 1012, 1017–18 (9th Cir. 2023) (rejecting political opinion claim, framed as a “refusal to submit to violence by criminal groups/gangs,” because petitioner’s refusal to give money to a threatening robber was “not evidence of a ‘conscious and deliberate’ decision that would naturally result in attributing a political position to her”); *Barrios v. Holder*, 581 F.3d 849, 854–55 (9th Cir. 2009) (rejecting petitioner’s contention that he was persecuted on account of his political opinion based on his refusal to join a gang), *abrogated in part by Henriquez-Rivas*, 707 F.3d 1081, 1093 (9th Cir. 2013) (en banc); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (petitioner’s refusal to join gang did not prove persecution on account of a protected ground),

*abrogated in part by [Henriquez-Rivas](#), 707 F.3d 1081 (limiting [Ramos-Lopez](#) to the extent that the case mischaracterized the “social visibility” requirement by requiring “on-sight” visibility); [Santos-Lemus v. Mukasey](#), 542 F.3d 738, 747 (9th Cir. 2008) (petitioner’s general aversion to gangs did not constitute a political opinion for asylum purposes) *abrogated on other grounds by [Henriquez-Rivas](#), 707 F.3d at 1093* (clarifying the “social visibility” requirement for establishing membership in a particular social group does not require “on-sight” visibility).*

(iii) Labor Union Membership and Activities

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

(iv) Opposing Corruption; Whistleblowing

A whistleblower’s exposure of government corruption “may constitute political activity sufficient to form the basis of persecution on account of political opinion.” [Grava v. INS](#), 205 F.3d 1177, 1181 (9th Cir. 2000) (Filipino policeman and customs officer); *see also* [Singh v. Barr](#), 935 F.3d 822, 825 (9th Cir. 2019); [Khudaverdyan v. Holder](#), 778 F.3d 1101, 1106 (9th Cir. 2015) (applying REAL ID Act and holding that one form of imputed political is perceived whistleblowing, and explaining the salient question is whether the individual’s actions were directed toward a governing institution); [Baghdasaryan v. Holder](#), 592 F.3d 1018, 1024 (9th Cir. 2010) (pre-REAL ID Act) (“Whistle-blowing against government corruption is an expression of political opinion.”).

“When the alleged corruption is inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily political.” [Grava](#), 205 F.3d at 1181 (distinguishing personal retaliation “completely untethered to a governmental system”); *see also* [Singh](#), 935 F.3d at 825; [Zhu v. Mukasey](#), 537 F.3d 1034, 1044–45 (9th Cir. 2008) (pre-REAL ID Act)

(applicant who was raped by her factory manager was repeatedly sought by police after writing a “letter to the town government [that] was more than a report of the rape: She condemned the appointment and protection—on the basis of family political connections—of people like the manager who raped her”); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007) (pre-REAL ID Act) (petitioner’s “whistle-blowing was political because—in criticizing the local regime’s failure to stop the extortion scheme—his acts were ‘directed toward a governing institution’ and not ‘only against individuals whose corruption was aberrational’” (citation omitted)).

“[T]he salient question” . . . is whether the alien’s “actions were directed toward a governing institution” or “against individuals whose corruption was aberrational.” [*Grava*, 205 F.3d at 1181]; *see also Khudaverdyan*, 778 F.3d at 1106 (similar); *Fedunyak* [, 477 F.3d at 1129] (similar). In other words, while an alien’s opposition to broad forms of governmental corruption may evince a political opinion, his opposition to isolated corruption or the abuses of rogue officials usually does not.

Singh, 935 F.3d at 825. “[W]histleblowing cases . . . reiterate that the crucial element of an asylum claim is the persecutor’s motive.” *Id.* “An alien must show ‘that the *persecutor* was *motivated* by a *belief* that the petitioner held the political opinion’—regardless of whether the victim actually held such an opinion.” *Id.* (quoting *Khudaverdyan*, 778 F.3d at 1106). Although personal retribution is not persecution on account of political opinion, the presence of mixed motives does not defeat an applicant’s claim for asylum. *Singh*, 935 F.3d at 825; *Grava*, 205 F.3d at 1181 n.3.

The court has held that “[t]o qualify as a whistleblower, [petitioner] was not required to expose governmental corruption to the public at large. It was sufficient that [he] demonstrated that he suffered retaliation for acting against governmental corruption.” *Fedunyak*, 477 F.3d at 1129; *see also Perez-Ramirez v. Holder*, 648 F.3d 953, 956 (9th Cir. 2011) (“Whistleblowing by a government employee against government officials engaged in corruption ‘may constitute political activity sufficient to form the basis of persecution on account of political opinion’ for the purposes of an asylum claim.” (quoting *Grava*, 205 F.3d at 1177)), *overruled on other grounds by Maldonado v. Lynch*, 786 F.3d 1155, 1163–64 (9th Cir. 2015) (en

banc); *Antonyan v. Holder*, 642 F.3d 1250, 1254 (9th Cir. 2011) (pre-REAL ID Act) (concluding that petitioner’s whistleblowing constituted political opinion, as required for asylum); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1133–35 (9th Cir. 2004) (retaliation against Armenian applicant who protested government corruption demonstrated persecution on account of political opinion); *Hasan v. Ashcroft*, 380 F.3d 1114, 1121 (9th Cir. 2004) (“When a powerful political leader uses his political office as a means to siphon public money for personal use, and uses political connections throughout a wide swath of government agencies, both to facilitate and to protect his illicit operations, exposure of his corruption is inherently political.”), *overruled on other grounds by* *Maldonado*, 786 F.3d at 1163–64; *Njuguna v. Ashcroft*, 374 F.3d 765, 770–71 (9th Cir. 2004) (retaliation against Kenyan applicant who opposed government corruption by helping domestic servants escape was on account of political opinion); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245–46 (9th Cir. 1999) (death threats received after Colombian prosecutor investigated political corruption by opposition political party constituted persecution on account of political opinion); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (Haitian fisherman’s refusal to accede to government extortion).

The BIA’s precedential decision *Matter of N-M-*, 25 I. & N. Dec. 526 (BIA 2011), set “forth a three-factor standard to determine whether retaliation for ‘opposition to official corruption (or whistleblowing)’ constitutes persecution on account of a political opinion.” *Singh v. Barr*, 935 F.3d 822, 824 (9th Cir. 2019).

Under that decision, the IJ considers: (1) “whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs,” (2) “any direct or circumstantial evidence that the alleged persecutor was motivated by the alien’s perceived or actual anticorruption beliefs,” and (3) “evidence regarding the pervasiveness of government corruption, as well as whether there are direct ties between the corrupt elements and higher level officials.”

Singh, 935 F.3d at 824 (citation omitted). Under the pre-*Loper Bright* regime, the court held that the framework set forth in *Matter of N-M-* to determine whether retaliation for opposition to official corruption (whistleblowing) was consistent with Ninth circuit cases and a reasonable interpretation of the INA, entitled to *Chevron* deference. See *Singh*, 935 F.3d 825–26.

In *Singh v. Barr*, the court held that substantial evidence supported the agency's determination that the petitioner failed to establish a claim based on actual or imputed anti-corruption political opinion (whistleblowing). 935 F.3d 826–27 (“Given Singh’s failure to take concrete steps to expose corruption, the BIA could reasonably conclude that Singh never formed a bona fide political opinion about corruption in the ranks of the Punjabi police,” and the evidence did not compel a conclusion contrary to the BIA’s).

In *Perez-Ramirez*, the court held that, where petitioner exposed the government corruption to his supervisor and refused to accede to corrupt demands, his acts constituted political activity, qualifying him as a whistleblower of government corruption. 648 F.3d at 957–58, *overruled on other grounds by Maldonado*, 786 F.3d at 1163–64.

Cf. Sanjaa v. Sessions, 863 F.3d 1161, 1165 (9th Cir. 2017) (post-REAL ID Act) (evidence did not compel the conclusion that Sanjaa was persecuted because of his purported whistleblowing activity or opposition to government corruption); *Kozulin v. INS*, 218 F.3d 1112, 1115–17 (9th Cir. 2000) (evidence did not compel conclusion that beating of Russian anti-communist, shortly after he reported misconduct of his ship captain, was on account of political opinion); *Zayas-Marini v. INS*, 785 F.2d 801 (9th Cir. 1986) (although petitioner was threatened with death after accusing Paraguayan government officials of corruption, the threats were grounded in personal animosity given, inter alia, petitioner’s continued close association with ruling members of the government).

(v) Neutrality

A conscious choice not to side with any political faction can be a manifestation of a political opinion. See *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997) (recognizing the doctrine of hazardous neutrality and noting that *Elias-Zacarias* questioned this theory without overruling it); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir. 1995) (desertion from Honduran military established neutrality).

An applicant’s neutrality must be the result of an affirmative decision to remain neutral rather than mere apathy. See *Lopez v. INS*, 775 F.2d 1015, 1016–17 (9th Cir. 1985) (El Salvador).

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

(vi) Other Expressions of Political Opinion

See *Rodriguez Tornes*, 993 F.3d at 753 (record compelled the conclusion that petitioner's feminist political opinion was at least one central reason for her past persecution and her presumptively well-founded fear of future persecution); *Ahmed v. Keisler*, 504 F.3d 1183, 1193 (9th Cir. 2007) (native of Bangladesh and a Bihari who was a political organizer and who participated in a hunger strike and two political demonstrations was persecuted on account of political opinion); *Zhou v. Gonzales*, 437 F.3d 860, 867–69 (9th Cir. 2006) (petitioner demonstrated well-founded fear and clear probability of persecution on account of bringing illegal Falun Gong materials into China from abroad, which Chinese government viewed as political threat); *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (applicant who was involved in translation and distribution of "The Satanic Verses" had a well-founded fear of persecution on account of political opinion); *Chouchkov v. INS*, 220 F.3d 1077, 1084 (9th Cir. 2000) (Russian nuclear engineer who was persecuted on account of his belief that his government should not sell nuclear technology to Iran was persecuted on account of political opinion and imputed political opinion); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (Salvadoran woman's resistance to rape and beating through flight constituted assertion of a political opinion opposing forced sexual subjugation), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*).

(vii) Imputed Political Opinion

“Imputed political opinion is still a valid basis for relief after *Elias-Zacarias*.” *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992); *see also Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997). “An imputed political opinion arises when ‘[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim’s views.’” *Baghdasaryan v. Holder*, 592 F.3d 1018, 1024 n.6, 1024–25 (9th Cir. 2010) (pre-REAL ID Act) (quoting *Canas-Segovia*, 970 F.2d at 602) (concluding that the record suggested a political opinion was imputed to petitioner, where “top law enforcement official indicated that [petitioner] was detained and beaten because he was ‘defaming’ and ‘raising his head’ against” government corruption); *see also Song v. Sessions*, 882 F.3d 837, 841–42 (9th Cir. 2017) (post-REAL ID Act) (“[T]he record compels the conclusion that the government officials at the protest and the police who arrested Song imputed to him an anti-government, anti-eminent domain political opinion, and that that imputation was one central reason for his persecution.”); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031–32 (9th Cir. 2014).

Under the imputed political opinion doctrine, the applicant’s own opinions are irrelevant. *See Kumar v. Gonzales*, 444 F.3d 1043, 1054 (9th Cir. 2006) (Indian police persecuted applicant based on their false belief concerning his terrorist affiliation); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009). “[O]ur analysis focuses on how the persecutor perceived the applicant’s actions and allegiances, and what motivated their abuse.” *Agbuya v. INS*, 241 F.3d 1224, 1229 (9th Cir. 2001) (NPA perceived applicant to be an enemy of the laborers, the communist cause, and the NPA itself).

“[D]irect and indirect evidence, taken together, [can compel the conclusion] that the petitioner was subjected to abuse because of ‘imputed political opinion.’” *Khudaverdyan v. Holder*, 778 F.3d 1101, 1106–07 (9th Cir. 2015) (post-REAL ID Act) (perceived whistleblowing is a form of imputed political opinion).

(A) Family Association

An imputed political opinion claim may arise from the applicant's associations with others, including familial, organizational, governmental or personal affiliations, which cause assumptions to be made about him. *See Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (pre-REAL ID Act) (“Quiroz Parada’s persecution on account of his family’s government service also amounts to persecution on account of imputed political opinion.”); *Silaya v. Mukasey*, 524 F.3d 1066, 1070–71 (9th Cir. 2008) (“[E]vidence that the alleged persecutor acted because of a petitioner’s family’s political associations is sufficient to satisfy the motive requirement.” (alteration and internal quotation marks)). “Typically, where killings and other acts of violence are inflicted on members of the same family by government forces, the inference that they are connected and politically motivated is an appropriate one.” *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (internal quotation marks omitted) (imputation of pro-guerilla political opinion by Salvadoran soldiers); *see also Lopez-Galarza v. INS*, 99 F.3d 954, 959–60 (9th Cir. 1996) (Sandinistas imputed a political opinion based on family’s ties to former government); *cf. Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1198–99 (9th Cir. 2023) (no credible, direct, and specific evidence that Gutierrez would be perceived as an enemy of the Ortega regime and persecuted on account of an imputed political opinion because of his father’s opposition to the Sandinistas in the 1980s); *Sharma v. Holder*, 633 F.3d 865, 870–71 (9th Cir. 2011) (rejecting contention that the police imputed Sharma’s father’s political beliefs to him where the evidence “overwhelmingly le[d] to the finding that the police wanted to stop the publication of Sharma’s father’s book rather than persecute Sharma for his political beliefs”); *Sangha v. INS*, 103 F.3d 1482, 1489–90 (9th Cir. 1997) (Sikh failed to show that militants imputed his father’s Akali Dal political opinion to him).

(B) No Evidence of Legitimate Prosecutorial Purpose

“[I]f there is no evidence of a legitimate prosecutorial purpose for a government’s harassment of a person . . . there arises a presumption that the motive for harassment is political.” *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (internal quotation marks omitted). Moreover, “extra-judicial punishment of suspected anti-government guerillas can constitute persecution on account of imputed political opinion.” *Singh v. Ilchert*, 63 F.3d 1501, 1508–09 (9th Cir.

1995) (discussing difference between legitimate criminal prosecution and persecution), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); see *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (refusing to characterize death threats by Salvadoran security forces “as an example of legitimate criminal prosecution”), *superseded by statute on other grounds as stated by Parussimova*, 555 F.3d at 739–40; *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) (“When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government’s actions are politically motivated.”), *superseded by statute on other grounds as stated by Parussimova*, 555 F.3d at 739–40.

Cf. Dinu v. Ashcroft, 372 F.3d 1041, 1044–45 (9th Cir. 2004) (rejecting imputed political opinion claim where evidence supported IJ’s finding that “the interrogation tactics employed by the Romanian police, albeit heavy-handed and inconsistent with what we would find acceptable, were nevertheless directed at the legitimate goal of finding evidence of crime rather than the illegitimate one of harassing a political opponent.”).

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

Cross-reference: Pretextual Prosecution

(C) Government Employees

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

(D) Other Cases Discussing Imputed Political Opinion

See Rodriguez-Zuniga v. Garland, 69 F.4th 1012, 1017 (9th Cir. 2023) ("Rodriguez-Zuniga's refusal to give money to the threatening robber is not evidence of a 'conscious and deliberate' decision that would naturally result in attributing a political position to her."); *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (pre-REAL ID Act) ("Quiroz Parada's persecution on account of his family's government service . . . amounts to persecution on account of imputed political opinion."); *Song v. Sessions*, 882 F.3d 837, 841–42 (9th Cir. 2017) (post-REAL ID Act) ("[T]he record compels the conclusion that the government officials at the protest and the police who arrested Song imputed to him an anti-government, anti-eminent domain political opinion, and that that imputation was one central reason for his persecution."); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1033 (9th Cir. 2014) (pre-REAL ID Act) (evidence did not establish that persecutors imputed political opinion to petitioner); *Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013) (post-REAL ID Act) (BIA's conclusion that petitioner was not persecuted on account of imputed political opinion supported by substantial evidence where nothing in the record suggested that alleged persecutors believed petitioner held a political belief contrary to their own); *Pagayon v. Holder*, 675 F.3d 1182, 1191 (9th Cir. 2011) (post-REAL ID Act) ("A personal dispute is not, standing alone, tantamount to persecution based on an imputed political opinion."); *Zhu v. Mukasey*, 537 F.3d 1034, 1045 (9th Cir. 2008) (pre-REAL ID Act) (applicant who was raped by her factory manager and later wrote a letter to the town government complaining of corruption "established that the police repeatedly sought to arrest her on the basis of a political opinion imputed to her as the result of her whistleblowing"); *Zhou v. Gonzales*, 437 F.3d 860, 869–70 (9th Cir. 2006) (pre-REAL ID

Act) (importing and distributing material critical of Chinese government's treatment of Falun Gong practitioners could be imputed as anti-governmental political opinion); *Ndom v. Ashcroft*, 384 F.3d 743, 755–56 (9th Cir. 2004) (applicant was persecuted by Senegalese armed forces on account of imputed political opinion), *superseded in part by statute as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076–77 (9th Cir. 2004) (Guatemalan woman who was gang raped by soldiers was persecuted on account of a pro-guerilla political opinion imputed to her entire village); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (rape because of applicant's family's association with the previous Ethiopian government); *Rios v. Ashcroft*, 287 F.3d 895, 900–01 (9th Cir. 2002) (perceived to be political opponents of the Guatemalan guerillas); *Al-Harbi v. INS*, 242 F.3d 882, 890 (9th Cir. 2001) (imputed political opinion based on United States evacuation from Iraq); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (former Filipino intelligence officer feared retaliation for testifying against guerilla leaders); *Yazitchian v. INS*, 207 F.3d 1164, 1168 (9th Cir. 2000) (political opinion of prominent Dashnak imputed to Armenian couple); *Chanchavac v. INS*, 207 F.3d 584, 591 (9th Cir. 2000) (Guatemalan military accused applicant of being a guerilla when beating him); *Cordon-Garcia v. INS*, 204 F.3d 985, 991–92 (9th Cir. 2000) (Guatemalan guerilla abductor told applicant that her teaching efforts undermined their recruitment efforts); *Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc) (Filipino military informant placed on NPA death list), *superseded in part by statute as stated by Parussimova*, 555 F.3d at 739–40; *Ratnam v. INS*, 154 F.3d 990, 995–96 (9th Cir. 1998) (torture by Sri Lankan government on account of imputed political opinion); *Vera-Valera v. INS*, 147 F.3d 1036, 1039 (9th Cir. 1998) (president of street vendor's cooperative in Peru); *Velarde v. INS*, 140 F.3d 1305, 1312 (9th Cir. 1998) (bodyguard to former Peruvian President's family), *superseded in part on other grounds by Falcon Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003); *Meza-Manay v. INS*, 139 F.3d 759, 764 (9th Cir. 1998) (husband was member of Peruvian counter-insurgency unit); *Rodriguez-Roman v. INS*, 98 F.3d 416, 429–30 (9th Cir. 1996) (Cuban illegal departure statute imputes disloyalty); *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996) (Sandinista prison director); *Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995) (imputed beliefs of Sikh separatists); *Alonzo v. INS*, 915 F.2d 546, 549 (9th Cir. 1990) (refusal to join Guatemalan military); *Beltran-Zavala v. INS*, 912 F.2d 1027, 1029–30 (9th Cir. 1990) (persecuted on account of friendship with Guatemalan

guerilla supporter), *overruled in part on other grounds as recognized by Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) (imputed opinion based on employment by Salvadoran government); *Blanco-Lopez v. INS*, 858 F.2d 531, 533 (9th Cir. 1988) (false accusation that applicant was a Salvadoran guerilla), *superseded in part by statute as stated by Parussimova*, 555 F.3d at 739–40; *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) (Haitian’s refusal to accede to extortion led to classification and treatment as a subversive); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (deliberate and cynical imputation of a political viewpoint by Salvadoran military official), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

(viii) Opposition to Coercive Population Control Policies

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

As amended, the Immigration and Nationality Act states that:

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

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

(A) Forced Abortion

“The plain language of the statute provides that forced abortions are per se persecution and trigger asylum eligibility.” *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) (pre-REAL ID Act) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was eligible for asylum and withholding), *superseded by statute as recognized by Li v. Garland*, 13 F.4th 954, 961 (9th Cir. 2021). “[A]n asylum applicant seeking to prove he was subjected to a coercive family planning policy need not demonstrate that he was physically restrained during a ‘forced’ procedure. Rather, ‘forced’ is a much broader concept, which includes compelling, obliging, or constraining by mental, moral or circumstantial means, in addition to physical restraint.” *Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004) (applicant suffered forced abortion where she was suspended from work for a month and required to attend birth control reeducation classes and was later forced into a van, driven to the hospital, and placed onto a surgical table for the abortion). “Forced” does not require that the victim demonstrate resistance, that the victim have gone into hiding to avoid an abortion, and that the abortion have been performed “pursuant to any official summons” or by “family planning officials,” instead of by petitioner’s employer. *Tang v. Gonzales*, 489 F.3d 987, 990–91 (9th Cir. 2007) (applicant suffered forced abortion where he testified that he and his wife wanted to have a baby, that his wife was subject to a mandatory gynecological exam by her employer upon whom she was economically dependent, that her employer’s policy required her to have an abortion, that company representatives took her to a clinic to have the abortion performed, and that the abortion was performed without anesthesia).

An asylum seeker may present evidence of a spouse’s forced abortion as part of proof of persecution, but he must also show substantial evidence of further persecution in support of his claims. *See He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014) (petitioner failed to establish persecution).

(B) Forced Sterilization

A person who has been forcibly sterilized is automatically eligible for asylum.

With respect to a *spouse* of a person who has been forcibly sterilized, compare *Zheng v. Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005) (“A person whose spouse has been forcibly sterilized or forced to have an abortion is automatically eligible for asylum.”), *Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) (“Ge is automatically eligible for asylum if he can show that his wife was forced to undergo an abortion under China’s one-child policy.”), and *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) (reversing BIA’s negative credibility finding and holding that husband whose wife was forcibly sterilized after the birth of her second child was entitled to asylum), with *Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1091–92 (9th Cir. 2010) (according *Chevron* deference to the BIA’s determination “that a spouse or unmarried partner of a victim of forced abortion is not presumptively eligible for refugee status”).

The *child* of a person who has been forcibly sterilized is not automatically eligible for asylum. See *Zhang v. Gonzales*, 408 F.3d 1239, 1244–46 (9th Cir. 2005) (according *Chevron* deference to the BIA’s conclusion that 8 U.S.C. § 1101(a)(42)(B) does not apply to children of forcibly sterilized parents); cf. *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (suggesting without deciding that the children of forcibly sterilized parents might be automatically eligible for asylum).

Even though the child is not automatically eligible for asylum, she may be able to establish persecution on account of her parent’s resistance to China’s population controls measures if she suffered hardships because of her parent’s forced sterilization. See *Zhang*, 408 F.3d at 1249–50 (remanding for new asylum determination where such hardships included economic deprivation, limited educational opportunities, and the trauma of witnessing her father’s forcible removal from her home).

“[W]hen an applicant suffers past persecution by means of an involuntary sterilization in accordance with the country’s coercive population control policy, he is [automatically] entitled by virtue of that fact alone to withholding of removal.” *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (following a forced sterilization “it is not possible, as a matter of law, for conditions to change or relocation to occur that would eliminate a well-founded fear of persecution”); see also *Matter of Y-T-L-*, 23 I. & N. Dec. 601, 606–07 (BIA 2003). But see *Zheng v. Ashcroft*, 397 F.3d 1139, 1149 (9th Cir. 2005) (remanding a withholding of

removal claim after determining that petitioner established a well-founded fear of persecution because the parties did not brief the issue).

(C) Other Resistance to a Coercive Population Control Policy

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

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

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

In *Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1094–95 (9th Cir. 2010), the court determined that the petitioner engaged in “other resistance” to China’s coercive population control program in light of his girlfriend’s forced abortion and his continued attempts to cohabit and marry in contravention of China’s population

control policy. *Id.* As a result of these actions, the petitioner suffered persecution. *Id.* at 1096–97.

(D) Family Members

With respect to a *spouse* of a person who has been forcibly sterilized, compare *Zheng v. Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005) (“A person whose spouse has been forcibly sterilized or forced to have an abortion is automatically eligible for asylum.”), *Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) (“Ge is automatically eligible for asylum if he can show that his wife was forced to undergo an abortion under China’s one-child policy.”), and *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) (reversing BIA’s negative credibility finding and holding that husband whose wife was forcibly sterilized after the birth of her second child was entitled to asylum), with *Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1091–92 (9th Cir. 2010) (according *Chevron* deference to the BIA’s determination “that a spouse or unmarried partner of a victim of forced abortion is not presumptively eligible for refugee status”).

In *Ge v. Ashcroft*, 367 F.3d 1121, 1126–27 (9th Cir. 2004), this court reversed a negative credibility finding and held that the applicant conclusively established past persecution based on his wife’s three forced abortions where the applicant also was detained, interrogated, and beaten when his wife failed to appear for a mandatory physical examination, and both the applicant and his wife were fired from their jobs.

The *child* of a person who has been forcibly sterilized is not automatically eligible for asylum. See *Zhang v. Gonzales*, 408 F.3d 1239, 1244–46 (9th Cir. 2005) (according *Chevron* deference the BIA’s conclusion that 8 U.S.C. § 1101(a)(42)(B) does not apply to children of forcibly sterilized parents); cf. *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (suggesting without deciding that the children of forcibly sterilized parents might be automatically eligible for asylum).

Even though the child is not automatically eligible for asylum, she may be able to establish persecution on account of her parent’s resistance to China’s population controls measures if she suffered hardships because of her parent’s forced sterilization. See *Zhang*, 408 F.3d at 1249–50 (remanding for new asylum determination where such hardships included economic deprivation, limited

educational opportunities, and the trauma of witnessing her father's forcible removal from her home).

In *Lin v. Ashcroft*, 377 F.3d 1014, 1028–31 (9th Cir. 2004), the court held that the 14-year-old applicant was prejudiced by his counsel's ineffective assistance in failing to raise plausible claims for relief on account of particular social group and imputed political opinion, where Lin's parents violated the mandatory limits on procreation by having a second child, his mother was forcibly sterilized, and the family faced other forms of harassment and harm.

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

f. Prosecution

Ordinary prosecution for criminal activity is generally not persecution. *Lin v. Holder*, 610 F.3d 1093, 1097 (9th Cir. 2010); *Chanco v. INS*, 82 F.3d 298, 301 (9th Cir. 1996) (prosecution for involvement in military coup in the Philippines); *Mabugat v. INS*, 937 F.2d 426 (9th Cir. 1991) (prosecution for misappropriation of funds); *Fisher v. INS*, 79 F.3d 955, 961–62 (9th Cir. 1996) (en banc) (punishment for violation of Iranian dress and conduct rules); *Abedini v. INS*, 971 F.2d 188, 191–92 (9th Cir. 1992) (punishment for distribution of Western videos and films, use of false passport, and avoidance of conscription in Iran).

“[W]here there is evidence of legitimate prosecutorial purpose, foreign authorities enjoy much latitude in vigorously enforcing their laws.” *Singh v. Gonzales*, 439 F.3d 1100, 1112 (9th Cir. 2006), *overruled on other grounds by Maldonado v. Lynch*, 786 F.3d 1155, 1162–63 (9th Cir. 2015) (en banc); *see also Dinu v. Ashcroft*, 372 F.3d 1041, 1043–44 (9th Cir. 2004) (legitimate prosecutorial purpose existed for “heavy-handed” investigation of shootings during civil uprising).

“Understanding that persecution may appear in the guise of prosecution, we have carved out exceptions to the general rule that applicants avoiding prosecution

for violations of criminal law are ineligible for asylum. Chief among these exceptions to the general rule are disproportionately severe punishment and pretextual prosecution.” *Li v. Holder*, 559 F.3d 1096, 1099 (9th Cir. 2009) (“[W]hen a petitioner violates no Chinese law, but instead comes to the aid of refugees in defiance of China’s unofficial policy of discouraging such aid, a BIA finding that the petitioner is a mere criminal subject to legitimate prosecution is not supported by substantial evidence.”).

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

(i) Pretextual Prosecution

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

Mixed motives: “even if the government authorities’ motivation for detaining and mistreating [an applicant] was partially for reasons of security, persecution in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation, even if the persecution served intelligence gathering purposes.” *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004) (past persecution by Senegalese armed forces) (alterations and internal quotation marks omitted), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); see also *Li v. Holder*, 559 F.3d 1096, 1109 (9th Cir. 2009) (“[W]hen a petitioner violates no Chinese law, but instead comes to the aid of refugees in defiance of China’s unofficial policy of discouraging such aid, a BIA finding that the petitioner is a mere criminal subject to legitimate prosecution is not supported by substantial evidence.”); *Navas v. INS*, 217 F.3d 646, 660 (9th Cir. 2000) (“If there is no evidence of a legitimate prosecutorial purpose for a government’s harassment of a person . . . there arises a presumption that the motive

for harassment is political.” (internal quotation marks omitted)); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (extra-prosecutorial torture of Sri Lankan applicant, even if conducted for intelligence gathering purposes, constitutes persecution); *Rodriguez-Roman v. INS*, 98 F.3d 416, 427 (9th Cir. 1996) (severe punishment under Cuban illegal departure law); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (governmental harm without formal prosecutorial measures is persecution), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009).

(ii) Illegal Departure Laws

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

But an applicant may establish persecution where there is evidence that departure control laws provide severe or disproportionate punishment or label violators as defectors, traitors, or enemies of the government. *See Al-Harbi v. INS*, 242 F.3d 882, 893–94 (9th Cir. 2001) (fear of execution based on U.S. evacuation from Iraq); *Rodriguez-Roman v. INS*, 98 F.3d 416, 430–31 (9th Cir. 1996) (severe punishment for violation of Cuban illegal departure law which “imputes to those who are prosecuted pursuant to it, a political opinion”); *Kovac v. INS*, 407 F.2d 102, 104 (9th Cir. 1969) (holding in Yugoslavian case that asylum law protects applicants who would be punished for violation of a “politically motivated prohibition against defection from a police state”).

g. Military and Conscription Issues

(i) Conscription Generally Not Persecution

Forced military conscription, and punishment for evading compulsory military service, generally are not persecution. *See, e.g., Zehatye v. Gonzales*, 453 F.3d 1182, 1188 (9th Cir. 2006) (applicant presented no evidence of individualized

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

Cf. Park v. Garland, 72 F.4th 965, 982–83 (9th Cir. 2023) (disagreeing with Park’s contention that South Korea’s military-conscription policy rises to the level of torture where “the record evidence does not establish that South Korea’s decades-old conscription policy, which applies equally to all male citizens within the designated age range, is imposed ‘with the intent of inflicting pain and suffering’” (citing *Deng Chol v. Garland*, 25 F.4th 1063, 1070 (8th Cir. 2022))).

(ii) Exceptions

Forced conscription or punishment for violation of military service rules can constitute persecution in some circumstances:

(A) Disproportionately Severe Punishment

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

(B) Inhuman Conduct

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

(C) Moral or Religious Grounds

Where an individual refuses to serve based on moral or religious beliefs, he may be able to establish past persecution. *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005) (petitioner deserted army after being tortured for voicing opposition to war); *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) (“[R]efusal to perform military service on account of genuine reasons of conscience, including genuine religious convictions, may be a basis for refugee status.”); *Barraza Rivera v. INS*, 913 F.2d 1443, 1450–51 (9th Cir. 1990); cf. *Canas-Segovia v. INS*, 970

F.2d 599, 601 (9th Cir. 1992) (requiring conscientious objector Jehovah's Witnesses to serve did not establish religious persecution).

(iii) Participation in Coup

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

(iv) Military Informers

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

(v) Military or Law Enforcement Membership

(A) Current Status

To the extent that an applicant fears that he will be targeted as a current member of the military, this danger does not constitute persecution on account of political opinion or membership in a social group. See *Madrigal v. Holder*, 716 F.3d 499, 503–04 (9th Cir. 2013) (“Mistreatment suffered while an applicant was an active military member does not by itself provide a basis for asylum because active duty members of the military do not constitute a social group.”); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1028–29 (9th Cir. 2000) (current member of Peruvian military); *Chanco v. INS*, 82 F.3d 298, 302–03 (9th Cir. 1996) (current member of Philippine military); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (“Military enlistment in Central America does not create automatic

asylum eligibility.”); *cf. Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) (granting petition where Filipino whistleblowing law enforcement officer feared political retribution by government, not mere criminals or guerilla forces).

(B) Former Status

An applicant’s status as a former member of the military could be the basis for a claim based on social group or imputed political opinion. *See Velarde v. INS*, 140 F.3d 1305, 1311 (9th Cir. 1998) (former bodyguard to daughters of former Peruvian president), *superseded by statute on other grounds as stated in Falcon Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (ex-soldier eligible for asylum because guerilla persecutors identified him politically with the Salvadoran government); *cf. Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (prior military service in Guatemala not a basis for asylum).

(vi) Non-Governmental Conscription

A guerilla group’s attempt to conscript an asylum seeker does not necessarily constitute persecution on account of political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992); *Parada v. Sessions*, 902 F.3d 901, 911 (9th Cir. 2018) (pre-REAL ID Act) (“[C]onscription by a non-governmental group does not necessarily constitute persecution on account of a protected ground.”); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003).

To establish asylum eligibility, an applicant must show that the guerillas will persecute him because of his political opinion, or other protected ground, rather than merely because he refused to fight with them. *Melkonian*, 320 F.3d at 1068 (applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his Armenian ethnicity and religion); *see also Pedro-Mateo v. INS*, 224 F.3d 1147, 1150–51 (9th Cir. 2000) (indigenous Guatemalan failed to show that forced recruitment was on account of statutory ground); *Tecun-Florian v. INS*, 207 F.3d 1107, 1109 (9th Cir. 2000) (Guatemalan not eligible when guerillas tortured him because he refused to join them); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 509 (9th Cir. 1999) (Guatemalan failed to show that guerillas beat and threatened him on account of imputed political opinion rather than for refusal to join them); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir.

1999) (granting petition where substantial evidence did not support BIA’s determination that Salvadoran guerillas’ threats were merely recruitment attempts).

But under pre-REAL ID Act law, “where . . . there is uncontradicted evidence that the attempted forced conscription was on account of [petitioner’s] family association and imputed political opinion . . .—both protected grounds—that attempted conscription is persecution within the meaning of our asylum laws.” *Parada*, 902 F.3d at 911 (reiterating that because the claim was governed by pre-REAL ID Act law, petitioner needed to demonstrate only that his persecutors were motivated in part by a protected ground).

h. Cases Concluding No Nexus to a Protected Ground

See *Rodriguez-Zuniga v. Garland*, 69 F.4th 1012, 1022 (9th Cir. 2023) (record supported agency’s finding that attempted robbery bore no nexus to a protected characteristic where petitioner’s claim was “based on a fear of general violence and criminal activity in Guatemala”); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1033 (9th Cir. 2014) (pre-REAL ID Act) (substantial evidence supported conclusion that petitioner was not persecuted on account of a protected ground); *Madrigal v. Holder*, 716 F.3d 499, 503–04 (9th Cir. 2013) (post-REAL ID Act) (“Mistreatment suffered while an applicant was an active military member does not by itself provide a basis for asylum because active duty members of the military do not constitute a social group.”); *Pagayon v. Holder*, 675 F.3d 1182, 1191 (9th Cir. 2011) (post-REAL ID Act) (even if petitioner could show a well-founded fear of reprisals by the National Police upon return to the Philippines, he could not show that reprisals would be based on an imputed political opinion); *Lin v. Holder*, 610 F.3d 1093, 1097 (9th Cir. 2010) (pre-REAL ID Act) (“Ordinary prosecution for criminal activity is not persecution ‘on account’ of a protected ground.”); *Zetino v. Holder*, 622 F.3d 1007, 1015–16 (9th Cir. 2010) (post-REAL ID Act) (where bandits had attempted to steal petitioner’s grandfather’s farm and murdered his family members in El Salvador, petitioner failed to prove a nexus where petitioner testified that the motivation for the acts of violence was the value of his grandfather’s land); *Baballah v. Ashcroft*, 367 F.3d 1067, 1075 n.7 (9th Cir. 2004) (relief precluded when persecution is “solely on account of an economic motive”); *Dinu v. Ashcroft*, 372 F.3d 1041, 1044–45 (9th Cir. 2004) (petitioner failed to meet his burden of proof that the authorities imputed a pro-Ceaușescu political opinion to him, or that the purported criminal investigation had no bona fide objective);

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

Cross-reference: Asylum, Nexus to Five Statutorily Protected Grounds, Proving a Nexus, Mixed-Motive Cases.

G. Humanitarian Asylum

The agency may grant humanitarian asylum even if the government has rebutted the presumption of a well-founded fear of future persecution. Humanitarian asylum may be granted in the absence of well-founded fear of persecution if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

8 C.F.R. § 1208.13(b)(1)(iii).

See *Singh v. Whitaker*, 914 F.3d 654, 661 (9th Cir. 2019) (“Regardless of whether the government has rebutted the presumption of an asylum applicant’s well-founded fear of persecution, the BIA may still grant humanitarian asylum.”); *id.* at 662 (“Humanitarian asylum based on past persecution may be granted where the petitioner has suffered ‘atrocious forms of persecution.’”); *Benyamin v. Holder*, 579 F.3d 970, 977 (9th Cir. 2009) (remanding to the BIA to consider in first instance whether humanitarian asylum should be granted where petitioner suffered female genital mutilation, which the court has recognized as a “particularly severe form of past persecution”); *Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (remanding for BIA to consider whether petitioner was eligible for asylum pursuant to former 8 C.F.R. § 1208.13(b)(1)(iii)(A)); *Silaya v. Mukasey*, 524 F.3d 1066, 1072 (9th Cir. 2008) (remanding for BIA to consider whether to grant humanitarian asylum); *Hanna v. Keisler*, 506 F.3d 933, 939 (9th Cir. 2007) (remanding for BIA to consider whether there existed a reasonable possibility that the petitioner may suffer other serious harm upon removal to Iraq, and thus could be eligible for humanitarian asylum); *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004) (applying a former version of 8 C.F.R. § 1208.13(b)(1)(iii)).

The burden of proof is on the applicant to show that humanitarian asylum is warranted. *Singh*, 914 F.3d 661–62.

a. Severe Past Persecution

Humanitarian relief is available if “[t]he applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution.” 8 C.F.R. § 1208.13(b)(1)(iii)(A).

“This avenue for asylum has been reserved for rare situations of ‘atrocious’ persecution, where the alien establishes that, regardless of any threat of future persecution, the circumstances surrounding the past persecution were so unusual and severe that he is unable to return to his home country.” *Vongsakdy v. INS*, 171 F.3d 1203, 1205 (9th Cir. 1999) (Laos); see also *Singh v. Whitaker*, 914 F.3d 654, 662 (9th Cir. 2019) (explaining that case law demonstrates extremely severe persecution is required to warrant humanitarian relief).

The persecution need not have resulted in ongoing disability. See *Lal v. INS*, 255 F.3d 998, 1004 (9th Cir. 2001) (Indo-Fijian), as amended by 268 F.3d 1148 (9th Cir. 2001).

It is unclear whether past persecution directed against one’s family is sufficient for humanitarian asylum. The United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979), para. 136, states that “[i]t is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.”

But this court has not decided whether an applicant could be eligible for relief based on the severity of the past persecution of his family where the applicant himself did not suffer severe past persecution.

(i) Sufficiently Severe Past Persecution for Humanitarian Asylum

See *Lal v. INS*, 255 F.3d 998, 1009–10 (9th Cir. 2001) (Indo-Fijian arrested, detained three times, beaten, tortured, forced to drink urine, cut with knives,

burned with cigarettes, forced to watch sexual assault of wife, forced to eat meat, had house set ablaze twice, had temple ransacked, and had holy text burned), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Vongsakdy v. INS*, 171 F.3d 1203, 1206–07 (9th Cir. 1999) (Laotian applicant threatened, beaten, and attacked, forced to perform hard manual labor and to attend “reeducation,” fed once a day, denied adequate water and medical care, and forced to watch guards kill his friend); *Lopez-Galarza v. INS*, 99 F.3d 954, 960–63 (9th Cir. 1996) (Nicaraguan applicant imprisoned for 15 days, raped and physically abused repeatedly, confined in a jail cell for long periods without food, forced to clean bathrooms and floors of men’s jail cells, had his family home stoned and vandalized by mobs, and had food ration card seized by authorities); *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988) (Haitian applicant arrested, assaulted, beaten 50 times with wooden stick, and threatened with death by the Ton Ton Macoutes on several occasions); *see also Matter of Chen*, 20 I. & N. Dec. 16, 20–21 (BIA 1989) (Red Guards ransacked and destroyed applicant’s home, imprisoned and dragged father through streets, and badly burned him in a bonfire of Bibles; as a child, petitioner was placed under house arrest, kept from school, interrogated, beaten, deprived of food, seriously injured by rocks, exiled to the countryside for “re-education,” abused, forced to criticize father, and denied medical care).

The court has remanded for consideration of humanitarian relief in: *Flores Molina v. Garland*, 37 F.4th 626, 638 (9th Cir. 2022) (remanding to the BIA to assess the merits of petitioner’s humanitarian asylum claim in the first instance); *Benyamin v. Holder*, 579 F.3d 970, 977 (9th Cir. 2009) (remanding to the BIA to consider in first instance whether humanitarian asylum should be granted where petitioner suffered female genital mutilation, which the court has recognized as a “particularly severe form of past persecution”); *Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (remanding for consideration of humanitarian relief where the “BIA erred in failing to determine whether, assuming the truth of Sowe’s testimony that he witnessed his parents’ murder, the severing of his brother’s hand, and his sister’s kidnaping, he provided compelling reasons for his being unwilling or unable to return to Sierra Leone”); *Silaya v. Mukasey*, 524 F.3d 1066, 1072 (9th Cir. 2008) (native and citizen of the Philippines kidnapped, raped, and physically abused by members of the NPA); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (Ethiopian raped by two soldiers during one house search and family harassed and harmed repeatedly); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (Guatemalan gang raped by soldiers as part of an

“orchestrated campaign” to punish entire village); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160–61 (9th Cir. 1996) (Nicaraguan severely beaten, threatened with death, imprisoned for working without a permit, witnessed sister being tortured and killed, and had family denied food rations and work permit).

(ii) Insufficiently Severe Past Persecution for Humanitarian Asylum

See *Singh v. Whitaker*, 914 F.3d 654, 662 (9th Cir. 2019) (while troubling, the physical harm Singh suffered at the hands of the police and Congress Party members, which resulted in multiple hospitalizations, did not rise to necessary level of atrociousness to warrant humanitarian asylum); *Hanna v. Keisler*, 506 F.3d 933, 939 (9th Cir. 2007) (Iraqi applicant detained for over one month and tortured; although past persecution not sufficient to qualify for humanitarian asylum, the court remanded for the BIA to consider whether there existed a reasonable possibility that petitioner might suffer other serious harm upon removal); *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 & n.2 (9th Cir. 2004) (economic and emotional persecution based on father’s 10-year imprisonment in Albania); *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1240 (9th Cir. 2001) (Salvadoran applicant targeted by government sporadically between 1978 and 1980, and then not again until 1991, when forces searched home looking for FMLN sympathizers); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (ethnic Amhara Ethiopian detained for a month, interrogated, beaten for 45 minutes, and almost raped by guards, children detained temporarily and beaten, family harassed); *Kumar v. INS*, 204 F.3d 931, 934–35 (9th Cir. 2000) (Indo-Fijian applicant stripped and fondled in front of parents, punched and kicked, forced to renounce religion, and beaten unconscious; soldiers tied up and beat parents, detained father, and knocked mother unconscious; temple ransacked); *Marcu v. INS*, 147 F.3d 1078, 1082–83 (9th Cir. 1998) (Romanian taunted as a child, denounced as an “enemy of the people,” detained, interrogated and beaten by police on multiple occasions, family’s possessions confiscated, and mother imprisoned for refusing to renounce U.S. citizenship); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (Sandinista authorities made multiple death threats, marked applicant’s house, took away ration card and means to buy inventory, and harassed and confiscated family property); *Kazlauskas v. INS*, 46 F.3d 902, 906–07 (9th Cir. 1995) (Lithuanian applicant ostracized, harassed by teachers and peers, and prevented from advancing to university; father imprisoned in Soviet labor

camps); *Acewicz v. INS*, 984 F.2d 1056, 1062 (9th Cir. 1993) (Polish citizens suffered insufficiently severe past persecution).

b. Fear of Other Serious Harm

A victim of past persecution who no longer reasonably fears future persecution on account of a protected ground may be granted humanitarian asylum if he or she establishes “a reasonable possibility that he or she may suffer other serious harm upon removal to that country.” 8 C.F.R. § 1208.13(b)(1)(iii)(B).

See *Hanna v. Keisler*, 506 F.3d 933, 939 (9th Cir. 2007) (Iraqi applicant detained for over one month and tortured; although past persecution not sufficient to qualify for humanitarian asylum, the court remanded for BIA to consider whether there existed a reasonable possibility that petitioner might suffer other serious harm upon removal); *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004) (remanding for consideration of humanitarian asylum where former government agents terrorized Albanian family in an effort to take over their residence); cf. *Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (petitioner failed to show “other serious harm” aside from claimed fear of persecution, which had been rebutted, but remanding for the BIA to consider whether petitioner was eligible for humanitarian asylum based on severe persecution under 8 C.F.R. § 1208.13(b)(1)(iii)(A)).

H. Exercise of Discretion

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

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

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

In exercising its discretion, the BIA must consider both favorable and unfavorable factors, including the severity of any past persecution suffered. See *Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995) (discussing likelihood of future persecution, severity of past persecution, alcohol rehabilitation, circumstances surrounding departure and entry into U.S., and criminal record in U.S.); see also *Gulla v. Gonzales*, 498 F.3d 911, 917–19 (9th Cir. 2007) (IJ abused his discretion by giving little weight to the fear of persecution, ignoring strong family ties to the US, relying on the use of fraudulent documents to reach the US, and relying on the alleged circumvention of asylum and immigration procedures), *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (IJ abused his discretion in failing to balance favorable factors against factors identified as negative); *Andriasian v. INS*, 180 F.3d 1033, 1043–47 (9th Cir. 1999) (discussing petitioner's temporary stay in a third country); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996) (discussing the likelihood of future persecution and humanitarian considerations).

"There is no definitive list of factors that the BIA must consider or may not consider. Each asylum application is different, and factors that are probative in one context may not be in others. However, all relevant favorable and adverse factors must be considered and weighed." *Kalubi*, 364 F.3d at 1139, 1140 & n.6

(holding that the relevant factors in Kalubi’s case were membership in a terrorist organization, forum shopping, the likelihood of future persecution, separation from a spouse, and the applicant’s health). “[T]he likelihood of future persecution is a particularly important factor to consider.” *Id.* at 1141 (internal quotation marks omitted); see *Gulla*, 498 F.3d 911; *Rodriguez-Matamoros*, 86 F.3d at 161.

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

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

I. Remanding Under *INS v. Ventura*

In *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam), the Supreme Court held that, where the BIA has not yet considered an issue, the proper course is to remand to allow the BIA to consider the issue in the first instance. This is known as the “ordinary remand rule.” The Supreme Court summarized this rule, as applied to administrative review generally, in a 2023 opinion:

It is a well-established maxim of administrative law that if the record before the agency does not support the agency action, or if the agency has not considered all relevant factors, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. A reviewing court, accordingly, is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. For if the grounds propounded by the agency for its decision are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. . . . Remand may be unwarranted in cases where there is not the slightest

uncertainty as to the outcome of the agency’s proceedings on remand. But we have applied that exception only in narrow circumstances. Where the agency was *required* to take a particular action, we have observed, that it provided a different rationale for the necessary result is no cause for upsetting its ruling.

Calcutt v. FDIC, 598 U.S. 623, 628–30 (2023) (per curiam) (citation modified).

For cases applying the ordinary remand rule, see, for example, *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam); *Antonio v. Garland*, 58 F.4th 1067, 1077–78 (9th Cir. 2023) (remanding petitioner’s claim for asylum and related relief and stating that “[t]he BIA may remand to the IJ for further factfinding as necessary” (citing *Ventura*, 537 U.S. at 16, 18)); *J.R. v. Barr*, 975 F.3d 778, 785 (9th Cir. 2020) (because the BIA did not reach the questions whether J.R. is a member of a particular social group or whether he suffered harm that rises to the level of persecution, the court was obliged to remand for further proceedings); *Coronado v. Holder*, 759 F.3d 977, 987 (9th Cir. 2014) (“[U]nder the ordinary remand rule, we are not permitted to decide a claim that the immigration court has not considered in the first instance.” (citation and internal quotation marks omitted)); *Pannu v. Holder*, 639 F.3d 1225, 1226 (9th Cir. 2011) (remanding to the BIA where the applicable law changed after the BIA’s decision); *Zhu v. Mukasey*, 537 F.3d 1034, 1045 (9th Cir. 2008) (remanding for BIA to consider whether petitioner fulfilled burden of establishing well-founded fear of persecution); *Tekle v. Mukasey*, 533 F.3d 1044, 1056 (9th Cir. 2008) (“We hold that where, as here, the IJ has made an adverse credibility finding and has also concluded in the alternative that the petitioner is ineligible for asylum or other relief, and the BIA has affirmed on the basis of the IJ’s adverse credibility finding, but has specifically declined to reach the issue of eligibility for asylum and other relief, we ordinarily must remand under *Ventura*.”); *Silaya v. Mukasey*, 524 F.3d 1066, 1072 (9th Cir. 2008) (remanding for BIA to consider in the first instance whether to grant humanitarian asylum); *Fakhry v. Mukasey*, 524 F.3d 1057, 1065 (9th Cir. 2008) (remanding for agency to apply the presumption of persecution and to determine if the government rebutted the presumption); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (reversing the BIA’s negative nexus finding and remanding for a determination as to changed circumstances); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 (9th Cir. 2003) (remanding for the BIA to

assess in the first instance whether petitioner established a well-founded fear of persecution).

Where the agency has already passed on the relevant issue, a remand may not be necessary. In *Khup v. Ashcroft*, 376 F.3d 898, 904–05 (9th Cir. 2004), and *Baballah v. Ashcroft*, 367 F.3d 1067, 1078–78 (9th Cir. 2004), the court declined to remand because the IJ had already considered the applicants’ eligibility for asylum and withholding. See also *Rodriguez Tornes v. Garland*, 993 F.3d 743, 753–54 (9th Cir. 2021) (concluding that a *Ventura* remand was unnecessary because the agency, by granting CAT protection, had necessarily decided that the petitioner had a well-founded fear of future persecution); *Latu v. Mukasey*, 547 F.3d 1070, 1075–76 (9th Cir. 2008) (granting petition and declining government’s request to remand under *Ventura* so the BIA could consider modified categorical approach, where the BIA had already considered whether the offense was a crime involving moral turpitude and all evidence had been presented to the BIA). In contrast, in *Lopez v. Ashcroft*, 366 F.3d 799, 806 (9th Cir. 2004), the court held that the applicant had established past persecution, and determined that a remand for a redetermination of changed country conditions was “more consistent with the spirit and reasoning of *Ventura*.” See also *Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (remanding withholding claim).

Remand is inappropriate where the court would be compelled to hold that petitioner has established eligibility for asylum and withholding of removal. See *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130–31 (9th Cir. 2007) (where the IJ concluded that the petitioner qualified for relief under the Convention Against Torture and the risk of torture derived in part from the petitioner’s political resistance to the government’s extortion schemes, the petitioner “easily met the lesser burden of establishing a well-founded fear of persecution” and demonstrated the existence of a clear probability of future persecution); *He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir. 2003) (applicant was statutorily eligible for asylum based on the forced sterilization of his spouse); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was statutorily eligible for asylum and withholding), *superseded by statute as recognized by* *Li v. Garland*, 13 F.4th 954, 961 (9th Cir. 2021); cf. *Chen v. Ashcroft*, 362 F.3d 611, 621–23 (9th Cir. 2004) (reversing negative credibility finding and remanding to allow the BIA to determine whether the involuntary insertion of an IUD and the imposition of a

large fine for an unauthorized pregnancy constituted past persecution, and whether she had a well-founded fear of future persecution); *Lin v. Gonzales*, 472 F.3d 1131, 1136 (9th Cir. 2007) (concluding that petitioner resisted a coercive population control program and remanding to allow the BIA to determine whether petitioner suffered past persecution or had a well-founded fear of future persecution in connection with resistance).

Remand is unnecessary, for example, where law dictates the outcome that the agency must reach. See *Park v. Garland*, 72 F.4th 965, 978 (9th Cir. 2023) (stating that even if the BIA applied the wrong legal standard in concluding Park’s conviction was a particularly serious crime, because the facts underlying his conviction are uncontested, “this is one of those ‘narrow circumstances’ where remand is unwarranted because the law dictates the outcome that the agency must reach” (citing *Calcutt v. Fed. Deposit Ins. Corp.*, 598 U.S. 623, 629–30 (2023) (per curiam))); see also *Gutierrez-Zavala v. Garland*, 32 F.4th 806, 810 (9th Cir. 2022) (although the *Chenery* doctrine typically limits the court’s review to the grounds relied upon by the agency, and generally the appeals court should remand under *Ventura*, the court need not remand where doing so would be an “idle and useless formality” (citation omitted)), *abrogated on other grounds as recognized by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024); *Singh v. Barr*, 935 F.3d 822, 827 (9th Cir. 2019) (although the BIA incorrectly applied the “one central reason” standard to petitioner’s withholding claim, remand was unnecessary because the agency found *no* nexus at all between the harm and the alleged protected ground; accordingly, the result would have been the same under the correct standard).

Remand may not be warranted (or may be limited in scope) where the government waives an argument by failing to raise it or fails to submit evidence on an issue before the agency. See, e.g., *Parada v. Sessions*, 902 F.3d 901, 913–14 (9th Cir. 2018) (pre-REAL ID Act) (holding that petitioner was statutorily eligible for asylum and entitled to withholding removal and remanding for the Attorney General to exercise his discretion as to whether to grant asylum; the court noted, “Particularly where, as here, the government took thirteen years to process the asylum application and then another five years to hold a hearing before an IJ—during which time the government had every opportunity to submit more up-to-date evidence of changed country conditions, but failed to do so—to provide the [government] with another opportunity to present evidence of changed country

conditions. . . would be exceptionally unfair.”); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1123 n.7 (9th Cir. 2004) (remand unnecessary where government failed to rebut substantial evidence that internal relocation was neither safe nor feasible); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004); *Ndom v. Ashcroft*, 384 F.3d 743, 756 (9th Cir. 2004) (government failed to put forth argument or evidence of changed country conditions), *superseded by statute on other grounds as stated by* *Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1135 (9th Cir. 2004) (same).

The court generally does “not remand a case to the BIA to apply the modified categorical approach ‘where only legal questions remain and these questions do not invoke the Board’s expertise; all relevant evidence regarding the conviction had been presented to the BIA in earlier proceedings; and the BIA had already once determined that the offense fell within the generic definition of the crime, even if only at the categorical stage.’” *Flores-Lopez v. Holder*, 685 F.3d 857, 865 (9th Cir. 2012) (quoting *Fregozo v. Holder*, 576 F.3d 1030, 1036 (9th Cir. 2009)); *see also* *Ragasa v. Holder*, 752 F.3d 1173, 1176 n.4 (9th Cir. 2014) (even though the BIA did not apply the modified categorical approach, the panel declined to remand to the agency to conduct the analysis in the first instance for several reasons, including documents in the record could not establish petitioner’s removability, there was no possibility that new evidence had developed, the BIA had already considered issue of removability, and the government did not request remand).

In *He v. Holder*, 749 F.3d 792, 796–97 (9th Cir. 2014), the court determined that it lacked jurisdiction to consider the petitioner’s request for remand to allow him to gather more evidence to establish his asylum claim. The court explained that if the petitioner later discovered new evidence that was not previously available, he could then move the BIA to reopen the case. *See id.* at 798.

Before *Loper Bright* set aside the *Chevron* doctrine, the court held that, “[w]hen 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) (per curiam)). But where the issue was not a matter that warranted *Chevron* deference, there was 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).

J. Derivative Asylees

“A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.” *Ma v. Ashcroft*, 361 F.3d 553, 561 n.10 (9th Cir. 2004) (quoting 8 U.S.C. § 1158(b)(3)).

This rule does not apply to withholding of removal. *See Sumolang v. Holder*, 723 F.3d 1080, 1083 (9th Cir. 2013) (recognizing that the asylum statute allows for derivative beneficiaries of the principal applicant, but that the withholding of removal statute makes no such allowance); 8 C.F.R. § 1208.21. An individual who is eligible for asylum in her own right cannot benefit from the derivative status set forth in § 1158(b)(3). *Ma*, 361 F.3d at 560–61.

Although minor *children* may obtain asylum derivatively through their parents, there is no comparable provision permitting *parents* to obtain relief derivatively through their minor children. *See* 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 207.7(b)(6) (stating that parents, siblings, grandparents, grandchildren, and other relatives of a refugee are ineligible for accompanying or follow-to-join benefits). *But see Abebe v. Gonzales*, 432 F.3d 1037, 1043 (9th Cir. 2005) (*en banc*) (remanding for BIA to consider in the first instance whether parents of a U.S. citizen child likely to face persecution in their native country may qualify as derivative asylees).

K. Bars to Asylum

1. One-Year Bar

Under 8 U.S.C. § 1158(a)(2)(B), an asylum applicant must “demonstrate[] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.” 8 U.S.C. § 1158(a)(2)(B).

“The 1-year period shall be calculated from the date of the alien’s last arrival in the United States or April 1, 1997, whichever is later,” 8 C.F.R. § 1208.4(a)(2)(ii), and the first day of the one-year period is the day after the noncitizen arrived in the United States, *see Minasyan v. Mukasey*, 553 F.3d 1224, 1227 (9th Cir. 2009).

Under 8 U.S.C. § 1158(a)(2)(D), an untimely application for asylum “may be considered . . . if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the [one-year] period.” 8 U.S.C. § 1158(a)(2)(D).

The INA states that “[n]o court shall have jurisdiction to review any determination of the Attorney General under [§ 1158(a)(2)].” 8 U.S.C. § 1158(a)(3). But this limitation is subject to 8 U.S.C. § 1252(a)(2)(D), which states that nothing in 8 U.S.C. §§ 1101–1537 “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), and “questions of law” under this provision include the application of a legal standard to a set of undisputed or established facts (mixed questions of law and fact), *see Wilkinson v. Garland*, 601 U.S. 209, 212 (2024); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020).

Accordingly, the court lacks jurisdiction to consider factual determinations but has jurisdiction to consider questions of law and mixed questions of law and fact pertaining to a changed circumstances or extraordinary circumstances determination under § 1158(a)(2)(D). *See Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025) (“*Wilkinson*’s core holding—that we retain jurisdiction to review mixed questions of law and fact under § 1252(a)(2)(D)—permits us to review . . . determinations under § 1158(a)(2)(D).”); *Alquijay v. Garland*, 40 F.4th 1099, 1102 (9th Cir. 2022) (“[A]lthough we lack jurisdiction to review a BIA determination that rests on the IJ’s resolution of an underlying factual dispute, we may consider whether the BIA erred in deciding that the undisputed facts . . . did not constitute extraordinary circumstances.” (citations and internal quotation marks omitted)); *Sumolang v. Holder*, 723 F.3d 1080, 1082–83 (9th Cir. 2013) (“As to the extraordinary-circumstances exception, we lack jurisdiction to review the BIA’s

ruling because it rests on the IJ’s resolution of an underlying factual dispute. . . . As to the changed-circumstances exception, we have jurisdiction to review the BIA’s ruling because it turns on undisputed facts”); *Gasparyan v. Holder*, 707 F.3d 1130, 1134 (9th Cir. 2013) (court had jurisdiction under § 1252(a)(2)(D) to consider argument that BIA applied an incorrect legal standard to extraordinary circumstances claim); *Singh v. Holder*, 656 F.3d 1047, 1051 (9th Cir. 2011) (“We may review the agency’s application of the changed or extraordinary circumstances exception to undisputed facts.”); *Husyev v. Mukasey*, 528 F.3d 1172, 1177–81 (9th Cir. 2008) (court had jurisdiction to consider whether petitioner filed asylum application within a reasonable time under extraordinary circumstances exception), *abrogation on other grounds recognized by Ruiz v. Bondi*, 163 F.4th 586, 593 (9th Cir. 2025).

When “a petitioner alleges that his failure to file a timely asylum application was due to extraordinary circumstances and both the IJ and the BIA fail to determine whether the extraordinary-circumstances exception should apply, we have jurisdiction to review the failure to make a determination.” *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040–41 (9th Cir. 2005) (remanding based on the IJ’s error of law in failing to address the petitioner’s extraordinary circumstances argument).

“Where . . . the government alleges an alien’s arrival date in the Notice to Appear, and the alien admits the government’s allegation before the IJ, the allegations are considered judicial admissions rendering the arrival date undisputed.” *Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009); *see also Hakopian v. Mukasey*, 551 F.3d 843, 847 (9th Cir. 2008) (holding government’s allegation of arrival date in Notice to Appear, and noncitizen’s subsequent admission of the allegation, constituted judicial admission as to the date of entry, and the IJ thus erred in determining the application was time-barred); *cf. Cortez-Pineda v. Holder*, 610 F.3d 1118, 1122 (9th Cir. 2010) (in applying special rule cancellation of removal under NACARA, explaining that *Hakopian* made clear that “that an entry date alleged in a Notice to Appear might not bind the IJ if the Notice to Appear is amended or if . . . the entry date is subsequently contested” and concluding that government should not be held to have made a binding judicial admission about petitioner’s entry date where the government “vigorously disputed” it); *Lin v. Holder*, 610 F.3d 1093, 1096 (9th Cir. 2010) (“[F]acts are undisputed, even if the exact departure and arrival dates are unclear, if ‘any view

of the historical facts necessarily establishes that [the alien] filed his asylum application within one year of arrival.” (quoting *Khunaverdians v. Mukasey*, 548 F.3d 760, 765 (9th Cir. 2008))).

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

Cross-reference: Jurisdiction Over Immigration Petitions.

a. Exceptions to the Deadline

“[T]he Government may still consider a late application if the applicant establishes (1) changed circumstances that materially affect the applicant’s eligibility for asylum or (2) extraordinary circumstances directly related to the delay in filing an application.” *Singh v. Holder*, 656 F.3d 1047, 1052 (9th Cir. 2011). “[T]he applicant need only provide evidence ‘[t]o the satisfaction of . . . the immigration judge . . . that he or she qualifies for an exception to the 1-year deadline.’” *Id.* at 1052–53 (quoting 8 C.F.R. § 1208.4(a)(2)(i)(B) and concluding IJ erred by holding petitioner to “clear and convincing” standard). If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. See 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4) & (5).

An applicant demonstrating changed circumstances must further demonstrate that the application was filed “within a reasonable period given those ‘changed circumstances,’” 8 C.F.R. § 208.4(a)(4)(ii), and an applicant demonstrating “extraordinary circumstances” must show that the application was filed “within a reasonable period given those circumstances,” 8 C.F.R. § 208.4(a)(5). “[W]e have jurisdiction to review whether an asylum applicant has filed for asylum within a reasonable period after changed circumstances materially affect the applicant’s eligibility for asylum.” *Taslimi v. Holder*, 590 F.3d 981, 986 (9th Cir. 2010).

“To establish extraordinary circumstances, an asylum applicant must show that: (1) the circumstances were not intentionally created by him through his own action or inaction; (2) those circumstances were directly related to his failure to file the application within the 1-year period; and (3) the delay was reasonable under the

circumstances.” *Ruiz v. Bondi*, 163 F.4th 586, 599 (9th Cir. 2025) (citation modified) (quoting 8 C.F.R. § 1208.4(a)(5)).

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

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

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

Cases applying § 1158(a)(2)(D) include, for example: *Ruiz v. Bondi*, 163 F.4th 586, 599–600 (9th Cir. 2025) (where petitioner failed to explain connection between past trauma and delay in filing asylum application, agency’s conclusion that he failed to establish “extraordinary circumstances” preventing him from filing a timely application was supported by substantial evidence); *Lopez v. Garland*, 116 F.4th 1032, 1046 (9th Cir. 2024) (“neither youth nor ignorance of the legal requirements for asylum constitute extraordinary circumstances” that would toll one-year limitations period (citation modified)); *Al Ramahi v. Holder*, 725 F.3d 1133, 1137–39 (9th Cir. 2013) (petitioner’s delay in filing not reasonable); *Viridiana v. Holder*, 646 F.3d 1230, 1234, 1238 (9th Cir. 2011) (fraudulent deceit by non-attorney immigration consultant can amount to an extraordinary circumstance for the delay in filing); *Vahora v. Holder*, 641 F.3d 1038, 1042 (9th Cir. 2011) (religious riots that began after petitioner left India, and their subsequent impact on his family, constituted changed circumstances to excuse late filing of asylum application); *Toj-Culpatan v. Holder*, 612 F.3d 1088, 1090 (9th Cir. 2010)

(no error in the BIA’s extraordinary circumstances determination where (1) Petitioner did not speak English; (2) he was detained for two months in an immigration detention center; and (3) his case was transferred after he moved from Arizona to California); *id.* at 1091 (rejecting petitioner’s contention that his case fit within 8 C.F.R. § 1208.4(a)(5)(v), which provides extraordinary circumstances may include a case where the application was filed and returned to the applicant, where petitioner failed to refile within a reasonable time); *Tamang v. Holder*, 598 F.3d 1083, 1090–91 (9th Cir. 2010) (post-REAL ID Act) (no extraordinary circumstances, but even if there were, application not filed in reasonable time); *Wakkary v. Holder*, 558 F.3d 1049, 1058–59 (9th Cir. 2009) (considering whether the petitioner’s delay in filing his asylum application was “reasonable under the circumstances” within the meaning of 8 C.F.R. § 208.4(a)(5) and remanding); *Dhital v. Mukasey*, 532 F.3d 1044, 1049–50 (9th Cir. 2008) (the BIA properly concluded petitioner lost nonimmigrant status when he failed to enroll in a semester of college classes, and that petitioner then failed to file application within a “reasonable period” when he waited 22 months without further explanation for delay).

2. Safe Third Country Bar

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

The safe third country bar is subject to the jurisdiction-stripping provided in 8 U.S.C. § 1158(a)(3), although the scope of § 1158(a)(3) is qualified by § 1252(a)(2)(D).

The United States and Canada entered into a bilateral agreement, effective December 29, 2004, which recognizes that both countries “offer generous systems of refugee protection” and provides, subject to exceptions, that noncitizens arriving in the United States from Canada at a land border port-of-entry shall be returned to Canada to seek protection under Canadian immigration law. *See* “Agreement Between the Government of the United States of America and the Government of

Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries,” U.S.-Can., Dec. 5, 2002, *available at* <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp>. The Agreement indicates that a noncitizen may apply for asylum, withholding of removal, or protection under the Convention Against Torture in one or the other, but not both, countries. *See also* 8 C.F.R. § 208.30(e)(6) (implementing regulation); 69 Fed. Reg. 69480 (Nov. 29, 2004) (rules implementing United States-Canada agreement).

3. Previous Denial Bar

An applicant who previously applied for and was denied asylum is barred. 8 U.S.C. § 1158(a)(2)(C). Notwithstanding 8 U.S.C. § 1158(a)(2)(C), an application for asylum may be considered if the alien demonstrates “the existence of changed circumstances which materially affect the applicant’s eligibility for asylum.” 8 U.S.C. § 1158(a)(2)(D).

This bar is subject to the jurisdiction-stripping provided in 8 U.S.C. § 1158(a)(3), although the scope of § 1158(a)(3) is qualified by § 1252(a)(2)(D).

4. Firm Resettlement Bar

As of October 1, 1990, an applicant may not be granted asylum if he or she “was firmly resettled in another country prior to arriving in the United States.” *See* 8 U.S.C. § 1158(b)(2)(A)(vi); *see also* *Aden v. Wilkinson*, 989 F.3d 1073, 1079 (9th Cir. 2021); *Arrey v. Barr*, 916 F.3d 1149, 1159 (9th Cir. 2019). Firm resettlement is defined by 8 C.F.R. § 1208.15.

“We review the agency’s finding of ‘firm resettlement’ for substantial evidence.” *Oscar v. Bondi*, 135 F.4th 777, 780 (9th Cir. 2025).

Oscar articulated the steps involved in applying the firm resettlement standard:

First, the government has an initial burden of making a prima facie showing that the mandatory firm resettlement bar applies. To meet this burden, the government may offer direct evidence that a country has

made an offer of firm resettlement to the alien, such as a grant of asylum, residence permit, or travel documents indicating the permanence of a person's status. If direct evidence is unavailable, the government can offer indirect evidence if it rises to a sufficient level of clarity and force. For instance, an alien may have an offer if the alien is entitled to permanent resettlement and all that remains in the process is for the alien to complete some ministerial act. If an alien has received an offer of resettlement, it does not matter whether the alien has allowed it to lapse—the focus is on whether the alien received an offer, not whether the alien accepted the offer. If the government fails at the first step to present prima facie evidence of an offer of firm resettlement, the court need go no further: the mandatory firm resettlement bar does not apply.

If, however, the government succeeds in making a prima facie case, the alien bears the burden of showing by a preponderance of the evidence that the bar does not apply. To rebut the prima facie case that an offer of firm resettlement exists, the alien must show that the alien does not have the right to return and remain in the third country indefinitely. A mere possibility that an alien might receive permanent refuge in a third country does not constitute an offer of permanent resettlement. But ineligibility for third-country refuge based on the alien failing to take advantage of its procedures for obtaining relief does not rebut the existence of an offer.

If the alien is unable to rebut the government's prima facie case that an offer exists, the alien must carry the burden of establishing an exception to firm resettlement by a preponderance of the evidence. The first exception . . . applies when the alien's presence in the third country was necessary for onward travel. The second exception applies when the alien's residence in the third country was so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. By its text, this exception applies when the alien shows that he lived under a restriction that was (1) substantial, (2) conscious, and (3) by the country's authorities. . . . If the alien shows an exception applies, the alien is not subject to the firm resettlement bar.

Oscar v. Bondi, 135 F.4th 777, 780–82 (9th Cir. 2025) (citation modified).

In *Oscar*, substantial evidence supported the finding of firm resettlement where the government presented evidence that the Chilean government had granted the petitioner a permanent residence permit that the petitioner had allowed to lapse, the petitioner did not satisfy his burden of showing that an offer did not exist, and the petitioner did not prove an exception to the firm resettlement bar. See *Oscar v. Bondi*, 135 F.4th 777, 783–84 (9th Cir. 2025).

Other cases applying the firm resettlement doctrine include: *Aden v. Wilkinson*, 989 F.3d 1073, 1082 (9th Cir. 2021) (“[T]he Board erred by concluding that Aden did not qualify for a firm-resettlement exception because the persecution he suffered was perpetrated by nongovernment actors.”); *Arrey v. Barr*, 916 F.3d 1149, 1159–60 (9th Cir. 2019) (the BIA erred by (1) failing to consider petitioner’s evidence that conditions of her residence were too restricted for her to be firmly resettled, (2) incorrectly applying firm resettlement rule not as a bar to asylum claim, but instead as a limitation on evidence the BIA considered in support of asylum claim, and (3) incorrectly applying firm resettlement rule to withholding of removal claims, to which it does not apply); *Jang v. Lynch*, 812 F.3d 1187, 1191–92 (9th Cir. 2015) (North Korean Human Rights Act did not preclude a finding that petitioner had firmly resettled in South Korea); *Mengstu v. Holder*, 560 F.3d 1055, 1059–60 (9th Cir. 2009) (IJ’s finding of firm resettlement in Sudan was not supported by substantial evidence where government did not meet its initial burden and, in any event, petitioner rebutted any presumption of resettlement), *superseded by statute as recognized in* *Parussimova v. Mukasey*, 555 F.3d 734, 740 (9th Cir. 2009); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 820–21 (9th Cir. 2004) (Guatemalan was not firmly resettled in Mexico because he did not receive an offer of permanent resettlement, was restricted to the municipality in which his refugee camp was located, was not allowed to attend Mexican schools, and was threatened with repatriation); *Andriasian v. INS*, 180 F.3d 1033, 1043–47 (9th Cir. 1999) (ethnic Armenian from Azerbaijan was not firmly resettled where he was harassed and threatened in Armenia and accused of being loyal to the Azerbaijanis); *Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir. 1998) (discussing a former firm resettlement regulation, 8 C.F.R. § 208.14(c) (1997)); *Yang v. INS*, 79 F.3d 932, 934–39 (9th Cir. 1996) (discussing 1990 firm resettlement regulation).

A finding of firm resettlement does not bar eligibility for withholding of removal. *Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (holding that the BIA erred by applying firm resettlement rule to limit evidence it considered in support of petitioner’s withholding of removal claims because the firm resettlement rule does not apply to those claims); *Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004) (“[E]ven if Siong is not eligible for asylum from Laos, because he firmly resettled in France, firm resettlement is not a bar to withholding of deportation.”).

5. Persecution of Others Bar

A person who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion” is not eligible for asylum. 8 U.S.C. § 1158(b)(2)(A)(i); *see also* 8 U.S.C. § 1101(a)(42) (“The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

In interpreting the persecution-of-others bar, courts have looked to caselaw interpreting similar statutes for guidance. *See, e.g., Fedorenko v. United States*, 449 U.S. 490, 514 n.34 (1981) (interpreting a similarly worded statute passed at the close of World War II, noting that an individual who merely cut the hair of inmates before execution did not assist in the persecution of civilians, and concluding that an armed uniformed guard who shot at escaping inmates qualified as a persecutor); *Laipenieks v. INS*, 750 F.2d 1427, 1431 (9th Cir. 1985) (interpreting former 8 U.S.C. § 1251(a)(19), and holding that there was insufficient evidence that applicant assisted or participated in persecution of others based on political beliefs).

Determining whether an applicant assisted in the persecution of others “requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability.” *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 (9th Cir. 2006). “Whether [petitioner’s] assistance was material is measured by examining the degree of relation his acts had to the persecution itself: How instrumental to the persecutory end were those acts? Did the acts further the persecution, or were they tangential to it?” *Id.* at 928 (serving as a military interpreter during interrogation and torture of suspected Peruvian Shining Path

members constituted persecution of others due to integral role in persecution); *see also* [Kumar v. Holder](#), 728 F.3d 993, 998–1000 (9th Cir. 2013) (remanding where the agency decisions reflected a misunderstanding of relevant precedent); [Vukmirovic v. Ashcroft](#), 362 F.3d 1247, 1252 (9th Cir. 2004) (IJ failed to conduct a particularized evaluation to determine Bosnian applicant’s individual accountability for persecution).

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

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

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

The Supreme Court held in [Negusie v. Holder](#), 555 U.S. 511 (2009), that the BIA failed to exercise its authority to interpret the statute, and misapplied [Fedorenko](#) as mandating that “whether an alien is compelled to assist in persecution is immaterial for prosecutor-bar purposes.” The Court remanded and explained that the BIA must interpret the statute in the first instance to determine

whether the statute permits such an interpretation based on a different course of reasoning. *Negusie*, 555 U.S. at 521–22.

6. Particularly Serious Crime Bar

“An alien is ineligible for asylum or withholding of removal if ‘the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.’” *Hernandez v. Garland*, 52 F.4th 757, 765 (9th Cir. 2022) (citing 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii)); see also *Kankamalage v. INS*, 335 F.3d 858, 864 n.1 (9th Cir. 2003) (noting that these statutory provisions apply only to immigration proceedings commenced on or after April 1, 1997). If an applicant pleaded guilty to the crime before October 1, 1990, the particularly serious crime bar does not apply. See *id.* at 864. The conviction, however, may be considered in the exercise of discretion for purposes of asylum. *Id.*

A person convicted of a particularly serious crime is a per se danger to the community. *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 (9th Cir. 2018) (“It is irrebuttably presumed that once a crime is determined to be particularly serious, the individual who committed that crime presents a danger to the community such that he or she is not entitled to protection by this country from persecution in another country.”).

“[T]he ‘particularly serious crime’ provision is not unconstitutionally vague on its face.” *Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2018) (addressing the provision within the meaning of 8 U.S.C. § 1231(b)(3)(B)(ii), which rendered the petitioner ineligible for statutory withholding of removal and withholding of removal under the Convention Against Torture).

This court has jurisdiction to review the BIA’s determination that an applicant has been convicted of a “particularly serious crime.” *Delgado v. Holder*, 648 F.3d 1095, 1099–1100 (9th Cir. 2011) (en banc) (overruling *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001), in light of *Kucana v. Holder*, 558 U.S. 233 (2010)).

The court reviews the agency’s determination of whether an offense constitutes a particularly serious crime for abuse of discretion. See *Hernandez v.*

Garland, 52 F.4th 757, 765 (9th Cir. 2022) (citing *Arbid v. Holder*, 700 F.3d 379, 383 (9th Cir. 2012), and 8 U.S.C. § 1252(a)(2)(B)(ii)). Under that standard, the court is “limited to ensuring that the agency relied on the ‘appropriate factors’ and ‘proper evidence,’” and it may not “reweigh the evidence and reach our own determination about the crime’s seriousness.” *Id.* (citation omitted) (citing *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015)).

The court may “determine whether the BIA applied the correct legal standard in making its determination. . . . [and therefore has] jurisdiction to review whether the BIA and IJ failed to consider the appropriate factors, . . . or relied on improper evidence, . . . in making the ‘particularly serious crime’ determination.” *Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (citation and internal quotation marks omitted); *see also Bare v. Barr*, 975 F.3d 952, 961 (9th Cir. 2020) (reviewing whether the BIA applied the correct legal standard and relied on appropriate factors and proper evidence in making its determination, and holding that the BIA did not abuse its discretion in concluding that Bare’s conviction for being a felon in possession of a firearm constitutes a particularly serious crime); *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (holding that the BIA abused its discretion by failing to engage in case-specific factual analysis, but nonetheless denying the petition for review where petitioner failed to carry his burden of showing eligibility for withholding of removal); *Avendano-Hernandez*, 800 F.3d at 1077 (“Our review is limited to ensuring that the agency relied on the ‘appropriate factors’ and ‘proper evidence’ to reach this conclusion.” (alteration omitted)).

a. Per Se Particularly Serious Crimes

All aggravated felonies are categorically particularly serious crimes for the purposes of asylum. *Blandino-Medina v. Holder*, 712 F.3d 1338, 1346 (9th Cir. 2013); *see also Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (“For purposes of asylum, an aggravated felony is *per se* a particularly serious crime. . . .”).

In addition, the statute “permits the Attorney General, by *regulation*, to make particular crimes categorically particularly serious even though they are not aggravated felonies.” *Delgado v. Holder*, 648 F.3d 1095, 1106 (9th Cir. 2011) (en banc) (citing 8 U.S.C. § 1158(b)(2)(B)).

For withholding of removal, an “aggravated felony is *per se* a particularly serious crime if the withholding applicant was sentenced to a term of imprisonment of at least five years.” *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019).

For withholding of removal, the Attorney General may *not* categorically designate offenses particularly serious crimes by regulation. *Blandino-Medina v. Holder*, 712 F.3d 1338, 1346 (9th Cir. 2013) (“[T]he withholding of removal statute is missing an analogue provision permitting the Attorney General to designate crimes as categorically particularly serious even if they are not aggravated felonies for which the defendant has received a sentence of at least five years.”).

b. Case-By-Case Adjudication

For purposes of asylum, the Attorney General also has the authority to designate offenses as particularly serious crimes through case-by-case adjudication. *Delgado v. Holder*, 648 F.3d 1095, 1106 (9th Cir 2011) (en banc) (discussing 8 U.S.C. § 1158(b)(2)(B)(ii)). In determining that the Attorney General may designate offenses particularly serious without first classifying them as such by regulation, *Delgado v. Holder* explained that “the statute does not require the Attorney General to anticipate every adjudication by promulgating a regulation covering each particular crime.” *Id.*

For offenses that are not *per se* particularly serious crimes, the legal standard for determining whether they are particularly serious is articulated in *Matter of Frentescu*, 18 I. &N. Dec. 244, 247 (BIA 1982). See *Hernandez v. Garland*, 47 F.4th 908, 916 (9th Cir. 2022). Under *Matter of Frentescu*, the seriousness of a crime is judged by looking at factors such “as the nature of conviction, the circumstances underlying the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.” *Konou v. Holder*, 750 F.3d 1120, 1127 (9th Cir. 2014) (quoting *Matter of Frentescu*, 18 I. & N. Dec. at 247). Crimes against persons are more likely to be considered particularly serious. *Id.*

“[A]ll reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of

conviction.” *Anaya-Ortiz v. Holder*, 594 F.3d 673, 677–78 (9th Cir. 2010) (quoting *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007), and concluding that the BIA’s interpretation of the evidence that may be considered in a particularly serious crime determination was reasonable); *see also Hernandez v. Garland*, 52 F.4th 757, 765–66 (9th Cir. 2022) (petitioner’s Form I-213 was a presumptively reliable document from which the agency could assess the crime’s seriousness); *Perez-Palafox v. Holder*, 744 F.3d 1138, 1141 (9th Cir. 2014) (all reliable information may be considered, including information outside the confines of the record of conviction, in the particularly serious crime determination). An applicant’s own testimony qualifies as the sort of “reliable information” that may be considered. *See Anaya-Ortiz*, 594 F.3d at 678–79 (concluding that the BIA’s reliance on petitioner’s own testimony was proper, and that the BIA applied the correct legal standard in determining petitioner’s drunk driving conviction constituted a particularly serious crime).

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

7. Serious Nonpolitical Crime Bar

An applicant is barred from asylum if there are serious reasons for believing that she committed a serious, nonpolitical crime outside the United States prior to arrival. 8 U.S.C. § 1158(b)(2)(A)(iii); *Guan v. Barr*, 925 F.3d 1022, 1031 (9th Cir. 2019). The court interprets “serious reasons to believe as being tantamount to probable cause.” *Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011) (citation and internal quotation marks omitted).

“[A] serious non-political crime is a crime that was not committed out of genuine political motives, was not directed toward the modification of the political organization or . . . structure of the state, and in which there is no direct, causal link between the crime committed and its alleged political purpose and object.”

Guan, 925 F.3d at 1031 (quoting *McMullen v. INS*, 788 F.2d 591, 595 (9th Cir. 1986), *overruled on other grounds by Barapind v. Enomoto*, 400 F.3d 744, 751 n.7 (9th Cir. 2005) (en banc)) (substantial evidence supported the IJ’s finding that there was probable cause to believe Guan committed a serious nonpolitical crime).

“The burden-shifting framework of 8 C.F.R. § 1240.8(d) [(‘If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.’)] cannot override the statutory requirement that there be ‘serious reasons’ to believe that the bar applies. 8 U.S.C. §§ 1158(b)(2)(A)(iii) [(restricting eligibility for asylum applicants where ‘there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States’)], 1231(b)(3)(B)(iii) [(same, in the context of withholding of removal)].” *Gonzalez-Castillo v. Garland*, 47 F.4th 971, 979 (9th Cir. 2022). Thus, “[t]o apply the bar, the agency must find that there are serious reasons to believe that the petitioner committed a serious nonpolitical crime, and to do so, there must be evidence supporting a finding of probable cause.” *Id.* at 977 (concluding that substantial evidence did not support finding of commission of serious nonpolitical crime where Interpol Red Notice contained errors that “cast[] doubt on its reliability, and . . . fail[ed] to articulate any specific crime of which [petitioner] [was] accused”); cf. *Villalobos-Sura v. Garland*, 8 F.4th 1161, 1167 (9th Cir. 2021) (arrest warrant and Interpol Red Notice, combined with the incredibility of petitioner’s testimony, established the requisite probable cause).

The agency is not required to balance the seriousness of the offense against the degree of persecution feared. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999).

8. Security Bar

An applicant is ineligible for asylum if there are reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv); *Malkandi v. Holder*, 576 F.3d 906, 914–17 (9th Cir. 2009) (post-REAL ID Act) (substantial evidence supported the adverse national security finding that applicant was a danger to national security and therefore ineligible for asylum and withholding of removal).

9. Terrorist Bar; Material Support

An applicant is ineligible for asylum if she is inadmissible or removable for reasons relating to terrorist activity, unless, in the case of an applicant inadmissible

as a representative of a terrorist organization or group that espouses or endorses terrorist activity, the Attorney General determines in her discretion that there are not reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(v); *see also Rayamajhi v. Whitaker*, 912 F.3d 1241, 1244 (9th Cir. 2019) (“A noncitizen who has engaged in ‘terrorist activity’ cannot obtain asylum or withholding of removal.”); *Annachamy v. Holder*, 733 F.3d 254 (9th Cir. 2013), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014); *Khan v. Holder*, 584 F.3d 773, 777–78, 785 (9th Cir. 2009) (substantial evidence supported IJ’s decision that petitioner belonged to a “terrorist organization,” rendering him ineligible for asylum and withholding of removal).

The commission of “an act that the actor knows, or reasonably should know, affords material support . . . to a terrorist organization or a member of a terrorist organization, unless the alien did not know (and should not reasonably have known) that the organization was a terrorist organization,” qualifies as engaging in terrorist activity. *See Rayamajhi*, 912 F.3d at 1244 (citing 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)).

“[T]he INA’s material support bar contains no implied exception for de minimis aid in the form of funds.” *Rayamajhi*, 912 F.3d at 1245 (“Petitioner admitted that, in 2009, he gave about \$50 to someone whom he knew was a Maoist. Thus, substantial evidence support[ed] the IJ’s finding, adopted by the BIA, that Petitioner gave material support to a terrorist organization, rendering him ineligible for asylum and withholding of removal.”).

“[T]he material support bar does not include an implied exception for individuals who assist organizations engaged in legitimate political violence or who provide support under duress.” *Annachamy v. Holder*, 733 F.3d 254, 267 (9th Cir. 2013), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014); *see also Rayamajhi*, 912 F.3d at 1244.

In *Cheema v. Ashcroft*, the court analyzed a prior version of the statute, INA § 208 (repealed 1996), which permitted a discretionary waiver of the terrorist asylum bar to any applicant excludable or deportable for reasons relating to terrorist activity if the Attorney General determined that there were not reasonable grounds for regarding an applicant as a danger to the security of the United States.

See 383 F.3d 848 (9th Cir. 2004). The court explained that the former “statute impose[d] a two-prong analysis: (1) whether an alien engaged in a terrorist activity, and (2) whether there are not reasonable grounds to believe that the alien is a danger to the security of the United States.” *Id.* at 855–56. Given this two-prong inquiry, the court held that the BIA erred by focusing solely on terrorist activity in concluding that Cheema was a danger to the security of the United States. *Id.* at 857–58; cf. *Bellout v. Ashcroft*, 363 F.3d 975, 978–79 (9th Cir. 2004) (applying a newer version of the statute that does not include the two-prong test and concluding that the applicant was barred from withholding due to his terrorist activities), *superseded by statute on other grounds as stated in Khan v. Holder*, 584 F.3d 773, 779–80 (9th Cir. 2009). Accordingly, *Cheema* has been superseded by statute on this point. See *Singh v. Holder*, 485 F. App’x 216, 217 (9th Cir. 2012) (unpublished).

All removal proceedings are subject to the REAL ID Act’s expanded definitions of terrorist organizations and terrorist related activities. See 8 U.S.C. §§ 1182(a)(3)(B), 1227(a)(4)(B); see *Haile v. Holder*, 658 F.3d 1122, 1126 n.3 (9th Cir. 2011) (noting that the REAL ID Act’s “amendments to § 1182, which expanded the definitions of terrorist organizations and terrorist-related activities, were given retroactive effect”); see also *Bojnoordi v. Holder*, 757 F.3d 1075, 1077 (9th Cir. 2014) (“[T]he statutory terrorism bar applies retroactively to an alien’s material support of a ‘Tier III’ terrorist organization.”).

III. WITHHOLDING OF REMOVAL OR DEPORTATION [§ 1231(b)(3)]

“Section 1231(b)(3) provides for withholding of removal.” *Silva v. Garland*, 993 F.3d 705, 719 (9th Cir. 2021), *abrogated on other grounds as stated by Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024). “[W]ithholding of removal under § 1231(b)(3) . . . prohibits removal to a country where the noncitizen’s ‘life or freedom would be threatened’ on account of his ‘race, religion, nationality, membership in a particular social group, or political opinion.’” *Iraheta-Martinez v. Garland*, 12 F.4th 942, 955 (9th Cir. 2021) (quoting 8 U.S.C. § 1231(b)(3)(A)); see also 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(b); *Silva*, 993 F.3d at 719 (quoting 8 C.F.R. § 1208.16(b)(2)).

An application for asylum under 8 U.S.C. § 1158 is generally considered an application for withholding of removal under 8 U.S.C. § 1231(b)(3) as well. *See* 8 C.F.R. § 1208.3(b); *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006).

Withholding codifies the international norm of “nonrefoulement,” or non-return to a country where an applicant would face persecution. *See Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1998) (en banc), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (“The basic withholding provision . . . parallels Article 33 [of the Refugee Convention], which provides that no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [a protected ground].” (alteration and internal quotation marks omitted)).

The agent of persecution must be “the government or . . . persons or organizations which the government is unable or unwilling to control.” *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2004) (internal quotation marks omitted).

Where deportation or exclusion proceedings were commenced before April 1, 1997, withholding of deportation is available under former 8 U.S.C. § 1253(h) (INA § 243(h)).

A. Eligibility for Withholding

1. Burden of Proof

“To secure withholding of removal, a petitioner must demonstrate that his ‘life . . . would be threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion.’” *Barbosa v. Barr*, 926 F.3d 1053, 1059 (9th Cir. 2019) (quoting 8 U.S.C. § 1231(b)(3)(A)); *Mairena v. Barr*, 917 F.3d 1119, 1123 (9th Cir. 2019); *see also INS v. Stevic*, 467 U.S. 407, 430 (1984); *Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018) (post-REAL ID Act); *Sanjaa v. Sessions*, 863 F.3d 1161, 1164 (9th Cir. 2017) (post-REAL ID Act); *Garcia v. Holder*, 749 F.3d 785, 791 (9th Cir. 2014) (post-REAL ID Act) (“To qualify for withholding of removal, an applicant must

show a ‘clear probability’ of future persecution. . . . That persecution must be apparent from objective evidence . . . and must be ‘on account of’ one of the statutorily enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group A petitioner carries the burden of persuading the fact finder that the evidence offered is credible.” (citations omitted)); 8 C.F.R. § 1208.16(b)(2).

To be eligible for withholding of removal, an applicant must show that the evidence in the record demonstrates a clear probability of persecution. *See Sharma v. Garland*, 9 F.4th 1052, 1059 (9th Cir. 2021); *Aden v. Wilkinson*, 989 F.3d 1073, 1085–86 (9th Cir. 2021). “A clear probability exists if it is ‘more likely than not’ the person will be persecuted upon return.” *Aden*, 989 F.3d at 1086. “The ‘clear probability’ standard for withholding is a more stringent burden of proof than the standard for asylum, which does not require that the applicant demonstrate that harm would be more likely than not to occur.” *Garcia v. Wilkinson*, 988 F.3d 1136, 1146 (9th Cir. 2021) (“[T]he BIA erred in its analysis of Garcia’s withholding of removal claim by erroneously conflating the nexus standard for withholding with the nexus standard for asylum.”).

Because “[t]he ‘more likely than not’ standard for withholding of removal is ‘more stringent’ than the ‘reasonable possibility’ standard for asylum, . . . an applicant who is unable to show a ‘reasonable possibility’ of future persecution ‘necessarily fails to satisfy the more stringent standard for withholding of removal.’” *Silva v. Garland*, 993 F.3d 705, 719 (9th Cir. 2021), *abrogated on other grounds as stated by Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *see also Davila v. Barr*, 968 F.3d 1136, 1142 (9th Cir. 2020) (“An applicant who fails to satisfy the lower standard for asylum necessarily fails to satisfy the more demanding standard for withholding of removal, which involves showing by a ‘clear probability’ that the petitioner’s life or freedom would be threatened in the proposed country of removal.”); *Sowe v. Mukasey*, 538 F.3d 1281, 1288 (9th Cir. 2008) (“When the government rebuts an applicant’s well-founded fear of future persecution, it defeats the applicant’s asylum claim, *and* his or her claim for withholding of removal.”)

The standard has “no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that he or she will be

subject to persecution upon deportation.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987); see *Zehatye*, 453 F.3d at 1190.

a. Nexus Standard

Although an asylum “applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant,” 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added), the standard for withholding of removal is not as demanding, *Barajas-Romero v. Lynch*, 846 F.3d 351, 358 (9th Cir. 2017) (explaining that the withholding statute uses only “a reason” in contrast to the asylum statute which states “one central reason”).

[T]he requirement that an applicant demonstrate that a protected characteristic would be “a reason” for future persecution is a “weaker motive” than the “one central reason” required for asylum. . . . “A person may have ‘a reason’ to do something that is not his ‘central’ reason or even ‘one central reason.’ Thus, although the overall standard of proof is more difficult to meet in withholding cases, the motive for persecution is easier to show.

Garcia v. Wilkinson, 988 F.3d 1136, 1146 (9th Cir. 2021) (citations omitted). “The difference between the motive standards matters, particularly in cases . . . in which the BIA’s decision turns on its nexus determination.” *Id.* at 1147.

The BIA errs by applying the more demanding asylum nexus standard to an application for withholding of removal. See *Salguero Sosa v. Garland*, 55 F.4th 1213, 1221 (9th Cir. 2022) (remanding where the agency erred in applying asylum’s heightened “one central reason” standard to petitioner’s withholding of removal claim); *Garcia v. Wilkinson*, 988 F.3d 1136, 1146 (9th Cir. 2021) (“[T]he BIA erred in its analysis of Garcia’s withholding of removal claim by erroneously conflating the nexus standard for withholding with the nexus standard for asylum.”); *Singh v. Barr*, 935 F.3d 822, 827 (9th Cir. 2019) (determining that remand was not necessary where, although the BIA incorrectly applied the “one central reason” standard to petitioner’s withholding claim, the result would be the same under the correct standard because the agency had found *no* nexus at all between the harm and the alleged protected ground).

The BIA reviews the IJ's nexus finding for clear error. *See Umana-Escobar v. Garland*, 69 F.4th 544, 552 (9th Cir. 2023) (remanding where the BIA erroneously reviewed the IJ's nexus determination de novo rather than for clear error and finding it "significant that the BIA expressly conflated the clear error standard with its review of the IJ's nexus determination").

See Fon v. Garland, 34 F.4th 810, 816 (9th Cir. 2022) (remanding asylum and withholding claims where agency's reasons for rejecting nexus arguments were invalid and vague).

2. Mandatory Relief

"Unlike asylum, withholding of removal is not discretionary. The Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the same protected grounds that apply under the asylum statute." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (citation and internal quotation marks omitted) (fear of execution based on U.S. evacuation from Iraq); *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 990 (9th Cir. 2018) ("The grant of withholding of removal is mandatory if an individual proves that his 'life or freedom would be threatened in [the] country [to which he or she would be removed] because of [his or her] race, religion, nationality, membership in a particular social group, or political opinion.'" (citation omitted)).

Although withholding of removal is generally mandatory if the applicant establishes that it is more likely than not that she would be subject to persecution on account of one of the protected grounds, an applicant is barred from obtaining withholding relief if she has been convicted of a particularly serious crime, 8 U.S.C. § 1231(b)(3)(B)(ii), or when there are serious reasons to believe that she committed a serious nonpolitical crime before arriving in the United States, *id.* § 1231(b)(3)(B)(iii)). *See Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1079 (9th Cir. 2020).

Cross-Reference: Bars to Withholding

3. Nature of Relief

Under withholding of removal, the successful applicant has a right only not to be removed to the country of persecution. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419–20 (1999). Withholding does not confer protection from removal to any other country. *El Himri v. Ashcroft*, 378 F.3d 932, 937–38 (9th Cir. 2004) (as amended).

Under asylum, by contrast, an applicant granted relief may apply for permanent residence after one year. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 n.6 (1987).

4. Past Persecution

Past persecution generates a presumption of eligibility for withholding of removal. *See Aden v. Wilkinson*, 989 F.3d 1073, 1086 (9th Cir. 2021) (“A finding of past persecution triggers a regulatory presumption that the applicant’s life or freedom would be threatened if deported.” (citation and internal quotation marks omitted)); *Mutuku v. Holder*, 600 F.3d 1210, 1213 (9th Cir. 2010) (pre-REAL ID Act); *Tamang v. Holder*, 598 F.3d 1083, 1091 (9th Cir. 2010) (post-REAL ID Act); *see also* 8 C.F.R. § 1208.16(b)(1)(i) (if past persecution is established, “it shall be presumed that the applicant’s life or freedom would be threatened in the future in the country of removal on the basis of the original claim”).

The presumption may be rebutted if the government establishes “by a preponderance of the evidence” that: (A) that there has been a fundamental change in circumstances; or (B) the applicant could reasonably relocate internally to avoid a future threat to life or freedom. 8 C.F.R. § 1208.16(b)(1)(i), (ii); *see also Aden*, 989 F.3d at 1086 (“To rebut this presumption, the government must show by a preponderance of the evidence that country conditions have so changed that it is no longer likely that the applicant would be persecuted there.”); *Singh v. Holder*, 753 F.3d 826, 831–37 (9th Cir. 2014) (government rebutted presumption that life or freedom would be threatened on account of a protected ground); *Mutuku*, 600 F.3d at 1213; *Tamang*, 598 F.3d at 1091; *Mousa*, 530 F.3d at 1030; *Hanna*, 506 F.3d at 940.

“While a showing of past persecution entitles an alien to a presumption of eligibility for withholding of removal, it is the alien’s burden to establish such persecution.” *Sanjaa v. Sessions*, 863 F.3d 1161, 1164 (9th Cir. 2017) (post-REAL ID Act) (quoting *Robleto-Pastora v. Holder*, 591 F.3d 1051, 1057 (9th Cir. 2010)).

Cross-Reference: Defining Persecution

5. Future Persecution

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

6. No Time Limit

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

7. Firm Resettlement Not a Bar

A finding of firm resettlement does not bar eligibility for withholding of removal. *See Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (holding that the BIA erred by applying the firm resettlement rule to limit the evidence it considered in support of Arrey’s withholding of removal claims because the firm resettlement rule does not apply to those claims); *Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004).

8. Entitled to Withholding

See Parada v. Sessions, 902 F.3d 901, 913–14 (9th Cir. 2018) (pre-REAL ID Act) (holding that petitioner was entitled to withholding of removal where he suffered past persecution on account of his family association and imputed political opinion and the government failed to rebut the presumption of future persecution);

Budiono v. Lynch, 837 F.3d 1042, 1051 (9th Cir. 2016) (concluding that the BIA erred in applying the terrorist bar and that Budiono was eligible for withholding of removal); *Al Ramahi v. Holder*, 725 F.3d 1133, 1137 (9th Cir. 2013) (petitioner was granted withholding of removal by agency); *Vitug v. Holder*, 723 F.3d 1056, 1065–66 (9th Cir. 2013) (gay native and citizen of the Philippines suffered past persecution giving rise to presumption of eligibility for withholding of removal that the government did not rebut); *Taslimi v. Holder*, 590 F.3d 981, 983 (9th Cir. 2010) (IJ concluded that petitioner was eligible for withholding of removal because petitioner showed it was more likely than not that her life or freedom would be threatened in Iran on account of her religion); *Ahmed v. Keisler*, 504 F.3d 1183, 1200 (9th Cir. 2007) (substantial evidence failed to support finding that petitioner, a native of Bangladesh and a Bihari, was not entitled to withholding of removal); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130–31 (9th Cir. 2007) (harassment, death threats, and beatings in retaliation for exposing government corruption entitled petitioner to withholding of removal); *Tang v. Gonzales*, 489 F.3d 987, 992 (9th Cir. 2007) (victims of forced abortion were entitled to withholding of removal); *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004) (past persecution by Senegalese armed forces), *superseded by statute on other grounds as stated by* *Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *El Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004) (as amended) (stateless Palestinians in Kuwait subjected to severe economic discrimination); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (applicant’s family persecuted and applicant threatened by government for Falun Gong practice); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (arrest, torture, and killing of fellow preachers, military pursuit, and documented history of human rights abuses in Burma); *Njuguna v. Ashcroft*, 374 F.3d 765, 772 (9th Cir. 2004) (applicant threatened and family members in Kenya attacked and imprisoned); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (applicant harassed and forced to have two abortions and an IUD inserted), *superseded by statute as recognized by* *Li v. Garland*, 13 F.4th 954, 961 (9th Cir. 2021); *Baballah v. Ashcroft*, 367 F.3d 1067, 1079 (9th Cir. 2004) (applicant and family suffered severe harassment, threats, violence, and discrimination); *Ruano v. Ashcroft*, 301 F.3d 1155, 1162 (9th Cir. 2002) (applicant received multiple death threats at home and business, was “closely confronted,” and was actively chased); *Cardenas v. INS*, 294 F.3d 1062, 1068 (9th Cir. 2002) (direct threats by Shining Path guerillas); *Rios v. Ashcroft*, 287 F.3d 895, 902–03 (9th Cir. 2002) (kidnapped and wounded by guerillas, and husband and brother killed); *Salazar-Paucar v. INS*, 281 F.3d

1069, 1074–75 (9th Cir. 2002) (death threats combined with harm to family and murders of his counterparts), *as amended by* 290 F.3d 964 (9th Cir. 2002); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. 2001) (harassed, fired, interrogated, threatened, assaulted, and arrested); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on evacuation from Iraq by United States); *Agbuya v. INS*, 241 F.3d 1224, 1231 (9th Cir. 2001) (kidnapped, falsely imprisoned, hit, and threatened with a gun by NPA); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000) (past torture by Indian authorities), *superseded by statute on other grounds as stated by* *Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (arrested, tortured, and scarred); *Tagaga v. INS*, 228 F.3d 1030, 1035 (9th Cir. 2000) (past sentence and would face treason trial if returned); *Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000) (past persecution of religious minority who engaged in prohibited interfaith commingling); *Zahedi v. INS*, 222 F.3d 1157, 1168 (9th Cir. 2000) (summoned for interrogation based on effort to translate and distribute banned book in Iran); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (husband killed, and applicant and family threatened in India); *Maini v. INS*, 212 F.3d 1167, 1177–78 (9th Cir. 2000) (physical attacks, death threats, and harassment at home, school, and work in India); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (multiple death threats by opposition political party in Colombia); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1043 (9th Cir. 1999) (ethnic Armenian from Azerbaijan); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (applicant beaten, harassed, and threatened with death by military); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (death threats from Philippine guerillas), *superseded by statute on other grounds as stated by* *Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (death threats from Salvadoran Recontra guerillas); *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (torture by Sri Lankan authorities); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1297 (9th Cir. 1997) (harassment by Peruvian Shining Path guerillas), *as amended on denial of reh’g by* 133 F.3d 726 (9th Cir. 1998); *Korablina v. INS*, 158 F.3d 1038, 1045–46 (9th Cir. 1998) (past discrimination, harassment, and violence); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1240 (9th Cir. 1996) (harassment by Sandinista government in Nicaragua); *Montoya-Ulloa v. INS*, 79 F.3d 930, 932 (9th Cir. 1996) (harassed, threatened, beaten, and placed on “black list” by Nicaraguan authorities); *Gomez-*

Saballos v. INS, 79 F.3d 912, 918 (9th Cir. 1996) (death threats by Sandinistas); *Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994) (applicant threatened, and close colleagues persecuted); *Mendoza Perez v. INS*, 902 F.2d 760, 763–64 (9th Cir. 1990).

9. Not Entitled to Withholding of Removal

See *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1197–1200 (9th Cir. 2023) (substantial evidence supported denial of withholding of removal where record did not compel conclusion that petitioner was the victim of past persecution nor faced a clear probability of future persecution); *Rodriguez-Zuniga v. Garland*, 69 F.4th 1012, 1023 (9th Cir. 2023) (substantial evidence supported agency’s finding that two protected grounds were not “a reason” for her past or feared persecution); *Hernandez v. Garland*, 52 F.4th 757, 763 (9th Cir. 2022) (agency did not commit legal error in determining that Hernandez’s state-court conviction was for a particularly serious crime, making him ineligible for asylum and withholding of removal); *Iraheta-Martinez v. Garland*, 12 F.4th 942, 959 (9th Cir. 2021) (IJ did not commit clear error in finding that petitioner was not likely to suffer persecution, and thus was not entitled to withholding of removal); *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 893 (9th Cir. 2021) (petitioner ineligible for withholding of removal where his ambiguous testimony did not compel the conclusion that his political opinion was a reason for his persecution); *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (post-REAL ID Act) (no objectively reasonable fear of future persecution in Mexico on account of protected ground, despite contentions that petitioner would be targeted as someone coming from the United States whose family would have money for ransom, that there was violence related to gangs and land disputes in his hometown, and that he would be singled out as an evangelical Christian); *Sanjaa v. Sessions*, 863 F.3d 1161, 1164 (9th Cir. 2017) (post-REAL ID Act) (although the physical harm Sanjaa suffered in Mongolia rose to the level of “persecution,” petitioner failed to meet his burden to establish that he was persecuted “on account of” one of the statutorily protected grounds); *Singh v. Holder*, 753 F.3d 826, 831–37 (9th Cir. 2014) (pre-REAL ID Act) (substantial evidence supported denial of withholding of removal where there had been a fundamental change in circumstances sufficient to overcome the presumption that petitioner’s life or freedom would be threatened on account of a protected ground); *Garcia v. Holder*, 749 F.3d 785, 791 (9th Cir. 2014) (post-REAL ID Act) (substantial evidence supported the denial of withholding of

removal where petitioner could not overcome adverse credibility determination); *Pagayon v. Holder*, 675 F.3d 1182, 1190–91 (9th Cir. 2011) (not entitled to withholding of removal where record failed to compel conclusion that notwithstanding petitioner’s relocation within the Philippines 15 years prior, he would face reprisals from the National Police should he be returned now, where his sister continued to live in the Philippines unmolested, and petitioner failed to establish he would be targeted on account of a protected ground); *Tamang v. Holder*, 598 F.3d 1083, 1094–95 (9th Cir. 2010) (post-REAL ID Act) (no past persecution in Nepal where petitioner did not suffer threats of violence against him personally, and even if he had established past persecution, changed country conditions mitigated any fear of persecution); *Sowe v. Mukasey*, 538 F.3d 1281, 1288 (9th Cir. 2008) (not entitled to withholding of removal where government rebutted petitioner’s well-founded fear of future persecution by showing changed country conditions in Sierra Leone); *Fakhry v. Mukasey*, 524 F.3d 1057, 1065–66 (9th Cir. 2008) (Senegalese applicant not eligible for withholding); *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (petitioner’s membership in a violent gang was not membership in a social group for purposes of withholding); *Kohli v. Gonzales*, 473 F.3d 1061, 1071 (9th Cir. 2007) (brief detention without mistreatment, occasion in which police told petitioner to go home and stop rallying, and police call to petitioner’s grandmother that it was in petitioner’s best interest to stop participating with activists was insufficient); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (evidence of harassment and attacks on interracial and interreligious couple in Fiji not strong enough); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 (9th Cir. 2003) (no compelling evidence that persecution of nonpolitical Albanians in Kosovo was so widespread that applicant faced a clear probability of persecution); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (given changes in Romania since departure); *Hakeem v. INS*, 273 F.3d 812, 817 (9th Cir. 2001) (remaining family unharmed, and applicant made two trips to Pakistan), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007), *abrogated on other grounds as stated in Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025); *Lim v. INS*, 224 F.3d 929, 938 (9th Cir. 2000) (given post-threat harmless period and family safety); *Barraza Rivera v. INS*, 913 F.2d 1443, 1454 (9th Cir. 1990) (insufficient evidence to show that petitioner would be forced to participate in assassinations); *Arteaga v. INS*, 836 F.2d 1227, 1231 n.6 (9th Cir. 1988) (one-time threat of conscription sufficient for asylum, but not for withholding), *abrogated on other grounds by INS v. Elias-*

Zacarias, 502 U.S. 478 (1992); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1373 (9th Cir. 1985) (no specific threat, and government unaware of petitioner’s protest activities).

10. No Derivative Withholding of Removal

Unlike asylum, withholding of removal relief is not derivative. *Compare* 8 U.S.C. § 1158(b)(3) (permitting derivative asylum for spouses and children as defined in 8 U.S.C. § 1101(b)(1)(A), (B), (C), (D), or (E)), *and* 8 C.F.R. § 1208.21, *with* 8 U.S.C. § 1231(b)(3) (failing to provide derivative withholding of removal); *see also* *Sumolang v. Holder*, 723 F.3d 1080, 1083 (9th Cir. 2013) (recognizing that the asylum statute allows for derivative beneficiaries of the principal applicant for asylum, but that the withholding of removal statute makes no such allowance); *Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005).

B. Bars to Withholding

Withholding is mandatory unless an exception applies. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999). Five exceptions are discussed below.

1. Nazis

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

2. Persecution-of-Others Bar

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

3. Particularly Serious Crime Bar

“An alien is ineligible for asylum or withholding of removal if ‘the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.’” *Hernandez v.*

Garland, 52 F.4th 757, 765 (9th Cir. 2022) (citing 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii)); *see also Kankamalage v. INS*, 335 F.3d 858, 864 & n.1 (9th Cir. 2003) (noting that these statutory provisions apply only to immigration proceedings commenced on or after April 1, 1997; if an applicant pled guilty to the crime before October 1, 1990, the particularly serious crime bar cannot be applied to categorically deny relief).

A person convicted of a particularly serious crime is a per se danger to the community. *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 (9th Cir. 2018) (“It is irrebuttably presumed that once a crime is determined to be particularly serious, the individual who committed that crime presents a danger to the community such that he or she is not entitled to protection by this country from persecution in another country.”).

“[T]he ‘particularly serious crime’ provision is not unconstitutionally vague on its face.” *Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2018) (addressing the provision within the meaning of 8 U.S.C. § 1231(b)(3)(B)(ii), which rendered the petitioner ineligible for statutory withholding of removal and withholding of removal under the Convention Against Torture).

This court has jurisdiction to review the BIA’s determination that an applicant has been convicted of a “particularly serious crime.” *Delgado v. Holder*, 648 F.3d 1095, 1099–1100 (9th Cir. 2011) (en banc) (overruling *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001), in light of *Kucana v. Holder*, 558 U.S. 233 (2010)).

The court reviews the agency’s determination of whether an offense constitutes a particularly serious crime for abuse of discretion. *See Hernandez v. Garland*, 52 F.4th 757, 765 (9th Cir. 2022) (citing *Arbid v. Holder*, 700 F.3d 379, 383 (9th Cir. 2012), and 8 U.S.C. § 1252(a)(2)(B)(ii)). “Under that standard, we are ‘limited to ensuring that the agency relied on the appropriate factors and proper evidence,’ and we may not ‘reweigh the evidence and reach our own determination about the crime’s seriousness.’” *Hernandez v. Garland*, 52 F.4th 757, 765 (9th Cir. 2022) (quoting *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015)).

“While we cannot reweigh evidence to determine if the crime was indeed particularly serious, we can determine whether the BIA applied the correct legal standard in making its determination. Therefore, we have 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) (citation modified); *see also Bare v. Barr*, 975 F.3d 952, 961 (9th Cir. 2020) (reviewing whether the BIA applied the correct legal standard and relied on appropriate factors and proper evidence in making its determination, and holding that the BIA did not abuse its discretion in concluding that Bare’s conviction for being a felon in possession of a firearm constituted a particularly serious crime); *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (holding that the BIA abused its discretion by failing to engage in case-specific factual analysis, but nonetheless denying the petition for review where petitioner failed to carry his burden of showing eligibility for withholding of removal); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015) (“Our review is limited to ensuring that the agency relied on the appropriate factors and proper evidence to reach this conclusion.” (citation modified)).

a. Per Se Particularly Serious Crimes

While “[a]ll aggravated felonies are categorically particularly serious crimes for the purposes of asylum, . . . only aggravated felonies for which the alien was sentenced to at least five years’ imprisonment are categorically particularly serious for the purposes of withholding of removal.” *Blandino-Medina v. Holder*, 712 F.3d 1338, 1346 (9th Cir. 2013) (citing 8 U.S.C. § 1231(b)(3)(B)(ii)); *see also Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (“For purposes of asylum, an aggravated felony is *per se* a particularly serious crime. . . . [For withholding of removal, however, an] aggravated felony is *per se* a particularly serious crime if the withholding applicant was sentenced to a term of imprisonment of at least five years.”).

The BIA may consider sentencing enhancements in determining whether a petitioner was convicted of an aggravated felony for which he or she was “sentenced to an aggregate term of imprisonment of at least 5 years,” and thus whether petitioner was convicted of a *per se* particularly serious crime. *Mairena v. Barr*, 917 F.3d at 1119, 1124 (9th Cir. 2019).

For withholding of removal purposes, the INA does *not* authorize the Attorney General to designate crimes as categorically particularly serious crimes by regulation. See *Blandino-Medina v. Holder*, 712 F.3d 1338, 1346 (9th Cir. 2013) (“[T]he withholding of removal statute is missing an analogue provision [to the asylum statute] permitting the Attorney General to designate crimes as categorically particularly serious even if they are not aggravated felonies for which the defendant has received a sentence of at least five years.”); cf. *Delgado v. Holder*, 648 F.3d 1095, 1106 (9th Cir. 2011) (en banc) (“There is little question that [the asylum provision at 8 U.S.C. § 1158(b)(2)(A)(ii)] permits the Attorney General, *by regulation*, to make particular crimes categorically particularly serious even though they are not aggravated felonies.”).

b. Case-By-Case Adjudication

For purposes of withholding of removal, this court accorded *Chevron* deference to the BIA’s interpretation of §1231(b)(3)(B) as authorizing the BIA to determine, by adjudication, whether a conviction is a particularly serious crime. *Delgado v. Holder*, 648 F.3d 1095, 1102–05 (9th Cir. 2011) (en banc). “Thus, that [a crime] is not statutorily defined as an aggravated felony does not preclude the BIA from determining that [a crime] can be a particularly serious crime.” *Id.* at 1097–98.

Where an applicant was convicted of an aggravated felony but sentenced to *fewer* than five years, “the BIA *may* determine that an applicant’s aggravated felony conviction qualifies as a particularly serious crime” for purposes of withholding of removal. *Flores-Vega*, 932 F.3d at 884; see also *Mairena v. Barr*, 917 F.3d 1119, 1124 (9th Cir. 2019) (“[A]ggravated felonies resulting in sentences fewer than five years are not per se particularly serious and still require a case-by-case analysis.” (quoting *Blandino-Medina v. Holder*, 712 F.3d 1338, 1347 (9th Cir. 2013))).

For offenses that are not per se particularly serious crimes, the legal standard for determining whether it is particularly serious was articulated in *Matter of Frentescu*, 18 I. &N. Dec. 244, 247 (BIA 1982). See *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 991 (9th Cir. 2018). Under *Matter of Frentescu*, the seriousness of a crime is judged by looking at such factors “as the nature of conviction, the circumstances underlying the conviction, the type of sentence imposed, and, most

importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.” *Id.* (quoting *Matter of Frentescu*, 18 I. & N. Dec. at 247).

“‘[A]ll reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.’” *Anaya-Ortiz*, 594 F.3d at 676 (quoting *Matter of N-A-M-*, 245 I. & N. Dec. 336, 342 (BIA 2007), and deeming the BIA’s interpretation reasonable); *see also Hernandez v. Garland*, 52 F.4th 757, 765–66 (9th Cir. 2022) (petitioner’s Form I-213 was a presumptively reliable document from which the agency could assess the crime’s seriousness); *Bare*, 975 F.3d at 964 (“The BIA may consider ‘all reliable information’ in determining whether a crime constitutes a particularly serious crime, which is a wide-reaching inquiry and includes consideration of conviction records, sentencing information, and ‘other information outside the confines of a record of conviction.’”); *Perez-Palafox v. Holder*, 744 F.3d 1138, 1141 (9th Cir. 2014) (all reliable information may be considered in the particularly serious crime determination, including information outside the confines of the record of conviction).

A noncitizen’s own testimony qualifies as the sort of “reliable information” that may be considered. *See Anaya-Ortiz*, 594 F.3d at 678–79 (concluding that BIA’s reliance on petitioner’s own testimony was proper, and that the BIA applied the correct legal standard in determining that petitioner’s drunk driving conviction was a particularly serious crime).

The “defendant’s mental condition at the time of the crime, whether it was considered during the criminal proceedings or not,” should also be considered. *Gomez-Sanchez*, 892 F.3d at 996. “This ensures that the Agency will in fact examine the circumstances of each conviction individually, taking into account all of the circumstances, as required under the case-by-case approach.” *Id.* at 996 & n.4 (holding that a BIA rule that a noncitizen’s mental health could not be considered as a factor in a particularly serious crime determination was not entitled to *Chevron* deference in connection with withholding of removal).

The court afforded *Chevron* deference to the Attorney General’s construction of 8 U.S.C. § 1231(b)(3)(B) as providing the Attorney General with

discretion to create a strong presumption that an offense is particularly serious. See *Miguel-Miguel v. Gonzalez*, 500 F.3d 941, 749–53 (9th Cir. 2007) (Attorney General was not precluded from issuing an adjudicative decision in *Matter of Y-L-*, 23 I. & N. Dec. 270 (A.G. 2002), creating a strong presumption that a drug trafficking offense resulting in a sentence of less than five years was a “particularly serious crime,” though that presumption could not be applied retroactively); see also *Rendon v. Mukasey*, 520 F.3d 967, 976 (9th Cir. 2008) (“[A]n aggravated felony containing a drug trafficking element is presumed to be a particularly serious crime which would make [a petitioner] ineligible for withholding of removal.”); cf. *Mendoza-Garcia v. Garland*, 36 F.4th 989, 999 (9th Cir. 2023) (BIA erred in applying a rebuttable presumption that petitioner’s burglary conviction was a particularly serious crime for purposes of withholding of removal).

Cross-reference: Criminal Issues in Immigration Law.

4. Serious Nonpolitical Crime Bar

Withholding of removal is not available if “there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before” arrival. 8 U.S.C. § 1231(b)(3)(B)(iii); see also *Villalobos Sura v. Garland*, 8 F.4th 1161, 1167 (9th Cir. 2021); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1079 (9th Cir. 2020); *Guan v. Barr*, 925 F.3d 1022, 1031 (9th Cir. 2019); *Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011) (the court interprets “serious reasons to believe as being tantamount to probable cause” (citation and internal quotation marks omitted)); *McMullen v. INS*, 788 F.2d 591, 598–99 (9th Cir. 1986) (applicant was ineligible for withholding because he facilitated or assisted Provisional Irish Republican Army terrorists to commit serious nonpolitical crimes), *overruled on other grounds by Barapind v. Enomoto*, 400 F.3d 744, 751 n.7 (9th Cir. 2005) (en banc).

“[A] ‘serious non-political crime’ is a crime that was not committed out of ‘genuine political motives,’ was not directed toward the ‘modification of the political organization or . . . structure of the state,’ and in which there is no direct, ‘causal link between the crime committed and its alleged political purpose and object.’”

Guan, 925 F.3d at 1031–32 (quoting *McMullen*, 788 F.2d at 595) (substantial evidence supported the IJ’s finding that there was probable cause to believe Guan committed a serious nonpolitical crime).

The court has “interpreted the ‘serious reasons’ standard as ‘tantamount to probable cause.’” *Villalobos Sura*, 8 F.4th at 1167 (quoting *Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011)).

“The burden-shifting framework of 8 C.F.R. § 1240.8(d) [(‘If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.’)] cannot override the statutory requirement that there be ‘serious reasons’ to believe that the bar applies. 8 U.S.C. §§ 1158(b)(2)(A)(iii) [(restricting eligibility for asylum applicants where ‘there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States’)], 1231(b)(3)(B)(iii) [(same, in the context of withholding of removal)].” *Gonzalez-Castillo v. Garland*, 47 F.4th 971, 979 (9th Cir. 2022). Thus, “[t]o apply the bar, the agency must find that there are serious reasons to believe that the petitioner committed a serious nonpolitical crime, and to do so, there must be evidence supporting a finding of probable cause.” *Id.* & 977 (substantial evidence did not support finding of commission of serious nonpolitical crime where Interpol Red Notice contained errors that “cast[] doubt on its reliability, and . . . fail[ed] to articulate any specific crime of which [petitioner] [was] accused”); *cf.* *Villalobos-Sura v. Garland*, 8 F.4th 1161, 1167 (9th Cir. 2021) (arrest warrant and Interpol Red Notice, combined with the incredibility of petitioner’s testimony, established the requisite probable cause).

The agency is not required to balance the applicant’s criminal acts against the risk of persecution. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999); *see also Kenyeres v. Ashcroft*, 538 U.S. 1301, 1306 (2003) (holding that petitioner was not eligible for a stay of removal pending review where substantial evidence supported the IJ’s determination that petitioner committed serious financial crimes in Hungary).

5. Security and Terrorist Bar; Material Support

An applicant is ineligible for withholding of removal if the Attorney General decides that there are reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1231(b)(3)(B); *Rayamajhi v. Whitaker*, 912 F.3d 1241, 1244 (9th Cir. 2019) (post-REAL ID Act) (“A noncitizen who has engaged in ‘terrorist activity’ cannot obtain asylum or withholding of removal.”); *Malkandi v. Holder*, 576 F.3d 906, 914–17 (9th Cir. 2009) (post-REAL ID Act) (substantial evidence supported the adverse national security finding that petitioner was a danger to national security). An applicant who is deportable for engaging in terrorist activity “shall be considered to be an alien for whom there are reasonable grounds for regarding as a danger to the security of the United States.” 8 U.S.C. § 1231(b)(3)(B)(iv); see also *Annachamy v. Holder*, 733 F.3d 254, 258 (9th Cir. 2013), overruled on other grounds by *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014); *Khan v. Holder*, 584 F.3d 773, 785 (9th Cir. 2009) (IJ’s decision that petitioner belonged to a “terrorist organization,” rendering him ineligible for asylum and withholding of removal, was supported by substantial evidence).

The commission of “an act that the actor knows, or reasonably should know, affords material support . . . to a terrorist organization or a member of a terrorist organization, unless the alien did not know (and should not reasonably have known) that the organization was a terrorist organization,” qualifies as engaging in terrorist activity. See *Rayamajhi*, 912 F.3d at 1244 (citing 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)).

“[T]he INA’s material support bar contains no implied exception for de minimis aid in the form of funds.” *Rayamajhi*, 912 F.3d at 1245 (“Petitioner admitted that, in 2009, he gave about \$50 to someone whom he knew was a Maoist. Thus, substantial evidence support[ed] the IJ’s finding, adopted by the BIA, that Petitioner gave material support to a terrorist organization, rendering him ineligible for asylum and withholding of removal.”).

“[T]he material support bar does not include an implied exception for individuals who assist organizations engaged in legitimate political violence or who provide support under duress.” *Annachamy v. Holder*, 733 F.3d 254, 267 (9th Cir. 2013), overruled on other grounds by *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014); see also *Rayamajhi*, 912 F.3d at 1244.

Interpreting the prior version of the terrorist bar to withholding in *Cheema v. Ashcroft*, the court held that it was impermissible to find an applicant a danger to the security of the United States solely because he engaged in terrorist activity, 383 F.3d 848, 857 (9th Cir. 2004). For an applicant to be barred by this section, the court said that there must be a finding supported by substantial evidence that links the terrorist activity with one of the criteria relating to this country's national security. *Id.* at 857; *see also Hosseini v. Gonzales*, 471 F.3d 953, 958 (9th Cir. 2006) (remanding for further consideration of security bar in light of *Cheema*); *cf. Bellout v. Ashcroft*, 363 F.3d 975, 978–79 (9th Cir. 2004) (applying a newer version of the statute that does not include the two-prong test and concluding that the applicant was barred from withholding due to his terrorist activities), *superseded by statute on other grounds as stated in Khan v. Holder*, 584 F.3d 773, 779–80 (9th Cir. 2009). Accordingly, *Cheema* has been superseded by statute on this point. *See Singh v. Holder*, 485 F. App'x 216, 217 (9th Cir. 2012) (unpublished).

All removal proceedings are subject to the REAL ID Act's expanded definitions of terrorist organizations and terrorist related activities. *See* 8 U.S.C. §§ 1182(a)(3)(B), 1227(a)(4)(B); *see Haile v. Holder*, 658 F.3d 1122, 1126 n.3 (9th Cir. 2011) (noting that the REAL ID Act's "amendments to § 1182, which expanded the definitions of terrorist organizations and terrorist-related activities, were given retroactive effect"); *see also Bojnoordi v. Holder*, 757 F.3d 1075, 1077 (9th Cir. 2014) ("[T]he statutory terrorism bar applies retroactively to an alien's material support of a 'Tier III' terrorist organization.").

In *Budiono v. Lynch*, 837 F.3d 1042, 1051 (9th Cir. 2016), the court concluded "that no evidence in the record support[ed] the IJ's finding that the JMA is a terrorist organization; therefore, the Board erred in denying Budiono's application for [withholding of removal] under the terrorist bar."

IV. CONVENTION AGAINST TORTURE (CAT)

"CAT prohibits removal of a noncitizen to a country where the noncitizen likely would be tortured." *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); *see Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) ("Article 3 [of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] provides that a signatory nation will not expel, return

. . . or extradite a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture.” (internal quotation marks omitted)), *as amended by* [355 F.3d 1140 \(9th Cir. 2004\)](#).

The United States signed the Convention Against Torture on April 18, 1988, and Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA) in 1988 to implement Article 3 of CAT. [Pub. L. No. 105-277](#), Div. G, Title XXII, 112 Stat. 2681-822 (codified as Note to [8 U.S.C. § 1231](#)); *see also* [Maldonado v. Lynch](#), [786 F.3d 1155, 1162 \(9th Cir. 2015\)](#) (en banc) (“In 1988, the United States signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1465 U.N.T.S. 85 (1988). Article 3 of CAT states that a signatory nation must not ‘expel, return . . . or extradite’ a person to a country ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture.’”).

The implementing regulations for CAT are found in [8 C.F.R. §§ 1208.16 to 1208.18](#).

Asylum applications filed on or after April 1, 1997, “shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.” [8 C.F.R. § 1208.13\(c\)\(1\)](#); *Nuru v. Gonzales*, [404 F.3d 1207, 1223 n.13 \(9th Cir. 2005\)](#); *see also* *Pirir-Boc v. Holder*, [750 F.3d 1077, 1086 n.9 \(9th Cir. 2014\)](#) (“[A] CAT claim is sufficiently raised when an alien declares his fear of future torture on his asylum application and provides supporting evidence during the removal hearing.”).

Noncitizens who were under an order of removal that became final before March 22, 1999, were permitted to move to reopen proceedings for the sole purpose of seeking protection under the Convention, so long as the motion was filed by June 21, 1999, and the evidence submitted in support of the motion demonstrated prima facie eligibility for relief. *See* [8 C.F.R. § 1208.18\(b\)\(2\)\(i\) and \(ii\)](#).

There are two forms of protection under the Convention Against Torture: (1) withholding of removal under [8 C.F.R. § 1208.16\(c\)](#) for noncitizens who are

not barred from eligibility under FARRA for having been convicted of a “particularly serious crime” or an aggravated felony for which the term of imprisonment is at least five years; and (2) deferral of removal under 8 C.F.R. § 1208.17(a) for noncitizens entitled to protection but subject to mandatory denial of withholding. See *Maldonado*, 786 F.3d at 1162; *Hosseini v. Gonzales*, 471 F.3d 953, 958–59 (9th Cir. 2006); see also *Haile v. Holder*, 658 F.3d 1122, 1130 (9th Cir. 2011); *Cole v. Holder*, 659 F.3d 762, 770–71 (9th Cir. 2011) (discussing CAT generally).

A. Standard of Review

“Although a noncitizen may obtain judicial review of factual challenges to CAT orders, that review is highly deferential The standard of review is the substantial-evidence standard: The agency’s ‘findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.’” *Nasrallah v. Barr*, 590 U.S. 573, 583–84 (2020) (quoting 8 U.S.C. § 1252(b)(4)(B)); see also *Lalayan v. Garland*, 4 F.4th 822, 840 (9th Cir. 2021) (“We review for substantial evidence the BIA’s determination that [Lalayan] is not eligible for protection under CAT.”); *Lopez v. Sessions*, 901 F.3d 1071, 1074 (9th Cir. 2018); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1078 (9th Cir. 2015); *Owino v. Holder*, 771 F.3d 527, 531–32 (9th Cir. 2014); see also *Zheng v. Holder*, 644 F.3d 829, 835 (9th Cir. 2011) (“In order for this court to reverse the BIA with respect to a finding of fact, the evidence must compel a different conclusion from the one reached by the BIA.”).

“We review questions of law regarding CAT claims de novo.” *Park v. Garland*, 72 F.4th 965, 978 (9th Cir. 2023) (citing *Velasquez-Samayoa v. Garland*, 49 F.4th 1149, 1154 (9th Cir. 2022)); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003) (the BIA’s interpretation of purely legal questions is reviewed de novo).

Mixed questions of law and fact are reviewed de novo. See *Xochihua-Jaimes*, 962 F.3d at 1183.

1. Agency Must Consider All Evidence

“CAT’s implementing regulations require the agency to consider ‘all evidence relevant to the possibility of future torture,’ and we have reversed where

the agency has failed to do so.” *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1089 (9th Cir. 2020) (quoting *Parada v. Sessions*, 902 F.3d 901, 914–15 (9th Cir. 2018) (quoting 8 C.F.R. § 1208.16(c)(3))); *see also Arrey v. Barr*, 916 F.3d 1149, 1160–61 (9th Cir. 2019); *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 n.6 (9th Cir. 2010) (“The regulations implementing CAT explicitly require the IJ to consider ‘all evidence relevant to the possibility of future torture.’” (quoting 8 C.F.R. § 208.16(c)(3))); *see also Udo v. Garland*, 32 F.4th 1198, 1202–06 (9th Cir. 2022) (remanding CAT claim where the BIA failed to give reasoned consideration to potentially dispositive evidence, including an excommunication notice and letters and affidavits from the petitioner’s family members); *De Leon Lopez v. Garland*, 51 F.4th 992, 1008 (9th Cir. 2022) (remanding CAT claim where the “IJ and BIA disregarded myriad contextual considerations pertinent to the likelihood of future torture”).

The court has applied a presumption that the BIA reviewed the record in the CAT context and stated that the BIA need not individually identify and discuss evidence that is neither “highly probative” nor “potentially dispositive.” *Hernandez v. Garland*, 52 F.4th 757, 770–71 (9th Cir. 2022) (quoting *Castillo v. Barr*, 980 F.3d 1278, 1283 (9th Cir. 2020), and *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011)).

“CAT claims must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible CAT claims.” *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1308 (9th Cir. 2015); *see also Velasquez-Samayoa v. Garland*, 49 F.4th 1149, 1155 (9th Cir. 2022) (“[W]hen an applicant posits multiple theories for why he would be tortured, the Agency should consider the aggregate risk posed by all sources and grant CAT relief if the cumulative probability of torture is greater than 50 percent.” (citing *Matter of J-F-F-*, 23 I. & N. Dec. 912 (A.G. 2006), and *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011))); *cf. Park v. Garland*, 72 F.4th 965, 983 (9th Cir. 2023) (“There is no indication that the BIA failed to ‘tak[e] into account all possible sources of torture’ where it expressly referenced both theories.” (citation omitted)); *Hernandez v. Garland*, 52 F.4th 757, 772–73 (9th Cir. 2022) (“Although the Board did not specifically address the combined probability of torture from different sources, its discussion of the CAT claim contained nothing to suggest that the Board had not adopted that aspect of the [IJ’s] reasoning.” (citing *Iraheta-Martinez v. Garland*, 12 F.4th 942, 960 (9th

[Cir. 2021](#)) (holding that, even where “the BIA did not make it perfectly clear that it was performing an aggregate analysis,” its opinion was “fairly read as approving the [immigration judge’s] finding that the probability of torture is less than 50% in the aggregate”))).

“[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* [Diaz-Reynoso v. Barr](#), 968 F.3d 1070, 1089 (9th Cir. 2020) (the BIA’s statement that it “consider[ed] all of the evidence” did not suffice, and remanding for further consideration of CAT claim); [Parada v. Sessions](#), 902 F.3d 901, 914 (9th Cir. 2018) (agency failed to consider all relevant evidence and improperly construed the government acquiescence standard; remanding for further consideration of CAT claim); [Gonzalez-Caraveo v. Sessions](#), 882 F.3d 885, 894 (9th Cir. 2018) (no indication that 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) (post-REAL ID Act)); *see also* [Rodriguez-Jimenez v. Garland](#), 20 F.4th 434, 435, 439 (9th Cir. 2021) (stating that “the agency need not provide a detailed explanation of every argument or piece of evidence in its decision,” and holding that given the agency’s express recognition and discussion of materials in the record, the BIA’s decisions and adoptions of IJ rulings adequately conveyed the reasoning behind the denial of the CAT claim), *overruled on other grounds by* [Alam v. Garland](#), 11 F.4th 1133, 1135–36 (9th Cir. 2021) (en banc)); [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.”).

“[T]he agency’s decision to credit some parts of the record over others does not mean it ignored relevant evidence.” [Smith v. Garland](#), 103 F.4th 663, 672 (9th Cir. 2024) (record did not establish that agency failed to consider all evidence where the IJ specifically cited parts of the record that supported the petitioner’s

case and there was no indication that the IJ ignored highly probative or potentially dispositive evidence; “The IJ and BIA were not required to discuss each of the approximately 1300 pages of evidence that Smith submitted.”).

Cross-reference: Standards of Review.

B. Definition of Torture

“The Torture Convention defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him . . . for an act he . . . has committed . . . when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity.” *De Leon Lopez v. Garland*, 51 F.4th 992, 1004 (9th Cir. 2022) (quoting 8 C.F.R. § 1208.18(a)(1)); *see also* *Sharma v. Garland*, 9 F.4th 1052, 1067 (9th Cir. 2021); *Kaur v. Garland*, 2 F.4th 823, 836 (9th Cir. 2021); *Acevedo Granados v. Garland*, 992 F.3d 755, 764–65 (9th Cir. 2021) (“In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.”); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1089 (9th Cir. 2020) (“Torture is any act by which severe pain or suffering is intentionally inflicted for such purposes as obtaining information or a confession, punishing an act committed or one suspected of having been committed, intimidating or coercing, or for any reason based on discrimination of any kind.”); *Davila v. Barr*, 968 F.3d 1136, 1144 (9th Cir. 2020) (“Torture is ‘more severe than persecution.’” (citation omitted)); *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1029 (9th Cir. 2019) (defining torture, quoting 8 C.F.R. § 1208.18(a)(1)); *Singh v. Whitaker*, 914 F.3d 654, 663 (9th Cir. 2019) (defining torture, quoting 8 C.F.R. § 1208.18(a)(1)); *Lopez v. Sessions*, 901 F.3d 1071, 1078 (9th Cir. 2018) (“Torture is defined as an extreme form of cruel and inhuman treatment that is specifically intended to inflict severe physical or mental pain or suffering.”); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015) (“Torture is defined, in part, as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind.’”); *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) (explaining that “petitioner must show that severe pain or suffering was specifically intended—that is, that the actor intend[ed] the actual consequences of his conduct”). “Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel,

inhuman or degrading treatment or punishment that do not amount to torture.” *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(2)), as amended by 355 F.3d 1140 (9th Cir. 2004); see also *Medina-Rodriguez v. Barr*, 979 F.3d 738, 749–50 (9th Cir. 2020).

“The United States included a reservation when it ratified the Convention, narrowing the definition of torture with respect to ‘mental pain or suffering.’ The reservation states that ‘mental pain or suffering refers to the prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.” *Nuru v. Gonzales*, 404 F.3d 1207, 1217 n.5 (9th Cir. 2005).

“Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” *Al-Saher*, 268 F.3d at 1147 (quoting 8 C.F.R. § 208.18(a)(3) (2002)), as amended by 355 F.3d 1140 (9th Cir. 2004); see also *Guan v. Barr*, 925 F.3d 1022, 1034 (9th Cir. 2019).

But “[w]hether used as a means of punishing desertion or some other form of military or civilian misconduct or whether inflicted on account of a person’s political opinion, torture is *never* a lawful means of punishment.” *Nuru*, 404 F.3d at 1207. Lawful sanctions encompass “‘judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty,’ but only so long as those sanctions do not ‘defeat the object and purpose of [CAT] to prohibit torture.’” *Id.* at 1221 (citing 8 C.F.R. § 1208.18(a)(3)). “A government cannot exempt tortuous acts from CAT’s prohibition merely by authorizing them as permissible forms of punishment in its domestic law.” *Id.*

“The threat of imminent death, whether directed at the applicant or someone the applicant knows, may constitute torture.” *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1183 (9th Cir. 2020).

“Rape and sexual assault may constitute torture, and ‘certainly rise[] to the level of torture for CAT purposes’ when inflicted due to the victim’s sexual orientation.” *Id.* (holding that the existing record compelled the conclusion that petitioner had met her burden under CAT); *see also Akosung v. Barr*, 970 F.3d 1095, 1105 (9th Cir. 2020) (“On remand, the Board should consider the threat of rape in assessing whether Akosung has established that she would be more likely than not to be tortured if returned to Cameroon.”).

C. Burden of Proof

To be eligible for withholding of removal under CAT, the applicant has the burden of establishing that if removed to the proposed country of removal “he is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, *but* defeats the object and purpose of CAT.” *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005) (internal quotation marks omitted); *see also Plancarte Saucedo v. Garland*, 23 F.4th 824, 834 (9th Cir. 2022) (“To establish entitlement to protection under CAT, an applicant must show ‘it is more likely than not that he or she would be tortured if removed to the proposed country of removal.’” (quoting 8 C.F.R. § 1208.16(c)(2))); *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 898 (9th Cir. 2021) (same); *Akosung v. Barr*, 970 F.3d 1095, 1104 (9th Cir. 2020) (“Under the CAT regulations, the applicant bears the burden of establishing that ‘it is more likely than not that he or she would be tortured if removed.’” (quoting 8 C.F.R. § 1208.16(c)(2))); *Davila v. Barr*, 968 F.3d 1136, 1144 (9th Cir. 2020) (“For withholding of removal under CAT, Davila must show that it is more likely than not that . . . she would be tortured if removed’ to Nicaragua.” (quoting 8 C.F.R. § 208.16(c)(2))); *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1183 (9th Cir. 2020) (“To be eligible for relief under CAT, an applicant bears the burden of establishing that she will more likely than not be tortured with the consent or acquiescence of a public official if removed to her native country.”); *Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (petitioner must prove that it is more likely than not that he will be tortured in the country of removal); *Mairena v. Barr*, 917 F.3d 1119, 1125 (9th Cir. 2019) (“The applicant bears the burden of proving that he is eligible for deferral of removal under CAT.”); *Singh v. Whitaker*, 914 F.3d 654, 662–63 (9th Cir. 2019) (“The petitioner must show that he ‘more likely than not’ will be tortured if he returns home.”); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018); *Andrade v. Lynch*, 798 F.3d 1242,

1245 (9th Cir. 2015) (“The petitioner bears the burden of proof, 8 C.F.R. § 208.16(c)(2), and the BIA’s factual findings must be upheld ‘unless the evidence in the record compels a contrary conclusion.’”); *Konou v. Holder*, 750 F.3d 1120, 1124 (9th Cir. 2014) (“Regulations implementing the CAT instruct that ‘[t]he burden of proof is on the applicant . . . to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.’” (quoting 8 C.F.R. § 1208.16(c)(2))); *Zheng v. Holder*, 644 F.3d 829, 835 (9th Cir. 2011) (“To receive relief under CAT, Petitioner has the burden of showing that he ‘is more likely than not to be tortured in the country of removal.’”); *Go v. Holder*, 640 F.3d 1047, 1054 (9th Cir. 2011) (petitioner failed to sustain burden of proof); *Edu v. Holder*, 624 F.3d 1137, 1146–47 (9th Cir. 2010) (granting petition and ordering CAT relief where the petitioner carried the burden of proof); *Wakkary v. Holder*, 558 F.3d 1049, 1067–68 (9th Cir. 2009); 8 C.F.R. § 1208.16(c)(2).

This standard requires that an applicant demonstrate “only a chance greater than fifty percent that he will be tortured” if removed. *Hamoui v. Ashcroft*, 389 F.3d 821, 827 (9th Cir. 2004); *see also Macedo Templos v. Wilkinson*, 987 F.3d 877, 883 (9th Cir. 2021); *Castillo v. Barr*, 980 F.3d 1278, 1283 (9th Cir. 2020); *Wakkary*, 558 F.3d at 1068.

A “petitioner carries this burden whenever he or she presents evidence establishing ‘substantial grounds for believing that he [or she] would be in danger of being subjected to torture’ in the country of removal.” *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001).

The “failure to establish eligibility for asylum does not necessarily doom an application for relief under the United Nations Convention Against Torture”; “the standards for the two bases of relief are distinct and should not be conflated.” *Farah v. Ashcroft*, 348 F.3d 1153, 1156–57 (9th Cir. 2003).

“An adverse credibility determination is not necessarily a death knell to CAT protection.” *Shrestha v. Holder*, 590 F.3d 1034, 1048 (9th Cir. 2010); *see also Garcia v. Holder*, 749 F.3d 785, 791 (9th Cir. 2014) (“An adverse credibility determination does not, by itself, necessarily defeat a CAT claim . . .”). “But when the petitioner’s ‘testimony [is] found not credible, to reverse the BIA’s decision [denying CAT protection,] [the court] would have to find that the reports alone compelled the conclusion that [the petitioner] is more likely than not to be

tortured.” *Shrestha*, 590 F.3d at 1048–49 (citation omitted); *see also Lalayan v. Garland*, 4 F.4th 822, 840 (9th Cir. 2021) (substantial evidence supported denial of CAT relief where the country reports submitted did not indicate a particularized risk of torture were petitioner removed to Armenia); *Mukulumbutu v. Barr*, 977 F.3d 924, 927 (9th Cir. 2020) (“Absent credible testimony, Mukulumbutu’s CAT claim rests on country conditions reports and other corroborating evidence in the record including the letters from his family and acquaintances.”); *Kamalthas*, 251 F.3d at 1282–83 (remanding for reconsideration of a CAT claim where the BIA relied unduly on its prior adverse credibility determination and failed to consider relevant country conditions in the record); *Taha v. Ashcroft*, 389 F.3d 800, 802 (9th Cir. 2004) (remanding for consideration of CAT claim that the BIA denied on the same adverse credibility grounds cited for the denial of asylum). *But see Farah*, 348 F.3d at 1157 (affirming denial of asylum and CAT claims based on adverse credibility determination where the applicant pointed to no additional evidence relevant to the CAT claim).

In *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc), the court explained:

Section 1208.16(c)(2) provides that an applicant for deferral of removal must demonstrate that it is more likely than not that he or she will be tortured if removed. In deciding whether the applicant has satisfied his or her burden, the IJ must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal. Section 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative. *See* § 1208.16(c)(3)(i)-(iv); *Kamalthas*, 251 F.3d at 1282. Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof.

Maldonado v. Lynch, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc).

Maldonado overruled *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008) (concluding that petitioner failed to establish that internal relocation was impossible within Mexico, and determining that substantial evidence supported the IJ’s decision to deny deferral of removal under the CAT), *Singh v. Gonzales*, 439

F.3d 1100, 1113 (9th Cir. 2006) (applicant presumably would be safe in another area of India where police are not under the mistaken impression that he was a separatist), *Hasan v. Ashcroft*, 380 F.3d 1114, 1122 (9th Cir. 2004) (noting differing standards for evaluating possibility of internal relocation for asylum and CAT claims), and *Perez-Ramirez v. Holder*, 648 F.3d 953 (9th Cir. 2011) (holding in the asylum context that the BIA improperly placed the burden on petitioner to show that he could not relocate within Mexico), to the extent they conflicted with the plain text of the regulations. See *Maldonado*, 786 F.3d at 1164.

“[T]he CAT regulations cast a wide evidentiary net, providing that ‘all evidence relevant to the possibility of future torture shall be considered, including, but not limited to . . . evidence of gross, flagrant or mass violations of human rights within the country of removal’” *Wakkary*, 558 F.3d at 1068 (quoting 8 C.F.R. § 1208.16(c)(3)); see also *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1088–90 (9th Cir. 2020) (remanding for further consideration of CAT claim where the BIA failed to consider all relevant evidence); *Quijada-Aguilar*, 799 F.3d at 1308 (“[O]nce Quijada-Aguilar appealed the IJ’s denial of deferral of removal under CAT to the BIA, the BIA was required to consider ‘all evidence relevant to the possibility of future torture,’ 8 C.F.R. § 1208.16(c)(3), including evidence based on family affiliation, in keeping with the regulation requiring the agency to evaluate a CAT claim in light of the aggregate risk of torture from all sources.”); *Garcia v. Holder*, 749 F.3d 785, 791 (9th Cir. 2014) (post-REAL ID Act) (“[I]n determining whether a petitioner will more likely than not be tortured if returned to his or her home country, ‘all evidence relevant to the possibility of future torture shall be considered.’ 8 C.F.R. § 1208.16(c)(3). *Kamalthas* only requires that a petitioner have the opportunity to introduce additional ‘documentary evidence of torture,’ and that the IJ and BIA consider all the evidence presented.”).

In *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1183 (9th Cir. 2020), the court said:

In evaluating a CAT claim, “the IJ must consider all relevant evidence; no one factor is determinative.” *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc). Relevant evidence includes:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

Xochihua-Jaimes, 962 F.3d at 1183 (quoting 8 C.F.R. § 1208.16(c)(3)).

“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.” *Kamalthas*, 251 F.3d at 1282 (quoting 8 C.F.R. § 208.16(c)(2)).

A finding of past persecution does not necessarily mean that the noncitizen will be tortured in the future. See *Singh v. Whitaker*, 914 F.3d 654, 663 (9th Cir. 2019) (“That Singh suffered persecution in the past does not necessarily mean he will be tortured in the future.”); *Ahmed v. Keisler*, 504 F.3d 1183, 1201 (9th Cir. 2007) (although evidence in the record compelled a finding that Ahmed would be *persecuted* if returned to Bangladesh, the record did not demonstrate it was more likely than not he would be *tortured*).

D. Country Conditions Evidence

“[C]ountry conditions alone can play a decisive role in granting relief under the Convention.” *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1283 (9th Cir. 2001) (holding that a negative credibility finding in asylum claim does not preclude relief under the Convention, especially where documented country conditions information corroborated the “widespread practice of torture against Tamil males”); see also *Uc Encarnacion v. Bondi*, 156 F.4th 927, 941 (9th Cir. 2025) (“An applicant may . . . satisfy the burden to receive CAT relief with evidence of country conditions alone.”); *Antonio v. Garland*, 58 F.4th 1067, 1077–78 (9th Cir. 2023) (remanding and stating that, should the agency reach the CAT claim, it should determine whether previously considered country reports establish governmental involvement or acquiescence); *Mukulumbutu v. Barr*, 977 F.3d 924, 927 (9th Cir. 2020) (acknowledging that country conditions reports alone can play

a decisive role in granting CAT relief, but concluding that the country reports and other corroborating evidence in the record, absent credible testimony, did not meet the threshold for establishing CAT eligibility in the petitioner's case); *Guan v. Barr*, 925 F.3d 1022, 1034–35 (9th Cir. 2019) (remanding for the BIA to reconsider CAT claim in light of the country reports and other evidence in support of his claim of religion-based torture that neither the BIA nor the IJ previously addressed); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) (“[A] CAT applicant may satisfy his burden with evidence of country conditions alone.” (citation omitted)); *Konou v. Holder*, 750 F.3d 1120, 1125 (9th Cir. 2014) (“[J]ust as a State Department Report alone can carry an applicant’s burden of establishing a probability of torture, a Report can also serve to outweigh an applicant’s evidence of a probability of torture.”); *Madrigal v. Holder*, 716 F.3d 499, 508 (9th Cir. 2013) (“Under CAT’s implementing regulations, the BIA must consider all evidence of country conditions to determine the likelihood that an applicant would be tortured.”); *Mutuku v. Holder*, 600 F.3d 1210, 1214 (9th Cir. 2010) (given the country conditions evidence, the record did not compel finding that petitioner would likely be tortured upon return to Kenya); *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (“[A]ll evidence relevant to the possibility of future torture shall be considered, including, but not limited to . . . [e]vidence of gross, flagrant or mass violations of human rights within the country of removal; and [o]ther relevant information regarding conditions in the country of removal.” (emphasis omitted) (quoting 8 C.F.R. § 208.16(c)(3))).

The agency’s failure to consider evidence of country conditions in denying CAT relief constitutes reversible error. *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010).

See also Soto-Soto v. Garland, 1 F.4th 655, 662–63 (9th Cir. 2021) (country condition reports showed an increased threat of torture for indigenous women in Mexico); *Parada v. Sessions*, 902 F.3d 901, 915 (9th Cir. 2018) (“Thus, while the IJ did ‘consider’ the country conditions reports, the significant and material disconnect between the IJ’s quoted observations and his conclusions regarding Quiroz Parada’s CAT claim indicate that the IJ did not properly consider all of the relevant evidence before him.”); *Go v. Holder*, 640 F.3d 1047, 1054 (9th Cir. 2011) (country reports and testimony insufficient to compel conclusion that petitioner would be tortured); *Muradin v. Gonzales*, 494 F.3d 1208, 1211 (9th Cir. 2007) (petitioner eligible for CAT relief given past abuse and beatings and State

Department report stating that torture of conscripts, prisoners, and deserters by Armenian security personnel was likely); *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005) (relying on country report showing that the Eritrean government routinely prosecuted military deserters and subjected at least some of them to torture); *Abassi v. INS*, 305 F.3d 1028, 1029 (9th Cir. 2002) (holding that the BIA must consider the most recent State Department country conditions report where a pro se applicant refers to the report in his moving papers); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that the BIA was required to consider relevant information in the State Department report on Iraq), *as amended by* 355 F.3d 1140 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 906–07 (9th Cir. 2004) (Seventh Day Adventist eligible for CAT relief given past persecution and country conditions reports stating that the Burmese government regularly tortured detainees); *cf. Sowe v. Mukasey*, 538 F.3d 1281, 1288–89 (9th Cir. 2008) (petitioner not eligible for CAT where conditions in Sierra Leone had changed).

E. Past Torture

“When evaluating an application for CAT relief, the IJ and the BIA should consider ‘all evidence relevant to the possibility of future torture, including . . . [e]vidence of past torture inflicted upon the applicant.’” *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015) (quoting 8 C.F.R. § 1208.16(c)(3)) (concluding that petitioner suffered past torture where she was assaulted, raped, and singled out because of her transgender identity and presumed sexual orientation); *see also De Leon Lopez v. Garland*, 51 F.4th 992, 1008 (9th Cir. 2022) (remanding CAT claim where the evidence compelled the conclusion that two of petitioner’s attackers were police officers, thus requiring the agency to reconsider whether petitioner suffered past torture); *Dawson v. Garland*, 998 F.3d 876, 882 (9th Cir. 2021) (“[T]he BIA is required to consider ‘all evidence relevant to the possibility of future torture.’” (quoting 8 C.F.R. § 1208.16(c)(3))).

Evidence of past torture is relevant, but not alone sufficient, to a determination of eligibility for CAT relief. *See Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 705 (9th Cir. 2022) (“In assessing eligibility for CAT relief, . . . evidence of past torture . . . can be relevant in assessing an applicant’s risk of future torture but does not alone establish or even give rise to a presumption that the applicant will suffer future torture.”); *Ruiz-Colmenares v. Garland*, 25 F.4th 742, 751 (9th Cir. 2022) (“Evidence of past torture is relevant (though not alone

sufficient) in assessing a particular petitioner’s likelihood of future torture.”); *Mohammed v. Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005) (quoting 8 C.F.R. § 1208.16(c)(3) (2000)); see also *Singh v. Whitaker*, 914 F.3d 654, 663 (9th Cir. 2019) (“Relevant considerations for a CAT claim include evidence of past torture inflicted upon the applicant, evidence of safe internal relocation, evidence of mass violations of human rights within the country of removal, and other pertinent country conditions.”); *Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) (“[T]he existence of past torture is ordinarily the principal factor on which we rely.” (citation and internal quotation marks omitted)); *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001).

Evidence of past torture that causes “permanent and continuing harm” alone may be sufficient to establish automatic entitlement to CAT relief. See *Mohammed*, 400 F.3d at 802 (analogizing to *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005), which recognized that continuing persecution may establish entitlement to withholding of removal).

“[I]f an individual has been tortured and has escaped to another country, it is likely that he will be tortured again if returned to the site of his prior suffering, unless circumstances or conditions have changed significantly, not just in general, but with respect to the particular individual.” *Nuru v. Gonzales*, 404 F.3d 1207, 1217–18 (9th Cir. 2005) (noting that “individualized analysis” of how changed conditions will affect the applicant’s situation is required); see also *Avendano-Hernandez*, 800 F.3d at 1080 (the BIA erred in finding that petitioner was not subject to past torture by public officials in Mexico).

“When an applicant flees and goes into hiding to avoid torture, it can hardly be said that the absence of past harm negates the likelihood of future torture.” *Akosung v. Barr*, 970 F.3d 1095, 1105 (9th Cir. 2020).

F. Internal Relocation

“[I]n assessing eligibility for CAT relief, the agency must consider the *possibility* of relocation—without regard for the reasonableness of relocation that is considered in other types of applications (asylum and withholding of removal under the INA).” *Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 705 (9th Cir. 2022) (citing 8 C.F.R. § 1208.16(c)(3)) (noting that “the asylum and CAT

regulations with respect to the relocation factor ‘differ markedly’”); *cf. Edu v. Holder*, 624 F.3d 1137, 1147 (9th Cir. 2010) (concluding the BIA erred in declaring petitioner could reduce her risk of torture by relocating within Nigeria, as doing so would also require petitioner to give up her political activity, and granting the petition so that petitioner would not be forced to choose between her “conscience and torture”).

“A petitioner is not required to prove that internal relocation is impossible; rather, relocation is just one factor the BIA must consider in assessing the likelihood of future torture and is not determinative on its own.” *Dawson v. Garland*, 998 F.3d 876, 884 (9th Cir. 2021).

“The CAT regulation does not bar relief if an applicant could relocate, but it nevertheless provides that assessing the likelihood of future torture requires considering ‘[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured.’” *Akosung v. Barr*, 970 F.3d 1095, 1101 (9th Cir. 2020) (quoting 8 C.F.R. § 1208.16(c)(3)(ii)). “Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured” is relevant to the possibility of future torture. *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3) (2000)); *see also Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1186 (9th Cir. 2020) (“Among its assessment of ‘all evidence relevant to the possibility of future torture,’ the IJ must consider ‘[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured.’” (citation omitted)); *Aguilar Fermin v. Barr*, 958 F.3d 887, 893 (9th Cir. 2020) (substantial evidence supported the agency’s conclusion that Aguilar could relocate within Mexico); *Arrey v. Barr*, 916 F.3d 1149, 1160–61 (9th Cir. 2019) (substantial evidence did not support the BIA’s determination that petitioner could safely relocate within Cameroon to avoid future harm); *Singh v. Whitaker*, 914 F.3d 654, 663 (9th Cir. 2019) (substantial evidence supported denial of CAT relief even though relocation analysis was insufficient); *Edu v. Holder*, 624 F.3d 1137, 1146–47 (9th Cir. 2010) (record showed danger to political activists throughout Nigeria); *Singh v. Ashcroft*, 351 F.3d 435, 443 (9th Cir. 2003) (applicant could settle in a part of India where he was not likely to be tortured and was not personally threatened).

In *Maldonado v. Lynch*, 786 F.3d 1155, 1163–64 (9th Cir. 2015) (en banc), this court clarified that § 1208.16(c)(2) does not place the burden on the applicant to demonstrate that relocation is impossible within the proposed country of removal. Rather, all relevant evidence must be considered by the agency and no one factor is determinative. Furthermore, the regulations do not shift the burden of proof to the government. *See id.* In so holding, the court overruled *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008) (concluding that petitioner failed to establish that internal relocation was impossible within Mexico, and determining that substantial evidence supported the IJ’s decision to deny deferral of removal under the CAT), *Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006) (applicant would presumably be safe in another area of India where police are not under the mistaken impression that he is a separatist), *Hasan v. Ashcroft*, 380 F.3d 1114, 1122 (9th Cir. 2004) (noting differing standards for evaluating possibility of internal relocation for asylum and CAT claims), and *Perez-Ramirez v. Holder*, 648 F.3d 953 (9th Cir. 2011) (holding in the asylum context that the BIA improperly placed the burden on petitioner to show that he could not relocate within Mexico), to the extent they conflict with the plain text of the regulations. *See Maldonado*, 786 F.3d at 1163–64; *see also Dawson v. Garland*, 998 F.3d 876, 884 (9th Cir. 2021) (“A petitioner is not required to prove that internal relocation is impossible; rather, relocation is just one factor the BIA must consider in assessing the likelihood of future torture and is not determinative on its own.”); *Xochihua-Jaimes*, 962 F.3d at 1186–87 (explaining that although the BIA cited *Maldonado*, and neither the IJ nor the BIA expressly stated that the burden was on petitioner to prove impossibility of relocation, their analyses strongly indicated that they applied this reasoning anyway, and contrary to the BIA’s conclusion, the evidence relating to the possibility of relocation weighed in favor of granting relief).

See also Vasquez-Rodriguez v. Garland, 7 F.4th 888, 891, 898–99 (9th Cir. 2021) (holding that the IJ’s determination that applicant could relocate to another part of El Salvador was not supported by substantial evidence and that the agency failed to consider evidence showing that it was more likely than not that Vasquez-Rodriguez would be tortured if removed to El Salvador); *Dawson*, 998 F.3d at 884–85 (“[T]he record supports a finding that Dawson can safely relocate within Jamaica.”).

G. Differences Between CAT Protection and Asylum and Withholding

“[T]he Convention’s reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured ‘on account of’ a protected ground; it is narrower, however, because the petitioner must show that it is ‘more likely than not’ that he or she will be tortured, and not simply persecuted upon removal to a given country.” *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001); *see also Davila v. Barr*, 968 F.3d 1136, 1144 (9th Cir. 2020) (“An applicant for CAT relief need not show that she will be tortured on account of any particular ground.”); *Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (same).

“Unlike asylum and withholding, there are no mandatory bars to an applicant seeking deferral of removal under CAT.” *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1113–14 (9th Cir. 2011); *see also Annachamy v. Holder*, 733 F.3d 254, 258 (9th Cir. 2013) (“An alien who has engaged in terrorist activities is ineligible for asylum, withholding of removal and withholding under CAT, but remains eligible for deferral of removal under CAT.”), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014).

H. Agent or Source of Torture

For CAT relief to be available, the torture must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Zheng v. Ashcroft*, 332 F.3d 1186, 1188 (9th Cir. 2003) (emphasis and internal quotation marks omitted) (quoting 8 C.F.R. § 208.18(a)(1) (2002)); *see also Rodriguez-Hernandez v. Garland*, 89 F.4th 742, 753–54 (9th Cir. 2023) (substantial evidence supported the denial of CAT relief where petitioner testified that his family received a threatening call warning that he would be kidnapped when he visited Mexico, but petitioner was not able to identify who made the threats, his family did not make any payments, he did not plan on visiting Mexico, his family was never harmed, and his generalized fear of violence in Mexico was insufficient); *Rodriguez-Zuniga v. Garland*, 69 F.4th 1012, 1027 (9th Cir. 2023) (denying CAT claim where petitioner forfeited any challenge to the agency’s dispositive determination that she failed to demonstrate that the Guatemalan government would acquiesce or consent to her torture); *B.R. v.*

Garland, 26 F.4th 827, 844 (9th Cir. 2022) (“CAT protection cannot be granted unless an applicant shows a likelihood of torture that ‘is inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity.’” (quoting 8 C.F.R. § 208.18)); *Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (“The torture must be by government officials or private actors with government acquiescence.”); *Singh v. Whitaker*, 914 F.3d 654, 662 (9th Cir. 2019); *Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018) (“The torture must be ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’” (quoting 8 C.F.R. § 1208.18(a)(1))); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 836 (9th Cir. 2016) (quoting *Zheng*); *Silaya v. Mukasey*, 524 F.3d 1066, 1073 (9th Cir. 2008) (denying petition for relief under CAT where petitioner failed to demonstrate that it was more likely than not that she would be tortured “at the instigation of, or with the acquiescence of the Philippine government”).

“Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1059 (9th Cir. 2006) (citing 8 C.F.R. § 208.18(a)(1)); see also *Hernandez v. Garland*, 52 F.4th 757, 770 (9th Cir. 2022) (upholding agency’s finding that the government did not acquiesce to the sexual assaults by private actors where petitioner did not make the police aware of the nature of attacks; the evidence therefore supported the BIA’s finding that the police were not aware or willfully blind to the assaults); *Diaz-Reynoso*, 968 F.3d at 1089 (remanding for the agency to consider evidence that Diaz-Reynoso reported her abuse to two different authority figures in her remote, rural community and that neither helped her); *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1186 (9th Cir. 2020) (record compelled the conclusion that petitioner established the requisite level of acquiescence by public officials where she “testified to multiple instances of such acquiescence in the past involving her personal circumstances, and presented extensive country conditions evidence documenting the widespread problem of public official acquiescence in Zetas crimes generally”); *Del Cid Marroquin v. Lynch*, 823 F.3d 933, 937 (9th Cir. 2016) (“Salvadoran law prohibits extrajudicial killings and violence, and there is substantial evidence that the government enforces those laws—albeit imperfectly—against both gang members and rogue police officers.”); *Andrade-Garcia*, 828 F.3d at 836 (no-government-acquiescence determination supported where police actively investigated aunt’s death but

stopped in accordance with cousin’s decision, and petitioner’s testimony that an officer took a bribe from a robber did not demonstrate that the government was aware of the torture that was the basis of petitioner’s claim).

“Acquiescence” by government officials does not require actual knowledge or willful acceptance; awareness and willful blindness by governmental officials is sufficient. *Zheng*, 332 F.3d at 1197 (remanding CAT claim of Chinese applicant who feared being killed by the smugglers who brought him to the United States); see also *Kaur v. Garland*, 2 F.4th 823, 837 (9th Cir. 2021) (“The ‘consent or acquiescence’ requirement of CAT requires that the government of the country of deportation be aware of the alleged torture but either ‘willfully blind to it . . . or unwilling[] to oppose it.’” (citation omitted)); *Diaz-Reynoso*, 968 F.3d at 1089 (“The public official need not have actual knowledge of the specific incident of torture; instead, it is sufficient that the public official is aware that torture of the sort feared by the applicant occurs and remains willfully blind to it.”); *Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011) (“Acquiescence by government officials requires only that they were aware of the torture but remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.” (citations and internal quotation marks omitted)); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010) (granting petition for review and remanding to the BIA to reconsider application for CAT deferral of removal where agency construed “government acquiescence” too narrowly).

To establish acquiescence, the petitioner need not establish that public officials sanctioned—i.e., approved, authorized, or supported—the alleged conduct. *Ornelas-Chavez*, 458 F.3d at 1059 & n.4 (IJ erred by requiring the applicant to show that the government “sanctioned” his torture; “Because ‘sanction’ connotes greater volition and approbation than ‘acquiescence,’ ‘awareness,’ ‘willful blindness,’ and even ‘willful acceptance,’ the IJ used a higher legal standard to assess Ornelas-Chavez’s CAT claim than is permitted under the law.” (footnotes omitted)). “It is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.” *Id.* at 1060. “[T]he acquiescence standard is met where the record demonstrates that public officials at any level—even if not at the federal level—would acquiesce in torture the petitioner is likely to suffer.” *Parada*, 902 F.3d at 916 (holding that agency

improperly construed the acquiescence standard and failed to consider all evidence; remanding for further consideration of CAT claim).

“[A]n applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in her torture.” *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013). It is enough for her to show that she was subject to torture at the hands of local officials.

Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1080 (9th Cir. 2015) (brackets omitted).

“[A] general ineffectiveness on the government’s part to investigate and prevent crime will not suffice to show acquiescence.” *Andrade-Garcia*, 828 F.3d at 836. Furthermore, “inability to bring the criminals to justice is not evidence of acquiescence, as defined by the applicable regulations.” *Id.*

“[A] government does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it.” *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014) (citation omitted). Evidence of future acquiescence by public officials should be sufficiently related to the sources of petitioner’s likely torture.

B.R. v. Garland, 26 F.4th 827, 844 (9th Cir. 2022) (concluding that nothing in the record would compel a reasonable adjudicator to conclude that the Mexican government would acquiesce in B.R.’s torture).

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

An applicant also need not demonstrate that she would face torture while under public officials’ prospective custody or physical control. *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004) (“[P]etitioner may qualify for withholding of removal by showing that he or she would likely suffer torture while under *private parties*’ exclusive custody or physical control.”); *see also Ornelas-Chavez*, 458 F.3d at 1059 (same); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787 (9th Cir. 2004) (same).

See also *Davila v. Barr*, 968 F.3d 1136, 1144 (9th Cir. 2020) (substantial evidence did not support the BIA’s determination that petitioner failed to show that the Nicaraguan government consented to or acquiesced in her torture).

I. Mandatory Protection

“If an alien meets his burden of proof regarding future torture, withholding of removal [under CAT] is mandatory under the implementing regulations” *Nuru v. Gonzales*, 404 F.3d 1207, 1216 (9th Cir. 2005) (citing 8 U.S.C. § 1231(b)(3), and 8 C.F.R. §§ 1208.16–1208.18).

But there is one qualification to the mandatory nature of withholding under the CAT. “If the alien has committed a ‘particularly serious crime’ or an aggravated felony for which the term of imprisonment is at least five years, only deferral of removal, not withholding of removal, is authorized.” *Nuru*, 404 F.3d at 1216 n.4 (citing 8 C.F.R. §§ 1208.16(d), 1208.17).

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

J. Nature of Protection

Unlike asylum, CAT protection does not confer status; it affords only protection from return to the country where the applicant would be tortured. See 8 C.F.R. § 1208.16(f); *Huang v. Ashcroft*, 390 F.3d 1118, 1121 (9th Cir. 2005) (“Withholding entitles the alien to remain indefinitely in the United States and eventually to apply for permanent residence; deferral also prevents removal, but confers no lawful or permanent status.”).

K. Derivative Torture Claims

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

L. Exhaustion

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

If the petitioner does not appeal the denial of CAT relief to the BIA, but the BIA addresses the merits of the claim, the court may review it. *See Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018) .

Cross-reference: Jurisdiction Over Immigration Petitions.

M. Habeas Jurisdiction

“The REAL ID Act clarified that final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals.” *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); *cf. Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (recognizing habeas jurisdiction over CAT claims before enactment of the REAL ID Act in 2005).

N. Cases Granting CAT Protection or Remanding for Further Consideration

See Uc Encarnacion v. Bondi, 156 F.4th 927, 942–46 (9th Cir. 2025) (agency failed to give reasoned consideration to evidence supporting the likelihood that petitioner would be tortured upon return to Mexico, including: experts’

testimony that petitioner more likely than not would be tortured by Mexican law enforcement or by criminal organizations operating with virtual impunity given his gang-related tattoos; experts' testimony that petitioner's indigenous and Americanized status, mental illness, and substance-abuse disorder placed him at a heightened risk of torture; and documentary evidence of widespread human rights abuses in Mexico related to perceived gang affiliation, deportee status, indigenous heritage, mental illness, and substance abuse; remanding for the agency to give reasoned consideration to the evidence); *Antonio v. Garland*, 58 F.4th 1067, 1078 (9th Cir. 2023) (remanding and stating that, should the agency reach CAT, it should reconsider whether the probative record evidence, including previously considered country reports, established government involvement or acquiescence); *Udo v. Garland*, 32 F.4th 1198, 1202–06 (9th Cir. 2022) (remanding CAT claim where the BIA failed to give reasoned consideration to potentially dispositive evidence, including an excommunication notice and letters and affidavits from the petitioner's family members); *De Leon Lopez v. Garland*, 51 F.4th 992, 1008 (9th Cir. 2022) (remanding CAT claim where the evidence compelled the conclusion that two of petitioner's attackers were police officers, thus requiring the agency to reconsider whether petitioner suffered past torture, and where the "IJ and BIA disregarded myriad contextual considerations pertinent to the likelihood of future torture"); *Velasquez-Samayoa v. Garland*, 49 F.4th 1149, 1157–58 (9th Cir. 2022) (remanding to the agency to assess the aggregate risk that petitioner would be tortured if removed to El Salvador and, as part of that assessment, to properly consider a country conditions expert's testimony); *Plancarte Saucedo v. Garland*, 23 F.4th 824, 835 (9th Cir. 2022) (granting petition and remanding where substantial evidence compelled the conclusion that there was official involvement and acquiescence in the cartel's actions forcing petitioner to provide medical treatment to cartel members); *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 891 (9th Cir. 2021) (remanding where the agency failed to consider evidence in the record showing that it was more likely than not Vasquez-Rodriguez would be tortured if removed to El Salvador); *Kaur v. Garland*, 2 F.4th 823, 837 (9th Cir. 2021) (holding that the BIA abused its discretion in denying motion to reopen to allow Kaur to pursue CAT relief on the ground that she had not established a prima facie case of eligibility); *Soto-Soto v. Garland*, 1 F.4th 655, 662–63 (9th Cir. 2021) (remanding for the BIA to grant deferral of removal under CAT where the record compelled the conclusion that petitioner carried her evidentiary burden); *Guan v. Barr*, 925 F.3d 1022, 1035 (9th Cir. 2019) (remanding for the BIA to reconsider

CAT claim in light of the country reports and other evidence in support of his claim of religion-based torture that neither the BIA nor the IJ previously addressed); *Arrey v. Barr*, 916 F.3d 1149, 1161 (9th Cir. 2019) (remanding for reconsideration where substantial evidence did not support the BIA's determination that petitioner could safely relocate within Cameroon); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081–82 (9th Cir. 2015) (petitioner entitled to CAT relief on remand where agency's denial was based on factual confusion as to what constitutes transgender identity and erroneous conclusion that there was no substantial evidence in the record showing that Mexican public officials had consented to or acquiesced in prior acts of torture against transgender persons); *Annachamy v. Holder*, 733 F.3d 254, 257 (9th Cir. 2013) (BIA granted deferral of removal, but denied asylum and withholding of removal; Sri Lanka), *overruled on other grounds by* *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014); *Haile v. Holder*, 658 F.3d 1122, 1130–33 (9th Cir. 2011) (petitioner eligible for deferral of removal where she established it was more likely than not she would be tortured upon return to Eritrea); *Cordoba v. Holder*, 726 F.3d 1106, 1117 (9th Cir. 2013) (remanding for consideration of CAT claim where considerable evidence supported claim); *Madrigal v. Holder*, 716 F.3d 499, 508–10 (9th Cir. 2013) (remanding for the BIA to consider whether any torture petitioner was likely to endure upon return to Mexico would be with the consent or acquiescence of a public official); *Edu v. Holder*, 624 F.3d 1137, 1147 (9th Cir. 2010) (petitioner entitled to deferral of removal under CAT where she was tortured in Nigeria for engaging in political activity and there were substantial grounds that she would be tortured again if returned to Nigeria); *Muradin v. Gonzales*, 494 F.3d 1208, 1211 (9th Cir. 2007) (petitioner eligible for CAT relief given past abuse and beatings and State Department report stating that torture of conscripts, prisoners, and deserters by Armenian security personnel was likely); *Hosseini v. Gonzales*, 471 F.3d 953, 959–61 (9th Cir. 2006) (applicant entitled to deferral of removal because it was more likely than not that Iranian government would torture him based on his involvement with an Iranian terrorist organization); *Nuru v. Gonzales*, 404 F.3d 1207, 1223 (9th Cir. 2005) (Eritrean soldier entitled to CAT relief where he was bound, whipped, beaten, and placed in the broiling sun for nearly one month after voicing political opposition to the war between Eritrea and Sudan); *Al-Safer v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (repeated beatings and cigarette burns of Iraqi Sunni Muslim constitute torture), *as amended by* 355 F.3d 1140 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 906–07 (9th Cir. 2004) (Seventh Day

Adventist entitled to CAT protection given past persecution and country conditions reports showing that the Burmese government regularly tortures detainees).

O. Cases Finding No Eligibility for CAT Protection

See *Smith v. Garland*, 103 F.4th 663, 672 (9th Cir. 2024) (substantial evidence supported the IJ’s conclusion that the aggregate risk of torture from each source the petitioner raised—mental health problems, race, and status as a deportee with prior convictions—did not surpass the more likely than not threshold, and the IJ properly found that the petitioner failed to show that Guyanese officials would acquiesce to violence by psychiatric inmates where the evidence showed that the Guyanese government was attempting to combat violence in psychiatric institutions, even if those measures had been unsuccessful); *Rodriguez-Zuniga v. Garland*, 69 F.4th 1012, 1027 (9th Cir. 2023) (denying CAT claim where petitioner forfeited any challenge to agency’s dispositive determination that she failed to demonstrate that the Guatemalan government would acquiesce or consent to her torture); *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1201 (9th Cir. 2023) (substantial evidence supported the denial of CAT relief where petitioner’s contentions were “entirely speculative and unsupported by the record”); *Park v. Garland*, 72 F.4th 965, 981–83 (9th Cir. 2023) (substantial evidence supported the agency’s determination that, considering the risk in the aggregate, Park was unlikely to be tortured because of his California drug convictions, under South Korea’s military-conscription policy, or as a cultural outsider); *Hernandez v. Garland*, 52 F.4th 757, 768–73 (9th Cir. 2022) (upholding the agency’s findings that (1) multiple incidents of abuse by police officers, which did not result in serious injuries or long-term harm, did not rise to the level of torture individually or cumulatively, and (2) the government did not acquiesce to his sexual assaults by private actors; and rejecting petitioner’s contentions that agency ignored evidence and failed to consider his risk of torture in the aggregate); *Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 706–07 (9th Cir. 2022) (although the country conditions evidence acknowledged crime and police corruption in Mexico generally, as well as higher rates in Tijuana, the evidence failed to show that petitioner faced a particularized, ongoing risk of future torture, and thus the agency did not err in concluding he was not eligible for CAT relief); *B.R. v. Garland*, 26 F.4th 827, 845 (9th Cir. 2022) (substantial evidence supported denial of CAT relief where nothing in the record would compel a reasonable adjudicator to conclude that the Mexican government would acquiesce in petitioner’s torture); *Ruiz-Colmenares v. Garland*,

25 F.4th 742, 751–52 (9th Cir. 2022) (even if petitioner was a credible witness, the agency properly concluded that he was not eligible for CAT relief; three instances of robbery that resulted in a three-day detainment in police custody and temporary bruises, none of which necessitated medical treatment, did not amount to past torture, and he failed to show he faced any particularized risk of future torture higher than that faced by Mexican citizens generally); *Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1233 (9th Cir. 2021) (substantial evidence supported the BIA’s finding that Alcaraz police mistreatment in Mexico did not rise to the level of torture); *Iraheta-Martinez v. Garland*, 12 F.4th 942 (9th Cir. 2021) (El Salvador) (holding that the BIA adequately undertook aggregate analysis of all potential sources of torture before concluding that Iraheta-Martinez was not entitled to CAT relief); *Dawson v. Garland*, 998 F.3d 876, 883 (9th Cir. 2021) (even assuming petitioner suffered past torture, the record did not compel the conclusion that petitioner faced a likelihood of future torture if returned to Jamaica); *Acevedo Granados v. Garland*, 992 F.3d 755, 765 (9th Cir. 2021) (record did not a compel a finding that police or medical workers at the National Public Hospital had a specific intent to torture individuals with intellectual disabilities); *Lalayan v. Garland*, 4 F.4th 822, 840 (9th Cir. 2021) (substantial evidence supported denial of CAT relief where country reports did not show a particularized risk of torture if petitioner were removed to Armenia); *Aguilar-Osorio v. Garland*, 991 F.3d 997, 1000 (9th Cir. 2021) (substantial evidence supported the BIA’s determination that Aguilar-Osorio failed to establish that past torture occurred with the consent or acquiescence of a public official), *abrogated on other grounds by* *Wilkinson v. Garland*, 601 U.S. 209 (2024); *Santos-Ponce v. Wilkinson*, 987 F.3d 886, 891 (9th Cir. 2021) (“[T]he fact that Ponce’s uncle was killed for unspecified reasons, combined with the existence of generalized violence in Honduras, does not compel the conclusion that, upon his return to Honduras, Ponce would more likely than not experience torture ‘inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official . . . or other person acting in an official capacity.’” (alteration in original)); *Flores-Vega v. Barr*, 932 F.3d 878, 887 (9th Cir. 2019) (substantial evidence supported BIA’s determination that petitioner failed to show it was more likely than not he would be tortured if removed to Mexico); *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1029–30 (9th Cir. 2019) (petitioner failed to demonstrate it was more likely than not he would be tortured if removed to Mexico where he was not tortured in the past and failed to show that it was more likely than not he would be subjected to torture by

or with the acquiescence of a public official); *Mairena v. Barr*, 917 F.3d 1119, 1125 (9th Cir. 2019) (substantial evidence supported denial of CAT relief, even though family was previously persecuted, where persecution transpired 30 years earlier, petitioner was never personally tortured, and there was no evidence that petitioner or anyone in his family had received threats while attempting to regain family land from government); *Singh v. Whitaker*, 914 F.3d 654, 662–63 (9th Cir. 2019) (despite agency’s insufficient relocation analysis, substantial evidence supported the denial of CAT relief; even though there was documentary evidence regarding human rights concerns in India, the evidence did not compel the conclusion that petitioner more likely than not would be tortured); *Lopez v. Sessions*, 901 F.3d 1071, 1078 (9th Cir. 2018) (Lopez’s contentions regarding his fears of returning to Mexico were not sufficiently particularized and did not provide a sufficient basis to conclude that any harm he would suffer would rise to the level of torture); *Guo v. Sessions*, 897 F.3d 1208, 1217 (9th Cir. 2018) (petitioner failed to demonstrate a likelihood of being tortured in China where he asserted only that he would be arrested upon his return to China); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 895 (9th Cir. 2018) (Mexico) (substantial evidence supported denial of CAT relief and there was no indication that the agency failed to consider all evidence in the record); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 836 (9th Cir. 2016) (substantial evidence supported IJ’s conclusion that petitioner failed to demonstrate a reasonable fear of torture if removed to Guatemala); *Del Cid Marroquin v. Lynch*, 823 F.3d 933, 937 (9th Cir. 2016) (substantial evidence supported the BIA’s conclusion that it is not more likely than not that Del Cid Marroquin would be tortured in El Salvador; although “gang membership is illegal under Salvadoran law, Del Cid Marroquin did not establish that the government tortures former gang members or those with gang-related tattoos”); *Singh v. Lynch*, 802 F.3d 972, 977 (9th Cir. 2015) (substantial evidence supported the conclusion that petitioner would be tortured if removed to India), *overruled on other grounds by Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021) (en banc); *Andrade v. Lynch*, 798 F.3d 1242, 1245 (9th Cir. 2015) (substantial evidence supported BIA’s denial of deferral of removal under CAT where petitioner failed to show that it was more likely than not that he would be tortured upon return to El Salvador); *Konou v. Holder*, 750 F.3d 1120, 1125–26 (9th Cir. 2014) (substantial evidence supported determination that petitioner was not likely to be tortured based on his sexual orientation upon return to the Marshall Islands); *Garcia v. Holder*, 749 F.3d 785, 791–92 (9th Cir. 2014) (substantial evidence

supported the denial of CAT relief); *Jiang v. Holder*, 754 F.3d 733 (9th Cir. 2014) (where petitioner’s CAT claim was based on the same testimony found not credible and she pointed to no other evidence to support her claim, substantial evidence supported the denial of CAT relief), *overruled on other grounds by Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021) (en banc); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1035 (9th Cir. 2014) (substantial evidence supported BIA’s determination that petitioner failed to establish the state action necessary for CAT relief; Guatemala); *Vitug v. Holder*, 723 F.3d 1056 (9th Cir. 2013) (not clear that past beatings and economic deprivation rose to the level of torture); *Latter-Singh v. Holder*, 668 F.3d 1156, 1164 (9th Cir. 2012) (conditions in India had changed such that Singh could safely return); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1113–14 (9th Cir. 2011) (although gang members had beaten petitioner and his cousin, petitioner failed to prove it was more likely than not he would be tortured upon return to El Salvador); *Zheng v. Holder*, 644 F.3d 829, 835–36 (9th Cir. 2011) (claims of possible torture were speculative); *Abufayad v. Holder*, 632 F.3d 623, 632–33 (9th Cir. 2011); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010) (evidence of generalized violence and crime in Mexico not particular to petitioners insufficient to establish CAT eligibility); *Shrestha v. Holder*, 590 F.3d 1034, 1048–49 (9th Cir. 2010) (denial of CAT protection supported by substantial evidence where testimony was not credible and background material provided was insufficient to compel conclusion that petitioner was entitled to relief); *Soriano v. Holder*, 569 F.3d 1162, 1167 (9th Cir. 2009) (no evidence showing likelihood of torture by gang members or demonstrating that petitioner would be subject to torture by or with consent of government official if petitioner was returned to the Philippines), *overruled in part by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc) (limiting *Soriano* to the extent it made considerations of diversity of lifestyle and origin the sine qua non of ‘particularity’ analysis); *Sowe v. Mukasey*, 538 F.3d 1281, 1288–89 (9th Cir. 2008) (evidence of changed country conditions in Sierra Leone defeated CAT claim); *Dhital v. Mukasey*, 532 F.3d 1044, 1051–52 (9th Cir. 2008) (State Department reports failed to demonstrate applicant faced “any particular threat of torture beyond that of which all citizens of Nepal are at risk”); *Silaya v. Mukasey*, 524 F.3d 1066, 1073 (9th Cir. 2008) (denying petition for relief under CAT where petitioner failed to demonstrate it was more likely than not that she would be tortured “at the instigation of, or with the acquiescence of the Philippine government”); *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) (conditions of mental health system in Mexico did not

warrant CAT relief); *Arteaga v. Mukasey*, 511 F.3d 940, 948–49 (9th Cir. 2007) (substantial evidence supported determination that petitioner failed to show that he would be tortured by El Salvadorean government, even though he showed a possibility of mistreatment); *Ahmed v. Keisler*, 504 F.3d 1183, 1201 (9th Cir. 2007) (evidence did not demonstrate it was more likely than not petitioner would be tortured if returned to Bangladesh, even though the evidence compelled a finding that he would be persecuted if returned); *Almaghzar v. Gonzales*, 457 F.3d 915, 822–23 (9th Cir. 2006) (post-REAL ID Act) (evidence of possible future torture was insufficient to overcome prior adverse credibility determination); *El Himri v. Ashcroft*, 378 F.3d 932, 938 (9th Cir. 2004) (as amended) (stateless Palestinians in Kuwait denied CAT relief where “most of the physical violence perpetrated by the government against Palestinians ended when constitutional government returned”); *Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (member of State-Department-designated terrorist organization failed to show that Algerian government was aware of or interested in him), *superseded by statute on other grounds as stated in Khan v. Holder*, 584 F.3d 773, 779–80 (9th Cir. 2009); *Singh v. Ashcroft*, 351 F.3d 435, 443 (9th Cir. 2003) (fear of members of mother’s family who are police officers); *Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003) (Somali’s claim “based on the same statements . . . that the BIA determined to be not credible”); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (harassment, wiretapping, staged car crashes, detention, and interrogation of Romanian anti-Communist did not amount to torture).

V. CREDIBILITY DETERMINATIONS

Under the REAL ID Act of 2005, which applies to applications for relief filed on or after May 11, 2005, credibility determinations are governed by the following standards:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal

consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. § 1158(b)(1)(B)(iii); *see Yali Wang v. Sessions*, 861 F.3d 1003, 1007 (9th Cir. 2017) (explaining that this standard applies to applications filed after May 11, 2005).

“Under the REAL ID Act, there is no presumption that an applicant for relief is credible, and the IJ is authorized to base an adverse credibility determination on the totality of the circumstances and all relevant factors.” *Manes v. Sessions*, 875 F.3d 1261, 1263 (9th Cir. 2017) (citation modified).

As explained in *Ren v. Holder*, 648 F.3d 1079, 1084 (9th Cir. 2011), the REAL ID Act abrogated case law holding that inconsistencies must go to the heart of an applicant's asylum claim to support an adverse credibility determination:

the REAL ID Act established new standards for adverse credibility determinations in proceedings on applications for asylum, withholding of removal, and CAT relief that . . . were submitted on or after May 11, 2005. The primary change was that the REAL ID Act abrogated this circuit's rule that inconsistencies that do not go to the heart of an applicant's claim may not support an adverse credibility determination. Under the REAL ID Act, the IJ may base an adverse credibility determination on any relevant factor that, considered in light of the totality of the circumstances, can reasonably be said to have a bearing on a petitioner's veracity. Conversely, trivial inconsistencies that under the total circumstances have no bearing on a petitioner's veracity should not form the basis of an adverse credibility determination.

Ren v. Holder, 648 F.3d 1079, 1084 (9th Cir. 2011) (citation modified).

In *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010), the court explained that the factors listed in the statute are non-exhaustive. Accordingly, the IJ can rely on non-listed factors, such as the level of detail in an applicant’s testimony, in deeming an applicant not credible:

IJs may look beyond the listed factors to any relevant factor in assessing credibility under the totality of the circumstances. For example, even though lack of detail is not expressly listed as a factor that may be considered, the pre-REAL ID Act practice of looking to the level of detail of the claimant’s testimony to assess credibility remains viable under the REAL ID Act as it is a relevant factor. The same logic holds as to other relevant factors not listed under the REAL ID Act but previously considered in assessing credibility.

Shrestha v. Holder, 590 F.3d 1034, 1040 (9th Cir. 2010) (citation modified).

The REAL ID Act standard is deferential to the agency. See *Jin v. Holder*, 748 F.3d 959, 964 (9th Cir. 2014) (post-REAL ID Act) (“The REAL ID Act significantly restricted appellate review of adverse credibility findings, whereby only the most extraordinary circumstances will justify overturning an adverse credibility determination.” (citation modified)); *Li v. Garland*, 13 F.4th 954, 959 (9th Cir. 2021) (post-REAL ID Act) (“Petitioners carry a substantial burden to convince us to overturn a Board decision denying relief on credibility grounds, particularly when the Board has adopted multiple bases for its adverse credibility determination.” (citation modified)); *Huang v. Holder*, 744 F.3d 1149, 1152–53 (9th Cir. 2014) (“Under the REAL ID Act . . . all aspects of the witness’s demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely.” (citation modified)).

A. Standard of Review

Adverse credibility findings are reviewed under the substantial evidence standard. See *Yali Wang v. Sessions*, 861 F.3d 1003, 1007 (9th Cir. 2017) (post-REAL ID Act) (“We review factual findings, including adverse credibility

determinations, for substantial evidence.” (quoting *Garcia v. Holder*, 749 F.3d 785, 789 (9th Cir. 2014)); *Shrestha v. Holder*, 590 F.3d 1034, 1039 (9th Cir. 2010) (post-REAL ID Act); *Cui v. Holder*, 712 F.3d 1332, 1336 (9th Cir. 2013) (pre-REAL ID Act); *Kin v. Holder*, 595 F.3d 1050, 1054 (9th Cir. 2010) (pre-REAL ID Act); *Malkandi v. Holder*, 576 F.3d 906, 914–17 (9th Cir. 2009) (post-REAL ID Act); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091 (9th Cir. 2009) (pre-REAL ID Act); *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) (pre-REAL ID Act) (“This court reviews factual determinations, including credibility determinations, for substantial evidence.”); *Rivera v. Mukasey*, 508 F.3d 1271, 1274 (9th Cir. 2007) (pre-REAL ID Act); *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002).

The substantial evidence standard is highly deferential: “Factual findings are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. That is, to reverse such a finding we must find that the evidence not only supports a contrary conclusion, but compels it.” *Yali Wang v. Sessions*, 861 F.3d 1003, 1007 (9th Cir. 2017) (citation modified); see also *Dong v. Garland*, 50 F.4th 1291, 1300–01 (9th Cir. 2022) (“This is a close case, in which reasonable adjudicators could reach different conclusions. But to reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it. . . . Because the agency rested its adverse credibility determination on substantial evidence, we do not disrupt it.” (citation modified)); *Li v. Garland*, 13 F.4th 954, 959 (9th Cir. 2021) (“In the end, petitioners carry a substantial burden to convince us to overturn a Board decision denying relief on credibility grounds, particularly when the Board has adopted multiple bases for its adverse credibility determination.”); *Aguilar Fermin v. Barr*, 958 F.3d 887, 892 (9th Cir. 2020); *Manes v. Sessions*, 875 F.3d 1261, 1263 (9th Cir. 2017) (post-REAL ID Act).

In assessing an adverse credibility finding under the REAL ID Act, the court “must look to the ‘totality of the circumstances[] and all relevant factors.’” *Alam v. Garland*, 11 F.4th 1133, 1136 (9th Cir. 2021) (en banc) alteration in original (quoting 8 U.S.C. § 1158(b)(1)(B)(iii)); see also *Kumar v. Garland*, 18 F.4th 1148, 1152–53 (9th Cir. 2021) (“Taking the totality of the circumstances into account, we review the BIA’s credibility determination for substantial evidence.”); *Li v. Garland*, 13 F.4th 954, 959 (9th Cir. 2021).

Where some of the reasons for the adverse credibility determination are supported by the evidence and some are not, the court considers whether under the totality of the circumstances the agency's determination is supported by substantial evidence:

This case thus presents a familiar pattern: a credibility finding supported by several reasons, some of which withstand judicial scrutiny and one (or sometimes more) that does not. We affirm credibility findings when they are supported by substantial evidence under the “totality of the circumstances.” 8 U.S.C. § 1158(b)(1)(B)(iii); *Alam v. Garland*, 11 F.4th 1133, 1137 (9th Cir. 2021) (en banc). That standard does not lend itself to a “bright line” rule or a “number-counting analysis” because some factors will weigh more heavily on an applicant's credibility than others.

Uc Encarnacion v. Bondi, 156 F.4th 927, 940 (9th Cir. 2025) (quoting *Kumar v. Garland*, 18 F.4th 1148, 1155 (9th Cir. 2021)).

The court may not uphold an adverse credibility determination merely because one basis for that determination is supported by substantial evidence; the court must consider the totality of the circumstances:

Although in numerous cases post-REAL ID Act, we had applied the single factor rule, which required us to uphold an adverse credibility determination so long as even one basis is supported by substantial evidence, we overruled those cases en banc in *Alam v. Garland* After *Alam*, there is no bright-line rule under which some number of inconsistencies requires sustaining or rejecting an adverse credibility determination. Rather, in assessing an adverse credibility finding under the REAL ID Act, we must look to the totality of the circumstances and all relevant factors.

Li v. Garland, 13 F.4th 954, 959 (9th Cir. 2021) (citation modified); see *Alam v. Garland*, 11 F.4th 1133, 1134 (9th Cir. 2021) (en banc) (“[W]e hold that the single factor rule conflicts with the REAL ID Act of 2005, . . . and we overrule our prior precedent establishing and applying it.”); see also *Kumar v. Garland*, 18 F.4th 1148, 1153 (9th Cir. 2021) (“Taking the totality of the circumstances into account,

we review the BIA’s credibility determination for substantial evidence.”). False statements or inconsistencies “must be viewed in light of all the evidence presented in the case.” *Kaur v. Gonzales*, 418 F.3d 1061, 1066 (9th Cir. 2005) (pre-REAL ID Act).

For pre-REAL ID Act applications, the single factor rule remains: the court is bound to accept a negative credibility finding as long as one of the identified grounds underlying a negative credibility finding is supported by substantial evidence and goes to the heart of the claims of persecution. *See, e.g., Wang v. INS*, 352 F.3d 1250, 1259 (9th Cir. 2003) (“[W]hether we have rejected some of the IJ’s grounds for an adverse credibility finding is irrelevant.”), *abrogated by Alam*, 11 F.4th at 1135–36.

A healthy measure of deference is given to agency credibility determinations because IJs are in the best position to assess demeanor and other credibility cues that cannot be readily assessed on review. *Manes*, 875 F.3d at 1263 (citing *Shrestha v. Holder*, 590 F.3d 1034, 1041 (9th Cir. 2010)); *see also Iman v. Barr*, 972 F.3d 1058, 1064 (9th Cir. 2020) (post-REAL ID Act); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003) (deference is given to the IJ’s credibility determination because the IJ is in the best position to assess whether or not petitioner is to be believed), *superseded by statute as stated in Ming Dai v. Sessions*, 884 F.3d 858, 869 n.8 (9th Cir. 2018), *vacated and remanded sub nom. Garland v. Ming Dai*, 593 U.S. 357 (2021); *Canjura-Flores v. INS*, 784 F.2d 885, 888 (9th Cir. 1985).

“While the substantial evidence standard demands deference to the IJ, we do not accept blindly an IJ’s conclusion that a petitioner is not credible. Rather, we examine the record to see whether substantial evidence supports that conclusion and determine whether the reasoning employed by the IJ is fatally flawed.” *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002) (pre-REAL ID Act) (citation modified). “The IJ must have a legitimate articulable basis to question the petitioner’s credibility, and must offer a specific, cogent reason for any stated disbelief,” and “any such reason must be substantial and bear a legitimate nexus to the finding.” *Id.* (citation modified); *see also Iman*, 972 F.3d at 1064 (“[W]e preserve meaningful appellate review of BIA decisions by requiring the agency to provide ‘specific and cogent reasons’ for an adverse credibility determination.”); *Perez-Arceo v. Lynch*, 821 F.3d 1178, 1186 (9th Cir. 2016) (applying REAL ID Act

provisions without deciding whether they applied to a motion to terminate proceedings) (“A negative credibility determination must be supported by ‘specific and cogent reasons.’”); *Chawla v. Holder*, 599 F.3d 998, 1001 (9th Cir. 2010) (pre-REAL ID Act); *Rivera*, 508 F.3d at 1275; *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (“Any such reason must be substantial and bear a legitimate nexus to the finding.” (internal quotation marks omitted)); *Garrovillas v. INS*, 156 F.3d 1010, 1013 (9th Cir. 1998) (pre-REAL ID Act) (“Generalized statements that do not identify specific examples of evasiveness or contradiction in the petitioner’s testimony prevent us from conducting a proper review.”); *de Leon-Barrios v. INS*, 116 F.3d 391, 394 (9th Cir. 1997) (“The obligation to provide a specific, cogent reason for a negative credibility finding does not require the recitation of unique or particular words.”).

Where an adverse credibility determination is based on inconsistencies, the IJ or BIA must explain “the significance of the discrepancy or point[] to the petitioner’s obvious evasiveness when asked about it.” *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000); *see also Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004) (BIA failed to clarify why purported discrepancy was significant).

Under the REAL ID Act, inconsistencies no longer need to go to the heart of the claim; when an inconsistency does go to the heart of the claim, however, it is of great weight. *See Shrestha v. Holder*, 590 F.3d 1034, 1046–47 (9th Cir. 2010) (applying REAL ID Act); *see also Li v. Garland*, 13 F.4th 954, 959 (9th Cir. 2021) (“As inconsistencies that form the basis of an adverse credibility determination no longer need to go to the heart of a petitioner’s claim, we need not consider whether an inconsistency identified by the IJ or Board is central.”).

The court’s review focuses on only the actual reasons relied upon by the agency. *See Mukulumbutu v. Barr*, 977 F.3d 924, 925 (9th Cir. 2020) (“In reviewing an adverse credibility determination, we consider ‘the reasons explicitly identified by the BIA, and . . . the reasoning articulated in the IJ’s . . . decision in support of those reasons.’” (quoting *Lai v. Holder*, 773 F.3d 966, 970 (9th Cir. 2014))); *Marcos v. Gonzales*, 410 F.3d 1112, 1116 (9th Cir. 2005) (pre-REAL ID Act); *Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004) (“[W]hen each of the IJ’s or BIA’s proffered reasons for an adverse credibility finding fails, we must accept a petitioner’s testimony as credible.”), *superseded by statute on other grounds as*

stated in *Perez-Rojas v. Sessions*, 685 F. App'x 575, 576 (9th Cir. 2017) (unpublished).

Where an adverse credibility finding is clearly erroneous, it will not be upheld. See *Mutuku v. Holder*, 600 F.3d 1210, 1213 (9th Cir. 2010) (pre-REAL ID Act).

Failure to authenticate foreign documents may not serve as a basis for an adverse credibility determination absent evidence of forgery or other unreliability. See *Zhao v. Holder*, 728 F.3d 1144, 1149–50 (9th Cir. 2013).

B. No Presumption of Credibility Based on Lack of Adverse Credibility Finding

In *Garland v. Ming Dai*, 593 U.S. 357, 364–65 (2021), the Supreme Court rejected the Ninth Circuit's deemed-true-or-credible rule, which had required the court to assume that a noncitizen's factual contentions were true in the absence of an explicit adverse credibility finding by the agency. The Court stated:

The Ninth Circuit's rule has no proper place in a reviewing court's analysis. Congress has carefully circumscribed judicial review of BIA decisions. When it comes to questions of fact . . . the INA provides that a reviewing court must accept "administrative findings" as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). This is a "highly deferential" standard. Nothing in the INA contemplates anything like the embellishment the Ninth Circuit has adopted. And it is long since settled that a reviewing court is "generally not free to impose" additional judge-made procedural requirements on agencies that Congress has not prescribed and the Constitution does not compel. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

Garland v. Ming Dai, 593 U.S. 357, 365 (2021) (some citations omitted).

By contrast, a presumption of credibility applies to *the BIA's* review of an IJ's decision in which no explicit adverse credibility determination was made. See

Garland v. Ming Dai, 593 U.S. 357, 366 (2021) (“The statute provides that absent an ‘explici[t]’ ‘adverse credibility determination,’ ‘the applicant or witness shall have a rebuttable presumption of credibility on appeal.’” (quoting 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1231(b)(3)(C), 1229a(c)(4)(C))).

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

Cross-reference: Credibility Determinations, No Presumption of Credibility.

C. Opportunity to Explain

“An IJ ‘must provide a petitioner with a reasonable opportunity to offer an explanation of any perceived inconsistencies that form the basis of a denial of asylum.’” *Munyuh v. Garland*, 11 F.4th 750, 762 (9th Cir. 2021) (quoting *Soto-Olarte v. Holder*, 555 F.3d 1089, 1092 (9th Cir. 2009)); see *Perez-Arceo v. Lynch*, 821 F.3d 1178, 1184 (9th Cir. 2016) (applying REAL ID Act provisions without deciding whether they applied to a motion to terminate proceedings) (“On the record here, the inconsistency with Antonio’s I-213 cannot support a negative credibility finding because the IJ did not ask Antonio about the inconsistency.”); *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (en banc) (post-REAL ID Act) (“In any contested administrative hearing, admission of a party’s testimony is particularly essential to a full and fair hearing where credibility is a determinative factor, as it was here.”); *Joseph v. Holder*, 600 F.3d 1235, 1244–45 (9th Cir. 2010) (pre-REAL ID Act) (adverse credibility determination not supported by substantial evidence where the BIA failed to offer petitioner an opportunity to explain why he did not provide the last name of an alleged persecutor); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091–92 (9th Cir. 2009) (pre-REAL ID Act) (adverse credibility determination not supported by substantial evidence where agency failed to offer petitioner an opportunity to explain an inconsistency upon which the adverse determination was partially based and failed to address the explanation that was given for other inconsistencies upon which the agency relied); *Quan v. Gonzales*, 428 F.3d 883, 886 (9th Cir. 2005) (pre-REAL ID Act) (applicant must be given an

opportunity to clarify unclear testimony); *Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004) (reversing negative credibility finding in part because applicant was denied a reasonable opportunity to explain a perceived inconsistency); *Guo v. Ashcroft*, 361 F.3d 1194, 1200 (9th Cir. 2004) (reversing negative credibility finding in part because applicant was not afforded an opportunity to explain ambiguous witness testimony); *Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003) (“[T]he BIA did not identify and respond to Ordonez’s explanations. Either Ordonez was given no chance to contest the issue or the BIA did not address his arguments. Either way, Ordonez’s rights were violated.”); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) (holding that “the BIA must provide a petitioner with a reasonable opportunity to offer an explanation of any perceived inconsistencies” that form the basis of an adverse credibility determination), *superseded by statute on other grounds as stated in Arizmendi-Medina v. Garland*, 69 F.4th 1043, 1052 (9th Cir. 2023).

The IJ also must consider and address the applicant’s explanation for the identified discrepancy. See *Kumar v. Garland*, 18 F.4th 1148, 1154 (9th Cir. 2021) (post-REAL ID Act) (“[A]n IJ must consider an applicant’s explanation for an inconsistency if the explanation is reasonable and plausible.” (citation and internal quotation marks omitted)); *Shrestha v. Holder*, 590 F.3d 1034, 1044 (9th Cir. 2010) (post-REAL ID Act) (“[I]n evaluating inconsistencies, the relevant circumstances that an IJ should consider include the petitioner’s explanation for a perceived inconsistency”); *Soto-Olarte*, 555 F.3d at 1091 (“[IJ’s] lack of consideration given to [petitioner’s] proffered explanation was error and prevent[ed] the underlying inconsistency from serving as substantial evidence.”); *Tekle v. Mukasey*, 533 F.3d 1044, 1055 (9th Cir. 2008) (pre-REAL ID Act) (rejecting adverse credibility finding where petitioner was not provided an opportunity to explain certain inconsistencies and the IJ failed to address explanations petitioner gave for other inconsistencies); *Guo*, 361 F.3d at 1200 (reversing negative credibility finding in part because the IJ did not address petitioner’s reasonable and plausible explanation for a perceived inconsistency); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (substantial evidence lacking where applicant provided an explanation for a discrepancy but neither the BIA nor the IJ addressed it), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007), *abrogated on other grounds as stated in Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025); cf. *Rivera v. Mukasey*, 508 F.3d 1271, 1275 (9th Cir. 2007) (pre-REAL ID Act) (upholding negative

credibility finding where the IJ found the petitioner's explanations for inconsistencies insufficient).

An IJ does not have “to engage in multiple iterations of the opportunity to explain. Once the IJ has provided a specific, cogent reason for disbelieving the alien's rationalization, the IJ need not offer the alien another opportunity to address the IJ's concerns” *Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011), *overruled in part on other grounds by Alam v. Garland*, 11 F.4th 1133, 1135–37 (9th Cir. 2021) (en banc).

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

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

The IJ and the BIA are not required to accept an applicant's explanation for a discrepancy. See *Li v. Garland*, 13 F.4th 954, 961 (9th Cir. 2021) (post-REAL ID Act) (“[E]ven if Li and her counsel's interpretation were reasonable, the IJ and Board were not compelled to accept her explanation for the discrepancy.”); *Jiang v. Holder*, 754 F.3d 733, 740 (9th Cir. 2014) (requiring the IJ to accept the petitioner's alternative plausible interpretation would amount to improper de novo review), *overruled on other grounds by Alam*, 11 F.4th at 1135–37.

D. Credibility Factors

Under the INA, credibility factors include, but are not limited to, “the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in

such statements.” 8 U.S.C. § 1158(b)(1)(B)(iii); *see Alam v. Garland*, 11 F.4th 1133, 1135–37 (9th Cir. 2021) (en banc); *Lalayan v. Garland*, 4 F.4th 822, 833 (9th Cir. 2021); *Iman v. Barr*, 972 F.3d 1058, 1064–65 (9th Cir. 2020).

1. Demeanor

“[T]he IJ is in the best position to consider a petitioner’s demeanor, candor, and responsiveness.” *Rodriguez-Ramirez v. Garland*, 11 F.4th 1091, 1093 (9th Cir. 2021) (post-REAL ID Act) (holding that the “BIA and IJ did not err in relying on Rodriguez-Ramirez’s evasive and unresponsive demeanor while testifying after providing examples of his evasiveness”).

“We give special deference to credibility determinations based on observations about a witness’s non-verbal behavior.” *Uc Encarnacion v. Bondi*, 156 F.4th 927, 937 (9th Cir. 2025) (internal quotation marks omitted). Credibility determinations based on an applicant’s demeanor are given “special deference.” *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999) (deferring to the IJ’s observation that the applicant “began to literally jump around in his seat and to squirm rather uncomfortably while testifying” on cross-examination). This deference applies only to “non-verbal, and therefore non-textual, factors.” *Lalayan v. Garland*, 4 F.4th 822, 839 (9th Cir. 2021).

“The reason why we give special deference to an IJ’s credibility determination is that the IJ himself or herself had the opportunity to evaluate the petitioner’s behavior in person.” *Lizhi Qiu v. Barr*, 944 F.3d 837, 843 (9th Cir. 2019) (post-REAL ID Act) (IJ erred by relying, in part, on asylum officer’s assessment of credibility during earlier asylum interview), *overruled on other grounds by Alam v. Garland*, 11 F.4th 1133, 1135–36 (9th Cir. 2021) (en banc).

The court has held that is legally erroneous for an IJ to rely on an asylum officer’s assessment of credibility. *Lizhi Qiu v.* 944 F.3d at 843.

Boilerplate demeanor findings are not appropriate. *See Uc Encarnacion v. Bondi*, 156 F.4th 927, 937 (9th Cir. 2025) (“[A]n IJ must identify specific examples in the record rather than state unexplained conclusions.”); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1048, 1051–52 (9th Cir. 2002) (“Cookie cutter credibility findings are the antithesis of the individualized determination required

in asylum cases.”). Instead, an IJ’s demeanor-based negative credibility finding should specifically and cogently refer to the non-credible aspects of the applicant’s demeanor. See *Manes v. Sessions*, 875 F.3d 1261, 1263 (9th Cir. 2017) (post-REAL ID Act) (“Demeanor findings ‘should specifically point out the noncredible aspects of the petitioner’s demeanor.’” (quoting *Shrestha v. Holder*, 590 F.3d 1034, 1042 (9th Cir. 2010))); *Kin v. Holder*, 595 F.3d 1050, 1055 (9th Cir. 2010) (pre-REAL ID Act) (demeanor finding insufficient where IJ failed to provide specific examples of how petitioner’s demeanor supported the adverse credibility determination).

But the IJ need not comment on the applicant’s demeanor at the time of its occurrence. See *Manes v. Sessions*, 875 F.3d 1261, 1263–64 (9th Cir. 2017) (post-REAL ID Act) (holding the IJ’s demeanor findings were sufficiently precise, even though the IJ did not comment on the petitioner’s demeanor at the time of occurrence).

A witness’s demeanor includes “the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication.” *Arulampalam v. Ashcroft*, 353 F.3d 679, 686 (9th Cir. 2003) (internal quotation marks omitted); accord *Huang v. Holder*, 744 F.3d 1149, 1153 (9th Cir. 2014) (post-REAL ID Act) (same).

See *Uc Encarnacion v. Bondi*, 156 F.4th 927, 937–38 (9th Cir. 2025) (IJ’s demeanor finding adequately supported based on petitioner’s hesitation and lengthy pauses during key questioning and body language that the IJ reasonably interpreted as deception rather than ordinary nervousness).

2. Responsiveness

“The REAL ID Act expressly permits the agency to base a credibility determination on the ‘responsiveness of the applicant or witness.’” *Shrestha v. Holder*, 590 F.3d 1034, 1045 (9th Cir. 2010) (post-REAL ID Act) (quoting 8 U.S.C. § 1158(b)(1)(B)(iii)); see *Iman v. Barr*, 972 F.3d 1058, 1065 (9th Cir. 2020) (“[T]he agency may base an adverse credibility determination on an applicant’s unresponsiveness.”); *Jin v. Holder*, 748 F.3d 959, 965 (9th Cir. 2014) (post-REAL

ID Act) (record supported the agency’s demeanor finding based on petitioner’s non-responsive or evasive testimony).

“To support an adverse credibility determination based on unresponsiveness, the BIA must identify particular instances in the record where the petitioner refused to answer questions asked of him.” *Singh v. Ashcroft*, 301 F.3d 1109, 1114 (9th Cir. 2002); *see also Lalayan v. Garland*, 4 F.4th 822, 839 (9th Cir. 2021) (“To support an adverse credibility determination based on unresponsiveness, the BIA must identify particular instances in the record where the petitioner refused to answer questions asked of him.”); *Iman*, 972 F.3d at 1065 (“Although a ‘pinpoint citation’ to the record is not necessary, the IJ must identify the particular instances where the petitioner was unresponsive.”); *Garrovillas v. INS*, 156 F.3d 1010, 1014–15 (9th Cir. 1998) (agency “fail[ed] to specify any particular instances in his testimony when Garrovillas refused to answer questions”); *Arulampalam v. Ashcroft*, 353 F.3d 679, 687 (9th Cir. 2003) (noting importance of sensitivity to petitioner’s cultural and educational background when appraising manner of speech).

“[T]here is no prohibition against drawing an adverse inference when a petitioner invokes his Fifth Amendment right against self-incrimination.” *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (post-REAL ID Act). But where “the sole witness refuses to answer questions, [the Department of Homeland Security] cannot satisfy its burden [of establishing grounds for termination of asylum by a preponderance of the evidence], ‘in the absence of any substantive evidence . . . , based solely upon the adverse inference drawn from . . . silence.’” *Urooj v. Holder*, 734 F.3d 1075, 1078 (9th Cir. 2013).

3. Specificity and Detail

The level of specificity in an applicant’s testimony is an appropriate consideration. *See Iman v. Barr*, 972 F.3d 1058, 1065 (9th Cir. 2020) (post-REAL ID Act) (“The lack of detail in an applicant’s testimony can be a relevant factor for assessing credibility.”); *see also Jin v. Holder*, 748 F.3d 959, 965–66 (9th Cir. 2014) (post-REAL ID Act) (agency’s adverse credibility finding supported by substantial evidence in part due to lack of detailed testimony); *Huang v. Holder*, 744 F.3d 1149, 1155 (9th Cir. 2014) (post-REAL ID Act) (noting the IJ may consider the level of detail of testimony to assess credibility and holding that

agency's adverse credibility finding was supported by substantial evidence); *cf. Zheng v. Ashcroft*, 397 F.3d 1139, 1147 (9th Cir. 2005) (testimony was fairly detailed, and IJ did not identify examples of how Zheng's testimony lacked detail); *Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004) ("[A] general response to questioning, followed by a more specific, consistent response to further questioning is not a cogent reason for supporting a negative credibility finding."), *superseded by statute on other grounds as stated in Perez-Rojas v. Sessions*, 685 F. App'x 575, 576 (9th Cir. 2017) (unpublished); *Akinmade v. INS*, 196 F.3d 951, 957 (9th Cir. 1999) (testimony was sufficiently detailed and specific, "especially when Akinmade was not given notice that he should provide such information, nor asked at the hearing to do so"); *Singh-Kaur v. INS*, 183 F.3d 1147, 1153 (9th Cir. 1999) (approving IJ's finding that an applicant's testimony was suspicious given its lack of specificity).

In *Iman v. Barr*, 972 F.3d 1058, 1065 (9th Cir. 2020), the court explained:

When an applicant "supplie[s] only vague assertions" and gives "few details" at the merits hearing, the lack of detailed testimony can support an adverse credibility finding. . . . For this factor to form the basis of an adverse credibility determination, however, the agency must "refer to specific instances in the record that support a conclusion that the factor undermines credibility."

Iman, 972 F.3d at 1065.

4. Inconsistencies

Prior to the REAL ID Act, inconsistencies forming the basis of an adverse credibility determination had to go to the heart of a petitioner's claim. *Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc) (post-REAL ID Act) ("Prior to enactment of the REAL ID Act, we concluded that 'minor discrepancies, inconsistencies, or omissions that d[id] not go to the heart of an applicant's asylum claim [could not] constitute substantial evidence' in support of an adverse credibility finding."); *Li v. Garland*, 13 F.4th 954, 958 (9th Cir. 2021) (post-REAL ID Act).

“The REAL ID Act eliminated the ‘heart of the claim’ requirement and required IJs to consider all factors under the totality of the circumstances in assessing credibility.” *Alam*, 11 F.4th at 1135. “[T]he plain text of the REAL ID Act makes clear that inconsistencies need not go to the heart of a petitioner’s claim, and our court continues to hold that ‘[u]nder the REAL ID Act, even minor inconsistencies that have a bearing on a petitioner’s veracity may constitute the basis for an adverse credibility determination.’” *Li*, 13 F.4th at 959.

In *Alam*, the court emphasized that “[t]here is no bright-line rule under which some number of inconsistencies requires sustaining or rejecting an adverse credibility determination—our review will always require assessing the totality of the circumstances.” 11 F.4th at 1137.

But “cases caution against relying too heavily on inconsistencies that could be attributable to simple human error or reluctance.” *Kumar v. Garland*, 18 F.4th 1148, 1153 (9th Cir. 2021) (post-REAL ID Act).

a. Minor Inconsistencies

“The IJ may also consider inconsistencies between the petitioner’s statements and other evidence of record. 8 U.S.C. § 1158(b)(1)(B)(iii).” *Manes v. Sessions*, 875 F.3d 1261, 1263 (9th Cir. 2017) (post-REAL ID Act).

Prior to the REAL ID Act, inconsistencies forming the basis of an adverse credibility determination had to go to the heart of a petitioner’s claim. *Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc) (post-REAL ID Act) (“Prior to enactment of the REAL ID Act, we concluded that ‘minor discrepancies, inconsistencies, or omissions that d[id] not go to the heart of an applicant’s asylum claim [could not] constitute substantial evidence’ in support of an adverse credibility finding.”); *Li v. Garland*, 13 F.4th 954, 958 (9th Cir. 2021) (post-REAL ID Act).

Thus, prior to the REAL ID Act, the court held that “[m]inor inconsistencies in the record that do not relate to the basis of an applicant’s alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant’s fear for his safety are insufficient to support an adverse credibility finding.” *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir.

2003), *superseded by statute as stated in Ming Dai v. Sessions*, 884 F.3d 858, 869 n.8 (9th Cir. 2018), *vacated and remanded sub nom. Garland v. Ming Dai*, 593 U.S. 357 (2021); *see also Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (pre-REAL ID Act) (recognizing “minor inconsistencies that reveal nothing about an asylum applicant’s fear for his safety are not an adequate basis for an adverse credibility finding” (citation and internal quotation marks omitted)); *Lei Li v. Holder*, 629 F.3d 1154, 1158 (9th Cir. 2011) (pre-REAL ID Act) (“A minor inconsistency or incidental misstatement that does not go to the heart of an applicant’s claim does not support an adverse credibility determination.”); *Chawla v. Holder*, 599 F.3d 998, 1006 (9th Cir. 2010) (pre-REAL ID Act) (minor inconsistency did not support adverse credibility determination); *Li v. Holder*, 559 F.3d 1096, 1103–07 (9th Cir. 2009) (pre-REAL ID Act) (adverse credibility determination “riddled” with speculation and based on minor inconsistencies that did not go to heart of claim not supported by substantial evidence); *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000) (pre-REAL ID Act) (“Any alleged inconsistencies in dates that reveal nothing about a petitioner’s credibility cannot form the basis of an adverse credibility finding.”).

Post-REAL ID Act, by contrast, “the plain text of the REAL ID Act makes clear that inconsistencies need not go to the heart of a petitioner’s claim, and our court continues to hold that ‘[u]nder the REAL ID Act, even minor inconsistencies that have a bearing on a petitioner’s veracity may constitute the basis for an adverse credibility determination.’” *Li*, 13 F.4th at 959, 961 (“[U]nder the REAL ID Act, . . . even minor inconsistencies may have a legitimate impact on a petitioner’s credibility.”).

Of course, an inconsistency goes to the heart of the claim is of great weight. *See Shrestha v. Holder*, 590 F.3d 1034, 1046–47 (9th Cir. 2010) (applying REAL ID Act).

Even under the REAL ID Act, trivial inconsistencies do not support an adverse credibility determination. *See Munyuh v. Garland*, 11 F.4th 750, 758 (9th Cir. 2021) (post-REAL ID Act) (“Although the REAL ID Act removed our earlier threshold limitation on the types of inconsistencies that may support an adverse credibility determination, . . . the record must still reasonably support an adverse determination for us to uphold it. For example, an utterly trivial inconsistency, such as a typographical error, will not by itself be enough.” (citation and internal

quotation marks omitted)); *Manes*, 875 F.3d at 1263 (“When an inconsistency is cited as a factor supporting an adverse credibility determination, that inconsistency should not be a mere trivial error such as a misspelling, and the petitioner’s explanation for the inconsistency, if any, should be considered in weighing credibility.” (quoting *Shrestha*, 590 F.3d at 1044)).

An adverse credibility finding should not rest on an applicant’s failure to remember nonmaterial details. See *Singh v. Holder*, 643 F.3d 1178, 1180–81 (9th Cir. 2011) (post-REAL ID Act) (“An applicant will naturally be more likely to remember and relate the facts that are important to his claim. The IJ therefore shouldn’t infer from an applicant’s careless error about peripheral details that he’s lying about the facts that do matter.”); see also *Kumar v. Garland*, 18 F.4th 1148, 1153 (9th Cir. 2021) (noting that “cases caution against relying too heavily on inconsistencies that could be attributable to simple human error or reluctance”).

Discrepancies that cannot be viewed as attempts to enhance claims of persecution generally have less bearing on credibility. See *Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004) (pre-REAL ID Act) (“Even if we were to agree with the INS that this testimony was inconsistent, any discrepancy cannot be viewed as an attempt by the applicant to enhance his claims of persecution, and thus has no bearing on credibility.” (citation modified) (citing *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000) (pre-REAL ID Act))).

But such inconsistencies may still bear on credibility. See *Kaur v. Gonzales*, 418 F.3d 1061, 1065 (9th Cir. 2005) (“Our court has never articulated a *per se* rule that whenever inconsistencies technically weaken an asylum claim they can never serve as the basis of an adverse credibility finding.”); see also *Don v. Gonzales*, 476 F.3d 738, 742 (9th Cir. 2007) (pre-REAL ID Act) (inconsistency that does not enhance a claim of persecution is relevant to credibility determination when accompanied by other indications of dishonesty such as a pattern of clear and pervasive inconsistency or contradiction).

b. Substantial Inconsistencies; *Falsus Maxim*

Substantial inconsistencies damage a claim and support a negative credibility finding. See, e.g., *Rodriguez-Ramirez v. Garland*, 11 F.4th 1091, 1093 (9th Cir. 2021) (post-REAL ID Act) (“The BIA and IJ were permitted to afford

substantial weight to inconsistencies that “bear[] directly on [Rodriguez-Ramirez]’s claim of persecution.”); *Mukulumbutu v. Barr*, 977 F.3d 924, 926 (9th Cir. 2020) (post-REAL ID Act) (petitioner’s inconsistent testimony about his birth date, circumstances surrounding a shooting, his injuries, and his reasons for leaving Brazil supported the agency’s adverse credibility determination); *Kin v. Holder*, 595 F.3d 1050, 1056–57 (9th Cir. 2010) (pre-REAL ID Act) (substantial evidence supported adverse credibility determination where petitioners omitted from asylum application a political demonstration and petitioners’ participation in it, and there were inconsistencies between testimony of different witnesses); *Hushev v. Mukasey*, 528 F.3d 1172, 1182–83 (9th Cir. 2008) (pre-REAL ID Act) (omission of political activism went to the heart of the claims and was not a “mere detail”), *abrogated on other grounds as stated in Ruiz v. Bondi*, 163 F.4th 586, 593 (9th Cir. 2025); *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) (“geographic discrepancies which went to the heart” of applicant’s claim).

For pre-REAL ID Act applications, “an adverse credibility ruling will be upheld so long as identified inconsistencies go to the heart of the asylum claim.” *Li v. Ashcroft*, 378 F.3d 959, 962 (9th Cir. 2004) (citation modified) (pre-REAL ID Act) (three prior asylum applications contained key omissions and discrepancies), *superseded by statute on other grounds*, 8 U.S.C. § 1158(b)(1)(B)(iii); *see also Kohli v. Gonzales*, 473 F.3d 1061, 1071 (9th Cir. 2007) (pre-REAL ID Act) (discrepancies between petitioner’s testimony, declaration, and letter of membership substantially support adverse credibility finding); *Goel v. Gonzales*, 490 F.3d 735, 739 (9th Cir. 2007) (pre-REAL ID Act) (inconsistencies between testimony and documentary evidence support an adverse credibility finding where inconsistencies went to the heart of the claim); *Don v. Gonzales*, 476 F.3d 738, 741–43 (9th Cir. 2007) (pre-REAL ID Act) (inconsistencies and lack of details regarding the event that spurred the persecutors to threaten petitioner went to the heart of the claim and were not trivial); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) (failure to include in either of two asylum applications or principal testimony the incident that precipitated flight from Guatemala); *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001) (inconsistencies relating to “the events leading up to his departure and the number of times he was arrested”), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *de Leon-Barrios v. INS*, 116 F.3d 391, 393–94 (9th Cir. 1997) (inconsistency relating to the basis for the alleged fear). To the extent

these cases rely on the “heart of the claim” rule, they are superseded by statute. See 8 U.S.C. § 1158(b)(1)(B)(iii).

“Material alterations in the applicant’s account of persecution are sufficient to support an adverse credibility finding.” *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (pre-REAL ID Act).

“Under this court’s precedent, an immigration judge may apply the *falsus* maxim to find that a witness who testified falsely about one thing is also not credible about other things.” *Shouchen Yang v. Lynch*, 822 F.3d 504, 508 (9th Cir. 2016); see *Ani v. Bondi*, 155 F.4th 1118, 1129 (9th Cir. 2025) (post-REAL ID Act) (“[D]eliberate deception of immigration authorities will surely reflect an important factor in the totality of circumstances, regardless of whether the deception relates to the eventual claimed basis for asylum. If a petitioner has deliberately deceived immigration authorities in the past when seeking immigration relief, it remains a permissible inference that the petitioner may be deceiving authorities in the present proceedings.”); *id.* (“Ani identifies no case in which we have rejected an adverse credibility determination based on a petitioner’s intentional deception of immigration authorities.”); *id.* at 1130 (lies to immigration authorities about fraudulent marriage supported adverse credibility finding even though those lies were irrelevant to subsequent asylum application); cf. *Li v. Holder*, 738 F.3d 1160, 1166 (9th Cir. 2013) (pre-REAL ID Act) (holding that the IJ could use material inconsistencies in testimony regarding one claim to support an adverse finding on another claim).

In *Ani*, the court explained:

[A]fter the REAL ID Act, the *falsus* maxim still allows IJs to make adverse credibility findings based on material falsehoods, even when they are not central to the basis for the present claim for immigration relief. A particularly concerning category of intentional falsehoods involves “deliberate deception” of immigration authorities. Such deception standing alone can support an adverse credibility finding under the totality of the circumstances, even if the deception is not directly relevant to an underlying claim for relief. Although these findings do not automatically require courts to uphold the adverse credibility determination, evidence that compels a contrary conclusion

will need to be so strong as to overcome the inherent credibility concerns associated with any petitioner who deliberately deceives immigration authorities to gain an immigration benefit.

Ani v. Bondi, 155 F.4th 1118, 1129–30 (9th Cir. 2025) (citations omitted).

In ruling on a motion to reopen, however, the BIA must credit evidence supporting the motion unless that evidence is inherently unbelievable. *Shouchen Yang v. Lynch*, 822 F.3d 504, 508 (9th Cir. 2016). Accordingly, “the BIA may not make adverse credibility determinations (including adverse credibility determinations based on the *falsus* maxim) in denying a motion to reopen.” *Id.* at 509.

That said, the BIA may deny a motion to reopen based on a previous adverse credibility finding if the previous finding demonstrates that a new claim has no factual basis. *See Greenwood v. Garland*, 36 F.4th 1232, 1236 (9th Cir. 2022) (“The BIA can thus reject a motion to reopen by relying on a previous adverse credibility determination if that earlier finding factually undermines the petitioner’s new claim. In layman’s terms, an earlier untruthful statement still remains untruthful and can undercut a petitioner’s new claim in a later proceeding.”); *id.* (where IJ found that petitioner’s testimony about his identity as a member of a political party was untruthful and petitioner’s motion to reopen was based on fear of violence on account of political party membership, the BIA did not abuse its discretion by denying motion to reopen).

Inconsistencies should not be viewed, not in isolation, but in light of all the evidence presented. *See Kaur v. Gonzales*, 418 F.3d 1061, 1067 (9th Cir. 2005) (pre-REAL ID Act) (repeated and significant inconsistencies deprived claim of the requisite “ring of truth”); *see also Garcia v. Holder*, 749 F.3d 785, 790–91 (9th Cir. 2014) (post-REAL ID Act) (adverse credibility finding supported by substantial evidence where petitioner lied about identity and country of origin, equivocated during her interview with the IJ, and did not explain inconsistent statements).

Under the REAL ID Act, although inconsistencies no longer need to go to the heart of the claim, when it does go to the heart of the claim, it is of great

weight. See *Shrestha v. Holder*, 590 F.3d 1034, 1046–47 (9th Cir. 2010) (applying REAL ID Act).

Although inconsistencies need not go to heart of the claim, the “IJ cannot selectively examine evidence in determining credibility, but rather must present a reasoned analysis of the evidence as a whole and cite specific instances in the record that form the basis of the adverse credibility finding.” *Tamang v. Holder*, 598 F.3d 1083, 1093–94 (9th Cir. 2010) (applying REAL ID Act and upholding adverse credibility determination where IJ provided specific and cogent reasons for ruling); see also *Munyuh v. Garland*, 11 F.4th 750, 764 (9th Cir. 2021) (post-REAL ID Act) (“Although we give great deference to the IJ as factfinder, substantial-evidence review does not require us to credit the credibility finding of an IJ who cherry-picks from—or misconstrues—the record to reach it. The IJ must consider the totality of the circumstances, and all relevant factors.”); *Ren v. Holder*, 648 F.3d 1079, 1084–85 (9th Cir. 2011) (post-REAL ID Act).

c. Mistranslation/Miscommunication

Apparent inconsistencies based on faulty or unreliable translations may not be sufficient to support a negative credibility finding. See *Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) (discrepancies attributable to the witness’s difficulties with English rather than prevarication); *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) (“Even where there is no due process violation, faulty or unreliable translations can undermine the evidence on which an adverse credibility determination is based.”); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) (“[W]e have long recognized that difficulties in interpretation may result in seeming inconsistencies, especially in cases . . . where there is a language barrier.”), superseded by statute as stated in *Ming Dai v. Sessions*, 884 F.3d 858, 869 n.8 (9th Cir. 2018), vacated and remanded sub nom. *Garland v. Ming Dai*, 593 U.S. 357 (2021); *Singh v. INS*, 292 F.3d 1017, 1021–23 (9th Cir. 2002) (perceived inconsistencies between applicant’s airport interview and testimony did not constitute a valid ground for an adverse credibility determination given the lack of an interpreter who spoke applicant’s language); *Zahedi v. INS*, 222 F.3d 1157, 1167 (9th Cir. 2000) (applicant “was not enhancing his claim with any of the confusing dates, and the confusion seems to have stemmed, at least in part, from language problems”); *Abovian v. INS*, 219 F.3d 972, 979 (9th Cir. 2000) (translation difficulties may have contributed to the purported disjointedness and

incoherence in testimony), *as amended by 228 F.3d 1127 and 234 F.3d 492 (9th Cir. 2000)*.

Discrepancies “capable of being attributed to a typographical or clerical error . . . cannot form the basis of an adverse credibility finding.” *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000); *see also Kumar v. Garland*, 18 F.4th 1148, 1153 (9th Cir. 2021) (post-REAL ID Act) (noting that “cases caution against relying too heavily on inconsistencies that could be attributable to simple human error or reluctance”); *Munyuh v. Garland*, 11 F.4th 750, 758 (9th Cir. 2021) (post-REAL ID Act) (“Although the REAL ID Act removed our earlier threshold limitation on the types of inconsistencies that may support an adverse credibility determination, . . . the record must still reasonably support an adverse determination for us to uphold it. For example, an utterly trivial inconsistency, such as a typographical error, will not by itself be enough.” (citations and internal quotation marks omitted)); *cf. Singh v. Ashcroft*, 367 F.3d 1139, 1143 (9th Cir. 2004) (IJ’s specific and cogent negative credibility finding was proper despite suggestion that hearing transcription was problematic because applicant did not contest any particular portion of the transcript or request remand for clarification).

5. Omissions

In *Iman v. Barr*, 972 F.3d 1058, 1067 (9th Cir. 2020), the court explained that:

in general, “omissions are less probative of credibility than inconsistencies created by direct contradictions in evidence and testimony.” . . . It is also well established in this circuit that “the mere omission of details is insufficient to uphold an adverse credibility finding.” . . . A collateral or ancillary omission that, under the totality of the circumstances, has no tendency to suggest an applicant fabricated her or his claim is likewise insufficient to support an adverse credibility determination.

Iman v. Barr, 972 F.3d 1058, 1067 (9th Cir. 2020) (citations omitted) (post-REAL ID Act); *see also Li v. Garland*, 13 F.4th 954, 959 (9th Cir. 2021) (post-REAL ID Act) (“Our decision in *Iman* clarifies the extent to which omissions may form the basis of an adverse credibility determination.”); *Rodriguez-Ramirez v. Garland*, 11

F.4th 1091, 1093 (9th Cir. 2021) (post-REAL ID Act) (recognizing that omissions are less probative of credibility than inconsistencies created by direct contradictions in evidence and testimony).

“[T]he mere omission of details is insufficient to uphold an adverse credibility finding.” *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000); *see also Uc Encarnacion v. Bondi*, 156 F.4th 927, 939–40 (9th Cir. 2025) (“The mere omission of details from an initial application for relief from removal generally is insufficient to uphold an adverse credibility finding.”); *id.* (petitioner’s omission of rectal bleeding from his original application did not support the adverse credibility finding where petitioner’s original injury allegations were of a severity comparable to long-term rectal bleeding, such that his testimony did not present a much different and more compelling story of persecution than his initial application); *Lizhi Qiu v. Barr*, 944 F.3d 837, 844 (9th Cir. 2019) (post-REAL ID Act) (unreasonable to find petitioner less credible merely because statement did not note specific date or names), *overruled on other grounds by Alam v. Garland*, 11 F.4th 1133, 1135–36 (9th Cir. 2021) (en banc); *Lai v. Holder*, 773 F.3d 966, 971 (9th Cir. 2014) (post-REAL ID Act) (“[T]o the extent the BIA’s decision relie[d] on Lai’s omissions as the basis of the IJ’s finding of ‘significant inconsistencies’ between Lai’s written statement and his testimony, substantial evidence [did] not support the adverse credibility determination.”); *Mousa v. Mukasey*, 530 F.3d 1025, 1029 (9th Cir. 2008) (pre-REAL ID Act) (petitioner’s failure to explain consequences of a leg infection did not support adverse credibility finding where petitioner testified about the infection “only in passing” and was “never asked to discuss the seriousness of the infection or how she had recovered from it”).

For example, an omission of one detail included in an applicant’s oral testimony does not make a supporting document inconsistent or incompatible. *See Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (where doctor’s letter failed to mention all of the applicant’s injuries).

“Omissions are not given much significance because applicants usually do not speak English and are not represented by counsel.” *Kin v. Holder*, 595 F.3d 1050, 1056 (9th Cir. 2010) (pre-REAL ID Act) (concluding that omissions from an asylum application of a political demonstration and petitioners’ participation in it were significant where the information was crucial to establishing persecution claim).

Where an applicant gives one account of persecution but then revises the story “so as to lessen the degree of persecution he experienced, rather than to increase it, the discrepancy generally does not support an adverse credibility finding.” *Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (internal quotation marks omitted); see also *Garrovillas v. INS*, 156 F.3d 1010, 1013–14 (9th Cir. 1998) (“[T]here was no reason for Garrovillas to disavow the earlier statement other than a desire to correct an error of which he had not been aware.”).

“Material alterations in the applicant’s account of persecution are sufficient to support an adverse credibility finding.” *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (pre-REAL ID Act) (citation omitted) (adverse credibility finding supported where omissions from original application “went to core of [the petitioner’s] fear of political persecution”). Thus, “an adverse credibility determination may be supported by omissions that are not ‘details,’ but new allegations that tell a ‘much different—and more compelling—story of persecution than [the] initial application.’” *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1185–86 (9th Cir. 2016) (post-REAL ID Act) (holding the BIA “reasonably concluded that Silva’s failure to mention his altercations with police were not details, but instead ‘significant events of alleged police misconduct that would have supported his applications for relief’”); see also *Mukulumbutu v. Barr*, 977 F.3d 924, 927 (9th Cir. 2020) (post-REAL ID Act) (“Mukulumbutu’s omission of the fact that he was stabbed in the leg sharply undermined his credibility because the fact of the stabbing would have made his case for asylum a ‘more compelling . . . story of persecution than [the] initial application.’” (citation omitted)).

“Omissions need not go to the heart of a claim to be considered when evaluating an applicant’s credibility under the REAL ID Act, but they must still be weighed in light of the totality of the circumstances and all relevant factors.” *Iman*, 972 F.3d at 1067. “[N]ot all omissions will deserve the same weight or support an adverse credibility finding.” *Id.*

“When assessing credibility, IJs and the BIA must distinguish between innocuous omissions that don’t bear on an applicant’s veracity, on the one hand, and omissions that tend to show an applicant has fabricated her or his claim, on the other hand.” *Id.* at 1069 (concluding that the agency erred by relying on an omission that had no tendency to show petitioner fabricated his claims of persecution when considered in light of the totality of the circumstances, given

petitioner's prior disclosure, the nature of the omitted information, and how the additional information was elicited at the merits hearing).

6. Incomplete Asylum Application

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

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

7. Sexual Abuse or Assault

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

(9th Cir. 2004) (“A victim of sexual assault does not irredeemably compromise his or her credibility by failing to report the assault at the first opportunity.”).

8. Airport Interviews

The court has “rejected adverse credibility findings that relied on differences between statements a petitioner made during removal proceedings and those made during less formal, routinely unrecorded proceedings.” *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (pre-REAL ID Act) (rejecting adverse credibility finding that relied on difference between bond hearing testimony and removal hearing testimony, noting similarities to asylum interviews and airport interviews). The court “hesitate[s] to view statements given during airport interviews as valuable impeachment sources because of the conditions under which they are taken and because a newly-arriving alien cannot be expected to divulge every detail of the persecution he or she sustained.” *Li v. Ashcroft*, 378 F.3d 959, 962–63 (9th Cir. 2004) (sworn airport interview statement was a reliable impeachment source supported adverse credibility determination), *superseded by statute on other grounds*, 8 U.S.C. § 1158(b)(1)(B)(iii); *see also Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (omission at the airport of specific details of torture that were revealed later did not support negative credibility finding); *Singh v. INS*, 292 F.3d 1017, 1021–24 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant’s initial statements at the airport); *cf. Liu v. Holder*, 640 F.3d 918, 925–26 (9th Cir. 2011) (pre-REAL ID Act) (adverse credibility finding supported in part by petitioner’s failure to mention Falun Gong, the central element of her claim, in airport interview).

9. Asylum Interview/Assessment to Refer

“Certain features of an asylum interview make it a potentially unreliable point of comparison to a petitioner’s testimony for purposes of a credibility determination.” *Singh v. Gonzales*, 403 F.3d 1081, 1087–88 (9th Cir. 2005) (pre-REAL ID Act) (discussing the nature of an asylum interview and concluding that discrepancies between Assessment to Refer and applicant’s testimony did not support an adverse credibility determination); *see also Lizhi Qiu v. Barr*, 944 F.3d 837, 843 (9th Cir. 2019) (post-REAL ID Act) (holding that asylum officer’s credibility determination could not support the adverse credibility finding),

overruled in part by *Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021) (en banc); *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (pre-REAL ID Act) (rejecting adverse credibility finding that relied on difference between bond hearing testimony and removal hearing testimony, noting similarities to asylum interviews and airport interviews). For example, the informal conference conducted by an asylum officer is quasi-prosecutorial in nature. See *Singh*, 403 F.3d at 1087–88 (citing *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th Cir. 2001), for a description of the asylum interview). In addition, although the regulations provide that an asylum officer “shall have the authority to administer oaths,” there is no requirement “that the officer *must* take evidence under oath.” See *Singh*, 403 F.3d at 1087–88 (citing 8 C.F.R. § 208.9(c)). Moreover, in the event that an applicant is unable to proceed with the interview in English, the applicant must provide at his or her own expense a competent translator. See *id.* “When an Assessment to Refer has sufficient indicia of reliability, though, an IJ may consider inconsistencies between what a petitioner said to an asylum officer and the petitioner’s testimony before the IJ.” *Lizhi Qiu*, 944 F.3d at 843 (concluding the agency erred when it went beyond the factual statements made in the Assessment to Refer and relied on the asylum officer’s assessment of petitioner’s credibility).

In *Singh v. Gonzales*, the court rejected the agency’s reliance on the Assessment to Refer to support its adverse credibility determination where the Assessment did not contain any record of the questions and answers at the asylum interview, or other detailed, contemporary, chronological notes of the interview, but included only a short conclusory summary, there was no transcript of the interview, or any indication of the language of the interview or of the administration of an oath before it took place, the asylum officer did not testify at the removal hearing, and the applicant was not asked at the removal hearing about the accuracy of the asylum officer’s report or given any opportunity to explain the discrepancies the asylum officer perceived. See 403 F.3d at 1089–90; cf. *Antonio v. Garland*, 58 F.4th 1067, 1074–75 (9th Cir. 2023) (relying on facts from petitioner’s credible fear interview, which were not raised at the IJ hearing, and determining the record compelled a different result).

10. Bond Hearing

The court has “rejected adverse credibility findings that relied on differences between statements a petitioner made during removal proceedings and those made

during less formal, routinely unrecorded proceedings.” *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (pre-REAL ID Act). Bond hearings are like airport interviews and asylum interviews in that they are far less formal than removal hearings. *Id.* at 1243. “Because the bond hearing lacks procedural safeguards to ensure reliability, including the requirement of an oath and a transcript of the proceedings, testimony given in bond hearings, as stated under 8 C.F.R. § 1003.19(d), shall be ‘separate and apart from, and shall form no part of, any deportation or removal hearing or proceedings.’” *Id.* at 1244. As such, 8 C.F.R. § 1003.19(d) precludes an IJ from considering evidence from a bond hearing when determining a petitioner’s credibility at a removal hearing. *Id.* at 1242–44.

11. State Department and other Government Reports

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

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

The agency may, however, place supplemental reliance on a State Department report to discredit general portions of an applicant’s testimony. *See*

Chebchoub v. INS, 257 F.3d 1038, 1043–44 (9th Cir. 2001) (affirming negative credibility finding based in part on country conditions evidence that Morocco did not practice enforced exile of dissidents), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010). In *Chebchoub*, the court also noted that the State Department report was not used to discredit specific testimony regarding the petitioner’s individual experiences. *Chebchoub*, 257 F.3d at 1044.

See also *Zheng v. Ashcroft*, 397 F.3d 1139, 1143–44 (9th Cir. 2005) (rejecting the IJ’s reliance on a country report in finding it unbelievable that applicants were forced to abort a child conceived outside of marriage); *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (alleged discrepancy based on country report statement that early marriage fines and regular IUD insertions were common, had no bearing on applicant’s credibility), *superseded by statute on other grounds*, 8 U.S.C. § 1158(b)(1)(B)(iii); *Ge v. Ashcroft*, 367 F.3d 1121, 1126 (9th Cir. 2004) (to the extent that the IJ relied on blanket statements in the State Department report regarding detention conditions in China, the IJ’s finding was not sufficiently individualized); *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) (despite State Department’s observations regarding high incidence of document fabrication in China, the “[m]ere failure to authenticate documents, at least in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding”), *superseded by statute on other grounds as recognized by Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc) (recognizing the REAL ID Act eliminated Wang’s “heart of the claim” requirement).

12. Speculation and Conjecture

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

See *Kumar v. Garland*, 18 F.4th 1148, 1155 (9th Cir. 2021) (post-REAL ID Act) (agency’s conclusion relied on speculation and conjecture, which cannot form the basis of an adverse credibility finding); *Joseph*, 600 F.3d at 1245–46 (agency improperly speculated that petitioner would have a sophisticated understanding of

Haiti's political situation, and also engaged in speculation when it assumed that petitioner's failure to leave Haiti sooner undermined his credibility); *Chawla v. Holder*, 599 F.3d 998, 1007 (9th Cir. 2010) (pre-REAL ID Act) (agency's conclusion that media or police reports existed was based on impermissible speculation and conjecture); *Li v. Holder*, 559 F.3d 1096, 1103–07 (9th Cir. 2009) (pre-REAL ID Act) (adverse credibility determination "riddled" with speculation and based on minor inconsistencies that did not go to heart of claim not supported by substantial evidence); *Mousa v. Mukasey*, 530 F.3d 1025, 1027 (9th Cir. 2008) (pre-REAL ID Act) (IJ's inability to reconcile applicant's ability to resist pressure to join Ba'ath political party in Iraq, despite that party's reputation for ruthless tactics, was improper speculation); *Kumar v. Gonzales*, 444 F.3d 1043, 1050–53 (9th Cir. 2006) (pre-REAL ID Act) (speculation concerning appropriate appearance of foreign official documents, investigative practices of Indian police, and whether applicant should know the whereabouts of his brother with whom he fled India); *Zhou v. Gonzales*, 437 F.3d 860, 865 (9th Cir. 2006) (pre-REAL ID Act) (implausibility that applicant would risk privileged position in society to smuggle illegal material into China for a friend); *Lin v. Gonzales*, 434 F.3d 1158, 1162–67 (9th Cir. 2006) (pre-REAL ID Act) (speculation concerning appropriate appearance of foreign official documents); *Quan v. Gonzales*, 428 F.3d 883, 887–88 (9th Cir. 2005) (pre-REAL ID Act) (speculation regarding police capabilities based on country's geographical size and unsupported assumption that banks in China would be closed on Sundays); *Jibril v. Gonzales*, 423 F.3d 1129, 1135–36 (9th Cir. 2005) (pre-REAL ID Act) (speculation concerning whether petitioner could have survived gunshot wound overnight and received necessary operation); *Shire v. Ashcroft*, 388 F.3d 1288, 1296–97 (9th Cir. 2004) (speculation concerning believability that applicant could enter the U.S. using false documents and not remember the names of the cities through which he traveled by bus from New York to San Diego); *Ge v. Ashcroft*, 367 F.3d 1121, 1125 (9th Cir. 2004) (personal conjecture about what the Chinese authorities would or would not do); *Guo v. Ashcroft*, 361 F.3d 1194, 1201–02 (9th Cir. 2004) (speculation as to why applicant did not apply for asylum immediately upon entry); *Arulampalam v. Ashcroft*, 353 F.3d 679, 687–88 (9th Cir. 2003) (IJ's hypotheses regarding abilities of Sri Lankan soldiers and police, and official registration requirements); *Wang v. INS*, 352 F.3d 1250, 1255–56 (9th Cir. 2003) (speculation regarding China's use of force against demonstrators and enforcement of one-child policy), *superseded by statute on other grounds as recognized by* *Alam v. Garland*, 11 F.4th 1133, 1136 (9th Cir.

2021) (en banc); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (IJ's hypothesis as to what motivated the applicant's departure from Sri Lanka); *Singh v. INS*, 292 F.3d 1017, 1024 (9th Cir. 2002) (assumption regarding Indian police motives); *Gui v. INS*, 280 F.3d 1217, 1226–27 (9th Cir. 2002) (IJ's opinion about appropriate way to silence a dissident and implications of Romanian government's failure to kill applicant); *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (rejecting the BIA's unsupported assumptions regarding the plausibility of applicant's political activities in Nigeria); *Bandari v. INS*, 227 F.3d 1160, 1167–68 (9th Cir. 2000) (“IJ's subjective view of what a persecuted person would include in his asylum application,” personal belief that applicant should have bled when he was flogged, and speculation about a foreign government's educational policies); *Chouchkov v. INS*, 220 F.3d 1077, 1083 (9th Cir. 2000) (personal conjecture about expected efficiency and competence of government officials); *Shah*, 220 F.3d at 1071 (State Department conjecture about the effect of electoral victory on existing political persecution and the BIA's conjecture about appropriate quantity and appearance of letters); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (“personal conjecture about what guerillas likely would and would not do”).

13. Implausible Testimony

Skepticism as to the plausibility of testimony may in certain circumstances be a proper basis for finding that the testimony is inherently unbelievable if the IJ's logical inferences are supported by substantial evidence. The court has explained:

By identifying the inherent plausibility of a witness's account as a factor distinct from various types of inconsistencies, the REAL ID Act expressly authorizes IJs to apply common sense to reach an implausibility finding. Credibility findings are not beyond judicial review, however, for speculation and conjecture alone cannot support an implausibility finding. The IJ must provide specific and cogent reasons in support of an implausibility finding, and those reasons must be supported by record evidence that undermines the plausibility of the witness's testimony.

Uc Encarnacion v. Bondi, 156 F.4th 927, 936 (9th Cir. 2025) (citation modified); see also *Yali Wang v. Sessions*, 861 F.3d 1003, 1008 (9th Cir. 2017) (“The IJ may

consider all relevant factors, including ‘the inherent plausibility’ of the petitioner’s account.” (citations omitted)).

“Our case law requires IJs to give witnesses an opportunity to address a perceived implausibility.” *Uc Encarnacion v. Bondi*, 156 F.4th 927, 936 (9th Cir. 2025); see also *Lalayan v. Garland*, 4 F.4th 822, 834 (9th Cir. 2021) (“[A]n IJ engages in impermissible speculation and conjecture when he or she bases an implausibility finding on an issue that the petitioner was not asked to address during the merits hearing.”).

Although case law “enables an IJ to challenge a witness on a perceived implausibility and discredit unbelievable testimony,” it also cautions against “unwarranted assumptions that are untethered from evidence in the record or based not on common sense but rather on cultural differences.” *Lalayan v. Garland*, 4 F.4th 822, 837 (9th Cir. 2021) (post-REAL ID Act) (agency’s implausibility findings were supported by evidence in the record and were based on reasonable assumptions, even if alternative explanations existed).

See also *Uc Encarnacion v. Bondi*, 156 F.4th 927, 936 (9th Cir. 2025) (IJ’s finding that petitioner’s denial of gang membership was implausible was adequately supported given petitioner’s “multiple gang-related tattoos” and petitioner’s testimony that “his entire family” was affiliated with Sureños gang); *Cui v. Holder*, 712 F.3d 1332, 1335–36 (9th Cir. 2013) (pre-REAL ID Act) (substantial evidence supported adverse credibility finding based in part on implausible testimony); *Don v. Gonzales*, 476 F.3d 738, 743 (9th Cir. 2007) (pre-REAL ID Act) (substantial evidence supported IJ’s finding that petitioner’s account of feared persecution by the police was implausible where petitioner had relatives in the police department, had reported threats to police, and had repeated interactions with police); cf. *Chawla v. Holder*, 599 F.3d 998, 1008 (9th Cir. 2010) (pre-REAL ID Act) (IJ’s skepticism as to the plausibility of testimony was based on mischaracterization of testimony and thus failed to support the adverse credibility determination); *Liu v. Holder*, 640 F.3d 918, 926 (9th Cir. 2011) (pre-REAL ID Act) (the IJ permissibly found that the “improbable nature” of petitioner’s story undermined petitioner’s credibility); *Singh v. Gonzales*, 439 F.3d 1100, 1100 (9th Cir. 2006) (pre-REAL ID Act) (IJ’s inferences not supported by substantial evidence), *overruled on other grounds by* *Maldonado v. Lynch*, 786 F.3d 1155, 1162–63 (9th Cir. 2015) (en banc); *Jibril v. Gonzales*, 423 F.3d 1129,

1135 (9th Cir. 2005) (pre-REAL ID Act) (“Testimony that is implausible in light of the background evidence can support an adverse credibility finding.” (citation modified)).

14. Counterfeit and Unauthenticated Documents

In pre-REAL ID Act cases, the court held that use of counterfeit documents was not a legitimate basis for a negative credibility finding unless the evidence went to the heart of the asylum claim. See *Akinmade v. INS*, 196 F.3d 951, 955–56 (9th Cir. 1999) (use of false passport and false declaration that applicant was a Canadian citizen supported claim of persecution); *Kaur v. Ashcroft*, 379 F.3d 876, 889 (9th Cir. 2004) (“[T]he fact that an asylum seeker . . . used false passports to enter this or another country, without more, is not a proper basis for finding her not credible.”), *superseded by statute on other grounds as stated in Perez-Rojas v. Sessions*, 685 F. App’x 575, 576 (9th Cir. 2017) (unpublished). Even if an applicant submitted an allegedly fraudulent document that went to the heart of the claim, the totality of the circumstances had to be considered. See, e.g., *Angov v. Lynch*, 788 F.3d 893, 910 (9th Cir. 2015) (pre-REAL ID Act) (“The adverse credibility finding based on the fraudulent subpoenas was supported by substantial evidence.”); *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 911 (9th Cir. 2004) (reversing adverse credibility determination based solely on the use of one allegedly fraudulent document where applicant corroborated testimony and nothing in the record suggested lack of credibility or knowledge that document was fraudulent); *Desta v. Ashcroft*, 365 F.3d 741, 745 (9th Cir. 2004) (fraudulent documents concerning alleged membership in the All Amhara People’s Organization and the Ethiopian Medhin Democratic Party went to the heart of his claim); *Pal v. INS*, 204 F.3d 935, 938 (9th Cir. 2000) (noting contradictions between testimony and doctor’s letter).

In post-REAL ID Act cases, the agency may consider any inconsistency, including fraudulent documents, regardless of whether the inconsistency goes to the heart of the petitioner’s claim for relief. See *Jin v. Holder*, 748 F.3d 959, 964–65 (9th Cir. 2014) (post-REAL ID Act) (considering fraudulent church certification when determining petitioner was not credible). But the determination still must be made based on the totality of the circumstances, and trivial inconsistencies having no bearing on the petitioner’s veracity cannot form the basis of the adverse credibility determination. *Id.*

“Mere failure to authenticate documents, at least in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding.” *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003), *superseded by statute on other grounds as recognized by Alam v. Garland*, 11 F.4th 1133, 1136 (9th Cir. 2021) (en banc); *see also Zhao v. Holder*, 728 F.3d 1144, 1149–50 (9th Cir. 2013) (failure to authenticate foreign documents may not serve as a basis for an adverse credibility determination absent evidence of forgery or other unreliability); *Lin v. Gonzales*, 434 F.3d 1158, 1164–65 (9th Cir. 2006) (pre-REAL ID Act) (an applicant does not have an affirmative duty to have every document authenticated by a document examiner); *Zhou v. Gonzales*, 437 F.3d 860, 866 (9th Cir. 2006) (pre-REAL ID Act) (failure to authenticate cannot support an adverse credibility determination absent some evidence of forgery or other unreliability); *Shire v. Ashcroft*, 388 F.3d 1288, 1299 (9th Cir. 2004) (“Mere failure to authenticate documents, at least in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding.” (quoting *Wang*, 352 F.3d at 1254)).

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

“[T]he IJ has no obligation to determine whether the documents submitted by a petitioner are forgeries; rather, the petitioner has the burden to satisfy the trier of fact by offering credible and persuasive evidence.” *Yali Wang v. Sessions*, 861 F.3d 1003, 1007–08 (9th Cir. 2017) (post-REAL ID Act).

15. Misrepresentations

“Untrue statements by themselves are not reason for refusal of refugee status.” *Turcios v. INS*, 821 F.2d 1396, 1400–01 (9th Cir. 1987) (Salvadoran applicant’s false claim to INS officials that he was Mexican did not undermine his credibility). For example, “the fact that an asylum seeker has lied to immigration officers or used false passports to enter this or another country, without more, is

not a proper basis for finding her not credible.” *Kaur v. Ashcroft*, 379 F.3d 876, 889 (9th Cir. 2004), *superseded by statute on other grounds as stated in Perez-Rojas v. Sessions*, 685 F. App’x 575, 576 (9th Cir. 2017) (unpublished). Such statements must be examined in light of all of the circumstances of the case. *Turcios*, 821 F.2d at 1400–01; *see also Marcos v. Gonzales*, 410 F.3d 1112, 1116 (9th Cir. 2005) (pre-REAL ID Act) (misrepresentation on visa application); *Guo v. Ashcroft*, 361 F.3d 1194, 1202 (9th Cir. 2004) (false statements made to extend B-1 visa); *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) (distinguishing between “false statements made to establish the critical elements of the asylum claim from false statements made to evade INS officials”).

“While the special circumstances of needing to lie one’s way out of a persecuting country and perhaps use fraudulent documents to get out of that country and into another may weaken or vitiate the adverse inference that might otherwise be drawn from past lies in other circumstances, lies and fraudulent documents when they are no longer necessary for the immediate escape from persecution do support an adverse inference.” *Singh v. Holder*, 638 F.3d 1264, 1272 (9th Cir. 2011) (pre-REAL ID Act) (“We have not held, and could not reasonably hold, that an asylum applicant’s past lies may never support an adverse credibility determination.”); *see also Singh v. Holder*, 643 F.3d 1178, 1180–81 (9th Cir. 2011) (post-REAL ID Act) (“[Lying to immigration authorities] always counts as substantial evidence supporting an adverse credibility finding, unless the lie falls within the narrow *Akinmade* exception.”).

False statements regarding alleged persecution may support a negative credibility finding. *See Al-Harbi v. INS*, 242 F.3d 882, 889–90 (9th Cir. 2001) (affirming negative credibility finding based on Iraqi dissident’s “propensity to change his story regarding incidents of past persecution”); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1393 (9th Cir. 1985) (negative credibility based on Salvadoran applicant’s lies to get passport and under oath to INS officials, travel under an assumed name, and conviction of illegally transporting noncitizens into the United States).

Even if an applicant’s explanation for a discrepancy is reasonable, the agency is not compelled to accept it. *See Li v. Garland*, 13 F.4th 954, 960–61 (9th Cir. 2021) (post-REAL ID Act) (where applicant submitted false information on her asylum application regarding her arrest record and provided a reasonable

explanation for the false information, the agency was not required to accept the explanation for the discrepancy, particularly because she was assisted by counsel).

Cross-reference: For a discussion of the effect of lying to immigration authorities on a matter not germane to the asylum application, see the discussion of the falsus maxim above, under the heading “Substantial Inconsistencies.”

16. Classified Information

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

17. Failure to Seek Asylum at First Opportunity

The failure to seek asylum in the first country in which an applicant arrives does not necessarily undermine a credible fear of persecution. See *Singh v. Gonzales*, 439 F.3d 1100, 1107 (9th Cir. 2006) (pre-REAL ID Act), *overruled on other grounds by Maldonado v. Lynch*, 786 F.3d 1155, 1162–63 (9th Cir. 2015) (en banc); *Ding v. Ashcroft*, 387 F.3d 1131, 1140 (9th Cir. 2004) (citing *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986)).

In *Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004), the IJ viewed the petitioner’s failure to seek asylum in Hong Kong or Thailand when she visited them on a business trip as undermining her credibility. The court rejected that reasoning, noting that the petitioner’s travel documents were held by the leaders of her trip, under whose control she remained at all times; there was no record evidence that either country offered asylum to women fleeing persecution on account of China’s oppressive population control policies at the time; the petitioner was not even aware that the United States could offer her asylum; and, even if the petitioner had gone to the American embassy in Thailand or Hong Kong seeking asylum, she could not have qualified for relief because forced abortion did not constitute persecution on account of political opinion at the time. *Id.* at 1140. The court held: “Although the IJ appears to have assumed that an individual who truly fears persecution in his homeland will automatically seek asylum in the first country in which he arrives, there is no basis for this assumption.” *Id.* But see *Loho v. Mukasey*, 531 F.3d 1016, 1018–19 (9th Cir. 2008) (“What cuts against

Loho's credibility is not that she failed to submit an asylum application during her previous visits, but that after leaving her home country for the safety of the United States, Loho took minimal steps to investigate the availability of some means of avoiding a return to the country she claims to have feared.”).

18. Cumulative Effect of Adverse Credibility Grounds

“[R]epeated and significant inconsistencies” may deprive a claim of the “requisite ring of truth.” *Kaur v. Gonzales*, 418 F.3d 1061, 1067 (9th Cir. 2005) (pre-REAL ID Act); see also *Don v. Gonzales*, 476 F.3d 738, 742 (9th Cir. 2007) (pre-REAL ID Act) (an adverse credibility determination may be supported by substantial evidence where there are inconsistencies that weaken a claim for asylum coupled with other indications of dishonesty); *Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) (inconsistencies provided substantial evidence in support of the BIA's adverse credibility determination where they involved the two incidents upon which the asylum application rested and thus were “the sum total” of the petitioner's testimony).

Furthermore, “just as repeated and significant inconsistencies can deprive an alien's claim of the requisite ring of truth, so too can an inconsistency accompanied by other indications of dishonesty—such as a pattern of clear and pervasive inconsistency or contradiction.” *Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011) (pre-REAL ID Act) (citation and internal quotation marks omitted), *overruled in part on other grounds by Alam v. Garland*, 11 F.4th 1133, 1135–37 (9th Cir. 2021) (en banc).

19. Voluntary Return to Country

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

In *Loho*, the court concluded that petitioner’s voluntary return to Indonesia was significant, even if she was not aware that she could have applied for asylum in the United States, because she failed even to investigate the means of avoiding a return to Indonesia:

We are persuaded that Loho’s two voluntary returns to her home country support the IJ’s adverse credibility finding even though she was not specifically aware of the possibility of applying for asylum. What cuts against Loho’s credibility is not that she failed to submit an asylum application during her previous visits, but that after leaving her home country for the safety of the United States, Loho took minimal steps to investigate the availability of some means of avoiding a return to the country she claims to have feared.

Loho v. Mukasey, 531 F.3d 1016, 1018–19 (9th Cir. 2008). *But see Ding v. Ashcroft*, 387 F.3d 1131, 1140 (9th Cir. 2004) (“Although the IJ appears to have assumed that an individual who truly fears persecution in his homeland will automatically seek asylum in the first country in which he arrives, there is no basis for this assumption.”).

20. Lack of Supporting Documentation

A lack of supporting documentation may be a factor supporting an adverse credibility determination. *See Barseghyan v. Garland*, 39 F.4th 1138, 1146 (9th Cir. 2022) (determining the BIA erred by misinterpreting the IJ’s reliance on petitioner’s lack of documentation as an independent basis for denying relief pursuant to 8 U.S.C. § 1158(b)(1)(B)(ii) (failure to sustain burden based on lack of reasonably obtainable evidence), when the IJ had in fact relied on it as “one factor supporting [the] adverse credibility determination under 8 U.S.C. § 1158(b)(1)(B)(iii)”); *cf. Barseghyan*, 39 F.4th at 1145–46 (substantial evidence did not support the IJ’s reliance upon the lack of or weakness of petitioner’s documentation as a basis for adverse credibility determination because “the IJ categorically ignored the documents that were consistent with his testimony,” and thus “the IJ did not consider the ‘totality of the circumstances’ when making its adverse credibility determination”).

E. Corroboration May Rehabilitate Testimony

“If a petitioner who has been found noncredible provides independent evidence to support her claims, the agency must evaluate whether that evidence independently proves her claims.” *Kalulu v. Bondi*, 128 F.4th 1009, 1023 (9th Cir. 2024) (remanding where the agency’s adverse credibility determination was supported by substantial evidence but the agency erroneously discounted eyewitness declarations and medical records of attacks in Zambia).

Corroborative evidence, therefore, may rehabilitate an applicant’s testimony that would otherwise be lacking in credibility. See *Ruiz-Colmenares v. Garland*, 25 F.4th 742, 750 (9th Cir. 2022) (“The agency reasonably concluded that Petitioner’s failure to provide any corroboration could not rehabilitate his incredible testimony.”); *Mukulumbutu v. Barr*, 977 F.3d 924, 927 (9th Cir. 2020) (“Substantial evidence also supports the BIA’s decision that Mukulumbutu did not rehabilitate his testimony with sufficient corroborating evidence.”); *Garcia v. Holder*, 749 F.3d 785, 791 (9th Cir. 2014) (corroborating documents were insufficient to rehabilitate petitioner’s testimony where the preparers were not available for cross examination, the authenticity of the documents relied on petitioner’s discredited testimony, and documents did not reveal any independent knowledge of the alleged abuse).

F. Implied Credibility Findings

1. Pre-REAL ID Act

a. Immigration Judges

For pre-REAL ID cases, “it is clearly our rule that when the IJ makes implicit credibility observations in passing, . . . this does not constitute a credibility finding.” *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137–38 (9th Cir. 2004) (alteration and internal quotation marks omitted); see also *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 658–59 (9th Cir. 2003) (same), *superseded by statute as stated in* *Ming Dai v. Sessions*, 884 F.3d 858, 869 n.8 (9th Cir. 2018), *vacated and remanded sub nom. Garland v. Ming Dai*, 593 U.S. 357 (2021); see also *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (pre-REAL ID Act) (“Precedent holds that an adverse credibility finding does not require the recitation of a particular

formula, yet the finding must be ‘explicit.’”); *Mansour v. Ashcroft*, 390 F.3d 667, 672 (9th Cir. 2004) (“The IJ’s ‘troubles’ with [petitioners’] testimony, like the ‘concerns’ expressed by the IJ in *Kataria*, amount to nothing more than an implicit adverse credibility determination, which we have refused to recognize.”); *Shoafera v. INS*, 228 F.3d 1070, 1075 n.3 (9th Cir. 2000) (explaining that the law of the circuit does not permit implicit adverse credibility determinations); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (“In the absence of an explicit adverse credibility finding, we must assume that [the applicant’s] factual contentions are true.”), *superseded by statute on other grounds as stated by* *Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009) (post-REAL ID Act); *cf. Toufighi v. Mukasey*, 538 F.3d 988, 994–95 (9th Cir. 2008) (pre-REAL ID Act) (concluding that through the IJ’s qualifying remarks, the IJ made an express adverse credibility determination as to petitioner’s claim that he converted to Christianity).

b. Board of Immigration Appeals

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

“[T]he BIA may not simply treat inconsistencies between the IJ’s findings and [the petitioner’s] testimony to be tantamount to an explicit adverse credibility finding.” *She v. Holder*, 629 F.3d 958, 964 (9th Cir. 2010) (pre-REAL ID Act), *superseded by statute on other grounds as stated in* *Ming Dai v. Sessions*, 884 F.3d 858, 868 n.8 (9th Cir. 2018), *vacated on other grounds by* *Garland v. Ming Dai*, 593 U.S. 357, 372–73 (2021).

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

factual findings, including credibility determinations, for clear error”), *superseded by statute as stated in Ming Dai v. Sessions*, 884 F.3d 858, 869 n.8 (9th Cir. 2018), *vacated and remanded sub nom. Garland v. Ming Dai*, 593 U.S. 357 (2021).

Where credibility is determinative, the BIA should either remand to the IJ to make a legally sufficient credibility determination or provide the applicant with specific notice that his credibility is at issue and afford the applicant an opportunity to respond. See *Mendoza Manimbao*, 329 F.3d at 661 (“[U]nder the most recent INS regulations, the BIA would have no choice but to remand to the IJ for an initial credibility determination, as the BIA is now limited to reviewing the IJ’s factual findings, including credibility determinations, for clear error.” (citing 8 C.F.R. § 1003.1(d)(3)(i) (2003))), *superseded by statute as stated in Ming Dai v. Sessions*, 884 F.3d 858, 869 n.8 (9th Cir. 2018), *vacated and remanded sub nom. Garland v. Ming Dai*, 593 U.S. 357 (2021).

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

Where an applicant had no notice that an adverse credibility determination could be based on his failure to call a witness to corroborate his testimony, due process requires a remand for a new hearing. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000).

2. Post-REAL ID Act

a. Immigration Judges

If the IJ does not make an explicit adverse credibility determination, a rebuttable presumption of credibility exists at the BIA. 8 U.S.C. § 1158(b)(1)(B)(iii) (“There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.”).

“[W]e leave for another day the question what the factfinder must say or do to furnish an ‘explici[t] adverse credibility determination.’” *Garland v. Ming Dai*,

593 U.S. 357, 368 (2021). In some cases pre-dating *Ming Dai* this court determined that an IJ did not make an explicit adverse credibility determination. See *Huang v. Mukasey*, 520 F.3d 1006, 1007–08 (9th Cir. 2008) (pre-REAL ID Act application) (although IJ found numerous inconsistencies in testimony, the IJ failed to make a credibility finding); *Mansour v. Ashcroft*, 390 F.3d 667, 672 (9th Cir. 2004) (“The IJ’s ‘troubles’ with [petitioners’] testimony, like the ‘concerns’ expressed by the IJ in [*Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000)], superseded by statute on other grounds as stated by *Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009)], amount to nothing more than an implicit adverse credibility determination. . . .”).

But where the IJ mentions credibility issues and the BIA adopts the IJ’s findings, the lack of an explicit adverse credibility determination does not mean this court treats the testimony as credible. *Villalobos Sura v. Garland*, 8 F.4th 1161, 1169 (9th Cir. 2021) (citing *Garland v. Ming Dai*, 593 U.S. 357, 366 (2021)). “[I]f the record contains evidence that a ‘reasonable factfinder could find sufficient’ to discredit the testimony, the reviewing court must accept the agency’s findings.” *Villalobos Sura*, 8 F.4th at 1169 (citing *Garland v. Ming Dai*, 593 U.S. 357, 366 (2021)).

b. Board of Immigration Appeals

Although there is a rebuttable presumption of credibility in BIA proceedings when the IJ does not make an explicit adverse credibility determination, the BIA does not have to make an explicit adverse credibility determination or use specific key words such as “incredible” or “rebutted” in order to find the presumption rebutted. *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021) (“[U]nlike the requirement that any initial adverse credibility determination must be ‘explicitly made,’ the INA contains no parallel requirement of explicitness when it comes to rebutting the presumption on appeal.”)

The reviewing court should consider the possibility that the BIA implicitly found the presumption of credibility rebutted. *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021) (“[T]he court ignored whether the agency’s statements could be fairly understood as rejecting his credibility.”).

If it appears that the BIA considered the presumption as rebutted, the reviewing court should treat it as rebutted:

So long as the BIA's reasons for rejecting an alien's credibility are reasonably discernible, the agency must be understood as having rebutted the presumption of credibility. It need not use any particular words to do so. And . . . a reviewing court must uphold that decision unless a reasonable adjudicator would have been compelled to reach a different conclusion.

Garland v. Ming Dai, 593 U.S. 357, 369 (2021); see *Ming Dai v. Garland*, 9 F.4th 1142, 1145 (9th Cir. 2021) (concluding on remand from the Supreme Court that the BIA implicitly considered petitioner's rebuttable presumption of credibility to have been rebutted where the BIA stated that petitioner had not been truthful about probative and damaging facts).

Where the IJ expresses doubts about testimony and the BIA adopts the IJ's findings, the lack of an explicit adverse credibility determination does not mean the reviewing court must treat testimony as credible, because the BIA may have implicitly concluded that the presumption of credibility on appeal was rebutted. See *Garland v. Ming Dai*, 593 U.S. 357, 369–71 (2021); *Ming Dai v. Garland*, 9 F.4th 1142, 1144–45 (9th Cir. 2021) (BIA adopted IJ's finding that testimony did not meet burden of proof and added assessment that specific testimony was not credible); *Villalobos Sura v. Garland*, 8 F.4th 1161, 1169 (9th Cir. 2021).

The "INA's statutory rebuttable presumption of credibility on appeal where the IJ has not rendered an explicit finding on this issue, see 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1231(b)(3)(C), 1229a(c)(4)(C), [is] limited . . . to an appeal to the BIA." *Dai v. Garland*, 9 F.4th 1142, 1145 (9th Cir. 2021) (discussing *Garland v. Ming Dai*, and explaining the Supreme Court held that the Ninth Circuit's "deemed-true-or-credible rule" has no proper place in a reviewing court's analysis). The provision does not apply retroactively to cases governed by pre-REAL ID Act law. See *She v. Holder*, 629 F.3d 958, 964 n.5 (9th Cir. 2010) (acknowledging that the pre-REAL ID Act rule requiring the BIA to presume a petitioner's testimony to be credible absent an adverse credibility finding, was altered by the REAL ID Act), *superseded by statute on other grounds as stated in*

Ming Dai v. Sessions, 884 F.3d 858, 868 n.8 (9th Cir. 2018), *vacated on other grounds by Garland v. Ming Dai*, 593 U.S. 357, 372–73 (2021).

A finding that the applicant is credible does not necessarily mean that the applicant has proven her case. See *Garland v. Ming Dai*, 593 U.S. 357, 372 (2021) (explaining that the agency may deem applicants credible without finding “their evidence *persuasive* or sufficient to meet their burden on essential questions” in light of “conflicting evidence”); *id.* at 371 (“even if the BIA treats an alien’s evidence as credible, the agency need not find his evidence persuasive or sufficient to meet the burden of proof” when considered along with other evidence in the record).

G. Discretionary Decisions

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

H. Motions to Reopen

The BIA should not make credibility determinations on motions to reopen. See *Silva v. Garland*, 993 F.3d 705, 718 (9th Cir. 2021) (“The BIA may not make credibility determinations on motions to reopen . . . and must accept as true the facts asserted by the [movant], unless they are ‘inherently unbelievable.’” (citations omitted)), *abrogated on other grounds as stated by Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *Yang v. Lynch*, 822 F.3d 504, 509 (9th Cir. 2016) (“[T]he BIA may not make adverse credibility determinations (including adverse credibility determinations based on the *falsus* maxim) in denying a motion to reopen.”).

Facts presented in supporting affidavits must be accepted as true unless inherently unbelievable. See *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (stating that the “self-serving nature of a declaration in support of a motion to reopen is not an appropriate basis for discrediting its content”); *Monjaraz-*

Munoz v. INS, 327 F.3d 892, 897 (9th Cir. 2003) (where the BIA cites no evidence to support a finding that petitioner’s version of the facts is incredible, and none is apparent from the court’s review of the record, petitioner’s allegations will be credited), *as amended by* 339 F.3d 1012 (9th Cir. 2003).

But the BIA need not accept factual assertions that directly conflict with a previous credibility determination. See *Greenwood v. Garland*, 36 F.4th 1232, 1235 (9th Cir. 2022) (“If the materiality of the evidence on changed country conditions [in a motion to reopen] ‘is contingent, in part or in whole, on factors that were determined to lack credibility [in the prior proceeding] and have not been rehabilitated, the [petitioner’s] ability to successfully establish prima facie eligibility may be undermined.’” (quoting *Matter of F-S-N-*, 28 I. & N. Dec. 1, 4 (BIA 2020))).

Cross-Reference: Motions to Reopen or Reconsider Immigration Proceedings

I. Remedy

1. Petitioner Deemed Credible

When this court determines that substantial evidence does not support a negative credibility finding, it may deem the applicant credible. See *Soto-Olarte v. Holder*, 555 F.3d 1089, 1095 (9th Cir. 2009) (pre-REAL ID Act) (explaining that “both the option of deeming a petitioner credible and the option of remanding on an open record remain viable in an appropriate case”).

In some cases where this court reverses the agency’s adverse credibility determination, remand to determine petitioner’s eligibility for asylum may be unnecessary. See *He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir. 2003) (explaining that remand for a determination of asylum eligibility or for further investigation of credibility was unnecessary and remanding for the Attorney General’s exercise of discretion as to asylum); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (explaining that applicant who had two forced abortions and an IUD inserted was statutorily eligible for asylum and withholding and remanding for the Attorney General’s exercise of discretion as to asylum), *superseded by statute on other grounds as stated in* *Li v. Garland*, 13 F.4th 954, 961 (9th Cir. 2021); see also *Guo*

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

Where adverse credibility is not the only issue on review, remand for the BIA to determine whether the applicant has met the other criteria for eligibility may be needed. *He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir. 2003) (explaining that remand for further evaluation of eligibility is generally warranted in the “usual asylum case” and citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)); *see also Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006) (pre-REAL ID Act) (reversing negative credibility finding and remanding for determination of eligibility), *overruled on other grounds by Maldonado v. Lynch*, 786 F.3d 1155, 1162–63 (9th Cir. 2015) (en banc); *Singh v. Ashcroft*, 362 F.3d 1164, 1172 (9th Cir. 2004) (same); *Chen v. Ashcroft*, 362 F.3d 611, 622–23 (9th Cir. 2004) (reversing negative credibility finding and remanding to allow BIA to determine whether petitioner had a well-founded fear that she would be forced to abort a pregnancy or to undergo involuntary sterilization).

2. Remand for Renewed Credibility Determination

When this court determines that substantial evidence does not support a negative credibility finding, it may remand for a renewed credibility determination. *See Soto-Olarte v. Holder*, 555 F.3d 1089, 1095 (9th Cir. 2009) (pre-REAL ID Act) (explaining that “both the option of deeming a petitioner credible and the option of remanding on an open record remain viable in an appropriate case”); *see also Kumar v. Garland*, 18 F.4th 1148, 1156 (9th Cir. 2021) (post-REAL ID Act) (remanding to the BIA to determine whether, in light of this court’s rejection of several of the agency’s adverse credibility grounds, the two remaining grounds suffice to support an adverse credibility determination based on the totality of the circumstances); *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998) (pre REAL ID Act); *Hartooni v. INS*, 21 F.3d 336, 343 (9th Cir. 1994) (pre-REAL ID Act) (remanding for credibility finding because the court could not “say that ‘no doubts have been raised’ about” applicant’s credibility).

The court may remand for a renewed credibility determination where the record has not been fully developed. *See, e.g., Munyuh v. Garland*, 11 F.4th 750, 764 (9th Cir. 2021) (remanding where petitioner was not given notice and an opportunity to provide corroboration); *Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1233 (9th Cir. 2021) (remanding where the BIA erred in relying on a probation report).

J. Applicability of Asylum Credibility Finding to the Denial of Other Forms of Relief

An adverse credibility determination in the context of an asylum application does not necessarily support the denial of other forms of relief on that basis. *See, e.g., Mukulumbutu v. Barr*, 977 F.3d 924, 927 (9th Cir. 2020) (post-REAL ID Act) (“An adverse credibility determination is not necessarily a death knell to CAT protection.” (citation omitted)); *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) (“We are not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim” (citation omitted)); *see also Smolnikova v. Gonzales*, 422 F.3d 1037, 1054 (9th Cir. 2005) (pre-REAL ID Act) (rejecting adverse credibility finding as to qualifying marriage claim where it was tainted by an unsupported credibility determination concerning asylum claim); *Taha v. Ashcroft*, 389 F.3d 800, 802 (9th Cir. 2004); *cf. Almaghzar v. Gonzales*, 457 F.3d 915, 921–22 (9th Cir. 2006) (habeas petition governed by REAL ID Act) (“*Kamalthas* requires that an applicant be given the opportunity to make a claim under the CAT by introducing documentary evidence of torture, but neither *Kamalthas* nor due process requires an IJ to rely on that evidence to grant relief when the applicant is not credible.”); *Farah v. Ashcroft*, 348 F.3d 1153, 1157 (9th Cir. 2003) (upholding denial of asylum and CAT relief based on adverse credibility determination where CAT claim depended upon same evidence presented in support of asylum).

K. Cases Reversing Negative Credibility Findings

See Kumar v. Garland, 18 F.4th 1148, 1152 (9th Cir. 2021) (discussing standard for reviewing adverse credibility determination under the REAL ID Act and holding that adverse credibility determination was not supported by substantial evidence under totality of circumstances); *Munyuh v. Garland*, 11 F.4th 750, 764 (9th Cir. 2021) (post-REAL ID Act) (granting petition for review where the IJ

failed to give specific, cogent reasons for rejecting petitioner’s reasonable, plausible explanations for discrepancies and discounted supporting documentation without giving petitioner notice and an opportunity to provide corroborative evidence); *Bhattarai v. Lynch*, 835 F.3d 1037, 1046 (9th Cir. 2016) (post-REAL ID Act) (determining that “inconsistencies identified by the IJ and BIA were either non-existent or procedurally defective because Bhattarai was not given the chance to explain them” and that “Bhattarai’s in-court testimony was remarkably detailed, consistent with his written declaration, and plausible in light of the U.S. State Department report and other country conditions evidence in the record”); *Lai v. Holder*, 773 F.3d 966, 974–75 (9th Cir. 2014) (post-REAL ID Act) (to the extent BIA’s decision relied on the petitioner’s omissions as the basis of the IJ’s finding of “significant inconsistencies” between his written statement and his testimony, substantial evidence did not support the adverse credibility finding); *Zhi v. Holder*, 751 F.3d 1088, 1092–95 (9th Cir. 2014) (post-REAL ID Act) (adverse credibility finding not supported by substantial evidence where conflict in dates was not a “legally significant discrepancy,” the IJ failed to consider and address explanations for adverse events, and petitioner was not given an opportunity to produce requested corroborative evidence); *Bassene v. Holder*, 737 F.3d 530, 536–38 (9th Cir. 2013) (pre-REAL ID Act) (substantial evidence did not support adverse credibility finding where IJ should not have drawn an adverse inference from the low level of detail in N-400 citizenship application and the BIA erred by finding the citizenship and asylum application inconsistent); *Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013) (en banc) (post-REAL ID Act) (petitioner’s due process rights were violated where he did not receive a full and fair hearing and IJ did not conduct a proper credibility analysis; remanding for a new hearing); *Lei Li v. Holder*, 629 F.3d 1154, 1158–60 (9th Cir. 2011) (pre-REAL ID Act) (adverse credibility finding not supported by substantial evidence where inconsistencies were minor and record did not support the conclusion that petitioner was evasive); *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (pre-REAL ID Act) (adverse credibility determination not supported by substantial evidence where the IJ based the finding in part on inconsistencies between petitioner’s bond hearing testimony according to the IJ’s notes and his testimony during his removal); *Chawla v. Holder*, 599 F.3d 998, 1001 (9th Cir. 2010) (pre-REAL ID Act) (adverse credibility determination not supported by substantial evidence where “[n]one of the reasons articulated by the IJ or BIA, considered either separately or in combination, provide[d] a legitimate basis to question Chawla’s credibility”);

Soto-Olarte v. Holder, 555 F.3d 1089, 1091–93 (9th Cir. 2009) (pre-REAL ID Act) (adverse credibility determination not supported by substantial evidence where neither the IJ nor the BIA addressed plausible explanation of inconsistency relied upon, and the petitioner was not given an opportunity to explain other inconsistencies that formed basis of determination); *Li v. Holder*, 559 F.3d 1096, 1103–07 (9th Cir. 2009) (pre-REAL ID Act) (adverse credibility determination “riddled” with speculation and based on minor inconsistencies that did not go to heart of claim not supported by substantial evidence); *Zhu v. Mukasey*, 537 F.3d 1034, 1038–43 (9th Cir. 2008) (pre-REAL ID Act) (IJ speculated, failed to address explanations, improperly relied on a statement given in airport interview that was not inconsistent with subsequent testimony, failed to provide an opportunity to explain a perceived inconsistency, and relied on minor inconsistencies that did not go to heart of claim); *Tekle v. Mukasey*, 533 F.3d 1044, 1052–55 (9th Cir. 2008) (pre-REAL ID Act) (IJ mischaracterized evidence, characterized evidence out of context, failed to provide applicant opportunity to explain perceived inconsistencies, and failed to address applicant’s explanations of perceived inconsistencies); *Mousa v. Mukasey*, 530 F.3d 1025, 1027–29 (9th Cir. 2008) (pre-REAL ID Act) (speculation regarding petitioner’s ability to resist pressure to join Ba’ath political party in Iraq despite the party’s reputation for ruthless tactics; failure to disclose sexual assault earlier in proceedings was credibly explained as a result of cultural norms; minor omission regarding consequences of leg infection); *Morgan v. Mukasey*, 529 F.3d 1202, 1206–10 (9th Cir. 2008) (pre-REAL ID Act) (agency relied on speculation and on discrepancies that were nonexistent or inconsequential); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1046 (9th Cir. 2007) (pre-REAL ID Act) (misstatements were not material, and IJ incorrectly “supposed” that applicant’s failure to find his parents was an “impossibility”); *Kumar v. Gonzales*, 444 F.3d 1043 (9th Cir. 2006) (pre-REAL ID Act) (veiled concerns about terrorist ties clouded adverse credibility determination and minor discrepancies that would not support determination individually could not support determination cumulatively); *Lin v. Gonzales*, 434 F.3d 1158 (9th Cir. 2006) (pre-REAL ID Act) (impermissible speculation regarding authenticity of several official documents); *Jibril v. Gonzales*, 423 F.3d 1129 (9th Cir. 2005) (pre-REAL ID Act) (inconsistencies on trivial matters not going to heart of claim; speculation and conjecture; unsupported demeanor finding); *Smolniakova v. Gonzales*, 422 F.3d 1037 (9th Cir. 2005) (pre-REAL ID Act) (adverse credibility determination based on misconstruction of the record; insufficient evidence; improper speculation and

conjecture); *Zheng v. Ashcroft*, 397 F.3d 1139 (9th Cir. 2005) (State Department reports on China not inconsistent with applicant's testimony); *Kaur v. Ashcroft*, 379 F.3d 876 (9th Cir. 2004) (failure to address explanation; conjecture), *superseded by statute on other grounds as stated in Perez-Rojas v. Sessions*, 685 F. App'x 575, 576 (9th Cir. 2017) (unpublished); *Hoque v. Ashcroft*, 367 F.3d 1190 (9th Cir. 2004) (discrepancy in documents; minor omissions; and no evidence to support finding that wife's testimony was unresponsive); *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004) (IJ's findings based on speculation and conjecture); *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004) (reluctance to discuss rape and minor inconsistencies in testimony of applicant and witness); *Singh v. Ashcroft*, 362 F.3d 1164 (9th Cir. 2004) (perceived inconsistencies insufficient); *Chen v. Ashcroft*, 362 F.3d 611 (9th Cir. 2004) (no opportunity to explain perceived inconsistency); *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir. 2004) (no opportunity to explain); *Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003) (insufficient demeanor-based finding; speculation); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (IJ misstated the evidence; other perceived problems explained); *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002) (minor omission in doctor's note; trivial inconsistency regarding location of rally; no examples of unresponsiveness); *Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002) (inconsistencies between initial airport interview and testimony; speculation and conjecture); *Gui v. INS*, 280 F.3d 1217 (9th Cir. 2002) (mischaracterizations of testimony; speculation); *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) (boilerplate negative credibility finding); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (neither the IJ or the BIA addressed the applicant's explanation for the identified discrepancy), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007), *abrogated on other grounds as stated in Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (implausibility finding based on impermissible grounds); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (conjecture; minor inconsistencies); *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (translation problems; confusion about dates that did not enhance applicant's claim); *Shah v. INS*, 220 F.3d 1062, 1067–71 (9th Cir. 2000) (no identification of evasiveness in the record; State Department conjecture; BIA's speculation); *Chanchavac v. INS*, 207 F.3d 584, 588 (9th Cir. 2000) (explainable inconsistencies and cultural assumptions); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (false passport and false declaration concerning Canadian citizenship; minor or non-existent discrepancies); *Osorio v. INS*, 99 F.3d 928, 931–32 (9th Cir. 1996)

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

L. Cases Upholding Negative Credibility Findings

See Dong v. Garland, 50 F.4th 1291, 1296–1301 (9th Cir. 2022) (post-REAL ID Act) (substantial evidence supported the adverse credibility determination in a “close case” in which the petitioner offered facially plausible explanations for some, if not all, of the identified inconsistencies and omissions); *Li v. Garland*, 13 F.4th 954, 959–60 (9th Cir. 2021) (post-REAL ID Act) (considering the totality of the circumstances, the inconsistencies were supported by substantial evidence and sufficient to support the adverse credibility determination); *Rodriguez-Ramirez v. Garland*, 11 F.4th 1091 (9th Cir. 2021) (post-REAL ID Act) (considering the totality of the circumstances, an inconsistency in a crucial date, an omission from petitioner’s asylum application that concerned the event that prompted him to flee to the United States, and the IJ’s demeanor findings were sufficient to conclude that substantial evidence supports the adverse credibility

determination); *Lalayan v. Garland*, 4 F.4th 822, 840 (9th Cir. 2021) (substantial evidence supported the agency’s implausibility findings with respect to Lalayan’s testimony and its finding that his wife was evasive and non-responsive, and that the record did not compel the conclusion that the adverse credibility determination was erroneous); *Aguilar Fermin v. Barr*, 958 F.3d 887, 892 (9th Cir. 2020) (post-REAL ID Act) (adverse credibility determination supported where the IJ and BIA identified inconsistencies and implausibility in petitioner’s account and petitioner’s explanations for the inconsistencies were unconvincing); *Mukulumbutu v. Barr*, 977 F.3d 924, 926–27 (9th Cir. 2020) (post-REAL ID Act) (substantial evidence supported adverse credibility finding based on inconsistencies between written and oral statements and implausibility of petitioner’s account; petitioner did not rehabilitate his testimony with sufficient corroborating evidence); *Manes v. Sessions*, 875 F.3d 1261, 1263 (9th Cir. 2017) (post-REAL ID Act) (IJ properly considered the totality of the circumstances and offered specific and cogent reasons for adverse credibility determination); *Yali Wang v. Sessions*, 861 F.3d 1003, 1007 (9th Cir. 2017) (post-REAL ID Act) (adverse credibility finding supported by substantial evidence where the IJ considered petitioner’s candor, her responsiveness, and the level of detail in her testimony; the IJ considered other evidence of record, including the documents petitioner submitted to corroborate her claims; and the IJ adequately described her concerns regarding the provenance and reliability of those documents); *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1187 (9th Cir. 2016) (post-REAL ID Act) (“Because the record does not compel the conclusion that the agency’s assessment of this evidence was mistaken or that ‘such corroborating evidence [was] unavailable,’ we decline to reverse the IJ’s credibility determination on this basis.”); *Singh v. Lynch*, 802 F.3d 972, 975 (9th Cir. 2015) (substantial evidence supported adverse credibility determination; “the REAL ID Act explicitly allows the BIA and IJ to base their credibility determinations on background evidence in the record”), *overruled on other grounds by Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021) (en banc); *Angov v. Lynch*, 788 F.3d 893, 910 (9th Cir. 2015) (pre-REAL ID Act) (“adverse credibility finding based on the fraudulent subpoenas was supported by substantial evidence” and the fraudulent subpoenas went to the heart of the claim); *Garcia v. Holder*, 749 F.3d 785, 789–91 (9th Cir. 2014) (post-REAL ID Act) (adverse credibility finding supported by substantial evidence where petitioner lied about identity and country of origin and equivocated during her interview with the IJ); *Jin v. Holder*, 748 F.3d 959, 965–67 (9th Cir. 2014) (post-REAL ID Act) (substantial evidence supported

adverse credibility finding where record showed non-responsive testimony, evasive responses, insufficient detail, and fraudulent church certificate); *Huang v. Holder*, 744 F.3d 1149, 1155 (9th Cir. 2014) (post-REAL ID Act) (adverse credibility finding supported by substantial evidence where “the IJ complied with the statutory requirement of reviewing the record as a whole and discussing the ‘totality of the circumstances’ underlying the adverse credibility determination”); *Li v. Holder*, 738 F.3d 1160, 1168 (9th Cir. 2013) (pre-REAL ID Act) (adverse credibility finding on one claim can support an adverse finding on another); *Cui v. Holder*, 712 F.3d 1332, 1338 (9th Cir. 2013) (pre-REAL ID Act) (petitioner’s inconsistent statements concerning police surveillance, failure to explain why he did not seek to enter the United States during his two-year-stay in Mexico, and voluntary return to China from Mexico provided adequate basis for the adverse credibility finding); *Singh v. Holder*, 643 F.3d 1178, 1180–81 (9th Cir. 2011) (post-REAL ID Act) (admission that petitioner repeatedly lied to immigration judge was sufficient to support adverse credibility finding); *Singh v. Holder*, 638 F.3d 1264, 1272 (9th Cir. 2011) (pre-REAL ID Act) (lies and fraudulent documents supported adverse credibility when they were no longer necessary for the immediate escape from persecution); *Liu v. Holder*, 640 F.3d 918 (9th Cir. 2011) (pre-REAL ID Act) (adverse credibility finding supported in part by petitioner’s failure to mention Falun Gong, the central element of her claim, in airport interview); *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (pre-REAL ID Act) (adverse credibility finding supported based on omission of incidents of mistreatment and arrest from original asylum application); *Fernandes v. Holder*, 619 F.3d 1069, 1075 (9th Cir. 2010) (pre-REAL ID Act) (misrepresentations in testimony and evidence of filing of fraudulent application); *Cortez-Pineda v. Holder*, 610 F.3d 1118, 1123–24 (9th Cir. 2010) (pre-REAL ID Act) (disputed entry date and inconsistencies between asylum application and hearing testimony as to when threats were received); *Martinez v. Holder*, 557 F.3d 1059, 1065 (9th Cir. 2009) (pre-REAL ID Act) (repeated and persistent lies under oath with respect to his asylum application); *Dhital v. Mukasey*, 532 F.3d 1044, 1050–51 (9th Cir. 2008) (pre-REAL ID Act) (filing of fraudulent first asylum application; repetition of fraudulent claim in asylum interview and initial hearing before IJ; inconsistency between explanation that false identity was used on first application in order to hide from persecutors, while simultaneously using true name to renew Nepalese passport and apply for credit cards); *Loho v. Mukasey*, 531 F.3d 1016, 1017–18 (9th Cir. 2008) (pre-REAL ID Act) (applicant’s admission that she voluntarily

returned to Indonesia twice following previous trips to the United States
 “inherently undermines her testimony that she experienced past suffering or that
 she feared returning home”); *Goel v. Gonzales*, 490 F.3d 735 (9th Cir. 2007) (pre-
 REAL ID Act) (petitioner’s testimony was at odds with his own documentary
 evidence); *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004) (omissions and
 discrepancies among three asylum applications, testimony, and airport interview
 statement), *superseded by statute on other grounds*, 8 U.S.C. § 1158(b)(1)(B)(iii);
Singh v. Ashcroft, 367 F.3d 1139, 1143 (9th Cir. 2004) (major inconsistencies;
 inability to explain political party responsibilities); *Desta v. Ashcroft*, 365 F.3d
 741, 745 (9th Cir. 2004) (fraudulent documents and material testimonial
 inconsistencies); *Wang v. INS*, 352 F.3d 1250 (9th Cir. 2003) (inconsistencies in
 testimonial and documentary evidence; evasiveness; new story), *superseded by
 statute on other grounds as recognized by* *Alam v. Garland*, 11 F.4th 1133, 1136
 (9th Cir. 2021) (en banc); *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003)
 (discrepancies regarding identity, membership in a persecuted group, and date of
 entry); *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) (geographic discrepancies
 going to heart of the claim); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir.
 2003) (“last-minute, uncorroborated story” regarding dramatic attack and
 stabbing); *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001) (material differences
 in two asylum applications regarding the basis of applicant’s fear); *Chebchoub v.
 INS*, 257 F.3d 1038 (9th Cir. 2001) (inconsistent statements about number of
 arrests; implausibility of other testimony), *superseded by statute on other grounds
 as stated in* *Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010) (post-REAL
 ID Act); *Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) (contradictions between
 testimony and doctor’s letter); *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999)
 (testimony waived during cross examination; inconsistent testimony; sudden
 change in name to coincide with newspaper article); *de Leon-Barrios v. INS*, 116
 F.3d 391, 393 (9th Cir. 1997) (major discrepancies in two asylum applications);
Mejia-Paiz v. INS, 111 F.3d 720, 723–24 (9th Cir. 1997) (inconsistencies in
 testimony and failure to offer proof that applicant was a Jehovah’s Witness);
Berroteran-Melendez v. INS, 955 F.2d 1251, 1256–57 (9th Cir. 1992)
 (discrepancies between testimony and application regarding number of arrests and
 lack of detail); *Ceballos-Castillo v. INS*, 904 F.2d 519 (9th Cir. 1990)
 (inconsistencies, including one regarding identity of alleged persecutors),
superseded by statute as stated in *Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir.
 2021) (en banc); *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985) (vague

allegations regarding threats); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985) (negative credibility based on applicant's lies to get passport and under oath to INS officials; travel under an assumed name; conviction for illegally transporting noncitizens in the U.S.); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1263–64 (9th Cir. 1985) (substantial inconsistencies between application and testimony).

M. The REAL ID Act Codification of Credibility Standards

The REAL ID Act's standards for credibility determinations are set out in 8 U.S.C. §§ 1158(b)(1)(B)(iii) (asylum); 1231(b)(3)(C) (withholding of removal); 1229a(c)(4)(C) (other relief from removal).

In *Perez-Arceo v. Lynch*, 821 F.3d 1178, 1183 n.3 (9th Cir. 2016), the court stated that it is “not clear whether the provisions of the REAL ID Act that govern credibility determinations in removal proceedings, 8 U.S.C. § 1229a(c)(4)(C),” apply to a motion to terminate proceedings because it is unclear whether such a motion is “an ‘[a]pplication[] for relief from removal’ within the meaning of the statute.” The court assumed without deciding that the REAL ID Act applied because, even under the REAL ID Act's more deferential standards, the IJ's decision was not supported by substantial evidence. *Perez-Arceo*, 821 F.3d at 1183 n.3.

N. Frivolous Applications

Section 1158(d)(6) states:

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

8 U.S.C. § 1158(d)(6); see also *Manhani v. Barr*, 942 F.3d 1176, 1177 (9th Cir. 2019).

For asylum applications filed on or after April 1, 1997, the frivolous asylum application bar, 8 U.S.C. § 1158(d)(6), renders an applicant permanently ineligible

for immigration benefits if her asylum application is found to be knowingly frivolous. See *Kalilu v. Mukasey*, 548 F.3d 1215, 1217 (9th Cir. 2008) (“A determination that an applicant filed a frivolous asylum application renders the applicant permanently ineligible for immigration relief.”). An application is frivolous “if any of its material elements is deliberately fabricated.” 8 C.F.R. § 1208.20; see also *Fernandes v. Holder*, 619 F.3d 1069, 1076 (9th Cir. 2010) (pre-REAL ID Act) (“An asylum application is frivolous if any of its material elements is deliberately fabricated.” (quoting 8 C.F.R. § 1208.20)).

“Fabrication of material evidence does not necessarily constitute fabrication of a material element.” *Khadka v. Holder*, 618 F.3d 996, 1004 (9th Cir. 2010) (pre-REAL ID Act). The bar applies to all benefits under the INA, including a waiver of deportation. *Manhani*, 942 F.3d at 1178.

“The consequences of filing a frivolous asylum application are severe. Noncitizens found to have knowingly filed such applications are ‘permanently ineligible for any benefits under [the Immigration and Nationality Act]’ including asylum.” *Udo v. Garland*, 32 F.4th 1198, 1206 (9th Cir. 2022) (quoting 8 U.S.C. § 1158(d)(6)).

The bar does not apply absent four procedural safeguards:

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

Fernandes, 619 F.3d at 1076 (quoting *Ahir v. Mukasey*, 527 F.3d 912, 917 (9th Cir. 2008) (pre-REAL ID Act) (adopting procedural requirements outlined in *Matter of Y-L-*, 24 I. & N. Dec. 151, 155–60 (BIA 2007))); see also *Liu v. Holder*, 640 F.3d 918, 928–29 (9th Cir. 2011) (pre-REAL ID Act) (concluding that petitioner was not given sufficient notice and opportunity to explain grounds which the IJ invoked for finding the asylum application to be frivolous); *Khadka*, 618 F.3d at 1002; *Farah v. Ashcroft*, 348 F.3d 1153, 1158 (9th Cir. 2003) (rejecting frivolous asylum

application determination where applicant was not given adequate opportunity to explain discrepancies).

“Whether the IJ complied with the BIA’s four procedural requirements for frivolousness finding is a question of law we review de novo.” [Liu, 640 F.3d at 928](#). “Whether a fabrication encompassed material elements of a claim is a mixed question of fact and law that we review de novo.” [Udo v. Garland, 32 F.4th 1198, 1206 \(9th Cir. 2022\)](#) (citation omitted) (concluding that the name of the hotel where alleged past persecution occurred was not a “material element” of asylum application).

The court has held that the “written warning on the asylum application adequately notifies the applicant of both the consequences of knowingly filing a frivolous application for asylum as well as the privilege of being represented by counsel, as required by 8 U.S.C. § 1158(d)(4)(A).” [Cheema v. Holder, 693 F.3d 1045, 1049 \(9th Cir. 2012\)](#) (pre-REAL ID Act). “The form states in clear, conspicuous, bold lettering on the signature page that ‘[a]pplicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act.’” [Id.](#) (concluding that the petitioner was notified of the consequences of filing a frivolous application where he signed below the bold warning on the application form). A frivolousness finding may be based on a withdrawn application. *See Kulakchyan v. Holder, 730 F.3d 993, 996 (9th Cir. 2013)*.

A finding of frivolousness does not flow automatically from an adverse credibility determination. [Liu v. Holder, 640 F.3d 918, 925 \(9th Cir. 2011\)](#) (pre-REAL ID Act); [Khadka v. Holder, 618 F.3d 996, 1002 \(9th Cir. 2010\)](#) (pre-REAL ID Act) (holding adverse credibility determination based solely on finding that petitioner created a false document to support his asylum application was insufficient to support a *sua sponte* finding that petitioner filed a frivolous application).

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

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

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

VI. CORROBORATIVE EVIDENCE

The REAL ID Act authorizes an IJ to require an applicant to provide corroboration beyond her testimony:

The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant’s burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

8 U.S.C. § 1158(b)(1)(B)(ii) (asylum); see also 8 U.S.C. § 1231(b)(3)(C); 8 U.S.C. § 1229a(c)(4)(B).

A. Pre-REAL ID Act Standards

1. Credible Testimony

“Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone.” *Garrovillas v. INS*, 156 F.3d 1010, 1016–17 (9th Cir. 1998) (internal quotation marks omitted); *see also* 8 C.F.R. § 1208.13(a) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”); *Li v. Holder*, 738 F.3d 1160, 1168 (9th Cir. 2013) (pre-REAL ID Act) (“[W]hile an applicant may establish his case through his testimony alone, the testimony establishes the claim only if the testimony is *credible*.” (citation omitted)).

Once an applicant’s testimony is deemed credible, no further corroboration is required to establish the facts to which the applicant testified. *See Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004) (pre-REAL ID Act), *superseded by statute on other grounds as stated in Perez-Rojas v. Sessions*, 685 F. App’x 575, 576 (9th Cir. 2017) (unpublished); *see also Lei Li v. Holder*, 629 F.3d 1154, 1160 (9th Cir. 2011) (pre-REAL ID Act) (explaining that in a “pre-REAL ID Act case, absent other substantial evidence of adverse credibility, the production of corroborating evidence cannot be required. When credibility is the only issue on appeal, and once each of the IJ’s reasons for finding adverse credibility is shown to be defective, this court accepts a petitioner’s testimony as credible.” (internal citations omitted)); *Joseph v. Holder*, 600 F.3d 1235, 1246 (9th Cir. 2010) (pre-REAL ID Act) (where substantial evidence did not support adverse credibility finding, no corroborative evidence was required); *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (pre-REAL ID Act) (explaining that where the IJ fails to make an explicit credibility finding, he cannot require corroborating evidence); *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (pre-REAL ID Act) (credible applicant was not required to produce evidence of organizational membership, political fliers, or medical records).

Moreover, “when each of the IJ’s or BIA’s proffered reasons for an adverse credibility finding fails, we must accept a petitioner’s testimony as credible,” and further corroboration is not required. *Kaur*, 379 F.3d at 890 (reversing the IJ’s five-factor negative credibility finding and holding that corroboration was not required); *see also Lin v. Holder*, 610 F.3d 1093, 1096–97 (9th Cir. 2010) (pre-

REAL ID Act) (where petitioner established by clear and convincing evidence that his asylum application was timely filed, there was no need for corroboration); *Abovian v. INS*, 219 F.3d 972, 978 (9th Cir. 2000) (“It is well settled in this circuit that independent corroborative evidence is not required from asylum applicants where their testimony is unrefuted.”), *as amended by* 228 F.3d 1127 and 234 F.3d 492 (9th Cir. 2000).

“If the trier of fact either does not believe the applicant or does not know what to believe, the applicant’s failure to corroborate testimony can be fatal to his asylum application.” *Cui v. Holder*, 712 F.3d 1332, 1336 (9th Cir. 2013) (pre-REAL ID Act) (quoting *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000)).

2. Credibility Assumed

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

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

3. Negative Credibility Finding

“[W]here the IJ has reason to question the applicant’s credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review.” *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000) (Sikh applicant should have presented his father at the hearing to corroborate his testimony, but remanding because applicant had no notice that negative credibility finding could be based on this failure); *see also Cui v. Holder*, 712 F.3d 1332, 1336 (9th Cir. 2013) (pre-REAL ID Act) (failure to corroborate can be fatal to an asylum application where the applicant is not credible); *Singh v. Holder*, 638 F.3d 1264, 1272–73 (9th Cir. 2011) (pre-REAL ID Act) (adverse credibility finding upheld where there was fraud in the asylum application, past perjury, and absence of reasonably available corroboration); *Chawla v. Holder*, 599 F.3d 998, 1005 (9th Cir. 2010) (pre-REAL ID Act) (rejecting IJ’s adverse credibility based on petitioner’s failure to provide corroboration, where evidence IJ demanded was not easily available); *Sidhu*, 220 F.3d at 1090 (“[I]f the trier of fact either does not believe the applicant or does not know what to believe, the applicant’s failure to corroborate his testimony can be fatal to his asylum application.”); *Chebchoub v. INS*, 257 F.3d 1038, 1045 (9th Cir. 2001) (substantial evidence supported the BIA’s determination that Moroccan applicant failed to satisfy his burden of proof based on a negative credibility finding and the failure to provide easily available corroborating evidence), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010) (post-REAL ID Act); *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997) (affirming negative credibility finding based on gaps and inconsistencies in testimony, and failure to provide documentary evidence proving membership in the Nicaraguan Jehovah’s Witness Church).

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

a. Non-Duplicative Corroborative Evidence

“[W]here an applicant produces credible corroborating evidence to buttress an aspect of his own testimony, an IJ may not base an adverse credibility

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

b. Availability of Corroborative Evidence

Corroborative documentation may not be "easily available" where the applicant fled his or her country in haste, or where it would be dangerous to be caught with material evidence. *See* *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000); *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000). "[I]t is inappropriate to base an adverse credibility determination on an applicant's inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States—such corroboration is almost never easily available." *Sidhu v. INS*, 220 F.3d 1085, 1091–92 (9th Cir. 2000); *see also* *Chawla v. Holder*, 599 F.3d 998, 1005 (9th Cir. 2010) (pre-REAL ID Act) (failure to provide charge sheet as corroborating evidence did not support adverse credibility determination where the charge sheet was not easily available); *Shire v. Ashcroft*, 388 F.3d 1288, 1298–99 (9th Cir. 2004) (medical records from and verification of stay in refugee camps in Kenya not easily available); *Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004) (affidavits or letters from friends and neighbors in India not easily available), *superseded by statute on other grounds as stated in* *Perez-Rojas v. Sessions*, 685 F. App'x 575, 576 (9th Cir. 2017) (unpublished); *Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) (Chinese employment records not easily available because applicant was fired); *Guo v. Ashcroft*, 361 F.3d 1194, 1201 (9th Cir. 2004) (corroborative evidence of job termination not easily available because it was in China); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (affidavits from Sri Lanka not easily available); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (corroborating letters or statements from mother in Guatemala and friend in Mexico not required).

By contrast, affidavits from close relatives in Western Europe and from individuals in the United States should be "easily available." *See* *Chebchoub v.*

INS, 257 F.3d 1038, 1044–45 (9th Cir. 2001), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *see also Sidhu*, 220 F.3d at 1091 (father living in nearby suburb was an “easily available” witness); *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997) (“Proving one’s membership in a church does not pose the type of particularized evidentiary burden that would excuse corroboration.”).

c. Opportunity to Explain

If corroborative evidence is required, the applicant must be given an opportunity to explain the failure to provide material corroboration. *See Sidhu v. INS*, 220 F.3d 1085, 1091 (9th Cir. 2000) (applicant was specifically asked to explain the lack of corroboration); *Chen v. Ashcroft*, 362 F.3d 611, 621 (9th Cir. 2004) (failure of brother to testify on applicant’s behalf was not determinative because she presented a plausible explanation for his absence); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (Sri Lankan applicant was not given an opportunity to explain failure to produce corroborative evidence).

B. Post-REAL ID Act Standards

For *applications* for asylum, withholding of removal, and other relief from removal ***filed on or after May 11, 2005***, sections 101(a)(3), (c), and (d)(2) of the REAL ID Act of 2005, **Pub. L. No. 109-13, 119 Stat. 231**, codified the BIA’s and this court’s practice regarding when an applicant’s credible testimony is sufficient to sustain his burden of proof without corroboration. *See 8 U.S.C. § 1158(b)(1)(B)(ii)* (as amended) (“The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”). The REAL ID Act created new standards governing when the trier of fact may require an applicant to submit corroborating evidence. *See Ren v. Holder*, 648 F.3d 1079, 1090 (9th Cir. 2011) (“[T]he REAL ID Act altered this court’s rules regarding when an asylum applicant may be required to provide corroboration to meet his burden of proof.”).

Adopting the standard set forth in the BIA’s decision, *Matter of S-M-J-*, 21 I. & N. Dec. 722 (BIA 1997), the new provisions permit the trier of fact to require

an applicant to provide evidence to corroborate otherwise credible testimony, unless the applicant does not have the evidence and cannot reasonably obtain the evidence. 8 U.S.C. § 1158(b)(1)(B)(ii), 8 U.S.C. § 1231(b)(3)(C), and 8 U.S.C. § 1229a(c)(4)(B) (as amended); *see also Jie Shi Liu v. Sessions*, 891 F.3d 834, 838 (9th Cir. 2018) (“[If] the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” (citation modified)); *Yali Wang v. Sessions*, 861 F.3d 1003, 1009 (9th Cir. 2017) (“If the testimony is not sufficient by itself, then the IJ may require corroborative evidence.”); *Bhattarai v. Lynch*, 835 F.3d 1037, 1042 (9th Cir. 2016) (“Under the REAL ID Act, which applies to applications filed after May 11, 2005, an applicant may establish eligibility on his credible testimony alone, without any corroboration. 8 U.S.C. § 1158(b)(1)(B)(ii). However, where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” (citation modified)).

In *Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009), the court stated:

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

Aden v. Holder, 589 F.3d 1040, 1044 (9th Cir. 2009) (addressing corroboration in asylum case under the REAL ID Act)

“If the IJ determines that corroborative evidence is necessary, ‘the IJ must give the applicant notice of the corroboration that is required and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available.’” *Yali Wang*, 861 F.3d at 1009 (quoting *Ren*, 648 F.3d at 1093); *see also Munyuh v. Garland*, 11 F.4th 750, 763 (9th Cir. 2021) (“The IJ . . . erred by failing to give Ms. Munyuh adequate notice that she was required to present such corroborative evidence and the opportunity either to obtain

it or explain why it was unavailable.”); *Jie Shi Liu*, 891 F.3d at 838 (post-REAL ID Act) (the trier of fact can request additional corroborating evidence, but the applicant must be put on notice that corroboration is necessary); *id.* at 839 (“Where . . . an IJ gives notice that an asylum-seeker’s testimony will not be sufficient and gives the petitioner adequate time to gather corroborating evidence, and the petitioner then provides no meaningful corroboration or an explanation for its absence, the IJ may deny the application for asylum.”) (denying petition for review where petitioner was sufficiently put on notice that corroboration was necessary but failed to corroborate claims); *Bhattarai v. Lynch*, 835 F.3d 1037, 1043 (9th Cir. 2016) (“[A]n IJ cannot articulate for the first time in her decision denying relief that key corroborative evidence is missing. . . . If the IJ or BIA failed to provide the required notice and opportunity, we must grant the petition and remand.”); *Zhi v. Holder*, 751 F.3d 1088 (9th Cir. 2014) (post-REAL ID Act) (REAL ID Act allowed IJ to demand that petitioner provide corroborative evidence to meet burden of proof, but IJ erred because she did not provide petitioner notice that he was required to present the corroborative evidence, nor did she give petitioner an opportunity to explain why such evidence may be unavailable); *Ren v. Holder*, 648 F.3d 1079, 1094 (9th Cir. 2011) (holding “that Ren received adequate notice and an opportunity to respond to the IJ’s request for corroborative evidence, that he failed to provide such evidence or any explanation as to why it was unavailable, and that the IJ was not compelled to conclude that Ren met his burden of proof without the corroborating evidence that she requested”); *id.* at 1093 (“If corroboration is needed, . . . the IJ must give the applicant notice of the corroboration that is required and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available.”); *Owino v. Holder*, 575 F.3d 956 (9th Cir. 2009) (post-REAL ID Act) (where the agency failed to apply the REAL ID Act, the court remanded for the IJ to determine whether petitioner was required to corroborate his claim).

Where the applicant’s testimony is not credible, the IJ is not required to give the applicant notice and an opportunity to provide additional corroborating evidence. See *Rodriguez-Ramirez v. Garland*, 11 F.4th 1091, 1094 (9th Cir. 2021) (“[A]lthough the BIA and IJ also pointed to a lack of corroborating evidence, the IJ was not required to give [Rodriguez-Ramirez] notice and an opportunity to provide additional corroborating evidence because substantial evidence supports the adverse credibility determination.”); *Mukulumbutu v. Barr*, 977 F.3d 924, 927 (9th Cir. 2020); *Yali Wang v. Sessions*, 861 F.3d 1003, 1009 (9th Cir. 2017) (because

petitioner was not credible, “[t]he IJ . . . had no obligation to give [petitioner] an additional opportunity to bolster her case by submitting further evidence”).

This standard differs from the court’s pre-REAL ID Act case law, which held that the trier of fact could not require corroborating evidence in the absence of an explicit adverse credibility determination. *E.g.*, [Kataria v. INS](#), 232 F.3d 1107, 1114 (9th Cir. 2000) (trier of fact may not require corroborating evidence absent an adverse credibility determination), *superseded by statute as stated by* [Aden v. Holder](#), 589 F.3d 1040, 1044 (9th Cir. 2009); [Ladha v. INS](#), 215 F.3d 889, 901 (9th Cir. 2000) (explicitly disapproving corroboration requirement set forth in *Matter of S-M-J-*), *overruled on other grounds by* [Abebe v. Mukasey](#), 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc).

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

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

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

C. Judicially Noticeable Facts

The court has rejected an adverse credibility determination based on an applicant’s failure to corroborate judicially noticeable facts. *See* [Singh v. Ashcroft](#),

393 F.3d 903, 907 (9th Cir. 2004) (taking judicial notice of existence and operations of Indian counter-terrorism agency and rejecting negative credibility finding based on petitioner's lack of corroborative evidence).

D. Forms of Evidence

Corroborative evidence may be in the form of documents, witness testimony, expert testimony, or physical evidence such as scars. *See, e.g., Castillo v. Barr*, 980 F.3d 1278, 1281 (9th Cir. 2020) (expert testimony); *Mukulumbutu v. Barr*, 977 F.3d 924, 927 (9th Cir. 2020) (petitioner failed to provide sufficient corroborating evidence, which included an affidavit and letters from interested parties); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1047 (9th Cir. 2005) (newspaper article reporting an alleged incident of persecution); *Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (burn marks on arms; doctor's letter); *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (country conditions reports; witness testimony; and scars); *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1199 (9th Cir. 2000) (expert testimony); *Akinmade v. INS*, 196 F.3d 951, 957 (9th Cir. 1999) (country conditions reports).

Although the trier of fact may deny an asylum application based on a finding that documentary evidence is not credible, such a finding must be supported by a legitimate articulable basis and specific cogent reasons, and cannot rest on mere speculation or conjecture, such as the IJ's bare subjective opinion as to the authenticity or probity of documents. *Lin v. Gonzales*, 434 F.3d 1158, 1162 (9th Cir. 2006); *see also Wang v. INS*, 352 F.3d 1250, 1253–54 (9th Cir. 2003), *superseded by statute on other grounds as recognized by Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc); *Shah v. INS*, 220 F.3d 1062, 1067–71 (9th Cir. 2000).

Rather, “the record must include some evidence undermining their reliability, such that a reviewing court can objectively verify whether the IJ has a legitimate basis to distrust the documents.” *See Lin*, 434 F.3d at 1162 (internal quotation marks omitted). The court has noted that this evidence may in some circumstances be comprised of judicial expertise garnered by repetitive examination of particular documents and familiarity with foreign document practices, but such expertise should be articulated on the record to permit meaningful review. *See id.* at 1163; *cf. Singh v. Gonzales*, 439 F.3d 1100 (9th Cir.

2006) (rejecting IJ’s reliance on her recollection of the State Department Foreign Affairs Manual for India because it was not part of the record), *overruled on other grounds by Maldonado v. Lynch*, 786 F.3d 1155, 1162–63 (9th Cir. 2015) (en banc).

“If the Board rejects expert testimony, it must state ‘in the record why the testimony was insufficient Improperly rejected expert testimony is a legal error and, thus, per se reversible.” *Castillo v. Barr*, 980 F.3d 1278, 1283 (9th Cir. 2020) (citations omitted).

E. Hearsay Evidence

In general, hearsay evidence is admissible if it is probative and its admission is fundamentally fair. *See Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006) (citing *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983)); *see also Sanchez v. Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012) (rejecting petitioner’s contention that Form I-213 should have been excluded from evidence as hearsay, and recognizing that the sole test for admission of evidence is whether it is probative and its admission is fundamentally fair); *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000); *Matter of Grijalva*, 19 I. & N. Dec. 713, 721–22 (BIA 1988).

But this court has held that the absence of an adverse credibility determination does not prevent the trier of fact from considering the relative probative value of hearsay and non-hearsay testimony, and according less weight to statements of out-of-court declarants when weighed against non-hearsay evidence. *Gu*, 454 F.3d at 1021 (explaining that the out-of-court statement of an anonymous friend was less persuasive or specific than that of a firsthand account).

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

F. Country Conditions Evidence

Country conditions evidence generally provides the context for evaluating an applicant’s credibility, rather than corroborating specifics of a claim. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1162 (9th Cir. 1999); *cf. Chebchoub v. INS*, 257 F.3d 1038, 1044 (9th Cir. 2001) (affirming BIA’s use of country reports to “refute

a generalized statement” regarding the practice of exile in Morocco), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010).

The agency errs by relying on a flawed or outdated country report. On remedy, compare *Parada v. Sessions*, 902 F.3d 901, 912 (9th Cir. 2018) (pre-REAL ID Act) (where materially outdated reports failed to rebut presumption of future persecution, and credible petitioner was eligible for relief, the court remanded for Attorney General to exercise discretion as to whether to grant asylum, instead of giving government another opportunity to present evidence of changed country conditions), with *Stoyanov v. INS*, 149 F.3d 1226 (9th Cir. 1998) (remanding a claim for reconsideration where the BIA relied on a flawed State Department report).

G. Authentication and Certification of Records

“[A]uthentication of documents is required in immigration proceedings.” *Smith v. Garland*, 103 F.4th 663, 667 (9th Cir. 2024).

Challenges to the authenticity of documents are forfeited if they are not raised before the IJ. See *Smith v. Garland*, 103 F.4th 663, 669–71 (9th Cir. 2024) (petitioner forfeited challenges to the authenticity of an FBI rap sheet and Form I-213 offered by the government by failing to raise those challenges before the IJ).

“Once a document is authenticated, the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.” *Smith v. Garland*, 103 F.4th 663, 671 (9th Cir. 2024) (citation modified) (admission of FBI rap sheet and Form I-213 did not violate due process where the agency permissibly concluded the documents were reliable).

8 C.F.R. § 287.6 sets out certain means for authenticating official domestic and foreign records. See 8 C.F.R. § 287.6(a)–(b).

The court has held that the regulation is not the exclusive means of authenticating official records. See *Jiang v. Holder*, 658 F.3d 1118, 1120 (9th Cir. 2011) (“Documents may be authenticated in immigration proceedings through any recognized procedure, such as those required by INS regulations or by the Federal

Rules of Civil Procedure. The procedure specified in [8 C.F.R. § 287.6](#) provides one, but not the exclusive method. Thus, the IJ erred by refusing to allow Jiang to authenticate the foreign documents through his own testimony.” (citation modified)); [Khan v. INS](#), 237 F.3d 1143, 1144 (9th Cir. 2001) (“Documents may be authenticated in immigration proceedings through any recognized procedure, such as those required by INS regulations or by the Federal Rules of Civil Procedure.” (citation modified)); *see also* [Smith v. Garland](#), 103 F.4th 663, 668 (9th Cir. 2024) (noting that “we have continued to hold that § 287.6 is not the exclusive means of authenticating official records,” while acknowledging tension between those holdings and the mandatory language of the regulation following a 1985 amendment).

Accordingly, failure to obtain consular certification of foreign official records as required by [8 C.F.R. § 287.6\(b\)](#) is not a basis to exclude corroborating documents. *See Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001) (“It was error to exclude the official records based solely on the lack of consular certification.”).

Failure to supply affirmative authentication for documents, in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding. *See Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) (“Mere failure to authenticate documents, at least in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding.”), *superseded by statute on other grounds as recognized by Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc); [Wang v. Ashcroft](#), 341 F.3d 1015, 1021 (9th Cir. 2003) (failure to testify to the authenticity of medical records or to present original documents was insufficient to support negative credibility finding where “there was no opposition to the introduction or challenge to the authenticity of these documents by the INS,” “neither Wang nor Ming was questioned about the documents or their source,” and there was “nothing in the record to support a finding that the documents are not credible”), *superseded by statute on other grounds as stated in Li v. Garland*, 13 F.4th 954, 961 (9th Cir. 2021); *see also Zhao v. Holder*, 728 F.3d 1144, 1149–50 (9th Cir. 2013) (“[F]ailing to authenticate foreign documents may not serve as a basis for an adverse credibility determination without some evidence of forgery or other unreliability.” (citation modified)).

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

I. HISTORICAL BACKGROUND

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) merged deportation and exclusion proceedings into a single new process called removal proceedings. See *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003), *abrogated on other grounds as recognized by Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025); see also *Judulang v. Holder*, 565 U.S. 42, 46 (2011) (explaining that prior to 1996 there were exclusion proceedings and deportation proceedings, but that the government has since unified the procedure into a “removal proceeding” for exclusions and deportations alike). Individuals in removal proceedings may be able to avoid removal if they qualify for “cancellation of removal” relief under 8 U.S.C. § 1229b. See *Pereira v. Sessions*, 585 U.S. 198, 202 (2018) (“Under [IIRIRA] the Attorney General of the United States has discretion to ‘cancel removal’ and adjust the status of certain nonpermanent residents.” (citing § 1229b(b))). Section 1229b provides for two forms of cancellation relief. See *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 n.2 (9th Cir. 2002), *abrogated on other grounds by Patel v. Garland*, 596 U.S. 328, 339 (2022). One form of cancellation is for applicants who are lawful permanent residents, see 8 U.S.C. § 1229b(a), and the other is for nonpermanent residents, see 8 U.S.C. § 1229b(b). See also *Romero-Torres*, 327 F.3d at 888 n.1.

IIRIRA repealed two analogous forms of relief: § 212(c) relief, 8 U.S.C. § 1182(c) (repealed 1996), and suspension of deportation, 8 U.S.C. § 1254 (repealed 1996). Some individuals, as discussed below, remain eligible for suspension of deportation and former § 212(c) relief. See *Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018) (although IIRIRA repealed § 212(c), relief remains available to certain individuals); *Gallegos-Vasquez v. Holder*, 636 F.3d 1181 (9th Cir. 2011) (discussing 212(c) relief).

“The REAL ID Act places the burden of demonstrating eligibility for cancellation of removal squarely on the noncitizen.” See *Young v. Holder*, 697 F.3d 976, 988 (9th Cir. 2012) (en banc) (citing 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d)), *abrogated on other grounds by Moncrieffe v. Holder*, 569 U.S. 184, 196 (2013); see also *Alanniz v. Barr*, 924 F.3d 1061, 1067 (9th Cir. 2019).

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

Where the former INS commenced deportation proceedings before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010); *see also Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1195 (9th Cir. 2023). Under the transitional rules, an applicant “may apply for the pre-IIRIRA remedy of suspension of deportation if deportation proceedings against her were commenced before April 1, 1997.” *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002) (citing IIRIRA § 309(c)); *see also Martinez-Garcia v. Ashcroft*, 366 F.3d 732, 734 (9th Cir. 2004).

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

Despite the repeal of § 212(c), certain noncitizens remain eligible for relief. *See* 8 C.F.R. § 1003.44 (setting forth procedure for special motion to seek former § 212(c) relief); 8 C.F.R. § 1212.3 (setting forth availability of former § 212(c) relief for noncitizens who pleaded guilty or nolo contendere to certain crimes); *see also INS v. St. Cyr*, 533 U.S. 289, 325 (2001) (holding that the elimination of § 212(c) relief had an “obvious and severe retroactive effect” on those who entered into plea agreements with the expectation that they would be eligible for relief), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); *Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018) (although IIRIRA repealed § 212(c), relief remains available to certain individuals).

Cross-reference: Section 212(c) Relief.

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

Individuals placed in removal proceedings on or after April 1, 1997, may apply for cancellation of removal, a form of discretionary relief. [Section 1229b](#) provides for two forms of cancellation of removal:

- [8 U.S.C. § 1229b\(a\)](#), for lawful permanent residents; and

- 8 U.S.C. § 1229b(b), for nonpermanent residents.

See *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 n.2 (9th Cir. 2002), *abrogated on other grounds by Patel v. Garland*, 596 U.S. 328, 339 (2022); see also *Romero-Torres*, 327 F.3d at 888 n.1, *abrogated on other grounds as recognized by Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025).

“[T]he INA imposes an annual limit on the number of aliens who may receive cancellation relief.” *Mendez-Garcia v. Lynch*, 840 F.3d 655, 660 (9th Cir. 2016); see 8 U.S.C. § 1229b(e)(1) (“[T]he Attorney General may not cancel the removal . . . of more than 4,000 aliens in any fiscal year.”).

Cancellation of removal is also available under the Nicaraguan Adjustment and Central American Relief Act (NACARA). The requirements for special rule cancellation of removal under NACARA are similar, but not identical, to the requirements for cancellation of removal under § 1229b. See *Lemus-Escobar v. Bondi*, 158 F.4th 944, 952 (9th Cir. 2025). The eligibility requirements for special rule cancellation of removal under NACARA are set out in 8 C.F.R. § 1240.66. Cancellation of removal under NACARA is discussed below.

A. Jurisdiction and Judicial Review

This court’s jurisdiction to review the agency’s denial of cancellation of removal is governed by:

- 8 U.S.C. § 1252(a)(2)(B)(i), which states that “no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 1229b” and precludes judicial review of the agency’s factual findings and ultimate discretionary decision regarding the granting of relief, and
- 8 U.S.C. § 1252(a)(2)(D), which states that “[n]othing in [§ 1252(a)(2)(B)(i)] shall be construed as precluding review of constitutional claims or questions of law” and provides for judicial review of both pure questions of law and mixed questions of law and fact, which involve the application of a legal standard to a set of established or undisputed facts.

Accordingly, jurisdiction over the agency’s denial of cancellation of removal is determined under the following framework:

For challenges to the agency’s denial of cancellation of removal . . . , we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility. But we lack jurisdiction over purely factual findings, such as an adverse credibility determination or a finding of historical fact; and we lack jurisdiction over purely discretionary determinations, such as the agency’s step-two determination that it would deny cancellation as a matter of discretion.

Lemus-Escobar v. Bondi, 158 F.4th 944, 954 (9th Cir. 2025). At step one:

A nonpermanent resident is statutorily eligible for cancellation of removal if four elements are met: (A) physical presence for ten years; (B) good moral character; (C) no conviction for certain categories of crimes, including crimes involving moral turpitude; and (D) exceptional and extremely unusual hardship.

Lemus-Escobar v. Bondi, 158 F.4th 944, 952 (9th Cir. 2025). The court has jurisdiction to review these step-one determinations to the extent they involve the application of a legal standard to an established or undisputed set of facts.

The court lacks jurisdiction to review the agency’s ultimate discretionary decision about whether to grant cancellation of removal to an applicant who is statutorily eligible for relief. *See Patel v. Garland*, 596 U.S. 328, 339 (2022). The court also lacks jurisdiction over the agency’s factual findings related to cancellation of removal. *See id.* (“Thus, § 1252(a)(2)(B)(i) encompasses not just ‘the granting of relief ‘ but also any judgment relating to the granting of relief. That plainly includes factual findings.”).

Cross-reference: Jurisdiction Over Immigration Petitions, Procedural Rules, and Standard of Review, Part V, Limited Review of Discretionary Actions Under § 1252(a)(2)(B).

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

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

1. Eligibility Requirements Generally

Section 1229b(a) states:

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a); *see Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004); *Alanniz v. Barr*, 924 F.3d 1061, 1065 (9th Cir. 2019); *Fuentes v. Lynch*, 837 F.3d 966, 967 (9th Cir. 2016).

In *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012), the Supreme Court held that each noncitizen must satisfy on her own the statutory requirements for continuous physical presence, without imputing a parent's LPR status or years of continuous residence, overruling this court's decisions in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), and *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009); *see also Mojica v. Holder*, 689 F.3d 1133, 1134 (9th Cir. 2012) (recognizing that *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009), is no longer valid precedent on the issue of imputation under 8 U.S.C. § 1229b and rejecting petitioner's imputation argument resting on her father's lawful permanent residence).

Cancellation is available for permanent residents who are either inadmissible or deportable. *See* 8 U.S.C. § 1229b(a) (“The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States”); *see also Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1055 (9th Cir. 2010).

The statute does not require a showing of extreme hardship or family ties to a United States citizen or lawful permanent resident. *See* 8 U.S.C. § 1229b(a).

If a noncitizen was at one time a lawful permanent resident for five years, but then lost that status, she is no longer eligible for cancellation of removal. *See Padilla-Romero v. Holder*, 611 F.3d 1011, 1013 (9th Cir. 2010).

2. “Admitted in Any Status”

“[A]n alien is ‘admitted’ when he presents himself for inspection and is waved through a port of entry, in accordance with our precedent and the BIA’s longstanding interpretation of ‘admission.’” *Saldivar v. Sessions*, 877 F.3d 812, 814 (9th Cir. 2017).

The following do not constitute “admission” for purposes of cancellation of removal:

- Receipt of temporary protected status (TPS). *See Hernandez v. Garland*, 47 F.4th 908, 914–15 (9th Cir. 2022) (“The plain language of the TPS statute reinforces our conclusion that receiving this status does not constitute an admission under the cancellation statute. . . . [W]e hold that receiving TPS is not an admission to the United States.”).
- Acceptance into the Family Unity Program. *See Medina-Nunez v. Lynch*, 788 F.3d 1103, 1105 (9th Cir. 2015) (“[A]cceptance into the Family Unity Program also does not constitute an admission for purposes of § 1229b(a)(2).”), *abrogating Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1018–19 (9th Cir. 2006).
- Being listed as a derivative beneficiary on a parent’s application for asylum or NACARA relief. *See Fuentes*, 837 F.3d at 967 (holding that a noncitizen

“was not ‘admitted in any status’ for purposes of cancellation of removal when he was listed as a derivative beneficiary on his mother’s asylum and Nicaraguan Adjustment and Central American Relief Act (NACARA) applications and received work authorization in the United States”).

- Approval of an I-130 petition. See *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1102 (9th Cir. 2011) (“[T]he approval of the I-130 petition does not constitute admission ‘in any status.’”); *id.* at 1103 (“Because we hold that the filing of an application for adjustment of status does not confer any change in status, we also hold that an approved I-130 application does not confer any change in status.”).
- The filing of an application for legal permanent residence. See *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1102 (9th Cir. 2011) (“[W]e have never held that mere filing for LPR status constitutes admission.”). By contrast, obtaining LPR status does constitute admission. See *id.* at 1102–03.
- Granting of employment authorization. See *Guevara v. Holder*, 649 F.3d 1086, 1090 (9th Cir. 2011) (holding that petitioner was not “admitted in any status” when he received employment authorization from the United States Citizenship and Immigration Services (USCIS) while his application to adjust his status to legal permanent resident was pending).
- Parole into the United States. See *Alanniz v. Barr*, 924 F.3d 1061, 1066–67 (9th Cir. 2019) (holding that petitioner’s parole into the country for adjustment of status purposes did not constitute admission in any status). Previously, in *Garcia v. Holder*, 659 F.3d 1261, 1272 (9th Cir. 2011), the court had held that parole as a special immigrant juvenile qualified as “admission in any status” for purposes of establishing seven years of continuous physical presence for cancellation of removal. 659 F.3d at 1272. *Alanniz v. Barr*, however, recognized that *Garcia* had been repudiated by the BIA and that the court had “accepted the BIA’s narrower reading of ‘admitted in any status’ as reasonable.” 924 F.3d 1061, 1066 (9th Cir. 2019); see also *Hernandez*, 47 F.4th at 913 (same).

3. Continuance Residence Generally

Maintenance of lawful status after admission is not required to meet the continuous residence requirement. *See de Rodriguez v. Holder*, 724 F.3d 1147, 1150–51 (9th Cir. 2013).

4. Termination of Continuous Residence

With respect to the termination of the period of continuous residence, the INA states:

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) [criminal grounds of inadmissibility] of this title or removable from the United States under section 1227(a)(2) [criminal grounds of deportability] or 1227(a)(4) [security-related grounds of deportability] of this title, whichever is earliest.

[8 U.S.C. § 1229b\(d\)\(1\)](#). This provision applies to cancellation of removal for legal permanent residents and non-legal permanent residents alike.

a. Termination Based on Service of NTA

The date on which the notice to appear is served counts toward the period of continuous presence. *See Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (rejecting the government’s contention that the period ends on the day preceding the date on which the notice to appear is served).

The precise times that the relevant events occurred are irrelevant. *See Lagandaon v. Ashcroft*, 383 F.3d 983, 992 (9th Cir. 2004) (“We hold that whether the ten-year physical presence requirement has been satisfied is a question that can be answered without recourse to fraction of a day, but only to dates. Thus, for

example, the span from January 1 to December 31 constitutes one year, regardless of the time of day on January 1 or December 31 that the relevant events occurred.” (citation modified)).

“[T]o trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, ‘specifies’ the ‘time and place’ of the removal proceedings.” *Pereira v. Sessions*, 585 U.S. 198, 209 (2018) (alteration omitted) (quoting 8 U.S.C. § 1229(a)(1)(G)(i)).

“A putative notice to appear that fails to designate the specific time or place of the noncitizen’s removal proceedings is not a ‘notice to appear under section 1229(a),’ and so does not trigger the stop-time rule.” *Pereira v. Sessions*, 585 U.S. 198, 208–09 (2018).

Pereira did not address whether a putative notice to appear that omits other information required by § 1229(a)(1) triggers the stop-time rule. See *Pereira v. Sessions*, 585 U.S. 198, 208 n.5 (2018) (“The Court leaves for another day whether a putative notice to appear that omits any of the other categories of information enumerated in § 1229(a)(1) triggers the stop-time rule.”).

A notice to appear sufficient to trigger the IIRIRA’s stop-time rule is a *single document* containing all the information about an individual’s removal hearing specified in § 1229(a)(1). See *Niz-Chavez v. Garland*, 593 U.S. 155, 159 (2021) (“The government was not free to short-circuit the stop-time rule by sending notices to appear that omitted statutorily required information.”).

b. Termination Based on Commission of Specified Offense

“[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.” 8 U.S.C. § 1229b(d)(1); see also *Alanniz v. Barr*, 924 F.3d 1061, 1065 (9th Cir. 2019) (“Section 1229b(d)(1) provides that the ‘period of continuous residence or continuous physical presence in the United States shall be

deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States”); *Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (remanding for determination of whether petitioner’s burglary conviction constituted a crime involving moral turpitude, which would end his period of continuous residence for purposes of cancellation for lawful permanent residents).

The stop-time rule is triggered by two events, each of which is required: (1) commission of an offense referred to in section 1182(a)(2); and (2) the offense’s effect of rendering the applicant inadmissible to the United States under section 1182(a)(2). See *Nguyen v. Sessions*, 901 F.3d 1093, 1096 (9th Cir. 2018), *abrogated on other grounds by Barton v. Barr*, 590 U.S. 222 (2020).

The second of these events may not occur until the noncitizen is convicted (or admits) the offense. See *Barton v. Barr*, 590 U.S. 222, 233 (2020) (“[T]he text of the law requires that the noncitizen be rendered ‘inadmissible’ as a result of the offense. For crimes involving moral turpitude, which is the relevant category of § 1182(a)(2) offenses here, § 1182(a)(2) provides that a noncitizen is rendered ‘inadmissible’ when he is convicted of or admits the offense.”).

But once the second event occurs, the clock stops on the noncitizen’s continuous presence *from the date the offense was committed*, not the date of the conviction or admission. See *Barton v. Barr*, 590 U.S. 222, 232 (2020) (“[C]ancellation of removal is precluded if a noncitizen *committed* a § 1182(a)(2) offense during the initial seven years of residence, even if (as in Barton’s case) the *conviction* occurred after the seven years elapsed. In other words, as Congress specified in the statute and as the BIA and the Courts of Appeals have recognized, the date of *commission* of the offense is the key date for purposes of calculating whether the noncitizen committed a § 1182(a)(2) offense during the initial seven years of residence.”); *Rudnitskyy v. Garland*, 82 F.4th 742, 747 (9th Cir. 2023) (“The agency correctly held that the stop-time rule is calculated from the date Petitioner committed a felony that rendered him inadmissible or removable upon his later conviction, rather than the conviction date.”).

The retroactive application of this provision is permissible, see *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1331 (9th Cir. 2006), unless the conviction occurred before enactment of IIRIRA and the noncitizen was eligible for former

§ 212(c) relief at the time IIRIRA became effective, *see Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1202–03 (9th Cir. 2006).

c. Military Service

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

4. Aggravated Felons

“Under the Immigration and Nationality Act, a lawful permanent resident is barred from receiving cancellation of removal . . . if he has been ‘convicted of any aggravated felony.’” *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1199–1200 (9th Cir. 2018) (quoting 8 U.S.C. § 1229b(a)(3)); *see also* 8 U.S.C. § 1229b(a)(3); *Sessions v. Dimaya*, 584 U.S. 148, 153 (2018) (“The Immigration and Nationality Act (INA) renders deportable any alien convicted of an ‘aggravated felony’ after entering the United States. Such an alien is also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the country.” (citation omitted)); *Habibi v. Holder*, 673 F.3d 1082, 1085 (9th Cir. 2011) (“[A]n LPR convicted of an ‘aggravated felony’ is ineligible for cancellation of removal.”).

Aggravated felonies are defined in 8 U.S.C. § 1101(a)(43); *see Sessions v. Dimaya*, 584 U.S. 148, 153 (2018) (noting that § 1101(a)(43) “defines ‘aggravated felony’ by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes”).

The definition of aggravated felony in § 1101(a)(3) includes “a crime of violence” as defined in 18 U.S.C. § 16. Section 16, in turn, defines a “crime of violence” in part as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16(b) (known as the “residual clause”). In *Dimaya*, the Supreme Court held that the residual clause is unconstitutionally vague. *See Sessions v. Dimaya*, 584 U.S. 148, 152 (2018).

Whether a specific offense qualifies as an aggravated felony is a frequently litigated issue. See, e.g., *Valdez v. Garland*, 28 F.4th 72, 81 (9th Cir. 2022) (remanding for the BIA to consider whether conviction for felony rape of an unconscious person, in violation of California Penal Code section 261(a)(4), is an aggravated felony barring cancellation of removal); *Olea-Serefina v. Garland*, 34 F.4th 856, 865 (9th Cir. 2022) (holding that conviction for corporal injury upon a child, in violation of California Penal Code section 273d(a), is a crime of violence aggravated felony barring cancellation of removal); *Vasquez-Borjas v. Garland*, 36 F.4th 891, 899–90 (9th Cir. 2022) (holding that conviction for forgery, in violation of California Penal Code section 472, is a crime involving moral turpitude barring cancellation of removal); *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1084 (9th Cir. 2007) (holding that stalking is not a crime of violence and therefore not an aggravated felony, thus petitioner was not ineligible for cancellation on aggravated felony ground).

Cases applying the aggravated felony bar on cancellation removal include, for example: *Becker v. Gonzales*, 473 F.3d 1000, 1003–04 (9th Cir. 2007) (holding that a 1978 aggravated felony conviction precluded petitioner’s application for cancellation of removal following commencement of removal proceedings on a 2004 offense); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 909 (9th Cir. 2004).

“Conviction of an aggravated felony constitutes a mandatory ground for denial of relief. Where an alien’s conviction indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.” *Rosas-Castaneda v. Holder*, 655 F.3d 875, 883 (9th Cir. 2011) (citations and internal quotation marks omitted), *overruled on other grounds by Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), *abrogated on other grounds by Moncrieffe v. Holder*, 569 U.S. 184, 196 (2013).

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

5. Exercise of Discretion

“Cancellation of removal . . . is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General.” *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003), *abrogated on other grounds as recognized by Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025).

The BIA has ruled that the factors relevant to determining whether a favorable exercise of discretion was warranted under former § 212(c) continue to be relevant in the cancellation context. *See Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).

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

C. Cancellation for Nonpermanent Residents, 8 U.S.C. § 1229b(b) (INA § 240A(b)(1))

1. Eligibility Requirements

The eligibility requirements for cancellation of removal for nonpermanent residents are set out in 8 U.S.C. § 1229b(b):

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1).

2. Ten Years of Continuous Physical Presence

“To be eligible for [cancellation of removal], a nonpermanent resident must meet certain enumerated criteria, the relevant one here being that the noncitizen must have ‘been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application’ for cancellation of removal.” *Pereira v. Sessions*, 585 U.S. 198, 202 (2018) (alteration in original) (quoting 8 U.S.C. § 1229b(b)(1)(A)); accord *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850 (9th Cir. 2004) (same).

This ten-year requirement violates neither due process nor international law. *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979–80 (9th Cir. 2006).

a. Start Date for Calculating Physical Presence

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

Residence in the Commonwealth of the Northern Mariana Islands (CNMI) before United States immigration law became effective there does not count toward the ten years of continuous presence in the United States required for cancellation of removal. *Torres v. Barr*, 976 F.3d 918, 931 (9th Cir. 2020) (substantial evidence supported the BIA's determination that petitioner failed to carry her burden of establishing ten years of continuous physical presence where her time in the CNMI did not count toward the physical presence requirement).

b. Termination of Continuous Physical Presence

[Section 1229b\(d\)\(1\)](#) states:

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) [criminal grounds of inadmissibility] of this title or removable from the United States under section 1227(a)(2) [criminal grounds of deportability] or 1227(a)(4) [security-related grounds of deportability] of this title, whichever is earliest.

[8 U.S.C. § 1229b\(d\)\(1\)](#).

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

(i) Termination Based on Service of NTA

An applicant’s accrual of continuous physical presence ends when removal proceedings are commenced through the service of a legally sufficient notice to appear. *See* [Niz-Chavez v. Garland](#), 593 U.S. 155, 158 (2021) (“Under the statute’s terms, ‘any period of continuous . . . presence in the United States shall be deemed to end . . . when the alien is served a notice to appear.’” (alterations in original) (quoting [8 U.S.C. § 1229b\(d\)\(1\)](#))); [Pereira v. Sessions](#), 585 U.S. 198, 202 (2018) (under the stop-time rule, “any period of . . . continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title.” (alterations in original) (quoting [8 U.S.C. § 1229b\(d\)\(1\)](#))).

The stop-time rule is not triggered unless the notice to appear specifies the time and place of the removal proceedings. See *Pereira v. Sessions*, 585 U.S. 198, 209 (2018) (“[B]ased on the plain text of the statute, it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, ‘specif[ies]’ the ‘time and place’ of the removal proceedings.” (second alteration in original) (quoting 8 U.S.C. § 1229a(1)(G)(i))); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005) (service of a notice to appear that failed to specify the date or location of the immigration hearing did not end the accrual of physical presence, although service of a second, proper notice to appear did so).

“A putative notice to appear that fails to designate the specific time or place of the noncitizen’s removal proceedings is not a ‘notice to appear under section 1229(a),’ and so does not trigger the stop-time rule.” *Pereira v. Sessions*, 585 U.S. 198, 208–09 (2018); accord *Quebrado Cantor v. Garland*, 17 F.4th 869, 874 (9th Cir. 2021) (noncompliant NTA did not stop continuous presence).

Pereira did not address whether a putative notice to appear that omits other information required by § 1229(a)(1) triggers the stop-time rule. See *Pereira v. Sessions*, 585 U.S. 198, 208 n.5 (2018) (“The Court leaves for another day whether a putative notice to appear that omits any of the other categories of information enumerated in § 1229(a)(1) triggers the stop-time rule.”).

A notice to appear sufficient to trigger the IIRIRA’s stop-time rule is a *single document* containing all the information about an individual’s removal hearing specified in § 1229(a)(1). See *Niz-Chavez v. Garland*, 593 U.S. 155, 159 (2021) (“The government was not free to short-circuit the stop-time rule by sending notices to appear that omitted statutorily required information.”).

The stop-time rule violates neither due process nor international law, *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979–80 (9th Cir. 2006), and its retroactive application is permissible, *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002).

The date on which the notice to appear is served counts toward the period of continuous presence. *Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (rejecting the government’s contention that the period ends the day preceding the date on which the notice to appear is served). The precise times that the relevant

events occurred are irrelevant. *Id.* at 992 (holding that “whether the ten-year physical presence requirement has been satisfied is a question that can be answered without recourse to ‘fraction[s] of a day,’ but only to dates”).

(ii) Termination Based on Commission of Specified Offense

“[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.” 8 U.S.C. § 1229b(d)(1); *see also Alanniz v. Barr*, 924 F.3d 1061, 1065 (9th Cir. 2019) (“Section 1229b(d)(1) provides that the ‘period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States’”); *Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (remanding for determination of whether petitioner’s burglary conviction constituted a crime involving moral turpitude, which would end his period of continuous residence for purposes of cancellation for lawful permanent residents).

The stop-time rule is triggered by two events, each of which is required: (1) commission of an offense referred to in section 1182(a)(2); and (2) the offense’s effect of rendering the applicant inadmissible to the United States under section 1182(a)(2). *See Nguyen v. Sessions*, 901 F.3d 1093, 1096 (9th Cir. 2018), *abrogated on other grounds by Barton v. Barr*, 590 U.S. 222 (2020).

The second of these events may not occur until the noncitizen is convicted (or admits) the offense. *See Barton v. Barr*, 590 U.S. 222, 233 (2020) (“[T]he text of the law requires that the noncitizen be rendered ‘inadmissible’ as a result of the offense. For crimes involving moral turpitude, which is the relevant category of § 1182(a)(2) offenses here, § 1182(a)(2) provides that a noncitizen is rendered ‘inadmissible’ when he is convicted of or admits the offense.”).

But once the second event occurs, the clock stops on the noncitizen’s continuous presence *from the date the offense was committed*, not the date of the

conviction or admission. See [Barton v. Barr](#), 590 U.S. 222, 232 (2020) (“[C]ancellation of removal is precluded if a noncitizen *committed* a § 1182(a)(2) offense during the initial seven years of residence, even if (as in Barton’s case) the *conviction* occurred after the seven years elapsed. In other words, as Congress specified in the statute and as the BIA and the Courts of Appeals have recognized, the date of *commission* of the offense is the key date for purposes of calculating whether the noncitizen committed a § 1182(a)(2) offense during the initial seven years of residence.”); [Rudnitskyy v. Garland](#), 82 F.4th 742, 747 (9th Cir. 2023) (“The agency correctly held that the stop-time rule is calculated from the date Petitioner committed a felony that rendered him inadmissible or removable upon his later conviction, rather than the conviction date.”).

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

c. Departure from the United States

An applicant has failed to maintain continuous physical presence if he “has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.” 8 U.S.C. § 1229b(d)(2); see also [Corro-Barragan v. Holder](#), 718 F.3d 1174, 1178 (9th Cir. 2013); [Valadez-Munoz v. Holder](#), 623 F.3d 1304, 1310–12 (9th Cir. 2010) (recognizing that not every departure from the United States will interrupt the period of continuous physical presence, but determining that noncitizen’s continuous physical presence was interrupted when upon returning to the United States petitioner was offered an option to see an IJ for an expedited hearing or withdraw application for admission and return abroad); [Lagandaon v. Ashcroft](#), 383 F.3d 983, 986 n.1 (9th Cir. 2004) (20-day absence did not interrupt petitioner’s period of continuous physical presence).

The 90/180-day rule replaced the previous “brief, casual and innocent” standard for determining when a departure breaks continuous physical presence. See [Mendiola-Sanchez v. Ashcroft](#), 381 F.3d 937, 939 (9th Cir. 2004).

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

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

Similarly, departure from the United States under a grant of voluntary departure, including administrative voluntary departure, breaks an applicant's continuous physical presence. *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003); *see also Matter of Romalez-Alcaide*, 23 I. & N. Dec. 423 (BIA 2002) (en banc).

For an administrative voluntary departure to constitute a break in continuous physical presence, its acceptance by an applicant must be knowing and voluntary. *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619–20 (9th Cir. 2006) (remanding to the agency for further consideration of whether applicant received voluntary departure, and if so, whether it was knowing and voluntary); *cf. Gutierrez v. Mukasey*, 521 F.3d 1114, 1117–18 (9th Cir. 2008) (holding that petitioner's testimony regarding acceptance of voluntary departure and rejection of opportunity to go before an IJ "constitutes substantial evidence of a knowing and voluntary consent to administrative voluntary departure in lieu of removal proceedings").

"[B]eing turned away at the border by immigration officials does not have the same effect as an administrative voluntary departure and does not itself interrupt the accrual of an alien's continuous physical presence." *Tapia v. Gonzales*, 430 F.3d 997, 998 (9th Cir. 2006); *see also Matter of Avilez-Nava*, 23 I. & N. Dec. 799, 807 (BIA 2005) (en banc) (concluding that a border turnaround does not interrupt accrual of physical presence). Moreover, the existence of a record of the border turnaround, including photographs or fingerprints, is

insufficient to interrupt the accrual of continuous physical presence. See *Tapia*, 430 F.3d at 1003–04; see also *Zarate*, 671 F.3d at 1135.

Although § 1229b addresses breaks in physical presence, there are no similar exceptions for breaks in physical presence under § 1229c(b). See *Corro-Barragan v. Holder*, 718 F.3d 1174, 1178–79 (9th Cir. 2013) (for noncitizen to be eligible for voluntary departure, noncitizen must be physically present in United States for at least one uninterrupted year).

d. Proof

An applicant may establish the time element of continuous presence by credible direct testimony or written declarations. See *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 849, 855 (9th Cir. 2004) (noting that “the regulations do not impose specific evidentiary requirements for cancellation of removal”); *Vera-Villegas v. INS*, 330 F.3d 1222, 1225 (9th Cir. 2003) (discussing suspension of deportation). Although contemporaneous documentation of presence “may be desirable,” it is not required. *Vera-Villegas*, 330 F.3d at 1225; cf. *Chebchoub v. INS*, 257 F.3d 1038, 1042 (9th Cir. 2001) (holding that an IJ may require documentary evidence when the IJ either does not believe the asylum applicant or does not know what to believe), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000) (same).

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

Cross-reference: Corroborative Evidence *supra*.

e. Military Service

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

3. Good Moral Character

a. Jurisdiction

As noted above, jurisdiction over the agency's denial of cancellation of removal is determined under the following framework:

For challenges to the agency's denial of cancellation of removal . . . , we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility. But we lack jurisdiction over purely factual findings, such as an adverse credibility determination or a finding of historical fact; and we lack jurisdiction over purely discretionary determinations, such as the agency's step-two determination that it would deny cancellation as a matter of discretion.

[Lemus-Escobar v. Bondi](#), 158 F.4th 944, 954 (9th Cir. 2025). At step one:

A nonpermanent resident is statutorily eligible for cancellation of removal if four elements are met: (A) physical presence for ten years; (B) good moral character; (C) no conviction for certain categories of crimes, including crimes involving moral turpitude; and (D) exceptional and extremely unusual hardship.

[Lemus-Escobar v. Bondi](#), 158 F.4th 944, 952 (9th Cir. 2025).

Accordingly, the court has jurisdiction over the good-moral-character determination to the extent it involves the application of a legal standard to a set of established or undisputed facts.

Older cases should be examined in light of the foregoing *Lemus-Escobar* framework. Those cases include, for example: *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (holding that the court has jurisdiction to determine whether a petitioner’s conduct falls within a per se exclusion category under 8 U.S.C. § 1101(f)(1)–(9)), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc), *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (holding that the court retained jurisdiction to review a finding that petitioner could not establish good moral character for purposes of cancellation of removal under § 1101(f)(7)), and *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (holding that the court lacks jurisdiction to review moral character determinations based on discretionary factors), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010).

b. Standard of Review

To the extent the agency’s moral character determination involves a fact-intensive mixed question of law and fact, this court’s review is for substantial evidence. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025); *cf. Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1046–47 (9th Cir. 2017) (en banc) (substantial evidence supported finding that petitioner was a “habitual drunkard” and therefore he did not establish the requisite good moral character); *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001) (“We review for substantial evidence a finding of statutory ineligibility for suspension of deportation based on a lack of good moral character.”).

Purely legal questions, such as whether a county jail is a penal institution within the meaning of 8 U.S.C. § 1101(f)(7), are reviewed de novo. *See Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 885 (9th Cir. 2005).

c. Time Period Required

“In order to be eligible for cancellation of removal, [an applicant] must have ‘been a person of good moral character’ during the continuous 10-year period of physical presence required by the statute.” *Moran v. Ashcroft*, 395 F.3d 1089, 1092 (9th Cir. 2005) (quoting 8 U.S.C. § 1229b(b)(1)(B)), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc); *see also*

Limsico v. INS, 951 F.2d 210, 213–14 (9th Cir. 1991) (declining to decide whether events occurring before the seven-year suspension period may be considered).

Note there is a potential conflict regarding the end of the good moral character period between cancellation of removal under 8 U.S.C. § 1229b(b) and NACARA cancellation (the two provisions being materially identical). Compare *Aragon-Salazar v. Holder*, 769 F.3d 699 (9th Cir. 2014) (for NACARA cancellation, the good moral character period is counted backward from the time the application is filed; dissenting opinion on this issue), with *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1162 (9th Cir. 2009) (for cancellation under 8 U.S.C. § 1229b(b), the good moral character period is counted backward from the date the application is finally resolved). In *Castillo-Cruz*, the court stated that “the relevant ten year period for the moral character determination is calculated backwards from the date on which the cancellation of removal application is finally resolved by the IJ or the BIA.” *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1162 (9th Cir. 2009) (holding that IJ erred in finding that petitioner failed to establish good moral character during required ten-year period, where convictions occurred more than ten years before the date of the IJ’s decision to pretermitt petitioner’s application). *Aragon-Salazar v. Holder*, 769 F.3d 699, 704 (9th Cir. 2014), however, stated:

The plain language of NACARA is . . . clear—the period of time for which an applicant must show good moral character refers to the period of seven years “immediately preceding the date of [the NACARA] application,” . . . and ends on the date that application is filed. For this reason, any conduct occurring after the filing of the application is irrelevant to the good moral character determination required under the plain language of the statute.

Id. (citation omitted)). *Aragon-Salazar* concluded that it was not bound by the language in *Castillo-Cruz*. *Aragon-Salazar*, 769 F.3d at 706 n.4 (“*Castillo-Cruz* . . . cited a BIA decision concluding that applications for cancellation of removal under 8 U.S.C. § 1229b(b)(1)(C) are continuing, without considering whether to afford the decision deference under *Chevron*. *Id.* We are not bound by this unreasoned conclusion arising in a different context.”). In *Mendez-Garcia v. Lynch*, 840 F.3d 655, 663 n.3 (9th Cir. 2016), the court acknowledged this conflict in a footnote.

For suspension cases, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc).

d. Per Se Exclusion Categories

(i) Habitual Drunkards

“No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . . a habitual drunkard.” 8 U.S.C. § 1101(f)(1); *see also Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997), *superseded by statute as stated in Trejo-Mejia v. Holder*, 593 F.3d 913 (9th Cir. 2010).

“The immigration statutes do not define the term ‘habitual drunkard.’” *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1046 (9th Cir. 2017) (en banc). “The ordinary meaning of ‘habitual drunkard’ is a person who regularly drinks alcoholic beverages to excess.” *Id.* Not all alcoholics are habitual drunkards. *Id.* In *Ledezma-Cosino v. Sessions*, the en banc court concluded that substantial evidence supported the agency’s finding that petitioner was a habitual drunkard where the petitioner had a 10-year history of alcohol abuse, he was convicted of driving under the influence, and his daughter testified that he had a drinking problem and that his liver had failed because of “too much alcohol.” *Id.* at 1046–47. The court also held that the term “habitual drunkard” was not unconstitutionally vague as applied and that the denial of cancellation of removal to “habitual drunkards” did not violate equal protection. *Id.* at 1047–48 (plurality opinion as to equal protection discussion).

(ii) 8 U.S.C. § 1182(a) (“Inadmissible Aliens”)

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

described in paragraphs (2)(D), (6)(E), and (9)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of

marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period.

8 U.S.C. § 1101(f)(3); *see also* [Avendano-Ramirez v. Ashcroft](#), 365 F.3d 813, 816 (9th Cir. 2004) (“§ 1101(f)(3) declares that no person can be of good moral character if she is ‘described in paragraphs (2)(D), (6)(E), and (9)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section.’”).

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

(A) Prostitution and Commercialized Vice

[Section 1182\(a\)\(2\)\(D\)](#) covers prostitution and commercialized vice.

(B) Alien Smugglers

[Section 1182\(a\)\(6\)\(E\)\(i\)](#) covers “[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.” 8 U.S.C. § 1182(a)(6)(E)(i); *see also* [Marquez-Reyes v. Garland](#), 36 F.4th 1195, 1203 (9th Cir. 2022) (“Not just any ‘encouragement’ is prohibited: The object of the encouragement must be an alien’s entry into the United States ‘in violation of law,’ indicating that the statute proscribes only conduct that aids criminal activity. In addition, the statute applies only when the conduct has been undertaken ‘knowingly.’ The most natural reading is that the scienter requirement imposed by the word ‘knowingly’ applies to ‘every element’ of the statute.”).

In [Khourassany v. INS](#), 208 F.3d 1096, 1101 (9th Cir. 2000), the court held that applicant who admitted that he paid a smuggler to bring his wife and child into the United States illegally in 1995 was statutorily ineligible for a good moral character finding for purposes of voluntary departure.

“The plain meaning of [[section 1182\(a\)\(6\)\(E\)\(i\)](#)] requires an *affirmative act* of help, assistance, or encouragement.” [Altamirano v. Gonzales](#), 427 F.3d 586,

592 (9th Cir. 2005) (emphasis added) (holding that noncitizen’s mere presence in a vehicle with knowledge that an undocumented noncitizen was hiding in the trunk did not constitute smuggling under § 1182(a)(6)(E)(i)); *see also Perez-Arceo v. Lynch*, 821 F.3d 1178, 1183, 1186–87 & n.4 (9th Cir. 2016) (mere knowledge of smuggling attempt is insufficient for removability); *Sanchez v. Holder*, 704 F.3d 1107, 1110 (9th Cir. 2012) (where petitioner admitted that she attempted to cross another individual—whom she was fully aware did not have permission to enter—into the United States as a “favor” to the individual’s parents, and intended to have the individual live with her in the United States, petitioner’s actions were “more than mere reluctant acquiescence in the plan of another, but were instead affirmative acts in violation of § 1182(a)(6)(E)(i)”; *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011) (explaining that the government must prove by clear and convincing evidence that the petitioner provided an affirmative act of assistance to help his wife and brother make an unlawful entry into the United States); *Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204, 1209 (9th Cir. 2008) (noncitizen’s reluctant acquiescence to her father’s requests to use her son’s birth certificate was not an “affirmative act” of assistance).

Collecting money to pay a transporter constitutes aiding and abetting “by providing ‘an affirmative act of help, assistance, or encouragement’” in a noncitizen’s effort to illegally enter the United States. *See Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 749 (9th Cir. 2007).

“[A]lien smuggling under § 1182 continues until the initial transporter ceases to transport the alien.” *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748 (9th Cir. 2007) (suspension of deportation case).

Section 1182(a)(6)(E)(ii) contains an exception to the smuggling provision in cases of family reunification, where an eligible immigrant, physically present in the United States on May 5, 1988, “encouraged, induced, assisted, abetted, or aided only the alien’s spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law” before May 5, 1988. 8 U.S.C. § 1182(a)(6)(E)(ii).

The statute also provides for a discretionary waiver of the alien-smuggling provision. *See* 8 U.S.C. § 1182(a)(6)(E)(iii) (citing the discretionary waiver provision in 8 U.S.C. § 1182(d)(11)). This waiver may be invoked for

“humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.” 8 U.S.C. § 1182(d)(11). But the “alien smuggling *inadmissibility* waiver” contained in § 1182(d)(11) does not authorize waiver of the “alien smuggling bar” to establishing good moral character for purposes of cancellation of removal. See *Sanchez v. Holder*, 560 F.3d 1028, 1032 (9th Cir. 2009) (en banc) (holding that inadmissibility waiver contained in § 1182(d)(11) did not apply to applicant for cancellation of removal who arranged to have his wife smuggled into the United States, and thus that he was statutorily unable to demonstrate good moral character).

(C) “Certain Aliens Previously Removed”

Section 1182(a)(9)(A) covers “certain aliens previously removed.” Section 1182(a)(9)(A)(i) covers any “alien who has been ordered removed under section 1225(b)(1) of this title . . . and who again seeks admission within 5 years of the date of such removal.” *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816 (9th Cir. 2004). Section 1182(a)(9)(A)(ii) covers “any alien not described in clause (i) who has been ordered removed under section 1229a . . . or” who has “departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien’s departure.” 8 U.S.C. § 1182(a)(9)(A)(i)–(ii).

(D) Crimes Involving Moral Turpitude

A conviction for a crime of moral turpitude “renders noncitizens statutorily ineligible for cancellation of removal.” *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1301 (9th Cir. 2017). Section 1182(a)(2)(A) covers “a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.” See *Lemus-Escobar v. Bondi*, 158 F.4th 944, 961 (9th Cir. 2025) (holding that a violation of California Penal Code section 246—shooting at an inhabited dwelling or occupied building or vehicle categorically qualifies as a crime involving moral turpitude); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1185 (9th Cir. 2000) (holding that petitioner’s offenses of making false attestation on employment verification form and using a false Social Security number were not crimes of moral turpitude barring a finding of good moral character for purposes of registry); see also *Mancilla-Delafuente v. Lynch*, 804 F.3d 1262, 1264 (9th Cir. 2015) (“Section 1229b(b)(1) does not allow for cancellation of a removal order

against an inadmissible alien if he has been convicted of ‘an offense under [section 1182\(a\)\(2\), 1227\(a\)\(2\), or 1227\(a\)\(3\)](#),’ which we have held means that if an alien has been convicted of an offense described under any of those sections, he is ineligible for cancellation.”); [Espino-Castillo v. Holder](#), 770 F.3d 861, 864–65 (9th Cir. 2014) (conviction for forgery was a crime involving moral turpitude, and as such petitioner was ineligible for cancellation of removal); cf. [Hernandez-Robledo v. INS](#), 777 F.2d 536, 542 (9th Cir. 1985) (holding that the BIA acted within its discretion in determining that petitioner’s conviction for malicious destruction of property was a crime involving moral turpitude, barring good moral character for purposes of suspension).

See also [Vasquez-Borjas v. Garland](#), 36 F.4th 891, 900 (9th Cir. 2022) (holding that petitioner failed to administratively exhaust the argument that he remained eligible for cancellation of removal in light of the petty offense exception to a crime involving moral turpitude conviction at [§ 1182\(a\)\(2\)\(A\)\(ii\)](#)).

The phrase “crime involving moral turpitude” is not unconstitutionally vague. See [Islas-Veloz v. Whitaker](#), 914 F.3d 1249, 1250 (9th Cir. 2019); [Martinez-de Ryan v. Whitaker](#), 909 F.3d 247, 251–52 (9th Cir. 2018).

(E) Controlled Substance Violations

[Section 1182\(a\)\(2\)\(A\)](#) also covers violations of “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 2).” 8 U.S.C. [§ 1182\(a\)\(2\)\(A\)](#); see also [Madrigal-Barcenas v. Lynch](#), 797 F.3d 643, 643 (9th Cir. 2015) (8 U.S.C. [§ 1182\(a\)\(2\)\(A\)\(i\)\(II\)](#) “provides that an applicant is inadmissible if the applicant stands convicted under ‘any law or regulation . . . relating to a controlled substance (as defined in section 802 of [the Federal Controlled Substances Act]).’”); [Bazuaye v. INS](#), 79 F.3d 118, 120 (9th Cir. 1996) (holding that application of the bar for purposes of voluntary departure did not violate due process). The mandatory bar to good moral character does not apply to a “single offense of simple possession of 30 grams or less of marihuana.” 8 U.S.C. [§ 1101\(f\)\(3\)](#).

(F) Multiple Criminal Offenses

Section 1182(a)(2)(B) covers “[a]ny alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more.” 8 U.S.C. § 1182(a)(2)(B); *see also Szonyi v. Barr*, 942 F.3d 874, 889–90 (9th Cir. 2019) (deferring to the BIA’s interpretation of “single scheme of criminal misconduct,” under 8 U.S.C. § 1227(a)(2)(A)(ii), in the context of removability); *Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1150–51 (9th Cir. 2002) (holding that petitioner with three convictions with aggregate sentences totaling over 10 years was ineligible for good moral character finding for purposes of registry).

(G) Controlled Substance Traffickers

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

(iii) Gamblers

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

(iv) False Testimony

An applicant who has given false testimony to obtain an immigration benefit is ineligible for relief that requires a showing of good moral character. See 8 U.S.C. § 1101(f)(6); see also *Aragon-Salazar v. Holder*, 769 F.3d 699, 701–02 (9th Cir. 2014) (“No person ‘who has given false testimony for the purpose of obtaining any [immigration] benefits’ during the relevant period for which good moral character is required shall be found to be a person of good moral character.”); *Abedini v. INS*, 971 F.2d 188, 193 (9th Cir. 1992) (discussing this provision in the context of voluntary departure).

“For a witness’s false testimony to preclude a finding of good moral character, the testimony must have been made orally and under oath, and the witness must have had a subjective intent to deceive for the purpose of obtaining immigration benefits.” *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001) (holding that false testimony to an asylum officer established lack of good moral character); *Bernal v. INS*, 154 F.3d 1020, 1023 (9th Cir. 1998) (applicant’s false statements made under oath during naturalization examination precluded finding of good moral character).

Whether a person has the subjective intent to deceive in order to obtain immigration benefits is a question of fact reviewed for clear error. *United States v. Hovsepian*, 422 F.3d 883, 885, 887 (9th Cir. 2005) (en banc) (citing Fed. R. Civ. P. 52(a)). “When the court rests its findings on an assessment of credibility, we owe even greater deference to those findings [of fact].” *Id.*

(v) Confinement

A person cannot show good moral character if he “has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period.” 8 U.S.C. § 1101(f)(7); see also *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1330 (9th Cir. 2013) (8 U.S.C. § 1101(f)(7) precluded noncitizen from establishing eligibility for cancellation of removal); *Rashtabadi v. INS*, 23 F.3d 1562, 1571–72 (9th Cir. 1994) (discussing good moral character in the context of voluntary departure).

“[T]he plain meaning of the statute is that confinement in any facility—whether federal, state, or local—as a result of conviction, for the requisite period of time, falls within the meaning of § 1101(f)(7).” *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 886 (9th Cir. 2005) (holding that incarceration in a county jail falls within the meaning of the statutory exclusion).

“The requirement that the confinement be as a result of a conviction precludes counting any time a person may have spent in pretrial detention.” *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 886 (9th Cir. 2005); see *Troncoso-Oviedo v. Garland*, 43 F.4th 936, 942 (9th Cir. 2022) (pretrial detention that is not credited toward a defendant’s sentence is not confinement “as a result of a conviction” for purposes of determining good moral character under 8 U.S.C. § 1101(f)(7)).

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

(vi) Aggravated Felonies

“Under the Immigration and Nationality Act, a lawful permanent resident is barred from receiving cancellation of removal . . . if he has been ‘convicted of any aggravated felony.’” *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1199–1200 (9th Cir. 2018) (quoting 8 U.S.C. § 1229b(a)(3)); cf. *Elmakhoum v. Sessions*, 883 F.3d 1170, 1172 (9th Cir. 2018) (explaining that a person who has been convicted of an aggravated felony, as defined by 8 U.S.C. § 1101(a)(43), cannot demonstrate good moral character, 8 U.S.C. § 1101(f)(8), in a case concerning naturalization).

The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43).

Whether a specific offense meets the definition of aggravated felony is a frequently litigated issue. See, e.g., *Olea-Serefina v. Garland*, 34 F.4th 856, 865 (9th Cir. 2022) (conviction for corporal injury upon a child, in violation of California Penal Code section 273d(a), is a crime of violence aggravated felony barring cancellation of removal); cf. *Castiglia v. INS*, 108 F.3d 1101, 1104 (9th

[Cir. 1997](#)) (holding that petitioner’s second degree murder conviction precluded a good moral character finding for purposes of naturalization).

The court has held that the disqualifying conduct must have occurred after November 29, 1990. *See* [8 U.S.C. § 1101\(f\)\(8\)](#); *United States v. Hovsepian*, [422 F.3d 883, 886 n.1 \(9th Cir. 2005\)](#) (en banc) (explaining that [8 U.S.C. § 1101\(f\)\(8\)](#) applies only to conduct that occurred after the statute’s effective date of November 29, 1990).

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

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

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

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

(viii) False Claim of Citizenship and Voting

“In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes . . . in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien . . . is or was a citizen . . . the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.” [8 U.S.C. § 1101\(f\)](#); *see also*

Hughes v. Ashcroft, 255 F.3d 752, 759 (9th Cir. 2001); cf. *McDonald v. Gonzales*, 400 F.3d 684, 685, 689–90 (9th Cir. 2005) (holding that petitioner was not an unlawful voter for purposes of removal, because she did not have the requisite mental state).

(ix) Adulterers

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

4. Criminal Bars

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

“The plain language of § 1229b indicates that it should be read to cross-reference a list of offenses in three statutes, rather than the statutes as a whole. The most logical reading of ‘convicted of an offense under’ is that reached by the BIA: ‘convicted of an offense *described* under’ each of the three sections.” *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 652 (9th Cir. 2004).

“The commission of an offense listed under any of three statutes cross-referenced in § 1229b(b)(1)(C) bars cancellation of removal, regardless of whether the petitioner entered illegally and committed an offense described under § 1227(a)(2), or whether the petitioner entered legally and committed an offense described under § 1182(a)(2).” *Sanchez-Ruano v. Garland*, 8 F.4th 965, 969–70 (9th Cir. 2021).

Section 1229b(b)(1)(C) “does not place any temporal limitation on when the crime was committed.” *Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (explaining that “a person can be of good moral character for ten years

before his application for cancellation of removal under 8 U.S.C. § 1229b(b)(1)(B), yet have committed a crime involving moral turpitude more than ten years earlier, and therefore be ineligible for cancellation of removal” under § 1229b(b)(1)(C)). Note, however, that *Lozano-Arredondo v. Sessions*, 866 F.3d 1082 (9th Cir. 2017), set aside the BIA’s interpretation of 8 U.S.C. § 1229b(b)(1)(C) in *Matter of Cortez Canales*, 25 I. & N. Dec. 301 (BIA 2010). In *Matter of Cortez*, the BIA held that the “within five years of admission” requirement for deportability on the basis of a crime involving moral turpitude conviction found in § 1227(a)(2) did not apply to cancellation of removal for nonpermanent residents. Relying on *Matter of Cortez*, the BIA held the offense committed by Lozano-Arredondo qualified as an offense under § 1227(a)(2) regardless of when it was committed. Declining to apply *Chevron* deference, *Lozano-Arredondo* held that the provision was ambiguous and remanded to the agency for it to consider the “question afresh.” 866 F.3d at 1089–93.

Because the applicant for cancellation of removal bears the burden of proving his eligibility, “any lingering uncertainty about whether [the applicant] stands convicted of a [disqualifying offense] would appear enough to defeat his application for relief.” *Pereida v. Wilkinson*, 592 U.S. 224, 231 (2021).

Under the same reasoning, the applicant bears the burden of showing that a conviction has been vacated and that the vacated conviction does not render the applicant ineligible for cancellation of removal. See *Ballinas-Lucero v. Garland*, 44 F.4th 1169, 1178 (9th Cir. 2022) (“Consistent with the Court’s reasoning in *Pereida*, we hold that applicants for cancellation of removal bear the burden of proving not only that their convictions have been vacated, but also that the vacated convictions are not valid for immigration purposes.”).

IIRIRA’s elimination of suspension of deportation for nonpermanent residents convicted of an aggravated felony has an impermissibly retroactive effect where the petitioner was eligible for a discretionary waiver of deportation at the time of the plea. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853–54 (9th Cir. 2006) (applying *INS v. St. Cyr*, 533 U.S. 289 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020)); cf. *Becker v. Gonzales*, 473 F.3d 1000, 1003–04 (9th Cir. 2007) (discussing retroactivity in context of aggravated felony bar to lawful permanent resident cancellation of removal).

See, e.g., *Madrigal-Barcenas v. Lynch*, 797 F.3d 643, 643 (9th Cir. 2015) (8 U.S.C. § 1182(a)(2)(A)(i)(II) “provides that an applicant is inadmissible if the applicant stands convicted under ‘any law or regulation . . . relating to a controlled substance (as defined in section 802 of [the Federal Controlled Substances Act]).’”); *Bolanos v. Holder*, 734 F.3d 875, 878 (9th Cir. 2013) (conviction under Cal. Penal Code § 417.3 categorically a crime of violence and therefore an aggravated felony making petitioner ineligible for cancellation of removal); *Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1056–57 (9th Cir. 2010) (conviction for corporal injury to a spouse under Cal. Penal Code § 273.5 is an offense described in § 1227(a)(2)); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391–94 (9th Cir. 2006) (addressing whether simple battery under California Penal Code section 242 qualified as a crime of domestic violence under the modified categorical approach).

5. Exceptional and Extremely Unusual Hardship

Nonpermanent resident applicants for cancellation of removal must establish “that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1229b(b)(1)(D).

a. Jurisdiction and Standard of Review

The court has jurisdiction to review the agency’s “exceptional and extremely unusual hardship” determination under 8 U.S.C. § 1229b(b)(1)(D) because “[t]he application of a statutory legal standard (like the exceptional and extremely unusual hardship standard) to an established set of facts is a quintessential mixed question of law and fact” and “such questions are reviewable under § 1252(a)(2)(D).” *Wilkinson v. Garland*, 601 U.S. 209, 212 (2024).

Wilkinson overruled Ninth Circuit decisions holding that the hardship determination was unreviewable. See *Lemus-Escobar v. Bondi*, 158 F.4th 944, 953–54 (9th Cir. 2025) (recognizing that *Wilkinson* overruled such cases).

The agency’s hardship determination is reviewed for substantial evidence. See *Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1003 (9th Cir. 2025) (“[W]e implement *Wilkinson*’s directive to apply a deferential standard of review to the

primarily factual mixed question at hand—whether the BIA erred in applying the exceptional and extremely unusual hardship standard to a given set of facts—by reviewing for substantial evidence.”). Of course, purely legal questions related to the agency’s hardship determination are reviewed de novo. *See Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021) (“We review issues of law de novo.”).

The court also has jurisdiction under § 1252(a)(2)(D) to review pure questions of law relating to the hardship provision, including questions of statutory interpretation. *See Arteaga-De Alvarez v. Holder*, 704 F.3d 730, 737–42 (9th Cir. 2012) (court had jurisdiction over petitioner’s claim that the BIA committed an error of law in “relying on a categorical rule that the availability of alternative relief necessarily undercuts a cancellation of removal claim of hardship to the applicant’s qualifying relative”); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (concluding that the court had jurisdiction to consider issues of statutory interpretation pertaining to the agency’s discretionary hardship determination).

The court also has jurisdiction under § 1252(a)(2)(D) to review colorable constitutional claims relating to the hardship provision. *See, e.g., Vilchez v. Holder*, 682 F.3d 1195, 1198 (9th Cir. 2012) (“Because due process requires the IJ to consider the relevant evidence, we . . . have jurisdiction to review whether the IJ considered this evidence in deciding whether to grant cancellation of removal.” (citation omitted)); *cf. Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (holding that the court lacked jurisdiction to consider petitioner’s non-colorable contention that the agency deprived her of due process by misapplying the applicable law to the facts of her case in evaluating exceptional and extremely unusual hardship; “Such an assertion is nothing more than an argument that the IJ abused his discretion, a matter over which we have no jurisdiction.”).

Cross-reference: Judicial Review, Limitations on Judicial Review of Discretionary Decisions

b. Qualifying Relative

Hardship to the applicant is insufficient. See *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003) (comparing suspension of deportation, which allows for hardship to the applicant).

The applicant must show the requisite degree of hardship to a “spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1229b(b)(1)(D); see also *Molina-Estrada v. INS*, 293 F.3d 1089, 1093–94 (9th Cir. 2002) (because petitioner provided no evidence that his mother was a lawful permanent resident, he was not eligible for cancellation).

An adult daughter 21 years of age or older does not qualify as a “child” for purposes of cancellation of removal. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144–45 (9th Cir. 2002), *abrogated on other grounds by Patel v. Garland*, 596 U.S. 328, 339 (2022).

A grandchild does not qualify as a “child” for purposes of cancellation, even when the grandparent has legal custody and guardianship. *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1178 (9th Cir. 2007) (holding that the statute precluded a functional approach to defining a “child”).

The court has held that the qualifying relative requirement does not violate the Free Exercise Clause of the First Amendment or place a substantial burden on religious exercise under the Religious Freedom Restoration Act. See *Fernandez v. Mukasey*, 520 F.3d 965, 966–67 (9th Cir. 2008) (concluding that devout Catholics who opposed in vitro fertilization failed to demonstrate that their lack of a qualifying relative was due to their religious beliefs because they could adopt a child, and that the connection between having a child and showing requisite hardship to obtain cancellation was too attenuated).

c. Alternative Means to Immigrate

The court has held that “a categorical rule that alternative means to immigrate necessarily undercuts a claim of hardship is inconsistent with the requirement that the agency examine each applicant’s case on its individual facts.”

Arteaga-De Alvarez v. Holder, 704 F.3d 730, 742 (9th Cir. 2012) (holding that the BIA’s use of a “categorical rule” was an erroneous interpretation of the statute and remanding to the BIA for reconsideration under the appropriate legal standard).

d. Hardship Standard and Application

The court has described the hardship standard applicable to cancellation of removal in the following terms:

To qualify for cancellation of removal, the alien must show that his removal would result in a certain kind of hardship—“exceptional and extremely unusual”—to a qualifying relative. 8 U.S.C. § 1229b(b)(1)(D). . . . [T]he hardship must be out of the ordinary and exceedingly uncommon. It must deviate, in the extreme, from the norm. The agency must compare the hardship in a given case to the hardship that results in the usual, ordinary course when an alien is removed.

Gonzalez-Juarez v. Bondi, 137 F.4th 996, 1005–06 (9th Cir. 2025). The court found instructive the standard articulated by the BIA in *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 62–64 (BIA 2001). Under that standard, the BIA:

evaluates “the ages, health, and circumstances” of qualifying relatives. . . . [T]he BIA offered hypothetical examples of hardship that might meet the standard: elderly parents deprived of support by an alien on whom they are solely dependent, or a qualifying child “with very serious health issues” or “compelling special needs in school” who would be removed from supportive healthcare or educational environments. But the BIA also noted: “A lower standard of living or adverse country conditions in the country of return . . . generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship.” The BIA stated that the hardship must be “substantially beyond the ordinary hardship that would be expected when a close family member leaves the country.”

Gonzalez-Juarez v. Bondi, 137 F.4th 996, 1006 (9th Cir. 2025) (last alteration in original) (citations omitted).

Cases applying the hardship standard: *See, e.g., Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1007–08 (9th Cir. 2025) (substantial evidence supported the BIA’s no-hardship determination where: Mexico had relatively high levels of crime and violence but there was no evidence that petitioner or his sons would be singled out for criminal violence in Mexico; sons could converse in Spanish; sons’ lack of Spanish fluency would translate into lost educational opportunities in Mexico; sons would be separated from their older sister; other family members lived in Mexico; sons did not have serious health problems or special needs; and family had \$10,000 in assets to transition to life outside the United States).

6. Exercise of Discretion

“Cancellation of removal, like suspension of deportation before it, is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General.” *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003), *abrogated on other grounds as recognized in Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025).

The court lacks jurisdiction to review the agency’s ultimate discretionary decision about whether to grant cancellation of removal to an applicant who is statutorily eligible for relief. *See Patel v. Garland*, 596 U.S. 328, 339 (2022).

The court has jurisdiction over constitutional challenges, however. *See Szonyi v. Barr*, 942 F.3d 874, 896 (9th Cir. 2019) (“This 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.”); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003) (“Although we may not review the IJ’s exercise of discretion, a due process violation is not an exercise of discretion.”) (biased remarks evinced the IJ’s reliance on improper discretionary considerations).

But “traditional abuse of discretion challenges recast as alleged due process violations do not constitute colorable constitutional claims that would invoke our jurisdiction.” *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005); *see also Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011) (dismissing petition challenging discretionary denial of cancellation of removal where petitioner failed

to raise a colorable legal or constitutional challenge to BIA's discretionary decision).

7. Dependents

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

D. Ineligibility for Cancellation of Removal

8 U.S.C. § 1229b(c) lists specific classes of noncitizens who are ineligible for cancellation of removal.

1. Certain Crewmen and Exchange Visitors

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

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

2. Security-Related Grounds

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

3. Persecutors

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

4. Previous Grants of Relief

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

The court held that a prior grant of special rule cancellation of removal and adjustment of status to a lawful permanent resident under NACARA § 203 qualified as a cancellation of removal under 8 U.S.C. § 1229b, thus rendering petitioner ineligible for a second grant of cancellation of removal pursuant to 8 U.S.C. § 1229b(c)(6). *Hernandez v. Garland*, 38 F.4th 785, 789–91 (9th Cir. 2022).

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

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

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

The importance of family unity and the combined effect of the ten-year requirement for eligibility and the stop-time rule do not violate due process, because Congress had a legitimate and facially bona fide reason for limiting the availability of relief. *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978–79 (9th Cir. 2006).

Likewise, these statutory limitations on the availability of cancellation of removal do not violate international law. *Id.* at 979–80; *see also Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1011–13 (9th Cir. 2005) (holding that the exceptional and extremely unusual hardship standard does not violate international law as expressed in the U.N. Convention on the Rights of the Child).

F. Ten-Year Bars to Cancellation

1. Failure to Appear

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

The statute defines exceptional circumstances as “circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.” 8 U.S.C. § 1229a(e)(1); *see also Arredondo v. Lynch*, 824 F.3d 801, 805 (9th Cir. 2016) (noncitizen failed to establish exceptional circumstances for her failure to appear).

[Section 1229a\(b\)\(7\)](#) states:

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

[8 U.S.C. § 1229a\(b\)\(7\)](#). [Section 1229a\(e\)\(1\)](#) states:

The term “exceptional circumstances” refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

[8 U.S.C. § 1229a\(e\)\(1\)](#).

In [Montejo-Gonzalez v. Bondi](#), 166 F.4th 851 (9th Cir. 2026) (en banc), the court addressed the meaning of [§ 1229a\(e\)\(1\)](#) in applying [§ 1229a\(b\)\(5\)\(C\)\(i\)](#), which states that an in absentia removal order may be rescinded on a motion to reopen if the noncitizen “demonstrates that the failure to appear was because of exceptional circumstances (as defined in [subsection \(e\)\(1\)](#)).” [8 U.S.C. § 1229a\(b\)\(5\)\(C\)\(i\)](#). The court held that, under [§ 1229a\(e\)\(1\)](#):

- “the circumstances (1) must cause the noncitizen’s failure to appear, (2) must be beyond the petitioner's control, and (3) must be sufficiently compelling.” [Montejo-Gonzalez v. Bondi](#), 166 F.4th 851, 854 (9th Cir. 2026) (en banc).

- “the statute’s listed examples of compelling circumstances are explicitly not exhaustive.” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc) (internal quotation marks omitted).
- “We . . . look to the particularized facts presented in each case to decide whether a failure to appear was because of sufficiently compelling circumstances beyond the petitioner’s control. This requires considering the totality of the circumstances.” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc) (citation and internal quotation marks omitted).
- “Evidence relevant to the statutory factors may include whether the petitioners were diligent, whether they encountered external or unforeseen circumstances, and whether they lacked a motive to evade the hearing.” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc).
- “the agency may consider whether a petitioner had a colorable claim for relief or was merely delaying the inevitable,” but “the possibility of unconscionable results is [not] a standalone element of ‘exceptional circumstances’ that the agency must consider.” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc) (overruling *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1036 (9th Cir. 2021)).
- “There is no per se rule that a traffic delay cannot be an exceptional circumstance.” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 855 (9th Cir. 2026) (en banc); *see id.* at 856 (“[W]e reject any bright-line rules about what can or cannot qualify as an exceptional circumstance because the statutory test depends on the totality of the circumstances in each petitioner’s case.”); *id.* at 858 (granting petition and remanding where “the agency’s truncated analysis failed to consider the totality of the circumstances relevant in this case, such as whether the extraordinary traffic delays were exceptional and beyond petitioners’ control, whether petitioners were diligent, and whether petitioners lacked motive to evade their hearing”).

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

2. Failure to Depart

Under 8 U.S.C. § 1229c(d), an applicant's failure to depart during a specified voluntary departure period will result in ineligibility for cancellation of removal for a period of ten years. *Id.*; see *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015–16 (9th Cir. 2008) (where motion to reopen is filed after period for voluntary departure period has elapsed, the BIA is compelled to deny the motion pursuant to 8 U.S.C. § 1229c(d)(1)); see also *Elian v. Ashcroft*, 370 F.3d 897, 900 (9th Cir. 2004).

“The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.” 8 U.S.C. § 1229c(d). “The plain language of 8 U.S.C. § 1229c(d) requires only that the order inform the alien of the penalties for failure to depart voluntarily[, and s]ervice of an order to the alien's attorney of record constitutes notice to the alien.” *de Martinez v. Ashcroft*, 374 F.3d 759, 762 (9th Cir. 2004).

There is no statutory authority to automatically toll the voluntary departure period while a petitioner's motion to reopen is pending. *Dada v. Mukasey*, 554 U.S. 1, 19–20 (2008) (holding that, in order to safeguard the right to pursue a motion to reopen, voluntary departure recipients should be permitted an opportunity to unilaterally withdraw a motion for voluntary departure, provided the request is made prior to the departure period expiring).

Prior to *Dada*, this court had held that in permanent rules cases, the filing of a timely motion to reopen or reconsider automatically tolled the voluntary departure period, regardless of whether the motion was accompanied by a motion to stay the voluntary departure period. See, e.g., *Barroso v. Gonzales*, 429 F.3d 1195, 1204–07 (9th Cir. 2005); see also *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (rejecting the court's prior analysis in *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998), and holding that petitioner's voluntary departure period is tolled while the BIA considers a timely-filed motion to reopen accompanied by a motion to stay removal), *abrogated by Dada v. Mukasey*, 554 U.S. 1, 19–21 (2008); cf. *Medina-Morales v. Ashcroft*, 371 F.3d 520, 529–31 & n.9 (9th Cir. 2004) (holding, in a permanent rules case, that where a petitioner bargains for voluntary departure in lieu of full adjudication under 8 U.S.C. § 1229c(a)(1), the BIA may weigh petitioner's voluntary departure agreement against the grant of a motion to reopen).

If voluntary departure was granted on or after January 20, 2009, the filing of a motion to reopen or reconsider, or the filing of a petition for review before the court of appeals, automatically terminates voluntary departure. See 8 C.F.R. 1240.26(i); *Matter of Velasco*, 25 I. & N. Dec. 143 (BIA 2009); see also *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 523–24 (9th Cir. 2012) (en banc) (discussing 8 C.F.R. 1240.26(i) and the automatic termination of the grant of voluntary departure upon filing of a petition for review or other judicial challenge).

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

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

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

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

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

H. NACARA Special Rule Cancellation

On November 19, 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act (NACARA), which established special rules to permit certain classes of aliens to apply for what is known as “special rule cancellation.” “Special Rule Cancellation allows designated aliens to qualify for cancellation

under the more lenient suspension of deportation standard that existed before the passage of [IIRIRA].” *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093 (9th Cir. 2005); see also *Campos-Hernandez v. Sessions*, 889 F.3d 564, 567 (9th Cir. 2018) (discussing NACARA); *Monroy v. Lynch*, 821 F.3d 1175, 1175–76 (9th Cir. 2016) (same); *Lezama-Garcia v. Holder*, 666 F.3d 518, 528–30 (9th Cir. 2011) (discussing NACARA § 202 providing for adjustment of status for certain Nicaraguan and Cuban nationals); *Barrios v. Holder*, 581 F.3d 849, 857 (9th Cir. 2009), *abrogated in part by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093 (9th Cir. 2013 (en banc)); *Munoz v. Ashcroft*, 339 F.3d 950, 955–56 (9th Cir. 2003); *Simeonov v. Ashcroft*, 371 F.3d 532, 536 (9th Cir. 2004); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1162 (9th Cir. 2002); 8 C.F.R. §§ 1240.60–1240.70.

Special rule cancellation of removal is available under NACARA for certain applicants from El Salvador, Guatemala, nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia. See *Ram v. INS*, 243 F.3d 510, 517 & n.9 (9th Cir. 2001); see also *Monroy*, 821 F.3d at 1175 (“NACARA provides various immigration benefits and relief from removal to certain nationals of Central American and former Soviet Bloc countries.”). Note that NACARA § 202 makes separate provision for adjustment of status for certain Nicaraguan and Cuban nationals.

The continuous presence requirements of NACARA depend on the circumstances:

Most applicants for cancellation of removal under NACARA must establish physical presence in the United States for “a continuous period of 7 years immediately preceding” the filing of an application for cancellation of removal. . . . An applicant for cancellation of removal under NACARA who is inadmissible under 8 U.S.C. § 1182(a)(2), however, is subject to a heightened physical presence requirement. Such an applicant, . . . must establish that he “has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for removal.”

Campos-Hernandez, 889 F.3d at 567 (citing NACARA § 203(b), 8 C.F.R. § 1240.66(b)(2), and 8 C.F.R. § 1240.66(c)(2)).

The court has deferred to the BIA’s interpretation of “NACARA § 203(b) as requiring that the ten-year continuous physical presence requirement for NACARA applicants run[s] from the most recent ‘commission of an act, or . . . assumption of a status, constituting a ground for removal.’” *Campos-Hernandez*, 889 F.3d at 571 (alteration in original).

NACARA § 203(c) allows an applicant one opportunity to file a motion to reopen his deportation or removal proceedings to obtain cancellation of removal. A motion to reopen will not be granted unless an applicant can demonstrate prima facie eligibility for relief under NACARA. See *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003). “An alien can make such a showing if he or she has complied with section 203(a)’s filing deadlines, is a native of one of the countries listed in NACARA, has lived continuously in the United States for at least ten years, has not been convicted of any crimes, is a person of good moral character, and can demonstrate extreme hardship if forced to return to his or her native country.” *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093 (9th Cir. 2005); see also NACARA § 203(a), (b), and (c); 8 C.F.R. § 1003.43(b); *Aragon-Salazar v. Holder*, 769 F.3d 699, 706 (9th Cir. 2014) (applicant must show good moral character during the 7-year period before the application for relief). “Such a showing need not be conclusive but need suggest only that it would be ‘worthwhile’ to reopen proceedings.” *Albillo-De Leon*, 410 F.3d at 1094 (citing *Ordonez*, 345 F.3d at 785).

Conduct occurring after the filing of the NACARA application is irrelevant to the moral character determination:

[T]he period of time for which an applicant must show good moral character refers to the period of seven years “immediately preceding the date of [the NACARA] application,” . . . and ends on the date that application is filed. For this reason, any conduct occurring after the filing of the application is irrelevant to the good moral character determination required under the plain language of the statute.

Aragon-Salazar, 769 F.3d at 706 (citation omitted)).

Note, however, that there is a potential conflict regarding the end of the good moral character period between cancellation of removal under 8 U.S.C. § 1229b(b) and NACARA cancellation (the two provisions being materially identical). Compare *Aragon-Salazar v. Holder*, 769 F.3d 699 (9th Cir. 2014) (for NACARA cancellation, good moral character period is counted backward from time application is filed), with *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1162 (9th Cir. 2009) (for cancellation under 8 U.S.C. § 1229b(b), the good moral character period is counted backward from the date the application is finally resolved).

A minor who qualifies for NACARA relief as a derivative under 8 C.F.R. § 1240.61(a)(4) is required to satisfy the seven-year physical presence requirement in 8 C.F.R. § 1240.66(b)(2). See *Barrios v. Holder*, 581 F.3d 858–59 (9th Cir. 2009), *abrogated in part by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093 (9th Cir. 2013) (en banc).

The court has held that a parent’s physical presence in the United States cannot be imputed to his minor child for purposes of NACARA relief. See *Barrios v. Holder*, 581 F.3d at 859; see also *Fuentes v. Lynch*, 837 F.3d 966, 967 (9th Cir. 2016) (“[T]he BIA properly concluded Fuentes was not ‘admitted in any status’ for purposes of cancellation of removal when he was listed as a derivative beneficiary on his mother’s asylum and Nicaraguan Adjustment and Central American Relief Act (NACARA) applications and received work authorization in the United States.”).

The court has held that the Child Status Protection Act does not apply to NACARA. See *Tista v. Holder*, 722 F.3d 1122, 1126 (9th Cir. 2013) (denying petition for review where petitioner failed to meet the definition of “child” at the time father was granted NACARA relief).

This court has held that a prior grant of special rule cancellation of removal and adjustment of status to lawful permanent resident under NACARA § 203 qualified as a cancellation of removal under 8 U.S.C. § 1229b, thus rendering petitioner ineligible for a second grant of cancellation of removal pursuant to 8 U.S.C. § 1229b(c)(6). *Hernandez v. Garland*, 38 F.4th 785, 789–91 (9th Cir. 2022).

1. Jurisdiction and Judicial Review

Judicial review of cancellation or removal determinations under NACARA is the same as judicial review of cancellation of removal determinations under § 1229b. Specifically, as discussed above:

For challenges to the agency's denial of . . . NACARA cancellation of removal, we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility. But we lack jurisdiction over purely factual findings, such as an adverse credibility determination or a finding of historical fact; and we lack jurisdiction over purely discretionary determinations, such as the agency's step-two determination that it would deny cancellation as a matter of discretion.

Lemus-Escobar v. Bondi, 158 F.4th 944, 954 (9th Cir. 2025).

2. NACARA Does Not Violate Equal Protection

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

3. NACARA Deadlines

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

F.3d 950, 956–57 (9th Cir. 2003) (“Statutes of repose are not subject to equitable tolling.”).

Although § 203(c) does not identify by date the deadline for filing a motion to reopen deportation or removal proceedings to seek special rule cancellation, the Attorney General set a deadline of September 11, 1998. *See* NACARA § 203(c); 8 C.F.R. § 1003.43(e)(1); *Albillo-De Leon*, 410 F.3d at 1094.

An application for special rule cancellation of removal, to accompany the motion to reopen, must have been submitted no later than November 18, 1999. 8 C.F.R. § 1003.43(e)(2). NACARA § 203(c), which applies only to noncitizens who have already complied with § 203(a)’s filing deadlines, is a statute of limitations subject to equitable tolling. *See Albillo-De Leon*, 410 F.3d at 1097–98. As noted, the court has held that § 203(a)’s deadlines are not subject to equitable tolling. *See Munoz*, 339 F.3d at 956–57.

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

I. Abused Spouse or Child Provision (VAWA)

A battered spouse, battered child, or the parent of a battered child, may apply for a special form of cancellation of removal. *See* 8 U.S.C. § 1229b(b)(2) (enacting provisions of the Violence Against Women Act of 1994 (VAWA)); *Torres v. Barr*, 976 F.3d 918, 931 (9th Cir. 2020) (“VAWA protects certain ‘battered women and children’ who are ‘present in the United States without admission or parole’ from removal under § 1182(a)(6)(A)(i).” (quoting 8 U.S.C. § 1182(a)(6)(A)(ii))); *Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058–59 (9th Cir. 2005) (holding that the IJ violated due process in refusing to hear relevant expert testimony regarding domestic violence).

Section 1229b(b)(2) states:

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is

inadmissible or deportable from the United States if the alien demonstrates that—

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

8 U.S.C. § 1229b(b)(2); *see Garcia-Mendez v. Lynch*, 788 F.3d 1058, 1062 (9th Cir. 2015) (noncitizen did not qualify as a “VAWA self-petitioner”); *cf. Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003) (discussing similar suspension of deportation provision).

In *Jaimes-Cardenas v. Barr*, 973 F.3d 940, 943–45 (9th Cir. 2020), the court held that the domestic violence waiver established under 8 U.S.C. § 1227(a)(7), and made applicable to cancellation of removal by 8 U.S.C. § 1229b(b)(5), is limited to crimes of domestic violence and stalking, and therefore did not cover petitioner’s drug conviction. The court considered the interplay between three provisions—§ 1229b(b)(2)(A)(iv), § 1229b(b)(5), and § 1227(a)(7)(A)—to determine the scope of the domestic violence waiver applicable to cancellation of removal and adjustment of status for victims of domestic violence, and concluded that the petitioner was ineligible for special cancellation of removal as a domestic violence victim due to his past drug conviction. *See id.*

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

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

A. Overview

Suspension of deportation under former 8 U.S.C. § 1254 (repealed 1996) (INA § 244) was available to persons who had been continuously present in the U.S. for 7 or 10 years, could establish good moral character, and could show that their deportation would cause extreme hardship (for the 7-year provision) or exceptional and extremely unusual hardship (for the 10-year provision) to themselves or their U.S. citizen or lawful permanent resident spouse, parent, or child.

Effective April 1, 1997, IIRIRA repealed suspension of deportation, 8 U.S.C. § 1254 (repealed). IIRIRA § 309(a), (c). A person who was in deportation proceedings before April 1, 1997 could apply for suspension under the old standards. Persons placed in removal proceedings on or after that date are required to apply for cancellation of removal. *Id.* If deportation proceedings

commenced before April 1, 1997, but an evidentiary hearing had not been conducted, the Attorney General could elect to proceed under removal proceedings where only cancellation would be available. IIRIRA § 309(c)(2). If an evidentiary hearing was conducted before April 1, 1997, the Attorney General could terminate proceedings and begin again under the new procedures. IIRIRA § 309(c)(3).

Former suspension of deportation remains applicable to certain Salvadorans, Guatemalans, Eastern Europeans, and persons who had applied for suspension prior to April 1, 1997, who were not served with an Order to Show Cause or committed certain crimes prior to being physically present in the U.S. for the requisite 7 or 10 years. *See, e.g., Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1162 (9th Cir. 2002) (“Section 203(b) of NACARA permits certain aliens to apply for special-rule cancellation of removal, which provides relief in accordance with the more lenient terms of pre-IIRIRA suspension of deportation law.”).

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

Suspension of deportation also may remain available on retroactivity grounds to persons who pleaded guilty or were found guilty after trial prior to IIRIRA, and because of their plea are not eligible for cancellation. *See Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 937–44 (9th Cir. 2007) (BIA erred in finding suspension not available to person convicted after trial and placed in proceedings after seeking naturalization one year before passage of IIRIRA), *implied overruling on other grounds recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118 (9th Cir. 2013); *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 851–54 (9th Cir. 2006) (following the Supreme Court’s decision in *INS v. St. Cyr*, 533 U.S. 289, 319 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020), suspension not barred to a person who pre-IIRIRA pleaded guilty to a crime that barred him from cancellation); *see also Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118 (9th Cir. 2013) (examining retroactivity following the Supreme Court’s decision in *Vartelas v. Holder*, 566 U.S. 257 (2012), and concluding that applicant need not prove reliance).

B. Eligibility Requirements

Under the pre-IIRIRA rules:

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

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

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

1. Continuous Physical Presence

Applicants for suspension must show that they have “been physically present in the United States for a continuous period of not less than seven years.” 8 U.S.C. § 1254(a)(1) (repealed 1996); see also *Corro-Barragan v. Holder*, 718 F.3d 1174, 1178 (9th Cir. 2013); *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc). “[T]he relevant seven year period is the period immediately preceding service of the OSC that prompts the application for suspension.” *Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 941 (9th Cir. 2004) (rejecting petitioners’ contention that they met the seven-year requirement before departing to Mexico for five months). Ten years of continuous physical presence was required for applicants deportable for serious crimes who could show exceptional and extremely unusual hardship. See *Leon-Hernandez v. INS*, 926 F.2d 902, 905 (9th Cir. 1991) (citing 8 U.S.C. § 1254(a)(2)); see also *Pondoc Hernaez v. INS*, 244 F.3d 752, 755 (9th Cir. 2001).

In *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1197 (9th Cir. 2023), the court held that the petitioner’s physical presence in the United States ended under the stop-time rule when he was served with an OSC, even though the OSC failed to disclose the time and place of the noncitizen’s deportation proceedings. The petitioner was therefore ineligible for suspension of deportation. *See id.* (“[W]e hold that an Order to Show Cause that fails to disclose the time and place of an immigrant’s deportation proceedings is sufficient to trigger the stop-time rule in a transitional rules case. The immediate result of this holding is that Gutierrez is ineligible for suspension of deportation.” (footnote omitted)).

a. Jurisdiction

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

b. Standard of Review

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

c. Proof

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

d. Departures: 90/180 Day Rule

Under the transitional rules, a noncitizen fails to maintain continuous physical presence if he is absent for more than 90 days, or 180 days in the aggregate. 8 U.S.C. § 1229b(d)(2); *Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 939 & n.2 (9th Cir. 2004); *see also Canales-Vargas v. Gonzales*, 441 F.3d 739,

742 (9th Cir. 2006). The 90/180 rule as applied to transitional rules cases is not impermissibly retroactive. See *Mendiola-Sanchez*, 381 F.3d at 940–41.

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

e. Brief, Casual, and Innocent Departures

Under pre-IIRIRA law, the statute allowed for “brief, casual and innocent” absences from the United States. 8 U.S.C. § 1254(b)(2) (repealed 1996); see also *Camins v. Gonzales*, 500 F.3d 872, 877–78, 885 (9th Cir. 2007) (legal permanent resident’s three-week trip to Philippines to visit ailing parent was brief, casual, and innocent under *Fleuti* doctrine); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1363 (9th Cir. 1995) (eight-day trip to Mexico seeking a visa was brief, casual, and innocent and did not interrupt continuous physical presence); cf. *Hernandez-Luis v. INS*, 869 F.2d 496, 498–99 (9th Cir. 1989) (voluntary departure under threat of coerced deportation was not a brief, casual, and innocent departure).

f. Deportation

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

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

g. IIRIRA Stop-Time Rule

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

transitional rules or the permanent rules” *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002) (citations omitted).

“A putative notice to appear that fails to designate the specific time or place of the noncitizen’s removal proceedings is not a ‘notice to appear under section 1229(a),’ and so does not trigger the stop-time rule.” *Pereira v. Sessions*, 585 U.S. 198, 208–09 (2018) (addressing the stop-time rule applicable to cancellation of removal under § 1229b(d)(1)). Note, however, that “an Order to Show Cause that fails to disclose the time and place of an immigrant’s deportation proceedings is sufficient to trigger the stop-time rule in a transitional rules case.” *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1197 (9th Cir. 2023).

The stop-time rule applies to suspension of deportation cases heard on or after April 1, 1997. See *Astrero v. INS*, 104 F.3d 264, 266 (9th Cir. 1996) (holding that IIRIRA’s stop-time rule could not be applied before its effective date of April 1, 1997); see also *Otarola v. INS*, 270 F.3d 1272, 1273 (9th Cir. 2001) (granting petition where INS maintained meritless appeal in order to avail itself of stop-time rule); *Ram v. INS*, 243 F.3d 510, 517–18 (9th Cir. 2001) (holding that application of the stop-time rule did not offend due process, and rejecting claim that seven years can start anew after service of the OSC); *Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1211 (9th Cir. 2001), corrected by 250 F.3d 1271 (9th Cir. 2001) (reversing premature application of the stop-time rule).

The stop-time rule violates neither due process nor international law, *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979–80 (9th Cir. 2006), and its retroactive application is permissible, *Pedroza-Padilla v. Gonzales*, 486 F.3d 1362, 1364 (9th Cir. 2007) (not unconstitutionally retroactive); *Jimenez-Angeles*, 291 F.3d at 602 (same).

h. Pre-IIRIRA Rule on Physical Presence

Before IIRIRA, an applicant “in deportation proceedings continued to accrue time towards satisfying the seven-year residency requirement for suspension of deportation during the pendency of the proceedings.” *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002); see also *Alcaraz v. INS*, 384 F.3d 1150, 1153 (9th Cir. 2004). An applicant, however, could not establish the seven-year requirement by pursuing baseless appeals. See *INS v. Rios-Pineda*, 471 U.S. 444,

449–50 (1985); *cf. Sida v. INS*, 783 F.2d 947, 950 (9th Cir. 1986) (distinguishing *Rios-Pineda*).

i. NACARA Exception to Stop-Time Rule

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

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

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

The stop-time rule also does not apply to class members covered by the December 2002 settlement of *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002). This class action challenged a directive of the Executive Office for Immigration Review (EOIR) that would have halted the granting of suspension applications during the period between February 13 and April 1, 1997, the effective date of IIRIRA, based on the annual cap on suspension grants.

As a result of the EOIR directive, some applicants who would have had their suspension of deportation claims heard under pre-IIRIRA law during this period were rendered ineligible by the stop-time rule when their cases were heard after April 1, 1997.

Eligible *Barahona-Gomez* class members may reapply for suspension of deportation under the law as it existed before the effective date of IIRIRA. For background on the case, *see Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir.

1999), supplemented by 236 F.3d 1115 (9th Cir. 2001); see also 68 Fed. Reg. 13727 (Mar. 20, 2003) (Advisory Statement). “The settlement contains two provisions that define who is entitled to relief”—“Definition of the Class” and a “Definition of ‘Eligible class members’”—both of which must be met to be eligible for relief. *Sotelo v. Gonzales*, 430 F.3d 968, 971 (9th Cir. 2005). “Eligibility under *Barahona-Gomez* is a question of law reviewed *de novo*.” *Navarro v. Mukasey*, 518 F.3d 729, 733 (9th Cir. 2008).

k. Repapering

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

2. Good Moral Character

a. Jurisdiction

In decisions predating recent jurisdictional developments, the court held that “direct judicial review is available under the transitional rules of a BIA denial of eligibility for suspension of deportation based on application of the per se exclusion categories” but that, “aside from the applicability of any per se category, IIRIRA’s transitional rules prohibit direct judicial review of the question of good moral character.” *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (discussing suspension of deportation), superseded by statute as stated in *Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010); see also *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (holding that the court retained jurisdiction to review a finding that petitioner could not establish good moral character for purposes of cancellation of removal under § 1101(f)(7)); *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (holding that court retained jurisdiction to determine whether a petitioner’s conduct fell within a per se exclusion category in cancellation of

removal case), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc).

The foregoing decisions must be examined in light of recent decisions holding that the application of a legal standard to a set of established or undisputed facts (a mixed question of law and fact) presents a question of law that is reviewable under 8 U.S.C. § 1252(a)(2)(D). *See, e.g., Wilkinson v. Garland*, 601 U.S. 209, 212 (2024) (“The application of a statutory legal standard (like the exceptional and extremely unusual hardship standard) to an established set of facts is a quintessential mixed question of law and fact. . . . [S]uch questions are reviewable under § 1252(a)(2)(D).”); *Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025) (“*Wilkinson*’s core holding—that we retain jurisdiction to review mixed questions of law and fact under § 1252(a)(2)(D)—permits us to review those legal issues even when the INA makes them discretionary.”); *cf. Lemus-Escobar v. Bondi*, 158 F.4th 944, 952–54 (9th Cir. 2025) (“For challenges to the agency’s denial of cancellation of removal or NACARA cancellation of removal, we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility [, which include, inter alia, ‘good moral character’ and ‘exceptional and extremely unusual hardship’].”).

b. Time Period Required

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

c. Per Se Exclusion Categories

The statutory or per se exclusion categories are set forth at 8 U.S.C. § 1101(f) and include “inadmissible aliens” defined in § 1182. Section 1182(a)(6)(E)(i) covers “any alien who have at any time ‘knowingly . . . encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.’” *Sanchez v. Holder*, 560 F.3d 1028,

1031 (9th Cir. 2009) (quoting 8 U.S.C. § 1182(A)(6)(E)(i)). “[A]lien smuggling under § 1182 continues until the initial transporter ceases to transport the alien.” *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748 (9th Cir. 2007) (suspension of deportation case). Moreover, collecting money to pay a transporter constitutes aiding and abetting “by providing ‘an affirmative act of help, assistance, or encouragement’” in a noncitizen’s effort to illegally enter the United States. *See id.* at 749.

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

3. Extreme Hardship Requirement

a. Jurisdiction

In decisions predating recent jurisdictional developments, the court held that an “extreme hardship” determination “is clearly a discretionary act” and thus that “the transitional rules operate to remove direct judicial review of BIA determinations of ‘extreme hardship.’” *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997), *superseded by statute as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010); *see also Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001) (holding that the court is “no longer empowered to conduct an ‘abuse of discretion’ review of the agency’s purely discretionary determinations as to whether ‘extreme hardship’ exists”).

The foregoing decisions must be examined in light of recent decisions holding that the application of a legal standard to a set of established or undisputed facts (a mixed question of law and fact) presents a question of law that is reviewable under 8 U.S.C. § 1252(a)(2)(D). *See, e.g., Wilkinson v. Garland*, 601 U.S. 209, 212 (2024) (“The application of a statutory legal standard (like the exceptional and extremely unusual hardship standard) to an established set of facts is a quintessential mixed question of law and fact. . . . [S]uch questions are reviewable under § 1252(a)(2)(D).”); *Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025) (“*Wilkinson*’s core holding—that we retain jurisdiction to review mixed questions of law and fact under § 1252(a)(2)(D)—permits us to review those legal issues even when the INA makes them discretionary.”); *cf. Lemus-Escobar v. Bondi*, 158 F.4th 944, 952–54 (9th Cir. 2025) (“For challenges to the agency’s

denial of cancellation of removal or NACARA cancellation of removal, we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility [, which include, inter alia, ‘good moral character’ and ‘exceptional and extremely unusual hardship’].”).

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

b. Qualifying Individual

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

c. Extreme Hardship Factors

The administrative regulations describe extreme hardship as “a degree of hardship beyond that typically associated with deportation.” 8 C.F.R. § 1240.58(b). The regulation sets forth the following non-exclusive list of factors relevant to the hardship inquiry:

- (1) The age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation;
- (2) The age, number, and immigration status of the alien’s children and their ability to speak the native language and to adjust to life in the country of return;
- (3) The health condition of the alien or the alien’s children, spouse, or parents and the availability of any required medical treatment in the country to which the alien would be returned;
- (4) The alien’s ability to obtain employment in the country to which the alien would be returned;

- (5) The length of residence in the United States;
- (6) The existence of other family members who are or will be legally residing in the United States;
- (7) The financial impact of the alien's departure;
- (8) The impact of a disruption of educational opportunities;
- (9) The psychological impact of the alien's deportation;
- (10) The current political and economic conditions in the country to which the alien would be returned;
- (11) Family and other ties to the country to which the alien would be returned;
- (12) Contributions to and ties to a community in the United States, including the degree of integration into society;
- (13) Immigration history, including authorized residence in the United States; and
- (14) The availability of other means of adjusting to permanent resident status.

8 C.F.R. § 1240.58(b); see *Chete Juarez v. Ashcroft*, 376 F.3d 944, 948–49 (9th Cir. 2004) (listing “broad range” of relevant circumstances informing the hardship inquiry); *Arrozal v. INS*, 159 F.3d 429, 433–34 (9th Cir. 1998) (discussing factors such as medical problems and political conditions); *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (considering family separation); *Ordonez v. INS*, 137 F.3d 1120, 1123–24 (9th Cir. 1998) (discussing persecution); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1318–19 (9th Cir. 1997) (considering community assistance and acculturation); *Tukhowinich v. INS*, 64 F.3d 460, 463 (9th Cir. 1995) (considering non-economic hardship flowing from economic detriment); *Biggs v. INS*, 55 F.3d 1398, 1401–02 (9th Cir. 1995) (considering medical information); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423–24 (9th Cir. 1987) (considering family separation); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)

(considering hardship to applicant based on separation from non-qualifying relatives).

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

Cf. Gonzalez-Juarez v. Bondi, 137 F.4th 996, 1005–06 (9th Cir. 2025) (discussing the “exceptional and extremely unusual hardship” standard applicable to cancellation of removal, 8 U.S.C. § 1229b(b)(1)(D)).

d. Current Evidence of Hardship

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

4. Ultimate Discretionary Determination

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

though the IJ referenced discretionary factors, the court had jurisdiction over the petition).

“Although we may not review the IJ’s exercise of discretion, a due process violation is not an exercise of discretion.” *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003) (granting petition where IJ’s biased remarks evinced the IJ’s reliance on improper discretionary considerations).

C. Abused Spouses and Children Provision (VAWA)

A battered spouse, battered child, or the parent of a battered child, could apply for a special form of suspension of deportation that was added to the INA by the Violence Against Women Act of 1994 (VAWA). See *Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003) (discussing former 8 U.S.C. § 1254(a)(3) (1996), which has since been amended and recodified). Under this provision, the Attorney General could suspend the deportation of a noncitizen who:

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

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

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

D. Ineligibility for Suspension

1. Certain Crewmen and Exchange Visitors

Persons who entered as crewmen after June 30, 1964, are statutorily ineligible for suspension. *See* 8 U.S.C. § 1254(f)(1) (repealed 1996); *see also* *Guinto v. INS*, 774 F.2d 991, 992 (9th Cir. 1985) (rejecting equal protection challenge). Certain “nonimmigrant exchange aliens” are also ineligible for relief. *See* 8 U.S.C. § 1254(f)(2) and (3) (repealed 1996).

2. Participants in Nazi Persecutions or Genocide

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

3. Noncitizens in Exclusion Proceedings

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

E. Five-Year Bars to Suspension

1. Failure to Appear

An individual is ineligible for suspension of deportation for a period of five years if, after proper notice, she failed to appear at a deportation or asylum hearing or failed to appear for deportation. *See* 8 U.S.C. § 1252b(e) (repealed 1996). The five-year ban also applies to voluntary departure and adjustment of status. *Id.* at § 1252(b)(e)(5). The government must provide proper notice in order for the bar to relief to be effective. *See* *Lahmidi v. INS*, 149 F.3d 1011, 1015–16 (9th Cir. 1998) (reviewing denial of motion to reopen in absentia deportation proceeding).

The pre-IIRIRA version of the statute provided an exception to the five-year bar for “exceptional circumstances.” *See* 8 U.S.C. § 1252b(e) (repealed 1996). Exceptional circumstances are defined as “circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.” 8 U.S.C. § 1252b(f)(2) (repealed 1996).

Cf. Montejo-Gonzalez v. Bondi, 166 F.4th 851, 854–58 (9th Cir. 2026) (en banc) (discussing exceptional circumstances under 8 U.S.C. § 1229a(e)(1)).

2. Failure to Depart

An individual is not eligible for suspension of deportation for a period of five years if she remained in the United States after the expiration of a grant of voluntary departure. *See* 8 U.S.C. § 1252b(e)(2)(A) (repealed 1996); *cf. Barroso v. Gonzales*, 429 F.3d 1195, 1204–07 (9th Cir. 2005) (holding that a timely-filed motion to reopen automatically tolled the voluntary departure period in permanent rules case). *But see Dada v. Mukasey*, 554 U.S. 1, 19–21 (2008) (holding that there is no statutory authority for automatically tolling the voluntary departure period during the pendency of a motion to reopen).

The five-year ban will not apply unless “the Attorney General has provided written notice to the alien in English and Spanish and oral notice either in the alien’s native language or in another language the alien understands of the consequences . . . of the alien’s remaining in the United States after the scheduled date of departure, other than because of exceptional circumstances.” 8 U.S.C. § 1252b(e)(2)(B) (repealed 1996). The IJ’s oral warning of the consequences of failing to depart must explicitly identify the types of discretionary relief that would be barred. *See Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (reviewing, under the transitional rules, the denial of petitioner’s motion to reopen suspension proceedings); *cf. de Martinez v. Ashcroft*, 374 F.3d 759, 762 (9th Cir. 2004) (suggesting in permanent rules cancellation case that the new ten-year statutory bar for failing to voluntarily depart no longer explicitly requires oral notice of the consequences for failing to depart).

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

F. Retroactive Elimination of Suspension of Deportation

Applying the Supreme Court’s retroactivity analysis in *INS v. St. Cyr*, 533 U.S. 289, 316 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020), 533 U.S. 289, 316–21 (2001), this court has held that IIRIRA’s elimination of suspension of deportation relief for nonpermanent residents convicted of certain enumerated offenses is impermissibly retroactive. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853–54 (9th Cir. 2006) (holding that IIRIRA’s elimination of suspension of deportation could not be applied retroactively to deprive a nonpermanent resident of discretionary relief from removal where he was eligible for such relief at the time of his guilty plea); *see also Mtoched v. Lynch*, 786 F.3d 1210, 1214 (9th Cir. 2015) (“There is a presumption in American law against retroactive legislation.”); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 931, 941 (9th Cir. 2007) (suspension of deportation application by a permanent resident), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–19 (9th Cir. 2013).

In *Vartelas v. Holder*, 566 U.S. 257 (2012), the Supreme Court clarified that actual reliance is not necessary to show the elimination of relief is impermissibly retroactive. *See Cardenas-Delgado*, 720 F.3d at 1118–19.

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

A. Overview

Former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), allowed certain long-time permanent residents to obtain a discretionary waiver for certain grounds of excludability and deportability. *See INS v. St. Cyr*, 533 U.S. 289, 294–95 (2001) (providing history of former § 212(c) relief), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020).

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

Although the literal language of former § 212(c) applies only to exclusion proceedings, the statute applies to individuals in deportation proceedings as well. *See St. Cyr*, 533 U.S. at 295–96 & n.5 (discussing the “great practical importance” of extending former § 212(c) relief to permanent residents in deportation proceedings, and noting the large percentage of applications that have been granted); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1122 (9th Cir. 2002), impliedly overruling *recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995).

In 1996, Congress modified eligibility for § 212(c) relief through the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1277 (1996). “Under § 440(d) of AEDPA, which became effective April 24, 1996, a [lawful permanent resident] who was ‘deportable by reason of having committed’ an aggravated felony became ineligible for § 212(c) relief.” *Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018) (holding that because petitioner was convicted of an aggravated felony after the effective date of § 440(d), he was ineligible for § 212(c) relief).

Effective April 1, 1997, IIRIRA repealed § 212(c), and created a more limited remedy called “cancellation of removal for certain permanent residents.” As discussed below, however, certain permanent residents remain eligible to apply for a former § 212(c) waiver. *See* 8 C.F.R. § 1212.3 (final rule establishing procedures to implement *St. Cyr*); *see also Lopez*, 901 F.3d at 1076 (although IIRIRA repealed § 212(c), relief remains available to certain individuals); *Zheng v.*

Holder, 644 F.3d 829, 833 (9th Cir. 2011) (“Although Congress repealed § 212(c) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Supreme Court ruled in *St. Cyr* that permanent residents who pled guilty to crimes prior to the repeal could still apply for § 212(c) relief if they would have been eligible at the time of their plea.”); *see also* *Tyson v. Holder*, 670 F.3d 1015, 1017–22 (9th Cir. 2012) (discussing the repeal of § 212(c) relief, as well as the determination that the repeal does not apply retroactively to those who pled guilty to aggravated felonies in reliance on the possibility of such relief).

Cross-reference: Cancellation for Lawful Permanent Residents.

B. Eligibility Requirements

1. Seven Years

To be eligible for discretionary relief from deportation under former § 212(c), an applicant must have accrued seven years of lawful permanent residence status. *See* *Ortega de Robles v. INS*, 58 F.3d 1355, 1360–61 (9th Cir. 1995) (holding that applicant could include time spent as a lawful temporary resident under the amnesty program); *see also* *Solorio-Ruiz v. Sessions*, 881 F.3d 733, 735 (9th Cir. 2018) (noting relief under former § 212(c) was available to lawful permanent residents who had been lawfully domiciled in the United States for seven consecutive years), *abrogated on other grounds as stated in* *United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020). An applicant could continue to accrue legal residency time for the purpose of relief while pursuing an administrative appeal. *See* *Foroughi v. INS*, 60 F.3d 570, 572 (9th Cir. 1995).

2. Balance of Equities

The IJ or BIA must balance the favorable and unfavorable factors when determining whether an applicant is entitled to former § 212(c) relief. *See, e.g.,* *Szonyi v. Barr*, 942 F.3d 874, 896 (9th Cir. 2019) (failure to consider all favorable and unfavorable factors bearing on a petitioner’s application for § 212(c) relief is an abuse of discretion); *Zheng v. Holder*, 644 F.3d 829, 833 (9th Cir. 2011) (“[T]he BIA abuses its discretion when it fails to consider all favorable and unfavorable factors bearing on a petitioner’s application for § 212(c) relief.”); *Georgiu v. INS*, 90 F.3d 374, 376–77 (9th Cir. 1996) (BIA failed to address positive equities).

Numerous cases have discussed the equities and adverse factors that should be balanced. *See, e.g., Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 923–24 (9th Cir. 2007); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (discussing positive equities and holding that defendant had a plausible claim for former § 212(c) relief); *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1056–57 (9th Cir. 2003) (holding that defendant did not establish prejudice given the significant adverse factors in his case); *Pablo v. INS*, 72 F.3d 110, 113–14 (9th Cir. 1995) (holding, under abuse of discretion standard, that BIA considered all of the relevant factors); *Yepes-Prado v. INS*, 10 F.3d 1363, 1366 (9th Cir. 1993) (listing factors).

In decisions predating recent jurisdictional developments, the court held that it lacks jurisdiction to review the discretionary balancing of the relevant factors. *See Vargas-Hernandez*, 497 F.3d at 923 (permanent rules) (“Discretionary decisions, including whether or not to grant § 212(c) relief, are not reviewable.” (citing 8 U.S.C. § 1252(a)(2)(B)(ii))); *Palma-Rojas v. INS*, 244 F.3d 1191, 1192 (9th Cir. 2001) (transitional rules).

The foregoing decisions must be examined in light of recent decisions holding that the application of a legal standard to a set of established or undisputed facts (a mixed question of law and fact) presents a question of law that is reviewable under 8 U.S.C. § 1252(a)(2)(D). *See, e.g., Wilkinson v. Garland*, 601 U.S. 209, 212 (2024) (“The application of a statutory legal standard (like the exceptional and extremely unusual hardship standard) to an established set of facts is a quintessential mixed question of law and fact. . . . [S]uch questions are reviewable under § 1252(a)(2)(D).”); *Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025) (“*Wilkinson*’s core holding—that we retain jurisdiction to review mixed questions of law and fact under § 1252(a)(2)(D)—permits us to review those legal issues even when the INA makes them discretionary.”); *cf. Lemus-Escobar v. Bondi*, 158 F.4th 944, 952–54 (9th Cir. 2025) (“For challenges to the agency’s denial of cancellation of removal or NACARA cancellation of removal, we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility [, which include, inter alia, ‘good moral character’ and ‘exceptional and extremely unusual hardship’].”).

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

C. Deportation: Comparable Ground of Exclusion

In a decision predating the Supreme Court’s decision in [Judulang v. Holder](#), 565 U.S. 42 (2012), the court held that, because former § 212(c) explicitly applied to the grounds of excludability, in order to be eligible for a waiver, an applicant in deportation proceedings must show that her ground of deportation had an analogous exclusion ground. *See* [Komarenko v. INS](#), 35 F.3d 432, 434–35 (9th Cir. 1994) (stating that the waiver was not available for deportation based on a firearms offense because there was no comparable exclusion ground), *abrogated by* [Abebe v. Mukasey](#), 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc); *see also* 8 C.F.R. § 1212.3(f)(5) (stating that an application for relief under former § 212(c) of the Act shall be denied if “[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act”). In [Judulang v. Holder](#), 565 U.S. 42 (2012), however, the Supreme Court held that the BIA’s comparable-ground approach was arbitrary and capricious.

D. Removal: Comparable Ground of Inadmissibility

In a decision predating [Judulang v. Holder](#), 565 U.S. 42 (2012), the court held that in order to be eligible for a waiver under former § 212(c), an applicant in removal proceedings must show that there is a ground of inadmissibility that is comparable to a ground of removability relating to a conviction for an aggravated felony. *See* 8 C.F.R. § 1212.3(f)(5); *Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 771 (BIA 2005), *overruling recognized by* [Castrijon-Garcia v. Holder](#), 704 F.3d 1205 (9th Cir. 2013), *overruled on other grounds by* [Ceron v. Holder](#), 747 F.3d 773, 782 n.2 (9th Cir. 2014) (en banc). In [Judulang v. Holder](#), 565 U.S. 42 (2012), the Supreme Court held that the BIA’s comparable-ground approach was arbitrary and capricious.

E. Ineligibility for Relief

Former § 212(c) relief is not available to persons based on certain national security, terrorist, or foreign policy grounds, or if the applicant participated in genocide or child abduction. *See* 8 U.S.C. § 1182(c) (repealed 1996) (referring to §§ 1182(a)(3) and 1182(a)(9)(C)). Applying IIRIRA’s elimination of § 212(c) relief to individuals who engaged in the requisite terrorist activity prior to IIRIRA’s enactment is not impermissibly retroactive. *Kelava v. Gonzales*, 434 F.3d 1120, 1124–26 (9th Cir. 2006).

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

1. IMMACT 90

“The Immigration Act of 1990 amended § 212(c), making ineligible for relief under that section ‘an[y] alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years.’” *Corpuz v. Holder*, 697 F.3d 807, 811, 816–17 (9th Cir. 2012) (quoting Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052) (where the court could not confidently calculate the petitioner’s “term of imprisonment” under § 212(c) to determine whether the petitioner was ineligible for a discretionary waiver from deportation, the petition was granted and the matter was remanded for a determination of the amount of good time credit to which the petitioner was entitled); *see also INS v. St. Cyr*, 533 U.S. 289, 297 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); *Toia v. Fasano*, 334 F.3d 917, 919 (9th Cir. 2003).

“Section 212(c) was further revised in 1991 to clarify that the bar applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years.” *Toia*, 334 F.3d at 919 n.1. The five-year period includes time served for sentencing enhancements, and time served for convictions obtained before the IMMACT 90 and 1991 amendments may be added to time served for convictions obtained after IMMACT 90 and the 1991 amendments. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1128, 1134 (9th Cir. 2007), *implied overruling on other grounds recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–19 (9th Cir. 2013). Accordingly, an applicant convicted of an aggravated felony after IMMACT 90 and the 1991 amendments cannot qualify for former § 212(c) relief if

the aggregate time served both before and after IMMACT 90 and the 1991 amendments is five or more years. See *Toia*, 334 F.3d at 919 n.1; *Saravia-Paguada*, 488 F.3d at 1134–35; see also *Solorio-Ruiz v. Sessions*, 881 F.3d 733, 735 (9th Cir. 2018) (“A § 212(c) waiver is not available if the applicant served an aggregate of more than five years of imprisonment for an aggravated felony.”), *abrogated on other grounds as stated in United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020).

a. Continued Eligibility for Relief

The IMMACT 90 five-year bar may not be applied retroactively to convictions before November 29, 1990. *Toia v. Fasano*, 334 F.3d 917, 918–19 (9th Cir. 2003); see also *Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1152 (9th Cir. 2002) (remanding for a determination of whether application of five-year bar was impermissibly retroactive); 8 C.F.R. § 1212.3(f)(4)(ii) (“An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990.”).

But the calculation of time served may include time served as a result of a conviction prior to IMMACT 90 and the 1991 amendments, when added to time served as a result of a post-IMMACT 90 conviction. See *Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1134–35 (9th Cir. 2007), *implied overruling on other grounds recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–19 (9th Cir. 2013).

2. AEDPA

Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) restricted former § 212(c) relief “for individuals ordered deported because of a conviction for an aggravated felony, for a drug conviction, for certain weapons or national security violations, and for multiple convictions involving crimes of moral turpitude.” *INS v. St. Cyr*, 533 U.S. 289, 297 & n.7 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); see also *Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018) (“Under § 440(d) of AEDPA, which became effective April 24, 1996, a LPR who was ‘deportable by reason of having committed’ an aggravated felony became

ineligible for § 212(c) relief.”); *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003); *Magana-Pizano v. INS*, 200 F.3d 603, 606 & n.2 (9th Cir. 1999).

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

a. Continued Eligibility for Relief

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

AEDPA § 440(d) also does not apply “if the alien pleaded guilty or nolo contendere and the alien’s plea agreement was made before April 24, 1996.” 8 C.F.R. § 1212.3(h)(1).

If the noncitizen entered a plea agreement between April 24, 1996, and April 1, 1997, she may apply for former § 212(c) relief, as amended by § 440(d) of AEDPA. 8 C.F.R. § 1212.3(h)(2).

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

3. IIRIRA

Section 304(b) of IIRIRA eliminated § 212(c) relief entirely and replaced it with cancellation of removal. See *INS v. St. Cyr*, 533 U.S. 289, 297 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002). Individuals who entered into plea agreements on or after April 1, 1997, are not eligible for former § 212(c) relief. See 8 C.F.R. § 1212.3(h)(3).

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

IIRIRA also removed the court’s jurisdiction to review discretionary determinations, including whether to grant or deny former § 212(c) relief. *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 923 (9th Cir. 2007) (permanent rules case); *Palma-Rojas v. INS*, 244 F.3d 1191, 1192 (9th Cir. 2001) (transitional rules case). *But see* 8 U.S.C. § 1252(a)(2)(D) (restoring jurisdiction over questions of law, including mixed questions of law and fact).

Cross-reference: Cancellation of Removal.

a. Retroactive Elimination of § 212(c) Relief

“There is a presumption in American law against retroactive legislation.” *Mtoched v. Lynch*, 786 F.3d 1210 (9th Cir. 2015) (citing *Vartelas v. Holder*, 566 U.S. 257, 266 (2012)). In *INS v. St. Cyr*, 533 U.S. 289 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020), the Supreme Court held that a retrospective application of the bar to former § 212(c) relief would have an impermissible retroactive effect on certain lawful permanent residents. *Id.* at 325 (holding that the elimination of § 212(c) relief had an “obvious and severe retroactive effect” on those who entered into plea agreements with the expectation that they would be eligible for relief). More specifically, “IIRIRA’s elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past.” *Id.* at 321 (citation and internal quotation marks omitted). Note that the Supreme Court in *Vartelas v. Holder*, 566 U.S. 257, 270–74, (2012), discussing *St. Cyr*, made clear that reliance is not necessary to show impermissible retroactivity. *See also Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018) (holding that § 440(d) did not attach new legal consequences to the commission of an aggravated felony, and thus did not have impermissible

retroactive effect as applied to LPR who was convicted after AEDPA's effective date); *Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–19 (9th Cir. 2013) (holding that it is unnecessary to show reliance to establish that the repeal of § 212(c) relief is impermissibly retroactive); *Peng v. Holder*, 673 F.3d 1248, 1256–57 (9th Cir. 2012) (holding that applying § 304(b) retroactively to petitioner's case would result in impermissible retroactive effect); *Tyson v. Holder*, 670 F.3d 1015, 1017–22 (9th Cir. 2012) (holding that BIA erred in concluding that *St. Cyr* is restricted to plea bargains, and further that the stipulated-facts trial in the instant case was similar to a guilty plea in “all important respects,” such that the repeal of 212(c) relief could not be applied retroactively); *Luna v. Holder*, 659 F.3d 753, 755–56 (9th Cir. 2011) (discussing § 212(c) relief).

b. Continued Eligibility for Relief

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

(i) Plea Agreements Prior to AEDPA and IIRIRA

Applicants who were convicted pursuant to plea agreements before AEDPA and IIRIRA, and who were eligible for former § 212(c) relief at the time of their guilty pleas, remain eligible to apply for former § 212(c) relief. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); *see also* 8 C.F.R. § 1003.44 (setting forth procedure for special motion to seek former § 212(c) relief); 8 C.F.R. § 1212.3(h) (setting forth continued availability of former § 212(c) relief); *Peng v. Holder*, 673 F.3d 1248, 1256–57 (9th Cir. 2012) (concluding that, “prior to the enactment of IIRIRA on September 30, 1996, a noncitizen, who proceeded to trial on a crime involving moral turpitude (having not been convicted of one prior crime involving moral turpitude), remains eligible to apply for a § 212(c) waiver”); *Zheng v. Holder*, 644 F.3d 829, 833 (9th Cir. 2011) (“Although Congress repealed § 212(c) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Supreme Court ruled in *St. Cyr* that permanent residents who pled guilty to crimes prior to the repeal could still apply for § 212(c) relief if they would

have been eligible at the time of their plea.”); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 n.1 (9th Cir. 2002) (stating that repeal of § 212(c) relief did not apply to petitioner falling under the transitional rules), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013).

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

**(ii) No Longer Necessary to Show Reasonable
Reliance on Pre-IIRIRA Application for Relief**

In *Hernandez de Anderson v. Gonzales*, the court held that a permanent resident applying for naturalization is in a similar position to “an alien engaged in plea bargaining, acutely aware of the immigration consequences of her action.” *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 942 (9th Cir. 2007) (citation modified), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–19 (9th Cir. 2013). Thus, an applicant who applied for relief pre-IIRIRA that demonstrates reasonable reliance on pre-IIRIRA law and plausibly shows that she would have acted differently had she known about the elimination of § 212(c) relief remains eligible for former § 212(c) relief. *Id.* at 941–44. The Supreme Court made clear in *Vartelas v. Holder*, 566 U.S. 257 (2012), however, that “neither actual reliance nor reasonable reliance was required to show that a statute was impermissibly retroactive.” *Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118 (9th Cir. 2013).

(iii) Similarly Situated Noncitizens Treated Differently

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

Cf. *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1054 (9th Cir. 2005) (denying petition for review challenging the retroactive application of IIRIRA's expanded aggravated felony definition); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (holding that retroactive application of AEDPA restrictions on former § 212(c) relief did not violate equal protection), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013).

c. Ineligibility for Relief

Section 304(b) of IIRIRA eliminated § 212(c) relief for all permanent residents other than those who remain eligible because of an impermissibly retroactive application of the statute. See *INS v. St. Cyr*, 533 U.S. 289, 297 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020). Ineligible applicants include the following:

(i) Plea Agreements after IIRIRA

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

(ii) Plea Agreements after AEDPA

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

AEDPA had already eliminated relief for aggravated felons. *See also Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053–54 (9th Cir. 2005).

(iii) Convictions After Trial

“[P]rior to the enactment of IIRIRA on September 30, 1996, an alien, who proceeded to trial on a crime involving moral turpitude (having not been convicted of one prior crime involving moral turpitude), remains eligible to apply for a § 212(c) waiver” where she can plausibly argue that she relied on the availability of relief. *Peng v. Holder*, 673 F.3d 1248, 1256–57 (9th Cir. 2012); *see also Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 941 (9th Cir. 2007) (petitioner convicted at trial nevertheless eligible for former § 212(c) relief because of her reasonable reliance on pre-IIRIRA application for relief), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–19 (9th Cir. 2013); *cf. Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (holding that, for an applicant who elected a jury trial prior to AEDPA, the AEDPA restrictions on former § 212(c) relief did not have an impermissibly retroactive effect because he could not plausibly claim that he would have acted differently if he had known about the elimination of § 212(c) relief), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013). In *Peng*, the court rejected the BIA’s interpretation that *Armedariz-Montoya* created a “bright-line rule barring aliens who proceeded to trial from § 212(c) relief.” *Peng*, 673 F.3d at 1256. *But see* 8 C.F.R. § 1212.3(h) (“Aliens are not eligible to apply for § 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial.”); *Kelava v. Gonzales*, 434 F.3d 1120, 1125–26 (9th Cir. 2006) (stating that *Clark v. Martinez*, 543 U.S. 371 (2005), did not effectively overrule *Armendariz-Montoya*); *United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (finding no impermissible retroactive effect where applicant was convicted after a jury trial).

(iv) Pre-IIRIRA Criminal Conduct

The availability of former § 212(c) relief at the time the crime was committed is not a basis for continued eligibility for relief under that section. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1131–34 (9th Cir. 2007), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–19 (9th Cir. 2013).

(v) Terrorist Activity

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

G. Expanded Definition of Aggravated Felony

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

IMMACT 90 amended § 212(c) to eliminate relief for aggravated felons who had served a term of imprisonment of at least five years, and the section was further amended in 1991 “to clarify that the bar applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years.” *Toia v. Fasano*, 334 F.3d 917, 919 n.1 (9th Cir. 2003); see also *Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1128, 1134–35 (9th Cir. 2007), implied overruling on other grounds recognized by *Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–19 (9th Cir. 2013); 8 C.F.R. § 1212.3(f)(4)(ii).

Section 440(d) of AEDPA barred waivers for “for individuals ordered deported because of a conviction for an aggravated felony, for a drug conviction, for certain weapons or national security violations, and for multiple convictions involving crimes of moral turpitude.” *INS v. St. Cyr*, 533 U.S. 289, 297 & n.7 (2001), superseded by statute on other grounds as stated in *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); see also *Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018); *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003); *Magana-Pizano v. INS*, 200 F.3d 603, 606 & n.2 (9th Cir. 1999).

Section 321 of IIRIRA also expanded the crimes defined as “aggravated felonies.” See *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002) (noting that “IIRIRA expanded the definition of ‘aggravated felony’ by [inter alia] reducing the prison sentence required to trigger ‘aggravated felony’ status for burglary from five years to one year.” (citation omitted)); see also 8 U.S.C. § 1101(a)(43) (defining aggravated felony); *INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001), superseded by statute on other grounds as stated in *Nasrallah v. Barr*, 590

[U.S. 573, 580 \(2020\)](#); [8 C.F.R. § 1212.3\(f\)\(4\)](#) (discussing applicability of aggravated felony exclusion).

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

V. SECTION 212(h) RELIEF, [8 U.S.C. § 1182\(h\)](#), WAIVER OF INADMISSIBILITY

Section 212(h) allows the Attorney General, in her discretion, to waive inadmissibility of an applicant “who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien’s denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.” [8 U.S.C. § 1182\(h\)\(1\)\(B\)](#); *see also Eleri v. Sessions*, [852 F.3d 879, 880 \(9th Cir. 2017\)](#) (“[T]he Attorney General may grant a waiver of inadmissibility if ‘the alien’s denial of admission would result in extreme hardship’ to his U.S. citizen spouse.”); *Negrete-Ramirez v. Holder*, [741 F.3d 1047, 1050 \(9th Cir. 2014\)](#) (discussing § 212(h) and concluding that petitioner was not barred from applying for waiver where her admission as a “visitor” into the United States did not constitute “admission” in the context of § 212(h)); *Sanchez-Avalos v. Holder*, [693 F.3d 1011, 1014 \(9th Cir. 2012\)](#) (“INA § 212(h) provides the Attorney General discretion to waive the inadmissibility of certain aliens if the alien establishes that inadmissibility would cause hardship to a family member who is a United States citizen or lawful resident.”), *abrogated in part by Descamps v. United States*, [570 U.S. 254 \(2013\)](#); *Sum v. Holder*, [602 F.3d 1092, 1094–95 \(9th Cir. 2010\)](#); *Yepez-Razo v. Gonzales*, [445 F.3d 1216, 1218 n.3 \(9th Cir. 2006\)](#) (describing the § 212(h) waiver). “Such a waiver is barred, however, if the alien has been convicted of an aggravated felony.” *Eleri*, [852 F.3d at 880](#) (quoting [§ 1182\(h\)](#)).

“The INA § 212(h) waiver provision may not be used to excuse convictions that bar relief under INA § 240A(b). § 212(h) permits the Attorney General to waive only a ground of *inadmissibility*; it cannot waive a conviction that bars cancellation of removal.” *Guerrero-Roque v. Lynch*, [845 F.3d 940, 943 \(9th Cir. 2017\)](#).

“[A] § 212(h) waiver for an alien *within* the United States is available only in connection with an application for adjustment of status, even for someone who is not eligible to apply for adjustment of status.” [Mtoched v. Lynch](#), 786 F.3d 1210, 1218 (9th Cir. 2015) (emphasis added); *see also Garcia-Mendez v. Lynch*, 788 F.3d 1058, 1065 (9th Cir. 2015) (holding “that an applicant for special rule cancellation does not, by virtue of that status, become eligible to seek a section 212(h) waiver”).

“[T]he hardship standard of 8 C.F.R. § 1212.7(d) applies to those who have committed ‘violent or dangerous crimes’ and who seek a waiver of inadmissibility under 8 U.S.C. § 1182(h)(1). [Section] 1212.7(d) directs the agency to consider hardship to the alien and to his or her relatives.” [Rivera-Peraza](#), 684 F.3d at 910–11.

Congress amended § 212(h) in 1996 to indicate that a noncitizen previously admitted for lawful permanent residence is ineligible for a § 212(h) waiver if the noncitizen has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the noncitizen from the United States. *See Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1050 (9th Cir. 2014) (discussing § 212(h) and concluding that petitioner was not barred from applying for waiver where her admission as a “visitor” into the United States did not constitute “admission” in the context of § 212(h)). Maintenance of “lawful” status after admission is not required. *de Rodriguez v. Holder*, 724 F.3d 1147, 1151 (9th Cir. 2013). The period during which an applicant is a Family Unity Program beneficiary counts toward the “lawfully residing continuously” requirement for § 212(h) relief. [Yepez-Razo](#), 445 F.3d at 1219.

Congress did not violate equal protection by providing a waiver of inadmissibility to aggravated felons who were not permanent residents while denying the same waiver to aggravated felons who were permanent residents. [Taniguchi v. Schultz](#), 303 F.3d 950, 958 (9th Cir. 2002); *see also* 8 U.S.C. § 1182(h) (precluding a waiver of inadmissibility to aggravated-felon lawful permanent residents only); *see also Peng v. Holder*, 673 F.3d 1248, 1258–59 (9th Cir. 2012) (holding that a rational basis exists for applying the seven-year continuous physical presence requirement on LPRs but not on non-LPRs for purposes of 212(h)); [Habibi v. Holder](#), 673 F.3d 1082, 1088 (9th Cir. 2011)

(“Congress does not violate equal protection by denying LPRs the opportunity to apply for a § 212(h) waiver.”); *Sum*, 602 F.3d at 1094–95. A rational basis exists for denying a discretionary waiver to aggravated felons who were permanent residents because they enjoyed greater privileges in the United States than aggravated felons who were not permanent residents and posed a potentially higher risk of recidivism than undocumented noncitizens who did not have the benefits that come with permanent resident status. See *Taniguchi*, 303 F.3d at 958.

IIRIRA and AEDPA also amended the statute to preclude a § 212(h) waiver for nonpermanent residents convicted of aggravated felonies and who are subject to expedited removal proceedings. See 8 U.S.C. § 1228(b) (stating that noncitizens subject to expedited removal proceedings are ineligible for any discretionary relief from removal). The elimination of § 212(h) relief for such individuals is not impermissibly retroactive because there is no indication as a matter of practice that they have chosen to forgo their constitutional right to a jury trial in reliance on maintaining their eligibility for such relief. See *United States v. Gonzales*, 429 F.3d 1252, 1257 (9th Cir. 2005).

A. Jurisdiction and Judicial Review

This court’s jurisdiction to review the agency’s denial of relief under § 1182(h) is governed by:

- 8 U.S.C. § 1252(a)(2)(B)(i), which states that “no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section 1182(h)” and precludes judicial review of the agency’s factual findings and ultimate discretionary decision regarding the granting of relief, and
- 8 U.S.C. § 1252(a)(2)(D), which states that “[n]othing in [§ 1252(a)(2)(B)(i)] shall be construed as precluding review of constitutional claims or questions of law” and provides for judicial review of both pure questions of law and mixed questions of law and fact, which involve the application of a legal standard to a set of established or undisputed facts.

See *Wilkinson v. Garland*, 601 U.S. 209, 212 (2024) (“The application of a statutory legal standard (like the exceptional and extremely unusual hardship

standard) to an established set of facts is a quintessential mixed question of law and fact. . . . [S]uch questions are reviewable under § 1252(a)(2)(D).”); *Patel v. Garland*, 596 U.S. 328, 339 (2022) (holding that § 1252(a)(2)(B)(i) precludes judicial review not just of the decision on the granting of relief but also any judgment *relating to* the granting of relief, which includes factual findings); *Ruiz v. Bondi*, 163 F.4th 586, 590 (9th Cir. 2025) (“*Wilkinson*’s core holding—that we retain jurisdiction to review mixed questions of law and fact under § 1252(a)(2)(D)—permits us to review those legal issues even when the INA makes them discretionary.”); cf. *Lemus-Escobar v. Bondi*, 158 F.4th 944, 952–54 (9th Cir. 2025) (“For challenges to the agency’s denial of cancellation of removal or NACARA cancellation of removal, we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility [, which include, inter alia, ‘good moral character’ and ‘exceptional and extremely unusual hardship’].”).

Under 8 U.S.C. § 1252(a)(2)(D), the court has jurisdiction to review constitutional claims and questions of law relating to waiver of inadmissibility under § 1182(h). Accordingly, the court has jurisdiction to consider the “legal question” of whether “the BIA used an erroneous legal standard in its analysis.” *Rivera-Peraza v. Holder*, 684 F.3d 906, 909 (9th Cir. 2012) (alteration omitted).

Prior to the aforementioned decisions, in *Safaryan v. Barr*, 975 F.3d 976, 989 (9th Cir. 2020), the court had held that it lacked jurisdiction to consider the agency’s conclusion that the petitioner’s conviction constituted a violent or dangerous crime and the agency’s determination that the petitioner failed to show exceptional and extremely unusual hardship. See *Safaryan v. Barr*, 975 F.3d 976, 989 (9th Cir. 2020) (“We have expressly held that the jurisdictional bar of § 242(a)(2)(B)(i) extends to the BIA’s discretionary decision to view an alien’s crime as a violent or dangerous one, and we similarly lack jurisdiction to review the agency’s discretionary weighing of the equities in [petitioner’s] case.” (citation modified)).

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

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

Section 301(a)(13) of IIRIRA abrogated the *Fleuti* doctrine. Accordingly, legal permanent residents convicted of certain crimes cannot leave the United States even for brief, innocent, and casual trips without facing charges of inadmissibility. *Camins v. Gonzales*, 500 F.3d 872, 877–80 (9th Cir. 2007). This abrogation, however, may not be applied retroactively to those who pleaded guilty prior to the enactment of IIRIRA. *Id.* at 884–85 (holding that *Fleuti* exception for an innocent, casual, and brief departure applies to legal permanent resident who pleaded guilty in January 1996 to sexual battery and who departed in 2001 for three weeks to see ailing mother in Philippines); *see also Vartelas v. Holder*, 566 U.S. 257, 260–63 (2012).

ADJUSTMENT OF STATUS [§ 1255]

I. OVERVIEW

Adjustment of status is the process through which a noncitizen achieves permanent residence while in the United States. See *Villavicencio-Rojas v. Lynch*, 811 F.3d 1216 (9th Cir. 2016) (“An alien subject to removal may ask the Attorney General to adjust his status ‘to that of an alien lawfully admitted for permanent residence if the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.’ 8 U.S.C. § 1255(i)(2).”).

Generally speaking, the Attorney General of the United States has the discretionary authority to adjust a petitioner’s status to lawful permanent resident provided that “(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.” 8 U.S.C. § 1255(a). Certain classes of petitioners, however, are ineligible for status adjustment. See *id.* § 1255(c). These include petitioners who are “in unlawful immigration status on the date of filing the application for adjustment of status or who ha[ve] failed (other than through no fault of [their] own or for technical reasons) to maintain continuously a lawful status since entry into the United States.” *Id.* § 1255(c)(2).

Xiao Lu Ma v. Sessions, 907 F.3d 1191, 1197 (9th Cir. 2018) (alterations in original) (discussing what constitutes “lawful status” within the meaning of 8 U.S.C. § 1255).

Historically, one would apply for permanent residence at the United States consulate office located in her home country (consular processing). The applicant would remain abroad until the application was approved, entering the United States for the first time as a permanent resident. As more individuals came to the United States on temporary visas in the 1950s, Congress created the adjustment of status process to facilitate the permanent residence application for those already in the United States.

“In the ordinary case, once the alien’s visa has been approved, she may apply for an adjustment of status to lawful permanent resident if she is physically present in the United States and meets other requirements” *Avagyan v. Holder*, 646 F.3d 672, 675 n.3 (9th Cir. 2011) (citing 8 U.S.C. § 1255(a), (c)); see also *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 46–49 & n.1 (2014) (plurality opinion) (explaining the process for obtaining a family-based immigrant visa and noting that the process for obtaining adjustment of status and an immigration visa are virtually identical). Once removal proceedings have commenced, the adjustment of status application must be filed in immigration court and may no longer be filed with the USCIS). See 8 C.F.R. §§ 245.2(a), 1245.2(a)(1)(i); *Avagyan*, 646 F.3d at 675 n.3. The USCIS, however, has exclusive jurisdiction to adjudicate the visa petition portion of the application. See *Avagyan*, 646 F.3d at 675 n.3 (citing 8 C.F.R. §§ 245.2(a), 1245.2(a)(1)(i)). “Accordingly, if an alien in removal proceedings may be eligible for adjustment of status but does not yet have an approved visa petition, he may request a continuance of removal proceedings while the USCIS adjudicates the visa petition.” *Avagyan*, 646 F.3d at 675 n.3. “Typically, the IJ will continue removal proceedings until USCIS adjudicates the visa petition.” *Id.* If the IJ denies the continuance, the applicant may still be eligible to move to reopen the case for adjustment of status processing once the visa petition is approved.

If a noncitizen is ineligible for adjustment of status in removal proceedings, she may be able to file for permanent residence at the United States consulate in her home country.

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

On May 22, 2026, USCIS announced “a new policy memo” stating that certain applicants seeking adjustment of status “must do so through consular processing via the Department of State outside of the country.” The agency stated that the new policy applies to applicants such as “students, temporary workers, or people on tourist visas,” who “come to the U.S. for a short time and for a specific purpose.” *See* U.S. Citizenship and Immigration Services Will Grant ‘Adjustment of Status’ Only in Extraordinary Circumstances, USCIS, May 22, 2026, <https://perma.cc/G6TX-6ETJ>; Policy Memorandum, Adjustment of Status is a Matter of Discretion and Administrative Grace, and an Extraordinary Relief that Permits Applicants to Dispense with the Ordinary Consular Visa Process, USCIS, May 21, 2026, <https://perma.cc/B5LN-8ZYG>.

A. Jurisdiction and Judicial Review

This court’s jurisdiction to review the agency’s denial of adjustment of status is governed by:

- [8 U.S.C. § 1252\(a\)\(2\)\(B\)\(i\)](#), which states that “no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 1255” and precludes judicial review of the agency’s factual findings and ultimate discretionary decision regarding the granting of relief, and
- [8 U.S.C. § 1252\(a\)\(2\)\(D\)](#), which states that “[n]othing in [[§ 1252\(a\)\(2\)\(B\)\(i\)](#)] shall be construed as precluding review of constitutional claims or questions of law” and provides for judicial review of both pure questions of law and mixed questions of law and fact, which involve the application of a legal standard to a set of established or undisputed facts.

See [Wilkinson v. Garland](#), 601 U.S. 209, 212 (2024) (“The application of a statutory legal standard (like the exceptional and extremely unusual hardship standard) to an established set of facts is a quintessential mixed question of law and fact. . . . [S]uch questions are reviewable under [§ 1252\(a\)\(2\)\(D\)](#).”); [Patel v. Garland](#), 596 U.S. 328, 339 (2022) (holding that [§ 1252\(a\)\(2\)\(B\)\(i\)](#) precludes judicial review not just of the decision on the granting of relief but also any judgment *relating to* the granting of relief, which includes factual findings); [Ruiz v. Bondi](#), 163 F.4th 586, 590 (9th Cir. 2025) (“*Wilkinson*’s core holding—that we

retain jurisdiction to review mixed questions of law and fact under § 1252(a)(2)(D)—permits us to review those legal issues even when the INA makes them discretionary.”); cf. *Lemus-Escobar v. Bondi*, 158 F.4th 944, 952–54 (9th Cir. 2025) (“For challenges to the agency’s denial of cancellation of removal or NACARA cancellation of removal, we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility [, which include, inter alia, ‘good moral character’ and ‘exceptional and extremely unusual hardship’].”).

Prior to the aforementioned decisions, this court had interpreted § 1252(a)(2)(B)(i) as barring judicial review of “decisions by the BIA that involve the exercise of discretion” while allowing review of nondiscretionary determinations. E.g., *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”), *abrogated by Patel v. Garland*, 596 U.S. 328, 339 (2022).

B. Eligibility for Permanent Residence

1. Visa Petition

“Adjustment of status requires, among other things, that the non-citizen have an immediately available immigrant visa.” *Tovar v. Sessions*, 882 F.3d 895, 897 (9th Cir. 2018) (citing 8 U.S.C. § 1255(i)(2)(B)). To be eligible for an immigrant visa, a noncitizen ordinarily must file a visa petition pursuant to 8 U.S.C. § 1154 (although some noncitizens may be eligible for immigrant visas through provisions creating special forms of relief such as asylum, withholding of removal, and cancellation of removal). The visa petition is the noncitizen’s petition to prove that she may be classified in one of the family or employment categories listed in 8 U.S.C. § 1153. The approval of a visa petition does not confer any legal status or right to remain in the United States, nor does it mean that the noncitizen will be granted adjustment of status. An approved visa petition establishes only that the USCIS has determined that the noncitizen fits into one of the visa categories listed in 8 U.S.C. § 1153.

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

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

Immediate Relatives, [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#): Spouses, children, and parents of U.S. citizens. The term “child” means unmarried person who is less than 21 years old, *see* [8 U.S.C. § 1101\(b\)\(1\)](#). A U.S. citizen is not allowed to petition for her parent until she is at least 21 years old. *See* [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#). **Immediate relatives are not subject to the priority date system. Immediate relatives may not include their own spouses and children on their applications.**

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

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

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

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

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

See [Scialabba v. Cuellar de Osorio](#), 573 U.S. 41, 46–49 & n.1 (2014) (plurality opinion) (explaining the process to obtain a family-based immigrant visa and discussing the Child Status Protection Act, family preference categories, and priority date retention); [Tovar](#), 882 F.3d at 897 (discussing the Child Status Protection Act and the family-based categories).

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

First Preference, 8 U.S.C. § 1153(b)(1): Priority Workers.

Second Preference, 8 U.S.C. § 1153(b)(2): Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability.

Third Preference, 8 U.S.C. § 1153(b)(3): Skilled Workers, Professionals, and Other Workers.

Fourth Preference, 8 U.S.C. § 1153(b)(4): Certain Special Immigrants.

Fifth Preference, 8 U.S.C. § 1153(b)(5): Employment Creation.

Note on labor certifications: noncitizens wishing to be classified in the second and third employment preferences ordinarily must receive an approved labor certification from the Department of Labor before filing for a visa petition. *See 8 U.S.C. § 1153(b)(3)(C).* A labor certification is not a visa petition; it is a certification from the Department of Labor that willing and qualified United States workers are not available for a particular job. *See 8 U.S.C. § 1182(a)(5)(A).* Because a labor certification is not a visa petition, a filed or approved labor certification alone does not enable a noncitizen to apply for adjustment of status. *See 8 U.S.C. § 1255(a).*

2. Priority Date

The INA caps the number of immigrant visas that the United States may issue annually across various visa categories. [8 U.S.C. § 1151](#). The demand for visas outpaces this annual allotment. As a result, a priority date system has been established to allocate visas among visa applicants. **Note:** immediate relatives are not subject to the priority date system and are provided as many visas as necessary each year. When a noncitizen files a visa petition, she is given a priority date (the same date that the visa petition was received by the USCIS). The noncitizen must monitor whether her priority date is “current,” i.e., whether there is a visa immediately available for her to use to immigrate to the United States. Failure to apply for an immigrant visa within one year following notification of the availability of a visa may be grounds for revocation of an approved visa petition.

See *Park v. Gonzales*, 450 F. Supp. 2d 1153 (D. Or. 2006), adopted by *Park v. Mukasey*, 514 F.3d 1384 (9th Cir. 2008).

The available visas are divided among countries and then subdivided among the various employment-based and family-based immigration categories. Certain visa categories, especially for noncitizens from large countries, have become oversubscribed and have waiting lists of up to 20 years. A noncitizen with an approved visa petition must continually check the monthly visa bulletin, found on the State Department’s website to determine whether his priority date is current and, therefore, whether he may file an adjustment of status application. See Visa Bulletin, U.S. Department of State, <https://perma.cc/AH98-YDGV>.

8 U.S.C. § 1255(a) allows a noncitizen to file an adjustment of status application if the noncitizen is eligible to receive an immigrant visa and the immigrant visa is immediately available (e.g., the priority date is current). Although most noncitizens demonstrate eligibility to receive an immigrant visa through the approval of a visa petition, noncitizens who can demonstrate visa eligibility and an immediately available visa do not need to have an approved visa petition to file for adjustment of status. The rule allowing noncitizens to apply for adjustment of status in the absence of an approved visa petition has been extended to the motion to reopen context. See *Malhi v. INS*, 336 F.3d 989, 994–95 (9th Cir. 2003); *Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253, 256 (BIA 2002) (en banc).

Because immediate relatives are not subject to the priority date system, they are always eligible to apply for adjustment of status without an approved visa petition.

3. Admissibility

A noncitizen applying for adjustment of status must demonstrate that he is not inadmissible pursuant to 8 U.S.C. § 1182. See *Romero v. Garland*, 7 F.4th 838, 840 (9th Cir. 2021) (“Our review hinges on whether Romero met his burden to show he is not inadmissible. The Attorney General has discretion to adjust the status of an admitted alien, like Romero, to lawful permanent resident (‘LPR’) if ‘the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and . . . an immigrant visa is immediately available to him at the time his application is filed.’” (alteration in original) (quoting 8

U.S.C. § 1255(a)); cf. *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 46–49 & n.1 (2014) (plurality opinion) (explaining the process to obtain a family-based immigrant visa, noting that the visa “application requires an alien to demonstrate in various ways her admissibility to the United States,” and noting that the processes for obtaining adjustment of status and an immigration visa are virtually identical).

Section 1182 makes noncitizens inadmissible for various reasons, such as having serious health problems, having been convicted of certain crimes, having engaged in terrorist activity, lacking sufficient support to avoid becoming a public charge, etc. See *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 49 (2014).

A noncitizen who has been admitted to the United States and is applying for adjustment of status must prove her non-inadmissibility by a preponderance of the evidence. See *Romero v. Garland*, 7 F.4th 838, 841 (9th Cir. 2021) (“Romero had been admitted before he applied for adjustment of status. Thus, he is not now an ‘applicant for admission,’ and therefore the ‘clearly and beyond doubt’ burden does not apply. Rather, the ‘preponderance of the evidence’ burden from 8 C.F.R. § 1240.8(d) applies.”).

By contrast, a noncitizen who entered the United States unlawfully, has not yet been admitted to the United States, and applies for adjustment of status must prove admissibility “clearly and beyond doubt.” See *Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1078 (9th Cir. 2013); *Romero v. Garland*, 7 F.4th 838, 841 (9th Cir. 2021) (“In *Lopez-Vasquez*, the petitioner had entered the United States illegally. Therefore, he was treated as an applicant for admission and bore the burden of proving clearly and beyond doubt he was not inadmissible. . . . Romero was lawfully admitted and is not now an applicant for admission, so our decision in *Lopez-Vasquez* does not govern the burden of proof here.” (citation modified)).

Noncitizens who are inadmissible under 8 U.S.C. § 1182 may be eligible to apply for one of the inadmissibility waivers listed in 8 U.S.C. § 1182, most of which require a showing of hardship to a United States citizen relative.

The grounds of inadmissibility are different from the grounds of removability listed in 8 U.S.C. § 1227. Therefore, even if an IJ has already determined that the noncitizen is removable under 8 U.S.C. § 1227, the IJ could determine that the noncitizen is admissible under 8 U.S.C. § 1182 and eligible for

adjustment of status. For instance, a crime of domestic violence is a ground of removability, but it is not a ground of inadmissibility. If a noncitizen is found to be removable for having committed a crime of domestic violence, the IJ must undertake a separate analysis to determine whether the same crime bars the noncitizen's adjustment of status application under the criminal grounds of inadmissibility listed in [8 U.S.C. § 1182](#).

Cases adjudicating admissibility in the adjustment-of-status context include the following. See [Munoz v. Garland](#), 71 F.4th 1174, 1180 (9th Cir. 2023) (holding that petitioner's misrepresentations about his citizenship to police officers did not render him inadmissible and therefore did not render him ineligible for adjustment of status; the court held that a false claim of citizenship to the police to minimize the risk that the police would report an arrest to federal immigration authorities does not satisfy [§ 1182\(a\)\(6\)\(C\)\(ii\)\(I\)](#)); [Romero-Millan v. Garland](#), 46 F.4th 1032, 1047 (9th Cir. 2022) (petitioner's drug paraphernalia conviction under [Arizona Revised Statutes section 13-3415](#) was a conviction for a controlled substance offense that rendered him inadmissible under [8 U.S.C. § 1182\(a\)\(2\)\(A\)\(i\)\(II\)](#) and therefore ineligible for adjustment of status); [Posos-Sanchez v. Garland](#), 3 F.4th 1176, 1184 (9th Cir. 2021) (the agency correctly concluded that petitioner was removable under [§ 1182\(a\)\(6\)\(A\)\(i\)](#) and ineligible to adjust his status under [§ 1255\(a\)](#)); [Carrillo de Palacios v. Holder](#), 708 F.3d 1066, 1073–75 (9th Cir. 2013) (petitioner who was inadmissible under [8 U.S.C. § 1182\(a\)\(9\)\(C\)\(i\)\(II\)](#) and did not qualify for the [§ 1182\(a\)\(9\)\(C\)\(ii\)](#) exception to inadmissibility was ineligible for adjustment of status); [Lopez-Vasquez v. Holder](#), 706 F.3d 1072, 1078–79 (9th Cir. 2013) (noncitizen was ineligible for adjustment of status where nothing in the state-court record demonstrated that the court changed his underlying conviction to one that did not render him inadmissible under [§ 1182](#)); [Valadez-Munoz v. Holder](#), 623 F.3d 1304, 1308 (9th Cir. 2010) (applicant was inadmissible for having made a false claim of citizenship); [Esquivel-Garcia v. Holder](#), 593 F.3d 1025, 1030 (9th Cir. 2010) (sufficient evidence supported the denial of adjustment of status where petitioner pleaded guilty to possession of a narcotic controlled substance under California law).

C. Eligibility for Adjustment of Status Process

Beyond the visa petition, priority date, and admissibility requirements, a noncitizen must prove that he is eligible to *file* an adjustment of status application

in accordance with the provisions of [8 U.S.C. § 1255](#). Noncitizens eligible for permanent residence through consular processing are not necessarily eligible for the adjustment of status process. The primary requirements for filing an adjustment of status application are lawful entry to the United States and current lawful status in the United States. *See* [8 U.S.C. § 1255\(a\), \(c\)](#).

[8 U.S.C. § 1255\(a\)](#) states that a noncitizen who has been “inspected and admitted or paroled” may be able to apply for adjustment of status, thus barring those who entered without inspection from applying for standard adjustment of status. *See, e.g., Man v. Barr*, [940 F.3d 1354, 1355 \(9th Cir. 2019\)](#) (denying petition for review that challenged the BIA’s dismissal of Man’s appeal of the IJ’s denial of his application for adjustment of status, where the BIA held that his conviction under [Cal. Health & Safety Code § 11359](#) . . . rendered [Man] inadmissible under [8 U.S.C. § 1182\(a\)\(2\)\(A\)\(i\)\(II\)](#), and thus ineligible for adjustment of status under [8 U.S.C. § 1255\(a\)](#)).

“The [Temporary Protected Status] program gives foreign nationals nonimmigrant status, but it does not admit them. So the conferral of TPS does not make an unlawful entrant . . . eligible under [§ 1255](#) for adjustment to LPR status.” *Sanchez v. Mayorkas*, [593 U.S. 409, 414 \(2021\)](#).

[8 U.S.C. § 1255\(c\)](#) bars adjustment of status for any noncitizen who has engaged in unlawful employment, has unlawful immigration status at the time of filing, or has failed to maintain lawful immigration status (other than through technical reasons or through no fault of her own). *See Chung Hou Hsiao v. Hazuda*, [869 F.3d 1034, 1035 \(9th Cir. 2017\)](#) (“An alien is disqualified from using this process, however, if he has engaged in unauthorized employment or has failed to continuously maintain lawful immigration status since entering the United States.”). Exceptions to these requirements are listed below in Section B.1.

[8 U.S.C. § 1229c\(d\)](#) imposes a separate bar to adjustment of status. This provision states that a noncitizen is ineligible for adjustment of status if she overstays a granted voluntary departure period. For cases subject to pre-Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) law, a noncitizen who overstayed a grant of voluntary departure was barred from adjustment of status even if she filed a motion to reopen before the voluntary departure period expired. *See Shaar v. INS*, [141 F.3d 953 \(9th Cir. 1998\)](#) (applying former [8 U.S.C.](#)

§ 1252b(e)(2)(A) to pre-IIRIRA deportation proceedings). This court held that in post-IIRIRA cases in which a motion to reopen is filed within the voluntary departure period, the voluntary departure period is tolled during the period the BIA is considering the motion. See *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005), abrogated by *Dada v. Mukasey*, 554 U.S. 1, 19–20 (2008); *Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005). In *Dada v. Mukasey*, 554 U.S. 1, 19–20 (2008), however, the Supreme Court held that there is no statutory authority for automatically tolling the voluntary departure period during the pendency of a motion to reopen.

Note that where voluntary departure was granted on or after January 20, 2009, the filing of a motion to reopen or reconsider, or the filing of a petition for review before the court of appeals, automatically terminates voluntary departure. See 8 C.F.R. § 1240.26(i); *Matter of Velasco*, 25 I. & N. Dec. 143 (BIA 2009); see also *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 523–24 (9th Cir. 2012) (en banc) (discussing 8 C.F.R. 1240.26(i) and the automatic termination of the grant of voluntary departure upon filing of a petition for review or other judicial challenge).

1. Exceptions to Lawful Entry and Lawful Status Requirements

a. Exception for Immediate Relatives

Noncitizens coming to the United States as immediate relatives pursuant to 8 U.S.C. § 1151(b)(2)(A)(i) (spouses, children, and parents of U.S. citizens), are exempt from portions of 8 U.S.C. § 1255. See 8 U.S.C. § 1255(c)(2). Immediate relatives must prove lawful entry to the United States but may adjust their status even if they have not maintained lawful status throughout their stay.

b. Noncitizens Eligible For 8 U.S.C. § 1255(i) (“245(i)”)

Legislation first passed in 1986 exempted certain noncitizens from the lawful status and lawful entry requirements. See 8 U.S.C. § 1255(i). Noncitizens who could not meet the lawful entry and status requirements could pay a \$1,000 penalty to file their adjustment of status applications. 8 U.S.C. § 1255(i) has since expired, although certain noncitizens are grandfathered and may use the provision. See also *Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 n.1 (9th Cir. 2010)

(noting that § 1255(i) benefits are available only to those who have been grandfathered into the provision); *Landin-Molina v. Holder*, 580 F.3d 913, 915 (9th Cir. 2009) (“Adjustment of status is generally available only to aliens who were inspected and admitted or paroled into the United States, see INA § 245(a), 8 U.S.C. § 1255(a); however, under § 1255(i), certain aliens who entered this country without inspection may apply for adjustment of status.”).

To establish eligibility for § 1255(i) grandfathering, a noncitizen must have had a labor certification or visa petition filed before April 30, 2001 (the expiration of the most recent 8 U.S.C. § 1255(i) provision). The visa petition filed before April 30, 2001, must have been either approved or “approvable when filed.” Therefore, even a noncitizen who hopes to adjust his status based on a visa petition filed after April 30, 2001 may be eligible for § 1255(i) if she had an “approvable when filed” visa petition filed before April 30, 2001. To establish that a visa petition was “approvable when filed,” a noncitizen must show that the petition was filed properly, was meritorious in fact, and was not fraudulent. In addition, she must show that, at the time of filing, the beneficiary had the appropriate familial or employment relationship to support the filing. See “INS Questions and Answers”, 6 Bender’s Immigr. Bull. 405 (2001).

“[I]n determining whether an alien’s prior visa petition was ‘meritorious in fact’ for purposes of the grandfathering provision, it is generally permissible to treat a denial of the petition as dispositive if the denial was made on the merits and if the denial was not the result of circumstances that changed after the petition was filed.” *Chung Hou Hsiao v. Hazuda*, 869 F.3d 1034, 1040 (9th Cir. 2017) (holding that prior merits-based denials of Hsiao’s visa petitions were dispositive proof that the petitions were not “approvable when filed”).

A noncitizen who is a substituted beneficiary of a labor certification application filed on or before April 30, 2001, is not considered eligible to apply for adjustment of status. See *Valencia v. Lynch*, 811 F.3d 1211, 1213 (9th Cir. 2016).

“[A] principal alien who is grandfathered into § 1255(i) may impart grandfathered status to a spouse, again provided that the spouse is eligible to receive a visa under § 1153(d).” *Landin-Molina*, 580 F.3d at 918. But to be entitled to grandfathered status, the derivative spouse must be “accompanying or following to join the principal grandfathered alien.” *Id.*

Because the deadline for filing for adjustment of status under § 1255(i) functions as a statute of repose, it is not subject to equitable tolling. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1049–50 (9th Cir. 2008); *see also Blanco v. Holder*, 572 F.3d 780, 785 (9th Cir. 2009) (holding that application for adjustment of status under § 1255(i) was not untimely, even though lawyer’s accompanying check for the filing fee was inadvertently unsigned).

In *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 514 (9th Cir. 2012) (en banc), the court deferred to the BIA’s interpretation in *In re Briones*, 24 I. & N. Dec. 355, 371 (BIA 2007), and held that aliens who are inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i), which renders inadmissible any noncitizen who has been unlawfully present in the United States for an aggregate period of more than one year and who enters or attempts to reenter the United States without being admitted, are ineligible for adjustment of status under 8 U.S.C. § 1255(i); *see also Acosta-Olivarria v. Lynch*, 799 F.3d 1271, 1275–77 (9th Cir. 2015) (the BIA’s decision in *In re Briones*, holding that inadmissibility under one-year bar prevented noncitizens from being eligible for adjustment of status, did not retroactively apply); *Correo-Ruiz v. Lynch*, 809 F.3d 543 (9th Cir. 2015) (remanding to determine if *Briones* may be applied retroactively).

c. Unlawful Employment Exception

Certain employment-based applicants for adjustment of status may be exempted from the lawful status requirements of 8 U.S.C. § 1255. Under 8 U.S.C. § 1255(k), religious workers and beneficiaries of first, second, and third preference employment visa petitions may adjust status despite a violation of status, provided that the violation of status does not exceed 180 days in the aggregate. *See also Peters v. Barr*, 954 F.3d 1238, 1240 (9th Cir. 2020) (“Subsection (k) of § 1255 provides . . . that skilled workers . . . receive something of a grace period: They remain eligible for adjustment of status as long as they have not been out of lawful status for more than 180 days at the time their application is filed.”); *Xiao Lu Ma v. Sessions*, 907 F.3d 1191, 1197 (9th Cir. 2018) (“Under section 1255(k), beneficiaries of ‘an approved work-visa petition,’ such as an H-1B visa, may adjust their status even if they have failed to maintain continuous lawful status as long as they have ‘not accrued more than 180 days out of lawful status prior to applying for adjustment.’” (citation omitted)). This court has held 8 C.F.R. § 274a.12(b)(20)’s grant of employment authorization does not confer lawful

nonimmigrant status on petitioners for purposes of status adjustment under 8 U.S.C. § 1255(k)(2). *Xiao Lu Ma*, 907 F.3d at 1196–97 (holding that while nonimmigrant workers may legally continue working in this country for up to 240 days under 8 C.F.R. § 274a.12(b)(20), while they wait to hear back from the USCIS on their extension applications, they do not have lawful status during this period of time for purposes of status adjustment).

“[T]he parenthetical exception in 8 U.S.C. § 1255(c)(2) . . . provides that an applicant’s failure to maintain lawful immigration status will not bar eligibility if the failure occurred ‘through no fault of his own or for technical reasons.’” *Peters*, 954 F.3d at 1241. 8 U.S.C. § 1245.1(d)(2) defines the terms “through no fault of his own” and “for technical reasons.” The court has held that 8 C.F.R. § 1245.1(d)(2)(i) “is invalid to the extent it excludes reasonable reliance on the assistance of counsel from the circumstances covered by the phrase ‘other than through no fault of his own.’” *Peters*, 954 F.3d at 1244 (holding that noncitizen reasonably relied on assurances from counsel that I-129 petition was properly filed, and that she remained eligible for adjustment of status because her failure to maintain lawful status occurred through no fault of her own).

2. Discretion

Ultimately, the grant or denial of an adjustment of status application is a matter of discretion. See 8 U.S.C. § 1255(a); *Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 (9th Cir. 2010); *Thomaidis v. INS*, 431 F.2d 711, 712 (9th Cir. 1970).

D. Adjustment of Status Application Pending

Regardless of prior status, a noncitizen with a pending adjustment of status application will be eligible to apply for work authorization, 8 C.F.R. § 274a.12(c)(9) and, where appropriate, travel authorization, 8 C.F.R. § 245.2(a)(4).

E. Adjustment of Status Application Approved

When an adjustment of status application is approved, the applicant receives lawful permanent residence (a green card). In certain adjustment-of-status cases based on marriage to a United States citizen, the lawful permanent residence is

conditional and the applicant must take further action to remove the conditions at a later date. *See* 8 U.S.C. § 1186a(a); *see, e.g., Chettiar v. Holder*, 665 F.3d 1375, 1376 (9th Cir. 2012) (“Chettiar’s conditional permanent resident status authorized him to remain in the United States for two years and seek removal of the conditions placed on his residency by submitting a petition to the CIS during the 90-day period immediately preceding the expiration of his two-year conditional residence period.”).

VOLUNTARY DEPARTURE [§ 1229c]

I. OVERVIEW

Voluntary departure, 8 U.S.C. § 1229c, is a form of relief that allows an individual to leave the United States without a final order of removal on her record. There are two types of voluntary departure: pre-hearing (§ 1229c(a)) and post-hearing (§ 1229c(b)).

With pre-hearing voluntary departure, a noncitizen seeks this relief in lieu of going through removal proceedings. To qualify, an applicant must: (1) make the request prior to or at the time their merits hearing is calendared; (2) request no other relief or withdraw any requests made; (3) concede removability; (4) waive appeal; and (5) have no aggravated felony convictions and not otherwise be deportable for security reasons. *See* 8 C.F.R. § 1240.26(b)(1)(i).

Individuals applying for post-hearing voluntary departure do so at the end of administrative proceedings, typically as an alternative to removal where their other applications for relief are denied. Post-hearing voluntary departure requires an applicant to show: (1) physical presence in the United States for at least one year prior to service of the notice to appear; (2) good moral character for at least five years immediately preceding the application for voluntary departure; (3) no aggravated felony convictions and not deportable for security reasons; and (4) clear and convincing evidence of the intent and means to depart the United States. *See* 8 C.F.R. § 1240.26(c)(1). Ultimate relief is discretionary.

Voluntary departure is important for individuals in removal proceedings because, among other benefits, it may allow them to preserve future pathways to legal status and gives them a window of time to leave the United States if they

have no other available relief or their applications are unsuccessful. *See Dada v. Mukasey*, 554 U.S. 1, 11 (2008) (describing the benefits of voluntary departure as avoiding extended detention, being allowed to choose when to depart, choosing the country of destination, and facilitating the possibility of readmission).

Specifically, “[a]n alien who makes a timely departure under a grant of voluntary departure . . . is not subject to” the following restrictions on readmission:

8 U.S.C. § 1182(a)(9)(A)(i) (“Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien’s arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal . . .) is inadmissible”); § 1182(a)(9)(A)(ii) (“Any alien not described in clause (i) who—(I) has been ordered removed under section [240] or any other provision of law, or (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien’s departure or removal . . . is inadmissible”).

Dada v. Mukasey, 554 U.S. 1, 12 (2008) (alterations in original). The five-year bar applies to “arriving aliens” and people subjected to expedited proceedings who depart under a removal order. The twenty-year bar applies following a second or successive removal order. A permanent bar applies following an aggravated felony conviction.

People are given up to 60 days to leave the United States if granted post-hearing voluntary departure, *see* 8 U.S.C. § 1229c(b)(2), and up to 120 days if granted pre-hearing voluntary departure, *see* 8 U.S.C. § 1229c(b)(2).

The consequences of failing to comply with the terms of voluntary departure are significant. If an individual does not timely depart, she may be subject to a civil penalty of up to \$5,000 and will be ineligible for certain forms of relief, including cancellation of removal and adjustment of status, for 10 years. *See* 8 U.S.C. § 1229c(d)(1).

II. JURISDICTION AND JUDICIAL REVIEW

This court’s jurisdiction to review the agency’s denial of voluntary departure is governed by:

- [8 U.S.C. § 1252\(a\)\(2\)\(B\)\(i\)](#), which states that “no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 1229c” and precludes judicial review of the agency’s factual findings and ultimate discretionary decision regarding the granting of relief, and
- [8 U.S.C. § 1252\(a\)\(2\)\(D\)](#), which states that “[n]othing in [[§ 1252\(a\)\(2\)\(B\)\(i\)](#)] shall be construed as precluding review of constitutional claims or questions of law” and provides for judicial review of both pure questions of law and mixed questions of law and fact, which involve the application of a legal standard to a set of established or undisputed facts.

See [Wilkinson v. Garland](#), 601 U.S. 209, 212 (2024) (“The application of a statutory legal standard (like the exceptional and extremely unusual hardship standard) to an established set of facts is a quintessential mixed question of law and fact. . . . [S]uch questions are reviewable under [§ 1252\(a\)\(2\)\(D\)](#).”); *[Patel v. Garland](#), 596 U.S. 328, 339 (2022)* (holding that [§ 1252\(a\)\(2\)\(B\)\(i\)](#) precludes judicial review not just of the decision on the granting of relief but also any judgment *relating to* the granting of relief, which includes factual findings); *[Ruiz v. Bondi](#), 163 F.4th 586, 590 (9th Cir. 2025)* (“*Wilkinson*’s core holding—that we retain jurisdiction to review mixed questions of law and fact under [§ 1252\(a\)\(2\)\(D\)](#)—permits us to review those legal issues even when the INA makes them discretionary.”); *cf. [Lemus-Escobar v. Bondi](#), 158 F.4th 944, 952–54 (9th Cir. 2025)* (“For challenges to the agency’s denial of cancellation of removal or NACARA cancellation of removal, we have jurisdiction over all constitutional claims and questions of law, including fact-intensive mixed questions of law; we thus have jurisdiction over step-one determinations of statutory eligibility.”).

See also [Posos-Sanchez v. Garland](#), 3 F.4th 1176, 1182 n.3 (9th Cir. 2021) ([Section 1252\(a\)\(2\)\(B\)\(i\)](#) precludes jurisdiction to review “a discretionary denial of voluntary departure” but [§ 1252\(a\)\(2\)\(D\)](#) establishes jurisdiction to “correct erroneous interpretations of 8 U.S.C. § 1229c”); *[Zamorano v. Garland](#), 2 F.4th*

1213, 1221 (9th Cir. 2021) (“Although we lack jurisdiction to reweigh the agency’s exercise of discretion in denying voluntary departure, we do have jurisdiction to review “constitutional claims or questions of law in challenges to denials of voluntary departure under § 1229c. Therefore, we have jurisdiction to review whether the BIA and IJ failed to consider the appropriate factors or relied on improper evidence.” (citations and internal quotation marks omitted)); *Corro-Barragan v. Holder*, 718 F.3d 1174, 1177 (9th Cir. 2013) (“We now confirm . . . that [§ 1252(a)(2)(D)] restores appellate jurisdiction over constitutional claims or questions of law in challenges to denials of voluntary departure under § 1229c.”) (court had jurisdiction to review the agency’s determination that the petitioner was statutorily ineligible for voluntary departure based on the agency’s interpretation of the term “physically present” in § 1229c(b)); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 976 (9th Cir. 2006) (court has jurisdiction under § 1252(a)(2)(D) to review the legal question of whether the BIA lacks statutory authority to change any aspect of an IJ’s decision, including the length of a voluntary departure period, when affirming a removal order in a streamlined BIA decision).

Cf. Esquivel-Garcia v. Holder, 593 F.3d 1025, 1030 (9th Cir. 2010) (“We also deny the petition for review of the denial of the request for voluntary departure. We lack jurisdiction to review this discretionary determination.” (citing 8 U.S.C. § 1229c(f))). Section 1229c(f) states that “[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b).” 8 U.S.C. § 1229c(f).

Where the IJ denies voluntary departure on two independent grounds, one legal and one involving the exercise of discretion and the BIA affirms solely on the discretionary grounds, the court lacks jurisdiction to review the denial of voluntary departure. *Gil v. Holder*, 651 F.3d 1000, 1006 (9th Cir. 2011), *abrogated on other grounds by Moncrieffe v. Holder*, 569 U.S. 184 (2013).

III. DECISIONS

A. Streamlined BIA Decisions

The BIA errs by issuing a streamlined affirmance that alters or disavows the IJ’s voluntary departure decision. See *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980–81 (9th Cir. 2006) (the BIA violated 8 C.F.R. § 1003.1(e)(4) by issuing a

streamlined affirmance that reduced the voluntary departure period granted by the IJ from 60 days to 30 days: “because the BIA issued a streamlined order, it was required to affirm the entirety of the IJ’s decision, including the length of the voluntary departure period”).

B. Stays of Removal; Effect of Filing Petition for Review

A grant of voluntary departure automatically terminates upon the filing of a petition for review. *See* 8 C.F.R. § 1240.26(i); *Singh v. Holder*, 658 F.3d 879, 886 n.9 (9th Cir. 2011) (“Under the current regulations, filing either a petition for review or a motion to reopen automatically terminates voluntary departure.”).

Accordingly, this court has no discretion to grant an equitable stay of the voluntary departure period. *See Garfias-Rodriguez v. Holder*, 702 F.3d 504, 525 (9th Cir. 2012) (en banc).

“[T]he voluntary departure period begins when an Immigration Judge or the BIA enters an order granting voluntary departure.” *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172–74 (9th Cir. 2003).

C. Effect of Departure on Petition for Review

Voluntary departure does not moot, or terminate this court’s jurisdiction over, a petition for review. *See Rivera v. Mukasey*, 508 F.3d 1271, 1277 (9th Cir. 2007).

D. Calculating Departure Deadline; Weekends and Holidays

In *Monsalvo v. Bondi*, 604 U.S. 712, 731 (2025), the court held that, under 8 U.S.C. § 1229c(b)(2), a voluntary-departure deadline that falls on a weekend or legal holiday extends to the next business day. *See id.* (“Here, as elsewhere, the term ‘days’ operates to extend a deadline that falls on a weekend or legal holiday to the next business day.”).

E. Criteria for Grant or Denial

The court has described the relevant considerations governing the agency’s grant or denial of voluntary departure as follows:

In exercising discretion to grant or deny requests for voluntary departure, IJs must weigh favorable and unfavorable factors by evaluating all of them, assigning weight or importance to each one separately and then to all of them cumulatively. Favorable factors include family ties within the United States; residence of long duration in this country, particularly if residence began at a young age as well as proof of rehabilitation if a criminal record exists; and other evidence attesting to good character. Where there is no indication in the IJ's decision that the IJ considered any of those favorable factors when deciding the voluntary departure issue, we generally vacate and remand to the BIA.

Zamorano v. Garland, 2 F.4th 1213, 1221 (9th Cir. 2021) (citation modified).

F. Reopening Based on Change in Law; Stop-Clock Rule

In *Gonzalez-Lara v. Garland*, 104 F.4th 1109 (9th Cir. 2024), the petitioner, during the pendency of her appeal to the BIA, had filed a motion to remand to apply for voluntary departure following the change in law presented by *Posos-Sanchez v. Garland*, 3 F.4th 1176 (9th Cir. 2021). When she was before the IJ, Gonzalez-Lara was not eligible for that relief because she had not accrued one year of continuous physical presence in the United States before service of her notice to appear (NTA). Under *Posos-Sanchez*, however, her NTA did not terminate her physical presence because it did not list the time and date of her hearing, and therefore, she had sufficient physical presence for voluntary departure.

The court concluded that the BIA erred in holding that Gonzalez-Lara was barred from seeking relief for which she became newly eligible while on appeal based on a change in law. The court observed that nothing in *Posos-Sanchez* required such a rule; that the court had required reopening based on eligibility arising from a change in law where the petitioner had not previously applied for such relief; and that a petitioner was not required to apply for relief when doing so would be futile.

The court, however, concluded that the BIA's error was harmless because Gonzalez-Lara did not allege facts to satisfy all elements of voluntary departure, and the record did not independently establish her prima facie eligibility.