IMMIGRATION LAW IN THE NINTH CIRCUIT

Selected Topics

Office of Staff Attorneys
United States Court of Appeals
for the Ninth Circuit

This outline is intended as a starting point for research.
It is not an authoritative statement of the law in the Ninth Circuit and may not be cited to or by the courts of this circuit.

Please send corrections and comments to
Outlines@ca9.uscourts.gov

Acknowledgment

The outline was originally written by Cheri L. Ho. It is updated by the Office of Staff Attorneys and the Ninth Circuit Court Librarians.

Introduction

This outline summarizes procedural and substantive principles relating to Immigration law in the Ninth Circuit. General citations are provided, with the expectation that you will read the cited case law, code sections, and regulations, and will find more specific, relevant, and current citations through independent research.

JURISDICTION OVER IMMIGRATION PETITIONS, PROCEDURAL RULES, AND STANDARDS OF REVIEW

Table of Contents

I. OVERVIEW 10

II. COURT OF APPEALS HAS EXCLUSIVE JURISDICTION OVER FINAL ORDERS OF REMOVAL 13

A. Definition and Scope of "Final Order of Removal" 15

B. When a Removal Order Becomes Final 19

C. Jurisdiction Over Expedited Removal Orders 20

D. Habeas Jurisdiction Over Non-Final Orders 21

III. PROCEDURAL RULES 23

A. Commencement of Removal Proceedings 23

B. Timeliness 24

1. Petitions for Review 24

2. Habeas Appeals 26

C. Venue 27

D. Stays of Removal in the Court of Appeals 27

1. No Automatic Stay of Removal Pending Review 27

2. Discretionary Stays of Removal Pending Review 28

3. Voluntary Departure Stays Precluded 29

4. Stay of the Court's Mandate 29

5. Staying Proceedings on Petition for Review 30

E. Exhaustion 30

1. Exceptions to Exhaustion 35

a. Constitutional Challenges 35

b. Futility and Remedies "Available . . . As of Right" 37

c. Motions to Reopen or Reconsider 37

d. Nationality Claims 38

e. Events Occurring after Briefing before the BIA 38

f. Habeas Review 38

g. Waiver and Forfeiture 38

F. Departure from the United States 39

1. Departure or Removal Does Not Automatically Moot Petition for Review 39

2. Departure Does Not Preclude Motions to Reopen or Reconsider 39

G. Fugitive Disentitlement Doctrine 41

H. Proper Respondent 42

I. Requirements of a Petition for Review Under § 1252(c) 43

J. Limitation on Injunctive Relief—§ 1252(f)(1) 43

IV. HISTORICAL CONTEXT 44

A. Reorganization of the Immigration and Naturalization Service 44

B. Reorganization of Administrative Regulations 44

C. Exclusion Orders 44

V. LIMITED REVIEW OF DISCRETIONARY ACTIONS UNDER § 1252(a)(2)(B)....................46

A. Limited Review of Certain Discretionary Relief Under § 1252(a)(2)(B)(i)....................46

1. Cancellation of Removal (§ 1229b)....................48

2. Adjustment of Status (§ 1255)....................50

3. Criminal Admissibility Waiver (§ 1182(h))....................51

4. Fraud or Misrepresentation Waiver (§ 1182(i))....................51

5. Voluntary Departure (§ 1229c)....................51

B. Older Case Law Applying § 1252(a)(2)(B)(i)....................51

1. Cancellation of Removal....................51

2. Cancellation of Removal under NACARA....................54

3. Adjustment of Status....................55

4. Voluntary Departure....................56

C. Limited Review of Discretionary Actions Under § 1252(a)(2)(B)(ii) 57

D. Older Case Law Applying § 1252(a)(2)(B)(ii)....................61

E. Older Case Law Applying IIRIRA § 309(c)(4)(E)....................64

VI. JURISDICTION PRECLUDED BY THE LACK OF JUDICIALLY MANAGEABLE STANDARDS....................66

VII. OTHER JURISDICTION-STRIPPING PROVISIONS....................67

A. Section 1226(e)—Discretionary Detention....................67

B. Section 1252(g)—Prosecutorial Discretion....................67

C. Section 1252(a)(2)(C)—Specified Criminal Offenses....................69

1. Review of Factual Findings Barred 70

a. Review of CAT Findings Permitted 70

2. Review of Constitutional & Legal Questions Permitted 72

3. Specific Offenses 73

a. Aggravated Felonies 73

b. Crimes Involving Moral Turpitude (CIMTs) 74

c. Particularly Serious Crimes 74

d. Certain Firearms Offenses 75

D. Section 1229c(f)—Voluntary Departure...75

E. Section 1254a(b)(5)(A)—Temporary Protected Status 75

VIII. JURISDICTION UNDER § 1252(a)(2)(D)—QUESTIONS OF LAW ...77

A. Scope of § 1252(a)(2)(D) 77

1. Section 1252(a)(2)(D) Applies Only to Review of Final Orders of Removal 77

B. Jurisdiction Over Questions of Law Before § 1252(a)(2)(D) 78

IX. JURISDICTION OVER ASYLUM CLAIMS 79

A. Section 1252(a)(2)(B) Inapplicable..79

B. Statutory Limits on Asylum Jurisdiction 79

1. Section 1158(a)(3)..79

a. One-Year Time Bar (Changed or Extraordinary Circumstances) 79

b. Third Country Bar 81

c. Previous Denial Bar 81

2. Section 1158(b)(2)(D) 82

a. Terrorist Activity Bar 82

X. JURISDICTION OVER CERTAIN MOTIONS 83

A. Motions to Reopen and Motions to Reconsider 83

1. Interaction with § 1252(a)(2)(B)(i) 85

2. Sua Sponte Reopening 86

3. Expedited Orders of Removal 88

4. Reinstated Removal Orders: BIA Jurisdiction 88

B. Motions for Continuance 88

1. Interaction with § 1252(a)(2)(B)(i) 89

XI. JURISDICTION OVER STREAMLINED REMOVAL PROCEEDINGS 90

A. Overview of Streamlined Removal Proceedings 90

1. Expedited Removal—Arriving Noncitizens Who Attempt Fraud or Lack Documentation (§ 1225(b)) 90

2. Reinstatement of Removal—Noncitizens Who Have Been Removed Previously (§ 1231(a)(5)) 91

3. Administrative Removal—Certain Criminal Aliens (§ 1228(b)) 93

B. Expedited Removal Proceedings 94

C. Reinstatement Proceedings 97

1. Overview 97

2. Reasonable Fear Proceedings 100

3. Timeliness of Petitions for Review 101

4. Scope of Jurisdiction ... 102

a. Jurisdiction Over Reinstated Removal Orders ... 103

b. Jurisdiction Over Collateral Attacks on Underlying Removal Orders ... 104

c. Jurisdiction Over Motions to Reopen Where Reinstated Removal Order & Unlawful Reentry ... 105

D. Administrative Removal Proceedings ... 105

XII. JURISDICTION OVER CERTAIN OTHER PROCEEDINGS ... 107

A. Legalization Denials ... 107

B. Registry ... 108

C. In Absentia Removal Orders ... 109

D. Discretionary Waivers ... 110

1. Ten-Year Unlawful Presence Bars ... 110

2. Document Fraud Waivers ... 111

3. Criminal Inadmissibility Waivers ... 111

4. Fraud Waivers ... 111

E. Inadmissibility on Medical Grounds ... 112

F. Administrative Closure ... 112

G. BIA Rejection of Untimely Brief ... 113

H. Appeal by Certification ... 113

XIII. SCOPE AND STANDARD OF REVIEW ... 115

A. Scope of Review ... 115

1. Where BIA Conducts De Novo Review ... 115

2. Where BIA Conducts Abuse of Discretion Review 117

3. Where BIA Incorporates IJ's Decision 118

a. Partial Incorporation 118

b. Incorporation Plus Additional Reasoning 118

c. Full Incorporation 119

4. *Burbano* Adoption and Affirmance 119

a. Full Incorporation 119

b. Partial Incorporation Plus Additional Reasoning 119

c. Effect of *Burbano* Citation on Exhaustion 120

d. *Burbano* Citation Adopts IJ's Reasoning Unless BIA Says Otherwise 120

5. Where BIA's Standard of Review is Unclear 121

6. Single Board Member Review 121

7. Streamlined Affirmances 121

a. Jurisdiction Over Regulatory or "As-Applied" Challenges to Streamlining 123

b. Streamlining and Multiple Grounds 124

c. Streamlining and Novel Legal Issues 125

d. Streamlining and Motions to Reopen 125

8. Review Limited to BIA's Reasoning 125

a. Ordinary Remand Rule 126

9. Review Generally Limited to Administrative Record 127

a. Judicial Notice Generally Prohibited 127

b. Exceptions 128

(i) Judicial Notice of the Agency's Own Records 128

(ii) Certain Basic Facts 128

(iii) Subsequent Events 128

(iv) Questions of Foreign Law 129

(v) Relying on Extra-Record Materials for Context 129

10. Administrative Notice 129

a. Indisputable Facts: Requires Notice 129

b. Disputable Facts: Requires Notice and Opportunity to Respond 130

11. No Additional Evidence (§ 2347(c)) 130

12. Forfeiture and Waiver 130

a. Exceptions to Forfeiture/Waiver 132

(i) No Prejudice to Opposing Party 132

(ii) Manifest Injustice 133

(iii) Issue Raised In Answering Brief 133

b. Party Presentation Principle 133

13. Agency Bound by Scope of 9th Circuit's Remand 133

a. Scope of IJ's Jurisdiction on Remand from BIA 134

14. Where Agency Ignores a Procedural Defect 135

15. BIA Cannot Cure Omission Through Motion to Reopen 135

16. Collateral Estoppel 135

B. Standards of Review 136

1. De Novo 137

a. Definition 137

b. Constitutional Questions 137

c. Statutory Interpretation 138

(i) *Skidmore* Deference 140

(ii) Status of Pre-*Loper Bright* Circuit Precedent Decided at *Chevron* Step Two 142

d. Regulatory Interpretation 143

e. Mixed Questions of Law and Fact 144

(i) Mixed Questions Reviewed De Novo 145

f. Other Questions of Law 145

2. Substantial Evidence 147

a. Definition 147

b. Mixed Questions Reviewed for Substantial Evidence .149

c. Other Questions Reviewed for Substantial Evidence...150

3. Abuse of Discretion 151

a. Definition 151

(i) Failure to Provide Reasoned Explanation 152

(ii) Failure to Address an Argument 154

(iii) Failure to Consider All Factors 155

(iv) Failure to Comply with Regulations 155

(v) Unexplained Departure from Precedent or Practice 155

(vi) Failure to Consider Evidence 155
(vii) Disregarding Evidence of Changed Conditions.156
(viii) Errors of Law..156
(ix) Failure to Give Individualized Consideration....156
(x) Other Abuses of Discretion 157
b. Questions Subject to Abuse of Discretion Review 157
c. Motion for a Continuance 159

JURISDICTION OVER IMMIGRATION PETITIONS, PROCEDURAL RULES, AND STANDARDS OF REVIEW

I. OVERVIEW

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

Before 1996, judicial review of most administrative action under the INA was governed by 8 U.S.C. § 1105a (1995), which gave courts of appeals exclusive jurisdiction for judicial review of final orders of deportation. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 476 (1999).

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which "repealed the old judicial-review scheme set forth in § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252." *Reno*, 525 U.S. at 475. IIRIRA "authorizes noncitizens to obtain direct 'review of a final order of removal' in a court of appeals." *Nasrallah v. Barr*, 590 U.S. 573, 579 (2020) (quoting 8 U.S.C. § 1252(a)(1)). But IIRIRA also placed significant limits on judicial review over certain discretionary determinations and petitions for review brought by individuals convicted of certain criminal offenses.

After IIRIRA and *prior to* May 11, 2005, (the date of enactment of the REAL ID Act of 2005), petitions for review were divided into three categories for purposes of judicial review:

> (1) IIRIRA Permanent Rules, *see*, *e.g.*, *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1102 (9th Cir. 2004) (rules in 8 U.S.C. § 1252 applied to "removal" proceedings initiated on or after April 1, 1997).
>
> (2) IIRIRA Transitional Rules, *see*, *e.g.*, *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997) (IIRIRA's uncodified transitional rules applied where deportation proceedings were initiated before April 1, 1997 and the agency's final deportation or exclusion order was entered after October 30, 1996), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010).
>
> (3) Pre-IIRIRA Rules, *see*, *e.g.*, *Velarde v. INS*, 140 F.3d 1305, 1309 n.3 (9th Cir. 1998) (judicial review provisions in 8 U.S.C. § 1105a, as amended by AEDPA, applied if the final order of deportation or exclusion was entered before October 31, 1996), *superseded by statute on other grounds as stated in Falcon Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003).

In May 2005, Congress enacted the REAL ID Act of 2005, which made several more significant changes to the judicial review provisions of the INA. Although the REAL ID Act did not repeal any of the existing statutory limits on the scope of judicial review implemented by IIRIRA, it eliminated statutory and nonstatutory habeas jurisdiction over final orders of removal, deportation, and exclusion and made a petition for review filed with the appropriate court of appeals the sole and exclusive means for judicial review of final removal orders. Thus, the REAL ID Act restored the pre-IIRIRA scheme of limiting judicial review over final orders of removal and deportation to the courts of appeals, while maintaining IIRIRA's limits on review over certain discretionary determinations and cases involving certain criminal offenses. *See* REAL ID Act § 106(a) (amending 8 U.S.C. § 1252).

The REAL ID Act simultaneously expanded the scope of direct judicial review of final orders of removal and deportation by providing explicitly for review of all constitutional claims and questions of law related to such final orders.

See 8 U.S.C. § 1252(a)(2)(D); *see also* *Nasrallah*, 590 U.S. at 579–81 (discussing IIRIRA and the REAL ID Act).

The REAL ID Act made this new judicial review scheme applicable to cases governed by IIRIRA's permanent rules and those governed by IIRIRA's transitional rules by providing that a petition for review filed under the transitional rules shall be treated as being filed under the permanent provisions of 8 U.S.C. § 1252. *See* REAL ID Act § 106(d) (uncodified); *Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005) (explaining that jurisdiction over transitional rules cases is now governed by 8 U.S.C. § 1252 rather than former 8 U.S.C. § 1105a (1995)). The REAL ID Act's amendments to the judicial review provisions thus govern all pending petitions for review, regardless of when the final order of removal, deportation, or exclusion issued.

II. COURT OF APPEALS HAS EXCLUSIVE JURISDICTION OVER FINAL ORDERS OF REMOVAL

The court of appeals has jurisdiction to review final orders of removal under 8 U.S.C. § 1252(a)(1). *See Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1299 (9th Cir. 2014) ("Generally, we have jurisdiction to review final orders of removal under 8 U.S.C. § 1252(a)(1)."); 8 U.S.C. § 1252(a)(1) ("Judicial review of a final order of removal . . . .").

This jurisdiction includes any rulings "arising from" a final order of removal. *See* 8 U.S.C. § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."); *Monsalvo Velazquez v. Bondi*, 145 S. Ct. 1232, 1240 (2025) (holding that § 1252(a)(1) and § 1252(b)(9) "authorize[] courts to review 'final order[s] of removal' and address 'questions of law . . . arising from' them").

The "zipper clause"—stating that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section," 8 U.S.C. § 1252(b)(9)—is designed to "consolidate judicial review of immigration proceedings into one action in the court of appeals." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 230 (2020) (quoting *INS v. St. Cyr*, 533 U.S. 289, 313 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 590 U.S. 573, 580 (2020)).

Jurisdiction in the courts of appeals is exclusive. *See* 8 U.S.C. § 1252(a)(5), (b)(9); *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) ("The exclusive means to challenge an order of removal is the petition for review process.").

Thus, judicial review of final orders of removal is not available under the Administrative Procedure Act (APA). *See Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) ("8 U.S.C. § 1252(a)(5) prohibits Administrative Procedure Act claims that indirectly challenge a removal order.").

Nor is judicial review of final orders of removal available through habeas corpus proceedings. *See* 8 U.S.C. § 1252(a)(5) ("Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)."); *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020) ("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."); *Perez v. Barr*, 957 F.3d 958, 964 (9th Cir. 2020) ("[T]he REAL ID Act of 2005 . . . eliminated habeas corpus jurisdiction over final orders of removal, making petitions for review before the courts of appeal 'the sole and exclusive means for judicial review' of such orders." (quoting 8 U.S.C. § 1252(a)(5))).

Providing for judicial review of final orders of removal through petitions for review rather than habeas proceedings does not violate the Suspension Clause. *See Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006) (no Suspension Clause violation because petition for review provides adequate substitute for traditional habeas jurisdiction).

Section 1252(a)(1) does not confer jurisdiction over nonfinal orders. *See Rauda v. Jennings*, 55 F.4th 773, 778 (9th Cir. 2022) ("Congress has intentionally (and unequivocally) stripped [the court of appeals] of jurisdiction to review non-final orders."); *id.* (although petitioner was seeking review of the denial of a temporary restraining order sought in habeas proceedings in district court, petitioner was fundamentally seeking a stay of removal pending the BIA's resolution of his motion to reopen, which was an interim order, not subject to review); *Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1299 (9th Cir. 2014) (jurisdiction to review final orders of removal under 8 U.S.C. § 1252); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012) (jurisdiction limited to final orders of removal); *Galindo-Romero v. Holder*, 640 F.3d 873, 877 (9th Cir. 2011) ("The carefully crafted congressional scheme governing review of decisions of the BIA limits this court's jurisdiction to the review of *final orders of removal*." (quoting *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009))); *Alcala v. Holder*, 563 F.3d 1009, 1016 (9th Cir. 2009) ("[W]here there is no final order of removal, this court lacks jurisdiction even where a constitutional claim or question of law is raised.").

A. Definition and Scope of "Final Order of Removal"

"[I]n the deportation context, a 'final order of removal' is a final order 'concluding that the alien is deportable or ordering deportation.'" *Nasrallah v. Barr*, 590 U.S. 573, 579 (2020) (quoting 8 U.S.C § 1101(a)(47)(A)).

A final order of removal encompasses any rulings that affect the validity of the final order of removal:

> [F]inal orders of removal encompass only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal. As this Court phrased it in *INS v. Chadha*, review of a final order of removal "includes all matters on which the validity of the final order is contingent." 462 U.S. 919, 938 (1983) (internal quotation marks omitted). The rulings that affect the validity of the final order of removal merge into the final order of removal for purposes of judicial review.

Nasrallah v. Barr, 590 U.S. 573, 582 (2020); *cf. INS v. Chadha*, 462 U.S. 919, 938 (1983) (holding that for purposes of former 8 U.S.C. § 1105a(a) (1995) a final deportation order "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing"); *Padilla-Martinez v. Holder*, 770 F.3d 825, 830 (9th Cir. 2014) (holding that the court had jurisdiction to review prior BIA decisions in the case because the final deportation order was contingent upon them).

By contrast, the final order of removal does not encompass rulings that do not affect the validity of the removal order. *See Nasrallah v. Barr*, 590 U.S. 573, 582–83 (2020) ("A CAT order is not itself a final order of removal because it is not an order 'concluding that the alien is deportable or ordering deportation.'").

But rulings "arising from" the removal order are reviewable under § 1252(a)(1) even if they do affect the validity of or merge into the removal order. *See Nasrallah v. Barr*, 590 U.S. 573, 582–83 (2020) (noting that a CAT order may be reviewed together with the final order of removal even though it does not affect the validity of or merge into the removal order).

In reinstatement proceedings, a reinstated removal order qualifies as a final order of removal. *See Vega-Anguiano v. Barr*, 982 F.3d 542, 545 (9th Cir. 2019)

("[T]he phrase 'final order of removal' in § 1252(a)(1) covers both a final removal order and a final reinstatement order.").

In administrative removal proceedings, the final administrative removal order (FARO) is the final order of removal because the FARO is not reviewable by an IJ or the BIA. *See Riley v. Bondi*, 606 U.S. 259, 267 (2025).

Thus, the deadline for filing a petition for review in administrative removal proceedings runs from the date the FARO is issued, not from the subsequent date upon which withholding-only proceedings are terminated. *See Riley v. Bondi*, 606 U.S. 259, 267–69 (2025) (explaining that an order denying CAT protection in withholding-only proceedings "does not affect the validity of a previously issued order of removal or render that order non-final"); *Johnson v. Guzman Chavez*, 594 U.S. 523, 540 (2021) ("Because the validity of removal orders is not affected by the grant of withholding-only relief, an alien's initiation of withholding-only proceedings does not render non-final an otherwise 'administratively final' reinstated order of removal."); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018) (reviewing petition for review challenging FARO issued by the DHS; petitioner challenged FARO on the grounds that it was issued in violation of his statutory right to counsel).

In regular removal proceedings, a final order of removal is issued by an IJ; the BIA has no authority to do so. *See Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 883–85 (9th Cir. 2003) (BIA acted beyond its authority when it vacated IJ's termination of removal proceedings and issued removal order in the first instance). The BIA acts consistent with its appellate role when it reverses an IJ's grant of relief from removal because in such cases "the BIA simply reinstates the order of removal that has already been entered by the IJ and that would have taken effect but for the IJ's subsequent" grant of relief from removal. *Lolong v. Gonzales*, 484 F.3d 1173, 1177–78 (9th Cir. 2007) (en banc); *see also Muradin v. Gonzales*, 494 F.3d 1208, 1209 (9th Cir. 2007) (concluding that the BIA's order of removal followed an initial determination of removability where the petitioner conceded removability and the IJ's grant of relief necessarily required the IJ to determine that the petitioner was removable). [In streamlined removal proceedings, a final order of removal may be issued by DHS rather than by an IJ.]

The BIA's denial of a motion to reopen is a final order of removal subject to judicial review. *See He v. Gonzales*, 501 F.3d 1128, 1129 n.1 (9th Cir. 2007) ("The denial of a motion to reopen is a final administrative decision subject to judicial review in the court of appeals."); *see also Mata v. Lynch*, 576 U.S. 153, 147–48 (2015) ("[C]ircuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding.").

An order dismissing removal proceedings is not a final order of removal. *See Galindo-Romero v. Holder*, 640 F.3d 873, 877 (9th Cir. 2011) (termination of removal proceedings is not reviewable because it results in "no order of removal at all"); *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009) (court lacked jurisdiction over petition for review of removal proceedings that were dismissed and resulted in no order of removal).

An interim BIA order denying a stay of removal pending the BIA's disposition of a motion to reopen is not a "final order of removal." *Shaboyan v. Holder*, 652 F.3d 988, 989–90 (9th Cir. 2011). But a BIA order denying a petitioner's request for a stay of removal would be reviewable as part of a petition for review stemming from a final order of removal. *Id.* at 991.

Prior to *Riley* and *Nasrallah*, the court held that an order terminating reasonable fear proceedings in reinstatement proceedings is a final order of removal. *See Martinez v. Sessions*, 873 F.3d 655, 658–60 (9th Cir. 2017) (concluding that the BIA's dismissal of the petitioner's appeal of the IJ's negative reasonable fear determination for lack of jurisdiction was a final administrative order under the circumstances of the case); *Ayala v. Sessions*, 855 F.3d 1012, 1015, 1018–20 (9th Cir. 2017) (holding that the court has "jurisdiction over petitions for review from negative reasonable fear determinations in the context of the reinstatement of an expedited removal order under 8 U.S.C. § 1252" and that the "final" order in the case was the BIA's dismissal of Ayala's appeal, in part because the IJ's decision had effectively (and misleadingly) instructed her to appeal to the BIA); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012) ("[W]here an alien pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order does not become final until the reasonable fear of persecution and withholding of removal proceedings are complete."). These decisions should be read in light of *Riley*'s holding, in the related context of administrative removal proceedings, that a FARO becomes final when issued by DHS, *see Riley v. Bondi*, 606 U.S. 259, 267–69 (2025), and *Nasrallah*'s holding that, in the context of regular removal proceedings, rulings on CAT relief do not merge into a final order of removal, *see Nasrallah v. Barr*, 590 U.S. 573, 583 (2020).

Prior to *Riley* and *Nasrallah*, the court held that a final order of removal in administrative removal proceedings is ripe for review when an IJ upholds the asylum officer's negative fear determination. *See Zuniga v. Barr*, 946 F.3d 464, 468 (9th Cir. 2019) (holding that "the IJ's decision is the final agency action on the reasonable fear question, such a final removal order is ripe for judicial review by a federal court of appeals"). This decision should be read in light of *Riley*'s holding, in the related context of administrative removal proceedings, that a FARO becomes final when issued by DHS, *see Riley v. Bondi*, 606 U.S. 259, 267–69 (2025), and *Nasrallah*'s holding that, in the context of regular removal proceedings, rulings on CAT relief do not merge into a final order of removal, *see Nasrallah v. Barr*, 590 U.S. 573, 583 (2020).

DHS's determination of a Visa Waiver Program entrant's removability under 8 C.F.R. § 217.4(b) is an order of removal subject to judicial review in the courts of appeals so long as the order has not been executed. *See Nicusor-Remus v. Sessions*, 902 F.3d 895, 898 (9th Cir. 2018) ("This Court has jurisdiction over Nicusor's 2002 removal order so long as it has not been executed.").

Prior to *Riley* and *Nasrallah*, the court held that a BIA decision that denies some claims but remands other claims for relief to the IJ for further proceedings is not a final order of removal with regard to any of the claims. *See Abdisalan v. Holder*, 774 F.3d 517, 526 (9th Cir. 2014) (en banc). But a BIA decision "is a final order of removal when it remands for consideration of voluntary departure but denies all other forms of relief." *Id*. at 526 n.8; *see Singh v. Lynch*, 835 F.3d 880, 883 (9th Cir. 2016) (BIA's order remanding solely for voluntary departure was a final order); *Pinto v. Holder*, 648 F.3d 976, 980 (9th Cir. 2011) (holding that "the BIA's decision denying asylum, withholding of removal, and CAT protection but remanding to the IJ for voluntary departure proceedings is a final order of removal . . . and, effectively, the only order that we can review"); *Go v. Holder*, 640 F.3d 1047, 1051–52 (9th Cir. 2011) (holding that removal order did not become final and 30-day period for filing petition for review of that order did not run until the BIA rejected all claims, including the CAT claim it had previously remanded for further proceedings).

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

B. When a Removal Order Becomes Final

An order of deportation (or removal) "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. § 1101(a)(47)(B).

In administrative removal proceedings, a final administrative order of removal (FARO) becomes final when DHS issues the order, not when withholding-only proceedings are completed, because the FARO is not reviewable by an IJ or the BIA. *See Riley v. Bondi*, 606 U.S. 259, 267–69 (2025).

Prior to *Riley* and *Nasrallah*, the court held that an order of removal does not become final in reinstatement proceedings until related proceedings on relief from removal have been completed. *See Martinez v. Sessions*, 873 F.3d 655, 658–60 (9th Cir. 2017) (holding that the BIA's dismissal of Martinez's appeal of the IJ's negative reasonable fear determination for lack of jurisdiction was a final administrative order under the circumstances of the case). This decision should be read in light of *Riley*'s holding, in the related context of administrative removal proceedings, that a FARO becomes final when issued by DHS, *see Riley v. Bondi*, 606 U.S. 259, 267–69 (2025), and *Nasrallah*'s holding that, in the context of regular removal proceedings, rulings on CAT relief do not merge into a final order of removal, *see Nasrallah v. Barr*, 590 U.S. 573, 583 (2020).

A removal order becomes final upon the BIA's affirmance of the order rather than upon noncitizen's overstay of voluntary departure period. *See Ocampo v. Holder*, 629 F.3d 923, 925–27 (9th Cir. 2010).

Res judicata does not apply to a removal order until the order becomes final—i.e., until the BIA affirms the IJ's removal order. *See Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1323–24 (9th Cir. 2006).

"[A]bsent any prejudice to the Government, a premature petition for review of an immigration order may ripen upon final disposition of the case by the BIA." *Martinez v. Barr*, 941 F.3d 907, 919–20 (9th Cir. 2019) (court of appeals had jurisdiction over petition for review of IJ's denial of motion to reopen, despite fact that BIA had not issued a final reviewable order prior to the filing of the petition, where BIA issued its final ruling while petition for review was pending and government was not prejudiced).

A final order of removal becomes nonfinal, depriving the court of jurisdiction, when the BIA grants a motion to reopen the removal proceedings. *See Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (dismissing petition for review without prejudice for lack of jurisdiction because there was "no longer a final decision to review"); *see also Keshishyan v. Holder*, 658 F.3d 888, 888 (9th Cir. 2011) (dismissing petition for lack of jurisdiction where the BIA reopened and terminated proceedings); *Cordes v. Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008) (vacating prior opinion and denying as moot pending petition for rehearing en banc where BIA had sua sponte reopened and remanded to IJ for further proceedings); *Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (dismissing petition for review where BIA reopened removal proceedings); *cf. Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 746 (9th Cir. 2008) (the BIA's grant of petitioner's motion to reconsider did not divest the court of appeals of jurisdiction over noncitizen's petition for review where BIA affirmed its prior decision and granted reconsideration for the limited purpose of addressing the IJ's discretionary denial of cancellation of removal), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (en banc).

An order of removal becomes final if it is executed (i.e., if the noncitizen is removed from the United States). *See Anderson v. Holder*, 673 F.3d 1089, 1096 (9th Cir. 2012) (holding that "a removal order that has been executed against a U.S. citizen is 'a final order of removal' within the meaning of § 1252(a)," even if the order was ultra vires); *cf. Viloria v. Lynch*, 808 F.3d 764, 769–70 (9th Cir. 2015) (court lacked jurisdiction to review citizenship claim where no final order or removal had been entered and the noncitizen had *not* been removed from the country).

C. Jurisdiction Over Expedited Removal Orders

Judicial review of an expedited removal is limited to three narrow issues, each of which must be raised in appropriate habeas corpus proceedings: (1) "whether the petitioner is an alien"; (2) "whether the petitioner was ordered removed" under an expedited removal order; and (3) whether the petitioner can prove that he or she has lawful status in the United States as an asylee, refugee, or permanent resident. 8 U.S.C. § 1252(a)(2)(A), (e); *see Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1192 (9th Cir. 2021).

Section 1252(a)(2)(D), which provides for judicial review of constitutional claims and questions of law, does not apply to expedited removal orders. *See*

Mendoza-Linares v. Garland, 51 F.4th 1146, 1162 (9th Cir. 2022) (holding that §§ 1252(a)(2)(C) and (e) "are to be construed in accordance with their broad plain language, even if that precludes review of constitutional claims or questions of law"); *Guerrier v. Garland*, 18 F.4th 304, 308 (9th Cir. 2021) (holding that § 1252(a)(2)(D) does not apply to the limitations in § 1252(a)(2)(A)'s "circumscribing judicial review of expedited removal orders").

Cross Reference: Jurisdiction Over Streamlined Removal Proceedings.

D. Habeas Jurisdiction Over Non-Final Orders

"[I]n cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court, and on appeal to this Court, pursuant to 28 U.S.C. § 2241." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006); *see Lopez-Marroquin v. Barr*, 955 F.3d 759, 759 (9th Cir. 2020) ("[D]istrict courts retain jurisdiction under 28 U.S.C. § 2241 to consider habeas challenges to immigration detention that are sufficiently independent of the merits of the removal order."); *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) ("The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction."); *Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) (as amended) (noting that the transfer provisions of the REAL ID Act do not apply where the noncitizen does not challenge a final order of removal); *cf. Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1082 (9th Cir. 2010) (concluding that an order reinstating a prior removal order qualified as an order of removal that could be challenged only in a petition for review).

Challenges to removal under the Alien Enemies Act (AEA), 50 U.S.C. § 21, which largely precludes judicial review, must be brought in habeas. *See Trump v. J. G. G.*, 604 U.S. 670, 672–73 (2025) (per curiam) (holding that noncitizens detained under presidential proclamation may challenge detention through habeas, not the Administrative Procedure Act, and reaffirming due process rights to notice and an opportunity to challenge removal); *see also A.A.R.P. v. Trump*, 605 U.S. 91, 95 (2025) (per curiam) (holding that detainees challenging removal under the AEA are entitled to due process, including sufficient notice to allow them to seek habeas relief before removal).

Federal courts have habeas jurisdiction to review the BIA's determination that a noncitizen is a "danger to the community" for purposes of continued detention. *Martinez v. Clark*, 124 F.4th 775, 779 (9th Cir. 2024) (holding that 8 U.S.C. § 1226(e), which bars review of a "discretionary judgment" regarding detention, does not preclude judicial review of the BIA's "dangerousness" determination, which is a mixed question of fact and law).

Where a noncitizen erroneously seeks habeas relief in district court rather than filing a petition for review in the court of appeals, this court may construe the habeas petition as a timely filed petition for review. *See*, *e.g.*, *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1085–86 (9th Cir. 2010), *overruled on other grounds by Garfias Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012) (en banc); *cf. Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006) (district court properly dismissed for lack of jurisdiction a habeas petition filed after the effective date of the REAL ID Act and attempting to challenge a final order of removal).

III. PROCEDURAL RULES

A. Commencement of Removal Proceedings

Regular (as opposed to streamlined) removal proceedings are commenced by filing of a charging document in immigration court. *See* 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court."); *Karingithi v. Whitaker*, 913 F.3d 1158, 1159–60 (9th Cir. 2019) ("A charging document is 'the written instrument which initiates a proceeding before an Immigration Judge,' and one of the enumerated examples is a notice to appear [(NTA)]." (quoting 8 C.F.R. § 1003.13)).

Removal proceedings commence when a charging document is filed in the immigration court, not when the document is served on the noncitizen. *See Cortez-Felipe v. INS*, 245 F.3d 1054, 1056–57 (9th Cir. 2001).

The filing of a charging document that fails to comply with statutory or regulatory requirements does not deprive the immigration court of jurisdiction. *See United States v. Bastide-Hernandez*, 39 F.4th 1187, 1191 (9th Cir. 2022) (en banc) (holding that 8 C.F.R. § 1003.14(a) uses the word "jurisdiction" in a "purely colloquial sense"); *id.* at 1193 (holding that the regulation "is a nonjurisdictional claim-processing rule" and that "the filing of an undated NTA that is subsequently supplemented with a notice of hearing fully complies with the requirements of that regulation"); *id.* at 1191–92 ("Nothing in the INA . . . conditions an immigration court's adjudicatory authority 'on compliance with rules governing notices to appear, whether statutory, *see* 8 U.S.C. § 1229(a) (statutory definition of notice to appear), or regulatory, *see* 8 C.F.R. § 1003.18(b).'" (quoting *United States v. Cortez*, 930 F.3d 350, 360 (4th Cir. 2019) (as amended))).

See also Aguilar Fermin v. Barr, 958 F.3d 887, 893–95 (9th Cir. 2020) (NTA without address of immigration court, or date or time of hearing, did not deprive immigration court of jurisdiction, where later notices of hearing included that information); *Karingithi v. Whitaker*, 913 F.3d 1158, 1158–59 (9th Cir. 2019) (holding that immigration court has jurisdiction over removal proceedings when initial NTA is missing time or date information and later notices of hearing include that information) (distinguishing *Pereira v. Sessions*, 585 U.S. 198 (2018)).

An in absentia removal order may not be rescinded based on a deficient NTA if the petitioner received a subsequent hearing notice providing the required information about the time and place of the hearing. *See Campos-Chaves v. Garland*, 602 U.S. 447, 456–57 (2024) (vacating the judgment in *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022)).

A petitioner forfeits challenges to a defective NTA by failing to raise the defect within a reasonable time. *See Bastide-Hernandez*, 39 F.4th at 1191 (explaining that, unlike challenges to subject matter jurisdiction, violations of claim-processing rules "may be forfeited if the party asserting the rule waits too long to raise the point" (quoting *Manrique v. United States*, 581 U.S. 116, 121 (2017))).

Challenges to a defective NTA must be exhausted in proceedings before the BIA before being presented in a petition for review in the court of appeals. *See Umana-Escobar v. Garland*, 69 F.4th 544, 550 (9th Cir. 2023) (claim-processing challenge to defective NTA unexhausted where petitioner's counseled brief to the BIA raised only a jurisdictional argument based on defects to the NTA); *see also Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025) (same); *Ruiz-Colmenares v. Garland*, 25 F.4th 742, 748 (9th Cir. 2022) (dismissing as unexhausted jurisdictional argument based on a defective NTA where petitioner raised it for the first time in the court of appeals); *cf. Suate-Orellana v. Garland*, 101 F.4th 624, 628–30 (9th Cir. 2024) (petitioner sufficiently exhausted deficient NTA claim).

B. Timeliness

1. Petitions for Review

"The petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1).

The 30-day filing deadline in in 8 U.S.C. § 1252(b)(1) is a nonjurisdictional, mandatory claim-processing rule. *See Riley v. Bondi*, 606 U.S. 259, 276–77 (2025); *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1046 (9th Cir. 2023) (holding that § 1252(b)(1)'s 30-day deadline is nonjurisdictional and subject to waiver and forfeiture), *abrogated on other grounds by Riley v. Bondi*, 606 U.S. 259 (2025).

This court has not addressed whether the 30-day deadline in § 1252(b)(1) is subject to equitable tolling. *See Alonso-Juarez*, 80 F.4th at 1047 n.3. Prior to *Alonso-Juarez*, this court had held that the 30-day filing deadline in 8 U.S.C. § 1252(b)(1) was "mandatory and jurisdictional" and not subject to waiver, forfeiture, or equitable exceptions. *See Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007), *abrogated by Alonso-Juarez v. Garland*, 80 F.4th 1039 (9th Cir. 2023).

The 30-day filing deadline in 8 U.S.C. § 1252(b)(1) applies to reinstated orders of removal. *See Vega-Anguiano v. Barr*, 982 F.3d 542, 545 (9th Cir. 2019). Prior to *Riley v. Bondi*, this court held that the 30-day filing deadline was triggered upon the completion of reasonable fear proceedings. *See*, *e.g.*, *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1046 (9th Cir. 2023) (citing *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958–59 (9th Cir. 2012)), *abrogated by Riley v. Bondi*, 606 U.S. 259 (2025).

The filing of a motion to reopen or reconsider does not toll the statutory time in which to file a petition for review challenging a final order of removal. *See Stone v. INS*, 514 U.S. 386, 405–06 (1995); *see also Martinez-Serrano v. INS*, 94 F.3d 1256, 1258–59 (9th Cir. 1996) (deeming a petition for review untimely under *Stone*).

"The time limit for filing a petition for review begins to run when the BIA mails its decision, which is presumed to be the date indicated on the cover letter to the decision." *Yepremyan v. Holder*, 614 F.3d 1042, 1043–44 (9th Cir. 2010); *Haroutunian v. INS*, 87 F.3d 374, 375 (9th Cir. 1996) (holding that "the date of issuance is the date of mailing").

To trigger the 30-day deadline, the BIA must mail the decision to the correct address. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1258–59 (9th Cir. 1996) (holding that "the date of issuance" is the date the final deportation order was mailed to the correct address); *cf. Singh v.* INS, 315 F.3d 1186, 1188–90 (9th Cir. 2003) (time limit began to run when BIA mailed decision to noncitizen's address on record where noncitizen had moved but not updated address on record; BIA was not required to mail notice to noncitizen's attorney where attorney had not filed a notice of appearance).

"In the absence of an appeal to the BIA, the IJ's removal order [becomes final], thirty days after the IJ's decision" becomes final. *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009).

Rule 26 of the Federal Rules of Appellate Procedure governs whether a petition for review was filed within 30 days of the mailing of the BIA decision. *See Yepremyan v. Holder*, 614 F.3d 1042, 1043–44 (9th Cir. 2010) (concluding that a petition for review was timely because the 30th day, which was the day after Thanksgiving, was a legal holiday for purposes of calculating time under Rule 26(a).

The three-day grace period of Fed. R. App. P. 26(c), however, does not apply. *See Haroutunian v. INS*, 87 F.3d 374, 377 (9th Cir. 1996) (three-day grace period of Rule 26(c) is inapplicable because time for filing the petition for review begins to run from the date of the final deportation order was issued, and not from the date of the "service of a paper").

A petition for review is "filed" when it is received by the court. *See Sheviakov v. INS*, 237 F.3d 1144, 1147–48 (9th Cir. 2001).

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

For petitioners who are pro se and detained, the prison mailbox rule applies. *See Barrientos v. Lynch*, 829 F.3d 1064, 1066–67 (9th Cir. 2016) (applying the prison mailbox rule to immigrant detainees); Fed. R. App. P. 25(a)(2)(A)(iii) ("A paper not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing . . . ."); *cf. Houston v. Lack*, 487 U.S. 266, 270 (1988) (applying the mailbox rule outside the immigration context).

2. Habeas Appeals

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

C. Venue

"The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2); *see Plancarte Sauceda v. Garland*, 23 F.4th 824, 831–32 (9th Cir. 2022) (venue proper in Ninth Circuit where hearing was held in Boise, even though IJ and some participants appeared remotely from Salt Lake City); *Trejo-Mejia v. Holder*, 593 F.3d 913, 914–16 (9th Cir. 2010) (transferring petition for review to Fifth Circuit where removal proceedings took place in Texas).

Because the venue provision is not jurisdictional, a court may retain a petition for review filed in the wrong venue in the interests of justice. *See Bibiano v. Lynch*, 834 F.3d 966, 971–74 (9th Cir. 2016). "When analyzing whether a transfer will be in the interests of justice, courts generally consider the reasonableness of the immigrant's confusion as to proper venue, as well as issues of delay, inconvenience to the parties, and waste of judicial resources." *Id*. at 974. In *Bibiano*, the court declined to transfer a petition for review to another circuit where the petitioner was reasonably confused about proper venue, the petition had been pending in the Ninth Circuit for more than a year, transfer would not have been more convenient for the parties, and transfer would have wasted judicial resources and caused unnecessary delay. *See id.* at 971–74.

D. Stays of Removal in the Court of Appeals

1. No Automatic Stay of Removal Pending Review

Before 1996, the filing of a petition for review automatically stayed the deportation of the noncitizen pending determination of the petition by the court unless the court otherwise directed or the noncitizen had been convicted of an aggravated felony. *See* 8 U.S.C. § 1105a(a)(3) (1995).

Under current law, "[s]ervice of the petition [for review] does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. § 1252(b)(3)(B); *see Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) ("With IIRIRA, Congress eliminated the automatic stay provision, but left intact the authority of the courts of appeal to grant stays as a matter of discretion.").

2. Discretionary Stays of Removal Pending Review

Under Ninth Circuit General Order 6.4(c), removals are temporarily stayed automatically upon the filing of a motion for a stay of removal. *See* 9th Cir. Gen. Ord. 6.4(c) (effective Apr. 1, 2019) ("Upon the filing of an initial motion or request for stay of removal or deportation, the order of removal or deportation is temporarily stayed until further order of the Court."); *see also* *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997) (applying former version of the General Orders) ("The filing of a motion for stay or a request for a stay contained in a petition for review will stay a petitioner's deportation temporarily until the court rules on the stay motion . . . .").

In 2025, a three-judge panel held that an opposed stay motion that has been fully briefed should be presented to the next available motions panel. *See Rojas-Espinoza v. Bondi*, 160 F.4th 991, 1002 (9th Cir. 2025), *reh'g en banc granted, opinion vacated*, 167 F.4th 1069 (9th Cir. 2026), *and on reh'g en banc*, No. 24-7536, 2026 WL 674370 (9th Cir. Mar. 10, 2026); *see also Rivera v. Mukasey*, 508 F.3d 1271, 1276–78 (9th Cir. 2007) (criticizing Ninth Circuit General Order 6.4(c)). The three-judge panel's *Rojas-Espinoza* opinion, however, was vacated.

"[S]tays of removal are governed by 'the traditional test for stays,' rather than 8 U.S.C. § 1252(f)'s higher standard for enjoining an alien's removal." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)). Factors governing whether a stay should issue include: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). With respect to the second factor, "an alien must demonstrate that irreparable harm is probable if the stay is not granted." *Leiva-Perez*, 640 F.3d at 968.

The denial of a petition for review does not automatically dissolve a stay of removal. *See Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004) (denying a petition for review and ordering the clerk to vacate the stay of removal when the mandate issues); *see also* 9th Cir. Gen. Ord. 6.4(c) ("Upon the filing of an initial motion or request for stay of removal or deportation, the order of removal or deportation is temporarily stayed until further order of the court.").

Cf. Roque-Carranza v. INS, 778 F.2d 1373, 1374 (9th Cir. 1985) (denying petition for review but staying order of deportation to permit petitioner to file a motion to reopen with the BIA based on new evidence and ineffective assistance of counsel).

3. Voluntary Departure Stays Precluded

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).

4. Stay of the Court's Mandate

The court may, upon denial of a petition for review, stay its mandate to allow the applicant to seek additional relief. *See*, *e.g.*, *Myers v. Holder*, 661 F.3d 1178, 1178–79 (9th Cir. 2011) (staying mandate until BIA ruled on motion to reopen, and ordering that the mandate would be stayed pending disposition of the case if the BIA granted the motion to reopen, and in the alternative, the mandate would issue immediately if the BIA denied the motion to reopen); *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004) (staying mandate to permit BIA to reopen and consider in the first instance eligibility for relief from removal in light of new regulation); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1143 (9th Cir. 2000) (dismissing petition for review for lack of jurisdiction but staying mandate to permit filing of habeas corpus petition in district court); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (staying mandate to permit applicant to file a motion to reopen seeking relief under the recently enacted Foreign Affairs Reform and Restructuring Act of 1998, which made relief available under the Convention Against Torture); *Ortiz v. INS*, 179 F.3d 1148, 1152 (9th Cir. 1999) (staying mandate to permit applicants to seek reopening for relief under the recently enacted Nicaraguan Adjustment and Central American Relief Act of 1997

(NACARA)); *Aguilar-Escobar v. INS*, 136 F.3d 1240, 1241 (9th Cir. 1998) (staying mandate to provide opportunity to reopen for relief under recently enacted NACARA); *Echeverria-Hernandez v. INS*, 946 F.2d 1481, 1482 (9th Cir. 1991) (en banc) (staying mandate to preserve the automatic stay under former 8 U.S.C. § 1105a(a)(3) (1995) pending resolution of administrative proceedings commenced pursuant to the *American Baptist Churches* settlement agreement); *cf. Valderrama v. INS*, 260 F.3d 1083, 1086 (9th Cir. 2001) (declining to stay the mandate to allow petitioner to file a motion to reopen with the BIA to apply for adjustment of status where motion to reopen would have been untimely).

5. Staying Proceedings on Petition for Review

The court may stay proceedings on a pending petition for review while the petitioner seeks administrative relief. *See Ardon-Matute v. INS*, 157 F.3d 696, 697 (9th Cir. 1998) (staying proceedings pending BIA's adjudication of motion to reopen seeking relief under the recently enacted NACARA).

E. Exhaustion

This court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1).

The administrative exhaustion requirement in § 1252(d)(1) is a nonjurisdictional claim-processing rule. *See Santos-Zacaria v. Garland*, 598 U.S. 411, 417–19 (2023). "Although it is subject to waiver and forfeiture, a claim-processing rule is mandatory in the sense that a court must enforce the rule if a party properly raises it." *Suate-Orellana v. Garland*, 101 F.4th 624, 629 (9th Cir. 2024) (alterations, citations, and internal quotation marks omitted).

Because the exhaustion requirement applies to remedies available "as of right," and motions for reconsideration or reopen are instead forms of discretionary review, a noncitizen need not file a motion for reconsideration or reopen to satisfy the exhaustion requirement. *See Santos-Zacaria*, 598 U.S. at 424–25.

"The fact that the BIA did not expressly address [a claim] does not by itself raise [exhaustion] concerns, as the BIA cannot preclude judicial review of a properly raised issue by not mentioning it." *Iraheta-Martinez v. Garland*, 12 F.4th 942, 948 (9th Cir. 2021).

Exhaustion "prevent[s] premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors." *Arsdi v. Holder*, 659 F.3d 925, 928 (9th Cir. 2011) (alteration in original) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)).

Exhaustion does not apply to constitutional challenges to the INA or agency procedures that the BIA lacks authority to address. *See Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (a petitioner's failure to raise an issue before the BIA generally constitutes a failure to exhaust, but an exception to the exhaustion requirement has been carved for constitutional challenges to the INA and agency procedures, because the BIA does not have jurisdiction to determine the constitutionality of the statutes it administers).

"Exhaustion requires a non-constitutional legal claim to the court on appeal to have first been raised in the administrative proceedings below and to have been sufficient to put the BIA on notice of what was being challenged." *Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020) (citations omitted).

"[A] general challenge to the IJ's decision does not satisfy 8 U.S.C. § 1252(d)(1)'s exhaustion requirement." *Gonzalez-Lara v. Garland*, 104 F.4th 1109, 1116–17 (9th Cir. 2024) (petitioner failed to exhaust challenge to the denial of CAT claim where petitioner's "brief to the BIA only requested reversal of the denial of CAT relief in the conclusion section, without identifying what issues would warrant such reversal"); *see also Santa-Gonzalez v. Bondi*, No. 16-70793, 2026 WL 945948, at *5 (9th Cir. Apr. 8, 2026) (petitioner failed to exhaust procedural due process claims where notice of appeal to the BIA said only that the IJ's decision was "wrongfully made"; statement "could not have placed the BIA on notice that he was raising any due process challenge, much less what specific procedural due process argument he was making or how it applied to the facts of his case"); *Smith v. Garland*, 103 F.4th 663, 669 (9th Cir. 2024) (challenge to the authenticity of a criminal judgment offered to prove prior aggravated felony conviction unexhausted where petitioner did not challenge authenticity before IJ and BIA); *Umana-Escobar v. Garland*, 69 F.4th 544, 550 (9th Cir. 2023) (claim-processing argument based on defective NTA unexhausted where petitioner's counseled brief to the BIA raised only a jurisdictional argument based on NTA defects); *Alanniz v. Barr*, 924 F.3d 1061, 1068–69 & n.8 (9th Cir. 2019) (petitioner's brief to the BIA failed to argue he was entitled to CAT protection where CAT was mentioned only twice, in the introduction and conclusion, and the brief made no argument for CAT relief); *Rizo v. Lynch*, 810 F.3d 688, 692–93 (9th

Cir. 2016) (petitioner failed to exhaust denial of asylum claim where conclusory statement in BIA brief failed to apprise the BIA of the particular basis for petitioner's claim that the IJ erred); *Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014) (even construing the pro se petitioner's claims liberally, he failed to raise even a general argument sufficient to exhaust the issue raised before the court); *Arsdi*, 659 F.3d at 929 (petitioner failed to meet minimum requirements for exhaustion); *Segura v Holder*, 605 F.3d 1063, 1066 (9th Cir. 2010) (broad statements in BIA notice of appeal and brief that the IJ "committed an error in law" were insufficient to put the BIA on notice of his claim that the IJ lacked authority to determine his status as a lawful permanent resident); *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 n.3 (9th Cir. 2010) (petitioner's mere citation to a case that discussed imputed political opinion on the last page of her brief to the BIA was insufficient to put the BIA on notice of the argument where she did not explicitly raise the issue in her asylum application, the written materials in support of her application, her notice of appeal to the BIA, or her BIA brief), *overruled on other grounds by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc); *Rendon v. Mukasey*, 520 F.3d 967, 972 (9th Cir. 2008) (challenge to conviction unexhausted where BIA brief made no mention of conviction and made only general challenge to IJ's removability decision); *Tall v. Mukasey*, 517 F.3d 1115, 1120 (9th Cir. 2008) (although petitioner "raised his due process rights in his brief to the BIA," he failed to raise the particular IJ procedural errors that he presented for the first time to the court of appeals); *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004) ("A petitioner cannot satisfy the exhaustion requirement by making a general challenge to the IJ's decision, but, rather, must specify which issues form the basis of the appeal."); *Barron v. Ashcroft*, 358 F.3d 674, 676–78 (9th Cir. 2004) (no exhaustion where BIA appeal failed to mention procedural due process challenge raised in court).

"But [exhaustion] does not require the issue to have been raised in a precise form during the administrative proceeding. Rather, the petitioner may raise a general argument in the administrative proceeding and then raise a more specific legal issue on appeal." *Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020) (citation omitted) (holding that petitioner's argument in BIA brief that the IJ "failed to consider the appropriate factors" was sufficient to exhaust argument that IJ failed to consider the first of three factors governing particularly serious crime determination where the context showed that the argument pertained to the first factor); *see also Shen v. Garland*, 109 F.4th 1144, 1158 (9th Cir. 2024) (petitioner sufficiently exhausted a legal issue regarding the effective date of a Chinese family planning law); *Suate-Orellana v. Garland*, 101 F.4th 624, 629–30 (9th Cir. 2024) (petitioner exhausted statutory claim-processing challenge to defective NTA where BIA brief argued that NTA was statutorily deficient, although BIA brief focused on jurisdictional effect of such defects); *Martinez v. Barr*, 941 F.3d 907, 922 (9th Cir. 2019) ("Diaz Martinez 'put the BIA on notice' that she lacked notice of the amended charges such that the BIA had 'an opportunity to pass' on the issue" and therefore exhausted issue before the BIA (quoting *Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004))); *Miller v. Sessions*, 889 F.3d 998, 1001 (9th Cir. 2018) (where petitioner put BIA on notice of jurisdictional basis for motion, and BIA had an opportunity to pass on the issue, the issue was exhausted); *Garcia v. Lynch*, 786 F.3d 789, 793–94 (9th Cir. 2015) (exhaustion doctrine not employed in a formalistic manner, and petitioner sufficiently exhausted the issue where argument was made in short motion to reconsider and accompanying declaration, and reiterated before IJ and in notice of appeal); *Agyeman v. INS*, 296 F.3d 871, 877–78 (9th Cir. 2002) (pro se argument in BIA brief that IJ erred by requiring testimony from his spouse adequately, if inartfully, exhausted due process claim that he was denied a full and fair hearing; "to the extent that [petitioner's] pro se appeal did not contain the exact legalese, the BIA had adequate opportunity to correct any errors occurring in the proceedings below"); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030 n.8 (9th Cir. 2000) ("We consider the argument because the law surrounding this issue is clear, the issue was briefed by both sides, the record has been adequately developed, and the argument is presented in only a slightly different form than it was to the BIA.").

"A *pro* se petitioner is not required to use the precise legal terminology . . . to make clear the basis of his challenge." *Ren v. Holder*, 648 F.3d 1079, 1084 (9th Cir. 2011) (concluding petitioner's pro se BIA notice of appeal, while inartful, was sufficient to make clear the basis of his challenge, satisfying exhaustion requirement); *see also Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1014 (9th Cir. 2021) ("the BIA may not ignore a pro se petitioner's inartful legal arguments if they suffice to give notice of the petitioner's reasons for appeal"; "pro se notices of appeal to the BIA should be construed liberally"); *Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) ("Although his pro se brief was inartful, [petitioner's] complaints about his counsel's deficient performance were sufficient to put the BIA on notice of his claim for ineffective assistance of counsel.").

When a petitioner files a BIA brief, only the issues raised and argued in the brief—and not those raised in the notice of appeal—are exhausted:

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

Abebe v. Mukasey, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc). Prior to *Abebe*, this court had held that an issue need not be raised in the BIA brief if it was raised in the BIA notice of appeal. *See Figueroa v. Mukasey*, 543 F.3d 487, 492 (9th Cir. 2008); *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000).

Exhaustion is satisfied where the BIA expressly adopts the IJ's decision and the IJ explicitly discussed the issue. *See Kwong v. Holder*, 671 F.3d 872, 876–77 (9th Cir. 2011) ("Because the BIA adopted the IJ's reasoning and affirmed 'for the reasons stated therein,' the IJ's discussion of the issue is sufficient, in and of itself, to overcome the exhaustion challenge.").

Similarly, "[w]here an issue has been presented to the IJ, and the BIA affirms the IJ decision citing *Matter of Burbano*, the issue is deemed exhausted." *Mutuku v. Holder*, 600 F.3d 1210, 1213 (9th Cir. 2010); *see also Cinapian v. Holder*, 567 F.3d 1067, 1073 (9th Cir. 2009) (where BIA adopted and affirmed IJ decision and cited *Burbano*, the court had jurisdiction to review asylum claim regardless of the clarity with which noncitizens raised the timeliness issue before the BIA); *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1232 (9th Cir. 2008) ("[W]hen the BIA cites *Burbano* in its decision, all issues presented before the IJ are deemed to have been presented to the BIA.").

An argument is exhausted where the IJ addressed the issue and petitioner raised it in his motion for reconsideration before the BIA, even though the BIA did not explicitly consider the argument in its denial of reconsideration. *See Singh v. Whitaker*, 914 F.3d 654, 660 n.1 (9th Cir. 2019).

An issue is exhausted if the BIA addresses it, even if the petitioner failed to properly present the issue to the BIA. *See Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018) ("It is well-established that we may review any issue addressed on the merits by the BIA, regardless of whether the petitioner raised it before the agency."); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) ("While we generally do not have jurisdiction to review unexhausted claims, we may review any issue addressed on the merits by the BIA, regardless whether it was raised to the BIA by the petitioner."); *Kin v. Holder*, 595 F.3d 1050, 1055 (9th Cir. 2010) (although petitioners did not state they were appealing the IJ's adverse credibility determination in BIA filings, issue was exhausted because the BIA ignored the procedural defect and considered the argument on its substantive merits); *Abebe v. Gonzales*, 432 F.3d 1037, 1040–41 (9th Cir. 2005) (en banc) ("When the BIA has ignored a procedural defect and elected to consider an issue on its substantive merits, we cannot then decline to consider the issue based upon this procedural defect.").

An issue is not exhausted, however, if the petitioner does not raise the issue before the BIA and the BIA merely suggests in passing that any such argument would likely fail. *See Vasquez-Borjas v. Garland*, 36 F.4th 891, 900 (9th Cir. 2022) ("The BIA merely noted that [petitioner] had not made any argument related to the petty-offense exception and that 'it appear[ed] that the exception . . . would not apply.' This equivocal and summary rejection of an unraised issue does not constitute an adjudication on the merits.").

The requirement that a noncitizen raise arguments before the BIA applies to "streamlined" decisions—i.e., when a single member of the BIA affirms the IJ's decision without opinion. *See Zara v. Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004).

1. Exceptions to Exhaustion

a. Constitutional Challenges

"An exception to the exhaustion requirement has been carved for constitutional challenges to the Immigration and Naturalization Act and INS procedures," *Rashtabadi v. INS*, 23 F.3d 1562, 1567 (9th Cir. 1994), because "[t]he BIA does not have jurisdiction to determine the constitutionality of the statutes it administers," *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 977 (9th Cir. 2006); *see Iraheta-Martinez v. Garland*, 12 F.4th 942, 949 (9th Cir. 2021) (same); *Chettiar v. Holder*, 665 F.3d 1375, 1379 n.2 (9th Cir. 2012) ("There is no administrative exhaustion requirement for constitutional due process challenges . . . where the due process claim involves 'more than mere procedural error that an administrative tribunal could remedy.'" (quoting *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004))); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005)

(“Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims.”); *see also Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1130 (9th Cir. 2007) (exhaustion requirement inapplicable to retroactivity challenge), *abrogation on other grounds as recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118–21 (9th Cir. 2013).

But constitutional challenges, including due process challenges, must be exhausted where the alleged defects are correctable by the BIA. *See Sola v. Holder*, 720 F.3d 1134, 1135–36 (9th Cir. 2013) (“The key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the BIA’s ken. In other words, challenges to procedural errors correctable by the administrative tribunal, must be exhausted before we undertake review.” (alterations, citations, and internal quotation marks omitted)); *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987) (“[A] petitioner cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process. Due process is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal.” (quoting *Reid v. Engen*, 765 F.2d 1457, 1461 (9th Cir. 1985))); *Barron v. Ashcroft*, 358 F.3d 674, 676–78 (9th Cir. 2004) (requiring exhaustion where the BIA could have remedied the alleged due process violation—“absence of counsel and lack of opportunity to present a case”—by ordering a rehearing with counsel present); *Sanchez-Cruz v. INS*, 255 F.3d 775, 780 (9th Cir. 2001) (applying exhaustion requirement to due process claim alleging IJ bias because the alleged violation was correctable by the BIA).

The exhaustion requirement does not apply to statutory claims that the BIA has no authority to address. *See, e.g.*, *Coyt v. Holder*, 593 F.3d 902, 905 (9th Cir. 2010) (exhaustion requirement inapplicable to claim that regulation conflicted with statute “[b]ecause the BIA has no authority to declare a regulation invalid”). *But see Lee v. Holder*, 599 F.3d 973, 976 (9th Cir. 2010) (cursorily applying exhaustion requirement to claim to the validity of U visa regulations).

The exhaustion requirement is inapplicable to claims arising under international law that the BIA lacks jurisdiction to address. *See Padilla-Padilla*, 463 F.3d at 977.

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

"[T]here are a number of exceptions to the general rule requiring exhaustion, covering situations such as where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (quoting *SEC v. G. C. George Sec., Inc.*, 637 F.2d 685, 688 n.4 (9th Cir. 1981))).

"Some issues may be so entirely foreclosed by prior BIA case law that no remedies are 'available . . . as of right' with regard to them before IJs and the BIA. The realm of such issues, however, cannot be broader than that encompassed by the futility exception to prudential exhaustion requirements. We therefore use the futility cases as a guide to the interpretation of the 'available . . . as of right' requirement." *Sun v. Ashcroft*, 370 F.3d 932, 942–43 (9th Cir. 2004) (citation omitted); *see also Gonzalez-Lara v. Garland*, 104 F.4th 1109, 1115 (9th Cir. 2024) (recognizing that "a petitioner does not need to exhaust a claim by applying for a form of relief where the application would be futile"); *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 896–97 (9th Cir. 2021) (petitioner not required to exhaust claim that he was eligible for withholding of removal because he faced persecution on account of his membership in the particular social group of persons erroneously believed to be gang members because the BIA had "rejected a nearly identical proposed social group" in an earlier decision); *Szonyi v. Barr*, 942 F.3d 874, 891 (9th Cir. 2019) ("Where the agency's position 'appears already set' and recourse to administrative remedies is 'very likely' futile, exhaustion is not required." (quoting *El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 747 (9th Cir. 1991))); *Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014) ("[I]f an issue is entirely foreclosed, such that the agency cannot give it unencumbered consideration, it is not available as of right and the statute does not require it to be exhausted.").

c. Motions to Reopen or Reconsider

"Section 1252(d)(1)'s exhaustion requirement . . . does not oblige a noncitizen to seek discretionary review, like reconsideration [or reopening] before the Board of Immigration Appeals." *Santos-Zacaria v. Garland*, 598 U.S. 411, 431 (2023); *accord Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) ("[M]otions to reconsider, like motions to reopen, are not 'remedies available . . . as of right' within the meaning of 8 U.S.C. § 1252(d)(1).").

d. Nationality Claims

The exhaustion requirement of 8 U.S.C. § 1252(d)(1) does not apply to a nationality claim—i.e., to a nonfrivolous claim that the petitioner is a United States citizen—because the government is not permitted to deport citizens. *See Brown v. Holder*, 763 F.3d 1141, 1146–47 (9th Cir. 2014) (transferring the case to the district court pursuant to 8 U.S.C. § 1252(b)(5)(B) where there were genuine issues of material fact concerning the petitioner's nationality); *Ayala-Villanueva v. Holder*, 572 F.3d 736, 738–40 (9th Cir. 2009) (petition held in abeyance and matter transferred to district court pursuant to 8 U.S.C. § 1252(b)(5)(B)).

e. Events Occurring after Briefing before the BIA

"We do not require an alien to exhaust administrative remedies on legal issues based on events that occur *after* briefing to the BIA has been completed." *Alcaraz v. INS*, 384 F.3d 1150, 1158–59 (9th Cir. 2004) (applicants exhausted administrative remedies regarding repapering argument because agency's repapering policies were issued after briefing to the BIA); *see also Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1279–80 (9th Cir. 2018) (exhaustion requirement inapplicable where petition for review challenged BIA action committed after briefing was completed because the only remaining administrative remedies for such an action were discretionary remedies that were not available "as of right"); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 977–78 (9th Cir. 2006) (petitioners need not have exhausted a challenge to the BIA's reduction of the IJ's voluntary departure period because it occurred after briefing and petitioners should not have anticipated BIA's action in their BIA briefing).

f. Habeas Review

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

g. Waiver and Forfeiture

"Because § 1252(d)(1)'s exhaustion requirement is not jurisdictional, it is subject to waiver and forfeiture." *Santos-Zacaria v. Garland*, 598 U.S. 411, 423 (2023).

F. Departure from the United States

1. Departure or Removal Does Not Automatically Moot Petition for Review

Neither removal nor departure automatically terminates this court's jurisdiction over a petition for review. *See Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 844 (9th Cir. 2006) (removal); *Rivera v. Mukasey*, 508 F.3d 1271, 1277 (9th Cir. 2007) (voluntary departure).

"[A] petition for review is mooted by the petitioner's removal from the United States unless there is 'some remaining collateral consequence that may be redressed by success on the petition.'" *Del Cid Marroquin v. Lynch*, 823 F.3d 933, 935 (9th Cir. 2016) (quoting *Abdala v. INS*, 488 F.3d 1061, 1064 (9th Cir. 2007)); *see id.* at 935–36 (petition for review not moot where granting the petition would "at least increase the chances" of petitioner being allowed to return to the United States); *Blandino-Medina v. Holder*, 712 F.3d 1338, 1342 (9th Cir. 2013) (holding that petitioner's removal did not moot his petition for review where a favorable ruling would have made it at least hypothetically possible for him to obtain a waiver of inadmissibility).

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

2. Departure Does Not Preclude Motions to Reopen or Reconsider

"[T]he text of IIRIRA makes clear that the statutory right to file a motion to reopen and a motion to reconsider is not limited by whether the individual has departed the United States." *Toor v. Lynch*, 789 F.3d 1055, 1060 (9th Cir. 2015).

Regulations prohibiting noncitizens from pursuing motions to reopen or reconsider following departure from the United States ("the regulatory departure bar") are therefore invalid. *See* 8 C.F.R. § 1003.2(d) ("A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."); 8 C.F.R. § 1003.23(b)(1) ("A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.").

"The regulatory departure bar is invalid irrespective of the manner in which the movant departed the United States"—i.e., irrespective of whether the movant departed voluntarily or involuntarily. *Toor*, 789 F.3d at 1064.

The "departure bar" in 8 C.F.R. § 1003.23(b)(1) also does not limit an immigration judge's discretion to sua sponte reopen removal proceedings after a noncitizen's departure from the United States. *See Rubalcaba v. Garland*, 998 F.3d 1031, 1036–41 (9th Cir. 2021). Accordingly, a noncitizen's departure from the United States does not limit an IJ's discretion to reopen or reconsider on the IJ's own motion.

Where a petitioner who has filed a motion to reopen is involuntarily removed before the BIA has ruled on the motion, the BIA cannot deem the motion to reopen withdrawn. *See Coyt v. Holder*, 593 F.3d 902, 906–07 (9th Cir. 2010) (holding that "8 C.F.R. § 1003.2(d) cannot apply to cause the withdrawal of an administrative petition filed by a petitioner who has been involuntarily removed from the United States," because "[i]t would completely eviscerate the statutory right to reopen provided by Congress if the agency deems a motion to reopen constructively withdrawn whenever the government physically removes the petitioner while his motion is pending before the BIA").

Similarly, physical removal of a petitioner by the United States *before* the petitioner has filed a motion to reopen does not preclude the petitioner from exercising the statutory right under 8 U.S.C. § 1229a(c)(7)(C) to file a motion to reopen within 90 days after entry of a final order of removal. *See Reyes-Torres v. Holder*, 645 F.3d 1073, 1076–77 (9th Cir. 2011); *see also Toor*, 789 F.3d at 1063

("In both *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010), and *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011), we held that IIRIRA invalidated the regulatory departure bar as applied to involuntary departures.").

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

G. Fugitive Disentitlement Doctrine

An applicant who fails to report for deportation or who fails to keep the courts apprised of his or her current address may have a petition for review dismissed under the fugitive disentitlement doctrine.

"Although an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice. Like the fugitive in a criminal matter, the alien who is a fugitive from a deportation order should ordinarily be barred by his fugitive status from calling upon the resources of the court to determine his claims." *Zapon v. DOJ*, 53 F.3d 283, 285 (9th Cir. 1995) (quoting *Bar-Levy v. U.S. DOJ*, 990 F.2d 33, 35 (2d Cir. 1993)); *see also Antonio-Martinez v. INS*, 317 F.3d 1089, 1091–93 (9th Cir. 2003) (dismissing petition for review under the fugitive disentitlement doctrine where petitioner had lost contact with his attorney and the agency and all efforts to contact him failed for over two years); *cf. Maldonado v. Lynch*, 786 F.3d 1155, 1161 (9th Cir. 2015) (en banc) (declining to apply the fugitive disentitlement doctrine because the petitioner did not flee); *Bhasin v. Gonzales*, 423 F.3d 977, 988–89 (9th Cir. 2005) (holding that the BIA abused its discretion by dismissing motion to reopen under the fugitive disentitlement doctrine where BIA sent notices to incorrect addresses and the case did not involve a "deliberate flouting" of immigration laws).

"The 'fugitive disentitlement doctrine' is a 'severe sanction that we do not lightly impose.'" *Bhasin*, 423 F.3d at 987–88 (quoting *Antonio-Martinez v. INS*, 317 F.3d 1089, 1091 (9th Cir. 2003)).

In *Uc Encarnacion v. Bondi*, 156 F.4th 927, 933–34 (9th Cir. 2025), the court held that the government's motion to dismiss the petition for review under the fugitive disentitlement doctrine was untimely where the government waited two years to file the motion, the government filed the motion one week before oral argument, and DHS knew of the petitioner's current whereabouts. The court also held that applying the fugitive disentitlement doctrine was unwarranted because, although the petitioner failed to attend a 2022 appointment with DHS, the petitioner was not a fugitive or in hiding and his whereabouts were likely known to his counsel, DHS, and the court. *Id.* at 934–35.

"[T]he critical question the court must ask when deciding whether to apply the fugitive disentitlement doctrine is whether the appellant is a fugitive at the time the appeal is pending." *Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009) (declining to dismiss petition for review under fugitive disentitlement doctrine where, although petitioner failed to report for removal in 2004, she was not a fugitive at the time she filed her petition for review in 2006 or at the time of the court's disposition of the petition in 2009).

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

H. Proper Respondent

The proper respondent in a petition for review is the Attorney General. *See* 8 U.S.C. § 1252(b)(3)(A).

The proper respondent in an immigration habeas petition under 28 U.S.C. § 2241 is the immediate custodian. *See Doe v. Garland*, 109 F.4th 1188, 1194–99 (9th Cir. 2024) (explaining that under *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), when a § 2241 habeas petitioner challenges his present physical confinement, he must name his immediate physical custodian—the warden of the facility where he is detained—as respondent and file the petition in the district of confinement).

I. Requirements of a Petition for Review Under § 1252(c)

Section 1252(c) states that "[a] petition for review or for habeas corpus of an order of removal . . . (1) shall attach a copy of such order, and (2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding." 8 U.S.C. § 1252(c).

These requirements are neither jurisdictional nor mandatory claim-processing rules. *See Kazarian v. Bondi*, 159 F.4th 690, 692 n.1 (9th Cir. 2025) (rejecting the government's argument that "§ 1252(c)'s requirements are mandatory claim-processing rules"); *id.* at 692–93 (denying government's motion to dismiss a petition for review where, although the petition misidentified the date of the BIA's decision and did not attach a copy of the BIA's order, as required by the statute, "the imperfections in [the] petition did not deprive the government of sufficient notice of his claim or prejudice the government").

J. Limitation on Injunctive Relief—§ 1252(f)(1)

Section 1252(f)(1) states that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter [8 U.S.C. §§ 1221–32], . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1).

The court held that § 1252(f)(1) did not bar the district court's stay of the "Remain in Mexico" policy under § 705 of the Administrative Procedure Act. *See Immigrant Defs. L. Ctr. v. Noem*, 145 F.4th 972, 990 (9th Cir. 2025).

IV. HISTORICAL CONTEXT

A. Reorganization of the Immigration and Naturalization Service

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

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

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

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

B. Reorganization of Administrative Regulations

The Homeland Security Act of 2002 transferred the functions of the former INS to DHS. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9824 (Feb. 28, 2003). The Executive Office for Immigration Review (EOIR), including the Board of Immigration Appeals (BIA) and the Immigration Judges, remain under the Department of Justice. *Id.* These changes required reorganization of the administrative regulations governing immigration proceedings to reflect the transfer of INS functions to DHS. *See id.* DHS regulations begin at 8 C.F.R. § 1.1, and EOIR regulations begin at 8 C.F.R. § 1001.1.

C. Exclusion Orders

Before IIRIRA, noncitizens who had not made an "entry" into the United States were placed in exclusion proceedings. *See Hose v. INS*, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). "Under pre-IIRIRA law, the appropriate avenue for judicial review of a final order of exclusion was for the alien to file a petition for a writ of habeas corpus in the district court." *Id.*; *see also* 8 U.S.C. § 1105a(b) (1995).

IIRIRA's permanent rules established a unified "removal" proceeding and eliminated the different jurisdictional tracks for deportation and exclusion proceedings. *See Hose*, 180 F.3d at 994 & n.1; *see also Padilla-Padilla v. Gonzales*, 463 F.3d 972, 974 (9th Cir. 2006) ("Prior to IIRIRA, aliens were placed in either deportation proceedings or exclusion proceedings. IIRIRA combined these two proceedings into a single proceeding, now called removal.").

IIRIRA's transitional rules also redirected review of exclusion orders from the district courts to the courts of appeal. *See id.* (citing IIRIRA § 309(c)(4)(A)).

V. LIMITED REVIEW OF DISCRETIONARY ACTIONS UNDER § 1252(a)(2)(B)

This section discusses three related statutory provisions:

1. § 1252(a)(2)(B)(i), which precludes judicial review of findings of fact and discretionary decisions relating to five enumerated forms of relief;

2. § 1252(a)(2)(B)(ii), which precludes judicial review of certain discretionary decisions or actions (other than the granting of asylum) not listed in subsection (i); and

3. § 1252(a)(2)(D), sometimes referred to as the Limited Review Provision, which preserves judicial review of constitutional questions and questions of law, including mixed questions of law and fact, notwithstanding the jurisdiction-stripping language of § 1252(a)(2)(B)(i) and (ii).

These provisions govern judicial review of a large number of discretionary administrative decisions in immigration cases.

A. Limited Review of Certain Discretionary Relief Under § 1252(a)(2)(B)(i)

Section 1252(a)(2)(B)(i) states that no court shall have jurisdiction to review:

> any judgment regarding the granting of relief under section 1182(h) [criminal inadmissibility waiver], 1182(i) [fraud or misrepresentation waiver], 1229b [cancellation of removal], 1229c [voluntary departure], or 1255 [adjustment of status] of this title . . . .

8 U.S.C. § 1252(a)(2)(B)(i).

As to these specified five forms of discretionary relief, § 1252(a)(2)(B)(i) precludes judicial review of the **purely discretionary ultimate judgment** as to whether to grant relief.

In addition, because § 1252(a)(2)(B)(i) precludes judicial review of "any judgment *relating to* the granting of relief," *Patel v. Garland*, 596 U.S. 328, 339

(2022), § 1252(a)(2)(B)(i) also precludes judicial review of **factual findings** relating to the granting of relief. *See Patel v. Garland*, 596 U.S. 328, 339 (2022) ("§ 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."); *see also Nasrallah v. Barr*, 590 U.S. 573, 586 (2020) ("§ 1252(a)(2)(B)[] states that a noncitizen may not bring a factual challenge to orders denying discretionary relief, including cancellation of removal, voluntary departure, adjustment of status, [and] certain inadmissibility waivers." (quoting *Kucana v. Holder*, 558 U.S. 233, 248 (2010))).

But § 1252(a)(2)(B)(i) does not preclude judicial review of **questions of law** relating to the granting of these five forms of relief. *See* 8 U.S.C. § 1252(a)(2)(D) ("Nothing in subparagraph (B) [i.e., § 1252(a)(2)(B)] or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.").

Furthermore, because the application of a statutory legal standard to a set of undisputed or established facts constitutes a "question of law" for purposes of § 1252(a)(2)(D), *see Wilkinson v. Garland*, 601 U.S. 209, 212 (2024); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020), § 1252(a)(2)(B)(i) does not preclude judicial review of **mixed questions of law and fact** relating to the granting of relief.

Thus, although § 1252(a)(2)(B)(i) may preclude judicial review of the ultimate exercise of discretion (sometimes referred to as "step two"), it does not preclude judicial review of threshold questions (sometimes referred to as "step one") that involve the application of a statutory standard to a set of undisputed or established facts. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025) ("[W]e 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.").

Thus, with respect to the five forms of relief specified in § 1252(a)(2)(B)(i), the court has jurisdiction over questions of law and mixed questions of law and fact but lacks jurisdiction over the purely discretionary ultimate judgment and findings of fact.

The mere fact that a mixed question involves some exercise of discretion does not mean that the question is unreviewable. *See Ruiz v. Bondi*, 163 F.4th 586, 598 (9th Cir. 2025) ("Nothing in *Wilkinson* suggests that discretionary mixed questions are unreviewable.").

Section 1252(a)(2)(B)(i) applies to agency actions taken outside of removal proceedings. *See* 8 U.S.C. § 1252(a)(2)(B) ("Notwithstanding any other provision of law . . . , and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title . . . ."); *Garcia v. U.S. Citizenship & Immigr. Servs.*, 146 F.4th 743, 749 (9th Cir. 2025) ("[U]nder *Nakka*'s construction of the plain language of § 1252(a)(2)(B)(i), it matters not that USCIS denied Cabello's requested relief outside the context of removal proceedings. Section 1252(a)(2)(B)(i) applies all the same. Every other circuit to address the question has likewise held that § 1252(a)(2)(B)(i) precludes district court review of challenges to USCIS adjustment of status determinations made outside the context of removal proceedings."); *Nakka v. U.S. Citizenship & Immigr. Servs.*, 111 F.4th 995, 1008 (9th Cir. 2024) ("[B]ecause of the 'regardless' clause, § 1252(a)(2)(B)(i) must be interpreted as also encompassing judgments regarding the granting of discretionary relief that are made by USCIS and DHS outside removal proceedings."); *cf. Bouarfa v. Mayorkas*, 604 U.S. 6, 13 n.4 (2024) ("We . . . assume—without deciding—that § 1252(a)(2)(B) applies when, as here, a noncitizen is neither in removal proceedings nor seeking review of a final order of removal.").

1. Cancellation of Removal (§ 1229b)

The court has jurisdiction over a determination that a noncitizen's removal would result in "exceptional and extremely unusual hardship" to a qualifying relative under 8 U.S.C. § 1229b(b)(1)(D). *See Wilkinson v. Garland*, 601 U.S. 209, 211–12 (2024) (jurisdiction under § 1252(a)(2)(D)); *Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1000 (9th Cir. 2025) (same).

The court has jurisdiction over step-one determinations of statutory eligibility under § 1252(a)(2)(D). *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025) ("For challenges to the agency's denial of cancellation of removal or NACARA cancellation of removal, we have jurisdiction over . . . step-one determinations of statutory eligibility.").

The court lacks jurisdiction over factual determinations. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025) ("For challenges to the agency's denial of cancellation of removal or NACARA cancellation of removal, . . . we lack jurisdiction over purely factual findings, such as an adverse credibility determination or a finding of historical fact . . . .").

The court lacks jurisdiction over the ultimate discretionary decision whether to grant cancellation of removal. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025) ("For challenges to the agency's denial of cancellation of removal or NACARA cancellation of removal, . . . 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.").

The court has jurisdiction to review denial of a motion to reopen cancellation of removal proceedings where the motion challenges the BIA's decision that the petitioner failed to establish a prima facie case of statutory eligibility for relief; such decision presents a mixed question of law and fact reviewable under § 1252(a)(2)(D). *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 963–64 (9th Cir. 2025) (motion included both cancellation of removal and cancellation of removal under NACARA).

Where the BIA's denial of a motion to reopen or a motion for a continuance turns on a factual finding relating to the petitioner's eligibility for cancellation of removal, the court lacks jurisdiction to review the BIA's denial of the motion to reopen or the motion for a continuance. *See Figueroa Ochoa v. Garland*, 91 F.4th 1289, 1293 (9th Cir. 2024). Although the petitioner sought review of procedural motions that do not fall within the scope of § 1252(a)(2)(B)(i), the jurisdictional bar of § 1252(a)(2)(B)(i) applied because the factual determinations were determinative of the ultimate granting or denying of relief, which in turn informed the agency's challenged procedural rulings. *See id.*

2. Adjustment of Status (§ 1255)

With respect to adjustment of status proceedings, § 1252(a)(2)(B)(i) precludes jurisdiction over factual determinations. *See Patel v. Garland*, 596 U.S. 328, 337–40 (2022) (no jurisdiction to review factual determinations of whether petitioner testified credibly and subjectively intended to misrepresent himself as a citizen).

Where the BIA's denial of a motion to reopen or a motion for a continuance turns on a factual finding relating to the petitioner's eligibility for adjustment of status, the court lacks jurisdiction to review the BIA's denial of the motion to reopen or the motion for a continuance. *See Figueroa Ochoa v. Garland*, 91 F.4th 1289, 1293 (9th Cir. 2024). Although the petitioner sought review of procedural motions that do not fall within the scope of § 1252(a)(2)(B)(i), the jurisdictional bar of § 1252(a)(2)(B)(i) applied because the factual determinations were determinative of the ultimate granting or denying of relief, which in turn informed the agency's challenged procedural rulings. *See id.*

Section 1252(b)(2)(B)(i) does not preclude structural challenges to agency practices governing adjustment of status applications. *See Nakka v. U.S. Citizenship & Immigr. Servs.*, 111 F.4th 995, 1004–09 (9th Cir. 2024) (holding that 8 U.S.C. § 1252(a)(2)(B)(i) precludes judicial review of denials of individual adjustment of status applications but does not strip district courts of jurisdiction to review collateral challenges to generally applicable agency policies and procedures governing such applications). (Plaintiffs' claims nevertheless faced significant procedural hurdles. *See id.* at 1010–16.)

In *Garcia v. United States Citizenship & Immigration Services*, 146 F.4th 743, 746 (9th Cir. 2025), plaintiff sought adjustment of status under 8 U.S.C. § 1255(m), which allows for the discretionary adjustment of U-visa holders. After denial of the application, plaintiff filed a civil action challenging USCIS's denial of discretionary relief as arbitrary and capricious under the Administrative Procedure Act, and the district court dismissed the complaint for lack of jurisdiction. *Id.* at 747. The court of appeals held that 8 U.S.C. § 1252(a)(2)(B)(i) applies to a district court review of challenges to USCIS adjustment of status determinations made outside the context of removal proceedings. *Id.* at 749. The court also held that *Nakka*'s exception for collateral challenges was inapplicable because USCIS had denied the plaintiff's request for adjustment of status, and once a plaintiff has applied for adjustment of status and the agency has denied it, the plaintiff ceases to have a collateral claim. *Id.* at 751.

3. Criminal Admissibility Waiver (§ 1182(h))

[Reserved]

4. Fraud or Misrepresentation Waiver (§ 1182(i))

[Reserved]

5. Voluntary Departure (§ 1229c)

[Reserved]

B. Older Case Law Applying § 1252(a)(2)(B)(i)

The court's pre-*Patel* (2022), pre-*Wilkinson* (2024) case law applying § 1252(a)(2)(B)(i) includes the following decisions.

In addressing whether § 1252(a)(2)(B)(i) strips jurisdiction over threshold questions antecedent to the ultimate granting or denial of relief, this court focused on whether the threshold question was discretionary or nondiscretionary. *E.g.*, *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141–44 (9th Cir. 2002), *abrogated on other grounds as stated in De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282, 1287 (9th Cir. 2022), *reh'g en banc granted, opinion vacated*, 62 F.4th 1232 (9th Cir. 2023). Under *Patel* and *Wilkinson*, jurisdiction turns on whether the threshold question is a factual question (no jurisdiction) or a legal/mixed question (jurisdiction). Mixed questions are reviewable under § 1252(a)(2)(B)(i) and § 1252(a)(2)(D) even if they involve discretion. *See Ruiz v. Bondi*, 163 F.4th 586, 598 (9th Cir. 2025) ("Nothing in *Wilkinson* suggests that discretionary mixed questions are unreviewable.").

1. Cancellation of Removal

The court held that it lacks jurisdiction over ultimate discretionary decision whether to grant cancellation of removal. *See Bermudez v. Holder*, 586 F.3d 1167, 1169 (9th Cir. 2009) ("We lack jurisdiction to review a decision by the BIA denying an alien's application for cancellation of removal in the exercise of discretion."), *abrogated on other grounds as stated in Madrigal-Barcenas v.*

Lynch, 797 F.3d 643, 644 (9th Cir. 2015); *see also Aguilar-Osorio v. Garland*, 991 F.3d 997, 999 (9th Cir. 2021) ("This court does not have jurisdiction to review the merits of the BIA's discretionary decision to deny cancellation of removal based on hardship.").

The court held that § 1252(a)(2)(B)(i) does not preclude judicial review of the purely legal and nondiscretionary question of whether the petitioner's daughter qualifies as a child for the purposes of 8 U.S.C. § 1229b(b)(1)(D). *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002), *abrogated on other grounds as stated in De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282, 1287 (9th Cir. 2022), *reh'g en banc granted, opinion vacated*, 62 F.4th 1232 (9th Cir. 2023).

The court held that is has jurisdiction to determine whether the BIA considered all relevant evidence in making discretionary cancellation of removal decision. *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."); *accord Vilchez v. Holder*, 682 F.3d 1195, 1200–01 (9th Cir. 2012) (court lacked jurisdiction over discretionary decision to deny cancellation of removal but exercised jurisdiction over claim that BIA failed to consider certain factors relevant to the decision).

Cases holding that § 1252(a)(2)(B)(i) precludes jurisdiction over the extreme hardship determination have been abrogated by *Wilkinson v. Garland*, 601 U.S. 209, 211–12 (2024). Such cases include: *Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012); *Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008) (no jurisdiction to review exceptional and extremely unusual hardship determination); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) ("[W]e lack jurisdiction to review the IJ's subjective, discretionary determination that Martinez-Rosas did not demonstrate 'exceptional and extremely unusual hardship' under 8 U.S.C. § 1229b(b)(1)(D)."), *abrogation recognized by Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1000 (9th Cir. 2025); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 (9th Cir. 2003) (holding that "an 'exceptional and extremely unusual hardship' determination is a subjective, discretionary judgment that has been carved out of our appellate jurisdiction"), *overruling recognized by Lemus-Escobar v. Bondi*, 158 F.4th 944, 1088 (9th Cir. 2025); *cf. Mendez-Castro v. Mukasey*, 552 F.3d 975, 980–81 (9th Cir. 2009) (because review of the hardship determination was precluded, so too was review of the petitioner's claim that the IJ's most recent hardship determination was factually inconsistent with prior agency hardship determinations), *abrogation recognized by Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1000 (9th Cir. 2025).

The court has jurisdiction to determine legal questions of whether the hardship standard violates international law or due process. *See Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (court has jurisdiction to consider questions of statutory interpretation, including whether the hardship standard is consistent with international law); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004–06 (9th Cir. 2003) ("Although we lack jurisdiction to review whether an alien has established exceptional and extremely unusual hardship, we retain jurisdiction to consider whether the BIA's interpretation of the hardship standard violates due process." (footnote omitted)).

The court held that a petitioner may not circumvent § 1252(a)(1)(B)(i)'s preclusion of judicial review over "exceptional and extremely unusual hardship" determinations by recharacterizing the claim as a violation of due process. *See Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) ("[T]raditional abuse of discretion challenges recast as alleged due process violations do not present sufficiently colorable constitutional questions as to give this court jurisdiction."); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) ("Although we retain jurisdiction to review due process challenges, a petitioner must allege at least a colorable constitutional violation. . . . [Petitioner's] claim that the IJ denied her right to due process by misapplying the facts of her case to the applicable law does not meet this requirement."), *abrogation recognized by Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1000 (9th Cir. 2025).

The court held that it has jurisdiction to review whether an applicant satisfies the statutory requirements for good moral character but lacks jurisdiction to review whether the applicant otherwise satisfies the good moral character requirement. *See Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 854 (9th Cir. 2006) (holding that a good moral character determination is reviewable only where it is based on one of the statutory exclusions found in 8 U.S.C. § 1101(f)); *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) ("Although we lack jurisdiction to review discretionary determinations of moral character, we have jurisdiction to determine whether a petitioner's conduct falls within a per se exclusion category, an issue that relates to eligibility for cancellation."), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028, 1031 (9th Cir. 2009) (en banc).

The court has jurisdiction to consider whether the BIA acted within its regulatory authority in denying cancellation of removal. *See Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012) (holding that § 1252(a)(2)(B)(i) does "not apply where, as here, the petitioner raises a question of law—whether the BIA acted within its regulatory authority").

The court has "jurisdiction over a constitutional challenge to a BIA decision denying cancellation of removal only if the constitutional claim is colorable, i.e., if it has some possible validity." *Arteaga-De Alvarez v. Holder*, 704 F.3d 730, 736 (9th Cir. 2012) (internal quotation marks omitted) (concluding that petitioner did not present a colorable due process claim where she argued that the "the denial of her application for cancellation of removal is contrary to a prior agency hardship determination, in this case the grant of cancellation of removal to her husband four years earlier on the basis of similar, but not identical facts").

The court has jurisdiction to review colorable legal claims relating to cancellation of removal. *See Arteaga-De Alvarez v. Holder*, 704 F.3d 730, 737–39 (9th Cir. 2012) (jurisdiction to consider colorable legal claim that the BIA's hardship determination was based on an error of statutory interpretation).

The court held that it lacks jurisdiction to consider a motion to reconsider where the basis for reconsideration is that the agency failed to properly weigh the hardship evidence. *See Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) ("[T]he BIA's denial of the motion to reconsider falls outside the court's jurisdiction because the court cannot reconsider the discretionary, fact-based determination that petitioners failed to demonstrate the requisite hardship.").

2. Cancellation of Removal under NACARA

Section 1252(a)(2)(B)(i) applies to cancellation of removal under NACARA § 203. *See Monroy v. Lynch*, 821 F.3d 1175, 1177 (9th Cir. 2016) ("[A]s with non-NACARA cancellation of removal, § 1252(a)(2)(B)(i) bars us from reviewing the BIA's discretionary denial of NACARA cancellation of removal.").

The court held in *Lanuza v. Holder*, 597 F.3d 970, 972 (9th Cir. 2010), that "we lack jurisdiction to determine Samayoa's statutory eligibility for NACARA § 203 relief."

The court has jurisdiction to address a mixed question of law and fact relating to eligibility for cancellation of removal under NACARA. *See Barrios v. Holder*, 581 F.3d 849, 857 (9th Cir. 2009) (reviewing BIA's ruling that petitioner failed to establish threshold requirement for relief under NACARA because it was a mixed question of law and fact reviewable under § 1252(a)(2)(D)), *abrogated on other grounds by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

3. Adjustment of Status

The BIA's ultimate discretionary decision to deny adjustment of status under § 1255 is unreviewable under § 1252(a)(2)(B)(i). *See Torres-Valdivias v. Lynch*, 786 F.3d 1147, 1151 (9th Cir. 2015); *Hosseini v. Gonzales*, 471 F.3d 953, 956–57 (9th Cir. 2006) (no jurisdiction to review the BIA's denial of adjustment of status claim where petitioner did not contend discretionary denial of adjustment was unconstitutional or unlawful)

The court has jurisdiction under § 1252(a)(2)(D) to review questions of law. *See Carrillo de Palacios v. Holder*, 708 F.3d 1066, 1069 (9th Cir. 2013) ("When addressing adjustment-of-status issues contained in final orders of removal, we have jurisdiction to review questions of law under 8 U.S.C. § 1252(a)(2)(D).").

The court had jurisdiction under § 1252(a)(2)(D) to determine whether *Matter of Jean* is applicable in the context of an adjustment of status application under § 1255. *See Torres-Valdivias v. Lynch*, 786 F.3d 1147, 1151 (9th Cir. 2015).

A petitioner cannot circumvent § 1252(a)(2)(B)(i) by recharacterizing a challenge to the denial of an adjustment of status application as a constitutional claim. *See Bazua-Cota v. Gonzales*, 466 F.3d 747, 748–49 (9th Cir. 2006) (although the court "retains jurisdiction over petitions for review that raise colorable constitutional claims or questions of law," petitioner's contention "that the BIA and IJ violated his right to due process by failing to properly weigh the equities and hardship before denying his application for adjustment of status" did not state a colorable constitutional or legal claim).

The court has jurisdiction to determine the purely legal question of the meaning of "spouse" under § 1151(b)(2)(A)(i) in connection with review of an adjustment of status denial. *See Freeman v. Gonzales*, 444 F.3d 1031, 1037 (9th Cir. 2006).

4. Voluntary Departure

Section 1252(a)(2)(B)(i) precludes jurisdiction to review "a discretionary denial of voluntary departure." *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1182 n.3 (9th Cir. 2021).

But the court has jurisdiction to review constitutional claims and questions of law in challenges to denials of voluntary departure. *See 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." (citations and internal quotation marks omitted)).

The court has jurisdiction under § 1252(a)(2)(D) to "correct erroneous interpretations of 8 U.S.C. § 1229c." *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1182 n.3 (9th Cir. 2021).

The court has jurisdiction under § 1252(a)(2)(D) to review whether the BIA and IJ failed to consider the appropriate factors or relied on improper evidence in denying voluntary departure. *See Zamorano v. Garland*, 2 F.4th 1213, 1221 (9th Cir. 2021).

The court has jurisdiction under § 1252(a)(2)(D) to determine the meaning of the term "physically present" in § 1229c(b). *See Corro-Barragan v. Holder*, 718 F.3d 1174, 1176 (9th Cir. 2013).

The 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. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 976 (9th Cir. 2006).

Apart from § 1252(a)(2)(B)(i), the court has held that it lacks jurisdiction to review the discretionary denial of voluntary departure under 8 U.S.C. § 1229c(f), which 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)." *See 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) does not preclude judicial review of questions of law relating to voluntary departure. *See Corro-Barragan v. Holder*, 718 F.3d 1174, 1176 (9th Cir. 2013).

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. *See Gil v. Holder*, 651 F.3d 1000, 1006 (9th Cir. 2011) (where the IJ denied voluntary departure on two grounds, one legal and one an exercise of discretion, and the BIA affirmed that denial on the sole ground of discretion, the court lacked jurisdiction to review the petitioner's challenge to the denial of voluntary departure), *abrogated on other grounds by Moncrieffe v. Holder*, 569 U.S. 184 (2013).

C. Limited Review of Discretionary Actions Under § 1252(a)(2)(B)(ii)

Section 1252(a)(2)(B)(ii) states that no court shall have jurisdiction to review:

> any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter [subchapter II of 8 U.S.C. Chapter 12, 8 U.S.C. §§ 1151–1382] to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) [asylum] of this title.

8 U.S.C. § 1252(a)(2)(B)(ii).

Section 1252(a)(2)(B)(ii) does not apply unless the discretionary authority at issue is specified by statute. Accordingly, it does not apply where discretion is conferred by regulation or case law. *See Kucana v. Holder*, 558 U.S. 233, 249 (2010) (holding that § 1252(a)(2)(B)(ii) does not proscribe judicial review of denials of motions to reopen, because the discretion to grant motions to reopen is conferred by regulation rather than by statute); *see also Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003) ("[T]he language of § 1252(a)(2)(B)(ii) requires that the discretionary authority be 'specified' under the

INA. . . . [T]he language of the statute in question must provide the discretionary authority.").

Thus, § 1252(a)(2)(B)(ii) does not strip jurisdiction over petitions challenging the denial of a continuance. *See Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1246 (9th Cir. 2008) (holding that § 1252(a)(2)(B)(ii) is inapplicable because an immigration judge's authority to continue a case is not "specified under" the subchapter II to be in the discretion of the Attorney General or DHS Secretary).

For the same reason, § 1252(a)(2)(B)(ii) does not strip jurisdiction over petitions challenging the denial of a motion to reopen. *See Kucana v. Holder*, 558 U.S. 233, 249 (2010) (so holding); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528–29 (9th Cir. 2004) (holding that § 1252(a)(2)(B)(ii) is inapplicable because an IJ's discretion to reopen derives from regulations promulgated by the Attorney General rather than from a statute under the relevant subchapter); *accord Nath v. Gonzales*, 467 F.3d 1185, 1188 (9th Cir. 2006) (same).

Section 1252(a)(2)(B)(ii) is governed by the reasoning of *Patel* and *Wilkinson*. *See Zia v. Garland*, 112 F.4th 1194, 1200 (9th Cir. 2024).

Thus, § 1252(a)(2)(B)(ii) precludes judicial review of factual determinations related to a discretionary decision or action covered by the provision. *See Zia v. Garland*, 112 F.4th 1194, 1200–02 (9th Cir. 2024); *see also Nasrallah v. Barr*, 590 U.S. 573, 586 (2020) (§ 1252(a)(2)(B)[] states that a noncitizen may not bring a factual challenge to . . . determinations 'made discretionary by statute.'" (quoting *Kucana v. Holder*, 558 U.S. 233, 248 (2010))).

But § 1252(a)(2)(D) preserves judicial review of mixed questions of law and fact underlying a discretionary decision or action covered by § 1252(a)(2)(B)(ii). *See Zia v. Garland*, 112 F.4th 1194, 1201–02 (9th Cir. 2024); *e.g.*, *Magana-Magana v. Bondi*, 129 F.4th 557, 568 (9th Cir. 2025) (extraordinary-circumstances inquiry under 8 U.S.C. § 1229a(c)(7)(C)(iv)(III) reviewable as mixed question of law and fact); *Zia v. Garland*, 112 F.4th 1194, 1202 (9th Cir. 2024) (good faith marriage determination under 8 U.S.C. § 1186a(c)(4) reviewable as a mixed question of law and fact).

In concluding that a decision to revoke an approved visa petition under § 1155 falls within the scope of discretionary decisions covered by § 1252(a)(2)(B)(ii), *Bouarfa* emphasized that: (1) the word "may" suggested discretion; (2) "Congress has in no way prescribed how that discretion must be exercised"; (3) the statute authorizes the Secretary to revoke a petition "at any time," for whatever reason "he deems to be good and sufficient cause"; and (4) § 1155 confers even broader discretion than the relief provisions included in § 1252(a)(2)(B)(i). *See Bouarfa v. Mayorkas*, 604 U.S. 6, 13–15 (2024).

Thus, to determine whether authority for a decision or action "is specified . . . to be in the discretion of the Attorney General or the Secretary of Homeland Security," 8 U.S.C. § 1252(a)(2)(B)(ii), the court considers whether the plain terms of the statute invoke the agency's discretion. *See Chairez v. Mayorkas*, 168 F.4th 1227, 1232 (9th Cir. 2026). Permissive terms, such as "may," "considers," or "deems," suggest discretion, while words such as "shall" or "must" suggest a lack of discretion. *See id.* at 1234.

The fact that a statute guides the exercise of discretion does not mean that the decision is nondiscretionary for purposes of § 1252(a)(2)(B)(ii). *See Chairez v. Mayorkas*, 168 F.4th 1227, 1234 (9th Cir. 2026) ("[W]hen Congress signals that it is merely providing guidance to the agency on its exercise of discretion, the discretionary judgment call as a whole falls within the jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii).").

Thus, a statute that states that the DHS Secretary "may, at any time, for what he deems to be *good and sufficient cause*," revoke an approved visa petition, 8 U.S.C. § 1155 (emphasis added), is discretionary under § 1252(a)(2)(B)(ii). *See Bouarfa v. Mayorkas*, 604 U.S. 6, 9 (2024). Similarly, a statute that states that the DHS Secretary "may waive" inadmissibility "if the Secretary of Homeland Security considers it to be *in the public or national interest* to do so," 8 U.S.C. § 1182(d)(14) (emphasis added), is discretionary under § 1252(a)(2)(B)(ii). *See Chairez v. Mayorkas*, 168 F.4th 1227, 1233 (9th Cir. 2026). The italicized phrases provide guidance for the exercise of discretion, but they do not render the decision nondiscretionary for purposes of § 1252(a)(2)(B)(ii).

The following decisions or actions fall within the scope of discretionary decisions or actions covered by § 1252(a)(2)(B)(ii):

- The decision to revoke an approved visa petition under 8 U.S.C. § 1155. *See Bouarfa v. Mayorkas*, 604 U.S. 6, 13 (2024) ("It is clear on the face of § 1155 that the revocation provision is a quintessential grant of discretion to the Secretary.”). DHS revoked the petition based on a sham marriage determination.

- A good faith marriage waiver under 8 U.S.C. § 1186a(c)(4). *See Zia v. Garland*, 112 F.4th 1194, 1199–1200 (9th Cir. 2024) (holding that a good faith marriage waiver under § 1186a(c)(4)(B) fits within the jurisdiction-stripping provision of § 1252(a)(2)(B)(ii)). Whether a marriage was in good faith, by contrast, presents a mixed question of law and fact over which the court has jurisdiction. *See Zia v. Garland*, 112 F.4th 1194, 1202 (9th Cir. 2024).

- Whether an applicant has shown extraordinary circumstances for waiving the one-year deadline for filing of a motion to reopen under 8 U.S.C. § 1229a(c)(7)(C)(iv)(III). *See Magana-Magana v. Bondi*, 129 F.4th 557, 566 (9th Cir. 2025).

- Denial of a request for a waiver of inadmissibility under 8 U.S.C. § 1182(d)(14). *See Chairez v. Mayorkas*, 168 F.4th 1227, 1232 (9th Cir. 2026).

In *Bouarfa v. Mayorkas*, 604 U.S. 6, 19 (2024), the Court declined to decide “whether § 1252(a)(2)(B)(ii) strips courts of jurisdiction to review threshold determinations that the agency must make before exercising discretion.” At minimum, § 1252(a)(2)(B)(ii) does not strip the court of jurisdiction to decide threshold mixed questions of law and fact that are antecedent to the ultimate discretionary decision. *See Magana-Magana v. Bondi*, 129 F.4th 557, 569 (9th Cir. 2025).

Section 1252(a)(2)(B)(ii) bars review of an exercise of discretion but it does not preclude jurisdiction challenges to the extent of the Attorney General’s or DHS Secretary’s authority under a covered statute. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

By analogy to § 1252(a)(2)(B)(i), the court lacks jurisdiction to review purely discretionary threshold questions that involve discretion but not the application of a statutory legal standard. *Cf. Lemus-Escobar v. Bondi*, 158 F.4th 944, 954 (9th Cir. 2025) (“For challenges to the agency’s denial of cancellation of removal or NACARA cancellation of removal, we . . . we lack jurisdiction over *purely discretionary determinations*, *such as* [but not necessarily limited to] the agency's step-two determination that it would deny cancellation as a matter of discretion." (emphasis added)); *cf. Ruiz v. Bondi*, 163 F.4th 586, 599 (9th Cir. 2025) ("[N]ot all discretionary decisions implicate questions of law.").

By analogy to § 1252(a)(2)(B)(i), the court lacks jurisdiction to review the denial of a motion to reopen or a motion for a continuance when the decision whether to reopen or continue turns on a factual finding respecting the petitioner's eligibility for discretionary relief within the ambit of § 1252(a)(2)(B)(ii). Although motions to reopen and to continue are not themselves within the scope of § 1252(a)(2)(B)(ii), that provision precludes jurisdiction where the decision to reopen or continue turns on a factual finding that the court lacks jurisdiction to review. *See Figueroa Ochoa v. Garland*, 91 F.4th 1289, 1293 (9th Cir. 2024).

By analogy to § 1252(a)(2)(B)(i), § 1252(a)(2)(B)(ii) applies to discretionary agency decisions and actions taken outside of removal proceedings. *See* 8 U.S.C. § 1252(a)(2)(B); *Garcia v. U.S. Citizenship & Immigr. Servs.*, 146 F.4th 743, 749 (9th Cir. 2025) (so holding with respect to § 1252(a)(2)(B)(i)); *Nakka v. U.S. Citizenship & Immigr. Servs.*, 111 F.4th 995, 1008 (9th Cir. 2024) (same); *cf. Bouarfa v. Mayorkas*, 604 U.S. 6, 13 n.4 (2024) ("We . . . assume—without deciding—that § 1252(a)(2)(B) applies when, as here, a noncitizen is neither in removal proceedings nor seeking review of a final order of removal."); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 692 (9th Cir. 2003) ("[W]e need not decide whether § 1252(a)(2)(B)(ii) applies outside the context of removal proceedings.").

D. Older Case Law Applying § 1252(a)(2)(B)(ii)

The court's pre-*Patel* (2022), pre-*Wilkinson* (2024) case law applying § 1252(a)(2)(B)(ii) includes the following decisions.

Section 1252(a)(2)(B)(ii) does not preclude a court from determining the scope of authority granted by a statute. *See Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (holding as a matter of interpretation that 8 U.S.C. § 1231(a)(6) authorizes the Attorney General to detain a removable noncitizen only for a period reasonably necessary to secure the noncitizen's removal); *id.* at 688 (§ 1252(a)(2)(B)(ii) inapplicable because "[t]he aliens here . . . do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion."). Note that *Zadvydas* predated the REAL ID Act of 2005, which expressly restored jurisdiction over questions of law. *See* 8 U.S.C. § 1252(a)(2)(D).

The court held that "§ 1252(a)(2)(B)(ii) precludes judicial review of USCIS's denial of a waiver of inadmissibility under § 1182(d)(3)(A)(ii)." *Vega v. U.S. Citizenship & Immigr. Servs.*, 65 F.4th 469, 471 (9th Cir. 2023) (noting that "§ 1182(d)(3)(A)(ii) does not contain language that qualifies the agency's exercise of discretion," "lacks governing standards or statutory guidelines restricting decision-making," and "contains no meaningful standard that would suggest the agency is not exercising its pure or unfettered discretion" (internal quotation marks omitted)).

The court held that "that § 1252(a)(2)(B)(ii) strips federal courts of jurisdiction to review USCIS's decision to deny a national-interest waiver" under § 1153(b)(2)(B)(i). *Poursina v. U.S. Citizenship & Immigr. Servs.*, 936 F.3d 868, 873 (9th Cir. 2019).

The court held that § 1252(a)(2)(B)(ii) precludes judicial review "over the BIA's ultimate determination" that a noncitizen committed a particularly serious crime but that courts "retain jurisdiction to determine whether the BIA applied the correct legal standard." *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (citations and internal quotation marks omitted); *see also Hernandez v. Garland*, 52 F.4th 757, 765 (9th Cir. 2022) (in reviewing a particularly serious crime determination, "we are limited to ensuring that the agency relied on the appropriate factors and proper evidence" and "may not reweigh the evidence and reach our own determination about the crime's seriousness" (internal quotation marks omitted)); *Dominguez v. Barr*, 975 F.3d 725, 734 (9th Cir. 2020) (same); *Bare v. Barr*, 975 F.3d 952, 961 (9th Cir. 2020) (same).

The court held that the decision whether to issue an immigrant investor visa under 8 U.S.C. § 1153(b)(5) is not discretionary within the meaning of § 1252(a)(2)(B)(ii). *See Spencer Enters., Inc. v. United States*, 345 F.3d 683, 691–92 (9th Cir. 2003) (although the statute allowed the Attorney General to "determine" the petitioner's eligibility for an investor visa, the statute "sets out a series of standards for eligibility that the visa petitioner must meet" and "directs that the Attorney General 'shall . . . approve the petition' of any visa petitioner who is determined to be eligible" (quoting 8 U.S.C. § 1154(b)).

The court held that § 1252(a)(2)(B)(ii) does not bar judicial review of claims that the Attorney General or DHS Secretary exceeded his or her statutory authority. *See Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003).

The court has held that § 1252(a)(2)(B)(ii) precludes judicial review of the discretionary decision to grant or revoke parole under 8 U.S.C. § 1182(d)(5)(A). *See Vazquez Romero v. Garland*, 999 F.3d 656, 665 (9th Cir. 2021) ("We have previously concluded that the jurisdiction-stripping provision of § 1252(a)(2)(B)(ii) applies to discretionary parole decisions under § 1182(d)(5)."); *Hassan v. Chertoff*, 593 F.3d 785, 788–90 (9th Cir. 2010) (same).

Before *Patel* and *Wilkinson* (and in many cases before the adoption of § 1252(a)(2)(D)), some decisions asked whether § 1252(a)(2)(B)(ii) barred review over a threshold factual question or mixed question of law and fact by asking whether the statute placed the question entirely within the Attorney General's judgment or conscience or required the Attorney General to apply a statutory legal standard. *See, e.g.*, *Singh v. Holder*, 591 F.3d 1190, 1194 (9th Cir. 2010) ("Even as to factual issues, § [1252](a)(2)(B)(ii) precludes judicial review of a decision made under a particular statute only when the language of the statute in question provides the discretionary authority for the Attorney Generals action. For a statutory provision to strip this court of jurisdiction under § [1252](a)(2)(B)(ii), the provision must specify that the right or power to act is entirely within the Attorney General's judgment or conscience." (footnote, citations, internal quotation marks, and alterations omitted)); *see also Nakamoto v. Ashcroft*, 363 F.3d 874, 879 (9th Cir. 2004) ("§ 1252(a)(2)(B)(ii) precludes judicial review only of 'matters of pure discretion, rather than discretion guided by legal standards.'" (quoting *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 690 (9th Cir. 2003))). In *Singh*, the BIA denied the petitioner's application for a hardship waiver of the joint petition requirement, *see* 8 U.S.C. § 1186a(c)(4)(A), in connection with an application to remove conditions on residence and attain permanent resident status. The court held that the § 1252(a)(2)(B)(ii) precluded jurisdiction over the "ultimate decision whether to grant a waiver," *Singh v. Holder*, 591 F.3d 1190, 1194 (9th Cir. 2010), but did not preclude jurisdiction over the BIA's determination that that the petitioner failed to demonstrate extreme hardship, *see id.* at 1194–97. The court reasoned that "'extreme hardship' is a legal standard." *Id.* at 1196. Although the method of reasoning in *Singh* is not on all fours with the current framework, its ultimate conclusions are likely consistent with *Patel*, *Wilkinson*, and subsequent case law. That case law holds that § 1252(a)(2)(B)(ii) precludes review of the ultimate discretionary decision and threshold factual questions, but that

§ 1252(a)(2)(B)(ii) does not preclude jurisdiction over threshold questions involving the application of a statutory legal standard to a set of undisputed or established facts.

The court held that § 1252(a)(2)(B)(ii) precluded review of the ultimate decision to grant a fraud waiver under 8 U.S.C. § 1227(a)(1)(H) but that the court had jurisdiction to review whether the petitioner satisfied the statutory eligibility requirements. *See San Pedro v. Ashcroft*, 395 F.3d 1156, 1157–58 (9th Cir. 2005) ("[W]e have jurisdiction only to review the statutory eligibility elements under § 237(a)(1)(H) and lack jurisdiction to review discretionary denial of the waiver.").

The court held that § 1252(a)(2)(B)(ii) precludes jurisdiction over the IJ's discretionary decision to deny an applicant's request to withdraw an application for admission under 8 U.S.C. § 1225(a)(4). *See Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 819 (9th Cir. 2004) ("[T]hat decision is committed by statute to the discretion of the Attorney General. We, therefore, do not have jurisdiction to review it." (citation omitted)).

The court held that § 1252(a)(2)(B)(ii) does not preclude review of the Attorney General's determination that a noncitizen is deportable for having engaged in marriage fraud under 8 U.S.C. § 1227(a)(1)(G). *See Nakamoto v. Ashcroft*, 363 F.3d 874, 881 (9th Cir. 2004) (reasoning that § 1227(a)(1)(G) "requires a decidedly factual determination—the existence or non-existence of fraud—guided by legal standards").

E. Older Case Law Applying IIRIRA § 309(c)(4)(E)

The IIRIRA transition rules stated that "there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244 [suspension of deportation], or 245 of the Immigration and Nationality Act." IIRIRA, Pub. L. No. 104-208, div. C, § 309(c)(4)(E), 110 Stat. 3009.

In applying IIRIRA § 309(c)(4)(E) to suspension of deportation, this court held that the court had jurisdiction over statutory eligibility requirements that do not involve the exercise of discretion, including determinations regarding continuous physical presence and whether a petitioner falls into a per se category of bad moral character. *See Hernandez v. Ashcroft*, 345 F.3d 824, 833 (9th Cir. 2003). The court held that a general inquiry regarding whether a noncitizen had good moral character and an "extreme hardship" determination were discretionary decisions that the court lacked jurisdiction to review. *See id.* The court also held that whether a VAWA petitioner suffered "extreme cruelty" was a nondiscretionary decision over which the court had jurisdiction. *See id.* at 835. The court reasoned that the application of a legal standard to factual determinations was nondiscretionary. *See id.* at 833–34. *Accord Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997) ("As to those elements of statutory eligibility which do not involve the exercise of discretion, direct judicial review remains."), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010); *id.* at 1151 (court had jurisdiction over continuous physical presence determination).

The court held that IIRIRA § 309(c)(4)(E) does not strip a court of jurisdiction to review whether a discretionary decision was ultra vires the statute in question. *See Hernandez v. Ashcroft*, 345 F.3d 824, 847 (9th Cir. 2003) ("When the BIA acts where it has no legal authority to do so, it does not make a discretionary decision, and such a determination is not protected from judicial review. Because the decision made by the BIA was contrary to law, it was not discretionary and jurisdiction exists to review the determination." (citations omitted)).

In *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), the court held that IIRIRA's transitional rules precluded review of an extreme hardship determination with respect to suspension of deportation: "the transitional rules operate to remove direct judicial review of BIA determinations of 'extreme hardship.'"

The court held that a petitioner could not circumvent IIRIRA § 309(c)(4)(E)'s preclusion of review of an extreme hardship determination by recharacterizing the decision as a due process violation. *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) ("Although we retain jurisdiction to review due process challenges, a petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb. . . . [T]o invoke our jurisdiction, a petitioner must allege at least a colorable constitutional violation."); *id.* (petitioner's argument that the "BIA erred in its finding that he did not meet the requirement of 'extreme hardship' . . . is nothing more than an argument that the Board abused its discretion, a matter over which we have no jurisdiction").

VI. JURISDICTION PRECLUDED BY THE LACK OF JUDICIALLY MANAGEABLE STANDARDS

A judge-made rule precludes jurisdiction to review discretionary decisions when judicially manageable standards for judging the agency's exercise of discretion are absent.

Under this rule, the court is barred from reviewing agency decisions if there is no meaningful standard against which to measure the agency's exercise of discretion. *See Idrees v. Barr*, 923 F.3d 539, 542–43 & n.3 (9th Cir. 2019) (explaining that an administrative action is committed to agency discretion when the law is drawn so that a court would have no meaningful standard against which to review the agency's exercise of discretion, and holding that BIA's discretionary decision not to certify petitioner's ineffective assistance of counsel claim under 8 C.F.R. § 1003.1 was committed to agency discretion and not subject to judicial review where no legal or constitutional error was asserted); *Magana-Magana v. Bondi*, 129 F.4th 557, 575 (9th Cir. 2025) ("[T]he BIA's decision of whether or not to reopen a removal proceeding *sua sponte* is a purely discretionary decision that we lack jurisdiction to review . . . [because there is] no 'sufficiently meaningful standard against which to judge the BIA's decision not to reopen.'" (quoting *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002))); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011) (explaining that the bar on reviewing decisions in the absence of meaningful standards for review is distinct from 8 U.S.C. § 1252(a)(2)(B)'s statutory bars on the review of discretionary agency decisions).

"At the same time, . . . we have jurisdiction to review Board of Immigration Appeals (BIA) denials of sua sponte reconsideration or reopening for 'legal or constitutional error.'" *Lona v. Barr*, 958 F.3d 1225, 1227 (9th Cir. 2020) (quoting *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016)).

Note that there is a "presumption favoring judicial review of administrative action." *Kucana v. Holder*, 558 U.S. 233, 251 (2010). "When a statute is 'reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" *Id.* (quoting *de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)). "It therefore takes 'clear and convincing evidence' to dislodge the presumption." *Id.* at 252 (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)).

VII. OTHER JURISDICTION-STRIPPING PROVISIONS

A. Section 1226(e)—Discretionary Detention

Section 1226(e) precludes judicial review of the Attorney General's "discretionary judgment" regarding detention of a noncitizen under § 1226. *See* 8 U.S.C. § 1226(e).

The court has held that it has jurisdiction to review the BIA's determination of whether a noncitizen is a "danger to the community" because that question is a mixed question of law and fact (and thus a "question of law") rather than a "discretionary judgment." *See Martinez v. Clark*, 124 F.4th 775, 783–84 (9th Cir. 2024).

B. Section 1252(g)—Prosecutorial Discretion

Section 1252(g) states that, with certain exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g).

In *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court construed § 1252(g) narrowly, holding that "[t]he provision applies only to three discrete actions that the Attorney General may take: her decision or action to *commence* proceedings, *adjudicate* cases, or *execute* removal orders." 525 U.S. 471, 482 (1999) (internal quotation marks omitted); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 19 (2020) ("Section 1252(g) is . . . narrow. That provision limits review of cases 'arising from' decisions 'to commence proceedings, adjudicate cases, or execute removal orders.' (quoting 8 U.S.C. § 1252(g))).

In *Reno*, the Court held that it lacked jurisdiction over noncitizens' selective enforcement claims (petitioners alleged that the government targeted them for deportation because of their affiliation with a politically unpopular group) because these claims fell squarely within the prohibition on review of the Attorney's General's decision to "commence proceedings." *Reno*, 525 U.S. at 486–87.

The court held that § 1252(g)'s plain language barred claims challenging the government's execution of the petitioner's removal order. *See Rauda v. Jennings*, 55 F.4th 773, 777 (9th Cir. 2022). Specifically, the court held that: § 1252(g) barred jurisdiction over the petitioner's habeas petition challenging the government's execution of his removal order while his motion to reopen was pending; neither the Suspension Clause nor the Due Process Clause preserved judicial review; and the statutorily provided process satisfied due process. *See Rauda v. Jennings*, 55 F.4th 773, 777–81 (9th Cir. 2022).

The court held that § 1252(g) does not bar review of actions that occur prior to any decision to commence removal proceedings. *See Shin v. Mukasey*, 547 F.3d 1019, 1023–24 (9th Cir. 2008) (holding that § 1252(g) did not bar jurisdiction over petitioner's equitable estoppel claim arising from actions taken by a government employee prior to any decision to commence proceedings against petitioner); *Wong v. United States*, 373 F.3d 952, 965 (9th Cir. 2004) (§ 1252(g) did not bar review of actions occurring prior to decision to commence proceedings or execute removal order), *abrogated on other grounds as stated in Pettibone v. Russell*, 59 F.4th 449, 452–53 (9th Cir. 2023).

The court held that § 1252(g) precluded jurisdiction to review petitioners' contention that the agency abused its discretion by denying a motion to reopen filed for the purpose of seeking prosecutorial discretion based on the recent order of President Obama. *See Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012).

In *Ibarra-Perez v. United States*, 154 F.4th 989, 996–97 (9th Cir. 2025), the court held that 8 U.S.C. § 1252(g) did not bar a Federal Tort Claims Act suit raising purely legal due process challenges to ICE's removal of petitioner to Mexico without providing meaningful notice and an opportunity to present a fear-based claim before removal to a country not designated in the IJ's removal order.

See also Alcaraz v. INS, 384 F.3d 1150, 1161 (9th Cir. 2004) (§ 1252(g) did not bar jurisdiction over repapering claim—i.e., over the petitioner's claim that the BIA erred by failing to administratively close removal proceedings to allow the petitioner to apply for cancellation of removal); *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) (because the gravamen of petitioner's claim did not arise from the Attorney General's decision or action to commence proceedings, adjudicate cases, or execute removal orders, district court had jurisdiction to issue injunction barring INS from deporting petitioner on any ground not in existence at the time of his original sentencing); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120–21 (9th Cir. 2001) (§ 1252(g) did not bar review of

BIA and IJ policies ordering a halt to the issuance of decisions granting suspension of deportation); *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc) (§ 1252(g) did not deprive district court of jurisdiction to enter preliminary injunction on claim that the INS's advance parole policy violated the Immigration Reform and Control Act of 1986); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 (9th Cir. 2000) (§ 1252(g) did not deprive district court of habeas jurisdiction to order BIA to reissue removal order to allow filing of timely petition for review where ineffective assistance of counsel had caused untimely filing); *Barapind v. Reno*, 225 F.3d 1100, 1109–10 (9th Cir. 2000) (§ 1252(g) did not affect the availability and scope of habeas review); *Sulit v. Schiltgen*, 213 F.3d 449, 453 (9th Cir. 2000) (§ 1252(g) did not bar review of due process claim that green cards were seized improperly without a hearing); *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999) (§ 1252(g) did not strip district court of habeas jurisdiction); *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) (§ 1252(g) did not prohibit district court from enjoining deportation of noncitizens who raised general collateral challenges to unconstitutional agency policies and practices).

C. Section 1252(a)(2)(C)—Specified Criminal Offenses

Section 1252(a)(2)(C) states that, "except as provided in subparagraph D [8 U.S.C. § 1252(a)(2)(D)], no court shall have jurisdiction to review any final order of removal against an alien is who is removable by reason of having committed a criminal offense covered in" certain statutes. 8 U.S.C. § 1252(a)(2)(C).

This provision is sometimes referred to as the "criminal alien bar." *E.g.*, *Coria v. Garland*, 114 F.4th 994, 1004 (9th Cir. 2024).

The criminal offenses covered by § 1252(a)(2)(C) include but are not limited to crimes involving moral turpitude, controlled substance offenses, and aggravated felonies. They are:

8 U.S.C. § 1182(a)(2):	the criminal grounds of inadmissibility
8 U.S.C. § 1227(a)(2)(A)(i) & (ii):	two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, for which both crimes carry possible sentences of one year or longer

8 U.S.C. § 1227(a)(2)(A)(iii):	conviction of an aggravated felony at any time after admission
8 U.S.C. § 1227(a)(2)(B):	controlled substance convictions and drug abuse
8 U.S.C. § 1227(a)(2)(C):	certain firearm offenses
8 U.S.C. § 1227(a)(2)(D):	miscellaneous crimes

"[F]or the criminal alien bar to apply, there must be an agency 'determination that the alien is removable' based on a covered conviction." *Coria v. Garland*, 114 F.4th 994, 1010 n.5 (9th Cir. 2024); *see also Eneh v. Holder*, 601 F.3d 943, 946 (9th Cir. 2010) ("This jurisdiction-stripping provision only applies where the IJ expressly premised removal upon a criminal conviction . . . .")); *Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008) ("Because Blanco was not ordered removed as a criminal alien under § 1182(a)(2), the jurisdictional bar of § 1252(a)(2)(C) does not apply."); *Kelava v. Gonzales*, 434 F.3d 1120, 1122–23 (9th Cir. 2006) (8 U.S.C. § 1252(a)(2)(C) did not preclude judicial review where BIA failed to address IJ's findings on aggravated felony charge and instead based decision solely on terrorist activity charge); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1253 (9th Cir. 2003) (holding that § 1252(a)(2)(C) "precludes judicial review only when an alien is actually determined to be removable and ordered removed on the basis of a covered criminal act").

1. Review of Factual Findings Barred

Section 1252(a)(2)(C) precludes judicial review of factual findings in cases involving noncitizens convicted of crimes specified in 8 U.S.C. § 1252(a)(2)(C). *See Nasrallah v. Barr*, 590 U.S. 573, 581 (2020) ("[J]udicial review of final orders of removal is somewhat limited in cases . . . involving noncitizens convicted of crimes specified in § 1252(a)(2)(C). In those cases, a court of appeals may review constitutional or legal challenges to a final order of removal, but the court of appeals may not review *factual* challenges to a final order of removal.").

a. Review of CAT Findings Permitted

Where a CAT order does not merge into the final order of removal, the criminal alien bar does not preclude judicial review of the agency's factual findings pertaining to CAT relief. *See Nasrallah v. Barr*, 590 U.S. 573, 579–82 (2020) (although § 1252(a)(2)(C) bars a noncitizen's factual challenges to his final order of removal, it does not preclude judicial review of factual challenges to CAT orders, because CAT orders do not merge into final orders of removal); *see id.* at 582 ("The rulings that affect the validity of the final order of removal merge into the final order of removal for purposes of judicial review. But the immigration judge's or the Board's ruling on a CAT claim does not affect the validity of the final order of removal and therefore does not merge into the final order of removal."); *see also Coria v. Garland*, 114 F.4th 994, 1000 (9th Cir. 2024) (noting that "courts of appeal can review factual findings underlying the denial of CAT relief" because a ruling on CAT protection is not part of the "final order of removal" under § 1252(a)(2)(C)).

But denials "of asylum and withholding of removal fall within the final order of removal and are subject to § 1252(a)(2)(C) 'unless an exception applies.'" *Coria v. Garland*, 114 F.4th 994, 1003 n.3 (9th Cir. 2024) (quoting *Pechenkov v. Holder*, 705 F.3d 444, 448 (9th Cir. 2012)).

According to *Coria*:

> Courts must first determine whether the denial of relief raised in a petition for review is part of the final order of removal or merges with it. If so, and if the petitioner is removable based on a conviction covered by § 1252(a)(2)(C), then we lack jurisdiction to review factual challenges to the final order of removal and may only review constitutional claims or questions of law under § 1252(a)(2)(D). But if the denial of relief is not considered part of the "final order of removal," as is true with a CAT order, we can review factual challenges notwithstanding a criminal conviction that would otherwise implicate § 1252(a)(2)(C).

Coria v. Garland, 114 F.4th 994, 1011 (9th Cir. 2024).

Coria held that *Nasrallah v. Barr*, 590 U.S. 573 (2020), which defined a final order of removal to include all IJ or BIA rulings that merge into final orders of removal, abrogated previous Ninth Circuit decisions adopting an "on the merits" exception to § 1252(a)(2)(C). *Coria v. Garland*, 114 F.4th 994, 1011 (9th Cir. 2024). Under that exception, the court had jurisdiction notwithstanding the criminal alien bar when "an IJ denies relief *on the merits*, for failure to demonstrate the requisite factual grounds for relief, rather than in reliance on the conviction." *Pechenkov v. Holder*, 705 F.3d 444, 448 (9th Cir. 2012); *see also Perez-Palafox v. Holder*, 744 F.3d 1138, 1144 (9th Cir. 2014) (noting that the "on the merits" exception "permits our review when the IJ denies relief on the merits of the claim rather than in reliance on the conviction, *i.e.*, when the IJ concludes that the petitioner failed to establish the requisite grounds for relief"); *Unuakhaulu v. Gonzales*, 416 F.3d 931, 936–37 (9th Cir. 2005) (as amended) ("Because the BIA did not (1) order Unuakhaulu removed based on his aggravated felony conviction, and (2) did not predicate its denial of withholding of removal and relief under CAT on Unuakhaulu's aggravated felony conviction or on a discretionary decision, we have jurisdiction to review Unuakhaulu's petition."). For example, when the agency denied relief from removal on the ground that the petitioner was ineligible for that relief because he had been convicted of a qualifying crime, the court lacked jurisdiction under the criminal alien bar; but if the agency denied this relief for reasons other than the crime underlying noncitizen's removability, then the court had jurisdiction to review the agency's factual findings. *Pechenkov v. Holder*, 705 F.3d 444, 448–49 (9th Cir. 2012). *Coria* held that the "on the merits" exception is no longer good law.

2. Review of Constitutional & Legal Questions Permitted

Section 1252(a)(2)(D) authorizes judicial review of constitutional questions and questions of law, including mixed questions of law and fact, notwithstanding § 1252(a)(2)(C). *See Nasrallah v. Barr*, 590 U.S. 573, 581 (2020) ("[J]udicial review of final orders of removal is somewhat limited in cases . . . involving noncitizens convicted of crimes specified in § 1252(a)(2)(C). In those cases, a court of appeals may review constitutional or legal challenges to a final order of removal, but the court of appeals may not review *factual* challenges to a final order of removal."); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020) (explaining that the phrase "questions of law" in 8 U.S.C. § 1252(a)(2)(D) includes the application of a legal standard to undisputed or established facts, which are known as mixed questions of law and fact).

Examples of questions of law include:

- Divisibility analysis, which presents a pure question of law. *See Romero-Millan v. Garland*, 46 F.4th 1032, 1040 (9th Cir. 2022) ("Notwithstanding § 1252(a)(2)(C), the BIA's divisibility analyses . . . are reviewable under § 1252(a)(2)(D), which exempts 'constitutional claims or questions of law' from that jurisdiction-stripping provision, because divisibility is a purely legal issue.”).

- Modified categorical approach. *See Romero-Millan v. Garland*, 46 F.4th 1032, 1040 (9th Cir. 2022) (“[T]he BIA’s application of the modified categorical approach . . . involves the application of a legal standard to ‘established facts,’ which the Supreme Court in *Guerrero-Lasprilla v. Barr* held was a reviewable question of law for the purposes of applying § 1252(a)(2)(D)’s exemption to the jurisdiction-stripping provision.”).

3. Specific Offenses

a. Aggravated Felonies

See Dominguez v. Barr, 975 F.3d 725, 733–34 (9th Cir. 2020) (as amended) (“‘We lack jurisdiction to review any final order of removal against an alien who is removable’ for committing an aggravated felony, retaining jurisdiction only to review jurisdictional issues, questions of law, and constitutional claims.” (quoting *Mairena v. Barr*, 917 F.3d 1119, 1123 (9th Cir. 2019))); *Fuentes v. Lynch*, 788 F.3d 1177, 1180 (9th Cir. 2015) (“We lack jurisdiction to review a final order of removal against an alien who is removable based on an aggravated felony conviction. However, we retain jurisdiction to determine whether a particular offense constitutes an aggravated felony.” (citation and internal quotation marks omitted)); *Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1299 (9th Cir. 2014) (court lacks jurisdiction to review final order of removal against noncitizen convicted of aggravated felony, but retains jurisdiction to review whether conviction qualifies as an aggravated felony under federal law); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) (“Although we lack ‘jurisdiction to review any final order of removal against an alien who is removable by reason of having committed’ an aggravated felony (among other offenses), 8 U.S.C. § 1252(a)(2)(C), we retain jurisdiction over ‘constitutional claims or questions of law,’ 8 U.S.C. § 1252(d), which includes the question whether a state crime of conviction is an aggravated felony.”); *Chuen Piu Kwong v. Holder*, 671 F.3d 872, 876 (9th Cir. 2011) (recognizing that IIRIRA stripped federal courts of jurisdiction to review any final order of removal where a noncitizen is removable for having committed an aggravated felony, but further explaining that because the REAL ID Act restored jurisdiction over questions of law, there was jurisdiction to determine whether an offense is an aggravated felony for purposes of removal); *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010) (court retains jurisdiction to determine its jurisdiction, and thus has jurisdiction to determine whether an offense is an aggravated felony); *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010) (court has jurisdiction to determine whether an offense is an aggravated felony).

b. Crimes Involving Moral Turpitude (CIMTs)

See Orellana v. Barr, 967 F.3d 927, 931–32 (9th Cir. 2020) ("With the exception of constitutional claims and questions of law, we lack jurisdiction to review a final order of removal against an alien who is removable for having committed two CIMTs not arising out of a single scheme of criminal misconduct when a sentence of one year or longer may be imposed on each offense."); *Rivera v. Lynch*, 816 F.3d 1064, 1070 (9th Cir. 2016) ("We have no jurisdiction to review a final order removing an alien on account of a conviction for a crime involving moral turpitude. Nevertheless, we have jurisdiction to review the BIA's determination that [petitioner's] conviction is, in fact, a CIMT." (alterations and internal quotation marks omitted)); *Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1027 (9th Cir. 2014) ("Though we generally lack jurisdiction to review orders of removal based on a conviction of a crime involving moral turpitude, 8 U.S.C. § 1252(a)(2)(C), 'we have jurisdiction to review the [BIA's] determination that [Petitioner's] convictions are, in fact, crimes involving moral turpitude' in the first place." (alterations in original) (quoting *Marmolejo-Campos v. Holder,* 558 F.3d 903, 907 (9th Cir. 2009) (en banc))); *Latter-Singh v. Holder*, 668 F.3d 1156, 1159 (9th Cir. 2012) (same); *Planes v. Holder*, 652 F.3d 991, 997–98 (9th Cir. 2011) (jurisdiction limited to whether the BIA committed legal error in concluding that petitioner was convicted of two or more crimes involving moral turpitude).

c. Particularly Serious Crimes

See Bare v. Barr, 975 F.3d 952, 961 (9th Cir. 2020) (although court lacked jurisdiction over determination that noncitizen committed a particularly serious crime, the court retained jurisdiction to determine whether the BIA applied the correct legal standard); *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 990–96 (9th Cir. 2018) (reviewing whether BIA applied the proper legal standard, concluding BIA's underlying rationale for its decision was unreasonable, and remanding for BIA to consider all reliable, relevant information, when making its particularly serious crime determination); *Konou v. Holder*, 750 F.3d 1120, 1127–28 (9th Cir. 2014) (BIA applied correct legal standard in determining that petitioner's assault and battery convictions were particularly serious crimes); *Blandino-Medina v. Holder*, 712 F.3d 1338, 1343 (9th Cir. 2013) (explaining that while the court cannot reweigh the evidence to determine if the crime was particularly serious, it does have jurisdiction to determine whether the agency applied the correct legal standard); *Arbid v. Holder*, 700 F.3d 379, 382 (9th Cir. 2012) (court had jurisdiction to review BIA's determination that noncitizen was convicted of a particularly serious crime); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (stating the court has "jurisdiction to review whether the BIA and IJ failed to consider the appropriate factors or relied on improper evidence in making the 'particularly serious crime' determination." (citations omitted)).

d. Certain Firearms Offenses

See Bolanos v. Holder, 734 F.3d 875, 876 (9th Cir. 2013) ("Under 8 U.S.C. § 1252(a)(2)(C), we lack jurisdiction to consider a challenge to the removal order that rests on a firearm conviction. But we retain jurisdiction to decide our own jurisdiction and to resolve questions of law."); *Malilia v. Holder*, 632 F.3d 598, 601–02 (9th Cir. 2011) ("When a petitioner's conviction is a deportable firearms offense under 8 U.S.C. § 1227(a)(2)(C), this court does not have jurisdiction to consider challenges to removal orders based on that conviction.").

D. Section 1229c(f)—Voluntary Departure

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).

This provision precludes judicial review of the denial of a request for voluntary departure. *See 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.").

But it does not preclude judicial review of questions of law relating to a denial of voluntary departure. *See Corro-Barragan v. Holder*, 718 F.3d 1174, 1176 (9th Cir. 2013).

E. Section 1254a(b)(5)(A)—Temporary Protected Status

Section 1254a(b)(5)(A) states that "[t]here is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection," which governs temporary protected status (TPS). 8 U.S.C. § 1254a(b)(5)(A).

The court held that 8 U.S.C. § 1254a(b)(5)(A) did not foreclose judicial review of plaintiffs' APA challenges to the DHS Secretary's vacatur and termination of Venezuela's TPS designation. *See Nat'l TPS All. v. Noem*, 166 F.4th 739, 755–57 (9th Cir. 2026) (holding that the provision does not bar claims that the DHS Secretary exceeded her statutory authority).

VIII. JURISDICTION UNDER § 1252(a)(2)(D)—QUESTIONS OF LAW

A. Scope of § 1252(a)(2)(D)

"In § 1252(a)(2)(D), sometimes referred to as the 'Limited Review Provision,' Congress restored 'the jurisdiction of federal courts to review constitutional claims or questions of law.'" *Magana-Magana v. Bondi*, 129 F.4th 557, 566 (9th Cir. 2025) (quoting *Zia v. Garland*, 112 F.4th 1194, 1199 (9th Cir. 2024))).

Under § 1252(a)(2)(D), the term "questions of law" includes "the application of a legal standard to undisputed or established facts, which are known as mixed questions of law and fact. *Magana-Magana v. Bondi*, 129 F.4th 557, 567 (9th Cir. 2025) (quoting *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020)).

Many of the "questions of law," including mixed questions, covered by § 1252(a)(2)(D) are discussed elsewhere in this Outline. In addition, the court has held that the following qualify as "questions of law" under § 1252(a)(2)(D):

- Whether an offense qualifies as a crime involving moral turpitude (CIMT). *See Mancilla-Delafuente v. Lynch*, 804 F.3d 1262, 1264 (9th Cir. 2015) ("Whether an offense is a CIMT is a purely legal question.")
- [Reserved]

1. Section 1252(a)(2)(D) Applies Only to Review of Final Orders of Removal

"The INA's savings clause, § 1252(a)(2)(D), expressly preserves judicial review of constitutional and legal claims, but only when such claims are raised in a petition for review from a final order of removal 'filed with an appropriate court of appeals in accordance with this section.'" *Chairez v. Mayorkas*, 168 F.4th 1227, 1235 (9th Cir. 2026) (quoting 8 U.S.C. § 1252(a)(2)(D)). "Under § 1252(a)(5), such petitions for review may be taken only as to 'an order of removal entered or issued' by the immigration courts." *Id.* (quoting 8 U.S.C. § 1252(a)(5)).

Accordingly, "[n]othing in the text of § 1252—or any other provision of the INA—can be read to provide *district courts* with jurisdiction, in the context of an APA challenge, to review infirmities underlying otherwise unreviewable, discretionary decisions." *Chairez v. Mayorkas*, 168 F.4th 1227, 1235 (9th Cir. 2026).

B. Jurisdiction Over Questions of Law Before § 1252(a)(2)(D)

The court generally recognized jurisdiction to consider constitutional challenges even before the REAL ID Act formally restored that jurisdiction through the adoption of § 1252(a)(2)(D) in 2005. *See, e.g.*, *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003) ("Notwithstanding any statutory limitations on judicial review, we retain jurisdiction to review this due process challenge to the INS's [streamlining] procedures."); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) ("Notwithstanding these statutory limitations on judicial review, we retain the power to review constitutional due process challenges to immigration decisions.").

IX. JURISDICTION OVER ASYLUM CLAIMS

A. Section 1252(a)(2)(B) Inapplicable

Asylum is not subject to § 1252(a)(2)(B)'s limitations on judicial review.

Section 1252(a)(2)(B)(i), by its express terms, applies only to five specified forms of relief, not including asylum.

And § 1252(a)(2)(B)(ii) expressly excludes "the granting of relief under section 1158(a) of this title," which refers to asylum. 8 U.S.C. § 1252(a)(2)(B)(ii). Although § 1252(a)(2)(B)(ii) refers to § 1158(a), this was "a drafting error," and the court instead reads § 1252(a)(2)(B)(ii) as referring to the grant of asylum under § 1158(b). *See Ruiz v. Bondi*, 163 F.4th 586, 596 (9th Cir. 2025).

Accordingly, the court has jurisdiction to review the discretionary denial of asylum. *See Morales v. Gonzales*, 478 F.3d 972, 979 (9th Cir. 2007) ("[B]ecause decisions whether to grant asylum are exempted from § 1252(a)(2)(B)(ii)'s jurisdiction-stripping mandate, we have jurisdiction to review the IJ's denial of Morales's asylum application."), *abrogated on other grounds as recognized in Ruiz v. Bondi*, 163 F.4th 586, 596 (9th Cir. 2025); *Hosseini v. Gonzales*, 471 F.3d 953, 956 (9th Cir. 2006) ("We . . . have jurisdiction to review the BIA's discretionary denial of Hosseini's application for asylum." (citing 8 U.S.C. § 1252(a)(2)(B)(ii))).

B. Statutory Limits on Asylum Jurisdiction

Statutory limits on asylum jurisdiction, including 8 U.S.C. § 1158(a)(3) and 8 U.S.C. § 1158(b)(2)(D), are subject to 8 U.S.C. § 1252(a)(2)(D), which authorizes judicial review of constitutional questions and questions of law, including mixed questions of law and fact.

1. Section 1158(a)(3)

a. One-Year Time Bar (Changed or Extraordinary Circumstances)

Although an asylum application must be filed within one year of an applicant's arrival in the United States, *see* 8 U.S.C. § 1158(a)(2)(B), § 1158(a)(2)(D) states that 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." 8 U.S.C. § 1158(a)(2)(D).

Although § 1158(a)(3) limits jurisdiction to review a determination under § 1158(a)(2)(D), *see* 8 U.S.C. § 1158(a)(3) ("No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2)."), this limitation is subject to 8 U.S.C. § 1252(a)(2)(D), which grants jurisdiction over constitution questions and questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) ("Nothing in subparagraph (B) or (C), or in any other provision of this chapter [8 U.S.C. §§ 1101–1537] (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."); *Husyev v. Mukasey*, 528 F.3d 1172, 1178 (9th Cir. 2008) ("The jurisdictional prohibition of § 1158(a)(3) is accordingly overridden by the REAL ID Act for questions of law and constitutional claims."), *abrogation on other grounds recognized by Ruiz v. Bondi*, 163 F.4th 586, 593 (9th Cir. 2025).

Accordingly, the court 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." (internal quotation marks and citations 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) (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).

b. Third Country Bar

Although 8 U.S.C. § 1158(a)(3) limits jurisdiction to review determinations under the safe third country bar, 8 U.S.C. § 1158(a)(2)(A), § 1158(a)(3) is subject to § 1252(a)(2)(D), which restores judicial review over constitutional questions and questions of law, including mixed questions of law and fact. *See Husyev v. Mukasey*, 528 F.3d 1172, 1178 (9th Cir. 2008) ("The jurisdictional prohibition of § 1158(a)(3) is accordingly overridden by the REAL ID Act for questions of law and constitutional claims."), *abrogation on other grounds recognized by Ruiz v. Bondi*, 163 F.4th 586, 593 (9th Cir. 2025).

c. Previous Denial Bar

Although 8 U.S.C. § 1158(a)(3) limits jurisdiction to review determinations under the previous denial bar, 8 U.S.C. § 1158(a)(2)(C), § 1158(a)(3) is subject to § 1252(a)(2)(D), which restores judicial review over constitutional questions and questions of law, including mixed questions of law and fact. *See Husyev v. Mukasey*, 528 F.3d 1172, 1178 (9th Cir. 2008) ("The jurisdictional prohibition of § 1158(a)(3) is accordingly overridden by the REAL ID Act for questions of law and constitutional claims."), *abrogation on other grounds recognized by Ruiz v. Bondi*, 163 F.4th 586, 593 (9th Cir. 2025).

The previous denial bar is subject to the changed/extraordinary circumstances exception in 8 U.S.C. § 1158(a)(2)(D). As discussed above, the court has jurisdiction to review constitutional questions and questions of law, including mixed questions of law and fact, under § 1158(a)(2)(D).

2. Section 1158(b)(2)(D)

a. Terrorist Activity Bar

Although 8 U.S.C. § 1158(b)(2)(D) limits jurisdiction to review determinations under the terrorist activity bar, 8 U.S.C. § 1158(b)(2)(A)(v), § 1158(b)(2)(D) is subject to 8 U.S.C. § 1252(a)(2)(D), which restores judicial review over constitutional questions and questions of law, including mixed questions of law and fact.

The court thus has jurisdiction to consider constitutional questions and legal questions, including mixed questions of law and fact, arising under the terrorist activity bar. *See Khan v. Holder*, 584 F.3d 773, 780 (9th Cir. 2009) ("We have jurisdiction to determine the scope and meaning of the statutory terrorism bar, including the definition of 'terrorist organization' and "terrorist activity,' as these present purely legal questions. We also have jurisdiction to determine whether the [Jammu Kashmir Liberation Front ('JKLF')] meets this standard. This is a mixed question, because the nature of JKLF's activities is undisputed by the parties, and the question is whether these undisputed facts as found by the IJ meet the legal standard of 'terrorist organization.' Finally, because the IJ found [petitioner's] testimony credible, whether [petitioner] reasonably should have known of the JKLF's terrorist activity presents a mixed question of law and fact over which we have jurisdiction."); *see also Rayamajhi v. Whitaker*, 912 F.3d 1241, 1244 (9th Cir. 2019) (although the court lacks jurisdiction to consider a petition for review of the BIA's denial of asylum and withholding of removal pursuant to the material support bar, the court retains jurisdiction over colorable constitutional claims and questions of law).

X. JURISDICTION OVER CERTAIN MOTIONS

A. Motions to Reopen and Motions to Reconsider

The Supreme Court has held that courts have jurisdiction to review motions to reopen or reconsider removal proceedings involving final orders of removal:

> [C]ircuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding. [*Kucana v. Holder*, 558 U.S. 233, 242 (2010)]. The INA, in combination with a statute cross-referenced there, gives the courts of appeals jurisdiction to review "final order[s] of removal." 8 U.S.C. § 1252(a)(1); 28 U.S.C. § 2342. That jurisdiction, as the INA expressly contemplates, encompasses review of decisions refusing to reopen or reconsider such orders. *See* 8 U.S.C. § 1252(b)(6) ("[A]ny review sought of a motion to reopen or reconsider [a removal order] shall be consolidated with the review of the [underlying] order").

Mata v. Lynch, 576 U.S. 143, 147–48 (2015).

The denial of a motion to reopen or reconsider a removal proceeding is a final administrative decision generally subject to judicial review in the court of appeals. *See Mata*, 576 U.S. at 147 ("[C]ircuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding."); *He v. Gonzales*, 501 F.3d 1128, 1129 n.1 (9th Cir. 2007) ("The denial of a motion to reopen is a final administrative decision subject to judicial review in the court of appeals."); *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020) (reviewing denial of motion to reconsider); *Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) ("We . . . 'have jurisdiction when an alien appeals from the [BIA]'s denial of a motion to reopen a removal proceeding.'" (second alteration in original) (quoting *Mata*, 576 U.S. at 147)); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016) (reviewing denial of motion to reopen for adjustment of status); *Hernandez v. Holder*, 738 F.3d 1099, 1100 (9th Cir. 2013) (jurisdiction to review BIA's dismissal of a motion to reopen for lack of jurisdiction); *Meza-Vallejos v. Holder*, 669 F.3d 920, 923 (9th Cir. 2012) (court has jurisdiction to review denial of motion to reopen pursuant to 8 U.S.C. § 1252(a)); *see also* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order."); *Kucana v. Holder*, 558 U.S. 233, 242

(2010) (discussing long history of federal-court review of administrative decisions denying motions to reopen removal proceedings).

> Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision.

Mata, 576 U.S. at 148.

In *Figueroa Ochoa v. Garland*, 91 F.4th 1289, 1293–94 (9th Cir. 2024), the court determined that under *Patel*, 8 U.S.C. § 1252(a)(2)(B)(i) barred review of the agency's denial of a continuance and motion to remand because the denials involved factual judgments by the agency relating to the denial of cancellation of removal and adjustment of status. Although petitioner sought review of procedural motions, the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B)(i) applied because the factual determinations were determinative of the ultimate grant or denial of discretionary relief.

The court has jurisdiction to review the denial of motions to reopen in which an independent claim of ineffective assistance of counsel is at issue. *See Fernandez v. Gonzales*, 439 F.3d 592, 602–03 (9th Cir. 2006), *abrogation in part recognized by Lemus-Escobar v. Bondi*, 158 F.4th 944, 964 (9th Cir. 2025).

In *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002), the court held that IIRIRA's transitional rules, IIRIRA § 309(c)(4)(E), allowed the court to review the BIA's denial of a motion to reopen to seek suspension of deportation even though the transitional rules barred review of a discretionary decision to deny suspension of deportation.

The court has jurisdiction to review the BIA's determination that an "alien has failed to provide a sufficient justification for an untimely motion" to reopen because it presents a mixed question of law and fact. *See Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009); *Perez-Camacho v. Garland*, 54 F.4th 597, 603 (9th Cir. 2022) (same).

1. Interaction with § 1252(a)(2)(B)(i)

In *Lemus-Escobar v. Bondi*, 158 F.4th 944, 962–64 (9th Cir. 2025), the court clarified jurisdiction over challenges to the BIA's denial of a motion to reopen to apply for the discretionary forms of relief listed in § 1252(a)(2)(B)(i). The court concluded that the court has jurisdiction over the denial of such a motion for a procedural reason (e.g., untimeliness or failure to attach new evidence) and over a denial on the ground that the petitioner has not established a prima facie case of statutory eligibility for relief. But the court lacks jurisdiction when the BIA rules that the petitioner failed to establish that the new evidence would likely change the determination that the petitioner does not warrant a favorable exercise of discretion. And the court always retains jurisdiction over constitutional claims and questions of law, including the application of a legal standard to established or undisputed facts (mixed questions). In reaching these conclusions, the court recognized, as overruled, this court's holding in *Fernandez v. Gonzales*, 439 F.3d 592 (9th Cir. 2006), concerning jurisdiction over challenges to the denial of reopening with respect to statutory eligibility for cancellation of removal.

> In sum, we lack jurisdiction over a BIA's denial of reopening on the ground that it would deny cancellation of removal as a matter of discretion. We reiterate that we always retain jurisdiction to review constitutional claims and questions of law. 8 U.S.C. § 1252(a)(2)(D). Even where the BIA states that it would deny relief as a matter of discretion, we retain jurisdiction over legal arguments that the BIA, for example, applied the wrong preliminary law, failed to accept the proffered evidence as true, or misapplied its regulations. *Cf. Fonseca-Fonseca*, 76 F.4th [1176,] 1181–83 [(9th Cir. 2023)] (reviewing whether the BIA applied the correct legal standard when it asked whether the new evidence "would likely change" its decision on statutory eligibility). We lack jurisdiction only over the BIA's purely discretionary judgment that it would deny relief as a matter of discretion. *See Moreno v. Garland*, 51 F.4th 40, 47 (1st Cir. 2022) (holding, in a case involving a discretionary denial of reopening, that "because we cannot discern any error of law in the BIA's explanation of its conclusion, we have no authority to review the BIA's exercise of discretion").

Lemus-Escobar v. Bondi, 158 F.4th 944, 965 (9th Cir. 2025).

Before *Lemus-Escobar*, the court had held that "[i]f . . . the BIA determines that a motion to reopen proceedings in which there has already been an unreviewable discretionary determination concerning a statutory prerequisite to relief does not make out a prima facie case for that relief, § 1252(a)(2)(B)(i) precludes our visiting the merits, just as it would if the BIA had affirmed the IJ on direct appeal." *Fernandez v. Gonzales*, 439 F.3d 592, 601 (9th Cir. 2006), *abrogation in part recognized by Lemus-Escobar v. Bondi*, 158 F.4th 944, 964 (9th Cir. 2025); *see also Garcia v. Holder*, 621 F.3d 906, 911 (9th Cir. 2010) (holding that "this court has jurisdiction to review BIA decisions on motions to reopen that present evidence that is 'so distinct from that considered previously as to make the motion to reopen a request for new relief, rather than for reconsideration of a prior denial'" (quoting *Fernandez*, 439 F.3d at 603)); *De Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004) (court retained jurisdiction to review denial of motion to reopen to apply for adjustment of status); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 527 (9th Cir. 2004) (§ 1252(a)(2)(B)(i) did not preclude review of denial of motion to reopen to re-apply for adjustment of status where agency had not previously ruled on discretionary adjustment application); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1169–70 (9th Cir. 2003) (§ 1252(a)(2)(B)(i) did not bar review of denial of motion to reopen to apply for adjustment of status); *cf. Arrozal v. INS*, 159 F.3d 429, 431–32 (9th Cir. 1998) (IIRIRA § 309(c)(4)(E)'s transitional rules did not bar review of denial of motion to reopen to apply in the first instance for suspension of deportation).

2. Sua Sponte Reopening

The court lacks jurisdiction to review the discretionary denial of sua sponte reopening but has jurisdiction to review the decision for legal or constitutional error. *See Perez-Camacho v. Garland*, 54 F.4th 597, 606 & n.12 (9th Cir. 2022) (citing *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) ("[T]his court has jurisdiction to review Board decisions denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error.")); *see also Magana-Magana v. Bondi*, 129 F.4th 557, 575 (9th Cir. 2025) (court lacks purely discretionary decision to sua sponte reopen because "BIA's *sua sponte* reopening power was quintessentially discretionary and . . . there was no 'sufficiently meaningful standard against which to judge the BIA's decision not to reopen'" (quoting *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002))); *Lara-Garcia v. Garland*, 49 F.4th 1271, 1277 (9th Cir. 2022) (jurisdiction to review denial of request for sua sponte reopening based on legal error); *Cui v. Garland*, 13 F.4th 991, 1001 (9th Cir. 2021) ("We may only exercise jurisdiction over BIA decisions denying sua sponte reopening 'for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error.'" (quoting *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016))); *Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) ("When the BIA denies *sua sponte* reopening or reconsideration as a matter of discretion, we lack jurisdiction to review that decision, although we retain jurisdiction to review the denial of sua sponte reopening for 'legal or constitutional error.'" (quoting *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020))); *Lona v. Barr*, 958 F.3d 1225, 1234 (9th Cir. 2020) ("[O]ur review under *Bonilla* is constricted to legal or constitutional error that is apparent on the face of the BIA's decision and does not extend to speculating whether the BIA *might* have misunderstood some aspect of its discretion."); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1115 (9th Cir. 2019) (court generally lacks jurisdiction to review BIA decision not to exercise its sua sponte authority to reopen removal proceedings but has jurisdiction to address legal or constitutional error); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016) ("[W]e have jurisdiction to review the Board's denial of a motion to reopen *sua sponte* for the limited purpose of determining whether the Board based its decision on legal or constitutional error."); *Go v. Holder*, 744 F.3d 604, 609–10 (9th Cir. 2014) (court lacked jurisdiction to review BIA's discretionary decision not to sua sponte reopen); *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009) (court lacks jurisdiction to remand to BIA with instructions to exercise sua sponte reopening discretion); *Toufighi v. Mukasey*, 538 F.3d 988, 993 n.8 (9th Cir. 2008) ("We lack jurisdiction to review the Board's refusal to reopen removal proceedings *sua sponte*." (citing *Ekimian*, 303 F.3d at 1160)); *cf. Mata v. Lynch*, 576 U.S. 143, 148 (2015) (noting, without confirming, Fifth and Eighth Circuit decisions holding that courts generally lack jurisdiction to review the BIA's decision not to exercise its sua sponte authority to reopen).

"If, upon exercise of its jurisdiction, this court concludes that the Board relied on an incorrect legal premise [in declining to exercise its authority to reopen sua sponte], it should 'remand to the BIA so it may exercise its authority against the correct legal background.'" *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (quoting *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 160 (3d Cir. 2011)). "Once it does so, this court will have no jurisdiction to review the *sua sponte* decision, as *Ekimian* instructs." *Id.*

3. Expedited Orders of Removal

Although the court has jurisdiction to review the denial of motions to reopen or reconsider final orders of removal, "the language of § 1252[(a)(2)(A)] clearly and convincingly demonstrates that Congress intended to circumscribe judicial review of motions to reopen credible fear determinations" in expedited removal proceedings. *Singh v. Barr*, 982 F.3d 778, 781 (9th Cir. 2020); *id.* at 784 ("Read together, §§ 1252(a)(2)(A), (D) and 1252(e) provide clear and convincing evidence that Congress intended to deprive circuit courts of appeals of jurisdiction to review expedited removal orders and related matters affecting those orders, including underlying negative credible fear determinations and rulings on the regulations implementing the expedited removal statute. We are without jurisdiction to review the petitions for review of the denials of Petitioners' motions to reopen and therefore dismiss.").

4. Reinstated Removal Orders: BIA Jurisdiction

With respect to BIA jurisdiction rather than court of appeals jurisdiction, in *Suate-Orellana v. Garland*, 101 F.4th 624, 630–31 (9th Cir. 2024), the court applied *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023), and held that 8 U.S.C. § 1231(a)(5), which bars reopening or review of a reinstated order of removal, is not jurisdictional, and the BIA therefore may exercise jurisdiction over an appeal concerning a motion to reopen a reinstated removal order. The court held that *Santos-Zacaria* abrogated prior circuit precedent, including *Bravo-Bravo v. Garland*, 54 F.4th 634, 640–41 (9th Cir. 2022), holding that § 1231(a)(5) deprived the BIA of jurisdiction over a motion to reopen a reinstated removal order. *See Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024).

B. Motions for Continuance

The court has jurisdiction to review an IJ's discretionary denial of a continuance. *See Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1246–47 (9th Cir. 2008) (holding that 8 U.S.C. § 1252(a)(2)(B)(ii) does not strip the court of jurisdiction); *Malilia v. Holder*, 632 F.3d 598, 604 (9th Cir. 2011) (court retains jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review challenge that IJ's denial of "request for a continuance was based on an error of law").

1. Interaction with § 1252(a)(2)(B)(i)

The court lacks jurisdiction to review factual judgments related to the granting or denying of the discretionary relief specified in 8 U.S.C. § 1252(a)(2)(B)(i), even if those factual judgments arise in the context of a procedural motion such as a motion for a continuance or a motion to remand. *See Figueroa Ochoa v. Garland*, 91 F.4th 1289, 1293–95 (9th Cir. 2024) (dismissing petition for review challenging the agency's denial of a request for a continuance and denial of a motion to remand where the agency's adjudication of those procedural motions involved a factual judgment related to the petitioner's eligibility for cancellation of removal and adjustment of status). The court relied on the Supreme Court's holding in *Patel v. Garland*, 596 U.S. 328, 338–39 (2022), that § 1252(a)(2)(B)(i) encompasses any judgment *relating to* the granting of discretionary relief, including factual findings.

XI. JURISDICTION OVER STREAMLINED REMOVAL PROCEEDINGS

A. Overview of Streamlined Removal Proceedings

Regular removal proceedings are held before an IJ, *see* 8 U.S.C. § 1229a, who determines based on the evidence presented at a hearing whether the noncitizen is removable from the United States.

In regular removal proceedings, "[t]he alien may seek various forms of relief or protection from removal, such as asylum or withholding of removal." *Johnson v. Guzman Chavez*, 594 U.S. 523, 528 (2021) (citing 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. §§ 1208.4(b)(3)(i), 1240.11(c), (e)). "If the immigration judge decides that the alien is inadmissible or deportable and that the alien is not entitled to any of the relief or protection that he requested, the immigration judge will issue an order of removal." *Id.* (citing 8 U.S.C. § 1229a(c)(5)). "If the immigration judge issues an order of removal, the alien may file a motion to reconsider, a motion to reopen, an appeal to the BIA, and a petition for review in federal court." *Id.* (citing 8 U.S.C. §§ 1229a(c)(5)–(7), 1252(b); 8 C.F.R. § 1240.15).

"Today, however, most non-citizens are ordered removed through streamlined proceedings—expedited removal, administrative removal, and reinstatement of removal—that do not involve a hearing before an immigration judge." *Gomez-Velazco v. Sessions*, 879 F.3d 989, 991 (9th Cir. 2018).

1. Expedited Removal—Arriving Noncitizens Who Attempt Fraud or Lack Documentation (§ 1225(b))

Expedited removal applies to arriving noncitizens who are inadmissible because they have attempted entry through fraud or misrepresentation or lack documentation. *See Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) (explaining that § 1225(b)(1) "applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation"); *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 507 (9th Cir. 2019) ("[A]n applicant is eligible for expedited removal only if the immigration officer determines that the individual is inadmissible on one of two grounds: fraud or misrepresentation or lack of documentation." (citations omitted)).

If an immigration officer determines that an arriving noncitizen is inadmissible on these grounds, "the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i); *see also* 8 C.F.R. § 235.3(b)(2)(ii) ("Except as otherwise provided in this section, such alien is not entitled to a hearing before an immigration judge . . . or to an appeal of the expedited removal order to the Board of Immigration Appeals.").

If the noncitizen indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the noncitizen shall be referred for a **credible fear interview** by an asylum officer. *See* 8 C.F.R. § 235.3(b)(4).

"A USCIS asylum officer shall then screen the alien for a credible fear of persecution or torture." 8 C.F.R. § 208.30(b). If the asylum officer makes a negative credible fear determination, the noncitizen has a right to have an IJ review the negative decision. *See* 8 C.F.R. § 208.30(g)(1). "If the immigration judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution or torture, the case shall be returned to DHS for removal of the alien," and "[t]he immigration judge's decision is final and may not be appealed." 8 C.F.R. § 1208.30(g)(2)(iv)(A). "If the immigration judge finds that the alien . . . possesses a credible fear of persecution or torture, the immigration judge shall vacate the Notice and Order of Expedited Removal and refer the case back to DHS for further proceedings . . . ." 8 C.F.R. § 1208.30(g)(2)(iv)(B).

2. Reinstatement of Removal—Noncitizens Who Have Been Removed Previously (§ 1231(a)(5))

"Congress has created an expedited process for aliens who reenter the United States without authorization after having already been removed." *Johnson v. Guzman Chavez*, 594 U.S. 523, 529 (2021) (citing 8 U.S.C. § 1231(a)(5)). DHS's regulations set out the process for reinstating an order of removal: "the agency obtains the alien's prior order of removal, confirms the alien's identity, determines whether the alien's reentry was unauthorized, provides the alien with written notice of its determination, allows the alien to contest that determination, and then reinstates the order." *Johnson v. Guzman Chavez*, 594 U.S. 523, 530 (2021) (citing 8 CFR §§ 241.8(a)–(c), 1241.8(a)–(c)). Section 1231(a)(5) does not "preclude an alien from pursuing withholding-only relief to prevent DHS from executing his removal to the particular country designated in his reinstated removal order." *Johnson v. Guzman Chavez*, 594 U.S. 523, 530 (2021) (citing 8 U.S.C. § 1231(b)(3)(A)).

If a noncitizen "expresses a fear to DHS of returning to the country of removal," then "DHS will refer him to an asylum officer for a reasonable fear determination." *Johnson v. Guzman Chavez*, 594 U.S. 523, 531 (2021); *see Bartolome v. Sessions*, 904 F.3d 803, 807 (9th Cir. 2018) (citing 8 C.F.R. §§ 241.8(e), 1241.8(e)).

"If the asylum officer concludes that the alien has a reasonable fear, he will refer the matter to an immigration judge for initiation of withholding-only proceedings." *Johnson v. Guzman Chavez*, 594 U.S. 523, 531 (2021) (citing 8 C.F.R. § 208.31(e) and 8 C.F.R. § 1208.31(e)); *see Hermosillo v. Garland*, 80 F.4th 1127, 1129 (9th Cir. 2023) ("[N]oncitizens who show a reasonable possibility of persecution or torture [during the screening interview] . . . receive a merits hearing before an IJ, where they then will receive 'full consideration' of their claim." (citing 8 C.F.R. §§ 208.31(e), 1208.31(e))); *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1190 (9th Cir. 2021) ("If the asylum officer determines that the non-citizen [with a reinstated removal order] has established a reasonable fear, the non-citizen is placed in 'withholding only' proceedings before an immigration judge, during which the judge will hold a hearing on whether to grant the non-citizen withholding of removal or protection under CAT." (citing 8 C.F.R. §§ 208.2(c)(2)–(3), 208.31(e))).

"[W]here the asylum officer decides that the alien has not established a reasonable fear of persecution or torture, the alien may appeal the asylum officer's determination to an IJ." *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012) (citing 8 C.F.R. § 208.31(g)); *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1190–91 (9th Cir. 2021) ("If the asylum officer determines that the non-citizen has not established a reasonable fear, the non-citizen may request review of that determination by an immigration judge. § 208.31(g). During the review hearing, the immigration judge conducts a de novo review of the record prepared by the asylum officer and may (but need not) accept additional evidence and testimony from the non-citizen."). "If the IJ agrees with the officer's negative fear determination, the case is 'returned to the Service for removal.'" *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012) (quoting 8 C.F.R. § 208.31(g)(1)). "The regulations do not provide any means for the alien to appeal the IJ's decision regarding a reasonable fear of persecution to the [BIA]." *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012).

Where the IJ disagrees with the asylum officer's determination and decides that the alien has established a reasonable fear, the alien can file an application for withholding of removal. *See Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012) (citing 8 C.F.R. § 208.31(g)(2)).

Where withholding-only proceedings take place, "[t]he immigration judge's final decision as to withholding can be appealed to the BIA." *Johnson v. Guzman Chavez*, 594 U.S. 523, 531 (2021) (citing 8 C.F.R. § 208.31(e) and 8 C.F.R. § 1208.31(e)); *see Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012) ("Either party can seek BIA review of the IJ's decision to grant or deny withholding of removal." (citing 8 C.F.R. § 208.31(g)(2)(ii))).

"The regulations provide no means by which an alien with a reinstated removal order may apply for asylum," and "DHS cannot execute a reinstated removal order until the reasonable fear proceedings are complete." *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012); *see also Iraheta-Martinez v. Garland*, 12 F.4th 942, 953 (9th Cir. 2021) ("The INA makes clear that noncitizens with reinstated removal orders, while eligible to seek withholding and CAT relief, are not eligible to seek asylum.").

3. Administrative Removal—Certain Criminal Aliens (§ 1228(b))

Administrative removal applies to noncitizens who are not lawful permanent residents and who have been convicted of an aggravated felony or certain crimes involving drugs or firearms. *See Gomez-Velazco v. Sessions*, 879 F.3d 989, 991 (9th Cir. 2018) (explaining that DHS is authorized under 8 U.S.C. § 1228(b) "to order a limited class of non-citizens removed from the country without affording them a hearing before an immigration judge").

"To invoke § 1228(b), DHS must establish that the individual to be removed: (1) is not a citizen of the United States; (2) has not been lawfully admitted for permanent residence; and (3) has been convicted of an aggravated felony [or certain other offenses]." *Gomez-Velazco v. Sessions*, 879 F.3d 989, 991 (9th Cir. 2018) (citing 8 U.S.C. § 1228(b)(1), (2); 8 C.F.R. § 238.1(b)(1)).

“DHS commences administrative removal proceedings by serving you with a ‘Notice of Intent to Issue a Final Administrative Removal Order.’” *Gomez-Velazco v. Sessions*, 879 F.3d 989, 991 (9th Cir. 2018) (citing 8 C.F.R. § 238.1(b)(2)). “If you do not file a response, or if you concede that you are removable as charged, a DHS official known as the deciding officer will issue a ‘Final Administrative Removal Order,’” or a **FARO**. *Gomez-Velazco v. Sessions*, 879 F.3d 989, 991 (9th Cir. 2018) (citing 8 C.F.R. § 238.1(d)(1)).

“If . . . you fear persecution or torture in the country to which you would be removed, the deciding officer must refer the case to an asylum officer to conduct a **reasonable fear interview**.” *Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018) (emphasis added) (citing 8 C.F.R. § 238.1(f)(3)). “If the asylum officer determines that your fear of persecution or torture appears reasonable, the case is transferred to an immigration judge for a hearing to determine whether you are entitled to withholding of removal.” *Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018) (citing 8 C.F.R. § 208.31(e)). “If the asylum officer determines that you do not have a reasonable fear of persecution or torture, you can seek review of that determination by an immigration judge.” *Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018) (citing 8 C.F.R. § 208.31(g)). “But if the adverse reasonable fear determination is ultimately upheld, the removal order may then be executed.” *Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018).

A FARO is a final order of removal for purposes of judicial review. *See Riley v. Bondi*, 606 U.S. 259, 267 (2025). The court has jurisdiction to review constitutional claims and questions of law under 8 U.S.C. § 1252(a)(2)(D). *See Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018).

B. Expedited Removal Proceedings

Section 1252(a)(2)(A) states that “no court shall have jurisdiction to review” expedited removal orders except as provided in § 1252(e). 8 U.S.C. § 1252(a)(2)(A).

This restriction is not subject to the exception in 8 U.S.C. § 1252(a)(2)(D), which authorizes judicial review of “constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals.” *See* 8 U.S.C. § 1252(a)(2)(D) (“Nothing in *subparagraph (B) or (C)*, or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." (emphasis added)).

Accordingly, this court lacks jurisdiction to consider "colorable constitutional claims" related to expedited orders of removal. *See Guerrier v. Garland*, 18 F.4th 304, 312–13 (9th Cir. 2021) (interpreting *Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103 (2020), as abrogating any "colorable constitutional claims" exception to the limits 8 U.S.C. § 1252(a)(2)(A) places on the court's review of expedited removal proceedings); *Mendoza-Linares v. Garland*, 51 F.4th 1146, 1149, 1160–67 (9th Cir. 2022) (noting that "Congress has clearly and unambiguously precluded us from asserting jurisdiction over the merits of individual expedited removal orders, even with regard to constitutional challenges to such orders"); *id.* at 1155 (holding that the court lacked jurisdiction to consider petitioner's claim that the Transit Bar should not have been applied to him during his expedited removal proceedings and that the resulting removal order was legally and factually deficient); *id.* at 1156–59 (holding that the 8 U.S.C. § 1252(e) exceptions were inapplicable).

Judicial review of expedited removal orders is limited to the review authorized under 8 U.S.C. § 1252(e), which states:

> Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—
>
> (A) whether the petitioner is an alien,
>
> (B) whether the petitioner was ordered removed under such section, and
>
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

8 U.S.C. § 1252(e); *see Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 111 (2020) (explaining that 8 U.S.C. § 1252(e)(2) allows habeas review of three matters: whether the petitioner is an alien; whether the petitioner was ordered removed; and whether the petitioner has already been granted entry as a lawful permanent resident, refugee, or asylee); *Galindo-Romero v. Holder*, 640 F.3d 873, 875 n.1 (9th Cir. 2011) (same).

Although this court lacks jurisdiction over challenges to expedited removal orders, it has jurisdiction to review proceedings associated with the reinstatement of expedited removal orders so long as the challenge to the reinstatement proceedings does not amount to a collateral attack on the underlying expedited removal order. *See Ayala v. Sessions*, 855 F.3d 1012, 1018 (9th Cir. 2017) ("[W]e conclude that we have jurisdiction over petitions for review of reasonable fear determinations made in connection with the reinstatement of expedited removal orders."); *see also Martinez v. Sessions*, 873 F.3d 655, 658 (9th Cir. 2017) (reviewing IJ's negative reasonable fear determination made in connection with the reinstatement of an expedited removal order).

Other cases applying § 1252(a)(2)(A) and (e) include: *Singh v. Barr*, 982 F.3d 778, 784 (9th Cir. 2020) ("Read together, §§ 1252(a)(2)(A), (D) and 1252(e) provide clear and convincing evidence that Congress intended to deprive circuit courts of appeals of jurisdiction to review expedited removal orders and related matters affecting those orders, including underlying negative credible fear determinations and rulings on the regulations implementing the expedited removal statute."); *id.* at 780–84 (holding that the court lacked jurisdiction to review IJ decisions denying motions to reopen negative credible fear proceedings associated with expedited removal proceedings; petitioners had claimed that they had received ineffective assistance of counsel in credible fear proceedings, that an asylum officer and IJ had erred in determining that one of the petitioner's was not credible, and that an asylum officer had mischaracterized the record in the second petitioner's case); *Smith v. U.S. Customs & Border Prot.*, 741 F.3d 1016, 1020–22 (9th Cir. 2014) (court had limited jurisdiction under § 1252(e)(2) to consider whether noncitizen was "ordered removed" under the expedited removal statute but lacked jurisdiction to consider any further collateral challenge to his expedited removal order); *Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1139 (9th Cir. 2008) (court lacked jurisdiction where noncitizen subject to reinstated removal order sought to collaterally attack the underlying expedited removal order on due process grounds); *cf. Ayala v. Sessions*, 855 F.3d 1012, 1017–18 (9th Cir. 2017) (distinguishing *Garcia de Rincon* and exercising jurisdiction where the petitioner was challenging the accuracy of the outcome of her reasonable fear determination during reinstatement proceedings rather than collaterally attacking the underlying expedited removal proceedings); *id.* at 1018 ("[W]e have jurisdiction over petitions for review of reasonable fear determinations made in connection with the reinstatement of expedited removal orders.").

C. Reinstatement Proceedings

1. Overview

8 U.S.C. § 1231(a)(5) states:

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

8 U.S.C. § 1231(a)(5). This provision was enacted in 1996 and replaced the former reinstatement provision at 8 U.S.C. § 1252(f) (1995).

Though this provision, Congress has authorized the expedited removal of aliens, through the reinstatement of a prior removal order, if "an alien has reentered the United States illegally after having been removed . . . under an order of removal." *Bartolome v. Sessions*, 904 F.3d 803, 808 (9th Cir. 2018) (alteration in original) (quoting 8 U.S.C. § 1231(a)(5)). "Congress further directed that the alien's prior removal order 'is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.'" *Id.* (quoting 8 U.S.C. § 1231(a)(5)); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1080 (9th Cir. 2010) ("The reinstatement of a prior removal order bars an alien from applying for 'any relief' from removal for which he or she might previously have been eligible."), *overruled on other grounds by Garfias Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012) (en banc).

"Despite this directive, Congress has also recognized that it must make exceptions for aliens who demonstrate a clear probability of persecution or torture. Thus, even an alien subject to expedited removal may still request withholding of removal or relief under CAT." *Bartolome,* 904 F.3d at 808 (citation omitted) (citing 8 U.S.C. § 1231(b)(3) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.")); *see also Hermosillo v. Garland*, 80 F.4th 1127, 1129 (9th Cir. 2023) ("Although the reinstatement statute on its face bars noncitizens from seeking immigration relief, DHS regulations carve out an exception: noncitizens who express a fear of persecution or torture in their country of removal may apply for withholding of removal or protection under the Convention Against Torture." (citing 8 C.F.R. § 208.31)).

In *Suate-Orellana v. Garland*, 101 F.4th 624 (9th Cir. 2024), the court applied *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023), and held that 8 U.S.C. § 1231(a)(5), which bars reopening or review of a reinstated order of removal, is not jurisdictional, and the BIA therefore may exercise jurisdiction over an appeal concerning a motion to reopen a reinstated removal order. *Suate-Orellana*, 101 F.4th at 630–32 (recognizing abrogation of prior case law, including *Bravo-Bravo v. Garland*, 54 F.4th 634, 640–41 (9th Cir. 2022), treating 8 U.S.C. § 1231(a)(5) as jurisdictional).

The court has jurisdiction to review reinstatement orders under 8 U.S.C. § 1252(a)(1) even though "[r]einstatement orders are not literally orders of removal because the orders merely reinstate previously issued removal (or, in these cases, deportation and exclusion) orders." *Castro-Cortez v. INS*, 239 F.3d 1037, 1043–44 (9th Cir. 2001), *overruled on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 n.5 (2006).

For cases discussing the retroactive application of the reinstatement provisions, see *Ortega v. Holder*, 747 F.3d 1133, 1134–35 (9th Cir. 2014) (holding that the IIRIRA provision that eliminated nearly all forms of relief from reinstatement was not impermissibly retroactive as applied to a noncitizen who failed to take any action before the IIRIRA's effective date); *Montoya v. Holder*, 744 F.3d 614, 616–17 (9th Cir. 2014) (holding that the reinstatement provision in IIRIRA barring adjustment of status was not impermissibly retroactive as applied to a noncitizen who had not yet applied for adjustment of status as of IIRIRA's effective date, although her brother had filed a Form I-130 petition for a visa based on a family relationship and the I-130 had been approved); *Ixcot v. Holder*, 646 F.3d 1202, 1203 (9th Cir. 2011) (holding that post-IIRIRA reinstatement provision was impermissibly retroactive when applied to a noncitizen who had applied for discretionary relief (asylum) prior to IIRIRA's effective date).

This court has held that the reinstatement procedures at 8 C.F.R. § 241.8 constitute a valid interpretation of the INA and do not offend due process. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495–96 (9th Cir. 2007) (en banc).

"Reinstatement of a prior order of removal is not automatic." *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009). "[W]hen an alien subject to removal leaves the country, the removal order is deemed to be executed. If the alien reenters the country illegally, the order may not be executed against him unless it has been reinstated by an authorized official." *Id.* (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 487 (9th Cir. 2007) (en banc)); *see also Lin v. Gonzales*, 473 F.3d 979, 982–83 (9th Cir. 2007) ("The IJ apparently assumed, and the BIA explicitly found, that the original deportation order had been 'automatically reinstated by operation of law' upon the petitioner's illegal reentry into the United States. This was error. . . . Only if the requirements of 8 C.F.R. § 241.8(a) and (b) have been satisfied is the alien removable under the previous order.").

Reinstatement of a prior order of removal requires immigration authorities to prove only that "(1) petitioner is an alien, (2) who was subject to a prior removal order, and (3) who illegally reentered the United States." *Lopez v. Garland*, 17 F.4th 1232, 1234 (9th Cir. 2021) (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007) (en banc)).

A "substantively illegal" reentry constitutes an illegal reentry, permitting the reinstatement of a prior removal order, even if it was "procedurally regular." *Tamayo-Tamayo v. Holder*, 725 F.3d 950, 953 (9th Cir. 2013) ("We hold that Petitioner's substantively illegal reentry met the requirement in § 1231(a)(5) that he had 'reentered the United States illegally,' notwithstanding the fact that he tricked the border official into allowing him physically to enter.").

By its plain language, 8 U.S.C. § 1231(a)(5) applies to noncitizens granted voluntary departure in lieu of deportation if they subsequently reenter the United States illegally. *See Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1128–29 (9th Cir. 2001).

2. Reasonable Fear Proceedings

An IJ's failure specifically to address all of the evidence and claims before him or her during reasonable fear review proceedings does not violate a noncitizen's due process rights:

> [R]easonable fear proceedings, as outlined in 8 C.F.R. §§ 208.31, 1208.31, are intended to provide a fair determination of whether an alien has a reasonable fear of persecution or torture, which fear would require the alien to be referred to an IJ to review eligibility for withholding of removal or relief under the Convention Against Torture ("CAT"). However, these reasonable fear proceedings are to be streamlined, not intended to have full evidentiary hearings, because the alien continues to be subject to the expedited removal process used for previously removed aliens with reinstated orders of removal. Thus, an IJ's failure specifically to address all of the evidence and claims before him or her (during the reasonable fear review proceedings) does not violate the alien's due process rights.

Bartolome v. Sessions, 904 F.3d 803, 807 (9th Cir. 2018).

An IJ's failure to recognize that she has sua sponte authority to reopen reasonable fear hearing is an abuse of discretion. *See Bartolome v. Sessions*, 904 F.3d 803, 807 (9th Cir. 2018).

If the immigration judge affirms the asylum officer's negative reasonable fear determination, this court formerly held that the noncitizen may file a petition for review of the immigration judge's affirmance directly with the appropriate court of appeals. *See Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1191 (9th Cir. 2021) (citing *Ayala v. Sessions*, 855 F.3d 1012, 1015–16 (9th Cir. 2017)); *see also Zuniga v. Barr*, 946 F.3d 464, 468 (9th Cir. 2019) ("Because the IJ's decision is the final agency action on the reasonable fear question, such a final removal order is ripe for judicial review by a federal court of appeals.").

In *Navarrete v. Bondi*, No. 24-2776, 2026 WL 797428, at *2 (9th Cir. Mar. 23, 2026), however, the court held otherwise. In *Navarrete*, the DHS issued an order reinstating a prior order of removal, the petitioner expressed a reasonable fear of returning to Mexico, an asylum officer determined that the petitioner did not have a reasonable fear of persecution if returned to Mexico, an IJ affirmed the negative reasonable-fear determination, and the petitioner filed a petition for review seeking review of the IJ's negative fear determination. *Id.* at *2–3. The court held that it lacked jurisdiction over the petition because courts cannot review CAT claims unless they are reviewing a final order of removal. *Id.* at *5. Because "[a]n order denying CAT protection is not a final order of removal, nor does it merge into a final order of removal . . . , we hold that a petition advancing a standalone claim for review of a CAT order is not sufficient to invoke our jurisdiction under 8 U.S.C. § 1252(a)(1)." *Id.* at *7.

3. Timeliness of Petitions for Review

8 U.S.C. § 1252(b)(1), which requires petitions for review be filed no later than 30 days after a final order of removal, "establishes the time limit for seeking review of reinstatement orders." *Vega-Anguiano v. Barr*, 982 F.3d 542, 545 (9th Cir. 2019). Thus, a petitioner seeking review of a reinstatement order must challenge the reinstatement order within 30 days of it becoming final. In *Vega-Anguiano v. Barr*, 982 F.3d 542, 544–45 (9th Cir. 2019), the court had jurisdiction to consider collateral attack on underlying removal order where petitioner petitioned for review within 30 days after the reinstatement order became final.

Section 1252(b)(1)'s 30-day deadline for petitioning for review of final orders of removal is not jurisdictional. *See Riley v. Bondi*, 606 U.S. 259, 277 (2025) (administrative removal case).

In the related context of administrative removal, the Supreme Court has held that the 30-day deadline runs from the date the final administrative order of removal (FARO) is issued by DHS, not when the BIA denied relief in withholding-only proceedings. *See Riley v. Bondi*, 606 U.S. 259, 272, 145 S. Ct. 2190, 2201, 222 L. Ed. 2d 497 (2025) ("[T]he FARO is the final order of removal in this case, and withholding-only proceedings do not disturb the finality of an otherwise final order of removal."). Applying *Riley* to the context of reinstatement of a removal order, the 30-day deadline runs from when the reinstated order of removal becomes final, not when withholding-only proceedings are completed. If so, then *Riley* would abrogate cases holding that, "where an alien pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order does not become final until the reasonable fear of persecution and withholding of removal proceedings are complete." *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012); *accord Alonso-Juarez v. Garland*, 80 F.4th 1039, 1046 (9th Cir. 2023) ("We hold that we remain bound by

Ortiz-Alfaro—the thirty-day deadline for filing a petition for review is triggered upon the completion of reasonable fear proceedings."); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 833 (9th Cir. 2016) ("An IJ's negative determination regarding the alien's reasonable fear makes the reinstatement order final . . . ."). *Riley* thus abrogated these decisions. *See Navarrete v. Bondi*, No. 24-2776, 2026 WL 797428, at *2 (9th Cir. Mar. 23, 2026).

A BIA order dismissing removal proceedings to permit the government to reinstate a prior expedited removal order is not a final order of removal. *See Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009) (dismissing petition for lack of jurisdiction where no final order of removal); *see also Galindo-Romero v. Holder*, 640 F.3d 873, 877 (9th Cir. 2011) ("We lack jurisdiction to review the agency's termination of Galindo's formal removal proceedings because the decisions of the BIA and IJ resulted in no order of removal at all."); *id.* at 881 ("[T]here will be no final order of removal for us to review until the government either reinstates its prior expedited removal order or initiates new formal removal proceedings.").

4. Scope of Jurisdiction

Although 8 U.S.C. § 1231(a)(5) "substantially limits this court's review of a prior removal order that has been reinstated by the government . . . we retain jurisdiction to review the reinstatement order itself under 8 U.S.C. § 1252(a)(1)." *Morales de Soto v. Lynch*, 824 F.3d 822, 825 (9th Cir. 2016); *see Andrade-Garcia v. Lynch*, 828 F.3d 829, 833 (9th Cir. 2016) ("Although reinstatement orders are not literally orders of removal, we have jurisdiction to review them under 8 U.S.C. § 1252(a)(1)). We may therefore review constitutional claims or questions of law that are "raised in the context of reinstated removal orders." (alterations, citations, and internal quotation marks omitted)).

As explained below, jurisdiction has two components. With respect to review of the reinstatement order itself, "our review of a reinstatement order is limited to assessing ICE's determination of the factual predicates for reinstatement: (1) that petitioner is an alien, (2) who was subject to a prior removal order, and (3) who illegally reentered the United States." *Villa-Anguiano v. Holder*, 727 F.3d 873, 877–78 (9th Cir. 2013) (alterations and internal quotation marks omitted). With respect to review of the underlying removal order that is subject to reinstatement, review is limited to constitutional claims and questions of law, and the petitioner must demonstrate a gross miscarriage of justice in the original removal proceedings. *Id.* at 877.

a. Jurisdiction Over Reinstated Removal Orders

The court may review immigration authorities' findings, required for reinstatement of the prior removal order, that "(1) petitioner is an alien, (2) who was subject to a prior removal order, and (3) who illegally reentered the United States." *Lopez v. Garland*, 17 F.4th 1232, 1234 (9th Cir. 2021) (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007) (en banc)). "[R]eview of the reinstatement itself is limited to confirming the agency's compliance with the reinstatement regulations." *Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1137 (9th Cir. 2008); *id.* at 1139 (concluding that court lacked jurisdiction to review underlying expedited removal order, where noncitizen's challenge to the reinstated removal order was not a habeas petition and did not contest the expedited removal order on any of the enumerated permissible grounds in 8 U.S.C. § 1252(e)); *Villa-Anguiano v. Holder*, 727 F.3d 873, 877–78 (9th Cir. 2013) ("[E]xcept where constitutional claims or questions of law arise in the context of reinstatement and the petitioner can demonstrate a gross miscarriage of justice in the original removal proceedings, our review of a reinstatement order is limited to assessing ICE's determination of the factual predicates for reinstatement: (1) that petitioner is an alien, (2) who was subject to a prior removal order, and (3) who illegally reentered the United States." (alternations, citations, and internal quotation marks omitted)).

In *Ayala v. Sessions*, 855 F.3d 1012, 1017–18 (9th Cir. 2017), the court held that "we have jurisdiction over petitions for review of reasonable fear determinations made in connection with the reinstatement of expedited removal orders."

See also Morales de Soto v. Lynch, 824 F.3d 822, 825–30 (9th Cir. 2016) (holding that ICE did not commit an error of law in reinstating petitioner's removal order, and holding that change in policy regarding prosecutorial discretion did not, without more, warrant remanding the proceedings to the agency); *Padilla v. Ashcroft*, 334 F.3d 921, 924 (9th Cir. 2003) (declining to decide whether the reinstated removal process violates due process by failing to afford a noncitizen a hearing where noncitizen could not show prejudice from lack of hearing).

b. Jurisdiction Over Collateral Attacks on Underlying Removal Orders

"[A]n individual placed in reinstatement proceedings under § 1231(a)(5) cannot as a general rule challenge the validity of the prior removal order in the reinstatement proceeding itself." *Miller v. Sessions*, 889 F.3d 998, 1002 (9th Cir. 2018). But "[t]he jurisdictional savings clause of § 1252(a)(2)(D) 'permits some collateral attack on an underlying removal order during review of a reinstatement order if the petitioner can show that he has suffered a gross miscarriage of justice in the initial deportation proceeding.'" *Vega-Anguiano v. Barr*, 982 F.3d 542, 544 (9th Cir. 2019) (quoting *Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1138 (9th Cir. 2008)); *see also Lopez v. Garland*, 17 F.4th 1232, 1234 (9th Cir. 2021) ("In the context of our review of a reinstatement order, we have interpreted § 1252(a)(2)(D) to permit a limited collateral attack on the original removal order on which the reinstatement order is premised."); *Villa-Anguiano v. Holder*, 727 F.3d 873, 880 (9th Cir. 2013) (where the district court in a related criminal case found constitutional infirmities in the prior removal proceedings that invalidated the prior removal for purposes of the criminal prosecution, the court remanded to ICE with instructions to (1) afford the noncitizen an opportunity to be heard on the new facts and (2) reassess whether to rely on the prior removal order as the basis for removal rather than instigating full removal proceedings); *Martinez-Merino v. Mukasey*, 525 F.3d 801, 803–05 (9th Cir. 2008) (denying petition for review where petitioner failed to demonstrate that alleged constitutional violations in underlying removal proceedings resulted in a "gross miscarriage of justice").

"[A] gross miscarriage of justice occurs when a deportation or removal order had no valid legal basis at the time of its issuance or at the time of its execution." *Vega-Anguiano v. Barr*, 982 F.3d 542, 547 (9th Cir. 2019); *see id.* at 551 ("[W]e conclude that Vega-Anguiano has shown a gross miscarriage of justice because his 1998 removal order was invalid at the time of his removal in 2008.").

By contrast, "[w]hen a removal order is legally valid at the time of entry and execution, a petitioner cannot challenge a reinstatement of that order as a gross miscarriage of justice based on developments that call into question the original removal order, but which occurred after the petitioner was removed from this country." *Lopez v. Garland*, 17 F.4th 1232, 1236 (9th Cir. 2021).

In a pre-REAL ID Act case, this court rejected the argument that the reinstatement provisions violate due process because 8 U.S.C. § 1231(a)(5) precluded collaterally attacks on underlying removal orders in reinstatement proceedings. *See Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173–74 (9th Cir. 2001) (reinstatement of prior removal order did not violate due process because noncitizen already had one full and fair hearing).

c. Jurisdiction Over Motions to Reopen Where Reinstated Removal Order & Unlawful Reentry

In *Suate-Orellana v. Garland*, 101 F.4th 624 (9th Cir. 2024), the court applied *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023), and held that 8 U.S.C. § 1231(a)(5), which bars reopening or review of a reinstated order of removal, is not jurisdictional, and that the BIA therefore may exercise jurisdiction over an appeal concerning a motion to reopen a reinstated removal order. *Suate-Orellana*, 101 F.4th at 630–32 (recognizing abrogation of prior case law, including *Bravo-Bravo v. Garland*, 54 F.4th 634, 640–41 (9th Cir. 2022), treating 8 U.S.C. § 1231(a)(5) as jurisdictional).

An individual who is placed in reinstatement proceedings under § 1231(a)(5) retains "the right, conferred by § 1229a(b)(5)(C)(ii), to seek rescission of a removal order entered *in absentia*, based on lack of notice, by filing a motion to reopen 'at any time.'" *Miller v. Sessions*, 889 F.3d 998, 1002–03 (9th Cir. 2018).

D. Administrative Removal Proceedings

For a noncitizen who is issued a FARO and then expresses a fear of return to his home country, but is ultimately denied relief in withholding-only proceedings, the FARO is the only "final order of removal" for purposes of satisfying 8 U.S.C. § 1252(b)(1)'s 30-day deadline for petitioning for review. *Riley v. Bondi*, 606 U.S. 259, 263 (2025). A BIA order denying CAT protection in subsequent withholding-only proceedings is not a "final order of removal" and "does not affect the validity of a previously issued order of removal or render that order non-final." *Id*. at 269.

Before *Riley v. Bondi*, 606 U.S. 259 (2025), this court had held that the IJ's decision upholding a negative reasonable fear determination in withholding-only proceedings was the final agency action for purposes of judicial review by a federal court of appeals. *See Zuniga v. Barr*, 946 F.3d 464, 467–68 (9th Cir. 2019)

("If the IJ upholds the negative screening determination, it constitutes a final order of removal."). *Riley* abrogates this precedent.

This court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to consider a claim that the petitioner was denied his constitutional right to counsel in connection with an administrative removal order issued by DHS under § 1228(b). *See Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018). The court in *Gomez-Valazco* rejected the petitioner's due process claim because the petitioner's failed to show that he was prejudiced by counsel's absence during his initial interaction with DHS officers. *See id.* at 996 ("Although he may have been improperly denied the right to counsel during his initial interaction with DHS officers, he has made no showing that the denial of that right caused him any prejudice."). As to when the petitioner is required to show prejudice, compare *Gomez-Velazco v. Sessions*, 879 F.3d 989, 994–95 (9th Cir. 2018) ("[W]e see no reason to conclusively presume prejudice when an individual is denied the right to counsel during his initial interaction with DHS officers, provided the individual is able to consult with counsel before the removal order is executed."), with *Zuniga v. Barr*, 946 F.3d 464, 471 (9th Cir. 2019) (holding that prejudice was conclusively presumed where the petitioner was denied his right to counsel in his reasonable fear review hearing before the IJ).

XII. JURISDICTION OVER CERTAIN OTHER PROCEEDINGS

A. Legalization Denials

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

Judicial review of a § 1255a legalization denial is available only during review of a final order of deportation or removal. *See Pedroza-Padilla v. Gonzales*, 486 F.3d 1362, 1364 n.1 (9th Cir. 2007) (jurisdiction to review denial of a § 1255a legalization application in conjunction with judicial review of an order of deportation); *Guzman-Andrade v. Gonzales*, 407 F.3d 1073, 1075 (9th Cir. 2005) (holding that court continues to have jurisdiction to review denial of a § 1255a legalization application when reviewing final removal order of an individual who would have been placed in deportation proceedings prior to passage of IIRIRA); *Proyecto San Pablo v. INS*, 189 F.3d 1130, 1134 (9th Cir. 1999) ("Judicial review of the [Legalization Appeals Unit] LAU's decision is available only in the court of appeals, as part of its review of a separate order of deportation. Thus, until the INS initiates deportation proceedings against an alien who unsuccessfully applies for legalization, that alien has no access to substantive judicial review of the LAU's denial." (citation omitted) (citing 8 U.S.C. § 1255a(f)(4)(A) ("There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title (as in effect before October 1, 1996).")); *Noriega-Sandoval v. INS*, 911 F.2d 258, 261 (9th Cir. 1990) ("[W]e hold that we lack jurisdiction to review the LAU's denial of an alien's application for adjustment to temporary resident status under IRCA, except in the context of a review of an order of deportation."). The courts also lacked jurisdiction to review § 1255a legalization denials in exclusion proceedings. *See Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1278 (9th Cir. 1996) (because 8 U.S.C. § 1255a(f)(4)(A) refers to deportation orders, "the plain meaning of the statute precludes review of a legalization application in an exclusion proceeding").

For SAW denials, judicial review is available during review of a final order of deportation or exclusion. *See* 8 U.S.C. § 1160(e)(3)(A) ("There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title (as in effect before October 1, 1996)."); *see also Espinoza-Gutierrez*, 94 F.3d at 1278 (noting that for SAW applicants, "Congress did provide for judicial review of LAU denials in exclusion proceedings").

Section 1160(e)(3)(A) continues to authorize judicial review of SAW denials even though review of final orders of removal now arises under 8 U.S.C. § 1252(a)(1) rather than former 8 U.S.C. § 1105a (1995). *See Perez-Martin v. Ashcroft*, 394 F.3d 752, 756–57 (9th Cir. 2005) (holding that "the SAW statute's provision for judicial review, 8 U.S.C. § 1160(e)(3)(A), still applies when judicial review is premised on 8 U.S.C. § 1252 rather than the section specified in the SAW statute, the now-defunct 8 U.S.C. § 1105a [(1995)]").

The BIA lacks jurisdiction to review the denial of SAW status. *See Perez-Martin v. Ashcroft*, 394 F.3d 752, 757–58 (9th Cir. 2005) ("[T]he plain language of the SAW statute forecloses BIA jurisdiction to review the denial of an application for SAW status." (citing 8 U.S.C. § 1160(e)(1) (requiring the Attorney General to establish a single level of administrative appellate review)).

SAW's limits on judicial review apply only to direct review of individual denials of SAW status. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491–92 (1991) (SAW's limits on judicial review, 8 U.S.C. § 1160(e), inapplicable where plaintiffs asserted constitutional and statutory challenges to the manner in which the SAW program was being implemented rather than challenging any individual determinations of applications for SAW status); *Hernandez Flores v. Rosen*, 984 F.3d 767, 773 (9th Cir. 2020) ("SAW's limits on administrative and judicial review do not preclude the government from seeking petitioner's removal based on convictions he sustained prior to securing SAW temporary resident status."); *Perez-Enriquez v. Gonzales*, 463 F.3d 1007, 1009–10 (9th Cir. 2006) (en banc) (noting jurisdiction under § 1252(a)(2)(D) where court was asked to interpret the SAW statute in the course of reviewing a streamlined decision order the petitioner removed on grounds of inadmissibility).

B. Registry

The court of appeals lacks jurisdiction to review the Attorney General's decision regarding a noncitizen's denial of registry under 8 U.S.C. § 1259 "to the extent the challenged decision was a legally permissible exercise of [the Attorney General's] discretion." *Gutierrez v. Holder*, 662 F.3d 1083, 1087 (9th Cir. 2011); *cf. Beltran-Tirado v. INS*, 213 F.3d 1179, 1182–83 (9th Cir. 2000) (holding that

IIRIRA's traditional rules did not deprive the court of jurisdiction to review the denial of petitioner's application for registry).

The court held that 8 U.S.C. § 1252(a)(2)(B)(ii) does not preclude judicial review of the Attorney General's threshold determination under 8 U.S.C. § 1259(c) that the applicant "establishes that he . . . is a person of good moral character." *See Gutierrez v. Holder*, 662 F.3d 1083, 1088–89 (9th Cir. 2011).

C. In Absentia Removal Orders

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

These limitations do not apply to claims that a petitioner is a national of the United States. *See* 8 U.S.C. § 1229a(b)(5)(D) (excluding cases described in 8 U.S.C. § 1252(b)(5)).

A noncitizen can rescind an in absentia removal order if she did not receive notice of the removal hearing in accordance with paragraph (1) or (2) of § 1229(a). *See* 8 U.S.C. § 1229a(b)(5)(C)(ii). In *Campos-Chaves v. Garland*, 602 U.S. 447, 457 (2024), the Supreme Court held that notice under *either* paragraph (1) or paragraph (2) is sufficient to provide notice and preclude rescission based on lack of notice. *See id.* ("An alien can have his in absentia removal order rescinded under § 1229a(b)(5)(C)(ii) only if he can demonstrate that he 'did not receive' a paragraph (1) notice *or* a paragraph (2) notice—whichever corresponds to the hearing at which he was ordered removed in absentia."). The Court vacated this court's decision in *Singh v. Garland*, 24 F.4th 1315, 1317 (9th Cir. 2022), which had held that an in absentia removal order was subject to recission unless the NTA itself specified the time and date of the noncitizen's removal proceedings.

In *Miller v. Sessions*, 889 F.3d 998, 1003 (9th Cir. 2018), the court concluded that 8 U.S.C. § 1231(a)(5), which allows DHS to reinstate a prior removal order without a hearing before an IJ, did not preclude petitioner from filing a motion to reopen seeking to rescind her prior, in absentia removal order based on lack of notice in accordance with 8 U.S.C. § 1229a(b)(5)(C)(ii).

D. Discretionary Waivers

Title 8 U.S.C. § 1252(a)(2)(B)(i) limits appellate court authority to review certain discretionary forms of relief, including of the criminal inadmissibility waver at 8 U.S.C. § 1182(h) and of the fraud or misrepresentation waiver at 8 U.S.C. § 1182(i).

Section 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." *Patel v. Garland*, 596 U.S. 328, 339 (2022).

But § 1252(a)(2)(B)(i) does not bar review of constitutional questions and questions of law, including the application of law to undisputed or established facts (mixed questions of law and fact). *See Wilkinson v. Garland*, 601 U.S. 209, 225 (2024).

Cross Reference: Limited Review of Discretionary Actions Under § 1252(A)(2)(B).

1. Ten-Year Unlawful Presence Bars

8 U.S.C. § 1182(a)(9)(B)(i) states that "[a]ny alien (other than an alien lawfully admitted for permanent residence) who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible."

Section 1182(a)(9)(B)(v) grants the Attorney General discretion to waive § 1182(a)(9)(B)(i) for the spouses and children of U.S. citizens or permanent residents and states that "[n]o court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause." 8 U.S.C. § 1182(a)(9)(B)(v).

2. Document Fraud Waivers

Section 1182(d)(12) states that "[n]o court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver" of the document fraud ground of inadmissibility in 8 U.S.C. § 1182(a)(6)(F)(i). 8 U.S.C. § 1182(d)(12).

3. Criminal Inadmissibility Waivers

Section 1182(h) states that "[n]o court shall have jurisdiction to review a decision of the Attorney General to grant or deny a [Section 212(h)] waiver" of inadmissibility under 8 U.S.C. § 1182(h)(1)(C). 8 U.S.C. § 1182(h); *see Mendoza v. Holder*, 623 F.3d 1299, 1302 (9th Cir. 2010) ("We lack jurisdiction to review the IJ's exercise of discretion in denying the 212(h) waiver . . . .").

4. Fraud Waivers

> [INA] § 237(a)(1)(H) (the "fraud waiver") allows the Attorney General to waive "[t]he provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in [the fraud provision]" for any alien who is the spouse, parent, or child of a U.S. citizen or permanent resident and who was 'otherwise admissible' at the time of admission.

Vasquez v. Holder, 602 F.3d 1003, 1010 (9th Cir. 2010) (alterations in original) (quoting the waiver provision currently codified at 8 U.S.C. § 1227(a)(1)(H)). "The effect of the fraud waiver is to transform an individual who enters the United States with an invalid immigrant visa to the status of one who entered as a nonpreference immigrant, despite the fact that a valid immigrant visa would never have been available to the individual at the time of entry." *Id*. at 1011 (internal quotation marks omitted).

"Although we do not have jurisdiction to review the discretionary denial of a fraud waiver, we do 'have jurisdiction . . . to review the statutory eligibility elements under § 237(a)(1)(H), as we may review 'constitutional claims or questions of law.'" *Vasquez v. Holder*, 602 F.3d 1003, 1017 (9th Cir. 2010) (citation omitted) (first quoting *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157–58 (9th Cir. 2005), and then quoting 8 U.S.C. § 1252(a)(2)(D)); *see also Fares v. Barr*, 942 F.3d 1172, 1174 (9th Cir. 2019) ("Whether an alien is eligible for a waiver [is] a question of statutory interpretation fit for judicial review." (alteration in original) (quoting *Federiso v. Holder*, 605 F.3d 695, 699 (9th Cir. 2010))); *Corona-Mendez v. Holder*, 593 F.3d 1143, 1146 (9th Cir. 2010) (jurisdiction to review the statutory eligibility elements of a waiver of inadmissibility under Section 237(a)(1)(H) under 8 U.S.C. § 1252).

In *Fares*, the court held that the petitioner was eligible for a waiver of removability under INA § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H), and remanded to the agency for it to exercise its discretion as to granting the waiver. *Fares*, 942 F.3d at 1175–76.

E. Inadmissibility on Medical Grounds

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

F. Administrative Closure

"Administrative closure is a procedure by which an IJ or the BIA temporarily removes a case from the active calendar or docket as a matter of administrative convenience and docket management." *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 889 (9th Cir. 2018); *see also Marquez-Reyes v. Garland*, 36 F.4th 1195, 1208–09 (9th Cir. 2022) (same). "Although this procedure is regularly used, it is not described in the immigration statutes or regulations." *Gonzalez-Caraveo*, 882 F.3d at 889.

"[T]his Court has jurisdiction to review administrative closure decisions." *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 893 (9th Cir. 2018) (concluding that the factors set out in *Matter of Avetisyan*, 25 I. & N. Dec. 688, 696 (BIA 2012), provide a meaningful standard for judicial review of an IJ or BIA decision granting or denying administrative closure).

As of April 2026, the *Avetisyan* factors remain good law. *See Matter of Cruz-Valdez*, 28 I. & N. Dec. 326, 326 (A.G. 2021) ("While rulemaking proceeds and except when a court of appeals has held otherwise, immigration judges and the

Board should apply the standard for administrative closure set out in *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012), and *Matter of W-Y-U-*, 27 I. & N. Dec. 17 (BIA 2017).").

Before *Avetisyan*, this court had held that the court lacked jurisdiction to review the agency's grant or denial of administrative closure because of the absence of a sufficiently meaningful standard for evaluating whether the agency abused its discretion. *See Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1120 (9th Cir. 2009).

Where the BIA held that it lacked authority to grant administrative closure and the Attorney General subsequently issued a decision recognizing that authority, the court agreed with the government's unopposed recommendation to remand the administrative closure issue to the BIA for further consideration. *See Umana-Escobar v. Garland*, 69 F.4th 544, 551 (9th Cir. 2023).

G. BIA Rejection of Untimely Brief

The court has jurisdiction to review the BIA's discretionary decision to reject an untimely brief under 8 C.F.R. § 1003.3(c)(1). *See Zetino v. Holder*, 622 F.3d 1007, 1012 n.2 (9th Cir. 2010) (in light of *Kucana v. Holder*, 558 U.S. 233, 237 (2010), which held that the proscription on judicial review stated in § 1252(a)(2)(B) applies only to Attorney General determinations made discretionary by statute, and not to determinations declared discretionary by the Attorney General through regulation, the court rejected the government's contention that the court lacked jurisdiction over the discretionary decision to reject an untimely brief). The court also considered the petitioner's due process challenge to the BIA's rejection of his untimely brief. *See Zetino*, 622 F.3d at 1013–14 (concluding that petitioner was not deprived of due process by BIA's decision not to accept his untimely brief).

H. Appeal by Certification

8 C.F.R. § 1003.1(c) "grants the BIA authority to accept a procedurally improper appeal by certification." *Idrees v. Barr*, 923 F.3d 539, 542 (9th Cir. 2019). The court lacks jurisdiction to review the BIA's discretionary decision not to accept an appeal by certification because the regulation lacks judicially manageable standards for judging the agency's exercise of discretion. *Id.* at 543.

But the court has jurisdiction to review a claim that the BIA's decision involved constitutional or legal error. *Id.* at 543 n.3.

XIII. SCOPE AND STANDARD OF REVIEW

A. Scope of Review

"In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency." *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011) (quoting *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004)). *See also Garcia v. Wilkinson*, 988 F.3d 1136, 1142 (9th Cir. 2021) ("In reviewing the BIA's decisions, we consider only the grounds relied upon by that agency."); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1075 (9th Cir. 2020) (same); *Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019) ("We 'cannot affirm the BIA on a ground upon which it did not rely.'" (quoting *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000))); *Budiono v. Lynch*, 837 F.3d 1042, 1046 (9th Cir. 2016) ("Our review is limited to those grounds explicitly relied upon by the Board.").

"If we conclude that the BIA's decision cannot be sustained upon its reasoning, we must remand to allow the agency to decide any issues remaining in the case." *Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020) (quoting *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004)); *see also Garcia*, 988 F.3d at 1142 ("If we conclude that the BIA's decision cannot be sustained upon its reasoning, we must remand to allow the agency to decide any issues remaining in the case." (quoting *Regalado-Escobar v. Holder*, 717 F.3d 724, 729 (9th Cir. 2013))); *Myers v. Sessions*, 904 F.3d 1101, 1113 (9th Cir. 2018) (same).

1. Where BIA Conducts De Novo Review

"Where the BIA conducts its own review of the evidence and law, rather than adopting the IJ's decision, our review is limited to the BIA's decision, except to the extent the IJ's opinion is expressly adopted." *Guerra v. Barr*, 974 F.3d 909, 911 (9th Cir. 2020) (quoting *Rodriguez v. Holder*, 683 F.3d 1164, 1169 (9th Cir. 2012)); *see also Rodriguez Tornes v. Garland*, 993 F.3d 743, 750 (9th Cir. 2021) (same).

The BIA's de novo review may render an IJ's error harmless. *See Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995) ("Board's application of the correct legal standard" may render IJ's application of an incorrect legal standard harmless); *id.* (IJ's refusal to consider exhibits "rendered harmless by the Board's subsequent consideration of the exhibits in conducting its de novo review"); *see also Marquez-Reyes v. Garland*, 36 F.4th 1195, 1209 (9th Cir. 2022) (even assuming IJ applied wrong legal standard in denying administrative closure, BIA's "de novo review made any error by the immigration judge harmless").

The BIA reviews and IJ's factfinding for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i) ("The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.").

The BIA does not itself engage in factfinding. *See* 8 C.F.R. § 1003.1(d)(3)(iv) ("Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding cases. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand."); *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012) ("Where the IJ has not made a finding of fact on a disputed matter, and such a finding is necessary to resolution of the case, the BIA must remand to the IJ to make the required finding; it may not conduct its own fact-finding."); *see also Alanniz v. Barr*, 924 F.3d 1061, 1069 (9th Cir. 2019) (remanding to the agency where additional IJ factfinding was required on petitioner's proposed social group).

"Where the BIA engages in de novo review of an IJ's factual findings instead of limiting its review to clear error, it has committed an error of law . . . ." *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012); *see also Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012) (BIA committed legal error by reviewing IJ factfinding de novo rather than for clear error); *Brezilien v. Holder*, 569 F.3d 403, 414 (9th Cir. 2009) (same).

The BIA's application of the wrong legal standard to factual findings may be inferred from the BIA's analysis; the BIA need not say in so many words that it reviewed the IJ's factual findings de novo. *See Soto-Soto v. Garland*, 1 F.4th 655, 659 (9th Cir. 2021) ("[I]f it appears that the BIA gave more weight to certain facts in the record than to others, leading to a different conclusion from the IJ, our court may justifiably infer that the BIA applied the wrong standard of review.").

"[T]he clear error standard does not allow the BIA to reweigh the evidence when the IJ's account of the evidence is plausible." *Guerra v. Barr*, 974 F.3d 909, 914 (9th Cir. 2020).

The BIA reviews de novo the IJ's application of legal standards to historical facts. *See Umana-Escobar v. Garland*, 69 F.4th 544, 552 (9th Cir. 2023) ("[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." (citation omitted)); *id.* at 552–53 (holding that the BIA erred by reviewing the IJ's nexus determination for clear error); *Perez-Palafox v. Holder*, 744 F.3d 1138, 1145 (9th Cir. 2014) ("The factual question involves the findings detailing the particular circumstances underlying the petitioner's claim. Questions of law resolve the legal consequences of the underlying facts, *i.e.*, whether the petitioner meets the legal requirements for the requested relief or conversely, whether the government has established ineligibility."); *id.* (where the underlying facts were established by the IJ, the BIA properly determined as a matter of law whether the petitioner was convicted of a particularly serious crime).

The BIA considers an exercise of discretion de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii) ("The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo."); *Brezilien v. Holder*, 569 F.3d 403, 413 n.3 (9th Cir. 2009) (citing 8 C.F.R. § 1003.1(d)(3)(ii)).

The BIA may decline to consider arguments raised for the first time on appeal. *See Honcharov v. Barr*, 924 F.3d 1293, 1296–97 (9th Cir. 2019) (holding that "the Board does not *per se* err when it concludes that arguments raised for the first time on appeal do not have to be entertained" and that "the Board did not err when it declined to consider . . . proposed particular social groups that were raised for the first time on appeal").

2. Where BIA Conducts Abuse of Discretion Review

"Where the [Board] does not perform an independent review of the IJ's decision and instead defers to the IJ's exercise of his or her discretion, it is the IJ's decision that we review." *Rojas v. Holder*, 704 F.3d 792, 794 (9th Cir. 2012) (alteration in original) (quoting *Campos-Granillo v. INS*, 12 F.3d 849, 852 (9th Cir. 1993) (as amended) ("The Board did not purport to exercise its own discretion, but merely concluded that the IJ did not err in exercising hers. Accordingly, we must review the IJ's decision.")); *see also de Leon-Barrios v. INS*, 116 F.3d 391, 393

(9th Cir. 1997) ("Generally, if the BIA conducts a de novo review of the record and makes an independent determination about whether relief is appropriate, we review the BIA's decision. If, however, the BIA reviews the IJ's decision for an abuse of discretion, we review the IJ's decision." (citation omitted)); *Yepes-Prado v. U.S. INS*, 10 F.3d 1363, 1367 (9th Cir. 1993) (as amended) ("Because in this case the Board did not determine the propriety of 212(c) relief for itself but merely determined that the IJ had not abused his discretion in denying Yepes-Prado's application, it is the exercise of the IJ's discretion and, therefore, his decision that we must review.")

3. Where BIA Incorporates IJ's Decision

a. Partial Incorporation

"Where the BIA 'has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's.'" *Maie v. Garland*, 7 F.4th 841, 845 (9th Cir. 2021) (quoting *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) ("Where, as here, the BIA has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's.")); *see also Garcia v. Wilkinson*, 988 F.3d 1136, 1142 (9th Cir. 2021) ("Because the BIA conducted a *de novo* review of the IJ's decision, our review is 'limited to the BIA's decision except to the extent that the IJ's opinion is expressly adopted [by the BIA]." (alteration in original) (quoting *Hosseini v. Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006))); *Medina-Lara v. Holder*, 771 F.3d 1106, 1111 (9th Cir. 2014) ("Where, as here, the Board incorporates the IJ's decision into its own without citing *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), this court will review the IJ's decision to the extent incorporated."); *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) (concluding that the BIA incorporated and adopted the IJ's credibility determination where the BIA drew examples from the IJ's analysis, and thus reviewing the IJ's credibility determination rather than the BIA's).

b. Incorporation Plus Additional Reasoning

"Where . . . the BIA adopts the immigration judge's decision and also adds its own reasons, we review both decisions." *Nuru v. Gonzales*, 404 F.3d 1207, 1215 (9th Cir. 2005); *accord Ling Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014) ("Where, as here, the BIA adopts the IJ's decision and adds some of its own analysis, the panel reviews both decisions."); *see Ruiz-Colmenares v. Garland*, 25

F.4th 742, 748 (9th Cir. 2022) ("Where, as here, the BIA cites *Burbano* and also provides its own review of the evidence and law, we review both the IJ's and the BIA's decisions." (quoting *Ali v. Holder*, 637 F.3d 1025, 1028 (9th Cir. 2011))).

c. Full Incorporation

See Sinha v. Holder, 564 F.3d 1015, 1019–20 (9th Cir. 2009) ("Because the BIA 'adopt[ed] and affirm[ed]' the IJ's decision without adding any commentary of its own, we treat the IJ's decision as that of the BIA.").

4. *Burbano* Adoption and Affirmance

a. Full Incorporation

"Where, as here, the BIA adopts and affirms the IJ's order pursuant to *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994), and expresses no disagreement with the IJ's decision, we review the IJ's order as if it were the BIA's." *Kwong v. Holder*, 671 F.3d 872, 876 (9th Cir. 2011); *see also Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc) ("Because the BIA affirmed on the basis of *Matter of Burbano*, we review the IJ's decision as if it were the BIA's decision."); *Viridiana v. Holder*, 646 F.3d 1230, 1233 (9th Cir. 2011) (where the BIA adopted and affirmed the IJ's decision pursuant to *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), and did not express disagreement with any part of the IJ's decision, "[w]e . . . review the IJ's decision directly"); *Abebe v. Gonzales*, 432 F.3d 1037, 1040 (9th Cir. 2005) (en banc) ("[W]here the BIA cites its decision in *Burbano* and does not express disagreement with any part of the IJ's decision, the BIA adopts the IJ's decision in its entirety."); *id.* at 1039 ("[W]hen 'the BIA adopts the decision of the IJ, we review the IJ's decision as if it were that of the BIA.'" (quoting *Hoque v. Ashcroft*, 367 F.3d 1190, 1194 (9th Cir. 2004))).

b. Partial Incorporation Plus Additional Reasoning

"Where, as here, the BIA cites *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994) and adds its own analysis to the IJ's, we review both Agency decisions." *Aleman-Belloso v. Bondi*, 128 F.4th 1031, 1039 (9th Cir. 2024); *see also Singh v. Garland*, 118 F.4th 1150, 1159 (9th Cir. 2024) ("Where the BIA cites *Matter of Burbano* and also provides its own review of the evidence and the law, the court reviews both the IJ and the BIA's decision."); *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1182 (9th Cir. 2021) ("Because the BIA cited *Matter of Burbano* and also provided its own analysis in this case, we review both the BIA and IJ's decisions."); *Joseph v. Holder*, 600 F.3d 1235, 1239-40 (9th Cir. 2010) ("Because the BIA expressly adopted the IJ's decision under *Matter of Burbano*, but also provided its own review of the evidence and the law, we review both the IJ and the BIA's decision.").

Where the BIA cites *Burbano* and also provides its own review of the evidence and the law, the court reviews both the IJ and the BIA's decision. *See Ruiz-Colmenares v. Garland*, 25 F.4th 742, 748 (9th Cir. 2022); *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1182 (9th Cir. 2021); *Cordoba v. Barr*, 962 F.3d 479, 481 (9th Cir. 2020); *Aguilar Fermin v. Barr*, 958 F.3d 887, 891 (9th Cir. 2020).

c. Effect of *Burbano* Citation on Exhaustion

"[W]hen the BIA cites *Burbano* in its decision, all issues presented before the IJ are deemed to have been presented to the BIA." *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1232 (9th Cir. 2008).

d. *Burbano* Citation Adopts IJ's Reasoning Unless BIA Says Otherwise

Unlike a streamlined summary affirmance (discussed below), which signifies only that the result the IJ reached was correct and that any errors were harmless or nonmaterial, a *Burbano* affirmance signifies that the BIA has conducted an independent review of the record and has determined that its conclusions are the same as those articulated by the IJ. *See Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1232 (9th Cir. 2008) ("In citing *Burbano*, '[t]he BIA thereby signaled that it had conducted an independent review of the record and had exercised its own discretion in determining that its conclusions were the same as those articulated by the IJ.'" (alteration in original) (quoting *Sembiring v. Gonzales*, 499 F.3d 981, 985 (9th Cir. 2007))); *Abebe v. Gonzales*, 432 F.3d 1037, 1040 (9th Cir. 2005) (en banc) ("[T]he BIA cited its decision in *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994), to signify that it had conducted an independent review of the record and had exercised its own discretion in determining that its conclusions were the same as those articulated by the IJ.").

A *Burbano* citation adopts IJ's analysis in its entirety unless BIA says otherwise: "Our caselaw establishes that where the BIA cites its decision in *Burbano* and does not express disagreement with any part of the IJ's decision, the

BIA adopts the IJ's decision in its entirety. If the BIA intends to constrict the scope of its opinion to apply to only one ground upon which the IJ's decision rested, the BIA can and should specifically state that it is so limiting its opinion." *Abebe v. Gonzales*, 432 F.3d 1037, 1040 (9th Cir. 2005) (en banc).

5. Where BIA's Standard of Review is Unclear

"Where the standard of review the BIA employed is unclear, we may look to both the BIA's decision and the IJ's oral decision as a guide to what lay behind the BIA's conclusion." *Vitug v. Holder*, 723 F.3d 1056, 1062 (9th Cir. 2013) (quoting *Benyamin v. Holder*, 579 F.3d 970, 974 (9th Cir. 2009)); *see Bassene v. Holder*, 737 F.3d 530, 536 (9th Cir. 2013) ("Where, as here, the BIA summarily affirms an IJ's decision and does not expressly conduct a de novo review we may 'look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion.'" (quoting *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007))); *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) (reviewing IJ's credibility determination where the record was ambiguous but it appeared that the BIA adopted the IJ's analysis); *Ahmed v. Keisler*, 504 F.3d 1183, 1190–91 (9th Cir. 2007) (looking to the IJ's decision as a guide to what lay behind the BIA's conclusion where the record suggested that the BIA conducted an independent review of the record but the lack of analysis suggested that the BIA gave significant weight to the IJ's findings); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197 (9th Cir. 2000) (same).

6. Single Board Member Review

In *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1014 (9th Cir. 2006), the court held that *Chevron* deference is inapplicable to an unpublished order issued by a single member of the BIA. Because the Supreme Court subsequently overruled *Chevron*, *see Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024), that holding is no longer relevant. It is still the case, however, that unpublished single-member decisions are accorded deference proportional to their thoroughness, reasoning, consistency, and ability to persuade. *See Lezama-Garcia v. Holder*, 666 F.3d 518, 524–25 (9th Cir. 2011) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

7. Streamlined Affirmances

One member of the BIA may affirm an IJ's decision, without opinion, in a "streamlined" decision under 8 C.F.R. § 1003.1(e)(4). If the BIA member determines that the decision should be affirmed without opinion, the BIA shall issue an order stating, "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination." 8 C.F.R. § 1003.1(e)(4)(ii). "An order affirming without opinion under authority of this provision shall not include further explanation or reasoning." *Id.*

Note that a "streamlined" BIA decision is distinct from "streamlined" removal proceedings—the expedited, reinstatement, and administrative removal proceedings discussed elsewhere.

The BIA errs by issuing a streamlined affirmance that alters or disavows any part of the IJ's decision. In *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980–81 (9th Cir. 2006), the court held that 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. "[B]ecause 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." *Id.* at 981. In *Kumar v. Gonzales*, 439 F.3d 520, 523–24 (9th Cir. 2006), the court noted that the BIA violated 8 C.F.R. § 1003.1(e)(4) by issuing a streamlined affirmance that purported to disavow the IJ's adverse credibility finding. But the court held that the violation was harmless—and did not render the petitioner's deportation unlawful—where the petitioner was not prejudiced. *Id.*

"When the BIA streamlines, we review the substance of the IJ's decision." *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 975 (9th Cir. 2006); *see also Lanza v. Ashcroft*, 389 F.3d 917, 925 (9th Cir. 2004) ("The 'practical effect' of streamlining is that, 'unless the BIA opts for three-judge review, the IJ's decision becomes the BIA's decision' and we evaluate the IJ's decision as we would that of the Board." (quoting *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003))); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 786 (9th Cir. 2004) ("[A]s a practical matter, we may review only the reasoning presented by the IJ.").

"An affirmance without opinion does not imply approval of any or all of the IJ's reasoning: it merely signifies that the reviewing BIA member considered any errors made by the IJ harmless or immaterial." *Lanza v. Ashcroft*, 389 F.3d 917, 925 (9th Cir. 2004); *see also Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821 (9th Cir. 2004) ("If a BIA member streamlines a case, the decision of the IJ becomes the final agency determination; however, summary affirmance does not necessarily mean that the BIA has adopted or approved of the IJ's reasoning, only that the BIA approves the result reached.").

The BIA's summary affirmance procedure does not violate due process. *See* *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848 (9th Cir. 2003) (cancellation of removal); *see also* *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1323 (9th Cir. 2006) (same); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078–79 (9th Cir. 2004) (asylum).

The BIA's discretion to issue a streamlined affirmance is not unlimited. *See* *Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007) (holding that the BIA erred when it issued a streamlined affirmance under 8 C.F.R. § 1003.1(e)(4) because the BIA failed to address the petitioners claims that the IJ proceedings suffered from procedural irregularities, including the denial of due process and the denial of the petitioner's statutory right to counsel).

A streamlined affirmance under 8 C.F.R. § 1003.1(e)(4) is a type of summary affirmance, but the term "summary affirmance" is used more broadly to refer to any situation in which the BIA offers limited analysis of its own. *E.g.*, *Bassene v. Holder*, 737 F.3d 530, 535–36 (9th Cir. 2013) (using the term "summarily affirms" to describe a BIA decision that adopted portions of the IJ's decision and also provided the BIA's own reasoning). When referring to streamlined affirmances under 8 C.F.R. § 1003.1(e)(4), the more specific term "streamlined affirmance" should be used.

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

The court has "jurisdiction to determine whether the BIA complied with its own regulations in deciding to streamline." *de Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047, 1052 (9th Cir. 2008); *see also* *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821–22 (9th Cir. 2004) (court has jurisdiction to determine whether the BIA complied with regulation authorizing streamlining only if IJ's errors were harmless or nonmaterial); *Chen v. Ashcroft*, 378 F.3d 1081, 1086–88 (9th Cir. 2004) (retaining jurisdiction over regulatory challenge to streamlining and concluding that BIA erred in summarily affirming IJ's denial of application for adjustment of status under Chinese Student Protection Act because legal issue presented not squarely controlled by existing BIA or federal court precedent); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (confirming jurisdiction over regulatory challenges to streamlining); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 852–53 (9th Cir. 2003) (rejecting the government's contention that the BIA's decision to streamline a case is inherently discretionary, and therefore never subject to review under the Administrative Procedure Act).

Before *Wilkinson*, the court held that where the decision on review is a discretionary hardship determination involved in an application for cancellation of removal, the court lacked jurisdiction over a challenge that the BIA's decision to streamline a case violated the regulations. *See Falcon Carriche*, 350 F.3d at 852–54. That analysis should be considered in light of the Supreme Court's subsequent decision in *Wilkinson v. Garland*, 601 U.S. 209, 212 (2024), which held that "[t]he application of a statutory legal standard (like the exceptional and extremely unusual hardship standard [governing eligibility for cancellation of removal]) to an established set of facts is a quintessential mixed question of law and fact" that is "reviewable under § 1252(a)(2)(D)."

Where the court reaches the merits of the agency decision, it is "unnecessary and duplicative" to review the BIA's decision to streamline. *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154–55 (9th Cir. 2005) (quoting *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 855 (9th Cir. 2003)); *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) ("Because we can reach the merits of the IJ's decision in this case, we need not . . . review the BIA's decision to streamline.").

b. Streamlining and Multiple Grounds

Where the BIA's streamlined affirmance without opinion leaves the court unable to discern whether it affirmed the IJ on a reviewable ground or an unreviewable ground, the court will remand the case to the BIA for clarification of the grounds for its decision. *See Lanza v. Ashcroft*, 389 F.3d 917, 924 (9th Cir. 2004) (remanding asylum case where it was unclear whether the BIA's affirmance without opinion was based on a reviewable ground (the merits of the asylum claim) or an unreviewable ground (untimeliness)); *Diaz-Ramos v. Gonzales*, 404 F.3d 1118, 1118 (9th Cir. 2005) (granting government's motion to remand for clarification of grounds for streamlined affirmance without opinion of denial of cancellation of removal); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157-59 (9th Cir. 2005) (remanding streamlined appeal for determination of whether BIA affirmed IJ's denial of waiver of removal on statutory or discretionary grounds).

Remand is unnecessary where the court must necessarily decide the merits of the reviewable ground in the course of deciding other claims for relief. *See Kasnecovic v. Gonzales*, 400 F.3d 812, 815 (9th Cir. 2005) (where the IJ denied asylum based on the nonreviewable one-year bar and reviewable adverse credibility grounds and this court affirmed the adverse credibility determination in reviewing the denial of withholding of removal and CAT relief, remand was unnecessary because asylum claim would fail regardless of what the BIA would have said on remand).

c. Streamlining and Novel Legal Issues

The BIA errs in streamlining an appeal if the regulatory requirements for streamlining—"(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case," 8 C.F.R. § 1003.1(e)(4)(i)—are inapplicable. *See Chen v. Ashcroft*, 378 F.3d 1081, 1086–87 (9th Cir. 2004) (remanding streamlined affirmance to the BIA where there was no BIA or federal court precedent that squarely controlled the legal issue presented and the petitioner raised a novel legal and factual issue).

d. Streamlining and Motions to Reopen

The rule that the BIA abuses its discretion when it denies a motion to reopen without explanation applies to streamlined cases. *See Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (holding that the BIA abused its discretion by denying petitioner's motion to reopen and remand without articulating its reasons where the BIA issued a streamlined affirmance of the IJ's denial of asylum and withholding of deportation and, in a footnote, denied without explanation the motion to reopen and remand filed by petitioner during the pendency of the BIA appeal).

8. Review Limited to BIA's Reasoning

"In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency." *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011) (quoting *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004)); *see also Garcia v. Wilkinson*, 988 F.3d 1136, 1142 (9th Cir. 2021) ("In reviewing the BIA's decisions, we consider only the grounds relied upon by that agency."); *Diaz-*

Reynoso v. Barr, 968 F.3d 1070, 1075 (9th Cir. 2020) (same); *Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019) ("We 'cannot affirm the BIA on a ground upon which it did not rely.'" (quoting *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000))); *Budiono v. Lynch*, 837 F.3d 1042, 1046 (9th Cir. 2016) ("Our review is limited to those grounds explicitly relied upon by the Board.").

a. Ordinary Remand Rule

"If we conclude that the BIA's decision cannot be sustained upon its reasoning, we must remand to allow the agency to decide any issues remaining in the case." *Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020) (quoting *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004)); *see also INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."); *Garcia v. Wilkinson*, 988 F.3d 1136, 1142 (9th Cir. 2021) ("If we conclude that the BIA's decision cannot be sustained upon its reasoning, we must remand to allow the agency to decide any issues remaining in the case." (quoting *Regalado-Escobar v. Holder*, 717 F.3d 724, 729 (9th Cir. 2013))); *Myers v. Sessions*, 904 F.3d 1101, 1113 (9th Cir. 2018) (same).

There is a narrow exception to the ordinary remand rule: "remand may be unwarranted in cases where '[t]here is not the slightest uncertainty as to the outcome' of the agency's proceedings on remand." *Calcutt v. Fed. Deposit Ins. Corp.*, 598 U.S. 623, 630 (2023) (per curiam) (alteration in original) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 n.6 (1969)).

The court applied this exception in *Gutierrez-Zavala v. Garland*, 32 F.4th 806 (9th Cir. 2022), *overruled by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024). After DHS reinstated the petitioner's prior removal order under 8 U.S.C. § 1231(a)(5), the petitioner filed a motion to reopen and terminate his removal proceedings, and the BIA denied the motion to reopen on the merits. *See id.* at 808. Citing Ninth Circuit precedent that has since been overruled, this court concluded that the BIA lacked jurisdiction to consider the motion to reopen under § 1231(a)(5). *See id.* at 809 (citing *Cuenca v. Barr*, 956 F.3d 1079, 1088 (9th Cir. 2020), *overruled by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024)). Under these circumstances, the court concluded that it could deny the petition for review based on the BIA's lack of jurisdiction over the motion to reopen even though the BIA did not rely on its lack of jurisdiction in denying the motion to reopen. *See id.* at 809–11. The court held that the ordinary remand rule was inapplicable because the BIA's rejection of the motion to reopen on remand for lack of jurisdiction would be the required and certain result. *Id.* ("When the BIA denies a motion to reopen a reinstated removal order on grounds other than a lack of jurisdiction, we may deny a petition challenging that ruling based on the BIA's lack of jurisdiction under 8 U.S.C. § 1231(a)(5)."). Because *Gutierrez-Zavala* was based on the premise that § 1231(a)(5) is jurisdictional, it is no longer good law. *See Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (overruling *Gutierrez-Zavala*). But the exception to the ordinary remand rule *Gutierrez-Zavala* recognized may be applicable in other cases.

9. Review Generally Limited to Administrative Record

When reviewing a final order of removal, "[o]ur review is limited to the administrative record underlying the BIA decision." *Njuguna v. Ashcroft*, 374 F.3d 765, 769 (9th Cir. 2004) (citing 8 U.S.C. § 1252(b)(4)(A) ("[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based.")). "We may review out-of-record evidence only where (1) the Board considers the evidence; or (2) the Board abuses its discretion by failing to consider such evidence upon the motion of an applicant." *Fisher v. INS*, 79 F.3d 955, 964 (9th Cir. 1996) (en banc); *see also id.* ("We will not create a new administrative record on appeal by reviewing evidence that the Board did not consider.").

The INA states that, except as pertaining to questions of an individual's nationality, "the court of appeals shall decide the petition [for review of a final order of removal] only on the administrative record on which the order of removal is based." 8 U.S.C. § 1252(b)(4)(A).

a. Judicial Notice Generally Prohibited

Generally, the court may not "take judicial notice of information not part of the administrative record or not previously submitted to the Board." *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (refusing to take judicial notice of State Department country report).

b. Exceptions

(i) Judicial Notice of the Agency's Own Records

The court is not precluded from taking judicial notice of an agency's own records. *See Lising v. INS*, 124 F.3d 996, 998–99 (9th Cir. 1997) (taking judicial notice of the petitioner's naturalization application that was not part of the administrative record in the proceeding before the BIA but was included in the agency's own records and an "official INS form that serves as the very basis for the BIA's decision"); *see also Dent v. Holder*, 627 F.3d 365, 371 (9th Cir. 2010) (noting that circuit precedent "does not prevent us from taking judicial notice of the agency's own records" and taking judicial notice "of the existence of Dent's adoptive mother's and his own applications for naturalization, because they are official agency records from Dent's A-file").

(ii) Certain Basic Facts

The court may take judicial notice under Federal Rule of Evidence 201 of certain basic facts not subject to reasonable dispute. In *Singh v. Ashcroft*, 393 F.3d 903, 904–05 (9th Cir. 2004), the BIA found the petitioner noncredible and denied the petitioner asylum, withholding of deportation, and CAT relief on the grounds that he failed to corroborate the existence of the Research and Analysis Wing (RAW), an organ of the government of India comparable to the CIA. The court took judicial notice of the fact of RAW's existence, reversed the BIA's adverse credibility finding, and granted the petition for review. *Id.* at 905–07. In doing so, the court eschewed a "hyper-technical application of the general rule that the court can consider only evidence considered by the Board." *Id.* at 907 (citing *Fisher v. INS*, 79 F.3d 955, 964 (9th Cir. 1996) (en banc)).

(iii) Subsequent Events

The court may take judicial notice of "dramatic foreign developments" that occur after the BIA's decision. *Gafoor v. INS*, 231 F.3d 645, 655–57 (9th Cir. 2000) (noting that "*Fisher* related to evidentiary material that could have been, but was not, presented to the BIA," holding that the court may take judicial notice of political developments subsequent to the BIA's decision, and remanding "to the agency for it to determine the impact of these dramatic recent events"), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009).

(iv) Questions of Foreign Law

In *Shen v. Garland*, 109 F.4th 1144, 1148–53 (9th Cir. 2024), the agency made an adverse credibility determination based in part on a mistaken assumption about when China repealed a policy requiring premarital medical examinations. The court concluded that a statute prohibiting supplementation of the administrative record during judicial review, 8 U.S.C. § 1252(b)(4)(A), did not preclude the court from considering extra-record materials to determine the effective date of the repeal of the Chinese law, because the statute did not "restrict our ability to conduct independent legal research concerning any question of law that properly arises in our consideration of a petition for review of a removal order." *Id.* at 1153–54. The court held that the issue of the effective date of the Chinese law's repeal was "a readily resolvable question of law" subject to the court's jurisdiction under 8 U.S.C. § 1252(a)(2)(D). *Id.* at 1154–57.

(v) Relying on Extra-Record Materials for Context

The court may consider information beyond the administrative record for context and informational purposes, but the court must base its decision solely on the administrative record. *See Ruiz v. Bondi*, No. 18-71787, 2026 WL 889143, at *2 n.1 (9th Cir. Apr. 1, 2026) ("[W]e incorporate extra-record information into our factual description 'for context and informational purposes only.' We base our decision solely on the administrative record." (citation omitted) (quoting *Castro-Cortez v. INS*, 239 F.3d 1037, 1040 n.2 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006)).

10. Administrative Notice

a. Indisputable Facts: Requires Notice

Where the agency intends to take administrative notice of events occurring after the hearing and the extra-record facts involved on legislative, indisputable, and general, the agency must provide notice to the noncitizen. *See Circu v. Gonzales*, 450 F.3d 990, 993 (9th Cir. 2006) (en banc) ("[N]otice of intent to take administrative notice of events occurring after the hearing is all that is required if extra-record facts and questions are 'legislative, indisputable, and general.'" (quoting *Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994))).

b. Disputable Facts: Requires Notice and Opportunity to Respond

Where the agency intends to take administrative notice of events occurring after the hearing and the extra-record facts or controversial, individualized, or disputable, the agency must provide the noncitizen both notice and an opportunity to respond. *See Circu v. Gonzales*, 450 F.3d 990, 991–92 (9th Cir. 2006) (en banc) ("[D]ue process requires '*both* notice to the applicant that administrative notice will be taken *and* an opportunity to rebut extra-record facts or to show cause why administrative notice should not be taken of those facts.'" (quoting *Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994))); *id.* at 994–95 (granting petition for review where IJ took administrative notice of country report without providing either notice or an opportunity to respond); *id.* at 994 (characterizing as a disputable fact whether purported changes in country conditions vitiate an applicant's previously well-founded fear of persecution).

11. No Additional Evidence (§ 2347(c))

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

12. Forfeiture and Waiver

Issues that are not raised at all in a petitioner's opening brief are forfeited. *See Singh v. Bondi*, 161 F.4th 560, 565 n.1 (9th Cir. 2025) ("Singh forfeited any challenge to the BIA's CAT finding by failing to raise the issue in his brief."); *Corro-Barragan v. Holder*, 718 F.3d 1174, 1177 n.5 (9th Cir. 2013) (failure to contest issue at all in opening brief); *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) ("We 'will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.'" (quoting *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003))).

Issues mentioned in an opening brief but not "specifically and distinctly" argued are also forfeited. *See Hernandez v. Garland*, 47 F.4th 908, 916 (9th Cir. 2022) (quoting *Velasquez-Gaspar v. Barr*, 976 F.3d 1062, 1065 (9th Cir. 2020)); *see id.* (issue forfeited where petitioner raised argument in a single sentence without coherently developing it); *Olea-Serefina v. Garland*, 34 F.4th 856, 867 (9th Cir. 2022) (due process and equal protection arguments forfeited where "contention is purely conclusory and devoid of supporting factual detail or legal argument"); *Cui v. Garland*, 13 F.4th 991, 999 n.6 (9th Cir. 2021) (issue was forfeited where it was raised in the "Statement of the Case" section but not in the argument section of the brief); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1260 (9th Cir. 1996) (same).

The opening brief adequately raised an issue in the following cases. *See Mamouzian v. Ashcroft*, 390 F.3d 1129, 1136 (9th Cir. 2004) (brief adequately raised challenge to IJ's decision regarding her fear of future persecution where it "discusses the grounds upon which a grant of asylum can be made, explains that the basis for [petitioner's] fear is her political opinion, and argues that she 'is more than likely to suffer future persecution should [she] return to Armenia'" (second alteration in original)); *id.* ("Mamouzian's brief may not be perfectly written, but it is not difficult to discern the point she is trying to make."); *id.* ("We will not ignore the ultimate objective of Mamouzian's appeal . . . by parsing her brief's language in a hyper technical manner. Just as deportation statutes must be construed in favor of the alien . . . , the briefs of aliens seeking refugee status must be reviewed with lenity and any ambiguities must be resolved in their favor."); *Guo v. Ashcroft*, 361 F.3d 1194, 1199 (9th Cir. 2004) (opening brief sufficiently raised argument that substantial evidence did not support IJ's credibility finding where brief stated "neither the Board nor the Immigration Judge pointed to any specific reasons for rejecting [his] testimony"); *Ndom v. Ashcroft*, 384 F.3d 743, 750–51 (9th Cir. 2004) (opening brief sufficiently raised past persecution claim where brief discussed evidence of past persecution and cited legal standard encompassing past persecution claim), *superseded by statute on other grounds as stated in Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009).

A petitioner does not forfeit claims "by failing to articulate the proper standard of review in his briefs to this court." *Ndom v. Ashcroft*, 384 F.3d 743, 750 (9th Cir. 2004) (asylum and withholding of removal claims not forfeited by failing to cite substantial evidence standard of review), *superseded by statute on other grounds as stated in Parussimova v. Mukasey*, 555 F.3d 734, 739–40 (9th Cir. 2009); *Mejia v. Ashcroft*, 298 F.3d 873, 876 (9th Cir. 2002) ("A failure to recite the proper standard of review does not constitute waiver of a properly raised merits issue."); *id.* at 876–77 (government's forfeiture argument was "entirely lacking in merit" where petitioner's brief cited the erroneous de novo review standard of review for a challenge to the denial of a motion to reopen rather than citing the correct abuse of discretion standard).

Issues raised for the first time in a reply brief or supplemental brief are forfeited. *See Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (government forfeited claim that 8 U.S.C. § 1231(a)(5) barred reopening because it did not raise the issue until the court ordered supplemental briefing); *Nguyen v. Barr*, 983 F.3d 1099, 1102 (9th Cir. 2020) (petitioner "waived review of the Board's discretionary denial of asylum because he did not contest this aspect of the Board's decision in his opening brief" and "raised it for the first time in his reply brief").

"The terms waiver and forfeiture — though often used interchangeably by jurists and litigants — are not synonymous. Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Honcharov v. Barr*, 924 F.3d 1293, 1295 n.1 (9th Cir. 2019) (quoting *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 20 n.1 (2017)).

a. Exceptions to Forfeiture/Waiver

(i) No Prejudice to Opposing Party

The court has discretion to review an issue not raised in the petitioner's opening brief "if the failure to raise the issue properly did not prejudice the defense of the opposing party." *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (quoting *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992)); *id.* at 1161–62 (reaching repapering issue where petitioners failed to raise the issue in their opening briefs but raised the issue in a Fed. R. App. P. 28 letter before oral argument, the government had the opportunity to address the issue at oral argument, and the court called for and received supplemental briefs by both parties on the repapering issue); *see also Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004) (court had discretion to reach issue not raised in opening brief where government briefed the issue in its answering brief and would suffer no prejudice from the petitioner's failure to properly raise the issue).

(ii) Manifest Injustice

"We will review an issue not raised in an appellant's opening brief 'if a failure to do so would result in manifest injustice.'" *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (quoting *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992)); *id.* (applying exception to repapering issue).

(iii) Issue Raised In Answering Brief

The court has discretion to review an issue not raised by a petitioner when it is raised in the government's answering brief. *See Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004) (reviewing appropriateness of summary dismissal because issue briefed by government and the government would suffer no prejudice).

b. Party Presentation Principle

"In our adversarial system of adjudication, we follow the principle of party presentation," relying on the parties to frame the issues for decision. *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020); *see also Clark v. Sweeney*, 607 U.S. 7, 9 (2025) (per curiam) ("The Fourth Circuit transgressed the party-presentation principle by granting relief on a claim that Sweeney never asserted and that the State never had the chance to address.").

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

"The BIA 'has no power to expand our remand beyond the boundary ordered by our court.'" *Conde Quevedo v. Barr*, 947 F.3d 1238, 1242 (9th Cir. 2020) (quoting *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1173 (9th Cir. 2006)); *see, e.g.*, *Conde Quevedo v. Barr*, 947 F.3d 1238, 1242 (9th Cir. 2020) (where the court remanding for the BIA to consider withholding of removal, the BIA on remand properly refused to consider petitioner's claim for CAT relief); *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1173 (9th Cir. 2006) (where the court remanded for the BIA to consider whether the petitioner demonstrated a well-founded fear of persecution, the BIA on remand properly refused to consider the petitioner's new argument that the notice to appear was defective).

a. Scope of IJ's Jurisdiction on Remand from BIA

"[T]he IJ's jurisdiction on remand from the BIA is limited only when the BIA expressly retains jurisdiction and qualifies or limits the scope of the remand to a specific purpose. An articulated purpose for the remand, without any express limit on scope, is not sufficient to limit the remand such that it forecloses consideration of other new claims or motions that the IJ deems appropriate or that are presented in accordance with relevant regulations." *Fernandes v. Holder*, 619 F.3d 1069, 1074 (9th Cir. 2010). Where the BIA simply directs the IJ to conduct further proceedings "consistent with" the BIA's opinion, the remand order does not limit or qualify the IJ's ability to consider new evidence or motions. *Id.*; *see also Padilla-Martinez v. Holder*, 770 F.3d 825, 831 (9th Cir. 2014) (where the BIA does not limit the scope of remand, the BIA presumably remands on an open record).

See, e.g., *Padilla-Martinez v. Holder*, 770 F.3d 825, 831 (9th Cir. 2014) (government permissibly offered new evidence on remand to IJ to support charge that petitioner was convicted of aggravated felony where BIA did not preclude new evidence in remand order); *Fernandes v. Holder*, 619 F.3d 1069, 1072–74 (9th Cir. 2010) (where BIA remanded to the IJ to allow the DHS to show changed country conditions to rebut the presumption of a well-founded fear of persecution, the IJ on remand permissibly granted the government's motion to reopen and considered new evidence that the petitioner had filed a fraudulent asylum application, which led to an adverse credibility finding and the denial of the petitioner's applications for asylum, withholding of removal, and CAT relief).

As a corollary to the rule that the IJ's jurisdiction on remand is unlimited, "the BIA only retains jurisdiction when remanding to an IJ if its remand order expressly retains jurisdiction *and* qualifies or limits the scope of remand to a specific purpose." *Bermudez-Ariza v. Sessions*, 893 F.3d 685, 688 (9th Cir. 2018). In *Bermudez-Ariza*, 893 F.3d at 686–87, after the BIA remanded for further proceedings on the petitioner's CAT claim, the IJ reconsidered its earlier denial of asylum and granted asylum, and the BIA vacated the grant of asylum as beyond the IJ's jurisdiction scope of the remand. The court concluded that IJ had jurisdiction to grant asylum on remand from the BIA and granted the petition for review challenging the BIA's vacatur of the IJ's grant of asylum. *Id.* at 687–89.

14. Where Agency Ignores a Procedural Defect

"When the BIA has ignored a procedural defect and elected to consider an issue on its substantive merits, we cannot then decline to consider the issue based upon this procedural defect." *Abebe v. Gonzales*, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc); *see id.* at 1040–41 (deeming claim exhausted where IJ considered it, petitioner's BIA brief did not raise claim, and BIA decision adopted and affirmed the IJ's decision and cited *Matter of Burbano*); *see also Maie v. Garland*, 7 F.4th 841, 846–47 (9th Cir. 2021) (concluding that although petitioner did not flesh out his argument before the agency, the issue was preserved because both the IJ and the BIA reached the merits of the issue).

15. BIA Cannot Cure Omission Through Motion to Reopen

The BIA cannot cure the legal error of ignoring a claim in a petitioner's direct appeal by subsequently considering the claim in a motion to reopen. *See Doissaint v. Mukasey*, 538 F.3d 1167, 1170–71 (9th Cir. 2008) ("[W]hen the BIA commits legal error in a petitioner's direct appeal, the BIA cannot cure that error in a denial of the petitioner's motion to reopen."). In *Doissaint*, the petitioner brought various claims before the IJ, including a claim for CAT relief. *Id.* at 1169. After the IJ denied the CAT claim on the merits, the petitioner appealed the CAT claim to the BIA. *Id.* The BIA erroneously concluded that the petitioner abandoned the claim and therefore declined to consider the claim on the merits. *Id.* The petitioner then filed a motion to reopen, asking the BIA to remand to the IJ so the IJ could consider new evidence on the CAT claim. *Id.* The BIA denied the motion to reopen, noting that the petitioner could have submitted his new evidence earlier and ruling that petitioner had failed to make a prima facie showing of eligibility for CAT relief. *Id.* The court held that the BIA's discussion of the CAT claim in its decision denying the motion to reopen could not cure the BIA's refusal to consider the CAT claim on appeal. *Id.* at 1170–71. The court held that a motion to reopen could not negate the BIA's legal error because a motion to reopen is "purely fact-based" and "is not a means by which the BIA can correct its own legal error." *Id.* at 1170. A motion to reconsider, by contrast, provides a means to correct legal errors. *Id.*

16. Collateral Estoppel

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

> Collateral estoppel applies to a question, issue, or fact when four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits.

Id.

In *Oyeniran*, the IJ and BIA determined in 2005 that the petitioner was entitled to deferral of removal under CAT. *Id.* at 803. In 2009, the government initiated new removal proceedings and the IJ and BIA denied deferral under CAT. *Id.* at 805. The court held that collateral estoppel barred the government from relitigating both the historical facts at issue in the 2005 proceedings (i.e., what occurred in 2003 and 2004) and the legal significance of those facts (i.e., the conclusion that if removed to his native country, it was more likely than not that the petitioner would be tortured by public officials, or by private individuals with the government's consent or acquiescence). *See id.* at 806–07; *id.* at 808 ("[T]he BIA's prior decision conclusively resolved certain past events and those historical events cannot be re-litigated."). The government, moreover, could not relitigate those findings based on new evidence. *See id.* at 807 ("The introduction of new evidence on a matter previously resolved is not an exception to collateral estoppel."). The BIA could, however, "consider events that occurred *after* the 2005 hearing" to decide the petitioner's "current application for deferral from removal." *Id.* at 808. The court explained that "[t]he very nature of deferral permits reevaluation of whether it is more likely than not that an alien will be tortured in the future based on *new* facts." *Id.*

B. Standards of Review

"The proper standard of review in immigration proceedings depends on the nature of the decision under review." *Virdiana v. Holder*, 646 F.3d 1230, 1233 (9th Cir. 2011); *see also* 8 U.S.C. § 1252(b)(4) (setting out standards of review for findings of fact, eligibility determinations, the discretionary decision whether to grant asylum, and the availability of corroborating evidence). The Ninth Circuit Standards of Review Outline also provides information on standards of review.

Petitions for review of BIA and IJ decisions generally involve one of the following standards of review: de novo review, substantial evidence review, or abusive of discretion review.

1. De Novo

a. Definition

"De novo review means that the reviewing court 'do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below.'" *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (alterations in original) (quoting *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988)); *see also Bartolome v. Sessions*, 904 F.3d. 803, 812 (9th Cir. 2018) (same).

b. Constitutional Questions

The court reviews constitutional questions de novo. *See Cruz v. Bondi*, 146 F.4th 730, 737 (9th Cir. 2025) ("We review legal and constitutional questions de novo."). For example, the court has reviewed the following de novo:

- Due process challenges to reasonable fear proceedings. *E.g.*, *Zuniga v. Barr*, 946 F.3d 464, 466 (9th Cir. 2019) ("We review de novo due process challenges to reasonable fear proceedings.").

- Due process claims based on the agency's improper consideration of evidence. *E.g.*, *Chavez-Reyes v. Holder*, 741 F.3d 1, 3 (9th Cir. 2014) (claim that the BIA violated petitioner's due process rights by considering guilty plea where the resulting conviction was overturned on appeal).

- Equal protections claims. *E.g.*, *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) ("We review de novo claims of equal protection and due process violations in removal proceedings.").

- Due process claims based on denial of the right to counsel. *E.g.*, *Colindres-Aguilar v. INS*, 819 F.2d 259, 261 (9th Cir. 1987) ("We review de novo petitioner's due process claim that the judge should have inquired whether he had waived his right to counsel.").

- Due process claims based on ineffective assistance of counsel. *E.g.*, *Mohammed v. Gonzales*, 400 F.3d 785, 791–92 (9th Cir. 2005) ("Questions of law, including claims of due process violations due to ineffective assistance, we review de novo.").

- Contentions the agency failed to consider probative evidence. *See Cole v. Holder*, 659 F.3d 762, 771-72 (9th Cir. 2011) (CAT context).

- Contentions the agency failed to consider arguments. *See Acevedo Granados v. Garland*, 992 F.3d 755, 764 (9th Cir. 2021) (remanding where neither the IJ nor the BIA "meaningfully engaged" with the language of Acevedo Granado's second proposed particular social group) (citing *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (IJ erred by failing to consider extraordinary circumstances proffered to excuse untimely asylum application)); *Brezilien v. Holder*, 569 F.3d 403, 412 (9th Cir. 2009) (remanding where BIA failed to address petitioner's claim that agency erred by failing to apply presumption of a well-founded fear of persecution); *Doissaint v. Mukasey*, 538 F.3d 1167, 1171 (9th Cir. 2008) (concluding the BIA erred by determining that petitioner's properly raised and briefed CAT claim was abandoned on appeal, and that the error was not cured by subsequent consideration of the claim in a motion to reopen); *Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007) (explaining that BIA is not free to ignore arguments raised by petitioner and concluding that "by summarily affirming the IJ's decision, the BIA ignored—and denied review of—[petitioner's]" procedural due process claim); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA's unexplained failure to address applicant's ineffective assistance of counsel claim); *cf. Almaghzar v. Gonzales*, 457 F.3d 915, 921-22 (9th Cir. 2006) (IJ's generalized statement that he considered all the evidence was sufficient).

- Egregious Fourth Amendment violations. *E.g.*, *Martinez-Medina v. Holder*, 673 F.3d 1029, 1033 (9th Cir. 2011).

c. Statutory Interpretation

The court reviews de novo the BIA's determination of questions of law, except to the extent that deference is owed to its interpretation of the governing statutes and regulations. *See Route v. Garland*, 996 F.3d 968, 975 (9th Cir. 2021).

Under the former *Chevron* regime, the court deferred to the agency's reasonable interpretation of ambiguous provisions of the INA. *See, e.g.*, *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908–09 (9th Cir. 2009) (en banc) (describing *Chevron* framework); *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56–57 (2014) (stating that "'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations" (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999))).

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court overruled *Chevron* and held that the Administrative Procedure Act requires courts to "exercise independent judgment in determining the meaning of statutory provisions." *Id.* at 394. In the aftermath of *Loper Bright*:

1. *Chevron* is overruled and courts are no longer required to defer to the BIA's reasonable interpretations of ambiguous provisions of the INA. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

2. Courts may look to agency interpretations for guidance under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) (in exercising independent judgment in determining the meaning of statutory provisions, "courts may . . . seek aid from the interpretations of those responsible for implementing particular statutes"); *Lemus-Escobar v. Bondi*, 158 F.4th 944, 960 (9th Cir. 2025) (according *Skidmore* deference to BIA's published decisions concerning what crimes involve moral turpitude); *Murillo-Chavez v. Bondi*, 128 F.4th 1076, 1086–87 (9th Cir. 2025) (court may look to agency interpretations for guidance but court is not bound by agency's reasonable interpretation); *Lopez v. Garland*, 116 F.4th 1032, 1036 (9th Cir. 2024) (explaining that, "after *Loper Bright Enterprises*, we may look to agency interpretations for guidance, but do not defer to the agency").

3. The holdings of cases that relied on the *Chevron* framework "are still subject to statutory *stare decisis*." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024); *Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024) (holding that the standard governing a three-judge panel's authority to overrule circuit precedent, *see Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc), applies to circuit precedent relying on the *Chevron* framework).

4. "[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024).

(i) *Skidmore* Deference

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Supreme Court stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In *Loper Bright*, the Supreme Court held that *Skidmore* deference continues to apply to an agency's interpretation of a statute it administers in the post-*Chevron* era. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 388 (2024) (discussing *Skidmore* deference); *id.* at 394 ("[C]ourts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes."); *see also Murillo-Chavez v. Bondi*, 128 F.4th 1076, 1086–87 (9th Cir. 2025) (court may look to agency interpretations for guidance but is not bound by agency's reasonable interpretation); *Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024) ("Now, our task is to evaluate the statute independently under *Skidmore*, giving 'due respect,' but not binding deference to the agency's interpretation.").

"Under *Skidmore*, '[t]he deference given to an agency action may range from great respect to near indifference, depending on the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position.'" *Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024) (alterations in original) (quoting *Bax v. Doctors Med. Ctr. of Modesto, Inc.*, 52 F.4th 858, 872 (9th Cir. 2022)).

Deference under *Skidmore* turns in part on the quality of the BIA's reasoning. *See, e.g.*, *Xiao Lu Ma v. Sessions*, 907 F.3d 1191, 1196 (9th Cir. 2018) ("Cursory conclusions are neither persuasive nor entitled to deference."); *Rivera v. Lynch*, 816 F.3d 1064, 1071 (9th Cir. 2016) ("[T]he BIA's decision that [California's perjury statute] is a CIMT is not entitled to *Skidmore* deference because . . . the BIA . . . provided no reasoning whatsoever."); *Arteaga-De Alvarez v. Holder*, 704 F.3d 730, 740 (9th Cir. 2012) ("[T]he BIA decision is not entitled to substantial weight. Its discussion of the alternative means to immigrate factor consists of one conclusory sentence. It is not thoroughly reasoned, and, as it lacks any explanation, it also lacks the 'power to persuade.'" (quoting *Skidmore*, 323 U.S. at 140)); *Vasquez v. Holder*, 602 F.3d 1003, 1012 n.8 (9th Cir. 2010) (according "minimal deference" where the BIA addressed issue in a single sentence and did not address distinctions between case at hand and prior precedent).

Unpublished BIA decisions may be entitled to *Skidmore* deference. *See* *Route v. Garland*, 996 F.3d 968, 975 (9th Cir. 2021) ("When the BIA does not publish its decision, we accord it deference pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which entitles the interpretation to a respect proportional to its power to persuade." (citation modified)); *Coquico v. Lynch*, 789 F.3d 1049, 1051 (9th Cir. 2015) ("[W]e review the BIA's unpublished interpretation of immigration law, including the definition of a CIMT, with *Skidmore* deference."); *Lezama-Garcia v. Holder*, 666 F.3d 518, 525 (9th Cir. 2011) (unpublished decision issued by a single member of the BIA accorded *Skidmore* deference).

Under *Chevron*, the court did not defer to the BIA's interpretation of statutes it did not administer, including federal criminal statutes and state statutes. *See* *Sandoval v. Sessions*, 866 F.3d 986, 988 (9th Cir. 2017) ("We do not defer to an agency's interpretations of state law or provisions of the federal criminal code."); *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1052 (9th Cir. 2011) ("The BIA is not charged with administering 18 U.S.C. § 16 and its interpretation of that statute gains no deference."); *cf.* *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) (en banc) ("The BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes and, thus, has no special administrative competence to interpret the petitioner's statute of conviction. As a consequence, we review the BIA's finding regarding the specific act for which the petitioner was convicted *de novo*.").

Under *Chevron*, the court did not defer to the BIA's interpretation of nationality/citizenship laws. *See Minasyan v. Gonzales*, 401 F.3d 1069, 1074 (9th Cir. 2005) ("Because 'the INA explicitly places the determination of nationality claims solely in the hands of the courts of appeals and (if there are questions of fact to resolve) the district courts,' we are not required to give *Chevron* deference to the agency's interpretation of the citizenship laws." (quoting *Hughes v. Ashcroft*, 255 F.3d 752, 758 (9th Cir. 2001))); *accord Acevedo v. Lynch*, 798 F.3d 1167, 1169 (9th Cir. 2015) (same).

Under *Chevron*, the court did not defer to BIA decisions determining whether a change in immigration law is retroactive. *See Tyson v. Holder*, 670 F.3d 1015, 1017 (9th Cir. 2012) ("We review de novo, and without *Chevron* deference to the BIA, whether a change to an immigration law is impermissibly retroactive." (quoting *Camins v. Gonzales*, 500 F.3d 872, 880 (9th Cir. 2007))) *see also Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1326 (9th Cir. 2006) ("The *Landgraf* test requires determinations first of Congress's clear intent, and second, of the impact of retroactive effect on the alien's rights. Respondent has not shown that the BIA is authorized by Congress to decide these issues.").

(ii) Status of Pre-*Loper Bright* Circuit Precedent Decided at *Chevron* Step Two

In *Lopez v. Garland*, 116 F.4th 1032 (9th Cir. 2024), the court held that circuit precedent that decided a question of statutory interpretation at *Chevron*'s second step remains binding on three-judge panels "absent 'intervening higher authority' that is 'clearly irreconcilable with'" the prior precedent. *Id.* at 1045 (quoting *Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc)). The court concluded that the *Loper Bright*'s discussion of existing precedent applies not only to Supreme Court precedent but also to circuit precedent. *See id.* ("[T]he Supreme Court has instructed that *Loper Bright Enterprises* does not 'call into question prior cases that relied on the *Chevron* framework.'" (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024))).

Lopez suggested that a three-judge panel could reconsider circuit precedent decided at *Chevron* step two if the BIA promulgated a new interpretation of the statute different from the agency interpretation to which the court had previously deferred at *Chevron* step two. *See Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024) (noting that "the BIA has not promulgated a new interpretation of the statute to prompt us to reconsider our precedent").

d. Regulatory Interpretation

"[W]e review *de novo* the BIA's determination of questions of law, except to the extent that deference is owed to its interpretation of the governing statutes and regulations." *Route v. Garland*, 996 F.3d 968, 975 (9th Cir. 2021) (quoting *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011 (9th Cir. 2006), *overruled on other grounds by Medina-Nunez v. Lynch*, 788 F.3d 1103, 1104 (9th Cir. 2015)).

Prior to *Kisor v. Wilkie*, 588 U.S. 558 (2019), the court adopted a highly deferential standard for deferring to BIA's interpretations of its regulations:

> The BIA's interpretations of its regulations are due 'substantial deference,' and should be upheld 'so long as the interpretation sensibly conforms to the purpose and wording of the regulations.' We therefore defer to the Board's interpretations of ambiguous regulations unless they are 'plainly erroneous,' 'inconsistent with the regulation,' or do 'not reflect the agency's fair and considered judgment.'"

Karingithi v. Whitaker, 913 F.3d 1158, 1161 (9th Cir. 2019) (citation omitted) (quoting *Lezama-Garcia v. Holder*, 666 F.3d 518, 525 (9th Cir. 2011)).

In *Kisor v. Wilkie*, 588 U.S. 558 (2019), the Supreme Court declined to overrule *Auer* deference, under which the courts often defer to agencies' reasonable readings of genuinely ambiguous statutes. *See Kisor v. Wilkie*, 588 U.S. 558, 563 (2019) (plurality opinion) (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). But the Court emphasized certain limitations on *Auer* deference:

- "First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019) (opinion of the Court).

- Second, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction." *Id.* at 575 (internal quotation marks omitted).

- Third, "[i]f genuine ambiguity remains, moreover, the agency's reading must still be reasonable." *Id.* (internal quotation marks omitted).

- Fourth, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitle[] it to controlling weight." *Id.* at 576. "[T]he regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's authoritative or official position, rather than any more ad hoc statement not reflecting the agency's views." *Id.* at 577 (internal quotation marks omitted). "Next, the agency's interpretation must in some way implicate its substantive expertise." *Id.* "Finally, an agency's reading of a rule must reflect fair and considered judgment to receive *Auer* deference," meaning "that a court should decline to defer to a merely convenient litigating position or post hoc rationalization advanced to defend past agency action against attack." *Id.* at 579 (alterations and internal quotation marks omitted).

e. Mixed Questions of Law and Fact

Mixed questions of law and fact qualify as "questions of law" for purposes of judicial review under 8 U.S.C. § 1252(a)(2)(D). *See Urias-Orellana v. Bondi*, 146 S. Ct. 845, 854 (2026); *Wilkinson v. Garland*, 601 U.S. 209, 222 (2024); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020).

But a mixed question is not necessarily subject to de novo review. Following recent Supreme Court precedent, the court has held that the proper standard of review applicable to a mixed question depends on the circumstances. If the mixed question requires primarily factual work, the substantial evidence standard of review or the abuse of discretion standard of review ordinarily applies. *See Wilkinson v. Garland*, 601 U.S. 209, 221–22 (2024). If the mixed question requires primarily legal work, the de novo standard of review ordinarily applies. *See id.*; *see also Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 24 (2021) ("[A] reviewing court should try to break [a mixed] question into its separate factual and legal parts, reviewing each according to the appropriate legal standard. But when a question can be reduced no further, . . . 'the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.'" (quoting *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018))); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 228 (2020) ("The answer to the 'proper standard' question may turn on practical considerations, such as whether the question primarily 'require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard' (often calling for review de novo), or rather 'immerse[s] courts in case-specific factual issues' (often calling for deferential review).” (alterations in original) (quoting *U.S. Bank*, 583 U.S. at 396)).

The court has adopted and applied the foregoing framework. *See Ruiz v. Bondi*, 163 F.4th 586, 599 (9th Cir. 2025); *Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1000–03 (9th Cir. 2025); *Oscar v. Bondi*, 135 F.4th 777, 780 (9th Cir. 2025); *Zia v. Garland*, 112 F.4th 1194, 1202 (9th Cir. 2024). Older circuit cases should be read in light of these decisions, especially broad statements in older cases suggesting that mixed questions are always reviewed de novo. *E.g.*, *Torres v. Barr*, 976 F.3d 918, 923 (9th Cir. 2020) (en banc) (“[W]e review de novo both purely legal questions and mixed questions of law and fact.” (alteration in original) (quoting *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1183 (9th Cir. 2020))); *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014) (“We review de novo questions of law and mixed questions of law and fact.”).

(i) Mixed Questions Reviewed De Novo

[Reserved]

f. Other Questions of Law

The court reviews legal questions de novo. *See Cruz v. Bondi*, 146 F.4th 730, 737 (9th Cir. 2025) (“We review legal and constitutional questions de novo.”); *Tomczyk v. Garland*, 25 F.4th 638, 643 (9th Cir. 2022) (en banc) (“We review legal questions raised in a petition for review . . . de novo.”). For example, the court has reviewed the following questions of law de novo:

- The BIA’s legal conclusions. *E.g.*, *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc) (“We review the Board’s legal conclusions de novo . . . .”).

- The BIA’s interpretation of its own jurisdiction. *E.g.*, *Hernandez v. Holder*, 738 F.3d 1099, 1101 (9th Cir. 2013) (“We review an agency’s determination of its own jurisdiction de novo.”).

- Whether the BIA applied the correct standard of review. *E.g.*, *Soto-Soto v. Garland*, 1 F.4th 655, 659 (9th Cir. 2021) (“‘Whether the BIA has applied the correct standard of review is a question of law’ that we review *de novo*.” (quoting *Rodriguez v. Holder*, 683 F.3d 1164, 1169 (9th Cir. 2012))).

- The retroactive applicability of statutes and regulations. *See*, *e.g.*, *Ortega v. Holder*, 747 F.3d 1133, 1134 (9th Cir. 2014) ("The retroactive applicability of statutes is reviewed de novo."); *Kankamalage v. INS*, 335 F.3d 858, 861–62 (9th Cir. 2003) (reviewing de novo whether regulation had retroactive effect).

- Interpretation of statutes and regulations, except to the extent deference is owed to the agency's interpretation. *See Route v. Garland*, 996 F.3d 968, 975 (9th Cir. 2021); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293 (9th Cir. 2018) ("We review 'de novo the BIA's determination of purely legal questions, including the BIA's interpretation of the Immigration and Nationality Act.' However, we do so with appropriate deference." (citation omitted) (quoting *Lopez v. INS*, 184 F.3d 1097, 1099 (9th Cir. 1999))). Prior to *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the court deferred to the BIA's reasonable interpretation of ambiguous provisions of the INA under *Chevron*. *See Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024). "Now, our task is to evaluate the statute independently under *Skidmore*, giving 'due respect,' but not binding deference to the agency's interpretation." *Id.* (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403 (2024)).

- Whether a particular conviction qualifies as a type of offense referenced in the INA. *See*, *e.g.*, *Lemus-Escobar v. Bondi*, 158 F.4th 944, 959 (9th Cir. 2025) ("Whether a state statute categorically defines a crime involving moral turpitude is a question of law that we review de novo."); *Villavicencio v. Sessions*, 904 F.3d 658, 663 (9th Cir. 2018) (reviewing de novo whether a particular conviction qualifies as an aggravated felony); *Latter-Singh v. Holder*, 668 F.3d 1156, 1159 (9th Cir. 2012) (reviewing de novo whether a crime involves moral turpitude); *Camacho-Cruz v. Holder*, 621 F.3d 941, 942 n.1 (9th Cir. 2010) (reviewing de novo legal determination that a conviction is a crime of violence).

- Whether applicant's daughter was a qualifying "child." *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1145 (9th Cir. 2002) (reviewing de novo legal determination of whether applicant's daughter was a qualifying "child" for purposes of 8 U.S.C. § 1229b(b)(1)(D)).

- Statutory eligibility for relief. *E.g.*, *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1050 (9th Cir. 2014) (reviewing de novo legal question of whether the petitioner was statutorily eligible to apply for a § 212(h) waiver). Note that the court lacks jurisdiction to review the agency's factual findings relating to discretionary relief, including § 212(h) waivers, enumerated in 8 U.S.C. § 1252(a)(2)(B)(i). *See Patel v. Garland*, 596 U.S. 328, 339 (2022) (holding that § 1252(a)(2)(B)(i) bars judicial review of any judgment "relating to" the granting of relief, including factual findings).

- Question of citizenship. *E.g.*, *Anderson v. Holder*, 673 F.3d 1089, 1096 (9th Cir. 2012) ("We review the question of citizenship de novo.").

- A district court's decision whether to grant or deny a writ of habeas corpus. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) ("The decision whether to grant or deny a petition for habeas corpus is reviewed *de novo*.").

- Denial of the statutory right to counsel. *E.g.*, *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 804 n.1 (9th Cir. 2007) (whether IJ violated statutory right to counsel).

2. Substantial Evidence

a. Definition

"Substantial evidence . . . is 'more than a mere scintilla,' but 'means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Urias-Orellana v. Bondi*, 146 S. Ct. 845, 850 (2026) (quoting *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019)); *see Castillo v. Barr*, 980 F.3d 1278, 1283 (9th Cir. 2020) ("Substantial evidence means the Board's holding is supported by 'reasonable, substantial, and probative evidence on the record.'" (quoting *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1056 (9th Cir. 2006))).

Thus, "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Urias-Orellana v. Bondi*, 146 S. Ct. 845, 850 (2026) (quoting *Nasrallah v. Barr*, 590 U.S. 573, 584 (2020)). *See also INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (holding that, "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it"); *id.* at 481 (holding that the BIA's determination that the petitioner was not eligible for asylum "can be reversed only if the evidence presented by [the petitioner] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed"); *Plancarte Sauceda*, 23 F.4th 824, 831 (9th Cir. 2022) ("To prevail under the substantial evidence standard, the petitioner 'must show that the evidence not only supports, but compels the conclusion that these findings and decisions are erroneous.'" (quoting *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000))); *Castillo v. Barr*, 980 F.3d 1278, 1283 (9th Cir. 2020) ("[W]e must uphold the Board's decision unless the record compels a contrary conclusion."); *Sanjaa v. Sessions*, 863 F.3d 1161, 1164 (9th Cir. 2017) ("To reverse the BIA, we must determine 'that the evidence not only *supports* [a contrary] conclusion, but *compels* it—and also compels the further conclusion that the petitioner meets the requisite standard for obtaining relief.'" (alteration in original) (quoting *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014))); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc) ("A finding by the IJ is not supported by substantial evidence when 'any reasonable adjudicator would be compelled to conclude to the contrary based on the evidence in the record.'" (quoting *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014) (in turn quoting 8 U.S.C. § 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.")))).

"The 'substantial evidence' standard of review means we must be deferential to the BIA's conclusions. But deference does not mean blindness." *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc); accord *Parada v. Sessions*, 902 F.3d 901, 909 (9th Cir. 2018) (same); *Garcia v. Wilkinson*, 988 F.3d 1136, 1142 (9th Cir. 2021) (same).

The substantial evidence standard is statutory as applied to questions of fact and judicial review of final orders of removal. *See* 8 U.S.C. § 1252(b)(4)(B) (stating that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"); *Urias-Orellana v. Bondi*, 146 S. Ct. 845, 850 (2026) (explaining that 8 U.S.C. § 1252(b)(4)(B) adopts the substantial evidence standard of review); *Nasrallah v. Barr*, 590 U.S. 573, 584 (2020) (same); *cf.* 8 U.S.C. § 1105a(a)(4) (repealed 1996) (stating that "the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive").

b. Mixed Questions Reviewed for Substantial Evidence

As discussed above, mixed questions of law and fact are reviewed for substantial evidence when they are primarily factual. *See Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1000–03 (9th Cir. 2025).

Post-*Patel* and post-*Wilkinson*, the Supreme Court and the Ninth Circuit have held that the following mixed questions are reviewed for substantial evidence:

- Whether a given set of facts constitutes persecution. *See Urias-Orellana v. Bondi*, 146 S. Ct. 845, 851 (2026) (with respect to the proper standard for review of the agency's persecution determinations, "we hold that § 1252(b)(4)(B) requires courts to review the entirety of the agency's conclusions—both the underlying factual findings and the application of the INA to those findings—for substantial evidence"). This decision abrogated some Ninth Circuit precedent to the contrary, such as *Kaur v. Wilkinson*, 986 F.3d 1216, 1221 (9th Cir. 2021) ("Whether particular acts constitute persecution for asylum purposes is a legal question . . . . review[ed] de novo." (alterations in original) (quoting *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005))).

- Whether the BIA erred in applying the exceptional and extremely unusual hardship standard to a given set of facts. *See Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1003 (9th Cir. 2025).

- Good faith marriage determination. *See Zia v. Garland*, 112 F.4th 1194, 1202 (9th Cir. 2024) (reviewing good faith marriage determination for substantial evidence because "it is a primarily factual question").

- Firm resettlement findings. *See Oscar v. Bondi*, 135 F.4th 777, 780 (9th Cir. 2025) ("Whether the agency properly applied the firm resettlement standard to a given set of facts is a 'primarily factual' mixed question, and therefore we continue to review the agency's firm resettlement determination with deference under the substantial evidence standard." (citation omitted) (quoting *Wilkinson v. Garland*, 601 U.S. 209, 225 (2024))).

- Whether changed or extraordinary circumstances allow the filing of an asylum more than one year after arrival in the United States. *See Ruiz v. Bondi*, 163 F.4th 586, 599 (9th Cir. 2025) (holding that the substantial evidence standard applies to the primarily factual mixed question of whether extraordinary circumstances exist under § 1158(a)(2)(D)).

c. Other Questions Reviewed for Substantial Evidence

Pre-*Wilkinson*, the court has held that the following questions are reviewed for substantial evidence:

- Factual findings underlying eligibility determinations for asylum and related relief. *See Plancarte Sauceda v. Garland*, 23 F.4th 824, 831 (9th Cir. 2022) ("We review for substantial evidence factual findings underlying the BIA's determination that a petitioner is not eligible for asylum, withholding of removal, or CAT relief."); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1305 (9th Cir. 2015) ("We review the BIA's denial of relief under CAT for substantial evidence.").

- Persecution determinations. *See Urias-Orellana v. Bondi*, 146 S. Ct. 845, 851 (2026) (holding that the agency's persecution determination is reviewed for substantial evidence); *Zhao v. Mukasey*, 540 F.3d 1027, 1030 (9th Cir. 2008) (holding that "substantial evidence does not support the IJ's rejection of the couple's claim of well-founded fear of persecution").

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

- Whether petitioner established a reasonable fear of torture. *See Orozco-Lopez v. Garland*, 11 F.4th 764, 774 (9th Cir. 2021) (reviewing for substantial evidence whether petitioner established a reasonable fear of persecution or torture).

- Whether applicant was persecuted on account of a protected ground. *See Rodriguez Tornes v. Garland*, 993 F.3d 743, 750 (9th Cir. 2021) (reviewing for substantial evidence the agency's factual findings, including whether applicant was persecuted on account of her political opinion); *Vasquez-*

Rodriguez v. Garland, 7 F.4th 888, 893 (9th Cir. 2021) (persecutor's actual motive is a question of fact reviewed for substantial evidence).

- Whether petitioner could safely relocate to avoid future persecution. *See Arrey v. Barr*, 916 F.3d 1149, 1161 (9th Cir. 2019) ("[S]ubstantial evidence did not support the Board's conclusion that Arrey could safely relocate within Cameroon to avoid future harm.").

- Adverse credibility determinations. *See Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014) ("We review factual findings, including adverse credibility decisions, under the deferential substantial evidence standard."); *Bassene v. Holder*, 737 F.3d 530, 536 (9th Cir. 2013) ("Credibility determinations are reviewed for substantial evidence.").

- Firm resettlement findings. *See Oscar v. Bondi*, 135 F.4th 777, 780 (9th Cir. 2025) ("We review the agency's finding of 'firm resettlement' for substantial evidence.").

- Factual findings in decision to terminate grant of asylum. *See Urooj v. Holder*, 734 F.3d 1075, 1077 (9th Cir. 2013) ("On review from a decision to terminate asylum status, this Court reviews the BIA's factual findings for substantial evidence.").

- Whether the BIA erred in applying the exceptional and extremely unusual hardship standard to a given set of facts. *See Gonzalez-Juarez v. Bondi*, 137 F.4th 996, 1003 (9th Cir. 2025).

- Whether petitioner established the requisite continuous physical presence for purposes of cancellation of removal. *See Zarate v. Holder*, 671 F.3d 1132, 1134 (9th Cir. 2012) ("We review for substantial evidence the BIA's decision that an alien did not establish ten years of continuous physical presence in the United States.").

3. Abuse of Discretion

a. Definition

"The BIA abuses its discretion when it acts 'arbitrarily, irrationally, or contrary to the law,' or 'when it fails to provide a reasoned explanation for its actions.'" *Lemus-Escobar v. Bondi*, 158 F.4th 944, 952 (9th Cir. 2025) (quoting *Bent v. Garland*, 115 F.4th 934, 939 (9th Cir. 2024)). "An error of law is an abuse of discretion." *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010).

The BIA abuses its discretion by denying a motion to reopen based on the mere fact that DHS opposed the motion without regards to the merits of the motion. *See Tadevosyan v. Holder*, 743 F.3d 1250, 1254 (9th Cir. 2014).

(i) Failure to Provide Reasoned Explanation

The court has "long held that the BIA abuses its discretion when it fails to provide a reasoned explanation for its actions." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (BIA abused its discretion by denying motion to remand without explanation); *see also Li v. Bondi*, 139 F.4th 1113, 1123–24 (9th Cir. 2025) ("An agency acts arbitrarily when it fails to offer any reasoned explanation for its determination. . . . 'While the BIA does not have to write an exegesis on every contention,' we require it 'to consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'" (quoting *Agonafer v. Sessions*, 859 F.3d 1198, 1206 (9th Cir. 2017))); *id.* at 1124–27 (where precedent clearly established the BIA's authority to review ineffective assistance of counsel claims involving conduct before a different tribunal, the BIA's "bare statement that the alleged conduct occurred 'before the Ninth Circuit, a different tribunal in a different branch of the Government,' without more, sheds no light on its reasons for declining to review Li's ineffective assistance claim," such that BIA abused its discretion by denying motion to reopen); *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1034 (9th Cir. 2021) ("The BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to the law, and when it fails to provide a reasoned explanation for its actions." (quoting *Tadevosyan v. Holder*, 743 F.3d 1250, 1253 (9th Cir. 2014))); *Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020) ("The BIA abuses its discretion when it makes an error of law or fails to provide a reasoned explanation for its actions.").

Where the BIA fails to engage in a substantive analysis of its decision, the court is unable to conduct a meaningful review. *See Arredondo v. Holder*, 623 F.3d 1317, 1320 (9th Cir. 2010) (remanding to the BIA to clarify statutory grounds upon which it relied). For example, in *Alphonsus v. Holder*, reviewing for abuse of discretion, the court concluded that "absent an adequate explanation as to how the

Board's 'meaningful risk of harm' rationale can be reconciled with the Board's precedents and with the statutory language, [the court could not] say that the Board's decision was the result of legally adequate decisionmaking." 705 F.3d 1031, 1044–50 (9th Cir. 2013) (granting the petition for review and remanding "for further consideration and explanation of the 'particularly serious crime' issue."), *abrogated on other grounds by Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018).

"While the BIA does not have to write an exegesis on every contention, it is required to consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Agonafer v. Sessions*, 859 F.3d 1198, 1206–07 (9th Cir. 2017) (internal quotation marks and citation omitted)); *id.* (BIA abused its discretion in denying motion to reopen where the BIA failed to adequately consider the issues raised by the new country conditions reports).

See also Mejia v. Sessions, 868 F.3d 1118, 1121–22 (9th Cir. 2017) (holding that the BIA abused its discretion by failing to explain why it allowed the IJ to disregard procedural requirements set forth in BIA precedent); *Arrozal v. INS*, 159 F.3d 429, 432 (9th Cir. 1998) ("The BIA abuses its discretion when it 'fails to state its reasons and show proper consideration of *all* factors when weighing equities and denying relief.'" (quoting *Watkins v. INS*, 63 F.3d 844, 849 (9th Cir. 1995))).

The reasonable explanation requirement applies to the court's review of BIA decisions generally and is not limited to cases governed by the abuse of discretion standard of review:

> The BIA's decisionmaking is governed by minimum procedural requirements. As relevant here, the BIA must provide a reasoned explanation for its actions. Due process and this court's precedent require a minimum degree of clarity in dispositive reasoning and in the treatment of a properly raised argument. The BIA must be clear enough that we need not speculate based on an incomplete analysis. . . . Without knowing the basis of the Board's decision, we cannot conduct a meaningful review. We therefore remand to the BIA for a clear explanation.

Delgado v. Holder, 648 F.3d 1095, 1108 (9th Cir. 2011) (en banc) (citations and internal quotation marks omitted).

Boilerplate explanations are inadequate:

> When reviewing the Board's determination that an alien is ineligible for asylum, we do not allow the Board to rely on "boilerplate" opinions "which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances." Instead, the Board's opinion must contain a statement of its reasons for denying the petitioner relief adequate for us to conduct our review, and we must remand for clarification if the Board fails to provide an adequate statement of the reasons for its decision. However, while we will not tolerate "boilerplate" opinions, we will not impose unnecessarily burdensome or technical requirements on the Board.

Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995) (citations omitted) (quoting *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991)).

In making an adverse credibility finding, the IJ must "state explicitly the factors supporting his or her adverse credibility determination." *Shrestha v. Holder*, 590 F.3d 1034, 1042 (9th Cir. 2010) ("[A]n IJ normally may not rely on nothing more than a vague reference to the 'totality of the circumstances' or recitation of naked conclusions that a petitioner's testimony was inconsistent or implausible, that the petitioner was unresponsive, or that the petitioner's demeanor undermined the petitioner's credibility."); *id.* ("[T]he better practice is for the agency to provide specific instances in the record that form the basis of the agency's adverse credibility determination.").

(ii) Failure to Address an Argument

The BIA abuses its discretion when it fails to address an argument. *See Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) ("The BIA abuses its discretion when it fails to offer a reasoned explanation for its decision, distorts or disregards important aspects of the alien's claim." (quoting *Konstantinova v. INS*, 195 F.3d 528, 529 (9th Cir. 1999))); *see, e.g.*, *Alcarez-Rodriguez v. Garland*, 89 F.4th 754, 763-64 (9th Cir. 2023) (holding that BIA abused its discretion in denying motion to reopen or remand where it failed to address petitioner's arguments regarding eligibility for relief from removal).

Where the agency fails to address an argument, there is no rationale for the court to review, which requires remanding to the agency for additional analysis or explanation. *See, e.g.*, *Muradin v. Gonzales*, 494 F.3d 1208, 1210 (9th Cir. 2007) ("In light of the IJ's failure to address this argument, and the BIA's reliance on the IJ's order, we remand for additional investigation or explanation.").

(iii) Failure to Consider All Factors

"[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." *Szonyi v. Barr*, 942 F.3d 874, 896 (9th Cir. 2019) (alteration in original) (quoting *Zheng v. Holder*, 644 F.3d 829, 833 (9th Cir. 2011)); *see also Franco-Rosendo v. Gonzales*, 454 F.3d 965, 966–68 (9th Cir. 2006) (BIA abused its discretion by failing to identify and evaluate favorable factors in support of motion to reopen).

(iv) Failure to Comply with Regulations

See Iturribarria v. INS, 321 F.3d 889, 895 (9th Cir. 2003) ("The BIA abuses its discretion when it fails to comply with its own regulations.").

(v) Unexplained Departure from Precedent or Practice

See Israel v. INS, 785 F.2d 738, 740 (9th Cir. 1986) ("The BIA acts arbitrarily when it disregards its own precedents and policies without giving a reasonable explanation for doing so.").

(vi) Failure to Consider Evidence

See Franco-Rosendo v. Gonzales, 454 F.3d 965, 966 (9th Cir. 2006) (holding that the BIA abuses its discretion when it fails to consider and address in its entirety the evidence submitted by a petitioner); *see also Yan Rong Zhao v. Holder*, 728 F.3d 1144, 1149 (9th Cir. 2013) ("Though the BIA does not have to address every piece of evidence, it is required to consider the evidence 'in its entirety . . . and where its failure to do so could have affected its decision, remand is appropriate.'" (alteration in original) (quoting *Singh v. Gonzales*, 494 F.3d 1170, 1172 (9th Cir. 2007))); *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013) ("[T]he BIA abuses its discretion where it ignores arguments or evidence."); *Avagyan v. Holder*, 646 F.3d 672, 681 (9th Cir. 2011) ("The BIA abuses its discretion when it denies petitioner's claim with no indication that it considered all of the evidence and claims presented by the petition."); *Hernandez-Velasquez v.*

Holder, 611 F.3d 1073, 1078 (9th Cir. 2010) (holding that the BIA "has a duty to weigh all relevant evidence, including affidavits or declarations, in cases in which there is a factual dispute about whether a document has been mailed by a petitioner to the BIA"); *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006) (BIA abused its discretion by denying motion to reopen without taking into consideration and evaluating the petitioner's new evidence); *Tukhowinich v. INS*, 64 F.3d 460, 463 (9th Cir. 1995) ("[F]ailure by the BIA to consider all pertinent facts regarding extreme hardship . . . is an abuse of discretion.").

"The regulations implementing the CAT 'explicitly require the IJ to consider all evidence relevant to the possibility of future torture.'" *Uc Encarnacion v. Bondi*, 156 F.4th 927, 930 (9th Cir. 2025) (quoting *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 n.6 (9th Cir. 2010)); *see* 8 C.F.R. § 208.16(c)(3) ("In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered . . . ."). In *Uc Encarnacion v. Bondi*, 156 F.4th 927, 930–31 (9th Cir. 2025), the court remanded where the BIA failed to give "reasoned consideration" to the evidence supporting the petitioner's CAT claim.

(vii) Disregarding Evidence of Changed Conditions

See Singh v. Garland, 46 F.4th 1117, 1123 (9th Cir. 2022) (explaining that "the BIA abuses its discretion when it concludes that the conditions portrayed in the evidence represent a mere continuation of existing conditions by disregarding the evidence of changed conditions").

(viii) Errors of Law

See Mejia v. Ashcroft, 298 F.3d 873, 878 (9th Cir. 2002) ("The BIA does not have the discretion to misapply the law, and it abuses its discretion when it does."); *see also Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020) ("The BIA abuses its discretion when it makes an error of law or fails to provide a reasoned explanation for its actions.").

(ix) Failure to Give Individualized Consideration

See Saldana v. INS, 762 F.2d 824, 828 (9th Cir. 1985), *amended*, 785 F.2d 650 (9th Cir. 1986) (holding that the BIA abuses its discretion by failing to give individualized consideration of the particulars of the case).

(x) Other Abuses of Discretion

The court has held that the BIA abused its discretion in the following additional circumstances:

- Denying a continuance that it necessary to protect a noncitizen's procedural rights. *See Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1119 (9th Cir. 2009).

- Improperly recharacterizing a motion. *See Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (holding that the BIA erred as a matter of law when it recharacterized the petitioner's motion to reopen as a motion for reconsideration and thus abused its discretion in denying the motion).

- Considering an irrelevant factor. *See Delmundo v. INS*, 43 F.3d 436, 440 (9th Cir. 1994) ("The BIA abuses its discretion when it considers an irrelevant factor when determining whether to grant a discretionary waiver of excludability.").

b. Questions Subject to Abuse of Discretion Review

The court has held that the following are reviewed for abuse of discretion:

- BIA's denial of a motion to reopen, reconsider, or remand. *See Singh v. Garland*, 124 F.4th 690, 697 (9th Cir. 2024) ("We review the BIA's denial of a motion to reopen for abuse of discretion."); *Alcarez-Rodriguez v. Garland*, 89 F.4th 754, 759 (9th Cir. 2023) ("We review the BIA's denial of a motion to remand using the abuse-of-discretion standard."); *Rebilas v. Mukasey*, 527 F.3d 783, 785 (9th Cir. 2008) ("We review the BIA's denial of a motion to reconsider for abuse of discretion . . . ."); *see also Mohammed v. Gonzales*, 400 F.3d 785, 791 (9th Cir. 2005) ("We review BIA rulings on motions to reopen and reconsider for abuse of discretion and reverse only if the Board acted arbitrarily, irrationally, or contrary to law.").

- Agency decisions denying equitable tolling of a motion to reopen. *See Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) ("We review BIA decisions to deny equitable tolling of a motion to reopen for abuse of discretion."); *see also Lara-Garcia v. Garland*, 49 F.4th 1271, 1277 (9th Cir. 2022) (stating that "the BIA acted within its discretion in holding that Petitioner failed to act with sufficient diligence" to qualify for equitable tolling with respect to untimely motion to reopen).

- An IJ's decision to deem an application waived for failing to adhere to deadlines imposed under 8 C.F.R. § 1003.31. *See Taggar v. Holder*, 736 F.3d 886, 889 (9th Cir. 2013) (holding that the abuse of discretion standard of review applies to an IJ's decision to deem applications waived for failing to adhere to deadlines imposed under 8 C.F.R. § 1003.31).

- An IJ's decision to deem an asylum application abandoned for failing to provide biometrics pursuant to 8 C.F.R. §§ 1003.47(c), 1208.10. *See Gonzalez-Veliz v. Garland*, 996 F.3d 942, 948 (9th Cir. 2021) ("An IJ's decision to deem an asylum application abandoned is reviewed for abuse of discretion.").

- The BIA's summary dismissal of an appeal. *See Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1012 (9th Cir. 2021) ("We review for abuse of discretion the BIA's summary dismissal of an appeal.").

- Denial of a motion for a continuance. See below.

- Agency's denial of administrative closure. *See Marquez-Reyes v. Garland*, 36 F.4th 1195, 1208–09 (9th Cir. 2022) (holding BIA did not abuse its discretion in denying request for administrative closure).

- An agency's determination that a removal offense constitutes a particularly serious crime. *See Hernandez v. Garland*, 52 F.4th 757, 765 (9th Cir. 2022). 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*. (quoting *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015); *see also Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1230–31 (9th Cir. 2021) (same).

- Whether the BIA clearly departs from its own standards. *See Salgado v. Sessions*, 889 F.3d 982, 987 (9th Cir. 2018) ("We review for abuse of discretion whether the BIA has clearly departed from its own standards.").

- Whether a noncitizen is a "danger to the community" warranting continued detention. *See Martinez v. Clark*, 124 F.4th 775, 781 (9th Cir. 2024) (no abuse of discretion in "dangerousness" determination).

- Whether a petitioner showed "extraordinary circumstances" to waive the one-year deadline for filing a motion to reopen under the Violence Against Women Act, 8 U.S.C. § 1229a(c)(7)(C)(iv)(III), because of the fact-bound nature of the mixed question at issue. *Magana-Magana v. Bondi*, 129 F.4th 557, 572 (9th Cir. 2025).

Where the abuse of discretion standard applies, purely legal questions are reviewed de novo. *See, e.g.*, *Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1012 (9th Cir. 2021) ("We review for abuse of discretion the BIA's summary dismissal of an appeal. But whether the summary dismissal violated a petitioner's due process rights is a question of law that we review de novo." (citation omitted)).

Generally, the denial of asylum is reviewed for substantial evidence. *See, e.g.*, *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) ("We review the denial of asylum, withholding of removal and CAT claims for substantial evidence."). But where a noncitizen is eligible for asylum, "the Attorney General's discretionary judgment whether to grant [asylum] relief . . . shall be conclusive unless manifestly contrary to the law and an abuse of discretion." 8 U.S.C. § 1252(b)(4)(D); *cf. Gulla v. Gonzales*, 498 F.3d 911, 915 (9th Cir. 2007) ("The Attorney General's decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion."); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("[W]hen refugee status has been established, we review the Attorney General's grant or denial of asylum for abuse of discretion.").

c. Motion for a Continuance

"Under 8 C.F.R. § 1003.29, an IJ 'may grant a motion for continuance for good cause shown.'" *Cui v. Mukasey*, 538 F.3d 1289, 1292 (9th Cir. 2008) (quoting 8 C.F.R. § 1003.29).

The court reviews for abuse of discretion the denial of a continuance. *See Orozco-Lopez v. Garland*, 11 F.4th 764, 774 (9th Cir. 2021); *Arrey v. Barr*, 916 F.3d 1149, 1158 (9th Cir. 2019) ("The IJ's decision not to continue a hearing is reviewed for abuse of discretion, but we have warned that we will not 'allow a myopic insistence upon expeditiousness to render the right to counsel an empty formality.'" (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005))); *Owino v. Holder*, 771 F.3d 527, 532–33 & n.1 (9th Cir. 2014) (explaining that motion to admit additional evidence past the deadline was equivalent to a motion to continue, and concluding IJ abused its discretion in denying the motion); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109–11 (9th Cir. 2010) (IJ abused her discretion by denying continuance, and denial of continuance in conjunction with limits placed upon petitioner's testimony violated petitioner's due process right to a full and fair hearing); *Cui v. Mukasey*, 538 F.3d 1289, 1292–95 (9th Cir. 2008) (holding that IJ abused discretion by denying a motion for a continuance so the petitioner could resubmit her fingerprints to the court); *id.* at 1292 ("[T]he decision to grant or deny continuances is in the sound discretion of the trial judge.").

> When evaluating an IJ's denial of a motion for continuance we consider a number of factors—including, for example, (1) the importance of the evidence, (2) the unreasonableness of the immigrant's conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted.

Cui v. Mukasey, 538 F.3d 1289, 1292 (9th Cir. 2008) (concluding IJ abused his discretion by denying petitioner's motion for a continuance so petitioner could resubmit her fingerprints); *see also Olea-Serefina v. Garland*, 34 F.4th 856, 866 (9th Cir. 2022) (finding no abuse of discretion under *Cui* factors); *Hui Ran Mu v. Barr*, 936 F.3d 929, 936 (9th Cir. 2019) (same); *Pleitez-Lopez v. Barr*, 935 F.3d 716, 719–21 (9th Cir. 2019) (BIA's decision to deny a continuance was an abuse of discretion where it failed to analyze all the *Cui* factors and analyzed the unreasonableness of petitioner's conduct in an arbitrary and irrational manner); *Peng v. Holder*, 673 F.3d 1248, 1253–57 (9th Cir. 2012) (BIA abused its discretion by denying continuance to allow noncitizen to apply for a § 212(c) waiver of removal); *Jiang v. Holder*, 658 F.3d 1118, 1120–21 (9th Cir. 2011) (IJ abused her discretion by denying continuance to afford noncitizen opportunity to authenticate foreign documents); *Ahmed v. Holder*, 569 F.3d 1009, 1012–14 (9th Cir. 2009) (IJ abused her discretion by denying continuance).

The question of whether the denial of a continuance constitutes an abuse of discretion must be resolved on a case-by-case basis. *See Ahmed*, 569 F.3d at 1012 (holding IJ abused its discretion in denying continuance).

"[A]n IJ's failure to state a reasoned basis for her decision may constitute an abuse of discretion." *Ahmed*, 569 F.3d at 1014 ("Absent an explanation from the

IJ, we have no choice but to conclude that the denial of the continuance was arbitrary and unreasonable."); *see also Peng*, 673 F.3d at 1253 ("The BIA abuses its discretion 'when it fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief.'" (quoting *Ahmed v. Holder*, 569 F.3d 1009, 1014 (9th Cir. 2009))).

Denial of a continuance can result in a violation of the noncitizen's due process right to a full and fair hearing. *See Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010).

RELIEF FROM REMOVAL

Table of Contents

ASYLUM, WITHHOLDING OF REMOVAL, AND THE CONVENTION AGAINST TORTURE 16

I. THE CONTEXT 16

II. ASYLUM [§ 1158] 18

A. Burden of Proof 18

B. Defining Persecution 21

1. Cumulative Effect of Harms 23

2. Subjective Intent to Harm Not Required 25

3. Forms of Persecution 25

a. Physical Violence 25

(i) Physical Violence Sufficient to Constitute Persecution 28

(ii) Physical Violence Insufficient to Constitute Persecution 31

b. Torture 31

c. Threats 32

(i) Cases Holding Threats Establish Persecution 34

(ii) Cases Holding Threats Not Persecution 35

d. Detention 36

e. Mental, Emotional, and Psychological Harm 38

f. Harm to Family Members or Close Friends 38

g. Substantial Economic Deprivation 39

h. Discrimination and Harassment....................................41

4. Age of the Victim..43

C. Source or Agent of Persecution; Unwilling or Unable to Protect.......43

1. Harm Inflicted by Relatives..46

2. Reporting of Persecution Not Always Required........................46

3. Cases Discussing Source or Agent of Persecution....................48

D. Past Persecution...49

1. Presumption of a Well-Founded Fear..51

2. Rebutting the Presumption of a Well-Founded Fear.................52

a. Fundamental Change in Circumstances..........................52

b. Government's Burden...53

(i) State Department Report......................................54

(ii) Administrative Notice of Changed Country Conditions..56

c. Cases Where Changed Circumstances or Conditions Insufficient to Rebut Presumption of Well-Founded Fear 57

d. Cases Where Changed Circumstances Sufficient to Rebut Well-Founded Fear...58

e. Internal Relocation...58

E. Well-Founded Fear of Persecution..61

1. Past Persecution Not Required...62

2. Subjective Prong...63

3. Objective Prong..64

4. Demonstrating a Well-Founded Fear...66

a. Targeted for Persecution...66

b. Family Ties...66

c. Pattern and Practice of Persecution...................................68

d. Membership in Disfavored Group 69
5. Internal Relocation 70
6. Continued Presence of Applicant 73
7. Continued Presence of Family 74
8. Possession of Passport or Travel Documents 75
9. Safe Return to Country of Persecution 76
10. Cases Finding No Well-Founded Fear 76
F. Nexus to the Five Statutorily Protected Grounds 77
1. Standards of Review 79
2. Proving a Nexus 79
a. Direct Evidence 80
b. Circumstantial Evidence 80
3. Mixed-Motive Cases 81
4. Shared Identity Between Victim and Persecutor 86
5. General Civil Strife and Motive 86
6. Resistance to Discriminatory Government Action 87
7. The Protected Grounds 87
a. Race 87
(i) Cases Finding Racial or Ethnic Persecution 88
(ii) Cases Finding No Racial or Ethnic Persecution ..88
b. Religion 89
(i) Cases Finding Religious Persecution 90
(ii) Cases Finding No Religious Persecution 91
c. Nationality 92
d. Membership in a Particular Social Group 92
(i) Three-Prong Cognizability Analysis 92
(ii) Cases Predating Three-Prong Cognizability

Analysis 96
(iii) Review of Particular Social Group Determinations 97
(iv) Types of Social Groups 98
(ii) Cases Involving Imputed Membership in a Particular Social Group 104
(iii) Cases Denying Particular Social Group Claims 104
e. Political Opinion 106
(i) Organizational Membership 108
(ii) Refusal to Support Organization 108
(iii) Labor Union Membership and Activities 109
(iv) Opposing Corruption; Whistleblowing 109
(v) Neutrality 112
(vi) Other Expressions of Political Opinion 113
(vii) Imputed Political Opinion 114
(viii) Opposition to Coercive Population Control Policies 119
f. Prosecution 124
(i) Pretextual Prosecution 125
(ii) Illegal Departure Laws 126
g. Military and Conscription Issues 126
(i) Conscription Generally Not Persecution 126
(ii) Exceptions 127
(iii) Participation in Coup 129
(iv) Military Informers 129
(v) Military or Law Enforcement Membership 129
(vi) Non-Governmental Conscription 130

h. Cases Concluding No Nexus to a Protected Ground....131
G. Humanitarian Asylum 133
a. Severe Past Persecution 134
(i) Sufficiently Severe Past Persecution for Humanitarian Asylum 134
(ii) Insufficiently Severe Past Persecution for Humanitarian Asylum 136
b. Fear of Other Serious Harm....137
H. Exercise of Discretion 137
I. Remanding Under *INS v. Ventura* 139
J. Derivative Asylees 144
K. Bars to Asylum....144
1. One-Year Bar 144
a. Exceptions to the Deadline 147
2. Safe Third Country Bar....149
3. Previous Denial Bar 150
4. Firm Resettlement Bar 150
5. Persecution of Others Bar 153
6. Particularly Serious Crime Bar 155
a. Per Se Particularly Serious Crimes....156
b. Case-By-Case Adjudication 157
7. Serious Nonpolitical Crime Bar....158
8. Security Bar....159
9. Terrorist Bar; Material Support 159
III. WITHHOLDING OF REMOVAL OR DEPORTATION [§ 1231(b)(3)]..161
A. Eligibility for Withholding....162
1. Burden of Proof....162

a. Nexus Standard 164
2. Mandatory Relief 165
3. Nature of Relief..166
4. Past Persecution 166
5. Future Persecution 167
6. No Time Limit 167
7. Firm Resettlement Not a Bar 167
8. Entitled to Withholding..167
9. Not Entitled to Withholding of Removal..170
10. No Derivative Withholding of Removal..172
B. Bars to Withholding 172
1. Nazis..172
2. Persecution-of-Others Bar 172
3. Particularly Serious Crime Bar 172
a. Per Se Particularly Serious Crimes..174
b. Case-By-Case Adjudication 175
4. Serious Nonpolitical Crime Bar..177
5. Security and Terrorist Bar; Material Support 179
IV. CONVENTION AGAINST TORTURE (CAT) 180
A. Standard of Review 182
1. Agency Must Consider All Evidence 182
B. Definition of Torture 185
C. Burden of Proof..187
D. Country Conditions Evidence 191
E. Past Torture 193
F. Internal Relocation 194
G. Differences Between CAT Protection and Asylum and Withholding

....197
H. Agent or Source of Torture 197
I. Mandatory Protection 201
J. Nature of Protection 201
K. Derivative Torture Claims...202
L. Exhaustion 202
M. Habeas Jurisdiction...202
N. Cases Granting CAT Protection or Remanding for Further Consideration...202
O. Cases Finding No Eligibility for CAT Protection 205
V. CREDIBILITY DETERMINATIONS 209
A. Standard of Review 211
B. No Presumption of Credibility Based on Lack of Adverse Credibility Finding...216
C. Opportunity to Explain..217
D. Credibility Factors...219
1. Demeanor 220
2. Responsiveness 221
3. Specificity and Detail...222
4. Inconsistencies 223
a. Minor Inconsistencies..224
b. Substantial Inconsistencies; *Falsus* Maxim.................................226
c. Mistranslation/Miscommunication..230
5. Omissions..231
6. Incomplete Asylum Application..234
7. Sexual Abuse or Assault..234
8. Airport Interviews...235

9. Asylum Interview/Assessment to Refer 235
10. Bond Hearing 236
11. State Department and other Government Reports 237
12. Speculation and Conjecture 238
13. Implausible Testimony..240
14. Counterfeit and Unauthenticated Documents 242
15. Misrepresentations 243
16. Classified Information 245
17. Failure to Seek Asylum at First Opportunity..........................245
18. Cumulative Effect of Adverse Credibility Grounds 246
19. Voluntary Return to Country 246
20. Lack of Supporting Documentation.......................................247

E. Corroboration May Rehabilitate Testimony 248

F. Implied Credibility Findings 248

1. Pre-REAL ID Act...248

a. Immigration Judges 248
b. Board of Immigration Appeals 249

2. Post-REAL ID Act 250

a. Immigration Judges 250
b. Board of Immigration Appeals 251

G. Discretionary Decisions 253

H. Motions to Reopen 253

I. Remedy..254

1. Petitioner Deemed Credible 254
2. Remand for Renewed Credibility Determination 255

J. Applicability of Asylum Credibility Finding to the Denial of Other Forms of Relief..256

K. Cases Reversing Negative Credibility Findings 256
L. Cases Upholding Negative Credibility Findings 260
M. The REAL ID Act Codification of Credibility Standards.................264
N. Frivolous Applications 264
VI. CORROBORATIVE EVIDENCE 267
A. Pre-REAL ID Act Standards 268
1. Credible Testimony...268
2. Credibility Assumed 269
3. Negative Credibility Finding 270
a. Non-Duplicative Corroborative Evidence 270
b. Availability of Corroborative Evidence 271
c. Opportunity to Explain 272
B. Post-REAL ID Act Standards 272
C. Judicially Noticeable Facts..275
D. Forms of Evidence...276
E. Hearsay Evidence 277
F. Country Conditions Evidence 277
G. Authentication and Certification of Records..................................278
CANCELLATION OF REMOVAL, SUSPENSION OF DEPORTATION, FORMER SECTION 212(c) RELIEF 280
I. HISTORICAL BACKGROUND 280
A. Continued Eligibility for Pre-IIRIRA Relief Under the Transitional Rules 281
II. CANCELLATION OF REMOVAL, 8 U.S.C. § 1229b 281
A. Jurisdiction and Judicial Review...282
B. Cancellation for Lawful Permanent Residents, 8 U.S.C. § 1229b(a) (INA § 240A(a))...284

1. Eligibility Requirements Generally 284
2. “Admitted in Any Status” 285
3. Continuance Residence Generally 287
4. Termination of Continuous Residence 287
   a. Termination Based on Service of NTA 287
   b. Termination Based on Commission of Specified Offense 288
   c. Military Service 290
4. Aggravated Felons 290
5. Exercise of Discretion 292
C. Cancellation for Nonpermanent Residents, 8 U.S.C. § 1229b(b) (INA § 240A(b)(1)) 292
1. Eligibility Requirements 292
2. Ten Years of Continuous Physical Presence 293
   a. Start Date for Calculating Physical Presence 293
   b. Termination of Continuous Physical Presence 294
      (i) Termination Based on Service of NTA 294
      (ii) Termination Based on Commission of Specified Offense 296
   c. Departure from the United States 297
   d. Proof 299
   e. Military Service 300
3. Good Moral Character 300
   a. Jurisdiction 300
   b. Standard of Review 301
   c. Time Period Required 301
   d. Per Se Exclusion Categories 303

(i) Habitual Drunkards 303

(ii) 8 U.S.C. § 1182(a) ("Inadmissible Aliens") 303

(iii) Gamblers 308

(iv) False Testimony 309

(v) Confinement 309

(vi) Aggravated Felonies... 310

(vii) Nazi Persecutors, Torturers, Violators of Religious Freedom 311

(viii) False Claim of Citizenship and Voting 311

(ix) Adulterers 312

4. Criminal Bars 312

5. Exceptional and Extremely Unusual Hardship 314

a. Jurisdiction and Standard of Review 314

b. Qualifying Relative.. 316

c. Alternative Means to Immigrate.................................. 316

d. Hardship Standard and Application............................. 317

6. Exercise of Discretion.. 318

7. Dependents... 319

D. Ineligibility for Cancellation of Removal 319

1. Certain Crewmen and Exchange Visitors............................... 319

2. Security-Related Grounds... 319

3. Persecutors 320

4. Previous Grants of Relief.. 320

E. Constitutional and Legal Challenges to the Availability of Cancellation of Removal or Suspension of Deportation.................. 320

F. Ten-Year Bars to Cancellation.. 321

1. Failure to Appear 321

2. Failure to Depart 324
G. Numerical Cap on Grants of Cancellation and Adjustment of Status 325
H. NACARA Special Rule Cancellation 325
1. Jurisdiction and Judicial Review 329
2. NACARA Does Not Violate Equal Protection....329
3. NACARA Deadlines....329
I. Abused Spouse or Child Provision (VAWA) 330
III. SUSPENSION OF DEPORTATION, 8 U.S.C. § 1254 (repealed) (INA § 244) 332
A. Overview 332
B. Eligibility Requirements 334
1. Continuous Physical Presence 334
a. Jurisdiction....335
b. Standard of Review 335
c. Proof....335
d. Departures: 90/180 Day Rule 335
e. Brief, Casual, and Innocent Departures....336
f. Deportation 336
g. IIRIRA Stop-Time Rule 336
h. Pre-IIRIRA Rule on Physical Presence....337
i. NACARA Exception to Stop-Time Rule 338
j. *Barahona-Gomez v. Ashcroft* Exception to the Stop-Time Rule....338
k. Repapering....339
2. Good Moral Character 339
a. Jurisdiction....339

b. Time Period Required.....340
c. Per Se Exclusion Categories.....340
3. Extreme Hardship Requirement.....341
a. Jurisdiction.....341
b. Qualifying Individual.....342
c. Extreme Hardship Factors.....342
d. Current Evidence of Hardship.....344
4. Ultimate Discretionary Determination.....344
C. Abused Spouses and Children Provision (VAWA).....345
D. Ineligibility for Suspension.....346
1. Certain Crewmen and Exchange Visitors.....346
2. Participants in Nazi Persecutions or Genocide.....346
3. Noncitizens in Exclusion Proceedings.....346
E. Five-Year Bars to Suspension.....346
1. Failure to Appear.....346
2. Failure to Depart.....347
F. Retroactive Elimination of Suspension of Deportation.....348
IV. SECTION 212(c) RELIEF, 8 U.S.C. § 1182(c) (repealed), Waiver of Excludability or Deportability.....348
A. Overview.....348
B. Eligibility Requirements.....350
1. Seven Years.....350
2. Balance of Equities.....350
C. Deportation: Comparable Ground of Exclusion.....352
D. Removal: Comparable Ground of Inadmissibility.....352
E. Ineligibility for Relief.....353
F. Statutory Changes to Former Section 212(c) Relief.....353

1. IMMACT 90 353
a. Continued Eligibility for Relief..................................354
2. AEDPA 354
a. Continued Eligibility for Relief..................................355
3. IIRIRA 355
a. Retroactive Elimination of § 212(c) Relief 356
b. Continued Eligibility for Relief..................................357
(i) Plea Agreements Prior to AEDPA and IIRIRA .357
(ii) No Longer Necessary to Show Reasonable Reliance on Pre-IIRIRA Application for Relief 358
(iii) Similarly Situated Noncitizens Treated Differently 359
c. Ineligibility for Relief..359
(i) Plea Agreements after IIRIRA 359
(ii) Plea Agreements after AEDPA 359
(iii) Convictions After Trial 360
(iv) Pre-IIRIRA Criminal Conduct 360
(v) Terrorist Activity...361
G. Expanded Definition of Aggravated Felony 361
V. SECTION 212(h) RELIEF, 8 U.S.C. § 1182(h), WAIVER OF INADMISSIBILITY...362
A. Jurisdiction and Judicial Review...364
VI. INNOCENT, CASUAL, AND BRIEF DEPARTURES UNDER *FLEUTI* DOCTRINE 366
ADJUSTMENT OF STATUS [§ 1255] 367
I. OVERVIEW 367
A. Jurisdiction and Judicial Review...369
B. Eligibility for Permanent Residence 370

1. Visa Petition 370
2. Priority Date 372
3. Admissibility 373
C. Eligibility for Adjustment of Status Process 375
1. Exceptions to Lawful Entry and Lawful Status Requirements 377
a. Exception for Immediate Relatives 377
b. Noncitizens Eligible For 8 U.S.C. § 1255(i) (“245(i)”) 377
c. Unlawful Employment Exception 379
2. Discretion 380
D. Adjustment of Status Application Pending 380
E. Adjustment of Status Application Approved 380
VOLUNTARY DEPARTURE [§ 1229c] 381
I. OVERVIEW 381
II. JURISDICTION AND JUDICIAL REVIEW 383
III. DECISIONS 384
A. Streamlined BIA Decisions 384
B. Stays of Removal; Effect of Filing Petition for Review 385
C. Effect of Departure on Petition for Review 385
D. Calculating Departure Deadline; Weekends and Holidays 385
E. Criteria for Grant or Denial 385
F. Reopening Based on Change in Law; Stop-Clock Rule 386

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 Sauceda 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-Saher 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 cudgeled 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-Saher 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 porterage 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-Marenco 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 Kotasz 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 established 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"); *Kotasz 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 courted 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) (conscription 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 Sauceda 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 Sauceda*, 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 Sauceda 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 F3d 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 whistle-blowing"); *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 Hoque 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-Marenco 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-Ceauşescu 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 *Khunaverdiants 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 is 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 n 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 Sauceda 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 Sauceda 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-Saher 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 noon 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); *Husyev 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 Smolniakova 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 inconsistences 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 waivered 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 pretermit 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) (holing 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. Elmakhzoumi 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 Sates 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 1196). 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), *implied 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.

MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

Table of Contents

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND MOTIONS TO RECONSIDER 6

A. Pertinent Regulations 7

B. Motion to Reopen 7

C. Motion to Reconsider 10

D. Motion to Remand 11

E. Motion to Reissue 12

F. Motion to Amend 13

G. Improperly Styled Motions 13

II. JURISDICTION 13

A. Effect of 8 U.S.C. § 1252(a)(2)(B)(i) 15

C. Sua Sponte Reopening 17

D. Certification Under 8 C.F.R. § 1003.1(c) 19

E. Finality of the Underlying Order 19

F. Filing Motion to Reopen or Reconsider Not a Jurisdictional Prerequisite to Filing a Petition for Review 20

G. Tolling of the Time Period to File Petition for Review 21

H. No Automatic Stay of Removal or Tolling of Voluntary Departure Period 21

1. Exception for In Absentia Removal or Deportation Orders 21

I. Consolidation 22

J. Departure from the United States (Departure Bar) 22

K. Bar Under 8 U.S.C. § 1231(a)(5) 25
III. STANDARD OF REVIEW 26
A. Generally 26
B. Full Consideration of All Factors 29
1. Later-Acquired Equities 31
C. Explanation of Reasons 32
D. Irrelevant Factors 33
E. Credibility Determinations 33
IV. REQUIREMENTS FOR A MOTION TO REOPEN 34
A. Supporting Documentation 35
1. Exceptions 36
B. Material and Previously Unavailable Evidence 36
C. Explanation for Failure to Apply for Discretionary Relief 37
D. Prima Facie Eligibility for Relief 38
E. Discretionary Denial 39
F. Relevance of Prior Grant of Voluntary Departure 41
1. Voluntary Departure Regulations 42
2. *Dada v. Mukasey* 42
3. Pre-*Dada v. Mukasey* 43
G. Appeal of Deportation Order 44
H. Fugitive Disentitlement Doctrine 44
V. TIME AND NUMERICAL LIMITATIONS 45
A. Generally 45
1. Time Limitations 45
2. Numerical Limitations 48
B. Exceptions to the 90-Day/One-Motion Rules 49
1. In Absentia Orders 49

a. Reopening and Rescission Based on Exceptional Circumstances 49

(i) Evidentiary Requirements 52

(ii) Cases Finding Exceptional Circumstances 53

(iii) Cases Finding No Exceptional Circumstances 54

(iv) Arriving Late While IJ On Bench 55

b. Reopening and Rescission Based on Improper Notice of Hearing 55

(i) Actual or Constructive Notice Sufficient 58

(ii) Noncitizens' Address Obligations and Right to Notice 61

(iii) Presumption of Effective Delivery 62

(iv) Improper Service of NTA 64

(v) Defective NTA in In Absentia Context 64

(vi) Notice in Pre-IIRIRA Proceedings 65

c. Movant in Custody 67

2. Changed Country Conditions/Circumstances 67

(i) Requirements for Motion Premised on Changed Country Conditions/Circumstances 68

(ii) Significance of Prior Adverse Credibility Determination 72

(iii) Changes in Personal Circumstances 73

(iv) Changes in U.S. Asylum Law 75

3. Jointly Filed Motions 75

4. Government Motions Based on Fraud 76

5. Sua Sponte Reopening by the Agency 76

(i) Exceptional Circumstances and Discretion 77

(ii) Limited Judicial Review 77

(iii) Departure or Illegal Reentry 79

VI. EQUITABLE TOLLING 79

A. Circumstances Beyond the Applicant's Control 85
B. Fraudulent or Erroneous Attorney Conduct 85
C. Changes in Law 86
D. Due Diligence 87
VII. INEFFECTIVE ASSISTANCE OF COUNSEL 89
A. Presented Through a Motion to Reopen 90
B. Exhaustion and Proper Forum 90
C. Standard of Review 92
D. Requirements for Due Process Violation 93
1. Constitutional and Statutory Basis 93
2. Fundamentally Unfair Proceeding; Competence 96
3. Prejudice 99
a. Rebuttable (and Irrebuttable) Presumptions of Prejudice 101
b. Exception for In Absentia Orders 104
E. The *Lozada* Requirements 105
F. Cases Discussing Ineffective Assistance of Counsel 109
1. Cases Finding Ineffective Assistance 109
2. Cases Rejecting Ineffective Assistance of Counsel Claims 111
VIII. CASES ADDRESSING MOTIONS TO REOPEN FOR SPECIFIC RELIEF 113
A. Motions to Apply for Cancellation of Removal 114
B. Motions to Reopen to Apply for Asylum and Withholding 115
C. Motions to Reopen to Apply for Relief Under the Convention Against Torture (CAT) 117
D. Motions to Reopen to Apply for Adjustment of Status 119
E. Motion to Reopen Reasonable Fear Proceeding 120
F. Motions to Reopen to Apply for Other Relief 121
1. Suspension of Deportation 121

2. NACARA Relief 121
3. 212(c) Relief 121
4. Miscellaneous Relief 122

MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) transformed motions to reopen from a regulatory procedure to a statutory form of relief. *See Dada v. Mukasey*, 554 U.S. 1, 14 (2008); *Meza-Vallejos v. Holder*, 669 F.3d 920, 924 (9th Cir. 2012) ("Prior to IIRIRA, there was no time limit for requesting the reopening of a case due to the availability of new evidence. IIRIRA provided the first statutory right to a motion to reopen . . . ." (citations and internal quotation marks omitted)); *Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005) (recounting the history of motions to reopen), *abrogated on other grounds by Dada v. Mukasey*, 554 U.S. 1 (2008).

For individuals in removal proceedings, motions to reconsider and motions to reopen are governed by 8 U.S.C. § 1229a(c)(6) and (7) respectively (formerly codified at 8 U.S.C. § 1229a(c)(5) and (6)). For deportation cases pending before the April 1, 1997 effective date of IIRIRA, motions to reopen or to reconsider are governed by 8 C.F.R. §§ 1003.2(c) (BIA) and 1003.23(b) (immigration judge) (formerly codified at 8 C.F.R. §§ 3.2 and 3.23).

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND MOTIONS TO RECONSIDER

The court has differentiated motions to reopen and motions to reconsider as follows:

> Motions to reopen and reconsider are two separate and distinct motions with different requirements. A motion to reconsider must specify errors in a previous BIA decision, *see* 8 C.F.R. § 1003.2(b)(1), so the BIA evaluates the motion using the same record evidence used in making its prior decision. A motion to reopen, in contrast, is premised on evidence unavailable at the time of a previous BIA decision. *See* 8 C.F.R. § 1003.2(c)(1). Critical to this case are the different filing deadlines applicable to the two types of motions. A motion to reconsider must be filed within thirty days of the challenged BIA decision, while a motion to reopen must be filed within ninety days. 8 C.F.R. § 1003.2(b)(2), (c)(2).

Garcia Corrales v. Blanche, 179 F.4th 739, 742 (9th Cir. 2026) (case citations and internal quotation marks omitted).

A. Pertinent Regulations

Regulations regarding motions to reopen and motions to reconsider are set forth at 8 C.F.R. §§ 1003.2 (to the BIA) and 1003.23 (to an immigration court). The regulations were amended effective January 2021, *see* 85 Fed. Reg. 81588-01, but the amendment was stayed and preliminarily enjoined. *See Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919 (N.D. Cal. 2021). This court acknowledged the stay and preliminary injunction without commenting on the validity of the regulations. *See Perez-Camacho v. Garland*, 54 F.4th 597, 603 n.5 (9th Cir. 2022) (discussing § 1003.2); *Bravo-Bravo v. Garland*, 54 F.4th 634, 637 n.2 (9th Cir. 2022) (discussing § 1003.23).

Disclaimer: Although this Outline may reference prior versions of the regulations, this does not reflect the court's view on the current status of the regulations.

B. Motion to Reopen

"The motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)); *accord Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021); *Chandra v. Holder*, 751 F.3d 1034, 1036 (9th Cir. 2014).

"'[E]very alien ordered removed . . . has a right to file one motion' with the IJ or Board to 'reopen his or her removal proceedings.'" *Mata v. Lynch*, 576 U.S. 143, 145 (2015) (quoting *Dada v. Mukasey*, 554 U.S. 1, 4–5 (2008)); *accord Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020) ("[T]he Immigration and Nationality Act permits a person one motion to reopen.").

Subject to exceptions, "that motion to reopen 'shall be filed within 90 days' of the final removal order." *Mata v. Lynch*, 576 U.S. 143, 145 (2015) (quoting 8 U.S.C. § 1229a(c)(7)(C)(i)); *see also Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020) ("[T]he motion must usually be filed 'within 90 days of the date of entry of a final administrative order of removal.'" (quoting 8 U.S.C. § 1229a(c)(7)(C)(i))).

The 90-day deadline does not apply to sua sponte reopening: the BIA may reopen proceedings on its own motion (sua sponte) at any time. *See Mata v. Lynch*, 576 U.S. 143, 145 (2015) (quoting 8 CFR § 1003.2(a) (2015)).

"A motion to reopen is a form of procedural relief that asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing." *Dada v. Mukasey*, 554 U.S. 1, 12 (2008) (internal quotation marks omitted).

A motion to reopen may provide new evidence with respect to an *existing* application for relief. *See Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) ("A motion to reconsider addresses whether an IJ made errors of law or fact, whereas a motion to reopen may be granted only upon a proffer of new evidence that 'is material and was not available and could not have been discovered or presented at the former hearing.'" (quoting 8 C.F.R. § 1003.23(2), (3))); *Oyeniran v. Holder*, 672 F.3d 800, 808 (9th Cir. 2012), *as amended* (May 3, 2012) ("[A] motion to reopen alleges new facts that bear upon the agency's earlier decision." (alteration in original) (quoting *Ghahremani v. Gonzales*, 498 F.3d 993, 997 n.1 (9th Cir. 2007))).

Alternatively, a motion to reopen may provide new evidence with respect to an *additional* application for relief. *See Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1063–64 (9th Cir. 2008) ("A petitioner may . . . move to reopen for the purpose of submitting a new application for relief, provided such motion is accompanied by the proper application for relief and all supporting documentation, and the evidence sought to be offered is material and was not available and could not have been presented at the former hearing." (citing 8 C.F.R. § 1003.2(c)(1))), *overruled on other grounds by Cheneau v. Garland*, 997 F.3d 916 (9th Cir. 2021) (en banc).

A motion to reopen is not a proper vehicle for raising an error of law:

> a motion to reopen is not a means by which the BIA can correct its own legal error. A motion to *reconsider* seeks to correct alleged errors of fact or law. A motion to *reopen*, on the other hand, is purely fact-based, seeking to present newly discovered facts or changed circumstances since a petitioner's hearing. . . . We hold that, when the BIA commits legal error in a petitioner's direct appeal, the

> BIA cannot cure that error in a denial of the petitioner's motion to reopen.

Doissaint v. Mukasey, 538 F.3d 1167, 1170–71 (9th Cir. 2008) (citations omitted).

The agency properly denies a motion to reopen when it raises new legal arguments but presents no new facts. *See Membreno v. Gonzales*, 425 F.3d 1227, 1229–30 (9th Cir. 2005) (en banc) ("The BIA properly denied Membreno's motion to reopen because Membreno presented the BIA with no new facts, but only new legal arguments. . . . The BIA did not abuse its discretion when it declined to reopen proceedings because Membreno presented no new facts in her motion to reopen.").

Claims of ineffective assistance of counsel should be raised in a motion to reopen when they are based on facts and evidence that were not available when the agency rendered its original decision. *See Correa-Rivera v. Holder*, 706 F.3d 1128, 1130–31 (9th Cir. 2013) (a filing raising ineffective assistance of counsel before the IJ was treated as a motion to reopen, rather than an appeal, where it was based on facts and evidence that were not available when the IJ rendered his decision); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (BIA erred as a matter of law in characterizing a filing as a motion to reconsider, rather than a motion to reopen, where it raised a claim of ineffective assistance based on factual representations that previously had been unavailable); *Iturribarria v. INS*, 321 F.3d 889, 895–97 (9th Cir. 2003) (a filing raising ineffective assistance of counsel was treated as a motion to reopen, rather than a motion to reconsider, where it was "based on new evidence that was purportedly not discoverable at an earlier stage"); *id.* at 891 ("Where the facts surrounding allegedly ineffective representation by counsel were unavailable to the petitioner at an earlier stage of the administrative process, motions before the BIA based on claims of ineffective assistance of counsel are properly deemed motions to reopen.").

Where a petitioner alleges ineffective assistance of counsel based on counsel's failure to exhaust an argument before the agency, the ineffective assistance claim should be presented to the agency in a motion to reopen. *See Benedicto v. Garland*, 12 F.4th 1049, 1062 (9th Cir. 2021) ("The proper way to raise and exhaust an ineffective assistance of counsel claim in this situation is through a motion to reopen before the agency.").

"[A] motion to reopen is the proper vehicle to challenge the dismissal of an untimely appeal when the challenge is premised on evidence not previously before the BIA." *Garcia Corrales v. Blanche*, 179 F.4th 739, 743 (9th Cir. 2026) (BIA abused its discretion in treating motion to reopen as motion to reconsider where the motion was premised on evidence that the petitioner's notice of appeal had been grossly delayed in the mail).

The BIA's granting of a motion to reopen divests the court of appeals of jurisdiction over a pending petition for review because it eliminates a prerequisite for this court's jurisdiction—a final order of removal. *See Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) ("The BIA's granting of the motion to reopen means there is no longer a final decision to review. This court only reviews final orders of removal."; dismissing petition for review for lack of jurisdiction where the BIA granted a motion to reopen and remanded to the IJ).

C. Motion to Reconsider

A motion to reconsider is based on legal grounds and seeks a new determination based on alleged errors of fact or law. *See* 8 U.S.C. § 1229a(c)(6) (permitting one motion to reconsider, filed within 30 days of the final order of removal, which specifies the errors of law or fact in the previous order and is supported by pertinent authority); 8 C.F.R. § 1003.2(b)(1) (2020) (motions to reconsider before the BIA); *see also Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) ("A motion to reconsider addresses whether an IJ made errors of law or fact . . . .").

A motion to reconsider "shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority." 8 U.S.C. § 1229a(c)(6)(C); *see* 8 C.F.R. § 1003.2(b)(1) (2020); *see also Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003) ("The only supporting materials required for a motion to reconsider are a statement of the party's arguments regarding the BIA's alleged errors and 'pertinent authority.'").

"A motion to reconsider a final order of removal generally must be filed within thirty days of the date of entry of the order." *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (citing 8 U.S.C. § 1229a(c)(6)(B) ("The motion must be filed within 30 days of the date of entry of a final administrative order of removal.")).

The BIA's grant of a motion to reconsider does not necessarily divest this court of jurisdiction over a pending petition for review. *See Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012) ("The BIA's grant of the motion for reconsideration does not divest us of jurisdiction over the petition for review of its initial order, because the analysis and the result reached by the BIA after reconsideration were substantially the same as in the previous order."; the BIA's decision on reconsideration, however, rendered the petition for review of the BIA's previous decision moot); *Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745–46 (9th Cir. 2008) ("Once a petition for review has been filed, federal court jurisdiction is divested only where the BIA subsequently vacates or materially changes the decision under review."), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); *id.* (where the BIA granted a motion to reconsider but expressly affirmed its prior decision, the BIA's grant of the motion to reconsider did not divest the court of jurisdiction over the petition for review challenging the final order of removal).

D. Motion to Remand

"Motions to remand are appropriately filed before the BIA while the Immigration Judge's deportation decision is before the BIA on direct appeal, whereas a motion filed after a final order has been issued [by the BIA] is a motion to reopen." *Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (BIA properly construed motion to remand as motion to reopen because it was filed after the deportation order had become final).

A motion to remand is similar to a motion to reopen and is subject to the same statutory or regulatory requirements. *See Angov v. Lynch*, 788 F.3d 893, 897 (9th Cir. 2015) (holding the BIA did not abuse its discretion in denying a motion to remand where petitioner did not provide any evidence supporting the motion nor explain why he believed a regulation had been violated); *Rodriguez v. INS*, 841 F.2d 865, 867 (9th Cir. 1987) ("The formal requirements of the motion to reopen and those of the motion to remand are for all practical purposes the same.").

A motion to reopen or reconsider filed while an immigration judge's deportation or removal decision is before the BIA on direct appeal will be treated as a motion to remand the proceedings to the immigration judge. *See* 8 C.F.R. § 1003.2(b)(1) and (c)(4) (2020); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097 (9th Cir. 2005) ("The motion to reopen, filed while his appeal was pending before the BIA, is treated as a motion to remand to the IJ for further proceedings.");

Rodriguez v. INS, 841 F.2d 865, 867 (9th Cir. 1987) ("Since the appeal was pending and the Board had not yet rendered a decision, the BIA properly treated their motion [to reopen] as a motion to remand to the immigration judge." (citation and internal quotation marks omitted)).

"To prevail on a motion to remand, a petitioner must, among other things, proffer evidence that is material." *Ani v. Bondi*, 155 F.4th 1118, 1131 (9th Cir. 2025) (internal quotation marks omitted) (citing 8 C.F.R. § 1003.2(c)(1), which governs motions to reopen).

Like motions to reopen, motions to remand may be used for the purpose of submitting new applications for relief. *See Gonzalez-Lara v. Garland*, 104 F.4th 1109, 1115 (9th Cir. 2024) ("[W]hile an appeal is pending before the BIA, a motion to remand is the proper course of action for a petitioner to submit a new application for relief, especially when that application is based on a substantial change in the law.").

"A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service." 8 C.F.R. § 1003.1(d)(3)(iv) (2020); *accord Torres-Casas v. Blanche*, 182 F.4th 1121, 1126 (9th Cir. 2026) (quoting 8 C.F.R. § 1003.1(d)(3)(iv)); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1119 (9th Cir. 2019). This requirement is a corollary to the rule that the BIA may not itself engage in factfinding.

The BIA abuses its discretion when it fails to provide a reasoned explanation for its denial of a motion to remand. *See Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005); *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004) ("To guard against piecemeal appeals and to insure this court is presented with a full and complete record, the BIA must address and rule upon remand motions, giving specific, cogent reasons for a grant or denial.").

E. Motion to Reissue

Ordinarily, when a noncitizen files a motion asking the BIA to reissue a decision, the purpose of the motion is to afford the noncitizen a new 30-day period for filing a petition for review in the court of appeals.

In analyzing a motion to reissue an agency decision, this court has applied the legal standards governing a motion to reopen. *See Coyt v. Holder*, 593 F.3d 902, 904 & n.1 (9th Cir. 2010) (petitioner filed a motion to reissue, which this court analyzed under the standards applicable to a motion to reopen); *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1076–77 (9th Cir. 2010) (petitioner filed a motion to reopen and reissue, which the BIA construed as a motion to reissue; this court construed the motion as a motion to reopen and reissue and, in addressing the merits of the motion, applied the legal standards applicable to a motion to reopen); *Singh v. Gonzales*, 494 F.3d 1170, 1172 (9th Cir. 2007) (petitioner "filed a motion to reopen with the BIA, requesting that it reissue its decision so [he] could timely appeal to this court"; this court applied the legal standards governing a motion to reopen).

F. Motion to Amend

An immigration judge has "broad authority to grant motions to amend documents in removal proceedings." *Matter of R-T-P-*, 28 I. & N. Dec. 828, 839 (BIA 2024); *see Urias-Gaxiola v. Blanche*, No. 22-1474, 2026 WL 2590513, at *3–6 (9th Cir. Sept. 2, 2026) (BIA abused its discretion by affirming the IJ's erroneous denial of a noncitizen's motion to amend his answer to withdraw a factual admission).

G. Improperly Styled Motions

Where a petitioner improperly titles a motion to reopen or to reconsider, the BIA should construe the motion based on its underlying purpose. *See Mohammed v. Gonzales*, 400 F.3d 785, 792–93 (9th Cir. 2005) (BIA properly construed motion to reconsider raising ineffective assistance of counsel as a motion to reopen; BIA also properly construed a subsequent motion to open as a motion to reconsider); *see also Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (putative "appeal" raising ineffective assistance of counsel claim construed as motion to reopen).

II. JURISDICTION

The court of appeals has jurisdiction to review the agency's refusal to reopen or reconsider a final order of removal:

> [C]ircuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal

> proceeding. [*Kucana v. Holder*, 558 U.S. 233, 242 (2010)]. The INA, in combination with a statute cross-referenced there, gives the courts of appeals jurisdiction to review "final order[s] of removal." 8 U.S.C. § 1252(a)(1); 28 U.S.C. § 2342. That jurisdiction, as the INA expressly contemplates, encompasses review of decisions refusing to reopen or reconsider such orders. *See* 8 U.S.C. § 1252(b)(6) ("[A]ny review sought of a motion to reopen or reconsider [a removal order] shall be consolidated with the review of the [underlying] order").

Mata v. Lynch, 576 U.S. 143, 147–48 (2015); *see* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of [a final order of removal], any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order."); *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020) (reviewing denial of motion to reconsider); *Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) ("We . . . 'have jurisdiction when an alien appeals from the [BIA]'s denial of a motion to reopen a removal proceeding.'" (second alteration in original) (quoting *Mata*, 576 U.S. at 147)); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016) (reviewing denial of motion to reopen for adjustment of status); *Hernandez v. Holder*, 738 F.3d 1099, 1100 (9th Cir. 2013) (jurisdiction to review BIA's dismissal of a motion to reopen for lack of jurisdiction); *Meza-Vallejos v. Holder*, 669 F.3d 920, 923 (9th Cir. 2012) (court has jurisdiction to review denial of motion to reopen pursuant to 8 U.S.C. § 1252(a)); *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (discussing long history of federal-court review of administrative decisions denying motions to reopen removal proceedings); *He v. Gonzales*, 501 F.3d 1128, 1129 n.1 (9th Cir. 2007) ("The denial of a motion to reopen is a final administrative decision subject to judicial review in the court of appeals.").

The court's jurisdiction to review the denial of a motion to reopen or reconsider applies to denials on grounds of untimeliness:

> Nothing changes when the Board denies a motion to reopen because it is untimely—nor when, in doing so, the Board rejects a request for equitable tolling. Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short

> in some other respect, the courts have jurisdiction to review that decision.

Mata v. Lynch, 576 U.S. 143, 148 (2015).

Where the petitioner files a motion to reopen or reconsider (or appeals the IJ's denial of a motion to reopen to the BIA) and the BIA issues an order automatically withdrawing the motion (or appeal) due to the petitioner's departure from the United States, the order is the "functional equivalent" of an order denying the motion to reopen or reconsider for purposes of the court's jurisdiction. *See Lopez-Angel v. Barr*, 952 F.3d 1045, 1047 (9th Cir. 2019) (citing *Madrigal v. Holder*, 572 F.3d 239, 242 (6th Cir. 2009)).

A. Effect of 8 U.S.C. § 1252(a)(2)(B)(i)

When the BIA denies a motion to reopen (or another procedural motion) pertaining to an application for a form of relief enumerated in § 1252(a)(2)(B)(i)—the criminal admissibility waiver under § 1182(h), the fraud or misrepresentation waiver under § 1182(j), cancellation of removal under § 1229b, voluntary departure under § 1229c, or adjustment of status under § 1255—the court's jurisdiction to review that denial is governed in part by § 1252(a)(2)(B)(i). Specifically:

- The court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review the agency's rulings on constitutional claims and questions of law. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 965 (9th Cir. 2025) ("We reiterate that we always retain jurisdiction to review constitutional claims and questions of law. Even where the BIA states that it would deny relief as a matter of discretion, we retain jurisdiction over legal arguments that the BIA, for example, applied the wrong preliminary law, failed to accept the proffered evidence as true, or misapplied its regulations." (citation omitted)).

- The court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review the agency's rulings on mixed questions of law and fact—i.e., on the application of a legal standard to a set of established or undisputed facts. *See Wilkinson v. Garland*, 601 U.S. 209, 212 (2024) (holding that mixed questions constitute legal questions under § 1252(a)(2)(D)); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020); *see, e.g.*, *Lemus-Escobar v. Bondi*, 158 F.4th 944, 963 (9th Cir. 2025) (court has jurisdiction to review the BIA's denial of a motion to reopen on the grounds that proffered evidence is not new because whether a motion to reopen presents "new" evidence is a mixed question of law and fact); *id.* (court has jurisdiction to review the BIA's denial of a motion to reopen on the grounds that the motion to reopen is untimely); *id.* (court has jurisdiction to review the BIA's denial of a motion to reopen on the grounds that the applicant failed to establish changed country conditions to excuse the procedural defects in a second motion to reopen); *id.* (court has jurisdiction to review the BIA's denial of a motion to reopen on the grounds that the applicant failed to establish "extraordinary circumstances" to excuse a late motion to reopen); *id.* at 963–64 (court has jurisdiction to review the BIA's denial of a motion to reopen based on the BIA's determination that the applicant's evidence does not establish a prima facie case of statutory eligibility for relief, such as continuous physical presence, good moral character, or hardship requirements applicable to an application for cancellation of removal); *id.* at 966 ("We have jurisdiction over a denial for a preliminary procedural reason and over a denial on the ground that the petitioner has not established a prima facie case of statutory eligibility for relief.").

- The court lacks jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(i) to review the agency's rulings regarding how it would exercise its purely discretionary judgment about the ultimate grant or denial of the enumerated form of relief. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 964–65 (9th Cir. 2025) (holding that § 1252(a)(2)(B)(i) precludes judicial review of "a determination by the BIA that, accepting the facts as true and assuming that the petitioner is statutorily eligible for a discretionary form of relief such as NACARA cancellation of removal, the petitioner has not established that the BIA would likely change its discretionary denial"); *id.* at 965 ("We lack jurisdiction . . . over the BIA's purely discretionary judgment that it would deny relief as a matter of discretion."); *id.* at 966 ("[W]e lack jurisdiction when the BIA rules that the petitioner failed to establish that the new evidence would likely change the BIA's determination that the petitioner does not warrant a favorable exercise of discretion.").

- The court lacks jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(i) to review factual rulings relating to one of the enumerated forms of relief. *See Figueroa Ochoa v. Garland*, 91 F.4th 1289, 1293–95 (9th Cir. 2024) (holding that § 1252(a)(2)(B)(i) "applies to factual judgments made in the course of ruling on procedural motions such as [the motion to remand and the motion for a continuance] at issue here”).

Note: Older cases addressing the application of 8 U.S.C. § 1252(a)(2)(B)(i) to judicial review of orders denying motions to reopen and other procedural motions should be examined with the foregoing *Figueroa Ochoa* and *Lemus-Escobar* framework in mind.

Cross-reference: Jurisdiction over Immigration Petitions, Jurisdiction over Motions to Reopen.

B. Effect of 8 U.S.C. § 1252(a)(2)(C)

Section 1252(a)(2)(C) limits the scope of judicial review of a final order of removal that rests upon the fact that the noncitizen has committed certain crimes. Section 1252(a)(2)(D), however, provides for judicial review over constitutional claims and questions of law.

In *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020), the petitioners, who were subject to § 1252(a)(2)(C), filed motions to reopen their removal proceedings after the 90-day time limit had long since passed. The BIA denied the petitioners’ request for equitable tolling of the time limit, concluding that they failed to demonstrate due diligence. *Id.* at 226. The Supreme Court held that the court of appeals had jurisdiction to review the BIA’s decisions because (1) due diligence constitutes a mixed question of law and fact and (2) a mixed question constitutes a “question of law” for purposes of § 1252(a)(2)(D). *Id.* at 226–36.

C. Sua Sponte Reopening

The court lacks jurisdiction to review the purely discretionary decision to deny sua sponte reopening but has jurisdiction to review the decision for legal or constitutional error. *See Perez-Camacho v. Garland*, 54 F.4th 597, 606 & n.12 (9th Cir. 2022) (citing *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (“[T]his court has jurisdiction to review Board decisions denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error.”)); *see also Magana-Magana v. Bondi*, 129 F.4th 557, 575 (9th Cir. 2025) (court lacks jurisdiction over the purely discretionary decision to sua sponte reopen because “BIA’s *sua sponte* reopening power was quintessentially discretionary and . . . there was no ‘sufficiently meaningful standard against which to judge the BIA’s decision not to reopen’” (quoting

Ekimian v. INS, 303 F.3d 1153, 1159 (9th Cir. 2002))); *Lara-Garcia v. Garland*, 49 F.4th 1271, 1277 (9th Cir. 2022) (jurisdiction to review denial of request for sua sponte reopening based on legal error); *Cui v. Garland*, 13 F.4th 991, 1001 (9th Cir. 2021) ("We may only exercise jurisdiction over BIA decisions denying sua sponte reopening 'for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error.'" (quoting *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016))); *Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) ("When the BIA denies *sua sponte* reopening or reconsideration as a matter of discretion, we lack jurisdiction to review that decision, although we retain jurisdiction to review the denial of sua sponte reopening for 'legal or constitutional error.'" (quoting *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020))); *Lona v. Barr*, 958 F.3d 1225, 1234 (9th Cir. 2020) ("[O]ur review under *Bonilla* is constricted to legal or constitutional error that is apparent on the face of the BIA's decision and does not extend to speculating whether the BIA *might* have misunderstood some aspect of its discretion."); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1115 (9th Cir. 2019) (court generally lacks jurisdiction to review BIA decision not to exercise its sua sponte authority to reopen removal proceedings but has jurisdiction to address legal or constitutional error); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016) ("[W]e have jurisdiction to review the Board's denial of a motion to reopen *sua sponte* for the limited purpose of determining whether the Board based its decision on legal or constitutional error."); *Go v. Holder*, 744 F.3d 604, 609–10 (9th Cir. 2014) (court lacked jurisdiction to review BIA's discretionary decision not to sua sponte reopen); *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009) (court lacks jurisdiction to remand to BIA with instructions to exercise sua sponte reopening discretion); *Toufighi v. Mukasey*, 538 F.3d 988, 993 n.8 (9th Cir. 2008) ("We lack jurisdiction to review the Board's refusal to reopen removal proceedings *sua sponte*." (citing *Ekimian*, 303 F.3d at 1160)); *cf. Mata v. Lynch*, 576 U.S. 143, 148 (2015) (noting, without adopting, the Fifth and Eighth Circuit decisions holding that courts generally lack jurisdiction to review the BIA's decision not to exercise its sua sponte authority to reopen).

"If, upon exercise of its jurisdiction, this court concludes that the Board relied on an incorrect legal premise [in declining to exercise its authority to reopen sua sponte], it should 'remand to the BIA so it may exercise its authority against the correct legal background.'" *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (quoting *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 160 (3d Cir. 2011)). "Once it does so, this court will have no jurisdiction to review the *sua sponte* decision, as *Ekimian* instructs." *Id.*

D. Certification Under 8 C.F.R. § 1003.1(c)

The above rule also applies to the BIA's discretionary decision of whether to certify a claim under 8 C.F.R. § 1003.1(c), which grants the BIA authority to accept a procedurally improper appeal by certification. *See Idrees v. Barr*, 923 F.3d 539, 542–43 & n.3 (9th Cir. 2019) (dismissing challenge to the agency's discretionary decision not to certify petitioner's ineffective assistance of counsel claim where petitioner challenged only the BIA's exercise of discretion and asserted no constitutional or legal error). Because "the decision of whether to certify a claim under 8 C.F.R. § 1003.1(c) is committed to agency discretion," and "[t]he regulation contains no standard for how the agency should exercise its discretion in determining whether to certify a claim for review," the court lacks jurisdiction to review the IJ's and BIA's decisions not to certify an appeal. *Id.* at 542–43 (applying 5 U.S.C. § 701(a), the Administrative Procedure Act provision limiting judicial review of final agency actions to actions that are not committed to agency discretion).

The court, however, retains jurisdiction over constitutional claims and questions of law. *See Idrees v. Barr*, 923 F.3d 539, 543 (9th Cir. 2019) (court retains jurisdiction to review claims that the BIA's or IJ's refusal to certify a claim rested on any constitutional or legal error).

E. Finality of the Underlying Order

The *filing* of a motion to reopen does not disturb the finality of the underlying deportation or removal order. *See Membreno v. Gonzales*, 425 F.3d 1227, 1229 (9th Cir. 2005); *cf. Nken v. Holder*, 556 U.S. 418, 430 n.1 (2009) (noting that staying a removal order does not affect finality, whereas granting a motion to reopen would extinguish that finality).

If the BIA *grants* a motion to reopen, however, "there is no longer a final decision to review," and the petition should be dismissed for lack of jurisdiction. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002); *see also Saavedra-Figueroa v. Holder*, 625 F.3d 621, 624 (9th Cir. 2010) ("We lack jurisdiction over a petition for review when the BIA reopens an alien's removal proceedings."); *Cordes v. Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008) (vacating prior opinion and denying petition for rehearing as moot where, unbeknownst to the court, the BIA had "sua sponte reopened the underlying proceeding, vacated its order of removal, and remanded the matter to the [IJ]," thereby stripping the court of jurisdiction); *Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (explaining that parties should notify the court when the BIA grants a motion to reopen while a petition for review is pending)

Neither the filing of a motion to reconsider nor the denial of a motion to reconsider affects jurisdiction over a petition for review of the underlying removal order. *See Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).

A grant of a motion to reconsider, moreover, does not *automatically* render the underlying removal order nonfinal or divest the court of jurisdiction over a pending petition for review. *See Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); *see also Singh v. INS*, 213 F.3d 1050, 1052 n.2 (9th Cir. 2000) ("We may review the [BIA's] denial of a motion to reopen while the motion to reconsider is pending [before the BIA]."); *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 624 (9th Cir. 2010) (court retained jurisdiction over petition for review where, while the petition was pending, the BIA granted reconsideration and affirmed the part of the underlying removal order addressed in the petition for review).

Rather, "[o]nce a petition for review has been filed, federal court jurisdiction is divested only where the BIA subsequently vacates or materially changes the decision under review." *Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).

F. Filing Motion to Reopen or Reconsider Not a Jurisdictional Prerequisite to Filing a Petition for Review

The filing of a motion to reopen or reconsider with the BIA is not a jurisdictional prerequisite to filing a petition for review with the court of appeals. *See Santos-Zacaria v. Garland*, 598 U.S. 411, 425 (2023) ("Because Board reconsideration (like reopening) is a discretionary form of review, it is not available to the noncitizen 'as of right.' Section 1252(d)(1) therefore does not require a noncitizen to pursue it."); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) ("The INS's contention that Noriega-Lopez was obliged to file a motion to reopen or reconsider before seeking review of the BIA's order of removal is erroneous."); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023–24 (9th Cir. 1992) ("A motion to reopen might have been granted as a matter of discretion, but reopening was not available 'as of right,' so a motion to reopen was not a jurisdictional prerequisite.").

G. Tolling of the Time Period to File Petition for Review

The time limit for filing a petition for review with the court of appeals is not tolled by the filing of a motion to reopen. *See Stone v. INS*, 514 U.S. 386, 405–06 (1995) ("[A] deportation order is final, and reviewable, when issued. Its finality is not affected by the subsequent filing of a motion to reconsider."); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996) (noting that *Stone* abrogated circuit precedent holding that "the filing of a motion to reopen or reconsider effectively tolled the statutory time in which to appeal the underlying final order" to the court of appeals).

Section 1252(b)(1)'s 30-day deadline for filing a petition for review is nonjurisdictional; it is a mandatory claims-processing rule. *See Riley v. Bondi*, 606 U.S. 259, 263, 277 (2025).

H. No Automatic Stay of Removal or Tolling of Voluntary Departure Period

The filing of a motion to reopen or reconsider does not automatically result in a stay of deportation or removal or toll a voluntary departure period. *See* 8 C.F.R. § 1003.2(f) (2020); *Baria v. Reno*, 180 F.3d 1111, 1113 (9th Cir. 1999); *cf. Dada v. Mukasey*, 554 U.S. 1, 18-19 (2008) (explaining there is no statutory authority for the automatic tolling of the voluntary departure period during the pendency of a motion to reopen).

1. Exception for In Absentia Removal or Deportation Orders

The filing of a motion to reopen of an in absentia order of deportation or removal automatically stays deportation. *See* 8 C.F.R. § 1003.23(b)(4)(ii) (2020) (before IJ); 8 C.F.R. § 1003.23(b)(4)(iii)(C) (2020); 8 C.F.R. § 1003.2(f) (2020) (before BIA).

I. Consolidation

Judicial review of a motion to reopen or reconsider must be consolidated with the review of the final order of removal. *See* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.").

J. Departure from the United States (Departure Bar)

Two federal regulations purport to preclude a noncitizen from filing or pursuing a motion to reopen after departure from the United States:

- 8 C.F.R. § 1003.23(b)(1), concerning motions to reopen or reconsider made before an immigration judge, states: "A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion." 8 C.F.R. § 1003.23(b)(1).

- 8 C.F.R. § 1003.2(d), concerning motion to reopen or reconsider made before the BIA, states: "A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

These regulations, known as the regulatory departure bar, are invalid as applied to procedurally proper motions to reopen. *See Rubalcaba v. Garland*, 998 F.3d 1031, 1037 (9th Cir. 2021) ("[A]n IJ or the BIA cannot apply the departure bar in cases where a noncitizen has filed a timely motion to reopen within ninety days of a final order of removal—regardless of when or how the noncitizen departed the United States."); *Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015) (holding that the regulatory departure bar is invalid as applied to a noncitizen who voluntarily departs from the United States); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1076–77 (9th Cir. 2011) (holding that the regulatory departure bar is invalid as applied to a noncitizen who files a motion to reopen after his voluntary removal); *Coyt v. Holder*, 593 F.3d 902, 906–07 (9th Cir. 2010) (holding that "the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen"—involuntary departure).

The regulatory departure bar is also inapplicable to sua sponte reopening. *See Rubalcaba v. Garland*, 998 F.3d 1031, 1041 (9th Cir. 2021) ("[W]e conclude that the plain, unambiguous language of the regulation makes clear that the departure bar does not apply in the context of sua sponte reopening.").

The regulatory departure bar in 8 C.F.R. § 1003.23(b)(1) and 8 C.F.R. § 1003.2(d) applies only to persons who are presently subject to removal proceedings. *See Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (holding that § 1003.23(b)(1) did not bar a motion to reopen by a noncitizen who previously had been removed to China; "Because petitioner's original removal proceedings were completed when he was removed to China, he did not remain the subject of removal proceedings after that time."); *see also Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007) (holding that § 1003.2(d) did not bar a motion to reopen by a noncitizen who filed the motion "after the completion of immigration proceedings").

Another federal regulation purports to render an administrative appeal to the BIA withdrawn if the movant departs from the United States. *See* 8 C.F.R. § 1003.4 ("Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens as defined in § 1001.1(q) of this chapter, subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken."). This regulatory departure bar is also invalid. *See Lopez-Angel v. Barr*, 952 F.3d 1045, 1049 (9th Cir. 2020) ("We . . . hold that an alien does not withdraw his appeal of a final removal order, including the appeal of the denial of a motion to reopen or reconsider, simply because he was involuntarily removed before the appeal was decided. Rather, we hold that § 1003.4 provides for withdrawal only when the petitioner engaged in conduct that establishes a waiver of the right to appeal.").

Two former regulations, 8 C.F.R. § 3.2 and 8 C.F.R. § 1105a(c), precluded BIA review of deportation orders that had already been executed. *See Perez-Camacho v. Garland*, 54 F.4th 597, 604 (9th Cir. 2022) ("Before 1996, the INA precluded the BIA from reviewing a challenge to a removal order brought by an alien who had been removed from the United States." (citing 8 U.S.C. § 1105a(c) (2020) and 8 C.F.R. § 3.2).

The court had held that these jurisdictional bars applied "only where the 'departure' was a 'legally executed' one." *Wiedersperg v. INS*, 896 F.2d 1179, 1181 (9th Cir. 1990). Accordingly, the BIA had jurisdiction to consider a motion to reopen on the ground that a deportation had been based on an invalid conviction. *See Wiedersperg v. INS*, 896 F.2d 1179, 1181–82 (9th Cir. 1990) (holding that petitioner was entitled to reopen his deportation proceedings where his state conviction, which provided the sole ground of deportation, had been vacated); *Estrada-Rosales v. INS*, 645 F.2d 819, 820–21 (9th Cir. 1981) (the former regulations did not bar the BIA from considering a motion to reopen deportation proceedings where the deportation had been based on an invalid conviction, such that the deportation had not been "legally executed"); *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977) (holding that "departure" under former 8 U.S.C. § 1105a meant a "legally executed" departure, which excluded departure in contravention of due process). A deportation or removal order was not "legally executed" where a vacated state court conviction was "a key part" or the deportation or removal proceeding; the vacated conviction need not have provided the sole ground of deportability. *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006) (holding that the regulatory bar to filing a motion to reopen after the noncitizen's departure from the country, 8 C.F.R. § 1003.2, does not apply to a person who was removed due to a later-expunged conviction).

The *Wiedersperg* line of authority does not provide an exception to the subsequently adopted limitations on the timing and number of motions to reopen. *See Perez-Camacho v. Garland*, 54 F.4th 597, 603 (9th Cir. 2022) ("[W]hen an alien brings a motion to reopen that is neither time nor number-barred, and challenges a removal order on the ground that it is based on a prior conviction that has been vacated or modified, the BIA may consider whether this claim demonstrates the alien's eligibility for relief."); *id.* at 603–07 (holding that the BIA did not abuse its discretion in denying petitioner's time- and number-barred motion to reopen where petitioner obtained a conviction modification 13 years after the removal order, and equitable tolling was not warranted where petitioner did not explain why he waited so many years to seek the conviction modification or how he was prevented from discovering the alleged ineffective assistance of his prior defense counsel).

K. Bar Under 8 U.S.C. § 1231(a)(5)

If a noncitizen who was removed pursuant to a removal order unlawfully reenters the United States, and the removal order is reinstated pursuant to 8 U.S.C. § 1231(a)(5), the noncitizen is barred from reopening the prior removal proceedings under § 1229a(c)(7). *See Cuenca v. Barr*, 956 F.3d 1079, 1082 (9th Cir. 2020) ("We conclude that an alien whose removal order is reinstated pursuant to § 1231(a)(5) may not reopen the prior removal proceeding under § 1229a(c)(7). The bar is a consequence of having reentered unlawfully."), *abrogated on other grounds by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (holding that § 1231(a)(5)'s bar on motions to reopen is nonjurisdictional and therefore subject to waiver and forfeiture).

Section 1231(a)(5), which provides that, if a noncitizen has reentered the United States illegally after having been removed, "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed," is not subject to an exception for removal orders that result in a gross miscarriage of justice. *See Bravo-Bravo v. Garland*, 54 F.4th 634, 636 (9th Cir. 2022), *abrogated on other grounds by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (holding that § 1231(a)(5)'s bar on motions to reopen is nonjurisdictional and therefore subject to waiver and forfeiture).

Section 1231(a)(5) also applies to the agency's authority to reopen such removal orders sua sponte. *See Bravo-Bravo v. Garland*, 54 F.4th 634, 636 (9th Cir. 2022), *abrogated on other grounds by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024).

The court has held that, "[w]hen the BIA denies a motion to reopen a reinstated removal order on grounds other than a lack of jurisdiction, we may deny a petition challenging that ruling based on the BIAs lack of jurisdiction under 8 U.S.C. § 1231(a)(5)." *Gutierrez-Zavala v. Garland*, 32 F.4th 806, 811 (9th Cir. 2022), *abrogated on other grounds by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (holding that § 1231(a)(5)'s bar on motions to reopen is nonjurisdictional and therefore subject to waiver and forfeiture). *Suate-Orellana* abrogates *Gutierrez-Zavala*'s holding to the extent that the decision was based on § 1231(a)(5) being jurisdictional. *Gutierrez-Zavala*, however, remains good law to the extent that it holds that this court may sustain a BIA decision on a ground upon which the BIA did not rely if remand would be idle and useless.

Although, "an individual placed in reinstatement proceedings under § 1231(a)(5) cannot as a general rule challenge the validity of the prior removal order in the reinstatement proceeding itself," the noncitizen retains "the right, conferred by § 1229a(b)(5)(C)(ii), to seek rescission of a removal order entered *in absentia*, based on lack of notice, by filing a motion to reopen 'at any time.'" *Miller v. Sessions*, 889 F.3d 998, 1002–03 (9th Cir. 2018).

Cross-reference: Jurisdiction over Immigration Petitions in the Ninth Circuit, Departure from the United States, Review of Motions to Reopen; and Review of Removal Orders.

III. STANDARD OF REVIEW

A. Generally

The court reviews denials of motions to reopen, remand, or reconsider for abuse of discretion. *See Eskilian v. Bondi*, 172 F.4th 682, 687 (9th Cir. 2026) ("We review the BIA's denial of a motion to reopen for abuse of discretion."); *Ani v. Bondi*, 155 F.4th 1118, 1126 (9th Cir. 2025) ("We review the BIA's denial of a motion to remand for abuse of discretion."); *B.R. v. Garland*, 26 F.4th 827, 835 (9th Cir. 2022) ("We review the denial of a motion to reconsider for abuse of discretion.); *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) ("We review BIA decisions to deny equitable tolling of a motion to reopen for abuse of discretion."); *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020) ("We generally review the denial of a motion to reconsider a final order of removal for an abuse of discretion, reversing when the denial is 'arbitrary, irrational, or contrary to law.'" (quoting *Go v. Holder*, 744 F.3d 604, 609 (9th Cir. 2014))); *Martinez v. Barr*, 941 F.3d 907, 921–22 (9th Cir. 2019) ("The BIA abused its discretion in failing to reopen proceedings that had a facially apparent due process violation . . . ."); *Bartolome v. Sessions*, 904 F.3d 803, 815 (9th Cir. 2018) ("The IJ's failure to recognize that he had at least *sua sponte* jurisdiction to reopen proceedings was an abuse of discretion."); *Agonafer v. Sessions*, 859 F.3d 1198, 1203 (9th Cir. 2017) ("We review the BIA's denial of a motion to reopen for an abuse of discretion."); *Yang v. Lynch*, 822 F.3d 504, 509 (9th Cir. 2016) ("Because the BIA may not make credibility determinations on a motion to reopen, the BIA's decision to discredit Yang's affidavit based on application of the *falsus* maxim was contrary to law, and therefore an abuse of discretion."); *Garcia v. Lynch*, 786 F.3d 789, 792 (9th Cir. 2015) ("We review the denial of a motion to reconsider for abuse of discretion."); *Taggar v. Holder*, 736 F.3d 886, 889-90 (9th Cir. 2013) ("We review the Board's denial of motions to remand for abuse of discretion.").

The abuse of discretion standard applies regardless of the underlying relief requested. *See INS v. Doherty*, 502 U.S. 314, 323–24 (1992).

"The BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to the law, and when it fails to provide a reasoned explanation for its actions. To properly act within its discretion, the BIA must give some indication that it considered all of the evidence and claims presented by the petition." *Eskilian v. Bondi*, 172 F.4th 682, 687 (9th Cir. 2026) (citations and internal quotation marks omitted); *see also Nababan v. Garland*, 18 F.4th 1090, 1094 (9th Cir. 2021) ("The BIA abuses its discretion when its decision is arbitrary, irrational or contrary to law."); *Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020) ("The BIA abuses its discretion when it makes an error of law or fails to provide a reasoned explanation for its actions."); *Tadevosyan v. Holder*, 743 F.3d 1250, 1252–53 (9th Cir. 2014) ("The BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to the law,' and 'when it fails to provide a reasoned explanation for its actions.'" (quoting *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005))).

In reviewing the BIA's denial of a motion to reopen, "[w]e review the BIA's determination of purely legal questions de novo and the BIA's factual findings for substantial evidence." *Nababan v. Garland*, 18 F.4th 1090, 1094 (9th Cir. 2021); *Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) (reviewing de novo a purely legal question of regulatory interpretation); *Martinez v. Barr*, 941 F.3d 907, 921 (9th Cir. 2019) ("We review de novo the BIA's determination of purely legal questions, including claims of due process violations [and the sufficiency of a notice to appear]."); *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (in reviewing the BIA's denial of a motion to reconsider, de novo review applies to the BIA's determination of purely legal questions).

"'Motions for reopening of immigration proceedings are disfavored,' and as such, 'the Attorney General has broad discretion to grant or deny such motions.'" *Cui v. Garland*, 13 F.4th 991, 995 (9th Cir. 2021) (quoting *INS v. Doherty*, 502 U.S. 314, 323 (1992)); *see also INS v. Abudu*, 485 U.S. 94, 107, 110 (1988) (noting that "the Attorney General's [former] regulations . . . plainly disfavor motions to reopen”); *Chandra v. Holder*, 751 F.3d 1034, 1036 (9th Cir. 2014) (“Motions to reopen . . . are generally disfavored because ‘every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.’” (quoting *INS v. Doherty*, 502 U.S. 314, 323 (1992))); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1150 (9th Cir. 2010) (same).

Applying a former regulation governing motions to reopen, 8 C.F.R. § 3.2 (1987), the Supreme Court noted that a motion to reopen was analogous to “a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden.” *INS v. Abudu*, 485 U.S. 94, 110 (1988); *see also Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008) (“Aliens who seek to remand or reopen proceedings to pursue relief bear a ‘heavy burden’ of proving that, if proceedings were reopened, the new evidence would likely change the result in the case.” (quoting *Matter of Coelho*, 20 I. & N. Dec. 464, 472 (BIA 1992) (in turn quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)))).

“The BIA can deny a motion to reopen on any one of at least three independent grounds—failure to establish a prima facie case for the relief sought, failure to introduce previously unavailable, material evidence, and a determination that even if these requirements were satisfied, the movant would not be entitled to the discretionary grant of relief which he sought.” *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1180 (9th Cir. 2023) (quoting *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010) (in turn quoting *INS v. Doherty*, 502 U.S. 314, 323 (1992))).

The court reviews for abuse of discretion the BIA’s determination that the petitioner failed to establish changed country conditions, as required to file a motion to reopen outside the 90-day deadline under 8 C.F.R. § 1003.2(c)(3)(ii). *See, e.g.*, *Reyes-Corado v. Garland*, 76 F.4th 1256, 1265 (9th Cir. 2023) (“The BIA thus abused its discretion in determining that Reyes-Corado had not provided qualitatively different [country conditions] evidence.”); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 805 (9th Cir. 2022) (“[T]he agency did not abuse its discretion in determining that petitioner had not shown changed country conditions in Mexico.”); *Rodriguez v. Garland*, 990 F.3d 1205, 1211 (9th Cir. 2021) (“The BIA therefore did not abuse its discretion in denying Petitioner’s motion to reopen on the grounds that he did not demonstrate a relevant change in country conditions.”); *Salim v. Lynch*, 831 F.3d 1133, 1139 (9th Cir. 2016) (“[T]he BIA abused its discretion when it concluded that the evidence proffered did not ‘meaningfully reflect’ changed country conditions in Indonesia.”). Underlying factual findings, however, are reviewed for substantial evidence. *See Kaur v. Garland*, 2 F.4th 823, 831–33 (9th Cir. 2021) (BIA's finding that treatment of widows in India had not worsened was not supported by substantial evidence).

Cross-reference: Jurisdiction over Immigration Petitions, Standards of Review; Ninth Circuit Standards of Review Outline.

B. Full Consideration of All Factors

"While the Board has broad discretion in ruling on a motion to reopen, it must show proper consideration of all factors, both favorable and unfavorable, in determining whether to grant a motion to reopen." *Toufighi v. Mukasey*, 538 F.3d 988, 993 (9th Cir. 2008); *see also Ali v. Holder*, 637 F.3d 1025, 1032 (9th Cir. 2011) ("When the BIA reviews a motion to reopen, it must show proper consideration of all factors, both favorable and unfavorable.").

See, *e.g.*, *Nababan v. Garland*, 18 F.4th 1090, 1096 (9th Cir. 2021) ("We hold that the BIA committed legal error because it did not assess the individualized risk of persecution that Petitioners face due to their identity as evangelical Christians. . . . On remand, the BIA should assess whether country conditions in Indonesia have materially changed for evangelical Christians in particular, as distinct from Christians in general."); *Chandra v. Holder*, 751 F.3d 1034, 1039 (9th Cir. 2014) ("The BIA abused its discretion when it failed to assess Chandra's evidence that treatment of Christians in Indonesia had deteriorated since his 2002 removal hearing. . . . Further, the BIA committed legal error insofar as it determined that Chandra's post-removal conversion to Christianity rendered him ineligible to file an untimely motion under the changed conditions exception."); *Zhao v. Holder*, 728 F.3d 1144, 1151 (9th Cir. 2013) (remanding where petitioner "tendered substantial evidence in support of her motion to reopen that was unaddressed or improperly rejected by the BIA"); *Ali v. Holder*, 637 F.3d 1025, 1032 (9th Cir. 2011) (remanding where the BIA failed to consider what effect a 2006 coup in Fiji had on petitioner's presumption of a well-founded fear of persecution, as well as "other favorable factors," such as any similarities between the 2006 coup and prior coups); *Garcia v. Holder*, 621 F.3d 906, 913 (9th Cir. 2010) (remanding where the BIA entirely failed to address petitioner's supplemental brief and the evidence attached to it; although BIA had discretion whether to consider the evidence, it was legal error for the BIA to entirely fail to exercise that discretion); *Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (holding that the BIA abused its discretion in denying motion to reopen based solely on failure to post voluntary departure bond without consideration of favorable factors; any misconduct on the part of petitioners in failing to depart "does not change the BIA's responsibility to weigh all the factors, positive *and* negative"); *Bhasin v. Gonzales*, 423 F.3d 977, 986–87 (9th Cir. 2005) (holding that the BIA abused its discretion by improperly discrediting petitioner's affidavit as "self-serving" and failing to properly consider "relevant factors weighing in favor of reopening"); *Mohammed v. Gonzales*, 400 F.3d 785, 792–93 (9th Cir. 2005) (holding that the BIA abused its discretion by denying motion to reopen in an "incomplete" and "nonsensical" opinion and in "failing to consider all the attached evidence"; "the BIA is obligated to consider and address in its entirety the evidence submitted by a petitioner"); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA's unexplained failure to address petitioner's claim of ineffective assistance of counsel); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097–99 (9th Cir. 2005) ("[W]e conclude that the BIA abused its discretion in denying Movsisian's motion to reopen without articulating its reasons.").

"[T]he BIA . . . has a duty to weigh all relevant evidence, including affidavits or declarations, in cases in which there is a factual dispute about whether a document has been mailed by a petitioner to the BIA." *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1078 (9th Cir. 2010).

"The BIA abuses its discretion when it denies petitioner's claim with no indication that it considered all of the evidence and claims presented by the petition." *Avagyan v. Holder*, 646 F.3d 672, 682 (9th Cir. 2011).

Although the BIA must consider all evidence, it need not expressly refute on the record every single piece of evidence presented. *Lin v. Holder*, 588 F.3d 981, 987–88 (9th Cir. 2009) (although BIA did not specifically address some of the evidence submitted, it did not abuse its discretion in denying the motion to reopen where it considered much of the evidence, "especially the evidence that was specific to her"); *see also Agonafer v. Sessions*, 859 F.3d 1198, 1206–07 (9th Cir. 2017) ("While the BIA 'does not have to write an exegesis on every contention,' it is required to 'consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'" (quoting *Lopez v. Ashcroft*, 366 F.3d 799, 807 n.6 (9th Cir. 2004))).

In *Agonafer*, the court held that, "[b]ecause the BIA failed to consider the issues raised by the new reports in a manner showing that it 'heard and thought and not merely reacted' to Agonafer's motion to reopen, . . . it 'abused its discretion in dismissing the new evidence as demonstrating a mere continuance of the previous circumstances.' . . . Accordingly, the BIA's denial of Agonafer's motion to reopen was arbitrary, irrational, or contrary to law." *Agonafer v. Sessions*, 859 F.3d 1198, 1207 (9th Cir. 2017) (citations omitted).

1. Later-Acquired Equities

Equities arising after a final order of deportation or removal may be given less weight than those acquired before the applicant was found to be deportable. *See Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995) ("The government rightly points out that equities flowing from [petitioner's] marriage should be given little weight because it took place . . . three months after the BIA's summary dismissal/final deportation order."). *But see Israel v. INS*, 785 F.2d 738, 740–42 (9th Cir. 1986) (BIA acted arbitrarily by declining to reopen case of noncitizen who had recently married where the BIA had stated in a prior decision that it would routinely reopen deportation proceedings in such circumstances).

Equities arising when the noncitizen knowns that she is in the country unlawfully also may be given less weight. *See Vasquez v. INS*, 767 F.2d 598, 602 (9th Cir. 1985) ("Since Vasquez married after he violated his departure order, the favorable equities of his marriage are entitled to less weight than if he had married while a legal resident."); *Sangabi v. INS*, 763 F.2d 374, 375 (9th Cir. 1985) (equities arising when the noncitizen knows that he is in the country illegally are entitled to less weight than are the equities arising when the alien is legally in this country).

On a motion to reopen or remand for adjustment of status premised on a marriage that occurred during deportation proceedings, the motion must present clear and convincing evidence indicating a strong likelihood that the marriage is bona fide. *See Malhi v. INS*, 336 F.3d 989, 993–94 (9th Cir. 2003) (discussing the regulatory presumption of fraud for intra-proceeding marriages, 8 C.F.R. § 204.2(a)(1)(iii)).

"[A] petitioner's untimely motion to reopen may qualify under the changed conditions exception in 8 C.F.R. § 1003.2(c)(3)(ii), even if the changed country conditions are made relevant by a change in the petitioner's personal circumstances." *Chandra v. Holder*, 751 F.3d 1034, 1038 (9th Cir. 2014). Accordingly, "the BIA committed legal error insofar as it determined that Chandra's post-removal conversion to Christianity rendered him ineligible to file an untimely motion under the changed conditions exception." *Id.* at 1039.

C. Explanation of Reasons

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

"While the BIA 'does not have to write an exegesis on every contention,' it is required to 'consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'" *Agonafer v. Sessions*, 859 F.3d 1198, 1206 (9th Cir. 2017) (quoting *Lopez v. Ashcroft*, 366 F.3d 799, 807 n.6 (9th Cir. 2004)).

"[T]he BIA must address and rule upon remand motions, giving specific, cogent reasons for a grant or denial." *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004).

See, e.g., *Avagyan v. Holder*, 646 F.3d 672, 681–82 (9th Cir. 2011) (remanding were it was unclear whether BIA considered specific claim raised by petitioner); *Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (remanding where BIA did not mention factors favoring reopening in the denying the motion); *Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) ("[T]he BIA must issue a decision that fully explains the reasons for denying a motion to reopen."); *Arrozal v. INS*, 159 F.3d 429, 433 (9th Cir. 1998) ("[T]he BIA must indicate how it weighed [the favorable and unfavorable] factors and indicate with specificity that it heard and considered petitioner's claims.").

D. Irrelevant Factors

The BIA "may not give weight to plainly irrelevant factors." *Virk v. INS*, 295 F.3d 1055, 1060–61 (9th Cir. 2002) (holding that BIA improperly considered the plainly irrelevant factor of petitioner's wife's alleged misconduct); *see also Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986) ("The inclusion of an improper factor in reaching a discretionary decision is grounds for remand."; the BIA improperly relied on misconduct of petitioner's father).

E. Credibility Determinations

The BIA may not make credibility determinations on motions to reopen. *See 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."); *Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986) ("As motions to reopen are decided without a factual hearing, the Board is unable to make credibility determinations at this stage of the proceedings.").

Accordingly, "facts presented in affidavits supporting a motion to reopen must be accepted as true unless inherently unbelievable." *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) ("[T]he self-serving nature of a declaration in support of a motion to reopen is not an appropriate basis for discrediting its content.")

Although the BIA must accept the facts in a noncitizen's affidavit as true, "[t]he Board may then draw its own legal conclusions from the evidence presented." *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002) (BIA did not abuse its discretion in denying motion to reopen and rescind an in absentia removal order where petitioner's statement, even accepted as true, that he has asthma and had an attack did not "definitively establish that [his] illness was 'serious' under the statute" so as to constitute "exceptional circumstances" under the applicable legal standard).

The BIA, moreover, "is free to interpret that evidence free from inferences in favor of the moving party." *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991).

In addition, the BIA "may rely on a previous adverse credibility determination to deny a motion to reopen if that earlier finding still factually undermines the petitioner's new argument." *Greenwood v. Garland*, 36 F.4th 1232, 1234 (9th Cir. 2022); *see id.* at 1235 ("If the materiality of the evidence on changed country conditions 'is contingent, in part or in whole, on factors that were determined to lack credibility and have not been rehabilitated, the respondent'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))); *accord Singh v. Garland*, 46 F.4th 1117, 1122 (9th Cir. 2022) ("[T]o prevail on a motion to reopen alleging changed country conditions where the persecution claim was previously denied based on an adverse credibility finding in the underlying proceedings, the respondent must either overcome the prior determination or show that the new claim is independent of the evidence that was found to be not credible." (quoting *Matter of F-S-N-*, 28 I. & N. Dec. 1, 3 (BIA 2020))).

"The BIA violates an alien's due process rights when it makes a sua sponte adverse credibility determination without giving the alien an opportunity to explain alleged inconsistencies." *Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003).

An adverse credibility determination is not supported by substantial evidence if the record contains no evidence contradicting the noncitizen's version of the facts. *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 897–88 (9th Cir. 2003) (holding that where 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 must be credited), *amended by* 339 F.3d 1012 (9th Cir. 2003).

Cross-Reference: Relief from Removal, Credibility Determinations, Motions to Reopen.

IV. REQUIREMENTS FOR A MOTION TO REOPEN

There are "'at least' three independent grounds on which the BIA might deny a motion to reopen—failure to establish a prima facie case for the relief sought, failure to introduce previously unavailable, material evidence, and a determination that even if these requirements were satisfied, the movant would not be entitled to the discretionary grant of relief which he sought." *INS v. Doherty*, 502 U.S. 314, 323 (1992); *accord Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1180 (9th Cir. 2023) ("The BIA can deny a motion to reopen on any one of at least three independent grounds—failure to establish a prima facie case for the relief sought, failure to introduce previously unavailable, material evidence, and a determination that even if these requirements were satisfied, the movant would not be entitled to the discretionary grant of relief which he sought." (quoting *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010))).

A. Supporting Documentation

A motion to reopen must be supported by affidavits, the new evidentiary material sought to be introduced, and, if necessary, a completed application for relief. *See* 8 U.S.C. § 1229a(c)(7)(B) ("The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material."); 8 C.F.R. § 1003.2(c)(1) (2020) (before BIA) ("A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation."); 8 C.F.R. § 1003.23(b)(3) (2020) (before IJ) (similar requirements); *see also INS v. Wang*, 450 U.S. 139, 143 (1981) (upholding the BIA's denial of motion to reopen to apply for suspension of deportation where "the allegations of hardship were in the main conclusory and unsupported by affidavit"); *Patel v. INS*, 741 F.2d 1134, 1137 (9th Cir. 1984) ("[I]n the context of a motion to reopen, the BIA is not required to consider allegations unsupported by affidavits or other evidentiary material.").

"Although the statute and regulation refer to 'affidavits,' we have treated affidavits and declarations interchangeably for purposes of motions to reopen, as well for purposes of BIA proceedings generally." *Malty v. Ashcroft*, 381 F.3d 942, 947 n.2 (9th Cir. 2004) (citations omitted).

The movant may submit an existing application for relief, rather than a new one, if she is seeking to reopen the existing application rather than to submit a new one. *See Aliyev v. Barr*, 971 F.3d 1085, 1087 (9th Cir. 2020) (holding that the BIA abused its discretion in denying petitioner's motion to reopen on the ground that he failed to attach the "appropriate application for relief" where he did not attach a new asylum application but attached the prior asylum application that he sought to reopen; "[W]hen a petitioner seeks to reopen proceedings as to the original claim, nothing in § 1003.2(c)(1) requires the petitioner to attach a new application for relief instead of his initial (relevant) application for relief.").

1. Exceptions

The petitioner's failure to submit supporting documentation does not bar reopening where the government either joins in the motion to reopen or does not affirmatively oppose it. *See Konstantinova v. INS*, 195 F.3d 528, 530–31 (9th Cir. 1999) (where government did not oppose petitioner's motion to remand, the BIA abused its discretion by denying the motion on basis that petitioner failed to include a completed application for relief; the BIA should have exercised its authority to waive the procedural requirements); *see also Guzman v. INS*, 318 F.3d 911, 914 n.3 (9th Cir. 2003) ("It would be an abuse of discretion . . . for the BIA to deny the motion [to remand] solely for [the reason that the petitioner failed to submit an application for adjustment of status with the motion] when the motion was not opposed by the INS.").

The supporting documentation need not be submitted concurrently with the motion so long as it is submitted within the 90-day time limitation on motions to reopen. *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 998–99 (9th Cir. 2006) (holding that BIA abused its discretion and violated due process in dismissing motion before expiration of the limitation period based on petitioner's failure to file supporting brief).

B. Material and Previously Unavailable Evidence

"A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ." 8 C.F.R. § 1003.2(c)(1); *see INS v. Doherty*, 502 U.S. 314, 324 (1992) (holding that the Attorney General did not abuse his discretion by denying a motion to reopen to apply for asylum and withholding based on lack of new material evidence); *Oyeniran v. Holder*, 672 F.3d 800, 808–09 (9th Cir. 2012) (granting petition for review where petitioner offered a legitimate and plausible explanation as to why evidence was new); *Goel v. Gonzales*, 490 F.3d 735, 738 (9th Cir. 2007) (holding that results of a polygraph examination administered after the former IJ hearing concerning events that took place prior to the IJ hearing could not serve as a basis for reopening where there was no reason why the petitioner could not have secured a polygraph report before the IJ hearing); *Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (BIA did not abuse its discretion by denying motion to reopen where the new information at issue was available and capable of discovery prior to deportation hearing); *Bolshakov v. INS*, 133 F.3d 1279, 1282 (9th Cir. 1998) (new information—petitioner's recent certification as a gifted artist—was not grounds for reopening where the petitioner could have applied for such status before his deportation proceedings ended and his asylum claim was denied); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (the BIA abused its discretion by affirming the IJ's decision to grant the government's motion to reopen the petitioner's deportation proceedings where the new information—a birth certificate—could have been discovered before the prior deportation hearing).

The movant need show only that the evidence was unavailable at the time of the IJ hearing, even if it was available before the appeal to the BIA. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 967 (9th Cir. 2025) ("The BIA erred as a matter of law by ruling that the evidence was not new because it became available after the hearing before the IJ [but before the appeal to the BIA]." (citing *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005))); *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (evidence was previously unavailable for purposes of a motion for reopen if it was unavailable at the time of the proceedings before the IJ, even if the evidence became available during the pendency of the appeal to the BIA).

"It is not sufficient that the evidence physically existed in the world at large; rather, the evidence must have been reasonably available to the petitioner." *Oyeniran v. Holder*, 672 F.3d 800, 808 (9th Cir. 2012) (Nigerian arrest warrant was not reasonably available to petitioner where he was in immigration detention in the United States for three years).

C. Explanation for Failure to Apply for Discretionary Relief

If the motion to reopen is made for the purpose of obtaining discretionary relief, the moving party must establish that he or she was denied the opportunity to apply for such relief, or that such relief was not available at the time of the original hearing. *See* 8 C.F.R. § 1003.2(c)(1) ("[N]or shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing.").

Cf. INS v. Doherty, 502 U.S. 314, 324, 327 (1992) (applying former 8 C.F.R. § 208.11 (1987), pertaining to motions to reopen for the purposes of pursuing asylum claims) ("[T]he Attorney General did not abuse his discretion in denying reopening . . . on the basis that respondent failed to satisfactorily explain his previous withdrawal of these claims."); *id.* at 327 (sustaining the Attorney's General's finding that "withdrawing a claim for a tactical advantage is not a reasonable explanation for failing to pursue the claim at an earlier hearing" and is the "functional equivalent" of failing to reasonably explain the failure to pursue the claim at the original hearing); *INS v. Abudu*, 485 U.S. 94, 111 (1988) (applying former 8 C.F.R. 208.11) (BIA did not abuse its discretion in concluding that the petitioner failed to reasonably explain his failure to request asylum during his deportation hearing where the new information would not have provided "significant additional support" for an asylum claim).

D. Prima Facie Eligibility for Relief

An applicant filing a motion to reopen must show prima facie eligibility for the underlying substantive relief requested. *See Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 703 (9th Cir. 2022) ("[T]he agency may deny a motion to reopen if . . . the petitioner failed to establish a prima facie case for the relief sought . . . ."); *Silva v. Garland*, 993 F.3d 705, 718 (9th Cir. 2021) ("Where, as here, the motion to reopen is based on changed circumstances in the country to which removal has been ordered, the movant must . . . demonstrate that the new evidence, when considered together with the evidence presented at the original hearing, would establish prima facie eligibility for the relief sought." (citing 8 U.S.C. § 1229a(c)(7)(ii) and 8 C.F.R. § 1003.2(c)(1))), *abrogated on other grounds as stated in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *id.* at 719 (BIA did not abuse its discretion in concluding that the petitioner failed to establish a prima facie case for asylum or withholding of removal where petitioner offered only speculation as to the possibility of future persecution); *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1228 (9th Cir. 2016) ("A motion to reopen will not be granted unless the respondent establishes a prima facie case of eligibility for the underlying relief sought."); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868–69 (9th Cir. 2003) (petitioner's request to reinstate his withdrawn asylum application was analogous to a motion to reopen; the legal standards applicable to the denial of a motion to reopen therefore applied).

"[P]rima facie eligibility for relief requires only a threshold showing of eligibility—a reasonable likelihood that the petitioner would prevail on the merits if the motion to reopen were granted." *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1179 (9th Cir. 2023). "[A] noncitizen demonstrates prima facie eligibility for relief where the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied." *Id.* (internal quotation marks omitted).

"The 'reasonable likelihood' standard requires a petitioner to show more than a mere possibility she will establish a claim for relief, but it does not require the petitioner to demonstrate she is more likely than not to prevail." *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1183 (9th Cir. 2023); *see also*; *Reyes-Corado v. Garland*, 76 F.4th 1256, 1263–66 (9th Cir. 2023) (noncitizen is not required to conclusively establish entitlement to relief); *Silva v. Garland*, 993 F.3d 705, 718 (9th Cir. 2021) ("To establish a prima facie case, the movant must adduce evidence that, along with the facts already in the record, 'will support the desired finding if evidence to the contrary is disregarded.'" (quoting *Maroufi v. INS*, 772 F.2d 597, 599 (9th Cir. 1985))), *abrogated on other grounds as recognized in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *Tadevosyan v. Holder*, 743 F.3d 1250, 1255 (9th Cir. 2014) (discussing reasonable likelihood standard); *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1171 (9th Cir. 2006) ("A respondent demonstrates prima facie eligibility for relief where the evidence reveals a reasonable likelihood the statutory requirements for relief have been satisfied." (alteration omitted) (quoting *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003))).

See, e.g., *Lemus-Escobar v. Bondi*, 158 F.4th 944, 967–70 (9th Cir. 2025) (BIA abused its discretion in concluding that petitioner failed to establish prima facie eligibility for asylum, withholding of removal, and CAT relief); *Sarkar v. Garland*, 39 F.4th 611, 622–23 (9th Cir. 2022) (BIA did not abuse its discretion in concluding that petitioner's new evidence showing a growing influence of Jihadist extremists in Bangladesh was not material to petitioner and thus was insufficient to demonstrate a prima facie claim for asylum and related relief).

E. Discretionary Denial

Even if the movant establishes a prima facie case for the relief sought and introduces previously unavailable, material evidence, the BIA may deny a motion to reopen on the ground that "the movant would not be entitled to the discretionary grant of relief which he sought." *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1180 (9th Cir. 2023).

Such determinations are subject to a "would likely change" standard, which "requires a petitioner to establish that it is at least more probable than not that the new evidence would change the outcome of the claim." *Fonseca-Fonseca v.*

Garland, 76 F.4th 1176, 1183 (9th Cir. 2023) (clarifying that "the 'reasonable likelihood' standard applies to decisions made on the prima facie ground, and the 'would likely change' standard applies to decisions made on the discretionary ground").

"[I]f the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met." *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *see INS v. Abudu*, 485 U.S. 94, 105 (1988) ("[I]n cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief."); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997) ("[W]here the ultimate grant of relief is discretionary, as it is in the case of suspension of deportation, the BIA may determine that the movant is not entitled to relief even though he meets the threshold requirements for eligibility."); *see also* 8 C.F.R. § 1003.2(a) (2020) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.").

But "the BIA must consider and weigh the favorable and unfavorable factors in determining whether to deny a motion to reopen proceedings on discretionary grounds." *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (remanding where BIA did not consider any of the factors weighing in petitioner's favor); *see also Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (BIA abused its discretion in denying motion to reopen based solely on petitioners' failure to post voluntary departure bond, without considering favorable factors); *id.* at 968 ("Instead of evaluating the favorable factors and the evidence, the BIA considered exclusively the petitioners' failure to depart, even though it assumed that they were eligible for relief. Where, as here, the petitioners are eligible for relief, any misconduct does not change the BIA's responsibility to weigh all the factors, positive *and* negative."); *Arrozal v. INS*, 159 F.3d 429, 433 (9th Cir. 1998) ("In its determination, the BIA must take into account *all* relevant factors. . . . Moreover, the BIA must indicate how it weighed these factors and indicate with specificity that it heard and considered petitioner's claims.").

F. Relevance of Prior Grant of Voluntary Departure

The BIA may not deny reopening as a matter of discretion based solely on the failure to post a voluntary departure bond or to depart voluntarily without also considering the favorable factors in support of reopening. *See Franco-Rosendo v. Gonzales*, 454 F.3d 965, 968 (9th Cir. 2006) (remanding for consideration of positive factors in favor of reopening where BIA denied reopening based solely on petitioner's failure to post a voluntary departure bond or depart voluntarily).

If a petitioner files a motion to reopen to apply for discretionary relief *after* the expiration of the voluntary departure period, he or she may be unable to establish prima facie eligibility for the relief sought. *See*, *e.g.*, *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015–16 (9th Cir. 2008) (BIA was compelled to deny petitioner's motion to reopen by operation of 8 U.S.C. § 1229c(d)(1), which states that "if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien . . . shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title."); *de Martinez v. Ashcroft*, 374 F.3d 759, 764 (9th Cir. 2004) (BIA correctly determined that petitioner was ineligible for adjustment of status where she filed her motion to reopen 30 days after expiration of her voluntary departure period).

A movant remains eligible for relief, however, if the failure to voluntarily depart was uninformed and hence not voluntary. *See Singh v. Holder*, 658 F.3d 879, 887, 887 n.10 (9th Cir. 2011) (petitioner remained eligible for adjustment of status because failure to depart was not "voluntary," where petitioner did not receive a copy of the BIA's decision and order of voluntary departure and his attorney did not tell him about the voluntary departure order) (distinguishing *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015–16 (9th Cir. 2008)).

Note that where the voluntary departure period expires on a weekend, and a motion to reopen is filed on the following Monday, the motion may be timely. *See Meza-Vallejos v. Holder*, 669 F.3d 920, 927 (9th Cir. 2012) ("[W]e hold that, where the last day of a period of voluntary departure falls on a day on which an immigrant cannot file a motion for affirmative relief with the BIA, that day does not count in the voluntary departure period if, as here, the immigrant files on the first available day a motion that would either have tolled, automatically withdrawn, or otherwise affected his request for voluntary departure.").

1. Voluntary Departure Regulations

A grant of voluntary departure terminates automatically when a timely motion to reopen or reconsider is filed. 8 C.F.R. § 1240.26(b)(3)(iii); (e)(1) (2020); *see also* 73 Fed. Reg. 76936. This regulation applies only prospectively. *Meza-Vallejos v. Holder*, 669 F.3d 920, 924 n.4 (9th Cir. 2012); *see also* 73 Fed. Reg. 76936.

A related regulation, effective January 20, 2009, also results in automatic termination of voluntary departure upon the filing of a petition for review. *See* 8 C.F.R. § 1240.26(i) (2020) ("If the alien files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall be terminated automatically, and the alternate order of removal will take effect immediately."); *see also Garfias-Rodriguez v. Holder*, 702 F.3d 504, 524–25 (9th Cir. 2012) (en banc) ("[B]ecause the filing of a petition . . . automatically terminates a petitioner's grant of voluntary departure, we conclude that, assuming that 8 C.F.R. § 1240.26(i) [(2012)] is valid, we have no authority to issue an equitable stay of Garfias's voluntary departure period.").

2. *Dada v. Mukasey*

Prior to the 2009 effective date of 8 C.F.R. § 1240.26, the Supreme Court in *Dada v. Mukasey* held that a timely-filed motion to reopen does not automatically stay the voluntary departure period while a petitioner's motion to reopen is pending and that voluntary departure recipients should be permitted an opportunity to withdraw a motion for voluntary departure where the request is made prior to the departure period expiring. Withdrawing a motion for voluntary departure allows a noncitizen to exercise her right to file a motion to reopen removal proceedings without suffering the penalties associated with failing to voluntary depart within the required 60 days. *See Dada v. Mukasey*, 554 U.S. 1, 5–6 (2008) ("Absent a valid regulation resolving the dilemma in a different way, we conclude the alien must be permitted an opportunity to withdraw the motion for voluntary departure, provided the request is made before the departure period expires.").

"Whether, and how, *Dada* applies retroactively remains an open question." *Meza-Vallejos v. Holder*, 669 F.3d 920, 925 n.4 (9th Cir. 2012) (noting that this court previously had remanded the question of *Dada*'s retroactivity in *Nevarez Nevarez v. Holder*, 572 F.3d 605, 609–10 (9th Cir. 2009), and, on remand, the BIA deemed petitioners' filing of a motion to reopen, followed by their election to remain in the United States to pursue that motion, as petitioners' exercise of their unilateral right to withdraw their request for voluntary departure).

3. Pre-*Dada v. Mukasey*

Prior to *Dada*, this court had held that, for permanent rules cases, "the timely filing of a motion to reopen or reconsider automatically tolls the voluntary departure period," regardless of whether the motion was accompanied by a motion to stay the voluntary departure period. *Barroso v. Gonzales*, 429 F.3d 1195, 1204–08 (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 was tolled while the BIA considered a timely filed motion to reopen accompanied by a motion to stay removal or voluntary departure), *abrogated by Dada v. Mukasey*, 554 U.S. 1, 19–21 (2008) (finding no statutory authority for "automatic tolling of the voluntary departure period during the pendency of the motion to reopen"); *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); *id.* at 530 n.9 "[W]e hold that the BIA may weigh a § 1229c(a) voluntary departure against granting an alien's motion to reopen made before a full adjudication of removal proceedings where, as here, the alien bargained for voluntary departure in lieu of full adjudication.").

Prior to IIRIRA, the BIA could deny a motion to reopen to apply for relief where the petitioners had failed to depart during the voluntary departure period. *See Shaar v. INS*, 141 F.3d 953, 954–59 (9th Cir. 1998), *superseded by statute as stated in Barroso v. Gonzales*, 429 F.3d 1195, 1201 n.13 (9th Cir. 2005); *cf. Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (holding, in a transitional rules case, that the BIA erred in denying a motion to reopen to apply for suspension of deportation where the IJ failed to give an adequate oral warning under the former statute of the consequences of failing to depart voluntarily).

Cross-reference: Cancellation of Removal, Ten-Year Bars to Cancellation, Failure to Depart.

G. Appeal of Deportation Order

"The BIA cannot deny a motion to reopen merely because an alien appeals a deportation order . . . ." *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531 n.10 (9th Cir. 2004).

H. Fugitive Disentitlement Doctrine

Individuals who disregard the order of deportation against them by refusing to report on their appointed date of departure may have their motion to reopen denied as a matter of discretion. But the fugitive disentitlement doctrine is a "severe sanction" that should not be lightly imposed. *See Bhasin v. Gonzales*, 423 F.3d 977, 987–88 (9th Cir. 2005) (holding that the BIA abused its discretion in denying a motion to reopen on the basis of the fugitive disentitlement doctrine where, although the petitioner had failed to report in accordance with the removal order, the agency had sent critical documents to the wrong address and there were serious questions as to whether the petitioner had received notice to appear for removal).

The fugitive disentitlement doctrine has been applied by this court. *See, e.g.*, *Antonio-Martinez v. INS*, 317 F.3d 1089, 1091 (9th Cir. 2003) (dismissing petition for review under the fugitive disentitlement doctrine where petitioner lost contact with his attorney and the agency and all efforts to contact him failed for over two years).

"[T]he critical question the court must ask when deciding whether to apply the fugitive disentitlement doctrine is whether the appellant is a fugitive at the time the appeal is pending." *Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009). "[F]or disentitlement to be appropriate, there must be 'some connection between a defendant's fugitive status and the appellate process.'" *Id.* (quoting *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244 (1993)).

"Two justifications frequently advanced in support of dismissal on a fugitive disentitlement theory are: (1) the pragmatic concern with ensuring that the court's judgment will be enforceable against the appellant; and (2) the equitable notion that a person who flouts the authority of the court waives his entitlement to have his appeal considered." *Sun v. Mukasey*, 555 F.3d 802, 804 (9th Cir. 2009).

V. TIME AND NUMERICAL LIMITATIONS

A. Generally

1. Time Limitations

Federal law states: "Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. § 1229a(c)(7)(C)(i); *see Mata v. Lynch*, 576 U.S. 143, 145 (2015) ("Subject to exceptions . . . , [a] motion to reopen 'shall be filed within 90 days' of the final removal order."); *Nababan v. Garland*, 18 F.4th 1090, 1095 (9th Cir. 2021) ("Generally, a party wishing to file a motion to reopen must do so within ninety days." (citing 8 C.F.R. § 1003.2(c)(2))); *Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021) ("An alien may generally file one motion to reopen within ninety days of a final administrative order of removal."); *Go v. Holder*, 744 F.3d 604, 607 (9th Cir. 2014) (motion to reopen must be filed no later than 90 days after the final decision in the proceeding sought to be reopened; holding that 8 C.F.R. § 1003.2(c) (2014) applies to CAT claims); *id.* at 609 ("[W]e hold that the procedural requirements specified in 8 C.F.R. § 1003.2(c) apply to CAT claims."); *Ocampo v. Holder*, 629 F.3d 923, 927–28 (9th Cir. 2010) ("8 U.S.C. § 1229a(c)(7)(C)(i) requires that a motion to reopen be filed within 90 days of a final order of removal.").

There is no time limit for motions to reopen for asylum applications based on changed country conditions. *See Lin v. Holder*, 588 F.3d 981, 985 (9th Cir. 2009).

"[A]n order of removal becomes final upon the earlier of: (i) a BIA determination affirming the order; or (ii) the expiration of the deadline to seek the BIA's review of the order." *Ocampo v. Holder*, 629 F.3d 923, 927–28 (9th Cir. 2010) (citing 8 U.S.C. § 1101(a)(47)(B)); *see also Vega v. Holder*, 611 F.3d 1168, 1170–71 (9th Cir. 2010) (applying *Chevron* deference and holding that BIA reasonably interpreted 8 U.S.C. § 1229a(c)(7)(C)(i) as requiring a motion to reopen to be filed within 90 days of the merits decision, rather than from a denial of the motion to reconsider).

A motion to reconsider must be filed within 30 days of the date of entry of a final administrative decision at issue. *See* 8 U.S.C. § 1229a(c)(6)(B) ("The motion [to reconsider] must be filed within 30 days of the date of entry of a final administrative order of removal."); 8 C.F.R. § 1003.2(b)(2) (2020) ("A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision . . . ."); *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) ("A motion to reconsider a final order of removal generally must be filed within thirty days of the date of entry of the order."); *accord Goulart v. Garland*, 18 F.4th 653, 654 (9th Cir. 2021) (same).

The limitations period begins to run when the agency sends its decision to the correct address. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1258–59 (9th Cir. 1996) ("'[T]he date of issuance' is the date the final deportation order was mailed to the correct address."); *see also Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1078–79 (9th Cir. 2010) (granting petition because BIA failed to weigh the evidence petitioner submitted in support of her claim that she mailed a Change of Address form to the BIA and that petitioner did not receive notice of BIA's decision); *Singh v. Gonzales*, 494 F.3d 1170, 1172 (9th Cir. 2007) (although a properly addressed cover letter creates a presumption of mailing on the date of the cover letter, such a presumption can be rebutted by affidavits of nonreceipt by a petitioner or a petitioner's counsel of record).

A removal order granting voluntary departure becomes final for purposes of a motion to reopen upon the BIA's affirmance of the order, not upon the noncitizen's overstay of the voluntary departure period. *See Ocampo v. Holder*, 629 F.3d 923, 925–28 (9th Cir. 2010) (holding that "a removal order that permits voluntary departure is final upon its issuance" rather than "upon expiration of the voluntary departure period" for purposes of determining the timeliness of a motion to reopen).

If the petitioner files a motion to reopen *after* the expiration of the voluntary departure period, the BIA must deny the motion to reopen based on petitioner's failure to depart. *See Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015 (9th Cir. 2008) (BIA was compelled by 8 U.S.C. § 1229c(d)(1) to deny a motion to reopen filed after expiration of the voluntary departure period); *de Martinez v. Ashcroft*, 374 F.3d 759, 763–64 (9th Cir. 2004) (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; BIA properly determined that petitioner "was ineligible for relief due to her failure to depart the United States within the period allotted for her voluntary departure"); *cf. Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1174 (9th Cir. 2003) (holding that "the voluntary departure period begins when an Immigration Judge or the BIA enters an order granting voluntary departure").

Where the voluntary departure period expires on a weekend, and a motion to reopen is filed on the following Monday, the motion may be timely. *See Meza-Vallejos v. Holder*, 669 F.3d 920, 927 (9th Cir. 2012) ("[W]e hold that, where the last day of a period of voluntary departure falls on a day on which an immigrant cannot file a motion for affirmative relief with the BIA, that day does not count in the voluntary departure period if, as here, the immigrant files on the first available day a motion that would either have tolled, automatically withdrawn, or otherwise affected his request for voluntary departure.").

"[T]he pendency of a petition for review of an order of removal does not toll the statutory time limit for the filing of a motion to reopen with the BIA." *Dela Cruz v. Mukasey*, 532 F.3d 946, 948–49 (9th Cir. 2008) (citing *Stone v. INS*, 514 U.S. 386, 405–06 (1995) (holding that a removal order is "final when issued" and that the filing of a motion to reopen or to reconsider with the BIA does not toll the statutory time limit for filing a petition for review), *clarified on other grounds by Riley v. Bondi*, 606 U.S. 259, 276–77 (2025))).

Where a noncitizen is ordered deported but is granted CAT deferral, the 90-day period for filing a motion to reopen begins to run when the deportation or removal order becomes final; "[t]hat petitioner's deportation was deferred under CAT does not alter this conclusion." *Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041–42 (9th Cir. 2008).

With respect to the deadlines specified in regulations, "the general rules concerning adequacy of notice through publication in the Federal Register apply in the immigration context." *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008) (publication of CAT regulations in Federal Register provided adequate notice of June 21, 1999 deadline to file motion to reopen based on CAT claim of applicant subject to pre-March 22, 1999 removal order). The court noted, however, that "[p]ublication in the Federal Register may not be sufficient notice to a party when the published information concerns imminent government action that directly affects the party's rights and that party's interest in the government action is more than purely speculative." *Id.* (internal quotation marks omitted).

The court can "review the merits of a citizenship claim by way of a petition for review from the denial of a motion to reopen, even where the motion was 'untimely' and denied 'as procedurally improper.'" *Anderson v. Holder*, 673 F.3d 1089, 1096 n.6 (9th Cir. 2012).

2. Numerical Limitations

Generally, a party may make one motion to reopen and one motion to reconsider. *See* 8 U.S.C. § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings under this section [except as provided in § 1229a(c)(7)(C)(iv)]."); 8 U.S.C. § 1229a(c)(6)(A) ("The alien may file one motion to reconsider a decision that the alien is removable from the United States."); 8 C.F.R. § 1003.2(c)(2) ("Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) . . . ."); 8 C.F.R. § 1003.2(b)(2) ("A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider."); *see also Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021) ("An alien may generally file one motion to reopen within ninety days of a final administrative order of removal."); *Agonafer v. Sessions*, 859 F.3d 1198, 1203 (9th Cir. 2017) (same); *Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008) ("[A]liens are entitled to file only one motion to reopen.").

The single-motion limitation on motions to reopen does not apply to motions to reopen and rescind in absentia orders of deportation (as opposed to in absential orders of removal). *See Fajardo v. INS*, 300 F.3d 1018, 1020 (9th Cir. 2002) (for in absentia cases governed by IIRIRA's permanent rules, the single-motion limitation applies to removal orders but not to deportation orders).

A motion to remand filed *before* a final administrative decision does not implicate the single-motion limitation under 8 C.F.R. § 1003.2(c)(2) (2020). *See Zhao v. Holder*, 728 F.3d 1144, 1147 (9th Cir. 2013) (BIA erred in holding motion to reopen numerically barred where the petitioner's first motion to remand was filed before administrative decision in her case).

"The question of whether a petition to reopen that is denied for untimeliness and thus is not considered on the merits by the BIA counts as a first petition for purposes of the number-bar rule is an open question that neither we, nor the BIA, have previously considered." *Nevarez Nevarez v. Holder*, 572 F.3d 605, 608 (9th Cir. 2009) (remanding for BIA to consider the question in first instance).

B. Exceptions to the 90-Day/One-Motion Rules

1. In Absentia Orders

"8 U.S.C. § 1229a(b)(5), authorizes immigration judges to order non-citizens removed from the country *in absentia*—that is, in the person's absence. Such orders may be entered when a non-citizen is directed to appear at a removal hearing but fails to show up, provided the government proves that it gave written notice of the hearing as required by statute and that the non-citizen is in fact removable." *Miller v. Sessions*, 889 F.3d 998, 999 (9th Cir. 2018) (citing 8 U.S.C. § 1229a(b)(5)(A)).

In *Campos-Chaves v. Garland*, 602 U.S. 447, 452 (2024), the Supreme Court observed:

> There are three scenarios in which an in absentia removal order may be rescinded. First, the alien can file a motion to reopen within 180 days of the order, and must demonstrate that the failure to appear was because of "exceptional circumstances." § 1229a(b)(5)(C)(i). Second, an alien can seek to rescind his in absentia removal order if he "demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien." § 1229a(b)(5)(C)(ii). Third, . . . an alien can seek rescission if he "demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2)" of § 1229(a).

a. Reopening and Rescission Based on Exceptional Circumstances

"An *in absentia* removal order can be rescinded if a petitioner files a motion to reopen within 180 days and demonstrates that his 'failure to appear was because of exceptional circumstances.'" *Singh v. Garland*, 117 F.4th 1145, 1150 (9th Cir. 2024) (quoting 8 U.S.C. § 1229a(b)(5)(C)(i)), *abrogated on other grounds by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc); *Cui v. Garland*, 13 F.4th 991, 996 (9th Cir. 2021) ("8 U.S.C. § 1229a(b)(5)(C)(i) states that a petitioner may challenge an in absentia removal order by filing 'a motion to reopen . . . within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances.'" (alteration in original)).

"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." *Singh v. Garland*, 117 F.4th 1145, 1150 (9th Cir. 2024) (quoting 8 U.S.C. § 1229a(e)(1)), *abrogated on other grounds by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc). "The statutory examples are explicitly not exhaustive." *Singh v. Garland*, 117 F.4th 1145, 1150 (9th Cir. 2024), *abrogated on other grounds by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc); *see Arredondo v. Lynch*, 824 F.3d 801, 805 (9th Cir. 2016) ("While the enumerated examples are not exclusive, exceptional circumstances must include a 'similarly severe impediment.'" (quoting *Singh-Bhathal v. INS*, 170 F.3d 943, 947 (9th Cir. 1999))).

"In other words, 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 court held:

> "Exceptional circumstances" are by definition unique, and the statute's listed examples of compelling circumstances are explicitly not exhaustive. We thus 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. 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. . . . Other factors may be relevant depending on the circumstances.

Montejo-Gonzalez v. Bondi, 166 F.4th 851, 854 (9th Cir. 2026) (en banc) (internal quotation marks and citations omitted).

"[W]e reject any categorical rules dictating what does or does not meet th[e exceptional circumstances] standard." *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 858 (9th Cir. 2026) (en banc).

Montejo-Gonzalez clarified that 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, 1036–37 (9th Cir. 2021)).

Montejo-Gonzalez also rejected a BIA and IJ "per se rule that 'traffic' cannot satisfy 8 U.S.C. § 1229a(b)(5)(C)(i)." *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 856 (9th Cir. 2026) (en banc) (holding that extraordinary and unusual traffic conditions may constitute exceptional circumstances under the specific circumstances of a particular case).

Where the noncitizen relies on her attorney's failure to apprise her of the removal hearing as evidence of exceptional circumstances, the petitioner need not satisfy the factors set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), for ineffective assistance of counsel claims. *See Singh v. Garland*, 117 F.4th 1145, 1151 (9th Cir. 2024) ("Substantial compliance with the *Lozada* factors is not required for consideration of an attorney's involvement as it relates to the totality of the circumstances. Whether Singh has substantially complied with the *Lozada* factors only bears on the viability of ineffective assistance of counsel as an independent basis for rescission of the *in absentia* removal order."), *abrogated on other grounds by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc). *But see Reyes v. Ashcroft*, 358 F.3d 592, 597–99 (9th Cir. 2004) (applying the *Lozada* requirements in the context of a motion to reopen an in absentia order); *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003) (applying the *Lozada* requirements in the context of a motion to reopen an in absentia order, while noting that the requirements are flexibly rather than rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance).

An applicant has 180 days to file a motion to reopen based on exceptional circumstances to rescind an in absentia removal order. *See* 8 U.S.C. § 1229a(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii) (removal order); 8 C.F.R. § 1003.23(iii)(A)(1) (deportation order).

The 180-day limit is subject to equitable tolling. *See Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002) (180-day limit for filing motion to reopen proceedings conducted in absentia based on exceptional circumstances tolled due to deceptive actions of notaries); *Varela v. INS*, 204 F.3d 1237, 1239 (9th Cir. 2000) ("[A] statute of limitation governing motions to reopen a deportation proceeding is equitably tolled 'where the alien's late petition is the result of deceptive actions by a notary posing as an attorney.'" (quoting *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) ("We conclude that the statute of limitations to reopen an order of deportation is equitably tolled where the alien's late petition is the result of the deceptive actions by a notary posing as an attorney."))), *superseded by statute on other grounds as stated in Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008).

"[A] petitioner who arrives late for his immigration hearing, but while the IJ is still in the courtroom, has not failed to appear for that hearing. Accordingly, he is not required to demonstrate exceptional circumstances in order to reopen proceedings." *Perez v. Mukasey*, 516 F.3d 770, 774–75 (9th Cir. 2008) (agency abused its discretion by denying motion to reopen based on movant's failure to demonstrate exceptional circumstances; showing of exceptional circumstances was not required); *accord Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 857 (9th Cir. 2026) (en banc); *cf. Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205 (9th Cir. 2003) (petitioner failed to appear at hearing where she arrived four and one-half hours late and the IJ was no longer on the bench hearing cases).

Cross Reference: Motions to Reopen or Reconsider Immigration Proceedings, Equitable Tolling, *infra*.

(i) Evidentiary Requirements

The BIA may not impose new proof requirements without notice. *See Singh v. INS*, 213 F.3d 1050, 1053–54 (9th Cir. 2000) (holding that BIA violated due process where it newly required an applicant to produce an affidavit from his employer or doctor, and to contact the immigration court); *id.* ("[T]he BIA may not rely on newly-created evidentiary standards to deny a motion to reopen a deportation proceeding held in absentia. . . . Fundamental fairness requires that Singh be given an opportunity to satisfy the BIA's evidentiary requirements."); *cf. Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891 (9th Cir. 2002) (holding that petitioner had notice of the BIA's evidentiary requirements).

(ii) Cases Finding Exceptional Circumstances

See Singh v. Garland, 117 F.4th 1145, 1150–52 (9th Cir. 2024) (remanding for reconsideration where the BIA failed to address the merits of the petitioner's pending claims for asylum and withholding of removal, failed to consider whether deportation would be an unconscionable result, failed to consider the significant extent to which the petitioner's hearing was rescheduled, failed to provide an adequately reasoned decision, and failed to consider the petitioner's reliance on his attorney's repeated statements regarding the timing of his hearing), *abrogated in part by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc); *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1037 (9th Cir. 2021) (holding that exceptional circumstances warranted reopening where petitioner failed to appear due to memory problems and inability to read), *overruled in part by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc); *Chete Juarez v. Ashcroft*, 376 F.3d 944, 948 (9th Cir. 2004) (holding that petitioner established exceptional circumstances because: she appeared at all scheduled hearings except the last hearing, of which she had no actual notice; she had prevailed on appeal before the BIA and was likely to prevail on her claim for suspension of deportation; and she had no reason to delay or evade the hearing); *Lo v. Ashcroft*, 341 F.3d 934, 938–39 (9th Cir. 2003) (employee in attorney's office erroneously informed petitioner that the hearing was on a later date); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 897–98 (9th Cir. 2003) (exceptional circumstances established where the petitioner failed to appear at his hearing because he relied on the negligent advice of his attorney's agent that he travel to Tijuana the day before his hearing in an attempt to validate his visa; "reasonable and justifiable reliance on the advice of his attorney's agent . . . constitutes an exceptional circumstance beyond Monjaraz's control"), *amended*, 339 F.3d 1012 (9th Cir. 2003); *Fajardo v. INS*, 300 F.3d 1018, 1022 n.8 (9th Cir. 2002) (remanding to the BIA for reconsideration and stating that "it is difficult to imagine how [an immigration paralegal's] failure to inform Fajardo of her need to appear at her deportation hearing would not constitute an exceptional circumstance excusing her absence"); *Singh v. INS*, 295 F.3d 1037, 1039–40 (9th Cir. 2002) (petitioner established exceptional circumstances where he arrived late to his hearing based on a misunderstanding as to the scheduled time of the hearing and had "no possible reason to try to delay the hearing," because he was eligible for adjustment of status); *Romani v. INS*, 146 F.3d 737, 739 (9th Cir. 1998) (where applicants were in the courthouse but did not enter the courtroom due to incorrect advice by lawyer's assistant, they did not fail to appear for their hearing, and reopening was warranted).

(iii) Cases Finding No Exceptional Circumstances

See Cui v. Garland, 13 F.4th 991, 1000 (9th Cir. 2021) (BIA acted within its discretion in denying motion to reopen because Cui did not articulate exceptional circumstances beyond her control that caused her to miss her original merits hearing and instead requested reopening based on the approval of her husband's Form I-130 petition); *Arredondo v. Lynch*, 824 F.3d 801, 806 (9th Cir. 2016) ("[A] car's mechanical failure does not alone compel granting a motion to reopen based on 'exceptional circumstances.' . . . [M]echanical failure, coupled with decisions to leave insufficient time to account for routine delays and to pay for car repairs instead of transportation to court, does not constitute exceptional circumstances."); *Vukmirovic v. Holder*, 640 F.3d 977, 978 (9th Cir. 2011) (noncitizen's failure to know about post-remand removal hearing because he had moved from his previous address without advising his new lawyer or immigration court of his whereabouts did not constitute exceptional circumstances; petitioner failed to demonstrate the diligence necessary by failing to keep the government apprised of his change in address); *Reyes v. Ashcroft*, 358 F.3d 592, 596–97 (9th Cir. 2004) (IJ did not abuse his discretion in denying motion to reopen where the petitioner failed to satisfy the *Matter of Lozada* requirements for establishing ineffective assistance of counsel); *Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205–06 (9th Cir. 2003) (no exceptional circumstances where petitioner misunderstood the time of her hearing, was ineligible for any relief from deportation, and the most she could have hoped for at the missed hearing would have been a discretionary grant of voluntary departure); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891–92 (9th Cir. 2002) (BIA did not abuse its discretion by concluding that asthma attack did not amount to exceptional circumstances where petitioner failed to offer evidence regarding the severity of the attack); *Singh-Bhathal v. INS*, 170 F.3d 943, 946–47 (9th Cir. 1999) (erroneous advice of immigration consultant not to appear at hearing did not constitute exceptional circumstance beyond petitioner's control; "Singh was informed that he was required to attend the November 30th hearing or be subject to immediate deportation, but he chose to heed the consultant's advice and disregard the written notice provided by the INS"); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (petitioner's failure to receive the notice of hearing personally was not an exceptional circumstance where the notice "was mailed to his last known address and receipt was acknowledged by someone at that address"); *see also Hernandez-Vivas v. INS*, 23 F.3d 1557, 1559–60 (9th Cir. 1994) (applying the former standard requiring a showing of "reasonable cause" rather than exceptional circumstances and holding that "the mere filing of a motion to change venue does not establish reasonable cause"; motion had not been granted and petitioner had failed to inquire as to the status of the motion).

In *Arredondo v. Lynch*, 824 F.3d 801, 806 (9th Cir. 2016), the court held that "[t]raffic and trouble finding parking, standing alone, do not constitute exceptional circumstances justifying a motion to reopen." *See also Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996) ("traffic congestion and trouble finding parking" did not constitute exceptional circumstances; "The BIA correctly found that Petitioners' traffic difficulties do not qualify as exceptional circumstances beyond Petitioners' control."). In *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 858 (9th Cir. 2026) (en banc), however, the court rejected a per se rule that traffic cannot establish exceptional circumstances. *See id.* ("The IJ and BIA abused their discretion by misreading our prior case law and applying a bright line rule that 'traffic' cannot constitute exceptional circumstances.").

(iv) Arriving Late While IJ On Bench

A noncitizen does not "fail to appear" for a removal hearing, and therefore need not establish exceptional circumstances to reopen in absentia removal proceedings, if she arrives at the courtroom late but while the IJ is still on the bench. *See Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 857 (9th Cir. 2026) (en banc) ("[A] petitioner who arrives late for his immigration hearing, but while the IJ is still in the courtroom, has not failed to appear for that hearing." (quoting *Perez v. Mukasey*, 516 F.3d 770, 774 (9th Cir. 2008))); *Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999) ("Jerezano was 15 to 20 minutes late, but arrived while the IJ was still on the bench. . . . [W]e hold that these circumstances do not constitute a failure to appear."); *cf. Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205 (9th Cir. 2003) (petitioner failed to appear at hearing where she arrived over four hours late and the IJ was no longer on the bench).

b. Reopening and Rescission Based on Improper Notice of Hearing

An in absentia removal order can be rescinded through a motion to reopen if the noncitizen "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(c)(ii). Section 1229(a)(1) governs notices to appear, while § 1229(a)(2) governs subsequent hearing notices. *See also* 8 C.F.R. § 1003.23(b)(4)(ii) ("An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act . . . ."); *Miller v. Sessions*, 889 F.3d 998, 999 (9th Cir. 2018) ("If the individual can show that she never received notice of the hearing, she may seek to rescind a removal order entered *in absentia* by filing a motion to reopen 'at any time.'" (quoting 8 U.S.C. § 1229a(b)(5)(C)(ii))).

In *Campos-Chaves v. Garland*, 602 U.S. 447, 450 (2024), the Supreme Court held that, "to rescind an in absentia removal order on the ground that the alien 'did not receive notice in accordance with paragraph (1) or (2),' the alien must show that he did not receive notice under either paragraph for the hearing at which the alien was absent and ordered removed." Accordingly, if noncitizens did not receive a notice to appear that complied with § 1229(a)(1) but received proper notice of the removal hearing under § 1229(a)(2), "they cannot seek rescission of their in absentia removal orders on the basis of defective notice under § 1229a(b)(5)(C)(ii)." *Campos-Chaves v. Garland*, 602 U.S. 447, 450–51 (2024) (rejecting the holding in *Singh v. Garland*, 24 F.4th 1315, 1317–20 (9th Cir. 2022), that lack of notice in the notice to appear alone rendered the in absentia removal order rescindable). The court explained:

> An alien can have his in absentia removal order rescinded under § 1229a(b)(5)(C)(ii) only if he can demonstrate that he "did not receive" a paragraph (1) notice *or* a paragraph (2) notice—whichever corresponds to the hearing at which he was ordered removed in absentia. Each alien before us received paragraph (2) notices for the hearings they missed. They are therefore ineligible for rescission of their in absentia removal orders.

Campos-Chaves v. Garland, 602 U.S. 447, 457 (2024). "The only way to make sense of § 1229a(b)(5)(C)(ii)'s reference to a single notice is for that notice to be the one that matters: the one that informed the alien of the time and date of the hearing the alien missed, and at which he was ordered removed." *Campos-Chaves v. Garland*, 602 U.S. 447, 460–61 (2024).

Due process requires notice of an immigration hearing that is reasonably calculated to reach the interested parties. *See United States v. Rivera-Valdes*, 157 F.4th 978, 990–91 (9th Cir. 2025) (en banc) (OSC that provided notice that a deportation hearing was forthcoming without specifying the date, time, or location of the hearing failed to afford the opportunity to be heard required by due process);

Khan v. Ashcroft, 374 F.3d 825, 828–29 (9th Cir. 2004) (notice of hearing in English was sufficient, under the circumstances, to satisfy due process); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155–56 (9th Cir. 2004) ("Because due process requires that aliens receive notice of their deportation hearings that is reasonably calculated to reach them, failure to provide adequate notice is grounds for reopening deportation proceedings." (citation omitted)); *Andia v. Ashcroft*, 359 F.3d 1181, 1185 (9th Cir. 2004) (interpreting pre-IIRIRA notice provision in 8 U.S.C. § 1252b(c)(3)(B) (repealed 1996)) ("Had petitioners not received any notice satisfying constitutional requirements—actual *or* constructive—of the deportation proceedings, it would be a violation of their rights under the Fifth Amendment of the Constitution to deport them in absentia."); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) ("An alien does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied. Rather, due process is satisfied if service is conducted in a manner 'reasonably calculated' to ensure that notice reaches the alien."; mailing notice of deportation hearing to the address provided by the noncitizen complied with due process).

"Where the Government learns that its notice efforts have not succeeded, that knowledge triggers an obligation on the Government's part to take additional reasonable steps to effect notice, if it is practicable to do so. Notice is not 'reasonably calculated' under the circumstances when the Government knows its method of service was ineffective and takes no additional steps to effect notice that are reasonably available to it." *United States v. Rivera-Valdes*, 157 F.4th 978, 989 (9th Cir. 2025) (en banc) (citation omitted).

"[T]he due process principles of *Mullane* [*v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950),] and *Jones* [*v. Flowers*, 547 U.S. 220 (2006),] apply to immigration removal proceedings." *United States v. Rivera-Valdes*, 157 F.4th 978, 989 (9th Cir. 2025) (en banc).

Notice that meets "statutory notice requirements" does not "necessarily satisf[y] constitutional requirements as well." *United States v. Rivera-Valdes*, 157 F.4th 978, 989 (9th Cir. 2025) (en banc). The government is required to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. *Id.* at 990.

A motion to reopen to rescind an in absentia removal order based on lack of notice of the removal hearing may be brought at any time: "Neither the statute nor the BIA's interpretation of the statute—or any court of appeals opinion—limits this ‘any time’ language by prescribing a cut-off period after an alien learns of the deportation order.” *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (interpreting pre-IIRIRA notice provision in 8 U.S.C. § 1252b(c)(3)(B) (repealed 1996)) (“As there is no time limitation for motions to reopen in absentia orders based on lack of notice, the IJ could not create one as a matter of discretion.”).

Although an individual in reinstatement proceedings under § 1231(a)(5) generally cannot challenge the validity of the prior removal order in the reinstatement proceeding itself, “she retains the right, conferred by § 1229a(b)(5)(C)(ii), to seek rescission of a removal order entered *in absentia*, based on lack of notice, by filing a motion to reopen ‘at any time.’” *Miller v. Sessions*, 889 F.3d 998, 1002–03 (9th Cir. 2018) (holding that 8 U.S.C. § 1231(a)(5), which precludes reopening of a reinstated removal order where the noncitizen leaves the United States while under the order of removal and then reenters illegally, does deprive immigration judges of jurisdiction to entertain a motion to reopen based on lack of notice under § 1229a(b)(5)(C)(ii)).

(i) Actual or Constructive Notice Sufficient

A petitioner “does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied.” *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding, with respect to former 8 U.S.C. § 1252b(c)(1), that notice was sufficient where it was mailed to the applicant’s last address, where receipt was acknowledged); *see also Dobrota v. INS*, 311 F.3d 1206, 1211 (9th Cir. 2002) (“[A]n alien does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied. Rather, the INS may generally satisfy notice requirements by mailing notice of the hearing to an alien at the address last provided to the INS, or, if she is represented, to her attorney’s address of record.” (citations and internal quotation marks omitted)).

“Actual notice is, however, sufficient to meet due process requirements.” *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004) (holding that a second notice in English was sufficient to advise petitioner of the pendency of the action when petitioner had appeared in response to an earlier notice in English); *cf. Sembiring v. Gonzales*, 499 F.3d 981, 988–90 (9th Cir. 2007) (petitioner produced sufficient evidence to overcome the presumption of effective service by regular mail where she stated that she did not receive the notice, she had no motive to avoid the hearing, she had initiated the removal proceedings by applying for asylum, she had appeared at other proceedings, and the government presented weak evidence that the notice in question had in fact been mailed).

(A) Notice to Counsel

Notice to counsel is sufficient to establish notice to the applicant. *See Garcia v. INS*, 222 F.3d 1208, 1209 (9th Cir. 2000) (rejecting claim of inadequate notice where the government personally served written notice of the hearing on petitioner's counsel of record and petitioner did not raise an ineffective assistance of counsel claim); *see also Al Mutarreb v. Holder*, 561 F.3d 1023, 1028 n.6 (9th Cir. 2009) ("[S]ervice of a hearing notice on an alien's counsel, and not on the alien himself, may be a sufficient means of providing notice of the time and location of removal proceedings.").

"We . . . hold that serving a hearing notice on an alien, but not on the alien's counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court. When such an appearance has been filed, the government must serve all notices to appear and all hearing notices on the counsel of record." *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009); *see Dobrota v. INS*, 311 F.3d 1206 (9th Cir. 2002) (notice insufficient where counsel of record was not provided with notice).

Cf. Cui v. Mukasey, 538 F.3d 1289, 1293–95 (9th Cir. 2008) (addressing adequate notice in the context of fingerprint requirements and concluding that notice of the requirement was insufficient where petitioner spoke Mandarin and IJ directed limited fingerprint instructions to counsel).

(B) Notice to Juvenile

If a juvenile under 18 years old is released from INS custody to a responsible adult, proper written notice of the removal hearing must be served on the juvenile and on the adult who took custody of him. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004).

Notice to the juvenile alone is sufficient where the juvenile is released on her own recognizance, rather than being released in the custody of an adult who has agreed to be responsible for the juvenile. *See Jimenez-Sandoval v. Garland*, 22 F.4th 866, 870–71 (9th Cir. 2022) (distinguishing *Flores-Chavez* and concluding that sufficient notice of deportation proceedings was provided where Order to Show Cause and Notice of Hearing were served on 17-year-old petitioner who was released from immigration custody on her own recognizance rather than into the custody of an adult and no adult had entered an agreement with the government to assume responsibility for the juvenile); *Cruz Pleitez v. Barr*, 938 F.3d 1141, 1143–47 (9th Cir. 2019) (holding that service of Order to Show Cause and Notice of Hearing only on noncitizen minor, and not on responsible adult with whom noncitizen minor lived, did not violate the noncitizen minor's due process rights where the noncitizen minor had never been detained and had affirmatively applied for asylum relief, distinguishing *Flores-Chavez*).

"[I]mproper service of an NTA on a minor alien released from DHS custody can be cured if DHS later perfects service before substantive removal proceedings begin." *B.R. v. Garland*, 26 F.4th 827, 837 (9th Cir. 2022). The court held that "*Flores-Chavez* requires DHS to serve the NTA on the custodian of a minor alien after he is released. It does not create a bizarre rule where, if service on the custodian is not made the instant the minor is released, DHS is barred from pursuing removal." *B.R. v. Garland*, 26 F.4th 827, 839–40 (9th Cir. 2022) (although DHS failed to provide notice of removal hearing to petitioner's mother, petitioner received proper notice of his removal hearing where notice was provided to him directly (though his attorney of record) and he had by that time become an adult; DHS cured its failure to provide notice to the petitioner's mother by effecting service to the petitioner, who by then was an adult, directly, because "[r]e-service should conform to DHS regulations that apply to the alien at the time of the service," and notice to the petitioner occurred prior to any substantive removal proceedings).

(C) Notice to Applicant No Longer in United States

A notice to appear mailed to an applicant's former address after she has already departed the United States may not be sufficient to establish proper notice. *See Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005) (BIA abused its discretion in denying a motion to reopen where the applicant submitted evidence demonstrating that the agency mailed notice to his former address after he had departed the United States; under the circumstances of the case, the applicant had not been required to provide the INS with a change in his address).

(ii) Noncitizens' Address Obligations and Right to Notice

The applicant is responsible for informing the immigration agency of her current address. *See* 8 U.S.C. § 1305(a) ("Each alien required to be registered under this subchapter who is within the United States shall notify the Attorney General in writing of each change of address and new address within ten days from the date of such change and furnish with such notice such additional information as the Attorney General may require by regulation."); 8 U.S.C. § 1306(b) (criminal and civil penalties for failing to notify the government of change in address); *Vukmirovic v. Holder*, 640 F.3d 977, 979 (9th Cir. 2011) ("Aliens are advised in various ways that they must keep the government apprised of any change of address." (citing 8 U.S.C. §§ 1305, 1306(b)).

By its plain language, 8 U.S.C. § 1305(a) applies only to noncitizens who are present in the United States. *See Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005).

"[A]n alien may not rely on lack of notice if the alien did not provide his or her current address to the government after being notified of the obligation to do so." *Urquia-Yanez v. Blanche*, 176 F.4th 622, 626 (9th Cir. 2026) (citing 8 U.S.C. §§ 1229(a)(2)(B), 1229a(b)(5)(B)).

English-language notices generally are reasonably calculated to reach and to inform noncitizens of their obligation to update their addresses and thus are sufficient to satisfy due process. *See Urquia-Yanez v. Blanche*, 176 F.4th 622, 629 (9th Cir. 2026) (holding that the petitioner received adequate notice of her removal hearing where notice of the hearing was sent to her address on file rather than her current address). The court explained:

> No regulatory or statutory provision requires DHS or the immigration court to provide an alien with notice of her obligation to update her address *in her native language* in order to subsequently enter an in absentia removal order. . . . And holding that due process requires such notice would run counter to our previous holding that English notices generally are "reasonably calculated to reach and to inform" aliens of their obligations.

Urquia-Yanez v. Blanche, 176 F.4th 622, 628 (9th Cir. 2026) (quoting *Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004)).

"[A]liens are entitled to notice unless they fail to give a current address to the government or fail to let the government know when they move." *Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1004 (9th Cir. 2014) (petition for review granted where agency denied motion to reopen proceeding in which petitioner was ordered removed in absentia, and petitioner was entitled to notice of her hearing).

A noncitizen's failure to provide an updated address, however, may not be fatal to a claim of lack of notice. In *United States v. Rivera-Valdes*, 157 F.4th 978, 991–92 (9th Cir. 2025) (en banc), the court assumed without deciding that the petitioner failed to update his address with the agency but held that the petitioner did not forfeit his right to constitutionally sufficient notice where: (1) the notice of hearing was returned to the government unclaimed; (2) there was a discrepancy between addresses in the record; and (3) the government took no further steps to effect service after attempted notice was returned unclaimed.

(iii) Presumption of Effective Delivery

The government will benefit from a presumption of effective delivery if the notice of hearing was properly addressed, had sufficient postage, and was properly deposited in the mails. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003) ("[I]f a letter *properly directed* is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." (internal quotation marks omitted)).

"A notice which fails to include a proper zip code is not properly addressed." *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003).

"Notice mailed to an address different from the one [the applicant] provided could not have conceivably been reasonably calculated to reach him." *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004).

"[T]he presumption of effective service of notices to appear by regular mail is weaker than the presumption when applied to delivery by certified mail." *Perez-Portillo v. Garland*, 56 F.4th 788, 793 (9th Cir. 2022) (quoting *Sembiring v. Gonzales*, 499 F.3d 981, 987 (9th Cir. 2007)); *accord Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011) ("Th[e] strong presumption of effective notice by certified mail contrasts with a weaker presumption that results from regular mail service."); *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) ("[D]elivery by regular mail does not raise the same 'strong presumption' as certified mail, and less should be required to rebut such a presumption.").

"[T]he test for whether an individual produced sufficient evidence to overcome the presumption of service by regular mail is 'practical and commonsensical rather than rigidly formulaic,' and . . . in many cases the only proof may be the individual's statement as well as circumstantial evidence." *Perez-Portillo v. Garland*, 56 F.4th 788, 793 (9th Cir. 2022) (quoting *Sembiring v. Gonzales*, 499 F.3d 981, 988 (9th Cir. 2007)).

"Where a petitioner actually initiates a proceeding to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing, a sworn affidavit from petitioner that neither he nor a responsible party residing at his address received the notice should ordinarily be sufficient to rebut the presumption of regular mail delivery." *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011) (alterations omitted) (quoting *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002)); *cf. Sembiring v. Gonzales*, 499 F.3d 981, 988–90 (9th Cir. 2007) (petitioner produced sufficient evidence to overcome the presumption of effectively service by regular mail where she stated that she did not receive the notice, she had no motive to avoid the hearing, she had initiated the removal proceedings by applying for asylum, she had appeared at other proceedings, and the government presented weak evidence that notice had in fact been mailed).

In addressing whether the petitioner has overcome the presumption of delivery, the agency must consider "all evidence presented." *Perez-Portillo v. Garland*, 56 F.4th 788, 794 (9th Cir. 2022); *see id.* at 795–96 (remanding where the agency invoked the doctrine of constructive notice without considering the credibility of the petitioner's claim of non-receipt in light of all the circumstantial and corroborating evidence); *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) ("[W]hen an alien is seeking to reopen deportation proceedings on the ground of lack of notice of the deportation hearing, the . . . presumption [of delivery where certified mail of notice of deportation proceedings is sent to an alien's last known address] requires the IJ and BIA to consider the evidence submitted by an alien which supports the defense of nondelivery or improper delivery of the notice.").

(iv) Improper Service of NTA

"[S]erving a hearing notice on an alien, but not on the alien's counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court. When such an appearance has been filed, the government must serve all notices to appear and all hearing notices on the counsel of record." *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009) (holding in absentia removal order must be rescinded).

"[A]bsent a showing of prejudice, improper service of an NTA can be cured and is not fatal." *B.R. v. Garland*, 26 F.4th 827, 837 (9th Cir. 2022).

The agency must provide proper notice of both the time and place of the hearing and the charges. Accordingly, proper service of a notice of hearing amending the date and time of a removal hearing does *not* establish proper service of an amended notice to appear that amends the underlying factual allegations lodged against the noncitizen. *See Martinez v. Barr*, 941 F.3d 907, 923 (9th Cir. 2019); *id.* at 925 ("[T]he BIA abuse[d] its discretion in denying the appeal of an [motion to reopen], where the IJ in the underlying removal proceeding ordered Diaz Martinez removable in absentia on the basis of an amended NTA of which she did not receive proper notice.").

Cross-reference: Due Process in Immigrations Proceedings; Notice of Hearing.

(v) Defective NTA in In Absentia Context

"[T]o rescind an in absentia removal order on the ground that the alien 'did not receive notice in accordance with paragraph (1) or (2),' the alien must show that he did not receive notice under either paragraph for the hearing at which the alien was absent and ordered removed." *Campos-Chaves v. Garland*, 602 U.S. 447, 450 (2024). Accordingly, if noncitizens did not receive a notice to appear that complied with § 1229(a)(1) but received proper notice of the removal hearing under § 1229(a)(2), "they cannot seek rescission of their in absentia removal orders on the basis of defective notice under § 1229a(b)(5)(C)(ii)." *Campos-Chaves v. Garland*, 602 U.S. 447, 450–51 (2024) (rejecting the holding in *Singh v. Garland*, 24 F.4th 1315, 1317–20 (9th Cir. 2022), that lack of notice in the notice to appear alone rendered the in absentia removal order rescindable).

Proper notice procedures for removal proceedings are set forth in 8 U.S.C. § 1229(a)(1) and (2).

Section 1229(a)(1) states that "written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)." 8 U.S.C. § 1229(a)(1); *see Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1003 (9th Cir. 2014) (discussing § 1229(a)(1)'s requirements); *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004) (same).

Section 1229(a)(1) states that "the notice must include seven specified elements, including, *inter alia*, the nature of the proceedings, the conduct that is alleged to be in violation of the law, and the date and time of the proceedings." *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004); *see Niz-Chavez v. Garland*, 593 U.S. 155, 159 (2021) (noting that IIRIRA requires a notice to appear to include "the nature of the proceedings against the alien, the legal authority for the proceedings, the charges against the alien, the fact that the alien may be represented by counsel, the time and place at which the proceedings will be held, and the consequences of failing to appear"); *Pereira v. Sessions*, 585 U.S. 198, 202–04 (2018) (quoting § 1229(a)(1) and listing NTA requirements); *Al Mutarreb v. Holder*, 561 F.3d 1023, 1026 (9th Cir. 2009) ("[N]otice is first accomplished through an NTA, which advises the alien that removal proceedings have begun, alerts him to the charges against him, and informs him of the date and location of the hearing.").

Neither the statute nor its implementing regulations require notices to appear or hearing notices to be provided in any language other than English. *See Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004) (distinguishing expedited removal proceedings for aggravated felons, in which the government is required to translate notice into a noncitizen's native language or a language the noncitizen understands); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 n.4 (9th Cir. 2004) ("Current law does not require that the Notice to Appear . . . be in any language other than English.").

(vi) Notice in Pre-IIRIRA Proceedings

Before passage of IIRIRA, service of Orders to Show Cause (a precursor to the Notice to Appear) and written notice of deportation hearings was governed by INA § 242B, 8 U.S.C. § 1252b(a)(1) and (a)(2) (repealed 1996).

(A) Orders to Show Cause

Service of the Order to Show Cause (OSC) was required to be given in person to the respondent or, if personal service was not practicable, by certified mail to the respondent or his counsel of record, with the requirement that the certified mail receipt be signed by the respondent or a responsible person at the respondent's address. *Matter of Grijalva*, 21 I. & N. Dec. 27, 32 (BIA 1995) (en banc). The pre-IIRIRA notice provision required an OSC to be written in English and Spanish. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 (9th Cir. 2004); 8 U.S.C. § 1252b(a) (repealed 1996).

The government bore the burden of demonstrating proper OSC service by clear, unequivocal, and convincing evidence. *See Chaidez v. Gonzales*, 486 F.3d 1079, 1087 (9th Cir. 2007) ("We conclude that the government has not met its burden, established in former 8 U.S.C. § 1252b(c)(1) and explicated in *Grijalva*, of demonstrating by clear, unequivocal, and convincing evidence that Chaidez or a responsible person at his address signed the certified mail return receipt for his OSC.").

(B) Hearing Notices

Unlike service of the Order to Show Cause, written notice of the time and place of the deportation hearing sent by certified mail to the respondent at the last address provided to the agency was sufficient to establish proper service by "clear, unequivocal, and convincing" evidence, regardless of whether there was proof of actual service or receipt of the notice by respondent. *See* 8 U.S.C. § 1252b(c)(1) (repealed) (stating that written notice shall be considered sufficient if provided at the most recent address provided by respondent); *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997); *Matter of Grijalva*, 21 I. & N. Dec. 27, 33–34 (BIA 1995) (en banc).

Adopting the BIA's standard from *Matter of Grijalva*, this court has held that written notice of a deportation hearing sent by certified mail through the United States Postal Service with proof of attempted delivery created a "strong presumption of effective service." *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011); *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) ("[C]ertified mail of notice of deportation proceedings which is sent to an alien's last known address provides sufficient notice under Section 242B, and . . . there is no requirement that the certified mail receipt be signed by the alien or a responsible person at his address in order to effect service."); *see also Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995) (en banc) ("[I]n cases where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises.").

"This presumption of effective service may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service." *Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995) (en banc); *see Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) ("[T]he 'presumption of effective service may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service' based on substantial and probative evidence presented by the alien." (quoting *Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995) (en banc))).

In *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003), where the INS sent a hearing notice by certified mail but could not produce a return receipt, the court expressed "no opinion whether the record, lacking the return receipt, deprives the INS of the presumption that notice was effective and thus relieving the Busquets of having to rebut the presumption."

"Th[e] strong presumption of effective notice by certified mail contrasts with a weaker presumption that results from regular mail service." *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011).

c. Movant in Custody

A motion to reopen to rescind an in absentia removal order may be filed at any time if the applicant demonstrates that he failed to appear at the hearing because he was in state or federal custody. *See* 8 U.S.C. § 1229a(b)(5)(C)(ii) (in absentia removal order "may be rescinded . . . upon a motion to reopen filed at any time if . . . the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien"); 8 C.F.R. § 1003.2(c)(3) (2020) (referring to 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2) (2020)).

2. Changed Country Conditions/Circumstances

A motion to reopen to apply or reapply for asylum or withholding of removal based on changed country conditions or circumstances that could not have been discovered or presented at the prior hearing, may be filed at any time. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) ("There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for [asylum or withholding of removal] and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding."); 8 C.F.R. § 1003.2(c)(3)(ii) (2020) (the time and numerical limitations shall not apply to a motion to reopen "[t]o apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing"); *Agonafer v. Sessions*, 859 F.3d 1198, 1203–04 (9th Cir. 2017) ("[T]he ninety-day deadline and one-motion limit do not apply if the motion to reopen is based on changed country conditions.").

See, e.g., *Ali v. Holder*, 637 F.3d 1025, 1031–32 (9th Cir. 2011) (BIA abused its discretion by denying motion to reopen based on changed country conditions); *Malty v. Ashcroft*, 381 F.3d 942, 945–48 (9th Cir. 2004) (BIA abused its discretion by denying motion to reopen based on changed circumstances in Egypt); *Azanor v. Ashcroft*, 364 F.3d 1013, 1021–22 (9th Cir. 2004) (BIA did not abuse its discretion by denying motion to reopen where the motion asserted changes in U.S. asylum law rather than changes in country conditions in Nigeria).

8 C.F.R. § 1003.2(c) (2020)'s limits on the timing and number of motions to reopen apply to motions to reopen to apply for CAT protection based on changed country conditions. *See Go v. Holder*, 744 F.3d 604, 607-09 (9th Cir. 2014) ("[W]e hold that the procedural requirements specified in 8 C.F.R. § 1003.2(c) apply to CAT claims.").

(i) Requirements for Motion Premised on Changed Country Conditions/Circumstances

The changed country conditions exception to the timing and numerical limitations on motions to reopen are subject to four requirements:

> Where . . . the motion to reopen is based on changed circumstances in the country to which removal has been ordered, the movant must: (1) produce evidence that conditions have changed in the country of removal, (2) demonstrate that the evidence is material, (3) show that the evidence was not available and would not have been

> discovered or presented at the previous hearing, and (4) demonstrate that the new evidence, when considered together with the evidence presented at the original hearing, would establish prima facie eligibility for the relief sought.

Silva v. Garland, 993 F.3d 705, 718 (9th Cir. 2021) (citing 8 U.S.C. § 1229a(c)(7)(ii); 8 C.F.R. § 1003.2(c)(1) (2020)), *abrogated on other grounds as recognized in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *accord Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021) (same); *Rodriguez v. Garland*, 990 F.3d 1205, 1209 (9th Cir. 2021) (same).

"[T]he changed country conditions exception is concerned with two points in time: the circumstances of the country at the time of the petitioner's previous hearing, and those at the time of the motion to reopen." *Salim v. Lynch*, 831 F.3d 1133, 1137–41 (9th Cir. 2016) (BIA abused its discretion in denying motion to reopen based on failure to establish changed country conditions where petitioner presented evidence of increased persecution of Christians in Indonesia; BIA also abused its discretion by failing to apply the disfavored-group analysis to the petitioner's case).

"The critical question is . . . whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution." *Malty v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004).

See, e.g., *Reyes-Corado v. Garland*, 76 F.4th 1256, 1265 (9th Cir. 2023) (the BIA abused its discretion in determining petitioner had not provided qualitatively different evidence where petitioner's new evidence—actions and threats against petitioner's immediate family in his country of origin and that were outside of his control—undermined the agency's prior reasons for denying relief); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 805 (9th Cir. 2022) (no abuse of discretion in denying reopening where the country conditions articles presented did not demonstrate that violence against law enforcement had materially changed from the time of petitioner's removal proceedings or was relevant to him, and the only other evidence petitioner presented was dated, vague, and largely pertained to a personal dispute); *Agonafer v. Sessions*, 859 F.3d 1198, 1206 (9th Cir. 2017) ("We conclude that the BIA abused its discretion because it clearly disregarded or failed to give credit to the post-2007 evidence submitted by Agonafer, which demonstrates that the country conditions regarding the treatment of homosexuals in Ethiopia are qualitatively different from the country conditions presented to the IJ in 2007."); *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1229 (9th Cir. 2016) (although the petitioners presented evidence of an increase in violent crimes in Mexico, they did not present evidence that violent individuals were targeting Americans or even wealthy individuals); *Najmabadi v. Holder*, 597 F.3d 983, 987–91 (9th Cir. 2010) (substantial evidence supported the BIA's conclusion that the evidence the petitioner, an Irani woman, submitted in her motion to reopen was not qualitatively different from the evidence presented at the original hearing); *Malty v. Ashcroft*, 381 F.3d 942, 945–46 (9th Cir. 2004) (BIA abused its discretion by denying motion to reopen where the petitioner "presented new, previously unavailable evidence indicating that the harassment had increased to the level of persecution [in Egypt], both with respect to Coptic Christians generally and with respect to Malty's family specifically"; where new evidence was qualitatively different from the evidence presented as the initial asylum hearing, "[t]he BIA abused its discretion in dismissing the new evidence as demonstrating a mere continuance of the previous circumstances" rather than materially changed country conditions).

"A self-induced change in personal circumstance, such as a child's birth in the United States, does not suffice for changed country circumstances purposes. However, changed circumstances that occur in the country of nationality or the country to which removal is ordered, and are entirely outside the petitioner's control, may constitute changed country circumstances even if they are personal, painful, or life-altering." *Reyes-Corado v. Garland*, 76 F.4th 1256, 1262 (9th Cir. 2023) (citation modified) (threats against petitioner and his family in Guatemala constituted changed country conditions, not changed personal circumstances). The "intra-familial" nature of the purported changed circumstances—in that case, an "escalating campaign of threats, harassment, and physical violence against [the petitioner's] family in Guatemala"—did not take the case outside of the changed conditions exception under 8 C.F.R. § 1003.2(c)(3)(ii) (2020). *Id*. at 1261–62.

The new information much be individually relevant to the petitioner. *See Sarkar v. Garland*, 39 F.4th 611, 622 (9th Cir. 2022) ("Although Sarkar contends that the changes in marriage laws, the removal of certain poems and stories from educational textbooks, and a terrorist attack that killed mostly foreigners show a change in Bangladesh's acceptance of radical Islam, he failed to show that those conditions more severely impact him and his family than the population at large. Thus, Sarkar has fallen short of his burden to show individualized relevancy and that his predicament is appreciably different from the dangers faced by his fellow citizens." (citation modified)); *Najmabadi v. Holder*, 597 F.3d 983, 989–90 (9th Cir. 2010) (new country conditions evidence may lack materiality where "it simply recounts generalized [country] conditions").

"If the materiality of the evidence on changed country conditions '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 [in connection with a motion to reopen] may be undermined.'" *Greenwood v. Garland*, 36 F.4th 1232, 1235 (9th Cir. 2022) (quoting *Matter of F-S-N-*, 28 I. & N. Dec. 1, 4 (BIA 2020)). "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." *Greenwood v. Garland*, 36 F.4th 1232, 1236 (9th Cir. 2022).

But *Greenwood* "does not mean the BIA can deny a motion to reopen just because that motion touches upon the same claim or subject matter as the previous adverse credibility finding." *Singh v. Garland*, 46 F.4th 1117, 1120 (9th Cir. 2022). If the prior adverse credibility finding does not implicate the newly submitted evidence, the new evidence must be addressed by the agency. *Id.* at 1122 ("[T]he new evidence submitted by Singh is independent of the evidence that the IJ relied on in making the adverse credibility finding. And in fact, the new evidence fills some gaps on which the adverse credibility finding was predicated. We thus hold that the BIA erred in finding Singh's motion to reopen foreclosed by the prior adverse credibility determination.").

Greenwood thus does not alter the general rule that the BIA may not make credibility determinations or factual findings in ruling on a motion 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, and internal quotation marks omitted)), *abrogated on other grounds as stated in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024).

Cross Reference: Motions to Reopen or Reconsider Immigration Proceedings, Time and Numerical Limitations, Exceptions to Ninety-Day/One-Motion Requirements, Changed Country Conditions/Circumstances, Significance of Prior Adverse Credibility Determination, *infra*.

Evidence that was "available" and "could have been presented or discovered at the initial removal hearing" is insufficient to justify reopening. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) (exception applies if "evidence is material and was not available and would not have been discovered or presented at the previous proceeding"); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 805 (9th Cir. 2022) (BIA could conclude that evidence of alleged threats and harassment from drug cartels that was available and could have been discovered at the time of petitioner's initial removal proceedings was insufficient to justify reopening (citing 8 U.S.C. § 1229a(c)(7)(C)(ii))).

The new information need not have postdated the initial hearing; it need only be newly available. *See Malty v. Ashcroft*, 381 F.3d 942, 946 (9th Cir. 2004).

"Prima facie eligibility for relief is established when the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied." *Sarkar v. Garland*, 39 F.4th 611, 622–23 (9th Cir. 2022) (internal quotations marks omitted) (petitioner's new country conditions evidence was insufficient to establish prima facie eligibility for relief where petitioner did not submit evidence of "direct" or "specific" facts establishing a reasonable fear of persecution or that was material to a claimed fear of torture); *cf. Nababan v. Garland*, 18 F.4th 1090, 1096 (9th Cir. 2021) (the BIA committed legal error by failing to assess the individualized risk of persecution that petitioners faced in Indonesia due to their identity as evangelical Christians, as distinct from Christians in general).

(ii) Significance of Prior Adverse Credibility Determination

"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.'" *Greenwood v. Garland*, 36 F.4th 1232, 1235, 1236 (9th Cir. 2022) (quoting *Matter of F-S-N-*, 28 I. & N. Dec. 1, 4 (BIA 2020), and concluding the agency did not abuse its discretion in denying the motion to reopen where petitioner did not challenge the agency's prior adverse credibility determination, which had called into question his identity, and thus petitioner could not connect the new evidence to himself).

This court has cautioned, however, that *Greenwood*'s holding "does not mean the BIA can deny a motion to reopen just because that motion touches upon the same claim or subject matter as the previous adverse credibility finding." *Singh v. Garland*, 46 F.4th 1117, 1120 (9th Cir. 2022) (holding that the BIA "erred in holding that the earlier adverse credibility finding barred [petitioner's] motion to reopen," and remanding). In *Singh*, the petitioner's new evidence was independent of the evidence relied on by the IJ in making the prior adverse credibility finding and, in fact, the new evidence "fill[ed] in some gaps on which the adverse credibility finding was predicated." *Id.* at 1122 (distinguishing *Greenwood v. Garland*, 36 F.4th 1232, 1234 (9th Cir. 2022)).

Greenwood thus does not alter the general rule that the BIA may not make credibility determinations or factual findings in ruling on a motion 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, and internal quotation marks omitted)), *abrogated on other grounds as stated in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024).

(iii) Changes in Personal Circumstances

"[A] petitioner's untimely motion to reopen may qualify under the changed conditions exception in 8 C.F.R. § 1003.2(c)(3)(ii), even if the changed country conditions are made relevant by a change in the petitioner's personal circumstances." *Chandra v. Holder*, 751 F.3d 1034, 1038–39 (9th Cir. 2014) (BIA abused its discretion in denying motion to reopen where petitioner had converted to Christianity in the United States and submitted evidence purporting to show worsened conditions for Christians in Indonesia); *see also Rodriguez v. Garland*, 990 F.3d 1205, 1209 (9th Cir. 2021) ("A petitioner's personal circumstances may act as a necessary predicate to the success of a motion to reopen where the new personal circumstances make the provided changed country conditions evidence relevant to the petitioner's (changed) personal circumstances." (citation modified)); *Salim v. Lynch*, 831 F.3d 1133, 1137–41 (9th Cir. 2016) (BIA abused its discretion by denying reopening where petitioner converted from Buddhism to Catholicism in the United States and submitted evidence of changed country conditions for Christians in Indonesia; "changed country conditions can become material due to changes in a petitioner's personal circumstances, including religious conversion").

"Changes in a petitioner's personal circumstances are only relevant where those changes are related to the changed country conditions that form the basis for the motion to reopen." *Rodriguez v. Garland*, 990 F.3d 1205, 1209–10 (9th Cir. 2021) (no abuse of discretion in denying motion to reopen based on changed country conditions where petitioner submitted evidence of a change in personal circumstances—having become a cooperating witness for the government—but did not show that conditions in Mexico had changed).

"[W]hile changes in personal circumstances may be *relevant* to a motion to reopen based on changed country conditions, a petitioner cannot succeed on such a motion that 'relies *solely* on a change in personal circumstances,' without also providing sufficient evidence of related changed country conditions." *Rodriguez v. Garland*, 990 F.3d 1205, 1209 (9th Cir. 2021) (quoting *Chandra v. Holder*, 751 F.3d 1034, 1037 (9th Cir. 2014)). "Put differently, a petitioner is always *required* to demonstrate changed country conditions, but *may* also present evidence of changed personal circumstances to the extent that is helpful 'to establish the materiality' of the changed country conditions." *Rodriguez v. Garland*, 990 F.3d 1205, 1210 (9th Cir. 2021) (quoting *Chandra v. Holder*, 751 F.3d 1034, 1037 (9th Cir. 2014)).

"A self-induced change in personal circumstance, such as a child's birth in the United States, does not suffice for changed country circumstances purposes. However, changed circumstances that occur in the country of nationality or the country to which removal is ordered, and are entirely outside the petitioner's control, may constitute changed country circumstances even if they are personal, painful, or life-altering." *Reyes-Corado v. Garland*, 76 F.4th 1256, 1262 (9th Cir. 2023) (citation modified) (citing *Kaur v. Garland*, 2 F.4th 823, 830–31 (9th Cir. 2021)).

Cross-Reference and Contrast: Exceptions to Ninety-Day/One-Motion Requirements, Changes in Country Conditions/Circumstances.

A self-induced change in personal circumstance, such as a child's birth in the United States, does not suffice for changed country circumstances purposes; otherwise, applicants could move to reopen by changing circumstances within their control. *See Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021).

But changes that are personal to the petitioner, but entirely outside the petitioner's control, can suffice. *Kaur v. Garland*, 2 F.4th 823, 831 (9th Cir. 2021).

A motion to reopen must be "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered." 8 U.S.C. § 1229a(c)(7)(C)(ii); *see, e.g.*, *Almaraz v. Holder*, 608 F.3d 638, 640–42 (9th Cir. 2010) (no abuse of discretion to deny motion to reopen as untimely where the diagnosis of HIV did not constitute changed circumstances "arising in the country of nationality" under 8 C.F.R. § 1003.2(c)(3)(ii) (2010); petitioner also failed to establish that certain provisions of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA) qualified as a material change in his circumstances arising from his country of origin); *Azanor v. Ashcroft*, 364 F.3d 1013, 1022 (9th Cir. 2004) (changes in United States asylum law not proper grounds for reopening under the changed country conditions exception).

(iv) Changes in U.S. Asylum Law

The exception for changed country conditions does not apply to changes in United States asylum law. *See Azanor v. Ashcroft*, 364 F.3d 1013, 1022 (9th Cir. 2004) (rejecting claim that recognition of female genital mutilation as a ground for asylum constituted changed country conditions within the meaning of former 8 C.F.R. § 3.2(c)(3)(ii) (2002)).

3. Jointly Filed Motions

An exception to the number and time restrictions exists if the motion to reopen is agreed upon by all parties and jointly filed. *See* 8 C.F.R. § 1003.2(c)(3)(iii) (2020) ("The time and numerical limitations . . . shall not apply to a motion to reopen proceedings . . . [a]greed upon by all parties and jointly filed."); *Bolshakov v. INS*, 133 F.3d 1279, 1281–82 (9th Cir. 1998) (rejecting government's contention that the "exception in section 3.2(c)(3)(iii) is an administrative remedy that must be exhausted before an alien can petition the Court of Appeals").

The deadline for filing a motion to reopen is not equitably tolled while a petitioner waits for a response from the District Counsel regarding whether the government will join a motion to reopen if the petitioner does not need that response to file the motion to reopen. *See Valeriano v. Gonzales*, 474 F.3d 669, 673–75 (9th Cir. 2007) (waiting for a response showed a lack of diligence where the petitioner could have filed a solo motion to reopen under 8 C.F.R. § 1003.2(c)(1)).

4. Government Motions Based on Fraud

The government may, at any time, bring a motion based on fraud in the original proceeding or a crime that would support termination of asylum. *See* 8 C.F.R. § 1003.2(c)(3)(iv) (2020).

5. Sua Sponte Reopening by the Agency

The BIA may at any time reopen proceedings sua sponte (i.e., on its own motion). *See* 8 C.F.R. § 1003.2(a) (2020) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1116 (9th Cir. 2019) (quoting regulation).

An immigration judge also has authority to reopen proceedings sua sponte. *See* 8 C.F.R. § 1003.23(b)(1) (2019) ("An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals.").

"In practice, the agency's decision to exercise its *sua sponte* authority is often not actually initiated by the agency on its own but is instead prompted, as here, by a party filing a motion to reopen *sua sponte*." *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1116 (9th Cir. 2019).

Regulations effective in 2021 purport to limit an immigration judge's authority to sua sponte reopen:

> Unless jurisdiction is vested with the Board of Immigration Appeals, an immigration judge may at any time reopen a case in which he or she has rendered a decision on his or her own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. Unless jurisdiction is vested with the Board of Immigration Appeals, in all other cases, an immigration judge may only reopen or reconsider any case in which he

> or she has rendered a decision solely pursuant to a motion filed by one or both parties.

8 C.F.R. § 1003.23(b)(1) (2026); *see Rubalcaba v. Garland*, 998 F.3d 1031, 1036 n.5 (9th Cir. 2021) (recognizing the amendment but applying the regulation as it was at the time of the BIA's decision).

But the 2021 version of the regulations was, at least at one time, stayed and preliminarily enjoined. *See Perez-Camacho v. Garland*, 54 F.4th 597, 606 n.12 (9th Cir. 2022).

(i) Exceptional Circumstances and Discretion

"In order for an individual to obtain sua sponte relief under 8 C.F.R. § 1003.2(a) [(2020)], the Board must be persuaded that the respondent's situation is truly exceptional." *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (internal quotation marks omitted). "Importantly, however, the Board is not *required*—by regulation or its own decisions—to reopen proceedings *sua sponte* in exceptional situations." *Id.* (internal quotation marks and citation omitted).

(ii) Limited Judicial Review

The court lacks jurisdiction to review the BIA's exercise of discretion in denying sua sponte reopening: "'the exceptional situation' benchmark [for sua sponte reopening] does not provide a sufficiently meaningful standard to permit judicial review," *see Bonilla v. Lynch*, 840 F.3d 575, 586 (9th Cir. 2016) (citing *Ekimian v. INS*, 303 F.3d 1153, 1159–60 (9th Cir. 2002)), nor is there a "judicially manageable standard for us to evaluate the BIA's *exercise of discretion*,'" *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1117 (9th Cir. 2019) (quoting *Singh v. Holder*, 771 F.3d 647, 650 (9th Cir. 2014)).

But the court retains "jurisdiction to review Board decisions denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error." *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (granting petition for review where the BIA premised its decision on an erroneous understanding of the legal principles concerning prior deportation and reopening of deportation proceedings); *see Lara-Garcia v. Garland*, 49 F.4th 1271, 1277 (9th Cir. 2022) (court retained jurisdiction to review the BIA's legal conclusions that (1) petitioner's conviction fell outside of the Federal First Offenders Act and (2) petitioner remained removable due to his crimes involving moral turpitude); *Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) ("When the BIA denies *sua sponte* reopening or reconsideration as a matter of discretion, we lack jurisdiction to review that decision, although we retain jurisdiction to review the denial of *sua sponte* reopening for legal or constitutional error."); *Singh v. Holder*, 771 F.3d 647, 650 (9th Cir. 2014) ("Where, as here, the BIA concludes that it lacks the *authority* to reopen, rather than denying a motion to reopen as an exercise of discretion, we hold that *Ekimian* [which rests on the absence of a judicially manageable standard for us to evaluate the BIA's exercise of discretion in ruling on a motion to reopen] does not preclude our jurisdiction.").

The scope of the court's review of legal error:

> is limited to those situations where it is obvious that the agency has denied sua sponte relief not as a matter of discretion, but because it erroneously believed that the law forbade it from exercising its discretion . . . or that exercising its discretion would be futile. . . . In other words, . . . review under *Bonilla* is constricted to legal or constitutional error that is apparent on the face of the BIA's decision and does not extend to speculating whether the BIA *might* have misunderstood some aspect of its discretion.

Lona v. Barr, 958 F.3d 1225, 1234 (9th Cir. 2020) (citations omitted); *see, e.g.*, *Cui v. Garland*, 13 F.4th 991, 1001 (9th Cir. 2021) (BIA did not commit legal error in declining sua sponte reopening of removal proceedings); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1119–20 (9th Cir. 2019) ("This petition does not fit within the narrow exception where the BIA's decision was based on legal or constitutional error.").

In *Mata v. Lynch*, 576 U.S. 143, 147 (2015), the Supreme Court held that a court has jurisdiction to review the denial of a motion to reopen a removal proceeding because the jurisdiction to review final orders of removal encompasses "review of decisions refusing to reopen or reconsider such orders."

Furthermore, the court has jurisdiction to review the denial of a motion to reopen when the BIA "denies a motion to reopen because it is untimely" or, "when, in doing so, the Board rejects a request for equitable tolling." *Mata v. Lynch*, 576 U.S. 143, 148 (2015).

Furthermore still, the court has jurisdiction to review the denial of a motion to reopen when the BIA, "in addition to denying the alien's statutorily authorized motion, states that it will not exercise its separate *sua sponte* authority to reopen the case." *Mata v. Lynch*, 576 U.S. 143, 148 (2015). Thus, even assuming arguendo that the court lacks jurisdiction to review the denial of sua sponte reopening, the court's jurisdiction to review the denial of a statutorily authorized motion to reopen is unaffected by the BIA's additional denial of sua sponte reopening.

Cross-Reference: Jurisdiction and Standards of Review, Jurisdiction Over Certain Motions, Motions to Reopen and Motions to Reconsider.

(iii) Departure or Illegal Reentry

The departure bar at 8 C.F.R. § 1003.23(b)(1), which purports to prevent a noncitizen who has departed the United States from reopening his or her removal proceedings, does not limit an immigration judge's sua sponte reopening authority. *Rubalcaba v. Garland*, 998 F.3d 1031, 1041 (9th Cir. 2021) ("[W]e hold that the BIA erred in determining that the departure bar prevented the IJ from reopening Rubalcaba's immigration proceedings sua sponte. . . . [T]he plain, unambiguous language of the regulation makes clear that the departure bar does not apply in the context of *sua sponte* reopening . . . .").

A removal order that has been reinstated under 8 U.S.C. § 1231(a)(5) because a noncitizen has reentered the United States illegally after having been removed "is not subject to being reopened or reviewed." 8 U.S.C. § 1231(a)(5). This prohibition applies to sua sponte reopening, although the bar is nonjurisdictional. *See Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (recognizing as abrogated *Bravo-Bravo v. Garland*, 54 F.4th 634, 636 (9th Cir. 2022)). Accordingly, the government can waive or forfeit the bar on sua sponte reopening contained in § 1231(a)(5). *See Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) ("The government did not raise § 1231(a)(5) until we ordered supplemental briefing on the issue. The issue therefore has been forfeited.").

VI. EQUITABLE TOLLING

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Ineffective Assistance of Counsel, *infra*.

The statutory filing deadlines for a motion to reopen (within 90 days of the date of entry of the order) or a motion to reconsider (within 30 days of the date of entry of the order) are amenable to equitable tolling. *See Eskilian v. Bondi*, 172 F.4th 682, 687 (9th Cir. 2026) ("[A] motion to reopen that would otherwise be time- or number-barred can be reviewed if the deadline is subject to equitable tolling."); *Bent v. Garland*, 115 F.4th 934, 941 (9th Cir. 2024) ("[T]his ninety-day period is subject to equitable tolling."); *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) ("The BIA may equitably toll [the] statutory filing deadline [for filing a motion to reconsider], including in cases where the petitioner seeks excusal from untimeliness based on a change in the law that invalidates the original basis for removal."); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 (9th Cir. 2015) (the deadline for filing a motion to reopen "is subject to equitable tolling"); *see also Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) ("We cannot penalize individuals in [immigration proceedings] for reasonably relying on the advice of counsel, even if that counsel turns out to have been incompetent or predatory."); *id.* at 682 ("Many, many immigrants fall victim to incompetent or fraudulent counsel who extract large sums of money but perform inadequately, or not at all. In recognition, we have long afforded equitable tolling of deadlines and numerical limitations to aliens who are prevented from timely or adequately filing due to ineffective assistance of counsel.").

"Equitable tolling is available when some extraordinary circumstance stood in the petitioner's way and prevented timely filing, and the petitioner acted with due diligence in pursuing the petitioner's rights." *Eskilian v. Bondi*, 172 F.4th 682, 687 (9th Cir. 2026) (citation modified); *see also Bent v. Garland*, 115 F.4th 934, 941 (9th Cir. 2024) ("A petitioner seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." (quoting *Holland v. Florida*, 560 U.S. 631, 634 (2010))).

"This court . . . recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider during periods when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). "When the issue is fraudulent representation, 'the limitations period is tolled until the petitioner definitively learns of counsel's fraud." *Mejia-Hernandez v. Holder*, 633 F.3d 818, 824 (9th Cir. 2011) (internal quotation marks omitted).

"In addition, equitable tolling is available where, despite all due diligence, the party invoking the doctrine is unable to obtain vital information bearing on the existence of the claim." *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (internal quotation marks omitted).

"We do not require petitioner to act with the maximum diligence possible—only due or reasonable diligence." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) (internal quotation marks omitted).

"Our review of petitioner's diligence must be fact-intensive and case-specific, assessing the reasonableness of petitioner's actions in the context of his or her particular circumstances." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011).

The court has explained:

> [A]s a general rule we measure a petitioner's diligence from the date on which a reasonable person in the petitioner's position is put on notice that something was wrong. We have also held that due diligence requires a showing of reasonable diligence, not maximum feasible diligence. In assessing a petitioner's diligence, we consider the petitioner's overall level of care and caution in light of his or her particular circumstances, and are guided by decisions made in other similar cases with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Eskilian v. Bondi, 172 F.4th 682, 687–88 (9th Cir. 2026) (citation modified).

To qualify for equitable tolling based on ineffective assistance of counsel, a petitioner must establish both procedural and substantive requirements. *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 922 (9th Cir. 2015).

Procedurally: "To qualify for equitable tolling on account of ineffective assistance of counsel, a petitioner must demonstrate (a) that he was prevented from timely filing his motion due to prior counsel's ineffectiveness; (b) that he demonstrated due diligence in discovering counsel's fraud or error; and (c) that he complied with the procedural requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988)." *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011); *accord* *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 (9th Cir. 2015).

"*Lozada* states: (1) The motion must be 'supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts,' (2) 'former counsel must be informed of the allegations and allowed the opportunity to respond,' and (3) if the prior counsel's conduct violated 'ethical or legal responsibilities,' the motion should reflect whether a complaint has been filed with the appropriate disciplinary authorities, and if not, why." *Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002) (quoting *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988)).

"In some cases, we have not required strict compliance with *Lozada* requirements, especially when the record shows a clear and obvious case of ineffective assistance." *Puga v. Chertoff*, 488 F.3d 812, 816 (9th Cir. 2007) (internal quotation marks omitted).

Substantively: "Having met these procedural requirements, the alien must show that his counsel's performance was deficient, and that he suffered prejudice as a result." *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 (9th Cir. 2015) (alteration and internal quotation marks omitted); *id.* at 922 ("We conclude [the petitioner] has met the substantive requirement of demonstrating that his counsel performed deficiently and that he suffered prejudice as a result."); *see also* *Singh v. Holder*, 658 F.3d 879, 885 (9th Cir. 2011) ("When considering the merits of a motion to reopen premised on ineffective assistance of counsel, the BIA asks whether counsel's performance was deficient, and whether the alien suffered prejudice.").

A petitioner establishes prejudice by showing that "his lawyer's errors may have affected the outcome of the proceedings." *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (internal quotation marks omitted).

"When a lawyer's error results in an alien being denied his right to appeal altogether, we apply a presumption of prejudice." *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (internal quotation marks omitted).

See, e.g., *Ray v. Gonzales*, 439 F.3d 582, 588 n.5 (9th Cir. 2006) (petitioner entitled to equitable tolling of the filing deadline and numerical restrictions where he reasonably believed his attorney would handle the filing of his motion to reopen and acted diligently after learning of counsel's failure to do so); *Singh v. Ashcroft*, 367 F.3d 1182, 1185–86 (9th Cir. 2004) (BIA abused its discretion in not equitably tolling the filing deadline where petitioner acted with due diligence after learning of counsel's deceit; counsel had failed to file a timely appellate brief to the BIA, the BIA had summary dismissed the appeal, and counsel had failed to communicate these facts to petitioner).

Equitable tolling may be based on the actions of non-attorneys. *See Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099 (9th Cir. 2005) ("It is well established in this circuit that ineffective assistance of counsel, where a nonattorney engaged in fraudulent activity causes an essential action in his or her client's case to be undertaken ineffectively, may equitably toll the statute of limitations."); *id.* (NACARA section 203(c) statute of limitations equitably tolled where petitioner "was affirmatively deceived by a nonattorney" who lied to petitioner about filing a motion to reopen to seek relief under NACARA); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002) ("The numerical limit on motions to reopen . . . may be waived (or tolled) in cases where a petitioner has been defrauded by an individual purporting to provide legal representation."); *id.* at 1224–25 ("Torres, who was not an attorney, missed the deadline for filing the application for suspension of deportation and then lied about having done so, assuring petitioners that it was the IJ that had lost the application and that the IJ's error could be rectified on appeal. Torres then compounded his mistakes and misrepresentations by advising the filing of a motion for reconsideration that prejudiced petitioners' claims. Torres' actions constitute the type of fraudulent representation that triggers equitable tolling . . . .").

Whether classified as "equitable tolling" or "exceptional circumstances," ineffective of counsel, or of non-attorneys, can extend the 180-day deadline for filing a motion to reopen in absentia removal proceedings beyond the 180-day statutory deadline. *See, e.g.*, *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) (BIA did not abuse its discretion in declining to equitably toll the 180-day deadline to file a motion to reopen because the one-sentence 2016 motion to reopen did not allege any claims of fraud or deceit and petitioner failed to demonstrate due diligence in discovering any deception, fraud, or error); *Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002) (180-day limit for filing motion to reopen proceedings conducted in absentia tolled due to deceptive actions of notaries); *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) (exceptional circumstances were demonstrated where a notary posing an attorney advised petitioner that he need not appear at his removal hearings; "We conclude that the statute of limitations to reopen an order of deportation is equitably tolled where the alien's late petition is the result of the deceptive actions by a notary posing as an attorney.").

The filing deadlines applicable to section 203(c) of NACARA, which allows a noncitizen one opportunity to file a petition to reopen his or her deportation or removal proceedings to obtain cancellation of removal, are nonjurisdictional and subject to equitable tolling. *See Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1098 (9th Cir. 2005) ("[W]e conclude that section 203(c) is subject to equitable tolling.").

Ineffective assistance of counsel can rise to a deprivation of due process. *See Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801 (9th Cir. 2022) ("Under the Fifth Amendment, the petitioner must demonstrate that counsel's conduct was egregious, in that it rendered the proceeding so fundamentally unfair that the alien was prevented from reasonably presenting his case. The petitioner must also show substantial prejudice, meaning that counsel's performance was so inadequate that the outcome of the proceeding may have been affected by the alleged violation."); *see also id.* at 802–03 (summarizing circumstances found to be sufficiently or insufficiently egregious); *Bonilla v. Lynch*, 840 F.3d 575, 582 (9th Cir. 2016) ("Equitable tolling applies in ineffective assistance of counsel cases because, although there is no Sixth Amendment right to counsel in a deportation proceeding, the due process guarantees of the Fifth Amendment still must be afforded to an alien petitioner." (citation modified)); *Avagyan v. Holder*, 646 F.3d 672, 677 (9th Cir. 2011) ("If the ineffective assistance of an alien's counsel prevents him from timely filing a motion to reopen, counsel has prevented the alien from reasonably presenting his case and denied him due process."); *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) ("Ineffective assistance of counsel amounting to a due process violation permits untimely reopening.").

See, e.g., *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 803–04 (9th Cir. 2022) (holding that petitioner failed to show either deficient performance or prejudice where his prior counsel failed to file earlier untimely motions to reopen).

"The jurisdictional question (whether the court has power to decide if tolling is proper) is of course distinct from the merits question (whether tolling is proper)." *Mata v. Lynch*, 576 U.S. 143, 150 (2015). Thus, the court has jurisdiction over the question of equitable tolling even if it turns out that the claim of equitable tolling is without merit.

A. Circumstances Beyond the Applicant's Control

"[E]quitable tolling is available where, despite all due diligence, the party invoking the doctrine is unable to obtain vital information bearing on the existence of the claim." *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (internal quotation marks omitted); *accord Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582, 599 (9th Cir. 2020) (en banc).

"The inability to obtain vital information bearing on the existence of a claim need not be caused by the wrongful conduct of a third party. Rather, the party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) (citing the example of a party's mental incapacity), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582, 599 (9th Cir. 2020) (en banc).

See, e.g., *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 845 (9th Cir. 2006) (IJ's erroneous statement that petitioner's conviction qualified as an aggravated felony and petitioner's unawareness of subsequent caselaw to the contrary did not warrant equitable tolling; "Tolling requires that his or her ignorance of the limitations period was caused by circumstances beyond the party's control, and that these circumstances go beyond a garden variety claim of excusable neglect." (internal quotation marks omitted)); *cf. United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006) (determining, for purposes of a collateral challenge to a removal order during criminal proceedings, where the government conceded petitioner was excused from the exhaustion requirement, that an IJ's implicit, erroneous categorization of petitioner's conviction as an aggravated felony rendered the removal order fundamentally unfair).

A 42-day delay in the delivery of a notice of appeal sent by certified mail—and mailed 11 days before the filing deadline—may merit equitable tolling. *See Garcia Corrales v. Blanche*, 179 F.4th 739, 743 (9th Cir. 2026).

B. Fraudulent or Erroneous Attorney Conduct

The court recognizes equitable tolling in cases involving ineffective assistance by an attorney or representative, coupled with fraudulent or erroneous conduct. *See Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) ("This court

. . . recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider during periods when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error.”).

“Where the ineffective performance was that of an actual attorney and the attorney engaged in fraudulent activity causing an essential action in her client’s case to be undertaken ineffectively, out of time, or not at all, equitable tolling is available.” *Iturribarria v. INS,* 321 F.3d 889, 898 (9th Cir. 2003).

“When the issue is fraudulent representation, ‘the limitations period is tolled until the petitioner definitively learns of counsel’s fraud.’” *Mejia-Hernandez v. Holder*, 633 F.3d 818, 824 (9th Cir. 2011) (quoting *Singh v. Gonzales*, 491 F.3d 1090, 1096 (9th Cir. 2007)); *cf. Smith v. Davis*, 953 F.3d 582, 598–99 (9th Cir. 2020) (en banc) (rejecting the stop-clock approach for evaluating when a petitioner must be diligent and stating that, “for a litigant to demonstrate he has been pursuing his rights diligently, and thus satisfies the first element required for equitable tolling, he must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim” (citation and internal quotation marks omitted)).

C. Changes in Law

“Although claims for equitable tolling typically arise in conjunction with claims of ineffective assistance of counsel, . . . claims based on changes in the law are not unheard of, nor are they prohibited.” *Lona v. Barr*, 958 F.3d 1225, 1230–31 (9th Cir. 2020) (“The BIA may equitably toll [the 30-day statutory deadline for filing a motion to reconsider a final order of removal], including in cases where the petitioner seeks excusal from untimeliness based on a change in the law that invalidates the original basis for removal.”); *see id.* at 1232 (citing example of “complete reversal of BIA precedent”); *id.* (holding that the BIA did not abuse its discretion in denying equitable tolling because the petitioner “alleged no facts . . . suggesting a diligent pursuit of her rights in the intervening years between her removal” and the relevant change in law); *see also Goulart v. Garland*, 18 F.4th 653, 655 (9th Cir. 2021) (BIA did not abuse its discretion in denying equitable tolling where the petitioner “failed to present any evidence suggesting that he diligently pursued relief during the years between his removal and the relevant change in law”).

D. Due Diligence

"[T]he proper starting point for measuring diligence in . . . is when a reasonable person in [the petitioner's] position would be put on notice of the error underlying his motion to reopen." *Bent v. Garland*, 115 F.4th 934, 942 (9th Cir. 2024); *see Perez-Camacho v. Garland*, 54 F.4th 597, 606 (9th Cir. 2022) ("In determining whether an alien exercised due diligence in alleging ineffective assistance of counsel, we consider when a reasonable person in the alien's position would suspect the specific fraud or error underlying her motion to reopen. We also consider whether the alien took reasonable steps to investigate the attorney's suspected fraud or error or, if the alien was ignorant of counsel's shortcomings, whether the alien made reasonable efforts to pursue relief." (citation modified)); *Sun v. Mukasey*, 555 F.3d 802, 806 (9th Cir. 2009) (BIA abused its discretion in denying equitable tolling where the petitioner "acted with admirable diligence" by retaining counsel and promptly filing a motion to reopen after she became aware of prior counsel's errors); *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) ("This court . . . recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider during periods when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error."); *cf. Smith v. Davis*, 953 F.3d 582, 598–99 (9th Cir. 2020) (en banc) ("[F]or a litigant to demonstrate he has been pursuing his rights diligently, and thus satisfies the first element required for equitable tolling, he must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim . . . ." (citation and internal quotation marks omitted).

"[D]ue diligence requires a showing of reasonable diligence, not maximum feasible diligence." *Bent v. Garland*, 115 F.4th 934, 943 (9th Cir. 2024) (internal quotation marks omitted).

"Our review of petitioner's diligence must be fact-intensive and case-specific, assessing the reasonableness of petitioner's actions in the context of his or her particular circumstances." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011).

Avagyan stated:

> In order to assess whether petitioner exercised due diligence, we consider three issues. First, we determine if (and when) a reasonable person in petitioner's position would suspect the specific fraud or error underlying her motion to reopen. Second, we ascertain whether petitioner took reasonable steps to investigate the suspected fraud or error, or, if petitioner is ignorant of counsel's shortcomings, whether petitioner made reasonable efforts to pursue relief. Typically, an alien is diligent if he continues to pursue relief and relies on the advice of counsel as to the means of obtaining that relief. Third, we assess when the tolling period should end; that is, when petitioner definitively learns of the harm resulting from counsel's deficiency, or obtains vital information bearing on the existence of his claim. In many cases, this occurs when the alien obtains a complete record of his immigration proceedings and is able to review that information with competent counsel.

Avagyan v. Holder, 646 F.3d 672, 679 (9th Cir. 2011)

"[F]or individuals born during the Soviet era or who are otherwise deemed 'stateless' for purposes of removability, we hold that it is reasonable to expect that an individual will begin to take action to challenge removability only once that individual learns that they can be removed to a country and thus are no longer 'stateless.'" *Eskilian v. Bondi*, 172 F.4th 682, 688 (9th Cir. 2026).

See, e.g., *Eskilian v. Bondi*, 172 F.4th 682, 688–89 (9th Cir. 2026) (petitioner acted with due diligence in waiting to seek vacatur of state conviction until she became subject to removal rather than being stateless); *Perez-Camacho v. Garland*, 54 F.4th 597, 607 (9th Cir. 2022) (BIA did not abuse its discretion in denying equitable tolling where the petitioner waited 21 years (13 of which occurred after his final order of removal was rendered) to seek modification of his conviction in state court based on the defense counsel's alleged ineffective representation, presented no evidence that he reasonably pursued relief during that period, and failed to show that he was prevented from discovering defense counsel's ineffective assistance); *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) ("Cui's one-sentence . . . motion to reopen does not allege any claims of fraud or deceit and simply asks to reopen the removal order so Cui may 'file an adjustment of status with CIS.' The BIA therefore did not abuse its discretion in declining to equitably toll the 180-day deadline to file a motion to reopen where Cui failed to demonstrate due diligence in discovering any deception, fraud, or error."); *Bonilla v. Lynch*, 840 F.3d 575, 583 (9th Cir. 2016) ("Given the exceedingly long lapse of time before seeking further legal advice, the lack of any continuing relationship or follow up with the lawyer relied upon, and the general nature of the advice offered, the BIA appropriately concluded that Bonilla did not make reasonable efforts to pursue relief, and so did not demonstrate the diligence necessary for equitable tolling." (citation and internal quotation marks omitted)); *Luna v. Holder*, 659 F.3d 753, 760–61 (9th Cir. 2011) (six-month delay in filing motion to reopen demonstrated a lack of diligence, and petitioner "failed to demonstrate that he exercised due diligence in discovering the deadline for filing a special motion to reopen" seeking section 212(c) relief); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099–1100 (9th Cir. 2005) (petitioner acted diligently once he became concerned with prior counsel's performance by making a FOIA request for his immigration court file and retaining new counsel, and petitioner acted diligently by filing his motion to reopen 121 days after receiving his FOIA response and learning that prior counsel had failed to file a motion to reopen).

The deadline for filing a motion to reopen is not equitably tolled while a petitioner waits for a response from the District Counsel regarding whether the government will join a motion to reopen where the petitioner does not need that response to file the motion to reopen. *See Valeriano v. Gonzales*, 474 F.3d 669, 673–75 (9th Cir. 2007) (waiting for response showed a lack of diligence because the petitioner could have filed a solo motion to reopen under 8 C.F.R. § 1003.2(c)(1); "diligence in attempting to obtain nonvital information or acquiescence is not 'diligence' within the meaning of our equitable tolling jurisprudence").

Whether the BIA properly applied the equitable tolling due diligence standard to a set of established or undisputed facts presents a mixed question of law and fact which the courts may review under 8 U.S.C. § 1252(a)(2)(D), notwithstanding the jurisdiction-stripping provisions set out in 8 U.S.C. § 1252(a)(2)(B) and (C). *See Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225–26 (2020).

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Presented Through a Motion to Reopen

"Where the facts surrounding allegedly ineffective representation by counsel were unavailable to the petitioner at an earlier stage of the administrative process, motions before the BIA based on claims of ineffective assistance of counsel are properly deemed motions to reopen." *Iturribarria v. INS*, 321 F.3d 889, 891 (9th Cir. 2003) ("[T]he BIA misapplied its own regulations when it classified [petitioner's] motion alleging ineffective assistance of counsel as a motion to reconsider rather than a motion to reopen."); *see also Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) ("Our case law holds that a motion to reopen—not a motion to reconsider—is the proper avenue ordinarily available to pursue ineffective assistance of counsel claims [based on newly available information]." (internal quotation marks omitted)); *Siong v. INS*, 376 F.3d 1030, 1036 (9th Cir. 2004) ("The facts regarding Attorney Domingo's failure to file the notice of appeal obviously were not available to Siong at the time of the initial appeal that was dismissed as untimely. The BIA thus abused its discretion when it misapplied its regulations to classify Siong's motion as a motion to reconsider." (alteration and internal quotation marks omitted)); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (BIA improperly characterized motion based on newly available facts as a motion to reconsider).

"Appeals [to the BIA] asserting ineffective assistance claims, like improperly captioned motions asserting such claims, are effectively motions to reopen. We therefore read the BIA's decision [dismissing the appeal] as [the denial of a] motion to reopen . . . ." *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013).

B. Exhaustion and Proper Forum

"The proper way to raise and exhaust an ineffective assistance of counsel claim [arising from attorney conduct before the BIA] is through a motion to reopen before the agency. . . . [T]his court simply does not have jurisdiction to review claims not raised to the BIA." *Benedicto v. Garland*, 12 F.4th 1049, 1062 (9th Cir. 2021); *Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) ("[T]o the extent petitioners contend they received ineffective assistance of counsel, we lack jurisdiction to review unexhausted claims that could have been corrected by the BIA.").

Because exhaustion is required for federal habeas relief sought under 28 U.S.C. § 2241, a noncitizen must present an ineffective assistance of counsel claim to the BIA before presenting it to the district court in a federal habeas petition, even if the attorney's conduct occurred after a final removal order was entered. *See Singh v. Napolitano*, 649 F.3d 899, 900–01 (9th Cir. 2011).

Earlier decisions had held that the exhaustion requirement applied only to ineffective assistance claims involving attorney conduct occurring prior to the BIA's decision on the final order of removal. *See Puga v. Chertoff*, 488 F.3d 812, 815–16 (9th Cir. 2007) (holding, as a matter of prudential exhaustion, that a noncitizen is required to exhaust an ineffective assistance of counsel claim in the BIA before raising it in district court if the claim relates to attorney conduct that occurred prior to and during the administrative removal proceedings); *Singh v. Gonzales*, 499 F.3d 969, 974 (9th Cir. 2007) ("Singh's first IAC claim, which arose prior to his hearing before the IJ, is barred [from consideration in district court] by his failure to exhaust administrative remedies."); *cf. Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995) ("[W]e will not require a petitioner to engage in the futile exercise of making a motion to reopen when the BIA lacks the jurisdiction to entertain the claim.").

In *Singh v. Gonzales*, 499 F.3d 969, 975–80 (9th Cir. 2007), the court held that a district court has jurisdiction to review claims of ineffective assistance based on conduct occurring after a final order of removal is entered—i.e., counsel's failure to file a timely petition for review in the court of appeals—because the claim does not involve review of a final order of removal; thus, the statutory provisions granting courts of appeals exclusive jurisdiction to review final orders of removal, 8 U.S.C. § 1252(a)(5) and (b)(9), do not strip the district court of jurisdiction); *cf. Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1046 (9th Cir. 2000) (affirming the district court's grant of a writ of habeas corpus based on ineffective assistance where counsel filed an untimely petition for review with this court).

The BIA abuses its discretion by failing to offer a reasoned explanation for declining to review claims of ineffective assistance of counsel based on attorney conduct occurring in the court of appeals. *Li v. Bondi*, 139 F.4th 1113, 1116 (9th Cir. 2025) (BIA declined to consider a motion to reopen raising ineffective assistance of counsel based on counsel's failure to file an opening brief in the Ninth Circuit, which caused the petition for review to be dismissed); *see id.* at 1122 ("Precedent firmly establishes that the Board has the discretion to consider ineffective assistance of counsel claims involving conduct before a different tribunal."); *id.* at 1126 (noting that, as a possible remedy for counsel's errors, the BIA could reissue its decision on the final order of removal, which would provide the petitioner a new 30-day period for filing a petition for review in the court of appeals); *see also Menjivar-Ayala v. Blanche*, 181 F.4th 948, 952 (9th Cir. 2026) (rejecting the BIA's conclusion that it could not reissue its prior decision because counsel's ineffective assistance occurred after the conclusion of proceedings before the BIA and holding that "counsel's failure to notify Petitioners of a BIA decision and a corresponding filing deadline in this court is grounds to seek reopening [and reissuance] before the BIA"); *id.* at 953 ("Just as in *Li*, the BIA abused its discretion when it denied Petitioners' motion to reopen on the basis that the claimed ineffective assistance occurred before a 'different tribunal' without offering any reasoned explanation.").

C. Standard of Review

The court reviews findings of fact regarding counsel's performance for substantial evidence. *See Lin v. Ashcroft*, 377 F.3d 1014, 1024 (9th Cir. 2004) ("We review findings of fact regarding counsel's performance for substantial evidence.").

"We review BIA rulings on motions to reopen and reconsider for abuse of discretion and reverse only if the Board acted arbitrarily, irrationally, or contrary to law." *Mohammed v. Gonzales*, 400 F.3d 785, 791 (9th Cir. 2005).

"Questions of law, including claims of due process violations due to ineffective assistance, we review de novo." *Mohammed v. Gonzales*, 400 F.3d 785, 791–92 (9th Cir. 2005).

"This court reviews BIA denials of motions to reopen for abuse of discretion, but reviews purely legal questions, such as due process claims, de novo." *Kwong v. Holder*, 671 F.3d 872, 880 (9th Cir. 2011) (citation modified).

Cross-reference: Jurisdiction Over Immigration Petitions, Procedural Rules, and Standards of Review; Scope and Standards of Review.

D. Requirements for Due Process Violation

1. Constitutional and Statutory Basis

Noncitizens in removal proceedings do not possess a Sixth Amendment right to counsel but possess a statutory right to counsel and a right to competent representation from a retained attorney under the Due Process Clause of the Fifth Amendment:

> Because a deportation hearing is a civil proceeding involving non-citizens, aliens involved in such proceedings do not enjoy the full panoply of constitutional rights that American citizens would enjoy in a criminal proceeding. For example, aliens involved in deportation proceedings do not enjoy the Sixth Amendment's guarantee of an attorney's assistance at the government's expense.
>
> Yet aliens are not without representational rights. Federal law guarantees an alien the right to obtain counsel of his own choice in "any removal proceedings before an immigration judge," 8 U.S.C. § 1362, and we have explained that this statutory provision stems from a constitutional guarantee of due process. Further, this Circuit has long recognized that an alien's due process right to obtain counsel in immigration matters also includes a right to *competent representation* from a retained attorney. Because due process requires more than the formal *availability* of counsel, we have held that an alien is denied due process when his attorney provides ineffective assistance. Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.

Ray v. Gonzales, 439 F.3d 582, 586–87 (9th Cir. 2006) (citations and internal quotation marks omitted); *see also, e.g.*, *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) ("The right to effective assistance of counsel in immigration proceedings stems from the Fifth Amendment's guarantee of due process."); *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) ("Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." (quoting *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985))).

The statutory right to counsel is set out in 8 U.S.C. § 1362, which states: "In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." *See Hernandez v. Mukasey*, 524 F.3d 1014, 1020 (9th Cir. 2008) ("Because individuals have a statutory right to obtain counsel in removal proceedings, a failure to recognize that right, or an attorney's misdeeds, can interfere with the proceedings, resulting in a denial of due process.").

"[D]ue process rights to assistance of counsel do not extend beyond the fairness of the hearing itself." *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008).

- In *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004), *amended sub nom. Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005), for example, the court held that the petitioner could not establish a due process violation where counsel's alleged deficiencies did not affect the fairness of the removal hearing; the mere fact that the attorney provided the petitioner poor advice was insufficient. "While this temporal distinction may not always be significant, in this case, Pineda's allegedly ineffective assistance did not undermine the fairness of the removal proceedings in part because it was given well before the prospect of a hearing materialized." *Lara-Torres v. Gonzales*, 404 F.3d 1105, 1105 (9th Cir. 2005).

- In *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008), the petitioner's attorney failed to file a visa petition within the statutorily required deadline. The court held that the attorney's conduct did not establish a due process violation, because "[t]his deficiency does not relate to the substance of an ongoing hearing; in fact, no proceedings had begun at the time the alleged attorney misconduct took place." *Id.*

"Although the failings of Balam-Chuc's attorney in this case have resulted in terrible consequences for him and his family, the Fifth Amendment simply does not apply to the preparation and filing of a petition that does not relate to the fundamental fairness of an ongoing proceeding." *Id.* at 1051.

- In *Flores v. Barr*, 930 F.3d 1082, 1090 (9th Cir. 2019), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished), the court rejected the petitioner's claim that he suffered prejudice as a result of his prior counsel's failure to recognize his eligibility for a U visa because the authority to issue such visas rests with USCIS rather than the BIA; the petitioner thus failed to "articulate[] how the lack of a visa caused any prejudice in his immigration proceedings before the IJ or BIA."

A noncitizen "cannot be precluded from demonstrating ineffective assistance of counsel because he reasonably relied upon and assumed his counsel's competence." *Iturribarria v. INS*, 321 F.3d 889, 901 (9th Cir. 2003).

In *Hernandez v. Mukasey*, 524 F.3d 1014, 1020 (9th Cir. 2008), the court held that "reliance upon the advice of a non-attorney cannot form the basis of a claim for ineffective assistance of counsel in a removal proceeding" if the petitioner has been offered free legal services but affirmatively chose to rely on an individual that they knew was not an attorney:

> The record indicates that the IJ repeatedly asked petitioners if they wished to obtain counsel, and that petitioners affirmatively declined. On at least two occasions, they were even provided with a list of attorneys who would provide free legal services. Having ensured that petitioners understood they were entitled to retain counsel and waived that right, the IJ properly allowed petitioners to proceed as they wished. . . . Because petitioners' reliance on a non-attorney was not sanctioned by law, advice from [the non-attorney] did not affect the fundamental fairness of their proceedings. There was no denial of due process.

Hernandez v. Mukasey, 524 F.3d 1014, 1020 (9th Cir. 2008).

"To establish ineffective assistance of counsel in immigration proceedings in violation of the right to due process, a petitioner must show (1) that the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case, and (2) prejudice." *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) (internal quotation marks omitted); *accord Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004); *Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003); *cf. Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) ("To prevail, the petitioner must demonstrate first that counsel failed to perform with sufficient competence, and, second, that she was prejudiced by counsel's performance."); *see, e.g.*, *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) (BIA did not err in rejecting ineffective assistance claim where petitioner established neither deficient performance nor prejudice). These two requirements are discussed below.

2. Fundamentally Unfair Proceeding; Competence

"[A]n alien's right to due process can be violated by egregious conduct that threatens the fairness of the proceeding, including egregiously deficient performance by the alien's lawyer." *Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009) (internal quotation marks omitted).

"[A] lawyer's performance in an immigration proceeding is not measured using 'specific guidelines,' but is instead a context-dependent inquiry into whether the attorney acted with sufficient competence." *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (citations and internal quotation marks omitted).

"We do not require that [the petitioner's] representation be brilliant, but it cannot serve to make [the petitioner's] immigration hearing so fundamentally unfair that he was prevented from reasonably presenting his case." *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004) (alteration and internal quotation marks omitted).

Ineffective assistance may be based on, inter alia: failing to make a considered determination as to the viability of arguments that would benefit a noncitizen; lacking sufficient knowledge of the facts to make a strategic judgment based on the plausible statutory interpretations; failing to raise female genital mutilation as part of an asylum claim; failing to perform legal research; or lack of preparation that prevents counsel from researching and preparing basic legal arguments fundamental to the asylum claim. *See United States v. Lopez-Chavez*, 757 F.3d 1033, 1041–42 (9th Cir. 2014) (collecting cases).

Similarly, ineffective assistance may be based on: telling one's clients the wrong date for a removal hearing, resulting in their removal; inadvertently or without justification causing the petitioner's application for relief to be denied on purely procedural grounds for failure to file required documents; carelessly failing to notice a timely appeal of an adverse decision; or defrauding a client by, for instance, accepting payment while providing no substantive legal assistance. *See Hernandez-Ortiz v. Garland*, 32 F.4th 794, 802 (9th Cir. 2022) (collecting cases).

"[C]ounsel's failure to file necessary papers in immigration proceedings may constitute ineffective assistance of counsel." *Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir. 2003).

"[W]hen counsel does not pursue a particular course of action as a tactical choice, she generally has not provided ineffective assistance, even if the choice turned out to be unwise or to the client's detriment." *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 802 (9th Cir. 2022) (internal quotation marks omitted). "[M]ost strategic decisions by counsel do not rise to the level of egregious conduct that threatens the fairness of the proceeding." *Id.* (internal quotation marks omitted).

Ineffective assistance generally does not occur when counsel: declines to raise claims or arguments that counsel determines lack merit; weighs the tradeoffs between different strategies and chooses not to pursue a strategy that could expose his client to undue risk; or fails to present cumulative evidence in support of a claim that counsel believes would not change the petitioner's likelihood of success. *See Hernandez-Ortiz v. Garland*, 32 F.4th 794, 802–03 (9th Cir. 2022) (collecting cases).

Counsel are not required "to follow a 'scorched earth' strategy in which they pursue[] every possible avenue for relief, regardless of the legal impediments." *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 804 (9th Cir. 2022).

See, e.g., *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 803–04 (9th Cir. 2022) (counsel not ineffective for failing to file untimely motions to reopen with no apparent prospect for avoiding the time bar); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) (ineffective assistance established where attorney conceded conviction was for aggravated felony before the IJ and failed to appeal issue to the BIA even though this was an open issue in the court of appeals; "counsel failed to do the minimal research that would have allowed him to acquire an understanding of immigration proceedings and would have revealed the key precedential BIA decision concerning the ground for [petitioner's] removability"); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013) (lawyer ineffective for failing to file application for cancellation of removal); *Kwong v. Holder*, 671 F.3d 872, 881 (9th Cir. 2011) ("BIA did not err in ruling that counsel's performance was not constitutionally deficient, particularly in light of the facts that counsel had to work with."; "Counsel presented sufficient evidence in support of Kwong's claim for withholding of removal to permit the IJ to make a reasoned decision on the merits of that claim."); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835 (9th Cir. 2011) (ineffective assistance where counsel admitted to factual allegations without any factual basis for doing so or appropriate investigation); *Nehad v. Mukasey*, 535 F.3d 962, 971–72 (9th Cir. 2008) (counsel deprived the petitioner of the ability to present his case to the immigration court and to the BIA where he announced that he would withdraw if the petitioner did not accept an offer of voluntary departure, which impinged on the petitioner's right to decide whether to concede his case, and violated his duty to insure that withdrawal would be conducted in a manner that would not prejudice his client); *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004) (counsel ineffective where "[s]he was unprepared; had not expected to argue; did not seek out the evidence she should have found; did not present effectively the evidence she had at hand; presented no legal framework for an asylum claim; and left her client alone, bewildered, and unrehabilitated as a witness"); *Lo v. Ashcroft*, 341 F.3d 934, 938 (9th Cir. 2003) (counsel ineffective where counsel's office calendared the wrong hearing date and therefore advised noncitizen not to attend her hearing); *Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir. 2003) (counsel ineffective by failing to file a timely application for suspension of deportation and by erroneously filing an application for cancellation of removal).

The relationship between the first prong of an ineffective assistance claim under the Sixth Amendment (*Strickland*) and the first prong of an ineffective assistance claim under the Due Process Clause has been examined in several cases:

- In *Lara-Torres v. Ashcroft*, 383 F.3d 968, 974 (9th Cir. 2004), *amended sub nom. Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005), the court rejected the proposition that the first prong of *Strickland v. Washington*, 466 U.S. 668, 688 (1984), which asks "whether counsel's assistance was reasonable considering all the circumstances," governs in the immigration context. "The Petitioners are thus wrong to assert that we must assess Pineda's performance strictly in terms of *Strickland*'s 'reasonableness' standard. The proper focus of our inquiry is whether the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case." *Id.* (internal quotation marks omitted).

- In *Torres-Chavez v. Holder*, 567 F.3d 1096 (9th Cir. 2009), the court noted that "aliens shoulder a heavier burden of proof in establishing ineffective assistance of counsel under the Fifth Amendment than under the Sixth Amendment." *Id.* at 1100 (internal quotation marks omitted). Thus, "[i]f an attorney's performance passes muster under *Strickland*, it cannot render an alien's proceeding fundamentally unfair. In other words, there is no violation of the alien's Fifth Amendment right to due process if the alien's counsel was effective for Sixth Amendment purposes." *Id.*

Cross-reference: Cases Finding Ineffective Assistance, below.

3. Prejudice

"Prejudice is found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings." *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999); *see Flores v. Barr*, 930 F.3d 1082, 1088–89 (9th Cir. 2019) ("In the context of a motion to reopen for ineffective assistance, the petitioner need not show that he would win or lose on any claims. Rather, the question with respect to prejudice is whether counsel's deficient performance may have affected the outcome of the proceedings, which means that the petitioner need only show plausible grounds for relief." (citation modified)), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished); *Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008) ("The question before us is not whether [the petitioner's] claims would prevail, but merely whether they are plausible enough to warrant consideration by the BIA on remand."); *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) ("To prevail, the petitioner . . . need not show that the counsel's ineffectiveness definitively changed the outcome."); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858–59 (9th Cir. 2004) ("Petitioners must demonstrate that counsel's performance was so inadequate that it may have affected the outcome of the proceedings. They need not show that they would win or lose on any claims. . . . [The BIA] should have asked only whether [counsel's] deficient performance may have affected the proceedings." (citation and internal quotation marks omitted)); *cf. Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009) ("An alien must also show substantial prejudice by demonstrating that the alleged violation affected the outcome of the proceedings." (internal quotation marks omitted)); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) ("To establish a due process violation, the Petitioners must [show] . . . substantial prejudice, which is essentially a demonstration that the alleged violation affected the outcome of the proceedings." (internal quotation marks omitted)), *amended sub nom. Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005); *Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) ("A showing of prejudice is essentially a demonstration that the alleged violation affected the outcome of the proceedings . . . .").

Prejudice is established where the petitioner demonstrates that, but for counsel's errors, her claims would have been viable or plausible. *See Mohammed v. Gonzales*, 400 F.3d 785, 794 (9th Cir. 2005) ("In order to assess whether [the petitioner] suffered prejudice, we must consider the underlying merits of the case to come to a tentative conclusion as to whether her claim, if properly presented, would be viable. . . . [The petitioner] must demonstrate only that she has *plausible* grounds for relief." (citations and internal quotation marks omitted)).

See, e.g., *Eskilian v. Bondi*, 172 F.4th 682, 689 (9th Cir. 2026) (petitioner established prejudice in second motion to reopen where counsel failed to provide any facts, evidence, or argument of petitioner's diligence in first motion to reopen); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 804 (9th Cir. 2022) (no prejudice where counsel failed to file untimely motions to reopen earlier; "if petitioner's prior lawyers had filed motions to reopen, they would have been in substantially the same position that petitioner is in today: filing an untimely motion to reopen immigration proceedings, with no valid basis to excuse the untimeliness"); *Flores v. Barr*, 930 F.3d 1082, 1090 (9th Cir. 2019) (no prejudice from counsel's failure to file response to motion to dismiss where petitioner failed to identify any arguments that might have defeated the motion), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920–21 (9th Cir. 2015) (counsel performed ineffectively by failing to appeal the IJ's denial of cancellation of removal based on the belief that the petitioner would soon receive an I-130 visa, where the petitioner was in fact ineligible for that visa); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1043 (9th Cir. 2014) (prejudice established where counsel failed to pursue open legal issue that the court of appeals later resolved, in a different case, in a manner that would have rendered the petitioner non-removable); *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101 (9th Cir. 2009) (counsel's performance "did not fall outside the wide range of reasonable representation" where counsel "could have reasonably made the tactical decision to concede his client's alienage"); *Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008) (counsel's advice to accept voluntary departure and to concede claims prejudiced the petitioner because he had a nontrivial chance of success both in applying for asylum and related relief and in appealing the IJ's determination that he was removable); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) (no prejudice caused by counsel's failure to present petitioner's supporting witness where, given the other evidence in the record, the witness's testimony "would not likely have led the IJ to reach a different outcome"); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898–99 (9th Cir. 2008) (prejudice established as to cancellation of removal where counsel failed to introduce available documentary evidence or elicit testimony demonstrating continuous physical presence and hardship); *Mohammed v. Gonzales*, 400 F.3d 785, 794–802 (9th Cir. 2005) (petitioner prejudiced where counsel failed to introduce evidence of past female genital mutilation, which would have presented plausible claims for asylum, withholding, and CAT relief); *Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir. 2003) (no prejudice from counsel's failure to file timely application for suspension for deportation where petitioner would not have been able to establish the hardship required for relief); *Ortiz v. INS*, 179 F.3d 1148, 1153–54 (9th Cir. 1999) (prejudice not established where petitioners failed to identify any evidence that, if it had been introduced, would have rendered them eligible for asylum).

a. Rebuttable (and Irrebuttable) Presumptions of Prejudice

"Certain types of ineffective assistance entitle a petitioner to a rebuttable presumption of prejudice." *Montes-Lopez v. Holder*, 694 F.3d 1085, 1090 (9th Cir. 2012).

"When a lawyer's error results in an alien being denied his right to appeal [to the BIA] altogether, we apply a presumption of prejudice." *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (internal quotation marks omitted)). "In cases involving such error, the proceedings are subject to a presumption of prejudice, and we will find that a petitioner has been denied due process if he can demonstrate plausible grounds for relief on his underlying claim." *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (internal quotation marks omitted) (applying a presumption of prejudice where petitioner's counsel failed to file an appeal and concluding that the government failed to rebut that presumption where petitioner's asylum application provided plausible grounds for relief); *see also Singh v. Ashcroft*, 367 F.3d 1182, 1189 (9th Cir. 2004) (presumption applied where the BIA summarily dismissed the appeal for failure to file a brief and presumption not rebutted where petitioner had plausible claim for asylum); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826–27 (9th Cir. 2003) (presumption applied where the BIA summarily dismissed appeal for failure to file brief, but presumption rebutted where petitioner had no plausible claim to adjustment of status or voluntary departure).

The presumption of prejudice applicable to counsel's failure to file a timely BIA appeal applies even if the BIA subsequently considers a motion to reopen. *See Siong v. INS*, 376 F.3d 1030, 1038 (9th Cir. 2004) ("Because the BIA was considering only the denial of a motion to reopen, Siong did not receive the in-depth review of the IJ's factual conclusion that he would be entitled to receive on direct appeal."; presumption not rebutted where petitioner showed plausible grounds for relief).

The presumption also applies when counsel fails to file a petition for review in the court of appeals. *See Menjivar-Ayala v. Blanche*, 181 F.4th 948, 954 (9th Cir. 2026) ("Because [counsel's] error in failing to notify Petitioners of the BIA's decision and the subsequent deadline to file a petition for review effectively denied Petitioners' right to appeal altogether, the BIA should have applied a presumption of prejudice when adjudicating Petitioners' IAC claim." (brackets and internal quotation marks omitted)); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045–46 (9th Cir. 2000) ("[W]here an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely."; petitioner showed prejudice because her counsel's error resulted in this court's dismissal of her petition for review as untimely and she had demonstrated plausible grounds for relief).

Where counsel fails to timely notify the petitioners of the BIA's decision and the 30-day deadline for filing a petition for review, "service of a courtesy copy of the BIA's decision on Petitioners is not sufficient to rebut the presumption that their counsel's deficient performance caused them prejudice." *Menjivar-Ayala v.*

Blanche, 181 F.4th 948, 953 (9th Cir. 2026) ("Petitioners retained counsel for the express purpose of representing them in their immigration proceedings and were thus entitled to rely on counsel for that assistance.").

The presumption applies where counsel ineffectively admits the factual allegations in the charge of removal, effectively preventing the noncitizen from presenting a case. *See Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835–36 (9th Cir. 2011) (presumption applied where counsel admitted factual allegations without a factual basis for doing so, thereby altogether preventing the petitioner from presenting his case; presumption not rebutted where petitioner would have had a plausible argument that his conduct did not fall within the smuggling ground for deportation).

An *irrebuttable* presumption of prejudice applies to denials of the right to counsel at a merits hearing or similarly significant stage in the proceedings. *See Zuniga v. Barr*, 946 F.3d 464, 471 (9th Cir. 2019) ("[A]n alien who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney."); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) ("[A]n individual who is wrongly denied the assistance of counsel at the merits hearing need not show prejudice in order to prevail. Prejudice in that context is conclusively presumed and automatic reversal is required." (citation omitted)); *Montes-Lopez v. Holder*, 694 F.3d 1085, 1093–94 (9th Cir. 2012) ("[W]e hold that an alien who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney."; petitioner was denied his right to counsel at his IJ merits hearing when the IJ denied his request for a continuance to obtain new counsel after his existing counsel was suspended from the bar).

The automatic reversal rule does not necessarily apply to denials of counsel at less significant stages in the proceedings. *See Gomez-Velazco v. Sessions*, 879 F.3d 989, 994 (9th Cir. 2018) (declining to apply the automatic reversal rule where the petitioner "was not denied the assistance of counsel throughout the entirety of the administrative removal process, which commences with service of the Notice of Intent to Issue a Final Administrative Removal Order and ends with execution of the order," but rather "lacked counsel at one discrete stage of the process—the point of his initial interaction with DHS officers"); *id.* at 994–95 (refusing to apply a presumption of prejudice and requiring the petitioner to show prejudice "when an individual is denied the right to counsel during his initial interaction with DHS officers, provided the individual is able to consult with counsel before the removal order is executed," because, "[i]n that scenario, we can determine what the evidentiary record would have looked like had the violation not occurred" and "assess what prejudicial effect, if any, counsel's absence had on the outcome of the proceedings").

In *Zuniga v. Barr*, 946 F.3d 434 (9th Cir. 2021), the court distinguished *Gomez-Velazco* and applied the automatic reversal rule where the petitioner was denied his statutory right to counsel in his reasonable fear review hearing before the IJ:

> In *Gomez-Velazco*, we distinguished *Montes-Lopez* on the ground that, after the discrete phase in which he lacked counsel, Gomez-Velazco was able to consult with counsel before his removal order was actually executed. The same was not true here. Zuniga was denied his right to counsel at the final stage of the reasonable fear proceeding—and thus, unlike the situation in *Gomez-Velazco*, Zuniga's attorney had no later opportunity to remedy any damage done by his client's un-counseled admissions or waivers.

Zuniga v. Barr, 946 F.3d 464, 471 n.10 (9th Cir. 2019) (alterations, citations, and internal quotation marks omitted).

Cross-reference: Due Process in Immigration Proceedings, Prejudice Requirement, Ineffective Assistance of Counsel.

b. Exception for In Absentia Orders

Where a claim of ineffective assistance of counsel is the basis for moving to reopen and rescind an in absentia removal order, a showing of prejudice is not required. *See Sanchez Rosales v. Barr*, 980 F.3d 716, 717 (9th Cir. 2020) ("A showing of prejudice is not required when ineffective assistance leads to an in absentia order of removal."); *Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003) ("The BIA . . . does not normally require a showing of prejudice when a motion for rescission of an *in absentia* removal order is grounded on ineffective assistance of counsel.").

Accordingly, the BIA abuses its discretion by denying a motion to reopen an in absentia removal order based on a failure to establish prejudice. *See Sanchez*

Rosales v. Barr, 980 F.3d 716, 719–20 (9th Cir. 2020) ("Petitioners were not required to demonstrate that the ineffective assistance of the non-attorney notario caused them prejudice. . . . [W]hen ineffective assistance leads to in absentia removal, we have followed the BIA's usual practice of not requiring a showing of prejudice." (internal quotation marks omitted)).

Cf. Monjaraz-Munoz v. INS, 327 F.3d 892, 896–98 (9th Cir. 2003) (noncitizen's reasonable reliance on the advice of his attorney's agent established exceptional circumstances for reopening removal proceedings in which in absentia removal order had been issued), *amended on other grounds,* 339 F.3d 1012 (9th Cir. 2003).

E. The *Lozada* Requirements

A motion to reopen based on ineffective assistance of counsel generally must meet the three procedural requirements set out by the BIA in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). *See Mohammed v. Gonzales*, 400 F.3d 785, 794 (9th Cir. 2005) ("A petitioner who seeks to reopen on the basis of ineffective assistance of counsel is usually expected to comply with the procedural guidelines set forth in *Matter of Lozada*, 19 I. & N. Dec. at 639."); *Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003).

Under *Lozada*, the petitioner must:

> 1) submit an affidavit explaining his agreement with former counsel regarding his legal representation, 2) present evidence that prior counsel has been informed of the allegations against her and given an opportunity to respond, 3) either show that a complaint against prior counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed.

Iturribarria v. INS, 321 F.3d 889, 900 (9th Cir. 2003).

"Compliance with *Lozada* ensures that the BIA has an objective basis for assessing the substantial number of claims of ineffective assistance of counsel that come before it." *Al Ramahi v. Holder*, 725 F.3d 1133, 1139 (9th Cir. 2013) (alteration and internal quotation marks omitted); *see also Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) ("[T]he policy goals of *Lozada* . . . are to provide a framework within which to assess the *bona fides* of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance." (internal quotation marks omitted)); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226–27 (9th Cir. 2002) ("These *Lozada* factors are intended to ensure both that an adequate factual record exists for an ineffectiveness complaint and that the complaint is a legitimate and substantial one." (internal quotation marks omitted)).

"In practice, we have been flexible in our application of the *Lozada* requirements. The *Lozada* factors are not rigidly applied, especially where their purpose is fully served by other means." *Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008); *see Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (noting that the *Lozada* requirements "are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance"); *Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) ("We have approved these so-called *Lozada* requirements, but we have also cautioned that these requirements are not sacrosanct. While these procedural requirements serve important policy goals—such as ensuring that a legitimate claim actually exists and developing an adequate factual basis for the BIA to adjudicate the claim—we have not hesitated to address ineffective assistance of counsel claims even when an alien fails to comply strictly with *Lozada*.") (collecting cases); *Mohammed v. Gonzales*, 400 F.3d 785, 794 n.9 (9th Cir. 2005) ("[T]his court has rejected the BIA's position that compliance with *Lozada* is always necessary."); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) ("These factors are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance.").

A petitioner need only *substantially comply* with the *Lozada* requirements. *See Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008) ("We conclude that Morales substantially complied with the *Lozada* requirements."); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824–25 (9th Cir. 2003) ("We have . . . permitted an ineffective assistance of counsel claim to go forward when there is substantial compliance with *Lozada* such that the purpose of *Lozada* is fully served by other means." (internal quotation marks omitted)); *id.* at 825 (noncitizen substantially complied with third requirement where, although noncitizen did not present evidence of filing of bar complaint, he presented evidence that the attorney self-reported the violation to the state bar); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) ("[P]etitioners have substantially complied with the *Lozada* factors.").

A petitioner need not comply with the *Lozada* requirements "when the record shows a clear and obvious case of ineffective assistance." *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002); *see id.* ("[T]he record itself demonstrates the legitimacy of petitioners' ineffective assistance complaint—relieving them of the need technically to comply with *Lozada*—since it is undisputed that petitioners' counsel failed timely to file their applications."); *see also Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 825–26 (9th Cir. 2003) (the legitimacy of the petitioner's claim was plain on the face of the administrative record where counsel did not file a brief—despite a promise to do so in the notice of appeal—and the BIA summarily dismissed the appeal); *see, e.g.*, *Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (ineffectiveness not plain on the face of the record where, although counsel failed to object to the admission of the asylum officer's notes in the proceedings before the IJ, the petitioner established no legal basis for excluding the notes from the proceeding); *Tamang v. Holder*, 598 F.3d 1083, 1089–91 (9th Cir. 2010) (ineffectiveness not plain on its face where petitioner provided no facts regarding counsel's purported failure to file a timely asylum application); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) (compliance with *Lozada* not required where the facts were plain on the face of the record; IJ allowed an attorney whom petitioner had never met and who had no understanding of her case to represent her), *amended on other grounds*, 213 F.3d 1221 (9th Cir. 2000); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) ("The face of the record shows a clear and obvious case of ineffective assistance of counsel."; record was undisputed that counsel failed to file application for suspension of deportation, in spite of having told petitioner that he did so, and that petitioner would have been prima facie eligible for relief had the application been filed).

The petitioner need not comply with the *Lozada* requirements when doing so would be futile. *See Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) ("[T]he BIA's insistence upon strict compliance with *Lozada* in cases where such compliance would clearly be futile only worsens the plight of the immigrant."); *id.* ("We conclude that, in cases where a petitioner's attorney has been suspended after failing to respond to prior charges of ineffective assistance, it would be futile for the petitioner to inform counsel of the accusations or file a complaint [in accordance with the second *Lozada* requirement], and [the petitioner's] failure to do so therefore does not bar her ineffective assistance of counsel claim.").

"[A]rbitrary application of the *Lozada* command is not warranted if petitioner shows diligent efforts to comply were unsuccessful due to factors beyond petitioner's control." *Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004) (internal quotation marks omitted); *see Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124–25 (9th Cir. 2000) ("Although the BIA acts within its discretion to impose the heightened *Lozada* procedural requirements, it may not impose the *Lozada* requirements arbitrarily." (citations omitted)); *id.* at 1125 (where petitioner "could not be expected to identify the specifics of counsel's deficient performance without reference to an accurate and substantially complete record of the filings and proceedings before the IJ," and petitioner made diligent but unsuccessful efforts to obtain those materials from counsel and the agency, the petitioner "could neither notify prior counsel of his allegations and give him the opportunity to respond, nor responsibly draft a complaint to the state bar," as *Lozada* requires).

The petitioner's failure to satisfy the *Lozada* requirements, however, may be fatal to a claim of ineffective assistance of counsel if the ineffectiveness of counsel is not plain on its face or it is otherwise impossible to determine whether the claim has merit. *See Tamang v. Holder*, 598 F.3d 1083, 1090–91 (9th Cir. 2010); *see also Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004) (noting that the court "presume[s], as a general rule, that the Board does not abuse its discretion when it obligates petitioners to satisfy *Lozada*'s literal requirements"); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824 (9th Cir. 2003) ("[U]nder ordinary circumstances the BIA does not abuse its discretion when it denies a motion to remand or reopen based on alleged ineffective assistance of counsel where petitioner fails to meet the requirements of *Lozada*." (internal quotation marks omitted)).

As to the second *Lozada* requirement, the court held that, "in cases where a petitioner's attorney has been suspended after failing to respond to prior charges of ineffective assistance, it would be futile for the petitioner to inform counsel of the accusations or file a complaint, and Morales's failure to do so therefore does not bar her ineffective assistance of counsel claim." *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (no obligation to inform counsel when doing so would be futile).

As to the third *Lozada* requirement, the court held that the BIA abused its discretion by requiring petitioner to provide correspondence from the state bar indicating receipt of a complaint where petitioner provided both a copy of the complaint and a declaration from the lawyer "admitting responsibility and absolving the client of any culpability for the delay." *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131–32 (9th Cir. 2013). The court explained that "*Lozada* doesn't require that a petitioner present probative evidence of having submitted a complaint to the bar, much less correspondence from the bar acknowledging such a complaint. *Lozada* suggests only that the motion should reflect whether such a complaint has been filed." *Id.* at 1131 (internal quotation marks omitted).

As to the third requirement, a noncitizen may reasonably decline to file a complaint with the state bar where the attorney's error was nothing more than an inadvertent mistake. *See Lo v. Ashcroft*, 341 F.3d 934, 938 (9th Cir. 2003) (where there was no evidence that the petitioners and counsel colluded to use their ineffective assistance of counsel claims to achieve delay, the petitioners' failure to file a complaint with the appropriate disciplinary authorities did not defeat the petitioners' ineffective assistance of counsel claim).

F. Cases Discussing Ineffective Assistance of Counsel

1. Cases Finding Ineffective Assistance

See Sanchez Rosales v. Barr, 980 F.3d 716, 719–20 (9th Cir. 2020) (granting petition and remanding to the BIA to evaluate petitioners' motion without requiring a showing of prejudice where petitioners claimed that ineffective assistance led to in absentia order of removal); *Flores v. Barr*, 930 F.3d 1082, 1087–90 (9th Cir. 2019) (holding that although the BIA correctly concluded Flores failed to show prejudice for several of his ineffective assistance of counsel claims, the BIA abused its discretion in concluding Flores failed to show prejudice from ineffective assistance with respect to petitioner's claims for relief under former § 212(c) and CAT deferral of removal), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920–22 (9th Cir. 2015) (where petitioner's counsel performed deficiently and petitioner suffered prejudice, petitioner was entitled to equitable tolling of the motion to reopen deadline); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041–42 (9th Cir. 2014) (in reviewing an illegal reentry case in which petitioner collaterally attacked his underlying removal order, determining that the concession by petitioner's immigration counsel that his prior drug conviction was an aggravated felony under the INA, and failure to appeal that question to the court of appeals, constituted deficient performance); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131–34 (9th Cir. 2013) (petitioner suffered prejudice where the record was undisputed that his lawyer failed to file his application for cancellation of removal; remanding to the

BIA to allow petitioner to file his application for relief); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835–36 (9th Cir. 2011) (petitioner prejudiced by counsel's ineffective assistance where counsel admitted to factual allegations without any factual basis for doing so); *Nehad v. Mukasey*, 535 F.3d 962, 967–73 (9th Cir. 2008) (ineffective assistance established where counsel pressured noncitizen to accept voluntary departure under threat of counsel's withdrawal two hours before hearing); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898–99 (9th Cir. 2008) (failure to introduce available documentary evidence, to elicit testimony, and to establish petitioner's mother as a qualifying relative for the purpose of the hardship analysis established ineffective assistance); *Ray v. Gonzales*, 439 F.3d 582, 588–90 (9th Cir. 2006) (failure to file a brief with the BIA on appeal, to file a petition for review, and to meet procedural requirements of two motions to reopen established ineffective assistance); *Mohammed v. Gonzales*, 400 F.3d 785, 793–803 (9th Cir. 2005) (counsel's performance was ineffective and caused prejudice where she failed to present evidence of petitioner's past female genital mutilation); *Hamoui v. Ashcroft*, 389 F.3d 821, 826–28 (9th Cir. 2004) (failure to file motion to reopen to pursue CAT claim constituted constitutionally deficient performance); *Lin v. Ashcroft*, 377 F.3d 1014, 1023–32 (9th Cir. 2004) (counsel's failure to investigate and present the factual and legal basis of petitioner's asylum claim, attend the hearing in person, advocate on petitioner's behalf at the hearing, and file a brief on appeal constituted ineffective assistance of counsel); *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004) ("Failing to file a timely notice of appeal is obvious ineffective assistance of counsel."); *Singh v. Ashcroft*, 367 F.3d 1182, 1185–90 (9th Cir. 2004) (counsel's failure to file brief to BIA established ineffective assistance and caused prejudice where BIA dismissed the appeal based on petitioner's failure to file a brief); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824–28 (9th Cir. 2003) (failure to file brief on appeal to BIA constituted ineffective assistance, but presumption of prejudice rebutted because petitioner had no plausible grounds for relief); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 896–97 (9th Cir. 2003) (advice to return to Mexico in order to prove validity of visa, where petitioner missed his hearing due to border detention upon attempted return, constituted ineffective assistance and exceptional circumstances warranting reopening), *amended on other grounds*, 339 F.3d 1012 (9th Cir. 2003); *Iturribarria v. INS*, 321 F.3d 889, 897–903 (9th Cir. 2003) (counsel was ineffective, but petitioner failed to show prejudice); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224–27 (9th Cir. 2002) (non-attorney provided ineffective assistance by failing to file a timely application for relief while assuring petitioners he was diligently handling their case); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044–45 (9th Cir.

2000) (untimely petition for review presented valid basis for ineffective assistance claim); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (finding a "clear and obvious case of ineffective assistance of counsel" where counsel "failed, without any reason, to timely file [an] application" for relief for which petitioner was prima facie eligible); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) (compliance with *Lozada* not required where IJ deprived petitioner of the right of counsel by allowing an attorney whom petitioner had never met and had no understanding of her case to represent her), *amended on other grounds*, 213 F.3d 1221 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097, 1100–01 (9th Cir. 1999) (fraudulent legal representation by notary posing as an attorney established ineffective assistance).

2. Cases Rejecting Ineffective Assistance of Counsel Claims

See Hernandez-Ortiz v. Garland, 32 F.4th 794, 803–04 (9th Cir. 2022) (petitioner failed to show prior counsel acted deficiently in failing to file earlier untimely motions to reopen or that he was prejudiced by counsel's "tactical decision" not to do so where, under the circumstances of the case, there was no apparent prospect of avoiding the time bar); *Flores v. Barr*, 930 F.3d 1082, 1087–90 (9th Cir. 2019) (BIA correctly concluded Flores failed to show prejudice for several of his ineffective assistance of counsel claims but abused its discretion in concluding that Flores failed to show prejudice from ineffective assistance with respect to petitioner's claims for relief under former § 212(c) and deferral of removal under the CAT), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished); *Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (because petitioner failed to comply with the procedural requirements of *Lozada*, he was entitled to relief only if "the ineffectiveness of counsel was plain on its face"; ineffectiveness was not plain where the record did not show counsel performed deficiently); *Al Ramahi v. Holder*, 725 F.3d 1133, 1138–39 (9th Cir. 2013) (petitioner failed to show that counsel's advice was deficient); *Kwong v. Holder*, 671 F.3d 872, 880–81 (9th Cir. 2011) (counsel's performance was not constitutionally deficient where counsel interrogated petitioner and presented sufficient evidence in support of petitioner's claim for withholding of removal to permit the IJ to make a reasoned decision on the merits of the claim); *Tamang v. Holder*, 598 F.3d 1083, 1090–91 (9th Cir. 2010) (failure to satisfy *Lozada* requirements was fatal to petitioner's ineffective assistance claim where ineffective assistance was not otherwise apparent); *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101–02 (9th Cir. 2009) (rejecting petitioner's contention that he received ineffective assistance where attorney conceded petitioner's alienage and did not inform him about the advantages of remaining silent; attorney's conduct fell within "wide range of reasonable representation" because counsel "could have reasonably made the tactical decision to concede his client's alienage"); *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050–51 (9th Cir. 2008) (where attorney failed to properly file a visa petition, the Fifth Amendment right to competent representation in removal proceedings did not apply because the deficiency did not relate to the substance or fundamental fairness of an ongoing hearing); *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008) (even if there was ineffective assistance, petitioner suffered no prejudice due to statutory bar to relief where petitioner overstayed voluntary departure period); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) (counsel's actions did not deny petitioner his right to full and fair hearing where the record showed that counsel diligently examined witnesses, argued points of law before the IJ, and informed petitioner of his right to appeal; in addition, even if counsel's performance was ineffective, petitioner failed to demonstrate prejudice); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 975–76 (9th Cir. 2006) (counsel's erroneous advice regarding the retroactivity of the stop-time rule did not affect the opportunity to present a case at the removal hearing and so did not establish a cognizable due process violation, as in *Lara-Torres*, *infra*); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (counsel's "unfortunate immigration-law advice" was not ineffective assistance because it did not "pertain to the actual substance of the hearing" or "call the hearing's fairness into question"), *amended on other grounds*, 404 F.3d 1105 (9th Cir. 2005); *Azanor v. Ashcroft*, 364 F.3d 1013, 1023 (9th Cir. 2004) (rejecting claim because petitioner failed to comply with *Lozada* and, alternatively, because petitioner—who did not inform counsel that she had suffered female genital mutilation—could not establish prejudice); *Reyes v. Ashcroft*, 358 F.3d 592, 597–98 (9th Cir. 2004) (rejecting claim because petitioner failed to comply substantially with *Lozada* and ineffective assistance was not apparent from the record); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071–72 (9th Cir. 2003) (petitioner failed to demonstrate prejudice from counsel's statement denigrating petitioner's hearing testimony); *Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (petitioner failed to show prejudice); *Ortiz v. INS*, 179 F.3d 1148, 1153–54 (9th Cir. 1999) (petitioner failed to show prejudice).

Cross-reference: Due Process in Immigration Proceedings, Ineffective Assistance of Counsel.

VIII. CASES ADDRESSING MOTIONS TO REOPEN FOR SPECIFIC RELIEF

A motion to reopen for the purpose of submitting a new application for relief must be accompanied by the appropriate application for relief and all supporting documentation. *See* 8 C.F.R. § 1003.2(c)(1) (2020) (motions to reopen before BIA); 8 C.F.R. § 1003.23(b)(3) (2020) (motions to reopen before IJ).

> A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing.

8 C.F.R. § 1003.2(c)(1) (2020).

"[A] prima facie case for relief is sufficient to justify reopening, and a prima facie case is established when the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied." *Tadevosyan v. Holder*, 743 F.3d 1250, 1255 (9th Cir. 2014) (citation and internal quotation marks omitted); *see also Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1183 (9th Cir. 2023) ("The 'reasonable likelihood' standard requires a petitioner to show more than a mere possibility she will establish a claim for relief, but it does not require the petitioner to demonstrate she is more likely than not to prevail.").

The agency has discretion to deny a motion to reopen even if the movant has made out a prima facie case for relief. *See* 8 C.F.R. § 1003.2(a) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief."); 8 C.F.R. § 1003.23(b)(3) ("The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief."); *Aviles-Torres v. INS*, 790 F.2d 1433, 1436 (9th Cir. 1986) ("In some instances, the BIA does not abuse its discretion when it denies reopening after the petitioner has made a prima facie showing of entitlement to discretionary relief.”).

Where the agency denies a motion to reopen as an exercise of discretion, rather than based on the movant’s failure to make out a prima facie case, the “would likely change” standard applies. *See Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1183 (9th Cir. 2023) (“[T]he ‘would likely change’ standard applies to decisions made on the discretionary ground.”); *id.* (“[T]he ‘would likely change’ standard requires a petitioner to establish that it is at least more probable than not that the new evidence would change the outcome of the claim.”).

For forms of mandatory, nondiscretionary relief, however, the BIA lacks discretion to deny reopening if the applicant makes out a prima facie case for relief. *See Aviles-Torres v. INS*, 790 F.2d 1433, 1436 (9th Cir. 1986) (because the BIA lacks discretion to deny withholding of deportation under § 243(h) if the applicant proves a clear probability of persecution, the BIA must either grant relief or remand to the IJ for factfinding where the motion to reopen establishes a prima facie case for relief).

“[W]hen a petitioner seeks to reopen proceedings as to the original claim, nothing in § 1003.2(c)(1) requires the petitioner to attach a new application for relief instead of his initial (relevant) application for relief.” *Aliyev v. Barr*, 971 F.3d 1085, 1087 (9th Cir. 2020) (holding that the BIA abused its discretion in denying petitioner’s motion to reopen on the ground that he failed to attach the “appropriate application for relief” where he did not attach a new asylum application but did attach the prior asylum application that he was seeking to reopen).

A. Motions to Apply for Cancellation of Removal

See Fonseca-Fonseca v. Garland, 76 F.4th 1176, 1180–83 (9th Cir. 2023) (remanding for reconsideration of petitioner’s motion to reopen to reapply for cancellation of removal where the agency applied the incorrect burden of proof); *Quebrado Cantor v. Garland*, 17 F.4th 869, 873 (9th Cir. 2021) (granting petition for review of denial motion to reopen removal proceedings based on claim that noncitizen met continuous presence requirement in United States, as required to be eligible for cancellation of removal).

B. Motions to Reopen to Apply for Asylum and Withholding

See, e.g., *INS v. Doherty*, 502 U.S. 314, 324–29 (1992) (asylum and withholding) (Attorney General did not abuse his discretion by denying the motion to reopen); *INS v. Abudu*, 485 U.S. 94, 104–11 (1988) (asylum and withholding) (holding that the abuse of discretion standard applies to denials of motions to reopen and that BIA did not abuse its discretion by denying the motion to reopen); *Reyes-Corado v. Garland*, 76 F.4th 1256, 1265 (9th Cir. 2023) (asylum) (petition granted where BIA erroneously determined petitioner had not provided qualitatively different country conditions evidence); *Singh v. Garland*, 46 F.4th 1117, 1120 (9th Cir. 2022) (asylum) (petition granted where the BIA "erred in holding that the earlier adverse credibility finding barred [petitioner's] motion to reopen"); *Sarkar v. Garland*, 39 F.4th 611, 622 (9th Cir. 2022) (asylum, withholding, and CAT relief) (petition denied where new country conditions evidence was not material to petitioner and therefore insufficient to demonstrate a prima facie claim for asylum and related relief); *Greenwood v. Garland*, 36 F.4th 1232, 1235–36 (9th Cir. 2022) (withholding and CAT relief) (petition denied where the materiality of petitioner's new country conditions evidence was contingent on petitioner's identity, a factor which the agency had previously determined lacked credibility); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801–05 (9th Cir. 2022) (asylum, withholding, and CAT relief) (petition denied where petitioner failed to establish equitable tolling based on ineffective assistance of counsel or changed country conditions to excuse untimely filing); *Nababan v. Garland*, 18 F.4th 1090, 1096 (9th Cir. 2021) (asylum, withholding, and CAT relief) (petition granted where BIA failed to assess individualized risk of persecution; directing the BIA on remand to assess whether country conditions in Indonesia had materially changed for evangelical Christians in particular, as distinct from Christians in general); *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1037 (9th Cir. 2021) (asylum, withholding, and CAT relief) (petition granted where exceptional circumstances warranted reopening of immigration proceedings involving in absentia removal order), *overruled on other grounds by Montejo-Gonzalez v. Bondi*, 166 F.4th 851 (9th Cir. 2026) (en banc); *Silva v. Garland*, 993 F.3d 705, 717–19 (9th Cir. 2021) (asylum, withholding, and CAT relief) (petition denied), *abrogated on other grounds as stated in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *Rodriguez v. Garland*, 990 F.3d 1205, 1211 (9th Cir. 2021) (asylum and withholding) (petition denied); *Salim v. Lynch*, 831 F.3d 1133, 1137–41 (9th Cir. 2016) (asylum and withholding) (petition granted); *Zhao v. Holder*, 728 F.3d 1144, 1145–51 (9th Cir. 2013) (asylum) (petition granted).

See also, e.g., *Ali v. Holder*, 637 F.3d 1025 (9th Cir. 2011) (petition granted); *Almaraz v. Holder*, 608 F.3d 638 (9th Cir. 2010) (petition denied); *Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010) (petition denied); *Najmabadi v. Holder*, 597 F.3d 983 (9th Cir. 2010) (petition denied); *Lin v. Holder*, 588 F.3d 981 (9th Cir. 2009) (petition denied); *Toufighi v. Mukasey*, 538 F.3d 988, 996–97 (9th Cir. 2008) (petition denied); *Chen v. Mukasey*, 524 F.3d 1028, 1031–34 (9th Cir. 2008) (petition denied); *Bhasin v. Gonzales*, 423 F.3d 977, 989 (9th Cir. 2005) (petition granted); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (petition granted); *Malty v. Ashcroft*, 381 F.3d 942 (9th Cir. 2004) (petition granted); *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (petition granted); *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004) (petition granted); *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (petition granted); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (denying petition as to asylum and withholding but granting as to CAT relief); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (petition granted); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (granting petition for review of BIA's denial of motion for reconsideration of the denial of a motion to reopen based on due process violation); *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002) (petition granted); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (petition denied as to motion to reopen but granted as to motion to remand); *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (petition denied); *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996) (petition denied); *Romero-Morales v. INS*, 25 F.3d 125 (9th Cir. 1994) (petition granted); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984) (petition denied); *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987) (petition granted); *Ghadessi v. INS*, 797 F.2d 804 (9th Cir. 1986) (petition granted), *superseded by statute on other grounds as stated in* Bhasin v. Gonzales, 423 F.3d 977, 987 n.5 (9th Cir. 2005); *Sakhavat v. INS*, 796 F.2d 1201 (9th Cir. 1986) (petition granted); *Aviles-Torres v. INS*, 790 F.2d 1433 (9th Cir. 1986) (petition granted); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986) (petition denied); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985) (granting petition on asylum claim and remanding); *Sangabi v. INS*, 763 F.2d 374 (9th Cir. 1985) (petition denied); *Samimi v. INS*, 714 F.2d 992 (9th Cir. 1983) (granting petition).

Cross-reference: Relief from Removal; Asylum, Withholding and the Convention Against Torture.

C. Motions to Reopen to Apply for Relief Under the Convention Against Torture (CAT)

"Denial of a motion to reopen to present a claim under the Convention qualifies as a final order of removal. We therefore have jurisdiction to address [the] petition for review." *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004).

Note, however, that the court has held that it lacks jurisdiction to review the denial of a CAT claim that is unrelated to an order of removal. *See Navarrete v. Bondi*, 170 F.4th 1214, 1225 (9th Cir. 2026) ("An order denying CAT protection is not a final order of removal, nor does it merge into a final order of removal. Accordingly, we hold that a petition advancing a standalone claim for review of a CAT order is not sufficient to invoke our jurisdiction under 8 U.S.C. § 1252(a)(1). Such claims can only be considered as part of the review of a final order of removal, a requirement that presupposes the existence of a claim for review of the final order of removal." (citations and internal quotation marks omitted)).

To obtain CAT protection, a petitioner is not required to produce "quantitative evidence." *See Calderon v. Blanche*, No. 24-7433, 2026 WL 2543389, at *5 (9th Cir. Aug. 28, 2026) ("The plain text of CAT's implementing regulations confirms that quantitative or statistical evidence is not required. . . . Congress did not create a bespoke evidentiary standard whereby noncitizens must come into court armed with reports prepared by statisticians and country conditions experts prognosticating about the noncitizen's exact numerical likelihood of being tortured." (citing 8 C.F.R. § 1208.16(c)(3))); *id.* at *8 ("The BIA erred by imposing a quantitative evidence requirement in this case.").

"The 'reasonable likelihood' standard applies at the motion to reopen stage, while the 'more likely than not standard' applies to CAT protection claims themselves." *Kaur v. Garland*, 2 F.4th 823, 837 (9th Cir. 2021) ("To prevail on her motion to reopen, Kaur need not prove her CAT claim. She must merely show that there is a reasonable likelihood that she will be able to show that it is more likely than not she will be tortured if returned to India.").

See, e.g., *Calderon v. Blanche*, No. 24-7433, 2026 WL 2543389, at *8–9 (9th Cir. Aug. 28, 2026) (BIA abused its discretion in denying motion to reopen to pursue CAT relief by (1) failing to give reasoned consideration of the petitioner's three experts and (2) concluding that the petitioner failed to offer prima facie evidence that he was more likely than not to be tortured if returned to El Salvador);

Silva v. Garland, 993 F.3d 705, 719 (9th Cir. 2021) (BIA did not abuse its discretion where petitioner failed to establish a prima facie case for CAT protection based on fear of torture in Philippines) (petition denied), *abrogated on other grounds as recognized in* *Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *Agonafer v. Sessions*, 859 F.3d 1198, 1203–04 (9th Cir. 2017) ("The changed country conditions exception [to the 90-day deadline for motions to reopen] likewise applies to motions to reopen to assert CAT claims.") (petition granted); *Go v. Holder*, 744 F.3d 604, 609 (9th Cir. 2014) ("[W]e hold that the procedural requirements specified in 8 C.F.R. § 1003.2(c) apply to CAT claims.") (petition denied); *Oyeniran v. Holder*, 672 F.3d 800, 808–09 (9th Cir. 2012) (BIA abused its discretion by rejecting new evidence on claim for CAT relief); *Williams v. Mukasey*, 531 F.3d 1040, 1042–43 (9th Cir. 2008) (publication of CAT regulations in Federal Register provided adequate notice of June 21, 1999 deadline to file motion to reopen based on CAT claim of applicant subject to pre-March 22, 1999 removal order); *Huang v. Ashcroft*, 390 F.3d 1118, 1120–23 (9th Cir. 2004) (the time limitations set forth in 8 C.F.R. § 208.18(b)(2) (2004) for motions to reopen CAT claims apply to both withholding and deferral of removal; "the window for moving to reopen removal orders that became final before March 22, 1999 applies to any alien seeking protection under CAT"); *Azanor v. Ashcroft*, 364 F.3d 1013, 1018–21 (9th Cir. 2004) (granting petition as to CAT relief and remanding for evaluation under correct legal standard); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (IJ abused his discretion in denying motion to reopen by failing to address eligibility for deferral of removal under CAT); *Abassi v. INS*, 305 F.3d 1028, 1030–32 (9th Cir. 2002) (petition granted in relevant part); *Kamalthas v. INS*, 251 F.3d 1279, 1282–84 (9th Cir. 2001) (vacated and remanded); *Khourassany v. INS*, 208 F.3d 1096, 1100 (9th Cir. 2000) ("Motions to reopen for consideration of claims under the Convention on Torture may not be urged in the first instance before our court; an applicant must first exhaust his or her administrative remedies before the BIA."); *Cano-Merida v. INS*, 311 F.3d 960, 965–66 (9th Cir. 2002) (BIA did not abuse its discretion in denying motion to reopen where petitioner did not make a prima facie showing that he was entitled to CAT relief).

Cross-reference: Relief from Removal; Asylum, Withholding and the Convention Against Torture.

D. Motions to Reopen to Apply for Adjustment of Status

"[T]he Board of Immigration Appeals has authority to reopen proceedings of an alien who is under a final order of removal in order to afford the alien an opportunity to pursue an adjustment of status application before United States Citizenship and Immigration Services." *Singh v. Holder*, 771 F.3d 647, 649 (9th Cir. 2014).

"Generally, a motion to reopen for adjustment of status will not be granted on the basis of a marriage entered into during deportation proceedings unless the petitioner qualifies for the bona fide marriage exception." *Yepremyan v. Holder*, 614 F.3d 1042, 1044–45 (9th Cir. 2010) (citing 8 U.S.C. § 1255(e)) (denying petition where petitioner failed to prove by clear and convincing evidence that her marriage was bona fide).

See, e.g., *Rubalcaba v. Garland*, 998 F.3d 1031, 1041 (9th Cir. 2021) (holding that the departure bar, 8 C.F.R. § 1003.23(b)(1), does not apply to sua sponte reopening and, therefore, that the IJ erred by denying motion to reopen for purposes of applying for adjustment of status); *Bonilla v. Lynch*, 840 F.3d 575, 583–84 (9th Cir. 2016) (denying petition for review as to the motion to reopen for adjustment of status); *Avagyan v. Holder*, 646 F.3d 672, 681–82 (9th Cir. 2011) (BIA abused its discretion in denying motion to reopen to apply for adjustment of status as untimely where petitioner filed the motion within 90 days of learning of prior counsel's ineffective assistance in pursuing adjustment of status); *Malilia v. Holder*, 632 F.3d 598, 604–07 (9th Cir. 2011) (agency abused its discretion in denying request for continuance in connection with application for adjustment of status); *Sharma v. Holder*, 633 F.3d 865, 872–74 (9th Cir. 2011) (BIA did not abuse its discretion in denying motion to reopen where evidence was insufficient to show bona fide marriage); *Ocampo v. Holder*, 629 F.3d 923, 928 (9th Cir. 2010) (motion to reopen to apply for adjustment of status denied as untimely); *Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041–42 (9th Cir. 2008) (petition denied as untimely); *Kalilu v. Mukasey*, 548 F.3d 1215, 1217–18 (9th Cir. 2008) (granting petition and remanding "for an exercise of the agency's discretion that takes into consideration the factors set forth in [*Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253, 256 (BIA 2002)]"); *Ochoa-Amaya v. Gonzales*, 479 F.3d 989, 992–93 (9th Cir. 2007) (petitioner did not qualify as child under Child Status Protection Act because he turned 21 before visa petition approved by INS; petition denied); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531–32 (9th Cir. 2004) (petition granted where the BIA erred in considering the strength of the stepparent-stepchild relationship); *de*

Martinez v. Ashcroft, 374 F.3d 759, 761–64 (9th Cir. 2004) (petition denied); *Manjiyani v. Ashcroft*, 343 F.3d 1018, 1019–20 (9th Cir. 2003) (petition remanded); *Malhi v. INS*, 336 F.3d 989, 993–95 (9th Cir. 2003) (denying petition) (BIA did not abuse its discretion in denying motion to remand where petitioner failed to make out a prima face case of a bona fide marriage); *Zazueta-Carrillo v. INS*, 322 F.3d 1166, 1174–75 (9th Cir. 2003) (granting petition and remanding where the BIA denied a motion to reopen to apply for adjustment of status based on petitioner's failure to depart voluntarily); *Castillo Ison v. INS*, 308 F.3d 1036, 1037–38 (9th Cir. 2002) (granting petition where the BIA incorrectly concluded that the Immigration Marriage Fraud Amendments of 1986 barred the petitioner from simultaneously filing both a petition for an immigrant visa and an application for adjustment of status); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002) (court lacked jurisdiction under *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002), to review the BIA's exercise of discretion in denying sua sponte reopening); *Konstantinova v. INS*, 195 F.3d 528, 530–31 (9th Cir. 1999) (granting petition where BIA arbitrarily denied motion to remand on the grounds that INS did not affirmatively join the motion); *Eide-Kahayon v. INS*, 86 F.3d 147, 149–51 (9th Cir. 1996) (petition denied); *Caruncho v. INS*, 68 F.3d 356, 360–62 (9th Cir. 1995) (petition denied); *Dielmann v. INS*, 34 F.3d 851, 852–54 (9th Cir. 1994) (petition denied where the BIA denied the motion to reopen on the grounds that the relative visa petition had not been adjudicated and that petitioner could not establish by clear and convincing evidence that marriage was entered into in good faith); *Ng v. INS*, 804 F.2d 534, 540 (9th Cir. 1986) (granting petition where the BIA abused its discretion in denying motion to reopen); *Israel v. INS*, 785 F.2d 738, 740–43 (9th Cir. 1986) (granting petition where the BIA denied the motion to reopen based on petitioner's post-deportation-proceedings marriage to a U.S. citizen).

Cross Reference: Jurisdiction Over Immigration Petitions, Procedural Rules, and Standards of Review, Limitations of Review of Discretionary Decisions, Enumerated Forms of Discretionary Relief.

E. Motion to Reopen Reasonable Fear Proceeding

An IJ has authority to reopen reasonable fear proceedings. *See Bartolome v. Sessions*, 904 F.3d 803, 815 (9th Cir. 2018) ("Nothing in this regulation [8 C.F.R. § 1003.23] precludes an alien from filing a motion to reopen before an IJ. To the contrary, § 1003.23(b)(1) provides that an IJ has *sua sponte* jurisdiction to reopen '*any* case in which he or she has made a decision.'"); *id.* ("The IJ's failure to recognize that he had at least *sua sponte* jurisdiction to reopen proceedings was an abuse of discretion."); *cf.* *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (holding that the IJ abused his discretion by denying motion to reconsider decision affirming a negative reasonable fear determination).

F. Motions to Reopen to Apply for Other Relief

1. Suspension of Deportation

See, e.g., *INS v. Rios-Pineda*, 471 U.S. 444, 449–52 (1985) (Attorney General did not abuse discretion in denying motion to reopen); *INS v. Wang*, 450 U.S. 139, 144–46 (1981) (per curiam) (BIA did not abuse discretion in denying motion to reopen); *Chete Juarez v. Ashcroft*, 376 F.3d 944, 947–50 (9th Cir. 2004) (petition granted); *Ordonez v. INS*, 345 F.3d 777, 783–87 (9th Cir. 2003) (petition granted); *Iturribarria v. INS*, 321 F.3d 889, 897–903 (9th Cir. 2003) (petition denied); *Guzman v. INS*, 318 F.3d 911, 912–13 (9th Cir. 2003) (BIA did not abuse its discretion in denying motion to reopen where "new" information regarding date of entry was available and capable of discovery prior to deportation hearing); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223–27 (9th Cir. 2002) (petition granted); *Arrozal v. INS*, 159 F.3d 429, 432–35 (9th Cir. 1998) (petition granted); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1318–19 (9th Cir. 1997) (petition granted); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997) (petition denied); *Watkins v. INS*, 63 F.3d 844, 847–52 (9th Cir. 1995) (reversed and remanded); *Limsico v. INS*, 951 F.2d 210, 213–14 (9th Cir. 1991) (petition denied); *Gonzalez Batoon v. INS*, 791 F.2d 681, 684–86 (9th Cir. 1986) (en banc) (discretionary denial of reopening was arbitrary).

2. NACARA Relief

See, e.g., *Mejia-Hernandez v. Holder*, 633 F.3d 818, 824–27 (9th Cir. 2011) (time period for filing motion to reopen for NACARA relief equitably tolled due to fraudulent representation by person falsely claiming to be an attorney); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1095–1100 (9th Cir. 2005) (equitable tolling of the deadline for filing a motion to reopen deportation proceedings to seek NACARA § 203(c) special rule cancellation).

3. 212(c) Relief

See, e.g., *Avila-Sanchez v. Mukasey*, 509 F.3d 1037, 1040–41 (9th Cir. 2007) (motion to reopen to obtain waiver of inadmissibility; petition denied); *Briseno v. INS*, 192 F.3d 1320, 1322–23 (9th Cir. 1999) (court lacks jurisdiction to review denial of aggravated felon's motion to reopen to apply for former § 212(c) relief; dismissing petition); *Foroughi v. INS*, 60 F.3d 570, 575–76 (9th Cir. 1995) (former § 212(c) relief; petition granted); *Butros v. INS*, 990 F.2d 1142, 1144–46 (9th Cir. 1993) (en banc) (former § 212(c) relief; petition granted); *Torres-Hernandez v. INS*, 812 F.2d 1262, 1264–65 (9th Cir. 1987) (former § 212(c) relief; petition denied); *Avila-Murrieta v. INS*, 762 F.2d 733, 734–36 (9th Cir. 1985) (former § 212(c) relief; petition denied).

Cross-reference: Relief from Removal; Cancellation of Removal, Suspension of Deportation, and Section 212(c) Relief.

4. Miscellaneous Relief

See, e.g., *Sanchez Rosales v. Barr*, 980 F.3d 716, 719–20 (9th Cir. 2020) (granting petition and remanding to the BIA to evaluate petitioners' motion to reopen to rescind petitioners' in absentia removal order); *Martinez v. Barr*, 941 F.3d 907, 922 (9th Cir. 2019) (motion to reopen removal proceedings after IJ issued an in absentia removal order); *Man v. Barr*, 940 F.3d 1354, 1355–58 (9th Cir. 2019) (motions to reopen to consider U visa; petition denied); *Cruz Pleitez v. Barr*, 938 F.3d 1141, 1143 (9th Cir. 2019) (motion to reopen seeking to rescind the deportation order entered in absentia; petition denied); *Miller v. Sessions*, 889 F.3d 998, 1003 (9th Cir. 2018) (motion to reopen to rescind a removal order entered in absentia; petition granted); *Navarro v. Mukasey*, 518 F.3d 729, 733–37 (9th Cir. 2008) (motion to reopen on the basis that petitioners qualified for benefits under the *Barahona-Gomez* class action settlement; petition granted); *Pedroza-Padilla v. Gonzales*, 486 F.3d 1362, 1364–65 (9th Cir. 2007) (legalization application; petition denied); *Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (petitioner failed to exhaust equitable tolling argument relating to citizenship claim; petition dismissed); *Virk v. INS*, 295 F.3d 1055, 1057–61 (9th Cir. 2002) (section 241(f) waiver of deportation; petition granted); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (motion to reopen to request a humanitarian waiver of deportability under § 241(a)(1)(E)(ii); petition denied); *Alquisalas v. INS*, 61 F.3d 722, 724–25 (9th Cir. 1995) (waiver of deportation under 8 U.S.C. § 1251(f)(1); petition granted); *Platero-Reymundo v. INS*, 807 F.2d 865, 867–68 (9th Cir. 1987) (reinstatement of voluntary departure; petition denied); *Desting-Estime v. INS*, 804 F.2d 1439, 1440–41 (9th Cir. 1986) (motion to reopen to redesignate country of deportation; petition denied); *Williams v. INS*, 795 F.2d 738, 745–46 (9th Cir. 1986) (reinstatement of voluntary departure; denying habeas relief where BIA did not abuse its discretion in denying reopening).

CRIMINAL ISSUES IN IMMIGRATION LAW

Table of Contents

CRIMINAL ISSUES IN IMMIGRATION LAW i

Table of Contents i

I. JUDICIAL REVIEW 1

II. CRIMINAL CONVICTIONS AS GROUNDS FOR INADMISSIBILITY AND REMOVABILITY 2

A. Distinguishing between Inadmissibility and Removability 2

B. Differing Burdens of Proof 2

C. Admissions 4

D. What Constitutes a Conviction? 5

1. Final, Reversed and Vacated Convictions 6

2. Expunged (Recalled or Reclassified) Convictions 8

a. Expungement Generally Does Not Eliminate Immigration Consequences of Conviction 8

b. Exception for Simple Drug Possession Offenses 9

c. Pardon Waiver 11

E. Definition of Sentence 12

1. One-Year Sentences 12

2. Recidivist Enhancements 13

3. Misdemeanors 14

4. Wobblers 14

F. Overlap with Other Immigration and Criminal Sentencing Areas of Law 15

III. METHOD OF ANALYSIS 17

A. Standard of Review 17

B. Categorical Approach 19

C. Modified Categorical Approach 24

1. Charging Documents, Abstracts of Judgment, Plea Documents, and Minute Orders 27
2. Police Reports and Stipulations 32
3. Probation or Presentence Reports 33
4. Extra-Record Evidence 33
5. Remand 34

IV. CATEGORIES OF CRIMINAL OFFENSES THAT MAY BE GROUNDS OF REMOVABILITY AND/OR INADMISSIBILITY 35

A. Crimes Involving Moral Turpitude ("CIMT") 35
1. Removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(i) 35
a. Single Crime Committed within Five Years of Admission 35
(i) Sentence of One Year or Longer 36
b. Multiple Offenses at Any Time 37
2. Inadmissibility Pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I) 38
a. Petty Offense Exception 39
b. Youthful Offender Exception 39
3. Definition of Crime Involving Moral Turpitude 40

B. Controlled Substances Offenses 51
1. Deportation Ground – 8 U.S.C. § 1227(a)(2)(B)(i) 51
2. Inadmissibility Grounds – 8 U.S.C. § 1182(a)(2)(A)(i)(II) & 8 U.S.C. § 1182(a)(2)(C) 54

V. CATEGORIES OF CRIMINAL OFFENSES THAT ARE GROUNDS OF REMOVABILITY ONLY 55

A. Aggravated Felony 55
1. Murder, Rape or Sexual Abuse of a Minor – 8 U.S.C. § 1101(a)(43)(A) 58
a. Murder 58
b. Rape 59
c. Sexual Abuse of a Minor 59

2. Illicit Trafficking in a Controlled Substance – 8 U.S.C. § 1101(a)(43)(B) 62
3. Illicit Trafficking in Firearms – 8 U.S.C. § 1101(a)(43)(C).....64
4. Money Laundering – 8 U.S.C. § 1101(a)(43)(D) 64
5. Explosives, Firearms and Arson – 8 U.S.C. § 1101(a)(43)(E) .65
6. Crimes of Violence ("COV") – 8 U.S.C. § 1101(a)(43)(F) 66
   a. Negligent and Reckless Conduct Insufficient 67
   b. Force Against Another...68
   c. Specific Crimes Considered 70
7. Theft or Burglary – 8 U.S.C. § 1101(a)(43)(G)........................73
8. Ransom Offenses – 8 U.S.C. § 1101(a)(43)(H)........................77
9. Child Pornography Offenses – 8 U.S.C. § 1101(a)(43)(I)........77
10. RICO Offenses – 8 U.S.C. § 1101(a)(43)(J) 77
11. Prostitution and Slavery Offenses – 8 U.S.C. § 1101(a)(43)(K) 78
12. National Defense Offenses – 8 U.S.C. § 1101(a)(43)(L) 78
13. Fraud or Deceit Offenses – 8 U.S.C. § 1101(a)(43)(M)...........79
14. "Alien Smuggling" – 8 U.S.C. § 1101(a)(43)(N).....................80
15. Illegal Reentry after Deportation for Aggravated Felony – 8 U.S.C. § 1101(a)(43)(O) 81
16. Passport Forgery – 8 U.S.C. § 1101(a)(43)(P) 81
17. Failure to Appear for Service of Sentence – 8 U.S.C. § 1101(a)(43)(Q) 82
18. Commercial Bribery and Counterfeiting – 8 U.S.C. § 1101(a)(43)(R) 82
19. Obstruction of Justice – 8 U.S.C. § 1101(a)(43)(S) 83
20. Failure to Appear before a Court – 8 U.S.C. § 1101(a)(43)(T) 84
21. Attempt or Conspiracy to Commit an Aggravated Felony – 8 U.S.C. § 1101(a)(43)(U) 84
22. Particularly Serious Crimes 85

B. Domestic Violence and Child Abuse Offenses 85
1. General Definition..85
2. Cases Considering Domestic Violence Convictions 89
3. Cases Considering Child Abuse Convictions 90
4. Cases Considering Violators of Protection Orders 91
C. Firearms Offenses...92
D. Miscellaneous Removable Offenses 93
VI. ELIGIBILITY FOR RELIEF DESPITE CRIMINAL CONVICTIONS 93

CRIMINAL ISSUES IN IMMIGRATION LAW

I. JUDICIAL REVIEW

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which limited petition-for-review jurisdiction for individuals removable based on enumerated crimes. *See* 8 U.S.C. § 1252(a)(2)(C) (2004) (providing that "except as provided in [8 U.S.C. § 1252(a)(2)(D)], no court shall have jurisdiction to review any final order of removal against an alien is who is removable by reason of having committed a criminal offense covered in" specified statutes); *see also Coria v. Garland*, 114 F.4th 994, 1004 (9th Cir. 2024) (referring to this provision as the "criminal alien bar").

In May 2005, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), amending the Immigration and Nationality Act ("INA") to expand the scope of direct judicial review over petitions for review brought by individuals removable based on enumerated crimes, and to limit the availability of habeas corpus relief over challenges to final orders of removal, deportation, or exclusion.

Cross-reference: Jurisdiction over Immigration Petitions, Overview.

"[D]enial[s] of asylum and withholding of removal fall within the final order of removal and are subject to § 1252(a)(2)(C) 'unless an exception applies.'" *Coria*, 114 F.4th at 1003 n.3 (quoting *Pechenkov v. Holder*, 705 F.3d 444, 448 (9th Cir. 2012)). Constitutional claims or questions of law are statutorily exempted from this jurisdictional prohibition. 8 U.S.C. § 1252(a)(2)(D); *see Coria*, 114 F.4th at 997.

In *Coria v. Garland*, the court held that *Nasrallah v. Barr*, 590 U.S. 573 (2020), which defined a final order of removal to include all agency rulings that merge into final orders of removal, abrogated previous Ninth Circuit decisions adopting an additional "on the merits" exception to § 1252(a)(2)(C). *Coria*, 114 F.4th at 1011; *see Pechenkov*, 705 F.3d at 448 (explaining that under the "on the merits" exception, the court had jurisdiction notwithstanding the criminal alien bar when "an IJ denies relief *on the merits*, for failure to demonstrate the requisite factual grounds for relief, rather than in reliance on the conviction"). Thus, where the criminal alien bar applies, "we lack jurisdiction to review factual challenges to the final order of removal and may only review constitutional claims or questions of law under § 1252(a)(2)(D)." *Coria*, 114 F.4th at 1011; *Nasrallah*, 590 U.S. at 581 (explaining that where a noncitizen was convicted of crimes specified in

§ 1252(a)(2)(C), "a court of appeals may review constitutional or legal challenges to a final order of removal, but the court of appeals may not review *factual* challenges to a final order of removal").

For a discussion of the criminal jurisdictional bar, see: Jurisdiction over Immigration Petitions, Limitations on Judicial Review Based on Criminal Offenses.

II. CRIMINAL CONVICTIONS AS GROUNDS FOR INADMISSIBILITY AND REMOVABILITY

A. Distinguishing between Inadmissibility and Removability

> [There are] two distinct concepts in our immigration law—inadmissibility and removability. "Federal immigration law governs both the exclusion of aliens from admission to this country and the deportation of aliens previously admitted." *Judulang v. Holder*, [565 U.S. 42, 45] (2011). "An inadmissible alien is one who was not admitted legally to the United States and is removable under § 1182, whereas a deportable alien is in the United States lawfully and is removable under § 1227." *Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1055 (9th Cir. 2010).

Nguyen v. Sessions, 901 F.3d 1093, 1096 (9th Cir. 2018), *abrogated on other grounds by Barton v. Barr*, 590 U.S. 222 (2020); *see also Sanchez-Ruano v. Garland*, 8 F.4th 965, 968 (9th Cir. 2021) ("Aliens who have not been admitted legally and commit certain crimes in the United States are *inadmissible*. . . . Aliens who have entered the United States lawfully and have committed certain crimes are *deportable*."); *Vasquez-Hernandez*, 590 F.3d at 1055 (same). Note that "the grounds for inadmissibility and deportability do not perfectly match, as some conduct and offenses can render a person inadmissible but not deportable, and vice versa." *Nguyen*, 901 F.3d at 1096. Furthermore, "admission to 'committing acts which constitute the essential elements of' a specified offense can make an applicant inadmissible, while, in most cases, a conviction is required to make a noncitizen deportable for commission of a crime." *Id*. at 1097 (comparing 8 U.S.C. § 1182(a)(2)(A)(i) with 8 U.S.C. § 1227(a)(2)(A)).

B. Differing Burdens of Proof

When analyzing an immigration case with criminal issues, it is important to determine whether the crime is being used to charge the noncitizen as inadmissible, removable, or ineligible for relief from removal. The posture of the case generally determines who bears the burden of proving the existence and nature of the conviction. When a noncitizen is charged as removable for a criminal conviction, it is the government's burden to prove by clear and convincing evidence that the noncitizen is removable. *See* 8 U.S.C. § 1229a(c)(3)(A); *Smith v. Garland*, 103 F.4th 663, 666-67 (9th Cir. 2024) ("The government bears the burden of establishing removability by 'clear, unequivocal, and convincing evidence.'" (quoting *Mondaca-Vega v. Lynch*, 808 F.3d 413, 419 (9th Cir. 2015) (en banc)); *Mendoza-Garcia v. Garland*, 36 F.4th 989, 998 (9th Cir. 2022) (the government bears the burden of proving by clear and convincing evidence that a conviction resulted in a term of imprisonment of at least one year to qualify as an aggravated felony rendering petitioner removable); *Vazquez Romero v. Garland*, 999 F.3d 656, 659 (9th Cir. 2021) ("[I]f the alien has already been lawfully admitted to the United States, the burden shifts to the government, which must establish by clear and convincing evidence that the alien is deportable."); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) ("The government bears the burden of proving by 'clear, unequivocal, and convincing evidence that the facts alleged as grounds for [removability] are true.'" (quoting *Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989)); *Retuta v. Holder*, 591 F.3d 1181, 1184 (9th Cir. 2010) ("The government bears the burden of proving by clear, unequivocal, and convincing evidence that the alien is removable.").

On the other hand, a noncitizen who is an "applicant for admission" bears the burden of proving that he is "clearly and beyond doubt entitled to be admitted and is not inadmissible under [8 U.S.C. § 1182]." *See* 8 U.S.C. § 1229a(c)(2); *Pereida v. Wilkinson*, 592 U.S. 224, 232 (2021) ("[T]he INA often requires an alien applying for admission to show 'clearly and beyond doubt' that he is 'entitled to be admitted and is not inadmissible.' . . . As part of this showing, an alien must demonstrate that he has not committed a crime involving moral turpitude."); *Vazquez Romero*, 999 F.3d at 659 ("[A]n alien who is an applicant for admission has the burden of proving that he is clearly and beyond doubt entitled to be admitted and is not inadmissible under § 1182." (citation and internal quotation marks omitted)); *Altamirano*, 427 F.3d at 590-91 (a parolee is an applicant for admission who bears the burden of proving admissibility, and the IJ erred when he placed the burden on the government); *see also Kepilino v. Gonzales*, 454 F.3d 1057, 1059-60 (9th Cir. 2006) (discussing shifting burden of production in the admission context).

Pursuant to the REAL ID Act of 2005's amendments to 8 U.S.C. 1229a(c), applicants for relief or protection from removal have the burden of establishing

(1) satisfaction of the applicable eligibility requirements, and (2) that a favorable exercise of discretion (where relevant) is warranted. 8 U.S.C. 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). The applicant has the burden, including proving that ambiguous criminal convictions do not result in ineligibility. *Pereida*, 592 U.S. at 235-36 (applicant for cancellation of removal failed to carry burden of proving he had not committed a CIMT where the statute of conviction is divisible and the record of conviction ambiguous); *Ballinas-Lucero v. Garland*, 44 F.4th 1169, 1171-72 (9th Cir. 2022) (applicant for cancellation had burden to establish that his California conviction was vacated because of a substantive or procedural defect in criminal proceedings, and not solely for immigration purposes or for a rehabilitative or equitable reason; determining that petitioner carried this burden); *Marinelarena v. Garland*, 6 F.4th 975, 977 (9th Cir. 2021) ("[W]hen the applicant stands convicted under a divisible state criminal statute that includes some offenses that are disqualifying and others that are not, and the record of conviction is ambiguous concerning which category fits the applicant's crime, then the applicant has failed to carry the required burden of proof." (citing *Pereida*, 592 U.S. at 233-36)). Where the evidence indicates that one or more ground for mandatory denial of an application applies, the noncitizen must show that the grounds do not apply by a preponderance of the evidence. 8 C.F.R. § 1240.8(d); *see also Romero v. Garland*, 7 F.4th 838, 841 (9th Cir. 2021) (per curiam) ("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.").

C. Admissions

When a crime is charged as a ground of inadmissibility rather than deportability, a noncitizen's admission to the essential elements of a crime may be sufficient to bar entry even absent a conviction. *Compare* 8 U.S.C. § 1182(a)(2)(A)(i) (ground of inadmissibility for any noncitizen who is convicted of or admits committing the essential acts of a crime involving moral turpitude), *with* 8 U.S.C. § 1227(a)(2)(A)(i) (ground of deportability for a noncitizen convicted of a crime involving moral turpitude); *see Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1030 (9th Cir. 2010) ("Thus, under 8 U.S.C. § 1182(a)(2)(A)(i)(II), admissions made by an alien to the IJ, enforcement officials, and third parties, apart from any conviction, may be considered to determine an alien's admissibility when considering the question of adjustment of status."). Admissions of controlled substances offenses may also be used to bar a noncitizen's entry. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II); *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1218 (9th Cir. 2002) (applicant was inadmissible because he admitted prior use of marijuana in the Philippines, which constituted the essential elements of a violation of a foreign state's law relating to a controlled substance).

"[A]dmissions by an alien to facts alleged in [the notice to appear], and concessions of removability, made in the 8 C.F.R. § 1240.10(c) 'pleading stage' of removal proceedings may be relied on by an IJ." *Perez-Mejia v. Holder*, 663 F.3d 403, 410 (9th Cir. 2011) (as amended).

D. What Constitutes a Conviction?

A conviction is defined as:

> a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A); *see also Bogle v. Garland*, 21 F.4th 637, 645 (9th Cir. 2021) (holding that conditional discharge of noncitizen's state marijuana charge, based on conditional guilty plea, was a potentially removable conviction); *Diaz-Quirazco v. Barr*, 931 F.3d 830, 843-44 (9th Cir. 2019) (discussing what constitutes a conviction and published BIA opinions setting forth the agency's interpretation of what proceedings amount to a "conviction"); *Reyes v. Lynch*, 834 F.3d 1104, 1107 (9th Cir. 2016) ("The federal definition of conviction where adjudication of guilt has been withheld includes aliens who have entered pleas of nolo contendere and 'the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.'"); *Retuta v. Holder*, 591 F.3d 1181, 1190 (9th Cir. 2010) ("[A]n unconditional suspended non-incarceratory sanction that has no present effect is not a punishment, penalty, or restraint of liberty under 8 U.S.C. § 1101(a)(48). Thus, the government has failed to prove [petitioner] was 'convicted' of a controlled substance offense . . . ."); *Murillo-Espinoza v. INS*, 261 F.3d 771, 773-74 (9th Cir. 2001) (BIA permissibly construed statute defining "conviction," for purposes of determining whether alien is removable for having been convicted of aggravated felony as precluding recognition of subsequent state rehabilitative expungements of convictions). The court has deferred to the BIA's

interpretation "that § 1101(a)(48)(A) does not require that the underlying offense be labeled a crime as long as the proceedings are 'criminal in nature' and contain 'constitutional safeguards normally attendant upon a criminal adjudication.'" *Diaz-Quirazco*, 931 F.3d at 835, 843-46 (holding that petitioner's violation of a protection order rendered him convicted of a removable offense).

An offense committed while a noncitizen is a juvenile qualifies as a conviction if the noncitizen is tried as an adult. *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 927 (9th Cir. 2007); *see also Rangel-Zuazo v. Holder*, 678 F.3d 967, 968-69 (9th Cir. 2012) (per curiam) (discussing the term "conviction" and reiterating that "where a juvenile offender is charged and convicted as an adult under state law, the offender has a 'conviction' for purposes of the INA").

Note that 8 U.S.C. "§ 1101(a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived." *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011).

1. Final, Reversed and Vacated Convictions

"A criminal conviction may not be considered by an IJ until it is final." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (pre-IIRIRA), *superseded by statute as stated in Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011). A conviction is final for immigration purposes "[o]nce an alien has been convicted by a court of competent jurisdiction and exhausted the direct appeals to which he is entitled." *Grageda*, 12 F.3d at 921 (citation and internal quotation marks omitted). "A conviction subject to collateral attack or other modification is still final." *Id.* (rejecting petitioner's claim that his conviction was not final because he had a pending petition for writ of error coram nobis); *see also Planes*, 652 F.3d at 996 (holding that "§ 1101(a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived").

A conviction overturned for substantive, non-immigration reasons does not remain valid for immigration purposes. *See Nath v. Gonzales*, 467 F.3d 1185, 1187-89 (9th Cir. 2006) ("[A] conviction vacated because of a procedural or substantive defect is not considered a conviction for immigration purposes and cannot serve as the basis for removability." (citation and internal quotation marks omitted)); *see also Prado v. Barr*, 949 F.3d 438, 441 (9th Cir. 2020) (as amended) (California's reclassification of alien's felony conviction for possession of marijuana as misdemeanor did not affect her removability or eligibility for asylum). By contrast, if a state court vacates a conviction 'solely for rehabilitative reasons or reasons related to the petitioner's immigration status,' that conviction remains valid for immigration purposes." *Bent v. Garland*, 115 F.4th 934, 940 (9th Cir. 2024) (as amended) (citing *Nath*, 467 F.3d at 1189); *see Poblete Mendoza v. Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010) ("A conviction vacated for reasons 'unrelated to the merits of the underlying criminal proceedings' may be used as a conviction in removal proceedings whereas a conviction vacated because of a procedural or substantive defect in the criminal proceedings may not." (citation omitted)).

Where the state court's order vacating petitioner's conviction under California Penal Code § 1473.7(a)(1) stated that vacatur was based on a constitutional violation and a non-knowing guilty plea, the BIA erred in finding that vacatur was solely for immigration purposes. *Bent*, 115 F.4th at 940-41 (explaining that remand would not be frivolous because the BIA plainly erred in construing both California Penal Code § 1473.7(a)(1) and the order vacating petitioner's conviction).

Where a reversed or vacated conviction serves as the basis for removability, the government bears the burden of proving that the state court reversed or vacated a prior conviction for reasons other than the merits. *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011) ("[T]he inquiry must focus on the state court's rationale for vacating the conviction, and the burden is on the government to prove that it was vacated *solely* for rehabilitative reasons or reasons related to [petitioner's] immigration status." (citation and internal quotation marks omitted)); *Nath*, 467 F.3d at 1189 (government failed to carry its burden where the record did not reveal the state court's reasons for setting aside petitioner's first conviction); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 n.3 (9th Cir. 2006) ("[F]or the government to carry its burden in establishing that a conviction remains valid for immigration purposes, the government must prove with clear, unequivocal and convincing evidence, that the Petitioner's conviction was quashed *solely* for rehabilitative reasons or reasons related to his immigration status, *i.e.*, to avoid adverse immigration consequences." (citation and internal quotation marks omitted)). Where a conviction serves as the basis for denying an application for relief, the applicant bears the burden of proving that the conviction was vacated because of a substantive or procedural defect in criminal proceedings, and not solely for immigration purposes or for a rehabilitative or equitable reason. *Ballinas-Lucero v. Garland*, 44 F.4th 1169, 1171-72, 1181 (9th Cir. 2022) (petitioner carried burden of proving that his California conviction was vacated for a substantive or procedural defect in criminal proceedings).

An overturned or vacated conviction does not, by itself, excuse failure to comply with the 90-day deadline to file a motion to reopen with the agency. *Compare Cardoso-Tlaseca*, 460 F.3d at 1107-08 (holding that the regulatory bar on filing a motion to reopen after a noncitizen's departure from the country does not apply to a person who was removed due to a later-expunged conviction, and remanding the BIA's denial of a timely motion to reopen for consideration of whether the conviction was vacated on the merits or because of immigration consequences), *and Wiedersperg v. INS*, 896 F.2d 1179, 1182-83 (9th Cir. 1990) (noncitizen was entitled to reopen proceedings where state conviction, which was the sole ground for his deportation, was vacated), *with Lara-Garcia v. Garland*, 49 F.4th 1271, 1273 (9th Cir. 2022) ("[T]he *Cardoso-Tlaseca* rule applies only to timely motions; it does not excuse an untimely motion . . . . [B]ecause Petitioner waited ten years to expunge his conviction, the BIA permissibly concluded that he failed to show sufficient diligence to warrant equitable tolling."), *and Perez-Camacho v. Garland*, 54 F.4th 597, 604 n.9, 607 (9th Cir. 2022) (as amended) (explaining that the ruling in *Wiedersperg* did not create an exception to the time and number requirements for the filing of motions to reopen, as *Wiedersperg* was decided before the regulatory time-and-number bar to motions to reopen went into effect).

2. Expunged (Recalled or Reclassified) Convictions

a. Expungement Generally Does Not Eliminate Immigration Consequences of Conviction

Following codification of the statutory definition of conviction in 8 U.S.C. § 1101(a)(48)(A), this court has deferred to the BIA's interpretation of the statute as "preclud[ing] the recognition of subsequent state rehabilitative expungements of convictions." *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony). "[F]ederal immigration law does not recognize a state's policy decision to expunge (or recall or reclassify) a valid state conviction." *Prado v. Barr*, 949 F.3d 438, 441 (9th Cir. 2020) (holding that reclassification of felony conviction for possession of marijuana as misdemeanor, for rehabilitative rather than substantive purposes, did not affect removability or eligibility for relief). For immigration purposes, [therefore,] a person continues to stand convicted of an offense notwithstanding a later expungement under a state's rehabilitative law." *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expungement of a misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); *see also Marinelarena v. Garland*, 6 F.4th 975, 979 (9th Cir. 2021) (state conviction expunged under California law due to fulfillment of conditions of probation or discharge prior to termination remains a "conviction" for federal immigration purposes); *Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1078-79 (9th Cir. 2013) (notwithstanding expungement of prior felony offense for possession of marijuana for sale, noncitizen was ineligible for adjustment of status); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

See also *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081, 1089 (9th Cir. 2021) (as amended) (holding "that California's amendment to § 18.5 of the California Penal Code, which retroactively reduces the maximum misdemeanor sentence to 364 days for purposes of state law, cannot be applied retroactively for purposes of § 1227(a)(2)(A)(i)").

b. Exception for Simple Drug Possession Offenses

In general, for convictions occurring **prior to July 14, 2011**, *see Nunez-Reyes v. Holder*, 646 F.3d 684, 694 (9th Cir. 2011) (en banc), the government may not remove a noncitizen on the basis of a simple drug possession conviction that has been expunged under a state rehabilitative statute and would satisfy the requirements of the Federal First Offender Act ("FFOA"), 18 U.S.C. § 3607. *See Vega-Anguiano v. Barr*, 982 F.3d 542, 546 (9th Cir. 2020) (as amended) ("For convictions occurring prior to July 14, 2011, the government may not remove an alien on the basis of a simple drug possession conviction, if the conviction has been expunged under a state rehabilitative statute and the alien has satisfied the requirements of the Federal First Offender Act." (citing *Lujan-Armendariz v. INS*, 222 F.3d 728, 749-50 (9th Cir. 2000), *overruled by Nunez-Reyes*, 646 F.3d at 690)); *see also Lopez v. Sessions*, 901 F.3d 1071, 1075 (9th Cir. 2018) (same); *Rice v. Holder*, 597 F.3d 952, 956-57 (9th Cir. 2010) (noncitizen's conviction in state court for using or being under the influence of a controlled substance was eligible for the same immigration treatment as those convicted of drug possession under FFOA), *overruled by Nunez-Reyes*, 646 F.3d at 695; *Romero v. Holder*, 568 F.3d 1054, 1059-60 (9th Cir. 2009), *overruled by Nunez-Reyes*, 646 F.3d at 690; *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 806-08 (9th Cir. 2009) (noncitizen's conviction for possession of drug paraphernalia under California law qualified for similar treatment under *Lujan-Armendariz* rationale), *overruled by Nunez-Reyes*, 646 F.3d at 690; *Dillingham v. INS*, 267 F.3d 996, 1006-07 (9th Cir. 2001) (reversing BIA's refusal to recognize foreign expungement of simple possession that would have qualified for federal first offender treatment), *overruled by Nunez-*

Reyes, 646 F.3d at 690. The noncitizen's offense had to fall within the scope of the FFOA, and not just a state rehabilitative statute, for the noncitizen to avoid immigration consequences. *See Dillingham*, 267 F.3d at 1006-07; *Aguiluz-Arellano v. Gonzales*, 446 F.3d 980, 983-84 (9th Cir. 2006). Moreover, the federal first offender exception does not apply to convicted noncitizens who are eligible for, but have not yet received, expungement of the conviction. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1291 (9th Cir. 2004) (removal order based on conviction that had not yet been expunged did not violate equal protection). "FFOA relief is unavailable when an offender has violated a condition of probation." *Estrada v. Holder*, 560 F.3d 1039, 1041 (9th Cir. 2009), *overruled in part as recognized by Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015).

In *Villavicencio-Rojas v. Lynch*, 811 F.3d 1216 (9th Cir. 2016), the court held that "two counts amount[ed] to a single 'offense' under the FFOA because they arose out of a single event, composed a single criminal case, and triggered a single, undivided sentence." *Id.* at 1219. As such, although the petitioner "was charged with possession of two different drugs, that alone does not change [the petitioner's] status as a first-time drug offender under the FFOA." *Id*. (because convictions occurred prior to 2011, *Nunez-Reyes* did not bar Villavicencio from relief).

"[T]he FFOA only applies to first time drug offenders convicted of simple possession of a controlled substance." *Lopez*, 901 F.3d at 1075 ("Because Lopez was convicted of possession *for sale* of a controlled substance, the exception does not apply.").

The court has held that persons convicted of possession of drug paraphernalia may be eligible for the same immigration treatment as those convicted under the FFOA. *See Ramirez-Altamirano*, 563 F.3d at 808-09 (pre-*Nunez-Reyes*, applying rule in *Lujan-Armendariz*) (petitioner convicted of violating Cal. Health & Safety Code § 11364).

In *Romero v. Holder* (pre-*Nunez-Reyes*, applying rule in *Lujan-Armendariz*), the court held that the "facts underlying a conviction that would have been eligible for relief under the FFOA, but was expunged under a state rehabilitative statute, cannot serve as an 'admission' of a drug offense, statutorily barring a finding of good moral character under 8 U.S.C. § 1101(f)(3)." *Romero*, 568 F.3d at 1062.

In *Nunez-Reyes*, the court overruled *Lujan-Armendariz*, holding that the constitutional guarantee of equal protection does not require treating an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under FFOA. *Nunez-Reyes*, 646 F.3d at 690. Accordingly, all cases that followed the rule in *Lujan-Armendariz* were overruled. The new rule announced by *Nunez-Reyes* applies only prospectively. *Nunez-Reyes*, 646 F.3d at 690-94 (holding that *Lujan-Armendariz* continues to apply to those noncitizens convicted before the publication date of *Nunez-Reyes*, July 14, 2011); *see also Lopez*, 901 F.3d at 1075 n.2 (applying *Lujan-Armendariz*, where conviction was before the publication date of *Nunez-Reyes*); *Villavicencio-Rojas*, 811 F.3d at 1218 ("The parties agree that *Nunez-Reyes* does not bar Villavicencio from relief, as his convictions occurred before 2011.").

The "en banc decision in *Nunez-Reyes* focused on the equal protection issue, and '[the court] assume[d], without deciding, that the statutory term "'conviction'" includes expunged state convictions." *Reyes v. Lynch*, 834 F.3d 1104, 1107 (9th Cir. 2016) (citation omitted). In *Reyes*, the court held that "a state conviction expunged under state law is still a conviction for purposes of eligibility for cancellation of removal and adjustment of status. And even though incarceration is not required, the federal definition of conviction is satisfied regardless of the rehabilitative purpose of probation, where the noncitizen was punished or his liberty was restrained by the terms of his probation." *Id.* at 1108.

c. Pardon Waiver

8 U.S.C. § 1227(a)(2)(A)(iv), the "pardon waiver," provides that the statutory provisions permitting removal for crimes of moral turpitude, *id.* § 1227(a)(2)(A)(i), multiple criminal convictions, *id.* § 1227(a)(2)(A)(ii), aggravated felonies, *id.* § 1227(a)(2)(A)(iii), and high speed flight, *id.* § 1227(a)(2)(A)(iv), "shall not apply . . . if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States." *Id.* § 1227(a)(2)(A)(vi); *see Lopez v. Garland*, 116 F.4th 1032, 1042-43 (9th Cir. 2024) (describing the pardon waiver and its history). In *Lopez v. Garland*, the court held that the potential lack of availability of a pardon for a particular conviction does not render the conviction an improper basis for removal. *Id.* at 1043-44 (interpreting the statute independently following *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and holding that the BIA correctly concluded that the possibility of obtaining a pardon is not a prerequisite to removal under 8 U.S.C. § 1227(a)(2)).

E. Definition of Sentence

Under the INA, "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B); *see also Troncoso-Oviedo v. Garland*, 43 F.4th 936, 941 (9th Cir. 2022) (pretrial detention that is not credited toward a defendant's sentence is not "confinement, as a result of conviction" for purposes of determining good moral character under 8 U.S.C. § 1101(f)(7), as required to establish eligibility for cancellation of removal); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132-33 (9th Cir. 2016) ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." (quoting 8 U.S.C. § 1101(a)(48)(B))).

In the criminal context, the court has held that the sentence imposed may be the term later imposed after revocation of probation. *See United States v. Jimenez*, 258 F.3d 1120, 1125-26 (9th Cir. 2001) (defendant in unlawful reentry case was convicted of aggravated felony because even though he was initially granted probation, probation was revoked and he was sentenced to two years' imprisonment).

1. One-Year Sentences

A sentence "for which the term of imprisonment [is] at least one year" means the actual sentence imposed by the court. *Alberto-Gonzalez v. INS*, 215 F.3d 906, 910 (9th Cir. 2000) (rejecting government's contention that the relevant term of imprisonment is the potential sentence that the judge could have imposed); *see also United States v. Pimentel-Flores*, 339 F.3d 959, 962 (9th Cir. 2003) ("The phrase 'for which the term of imprisonment [is] one year or more' refers to the actual sentence imposed in the earlier felony case, not the maximum available sentence." (citation omitted)).

The phrase "at least one year" refers to a sentence of 365 days or more. *See Olea-Serefina v. Garland*, 34 F.4th 856, 862 (9th Cir. 2022) (petitioner's sentence included "a jail term of 365 days, which meets the statutory requirement of a term of 'at least one year'" (citing 8 U.S.C. § 1101(a)(43)(F)); *Matsuk v. INS*, 247 F.3d 999, 1001-02 (9th Cir. 2001) (rejecting petitioner's contention that the phrase "should be read to mean a 'natural or lunar' year, which is composed of 365 days and some hours"), *overruled on other grounds by Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc); *Bayudan v. Ashcroft*, 298 F.3d 799, 800 (9th Cir. 2002) (order) (setting aside previous order dismissing petition for lack of jurisdiction because 364-day sentence for manslaughter was not a crime of violence constituting an aggravated felony); *see also Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132-33 (9th Cir. 2016) ("[A] sentence of 365 days equates to imprisonment of 'at least one year.'"); *United States v. Gonzalez-Tamariz*, 310 F.3d 1168, 1171 (9th Cir. 2002).

2. Recidivist Enhancements

Recidivist enhancements are not considered when determining the nature of an offense, but may be considered when calculating the amount of time served on account of an offense. In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4, the defendant received a two-year sentence for his conviction for petty theft with a prior conviction. *Id.* at 1208. This court held that the conviction was not an aggravated felony under federal sentencing law because the maximum possible sentence for petty theft in California, without the recidivist enhancement, was six months. *Id.* at 1210; *see also Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) (petitioner was not convicted of an aggravated felony which would deprive the court of jurisdiction because his California conviction of petty theft with a prior conviction was not a crime for which a sentence of one year or longer could be imposed). However, this court held in *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007), *implied overruling on other grounds recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013), that for purposes of determining eligibility for relief under former § 212(c), it could consider recidivist enhancements when calculating the amount of time served. *Id.* at 1129. *Saravia-Paguada* explained that *Corona-Sanchez* and *Rusz* stand for the proposition that recidivism should not inform the nature of an offense, but may be considered when determining the actual time served. *Saravia-Paguada*, 488 F.3d at 1127-29.

Note that in *United States v. Rodriguez*, 553 U.S. 377 (2008), the Supreme Court reversed the Ninth Circuit's decision in *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), which applied the rule in *Corona-Sanchez* holding that the maximum term of imprisonment under the Armed Career Criminal Act must be determined without taking recidivist enhancements into account. In reversing the Ninth Circuit's decision, the Supreme Court held that when determining the "maximum term of imprisonment," it is necessary to refer to the applicable recidivist enhancements for prior offenses. *Rodriguez*, 553 U.S. at 382-84; *see also* *United States v. Rivera*, 658 F.3d 1073, 1076 (9th Cir. 2011) ("because the recidivist sentence *does* relate to the commission of the repeat offense and is clearly part of the sentence "prescribed by law," a recidivist sentence may be considered in determining whether a prior conviction qualifies as a predicate offense"), *overruled in part as stated in* *Lopez-Valencia v. Lynch*, 798 F.3d 863, 872 n.6 (9th Cir. 2015).

3. Misdemeanors

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court held that a state drug offense may be an aggravated felony only if it proscribes conduct punishable as a felony under federal law. *Id.* at 60. However, an offense designated by the state as a misdemeanor, but by federal law as a felony, may qualify as an aggravated felony. *See*, *e.g.*, *United States v. Alvarez-Gutierrez*, 394 F.3d 1241, 1244-45 (9th Cir. 2005); *United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002); *see also* *Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011); *United States v. Rivera*, 658 F.3d 1073, 1075-76 (9th Cir. 2011) (holding that defendant's state felony petty theft conviction qualified as an aggravated felony, although under California law a conviction for petty theft was a misdemeanor), *overruled in part as stated in* *Lopez-Valencia v. Lynch*, 798 F.3d 863, 872 n.6 (9th Cir. 2015). This court has found that a state conviction for misdemeanor sexual battery was a crime involving moral turpitude. *See* *Gonzales-Cervantes v. Holder*, 709 F.3d 1265, 1267 (9th Cir. 2013).

In *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081 (9th Cir. 2021), the court held that "that California's amendment to § 18.5 of the California Penal Code, which retroactively reduces the maximum misdemeanor sentence to 364 days for purposes of state law, cannot be applied retroactively for purposes of § 1227(a)(2)(A)(i)." *Id.* at 1089.

4. Wobblers

An "offense [that] can result in a range of punishments . . . is referred to as a 'wobbler' statute, providing for either a misdemeanor or a felony conviction." *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003), *overruled on other grounds by* *Ceron v. Holder*, 747 F.3d 773, 777 (9th Cir. 2014) (en banc); *see also* *Arrellano Hernandez v. Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016); *Ceron*, 747 F.3d at 777 (certain statutes "are known in California as 'wobblers' because the state court can treat a conviction under [the statute] either as a felony or as a misdemeanor"); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1051 (9th Cir. 2004), *overruled on other grounds by Ceron*, 747 F.3d at 777-78; *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999). For wobbler offenses, "it is clear that a state court's designation of a criminal offense [as a misdemeanor or a felony] is binding on the BIA for purposes of determining whether there has been a conviction under the INA." *Garcia-Lopez*, 334 F.3d 840, 844 (9th Cir. 2003), *overruled on other grounds by Ceron*, 747 F.3d at 777-78.

> "Under California law, a 'wobbler' is presumptively a felony and 'remains a felony except when the discretion is actually exercised' to make the crime a misdemeanor." [*Ewing v. California*, 538 U.S. 11, 16 (2003)]. An offense is "deemed a felony" when a defendant is convicted and "granted probation without the imposition of a sentence." *People v. Feyrer*, 48 Cal. 4th 426, 106 Cal. Rptr. 3d 518, 226 P.3d 998, 1007 (2010), *superseded by statute on another ground as stated in People v. Park*, 56 Cal.4th 782, 156 Cal.Rptr.3d 307, 299 P.3d 1263, 1266 n.4 (2013). The offense remains a felony unless the sentencing court subsequently reduces it to a misdemeanor.

Arrellano Hernandez, 831 F.3d at 1132.

In *Ceron*, the en banc court explained that California Penal Code Section 19 "specifies a general statutory maximum penalty of six months' imprisonment in the county jail for all misdemeanors, '*[e]xcept* in cases where a different punishment is prescribed by any law of this state.'" *Ceron*, 747 F.3d at 778 (quoting Cal. Penal Code § 19). When a different maximum penalty is prescribed by statute, the six-month default maximum does not apply. *Id.* The court explained that in both *Garcia-Lopez* and *Ferreira*, the court erroneously applied the six-month maximum. *Id.* Accordingly, the en banc court overruled that aspect of those cases. *Id.*

F. Overlap with Other Immigration and Criminal Sentencing Areas of Law

Some grounds of inadmissibility do not require that a noncitizen be convicted of or admit to a crime, but rather require proof of undesirable behavior. Although not considered here, these grounds should be kept in mind as they may overlap with the grounds discussed in this section. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(D)(i) (prostitution and commercialized vice); 8 U.S.C. § 1182(a)(6)(E)(i) (alien smuggling); 8 U.S.C. § 1182(a)(2)(E) (noncitizens asserting immunity from prosecution); 8 U.S.C. § 1182(a)(2)(H) (trafficking in persons); 8 U.S.C. § 1182(a)(2)(I) (money laundering).

The criminal sentencing guidelines also are similar to certain immigration provisions, and thus cases interpreting them may be relevant. U.S.S.G. § 2L1.2 defines "aggravated felony" with specific reference to 8 U.S.C. § 1101(a)(43) (under § 2L1.2, certain drug trafficking offenses, crimes of violence, aggravated felonies, etc. may be used to enhance a noncitizen's sentence for violating 8 U.S.C. § 1326), and should be relevant to immigration cases considering the same statute. In some cases, the court has found criminal sentencing cases controlling in the immigration context. For example, this court has held that for purposes of determining whether a crime constituted aggravated felony sexual abuse of a minor, prior precedent in a criminal case was controlling. *See Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066-67 (9th Cir. 2003) (citing *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999), and rejecting petitioner's argument that because it is a criminal case, it is not controlling in the immigration context); *see also Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (per curiam) (applying construction of "crime of violence" from sentencing case); *Castro-Baez v. Reno*, 217 F.3d 1057, 1058-59 (9th Cir. 2000) (applying definition of rape adopted in a criminal case); *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) (applying the uniform definition of "burglary" in the Career Criminals Amendment Act).

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court held that the same definition of aggravated felony drug offense should be used in both the criminal sentencing and immigration contexts, rejecting the Ninth Circuit's prior cases which defined the term differently in the two contexts. *Id.* at 52 n.3, 57. The Court held that in both contexts, a state offense could be an aggravated felony only if it proscribes conduct punishable as a felony under federal law. *Id.* at 60.

U.S.S.G. § 2L1.2 also has provisions regarding crimes of violence, firearms offenses, and drug trafficking offenses. Cases interpreting these statutes may also be useful in analyzing criminal immigration cases, but these terms are defined differently in the immigration statute, and thus cases interpreting them are not controlling. *Compare Valencia v. Gonzales*, 439 F.3d 1046, 1053 (9th Cir. 2006) (holding that statutory rape is not a crime of violence under the immigration statute), *with United States v. Asberry*, 394 F.3d 712, 717-18 (9th Cir. 2005) (holding that statutory rape is a crime of violence under U.S.S.G. § 4B1.2); *see also Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006) (holding that the modified categorical approach applies to prior crimes of domestic violence and distinguishing *United States v. Belless*, 338 F.3d 1063, 1065-67 (9th Cir. 2003), *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014), which held otherwise); *but see Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (discussing rule of lenity and stating that the statutory definition of crime of violence must be interpreted "consistently, whether we encounter its application in a criminal or noncriminal context").

Cross-reference: Aggravated Felonies, Offenses Defined as Aggravated Felonies, Illicit Trafficking in Controlled Substances, or State Drug Offenses.

III. METHOD OF ANALYSIS

A. Standard of Review

This court reviews de novo whether a state or federal conviction is an offense with immigration consequences. *Diaz-Quirazco v. Barr*, 931 F.3d 830, 838 (9th Cir. 2019); *see*, *e.g.*, *Ortiz v. Garland*, 25 F.4th 1233, 1226 (9th Cir. 2022) (reviewing de novo whether a state conviction constitutes a crime involving moral turpitude for removal purposes); *Valdez v. Garland*, 28 F.4th 72, 76 (9th Cir. 2022) (reviewing de novo whether a state conviction was an aggravated felony); *Walcott v. Garland*, 21 F.4th 590, 593 (9th Cir. 2021) (reviewing de novo whether a particular conviction under state law was a removable offense); *Amaya v. Garland*, 15 F.4th 976, 980 (9th Cir. 2021) (reviewing de novo whether a criminal conviction was a crime of violence and therefore an aggravated felony rendering noncitizen removable); *Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1070 (9th Cir. 2021) (reviewing de novo whether a particular offense was an aggravated felony under the INA); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1130 (9th Cir. 2016) ("We review de novo whether a particular conviction under state law is a removable offense.").

The court reviews for an abuse of discretion whether a crime is particularly serious, rendering a noncitizen ineligible for withholding of removal. *Edgar G.C. v. Bondi*, 136 F.4th 832, 842 (9th Cir. 2025); *see also Mendoza-Garcia v. Garland*, 36 F.4th 989, 993 (9th Cir. 2023); *Hernandez v. Garland*, 52 F.4th 757, 765 (9th Cir. 2022) ("Deciding whether an offense constitute a particularly serious crime involves the exercise of discretion, and Congress has limited our jurisdiction to review the agency's discretionary decisions. Accordingly, we may review a particularly-serious-crime determination only for abuse of discretion." (citations omitted)); *Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1230 (9th Cir. 2021); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015); *Arbid v. Holder*, 700 F.3d 379, 383 (9th Cir. 2012) (per curiam) ("[D]etermining whether a crime is particularly serious is an inherently discretionary decision, and we will review such decisions for abuse of discretion.”). “[W]e 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*, 52 F.4th at 765 (citing *Avendano-Hernandez*, 800 F.3d at 1077; internal quotation marks omitted)); *see also Alcaraz-Enriquez*, 19 F.4th at 1230-31; *Bare v. Barr*, 975 F.3d 952, 961 (9th Cir. 2020).

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court rejected *Chevron* deference, directing that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.” *Id.* at 412. Prior to *Loper Bright*, courts determined whether the agency’s interpretation of statutes that it administered was entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See*, *e.g.*, *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 990 (9th Cir. 2018) (“Under *Chevron*, we afford deference to the Board’s reasonable interpretations of ambiguous statutes it is charged with administering.” (citation omitted)); *see also Barbosa v. Barr*, 926 F.3d 1053, 1057 (9th Cir. 2019) (as amended) (explaining that the court affords no deference to the agency’s determination of the elements of a statute of conviction, because “the BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes” (citation omitted)). After *Loper Bright*, “we may look to agency interpretations for guidance, but do not defer to the agency.” *Lopez v. Garland*, 116 F.4th 1032, 1036, 1039 (9th Cir. 2024) (explaining that following *Loper Bright*, “our task is to evaluate the statute independently under *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)], giving ‘due respect’ but not binding deference to the agency’s interpretation” (citing *Loper Bright Enters.*, 603 U.S. at 403)); *see Skidmore*, 323 U.S. at 140 (explaining that, while an agency’s interpretation is “not controlling,” it may have “power to persuade” based on “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements”). The *Loper Bright* Court, however, did not “call into question prior cases that relied on the *Chevron* framework,” which “are still subject to statutory *stare decisis* despite our change in interpretive methodology.” *Loper Bright Enter.*, 603 U.S. at 412; *see also Lopez*, 116 F.4th at 1045 (explaining that following *Loper Bright*, where the agency “has not promulgated a new interpretation of the statute to prompt us to reconsider our precedent,” and “absent ‘intervening authority’ that is ‘clearly irreconcilable with’” such precedent, a three-judge panel remains bound by prior case law affording *Chevron* deference to the agency (citing *Miller v. Gammie*, 339 F.3d 889, 893, 900 (9th Cir. 2003) (en banc)).

B. Categorical Approach

"The [Supreme] Court first discussed the categorical approach in the criminal context, but it has since migrated into . . . INA cases." *Pereida v. Wilkinson*, 592 U.S. 224, 233 (2021). In *Pereida*, the Court explained that when applying the categorical approach, "a court does not consider the facts of an individual's crime as he actually committed it. Instead, a court asks only whether an individual's crime of conviction necessarily—or categorically—triggers a particular consequence under federal law." *Id.*

To determine whether a conviction categorically constitutes a predicate offense for immigration purposes, the court applies the two-step approach set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990) and *Shepard v. United States*, 544 U.S. 13, 15 (2005). *See Silva v. Garland*, 993 F.3d 705, 712 (9th Cir. 2021) ("To determine whether an alien's crime of conviction subjects the alien to removal under 8 U.S.C. § 1227(a)(2)(A)(ii), we apply the categorical approach set forth in *Taylor v. United States*, [495 U.S. 575 (1990)]."); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1100 (9th Cir. 2011) (as amended) (to review the BIA's determination that petitioner's convictions were for generic attempted theft offenses, "we use the categorical and modified categorical approaches of [*Taylor*] and [*Shepard*]."); *see also Barbosa v. Barr*, 926 F.3d 1053, 1057 (9th Cir. 2019) (as amended) (applying the process mandated by *Descamps v. United States*, 570 U.S. 254 (2013), to evaluate whether a conviction under Oregon Revised Statutes § 164.395 was categorically a crime involving moral turpitude); *Myers v. Sessions*, 904 F.3d 1101, 1107 (9th Cir. 2018) (explaining the categorical approach as set forth in *Taylor* and *Descamps*); *Villavicencio v. Sessions*, 904 F.3d 658, 664 (9th Cir. 2018) (as amended); *Linares-Gonzalez v. Lynch*, 823 F.3d 508, 514 (9th Cir. 2016) ("In determining whether the conduct proscribed by the statute involves moral turpitude, we apply the categorical approach of *Taylor v. United States*, 495 U.S. 575, 598-602 (1990), comparing the elements of the state offense to those of the generic CIMT to determine if there is a categorical match."); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 853 (9th Cir. 2013); *Olivas-Motta v. Holder*, 746 F.3d 907, 910 (9th Cir. 2013); *Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012); *Parrilla v. Gonzales*, 414 F.3d 1038, 1042 (9th Cir. 2005).

> The categorical approach is best understood as a task of statutory matching—we ask whether the statutory elements of the crime of conviction match the elements of the generic offense which serves as the basis for removal. *See Mathis v. United States*, [579 U.S. 500, 504 (2016)]. If the elements of the crime of conviction match (or are narrower than) the elements of the generic offense, then the analysis

can stop: the crime of conviction qualifies as a predicate for removal. *Id.*

Syed v. Barr, 969 F.3d 1012, 1017 (9th Cir. 2020); *see Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024) ("Under the [categorical approach], 'we compare the elements of the state offense'—or in this case, municipal offense—'to the elements of the generic offense defined by federal law.' If the elements of the state or municipal crime are 'the same as or narrower than' the elements of a generic CIMT, it is a 'categorical match' . . . ." (citing *Amanza-Arenas v. Lynch*, 815 F.3d 469, 475 (9th Cir. 2016) (en banc)); *see also Olea-Serefina v. Garland*, 34 F.4th 856, 862 (9th Cir. 2022) (in determining that a violation of California Penal Code § 273d(a), corporal injury on a child, constitutes an aggravated felony crime of violence, the court "appl[ied] a 'categorical approach,' meaning that our 'sole focus is on the elements of the relevant statutory offense, not on the facts underlying the convictions.'" (quoting *United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018)); *Amaya v. Garland*, 15 F.4th 976, 980 (9th Cir. 2021) ("In the crime of violence context, we compare the state statute to 18 U.S.C. § 16(a), rather than a generic assault statute, and we will only find a categorical match if 'every violation of the statute necessarily involves violent force.'" (citations omitted)); *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1115 (9th Cir. 2018) (after identifying requisite elements for conviction under the statute, "we apply the categorical approach to determine whether the elements of conviction match the generic definition of a crime involving moral turpitude"); *Hernandez-Cruz*, 651 F.3d at 1100 (comparing petitioner's convictions under California Penal Code § 459 to the generic crime, attempted theft); *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (stating that the categorical approach is based only on the elements of the statute, and the court will not "look to the particular facts underlying the conviction"). "[W]here a statute 'has both criminal and noncriminal applications,' the statute should be consistently interpreted in both criminal and noncriminal, *i.e.*, immigration, applications." *Alvarado v. Holder*, 759 F.3d 1121, 1126 n.3 (9th Cir. 2014) (citations omitted), *abrogated on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411 (2023). "In the immigration context, [the categorical] approach . . . generally applies in determining whether an alien is removable in the first instance or whether he is statutorily barred from various forms of relief." *Torres-Valdivias v. Lynch*, 786 F.3d 1147, 1152 (9th Cir. 2015).

"Because Congress predicated deportation 'on convictions, not conduct,' the [categorical] approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior." *Mellouli v. Lynch*, 575 U.S. 798, 805 (2015). *See also Pereida*, 59 2 U.S. at 233 ("The categorical approach is required .

. . because the language found in statutes like the INA provision before us don't task courts with examining whether an individual's actions meet a federal standard like 'moral turpitude,' but only whether the individual 'has . . . been convicted of an offense' that does so."); *Lopez*, 116 F.4th at 1038-39 (explaining that the categorical approach "focuses on the elements of the crime as stated in the relevant statute or ordinance rather than the specific conduct of the individual"); *Villavicencio*, 904 F.3d at 664 (explaining that the court examines only the statutory definition of the crime to determine whether the state statute of conviction renders a noncitizen removable under the statute of removal, without looking to the actual conduct underlying the petitioner's offense). "[The court] ignore[s] the actual facts of the particular prior conviction and instead compare[s] the elements of the state statute of conviction to the federal generic crime to determine whether the conduct proscribed by the state statute is broader than the generic federal definition." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 647 (9th Cir. 2020) (citation and internal quotation marks omitted); *see also Ramirez v. Lynch*, 810 F.3d 1127, 1130-31 (9th Cir. 2016) ("To assess whether a state conviction qualifies as an aggravated felony, we generally employ the 'categorical approach' to determine whether the state offense matches the 'generic' federal definition of the pertinent offense listed in the INA:here, a crime of violence under 18 U.S.C. § 16(a) or (b)."); *Mancilla-Delafuente v. Lynch*, 804 F.3d 1262, 1265 (9th Cir. 2015) (explaining that the court compares the elements of the state offense with those of the generic definition of a CIMT to determine if there is a categorical match); *Murillo-Prado v. Holder*, 735 F.3d 1152, 1156 (9th Cir. 2013) (per curiam) ("'[The court] look[s] not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony.'" (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013))). "By 'generic,' [the Court] mean[s] the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Moncrieffe*, 569 U.S. at 190 (citation omitted). "By focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 575 U.S. at 806.

The court will "first make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the state statute] is broader than, and so does not categorically fall within, this generic definition." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887

(9th Cir. 2003); *see also Descamps v. United States*, 570 U.S. 254, 257 (2013) (under the categorical approach "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood."); *Dominguez v. Barr*, 975 F.3d 725, 734 (9th Cir. 2020) (as amended) (comparing the elements of the offense of the petitioner's conviction with the elements of a generic offense); *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1200 (9th Cir. 2018) (comparing the elements of the offense of conviction with the elements of the federal generic offense to see if they are a categorical match); *Ragasa v. Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014) ("Under the categorical approach, we examine only the statutory definition of the crime to determine whether the state statute of conviction renders an alien removable under the statute of removal . . . without looking to the actual conduct underlying the petitioner's offense." (citation and internal quotation marks omitted)); *Rodriguez-Castellon*, 733 F.3d at 853; *Robles-Urrea*, 678 F.3d at 707; *Rohit v. Holder*, 670 F.3d 1085, 1088 (9th Cir. 2012); *Hoang v. Holder*, 641 F.3d 1157, 1159-60 (9th Cir. 2011); *Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010).

"Under the *Taylor* categorical approach, this court must look to 'the ordinary case' that is prosecuted by the state, not some extreme hypothetical." *Rebilas v. Mukasey*, 527 F.3d 783, 785-86 (9th Cir. 2008) (citation omitted) (explaining that, rather than speculating about what conduct Arizona prosecutes under a particular statute, the court looks to Arizona cases to see if any convictions were based on conduct that would not violate the federal generic crime); *see also Dominguez*, 975 F.3d at 734 (noting that the court looks to the offense as commonly understood). The court will examine "what types of conduct are ordinarily prosecuted" under state law. *Rebilas*, 527 F.3d at 786.

> It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007); *see also Alfred v. Garland*, 64 F.4th 1025, 1043-48 (9th Cir. 2023) (en banc) (reviewing Washington case law to see if there is a "realistic probability, not a theoretical possibility" that the state applies accomplice liability for second-degree robbery to conduct that falls outside of the generic Washington accomplice liability is a categorical match with the generic theft definition), *overruling* *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017) and *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018); *United States v. Alvarez*, 60 F.4th 554, 563-66 (9th Cir. 2023) (applying the realistic probability test to determine that petitioner's conviction for felonious assault on a police officer in violation of Ohio Revised Code § 2903.13(A) categorically is a crime of violence under § 16(a) and thus qualifies as an aggravated felony pursuant to § 1101(a)(43)(F)); *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1153-54 (9th Cir. 2020) (applying the realistic probability test and concluding that conviction of possession for sale of methamphetamine in violation of Cal. Health & Safety Code § 11378 is a categorical match to the federal definition of a controlled substance offense). *Cf.* *United States v. Taylor*, 596 U.S. 845, 859 (2022) (distinguishing *Duenas-Alvarez* as concerning the meaning of a *state* statute in which the elements of the state and federal offenses clearly overlapped, and not reaching the question of whether state courts apply the federal statute in question in a "special (nongeneric) manner because there is no overlap to begin with. . . . [as] [a]ttempted Hobbs Act robbery does not require proof of *any* of the elements of [the crime of violence sentencing enhancement that 18 U.S.C.] § 924(c)(3)(A) demands").

In applying the categorical approach, the court "presume[s] that the state conviction 'rested upon . . . the least of th[e] acts' criminalized by the statute, and then . . . determine[s] whether that conduct would fall within the federal definition of the crime." *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)); *see also* *Duenas-Alvarez*, 549 U.S. at 193; *Vasquez-Valle v. Sessions*, 899 F.3d 834, 839 (9th Cir. 2018); *Robles-Urrea*, 678 F.3d at 707; *Jordison v. Gonzales*, 501 F.3d 1134, 1135 (9th Cir. 2007).

The court compares state and federal law at the time of the underlying criminal offense, not at the time of removal proceedings. *Medina-Rodriguez v. Barr,* 979 F.3d 738, 742 (9th Cir. 2020). This court has not yet decided whether the comparison should be made as of the time of arrest, the time of conviction, or the time of the underlying conduct. *Tellez-Ramirez v. Garland*, 87 F.4th 424, 428 n.1 (9th Cir. 2023) (citing *Medina-Rodriguez*, 979 F.3d at 747 n.5).

"[I]n conducting the categorical analysis, [the court does] not consider the availability of affirmative defenses; the fact that there may be an affirmative defense under the federal statute, but not under the state statute of conviction, does not mean that the state conviction does not fall categorically within the federal statute." *Gil v. Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011), *implied overruling on other grounds recognized by United States v. Aguilera-Rios*, 769 F.3d 626, 634 (9th Cir. 2014).

This court has accorded *Chevron* deference to the BIA's interpretation that the categorical approach does not apply in assessing whether a noncitizen is ineligible for cancellation of removal under § 1229b(b)(1)(C) based on having "engaged in conduct" that violates a protection order under § 1227(a)(2)(E)(ii). *Diaz-Quirazco v. Barr*, 931 F.3d 830, 838-43 (9th Cir. 2019).

C. Modified Categorical Approach

The modified categorical approach is a "tool" that helps courts implement the categorical approach when a defendant was convicted of violating an overbroad, divisible statute. *Descamps v. United States*, 570 U.S. 254, 263 (2013). "All the modified approach adds is a mechanism for [comparing the elements of a statute of conviction to those of the generic offense] when a statute lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" *Id*. (citation omitted).

"Only in the 'narrow range of cases' where an overbroad statute is divisible [does the court] proceed to the . . . 'modified categorical approach.'" *Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1071 (9th Cir. 2021) (citation omitted); *see also Tellez-Ramirez v. Garland*, 87 F.4th 424, 432-34 (9th Cir. 2023) (concluding Idaho possession of a controlled substance with intent to deliver is overbroad and divisible as to substance, but not as to mens rea). A statute of conviction is "overbroad" where it "criminalizes a broader swath of conduct than the generic . . . offense." *Lopez-Marroquin*, 9 F.4th at 1069. If a statute is "overbroad" then the question of divisibility arises. *Id*. at 1071.

A statute is divisible where it lists the elements in the disjunctive, *and* state law requires that a jury unanimously agree as to the disjunctively phrased element in order to convict. *See Rendon v. Holder*, 764 F.3d 1077, 1084-90 (9th Cir. 2014) (distinguishing alternative means versus elements and determining that California second-degree burglary is indivisible where a jury could convict without agreeing on whether the defendant had the intent to commit "grand or petit larceny" *or* "any [non-theft] felony"); *see also Murillo-Chavez v. Bondi*, 128 F.4th 1076, 1083-84 (9th Cir. 2025) (concluding that Oregon Revised Statutes § 166.250, unlawful possession of a firearm, "prohibits a disjunctive set of offenses and is therefore divisible" based on the text of the statute and state-court decisions and jury instructions treating violations of subsections of the statute as separate crimes); *Tellez-Ramirez,* 87 F.4th at 430 & n.2 (looking at text of statute, state-court precedent, and state jury instructions to conclude that Idaho controlled substance offense is divisible as to substance); *Padilla-Martinez v. Holder*, 770 F.3d 825, 831-32 n.3 (9th Cir. 2014) ("A statute is divisible if it contains multiple, alternative elements of functionally separate crimes, and as to each alternative element, the jury must then find that element, unanimously and beyond a reasonable doubt." (citation and internal quotation marks omitted)). If a statute lists only "'alternative means of committing the same crime,' it is not divisible." *United States v. Linehan*, 56 F.4th 693, 700 (9th Cir. 2022) (quoting *Almanza-Arenas v. Lynch*, 815 F.3d 469, 478 (9th Cir. 2016) (en banc)). "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Mathis v. United States*, 579 U.S. 500, 504 (2016) (quoting Black's Law Dictionary 634 (10th ed. 2014)).

In *Descamps*, the Supreme Court overruled this court's holding in *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 940 (9th Cir. 2011) (en banc), which held that the modified categorical approach applied to the analysis of whether a prior conviction under a statute missing an element of the generic crime was a crime of violence. After *Descamps*, the court "no longer analyzes a statute missing an element of a generic offense . . . under the modified categorical approach." *United States v. Gomez*, 757 F.3d 885, 889 (9th Cir. 2014). Rather, "[i]f a statute is not divisible or if there is no match under the modified approach, the conviction will not serve as a basis of removal." *Syed v. Barr*, 969 F.3d 1012, 1017 (9th Cir. 2020).

If one alternative of a divisible statute matches an element of a generic offense, but another does not, "the modified categorical approach permits . . . courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 570 U.S. at 257; *see also Pereida v. Wilkinson*, 592 U.S. 224, 238) (explaining that the court has "described the modified categorical approach as requiring courts to 'review . . . record materials' to determine which of the offenses in a divisible statute the defendant was convicted of committing" (quoting *Mathis v. United States*, 578 U.S. 500, 502 (2016))). This approach thus "calls on courts to consider 'extra-statutory materials' to 'discover' the defendant's crime of conviction." *Pereid*, 592 U.S. at 238.

Although the court will "look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction," it will not "look beyond the record of conviction itself to the particular facts underlying the conviction." *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004); *see also Maie v. Garland*, 7 F.4th 841, 852 (9th Cir. 2021) ("The modified categorical approach allows us to consider a particular class of documents to determine the elements established by the prior conviction, without considering the factual circumstances of the crime."); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (stating that the court will "conduct a limited examination of documents in the record to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially over-inclusive"). The modified categorical approach "is concerned only with the crime of which the defendant was convicted, and not with his *conduct*." *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011).

To prove removability under the modified categorical approach, "the evidence submitted by the government . . . must meet a clear and convincing standard." *Murillo-Prado v. Holder*, 735 F.3d 1152, 1157 (9th Cir. 2013) (per curiam); *see also Mendoza-Garcia v. Garland*, 36 F.4th 989, 998 (9th Cir. 2022) (government met burden of showing that petitioner had been sentenced to a term of imprisonment of at least one year for purposes of establishing removability for conviction of an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) (citing 8 U.S.C. § 1229a(c)(3)(A)); *Quintero-Salazar v. Keisler*, 506 F.3d 688, 694 (9th Cir. 2007) ("[T]he government has the burden to establish clearly and unequivocally the conviction was based on all of the elements of a qualifying predicate offense." (citations and internal quotation marks omitted)); *Coronado v. Holder*, 759 F.3d 977, 983 (9th Cir. 2014) (government met burden of proving, under the modified categorical approach, that petitioner's convictions were removable offenses).

To prove eligibility for relief, an applicant bears the burden of proving that ambiguous, divisible criminal convictions do not result in ineligibility. *Pereid*, 592 U.S. at 235 (applicant for cancellation of removal failed to carry burden of proving he had not committed a CIMT where the statute of conviction is divisible and the record of conviction ambiguous).

The BIA's divisibility analyses and application of the modified categorical approach, which involves the application of a legal standard to established facts, are reviewable under § 1252(a)(2)(D). *Romero-Millan v. Garland*, 46 F.4th 1032, 1040 (9th Cir. 2022).

1. Charging Documents, Abstracts of Judgment, Plea Documents, and Minute Orders

"[A] court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013); *see also Khalulyan v. Garland*, 63 F.4th 1207, 1210 (9th Cir. 2023) (holding that, in evaluating whether the government has satisfied the "exceed[ing] $10,000" requirement for a fraud or deceit aggravated felony at 8 U.S.C. § 1101(a)(43)(M)(i), the agreed-upon sentencing enhancement in petitioner's plea agreement was sufficient to prove that his offense of conviction involved more than $10,000 in losses); *Romero-Millan v. Garland*, 46 F.4th 1032, 1043 (9th Cir. 2022) ("The IJ did not err by applying the modified categorical approach to examine the underlying record of conviction. The charging documents, the plea colloquy, and the plea agreement establish that the substance upon which the conviction . . . was based was cocaine, a substance on the federal list. The BIA did not err in concluding that the drug type underlying his conviction was cocaine."); *Mendoza-Garcia v. Garland*, 36 F.4th 989, 995-96 (9th Cir. 2022) ("In his plea agreement, Petitioner admits: 'I unlawfully and knowingly entered and remained in *an occupied dwelling* with the intent to commit the crime of theft therein.' . . . Accordingly, we conclude that Petitioner was convicted of first-degree burglary of a dwelling."); *Dominguez v. Barr*, 975 F.3d 725, 735 (9th Cir. 2020) (as amended) (when applying the modified categorical approach, the court examines a limited class of documents—such as the charging instrument, jury instructions, jury verdict, or plea agreement— to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction); *Tejeda v. Barr*, 960 F.3d 1184, 1187 (9th Cir. 2020) (per curiam) ("Applying the modified categorical approach, Tejeda's plea agreement, the charging document, and the minute order are cognizable for modified-categorical-approach purposes, … , and establish the elements of his offense."); *Altayar v. Barr*, 947 F.3d 544, 549 (9th Cir. 2020) ("When, as here, the conviction is based on a guilty plea, we may examine the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (citation omitted)); *Vasquez-Valle v. Sessions*, 899 F.3d 834, 843 (9th Cir. 2018) (explaining under the modified categorical approach, the court can look beyond the statutory text to a limited set of documents to determine which statutory phrase was the basis for the conviction, including the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.); *Diego v. Sessions*, 857 F.3d 1005, 1014 (9th Cir. 2017) (considering the indictment and the plea petition); *Ramirez v. Lynch*, 810 F.3d 1127, 1131 (9th Cir. 2016) ([W]e may look beyond the elements of the statute to the documents of conviction, i.e., to the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment, to determine whether the petitioner was convicted of a set of elements that falls within the generic definition."); *United States v. Torre-Jimenez*, 771 F.3d 1163, 1167 (9th Cir. 2014) (criminal complaint, abstract of judgment, and docket sheet were appropriate sources for review under the modified categorical approach); *Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014) (reliance on the abstract of judgment in combination with a charging document is permitted under the modified categorical approach); *Ragasa v. Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014) ("Under the modified categorical approach, [the court] review[s] 'a limited set of documents in the record of conviction: the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings'"); *Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) ("Where the minute order or other equally reliable document specifies that a defendant pleaded guilty to a particular count of a criminal complaint, the court may consider the facts alleged in the complaint."); *Murillo-Prado v. Holder*, 735 F.3d 1152, 1156 (9th Cir. 2013) (per curiam) (the modified categorical approach permits courts to consider a limited class of documents, such as indictments and jury instructions). Documents such as the indictment, jury instructions, plea colloquy and plea agreement, are merely illustrative and documents of equal reliability may also be considered. *See Rivera v. Lynch*, 816 F.3d 1064, 1078 (9th Cir. 2016); *United States v. Leal-Vega*, 680 F.3d 1160, 1168 (9th Cir. 2012); *see also Pereida v. Wilkinson*, 592 U.S. 224, 242 (2021) (pointing to 8 U.S.C. § 1229a(c)(3)(B) and suggesting that an applicant for relief may meet his burden of proving that a conviction is not disqualifying where the record of conviction is ambiguous by looking to non-*Shepard* documents).

"In the context of a guilty plea, the modified categorical approach inquires whether a guilty plea to an offense defined by a nongeneric statute *necessarily admitted* elements of the generic offense." *Garcia v. Lynch*, 786 F.3d 789, 795 (9th Cir. 2015) (quoting *Alvarado v. Holder*, 759 F.3d 1121, 1130 (9th Cir. 2014)). If a noncitizen's admissions or concession leave material issues in dispute, the IJ may rely on facts admitted at the pleading stage, but may not consider further statements made by the noncitizen unless they are contained in the specific set of documents that are part of the record of conviction. *Pagayon v. Holder*, 675 F.3d 1182, 1189 (9th Cir. 2011) (per curiam).

A rap sheet may form part of the record of conviction. *See Lozano-Arredondo v. Sessions*, 866 F.3d 1082, 1087-88 (9th Cir. 2017) (recognizing that a rap sheet may form part of the "record of conviction," but concluding that under the circumstances of this case it was not sufficiently reliable to be considered under the modified categorical analysis).

See also Lazo v. Wilkinson, 989 F.3d 705, 714 (9th Cir. 2021) (charging documents and the transcript of the guilty-plea colloquy in petitioner's case unambiguously established that petitioner's conviction was for possession of cocaine under Cal. Health & Safety Code § 11350 and is a violation of law "relating to a controlled substance" as defined in the Controlled Substances Act); *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1090 (9th Cir. 2020) (considering the only conviction documents in the record—the charging document and the abstract of judgment—the court held that petitioner was removable as charged); *Syed*, 969 F.3d at 1020 (the original information and minutes of plea hearing together demonstrated that petitioner was properly deemed removable as a noncitizen convicted of a crime involving moral turpitude); *Tejeda*, 960 F.3d at 1187 ("Applying the modified categorical approach, Tejeda's plea agreement, the charging document, and the minute order are cognizable for modified-categorical-approach purposes, . . . , and establish the elements of his offense."); *Altayar*, 947 F.3d at 550 ("Considering the charging document, plea agreement, and plea colloquy together, it is clear Altayar was convicted under [Arizona Revised Statutes] §§ 13-1203(A)(2) and 13-1204(A)(2)."); *Myers v. Sessions*, 904 F.3d 1101, 1111-12 (9th Cir. 2018) (concluding that the Travel Act was divisible, applying the modified categorical approach, and considering the superseding information and plea agreement in determining that the conviction was for a controlled substance offense); *Garcia v. Lynch*, 786 F.3d 789, 795 (9th Cir. 2015) (concluding that nothing in the conviction documents in the record—namely, the abstract of judgment and criminal complaint—established that Garcia's conviction was for non-consensual grand theft); *Kwong v. Holder*, 671 F.3d 872, 879-80 (9th Cir. 2011) (discussing the sufficiency of abstract of judgment to establish conviction); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010) (deferring "to the BIA's reasonable conclusion that all 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" (citation and internal quotation marks omitted)); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (under the modified categorical approach, the court may look to the "charging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment . . . to document the elements of conviction").

In *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), *abrogated on other grounds by Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), *abrogated in part by Moncrieffe v. Holder*, 569 U.S. 184 (2013), the court held that the district court could rely on the state court clerk's minute order in determining whether a prior state burglary conviction qualified as a crime of violence. *Snellenberger*, 548 F.3d at 702. In *Cabantac v. Holder*, 736 F.3d 787, (9th Cir. 2013) (as amended), the court held that where the abstract of judgment or minute order "specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment," the court may consider the facts alleged in that count. *Id*. at 790 (holding that the record was clear that the petitioner pleaded guilty to possession of a controlled substance that supported the order of removal); *see also Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) ("Where the minute order or other equally reliable document specifies that a defendant pleaded guilty to a particular count of a criminal complaint, the court may consider the facts alleged in the complaint.").

Prior to *Snellenberger*, abstracts of judgment were found not sufficient to establish the nature of a defendant's conviction. *See*, *e.g.*, *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004) (holding that a California abstract of judgment was not sufficient to establish unequivocally that defendant was convicted of the sale and transportation of methamphetamine), *implied overruling recognized by Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011); *cf. United States v. Sandoval-Sandoval*, 487 F.3d 1278, 1280 (9th Cir. 2007) (per curiam) (contrasting impermissible reliance on an abstract of judgment to determine the nature of a conviction with permissibly using it to determine "a discrete fact regarding Defendant's prior conviction, namely, the length of sentence imposed"). This court has stated that although *Snellenberger* did not explicitly overrule *Navidad-Marcos*, it is clear that its reasoning is inconsistent with that decision. *Kwong v. Holder*, 671 F.3d 872, 879 (9th Cir. 2011) (discussing the sufficiency of abstract of judgment to establish conviction).

"When a plea agreement makes direct reference to a specific count in the charging document, the charging document 'may be considered in combination with other documents in the record to determine whether [the petitioner] pled guilty to an aggravated felony.'" *Murillo-Prado v. Holder*, 735 F.3d 1152, 1157 (9th Cir. 2013) (citation omitted); *see also United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1142 (9th Cir. 2014) (in non-immigration case, plea of guilty to second degree sexual assault was a document that court could consider under the modified categorical approach).

"Charging papers alone are never sufficient" but "may be considered in combination with a signed plea agreement." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc) (citations omitted), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4; *see also Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014) (reliance on the abstract of judgment in combination with a charging document is permitted under the modified categorical approach); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003). *Cf. United States v. Savage*, 488 F.3d 1232, 1236 (9th Cir. 2007) (applying the modified categorical approach "[b]ased on the charging document and the transcript of Savage's plea allocution" to establish that he committed a crime of violence). However, "the charging instrument … may not be considered when the original charges are dismissed and the defendant pleads guilty to a different offense." *Alvarado v. Holder*, 759 F.3d 1121, 1131 (9th Cir. 2014).

"The set of noticeable documents includes the indictment (but only in conjunction with a signed plea agreement), the judgment of conviction, the minute order fully documenting the judgment, jury instructions, a signed guilty plea or the transcript from the plea proceedings." *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1035 (9th Cir. 2010) (where IJ relied solely on noncitizen's judicial admissions and an unidentified "conviction document" to determine that conviction was a controlled substance offense under the INA, the court held that the government failed to meet its burden because the judicially noticeable documents in the record were inconclusive); *see also Fregozo v. Holder*, 576 F.3d 1030, 1033 n.1 (9th Cir. 2009) (explaining that neither the court nor the BIA could rely on police reports that were not incorporated by reference into the nolo plea or the record of conviction to determine whether alien was convicted of a "crime of child abuse" within the meaning of the INA), *abrogated on other grounds as recognized by Diaz-Rodriguez v. Garland*, 55 F.4th 697, 729-30 (9th Cir. 2022) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024).

"[T]he INA makes clear that '[o]fficial minutes of a court proceeding' are sufficient 'proof of a criminal conviction.'" *Retuta v. Holder*, 591 F.3d 1181, 1184-85 (9th Cir. 2010) (quoting 8 U.S.C. § 1229a(c)(3)(B)(iv)).

"When the modified categorical approach must be employed, an alien's factual admissions may not be used as evidence to establish that he is removable, unless those admissions are included in the 'narrow, specified set of documents that are part of the record of conviction,' such as a plea agreement." *Perez-Mejia v. Holder*, 663 F.3d 403, 410 (9th Cir. 2011) (citations omitted).

2. Police Reports and Stipulations

The court may not "look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for," a relevant offense. *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"); *see also United States v. Almazan-Becerra*, 482 F.3d 1085, 1090-91 (9th Cir. 2007) (remanding to determine whether, in light of *Shepard*, a police report stipulated to form the basis of a guilty plea could be used to support a sentencing enhancement).

However, "[a]lthough police reports and complaint applications, standing alone, may not be used to enhance a sentence following a criminal conviction, the contents of these documents may be considered if specifically incorporated into the guilty plea or admitted by a defendant." *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005) (citation omitted) (Certification for Determination of Probable Cause, incorporated by reference into guilty plea, demonstrated that conviction met the definition of sexual abuse of a minor); *see also Fregozo v. Holder*, 576 F.3d 1030, 1033 n.1 (9th Cir. 2009) (explaining that neither the court nor the BIA could rely on police reports that were not incorporated by reference into the nolo plea or the record of conviction, to determine whether petitioner was convicted of a "crime of child abuse" within the meaning of the INA), *abrogated on other grounds as recognized by Diaz-Rodriguez v. Garland*, 55 F.4th 697, 729-30 (9th Cir. 2022) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024); *United States v. Espinoza-Cano*, 456 F.3d 1126, 1132-33 (9th Cir. 2006) (superseded by regulation) (police report could be considered in determining whether prior conviction qualified as an aggravated felony because report was incorporated by reference into the charging document and stipulated to form the factual basis of a guilty plea); *United States v. Hernandez-Hernandez*, 431 F.3d 1212, 1218 (9th Cir. 2005) (defendant's assent to the statement of facts in a motion to set aside the indictment or information under Cal. Penal Code § 995 was a proper basis for a sentencing court to engage in a modified categorical analysis).

3. Probation or Presentence Reports

In *Corona-Sanchez*, this court held that the defendant's presentence report ("PSR"), which recited the facts of the crime as alleged in the charging papers, was not sufficient to establish that the defendant pled guilty to the elements of the generic definition of a crime. *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4; *see also United States v. Castillo-Marin*, 684 F.3d 914, 919-20 (9th Cir. 2012) (it was plain error to rely on PSR to determine defendant had prior conviction for crime of violence); *Rebilas v. Mukasey*, 527 F.3d 783, 787 (9th Cir. 2008); *Abreu-Reyes v. INS*, 350 F.3d 966, 967 (9th Cir. 2003) (order) (IJ may not use PSR to determine whether petitioner was an aggravated felon); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153-54 (9th Cir. 2003) (BIA erred in relying solely on the PSR to demonstrate the elements of a drug trafficking conviction); *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076-77 (9th Cir. 2003) (order); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003); *cf. United States v. Rodriguez-Guzman*, 506 F.3d 738, 746-47 & n.9 (9th Cir. 2007) (stating that under *Shepard*'s modified categorical approach, a sentencing hearing transcript is not judicially noticeable).

4. Extra-Record Evidence

Under the modified categorical approach, evidence outside the record of conviction may not be considered to determine whether a conviction is a predicate immigration offense. *See Cervantes v. Holder*, 772 F.3d 583, 588 (9th Cir. 2014) ("[I]n this circuit, 'an IJ is limited to the record of conviction in determining whether an alien has been 'convicted of' a CIMT.'" (citation omitted)); *Olivas-Motta v. Holder*, 746 F.3d 907, 908 (9th Cir. 2014) (holding that the agency is confined to the record of conviction in determining whether a noncitizen has been convicted of a crime involving moral turpitude); *Tokatly v. Ashcroft*, 371 F.3d 613, 623-24 (9th Cir. 2004) (stating that "[w]e decline to modify this court's—and the Board's—strict rules against extra-record of conviction evidence in order to authorize use of an alien's admissions in determining removability," and holding that the IJ erred by relying on testimonial evidence at the removal hearing to determine that petitioner was convicted of a crime of domestic violence); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1036 (9th Cir. 2010) (IJ's reliance on petitioner's admissions, coupled with the government attorney's assessment that was based on a "rap sheet" that the IJ never looked at, was insufficient to conclude that petitioner "had been convicted of possession for sale of a controlled substance that would constitute an aggravated felony under the INA"); *Cisneros-Perez v.*

Gonzales, 465 F.3d 386, 393 (9th Cir. 2006) (inferences and admissions during testimony before the IJ could not be used to determine whether petitioner was convicted of a crime of domestic violence); *see also Taylor v. United States*, 495 U.S. 575, 601 (1990) (noting the "practical difficulties and potential unfairness of a factual approach," rather than a categorical approach, to a defendant's prior offenses).

5. Remand

If the court determines that the record in a case does not support attaching immigration consequences to a particular crime of conviction under the modified categorical approach, the case will ordinarily not be remanded under *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), for the government to submit further documentation. *See Flores-Lopez v. Holder*, 685 F.3d 857, 865 (9th Cir. 2012); *Fregozo v. Holder*, 576 F.3d 1030, 1036 (9th Cir. 2009), *abrogated on other grounds as recognized by Diaz-Rodriguez v. Garland*, 55 F.4th 697, 729-30 (9th Cir. 2022) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132-35 (9th Cir. 2006) (en banc); *see also Ragasa v. Holder*, 752 F.3d 1173, 1176 n.4 (9th Cir. 2014) (remanding to BIA to conduct modified categorical approach was not warranted). However, remand may be appropriate where it is unclear whether DHS had the opportunity to introduce all relevant evidence regarding the conviction in the proceedings below. *See Flores-Lopez*, 685 F.3d at 865-67 (remanding for BIA to apply modified categorical approach in the first instance where the record of conviction may have been incomplete).

See also Cheuk Fung S-Yong v. Holder, 600 F.3d 1028, 1036 (9th Cir. 2010) (granting petition for review and reversing the order of removal); *Retuta v. Holder*, 591 F.3d 1181, 1190 (9th Cir. 2010) ("Because the Government presented no evidence sufficient to establish that Retuta was subject to removal, we grant the petition for review, reverse the order of removal, and remand to the Board for disposition consistent with this opinion.").

IV. CATEGORIES OF CRIMINAL OFFENSES THAT MAY BE GROUNDS OF REMOVABILITY AND/OR INADMISSIBILITY

A. Crimes Involving Moral Turpitude ("CIMT")

1. Removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(i)

"Under federal immigration law, a non-citizen may be removed from the country if he has been convicted of a 'crime involving moral turpitude' (CIMT)." *Ortiz v. Garland*, 25 F.4th 1223, 1225 (9th Cir. 2022). 8 U.S.C. § 1227(a)(2)(A)(i) provides that the Attorney General can order the removal of a non-citizen who either 1) was convicted within five years of entering the United States of a CIMT that may be punishable by a sentence of one year or longer, or 2) was convicted of two or more CIMTs not arising out of a single scheme of criminal misconduct. *See Ortiz*, 25 F.4th at 1225.

a. Single Crime Committed within Five Years of Admission

"Any alien who is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and . . . for which a sentence of one year or longer may be imposed, is deportable." 8 U.S.C. § 1227(a)(2)(A)(i)(I)-(II); *see also Ortiz v. Garland*, 25 F.4th 1223, 1225 (9th Cir. 2022); *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081, 1084 (9th Cir. 2021); *Ortega-Lopez v. Barr*, 978 F.3d 680, 683 (9th Cir. 2020); *Altayar v. Barr*, 947 F.3d 544, 548 (9th Cir. 2020); *Mancilla-Delafuente v. Lynch*, 804 F.3d 1262, 1265 (9th Cir. 2015) ("Section § 1227(a)(2)(A)(i)(I) provides that an alien convicted of a CIMT for which the potential punishment is one year or more is removable.").

The "date of admission" for purposes of calculating the five years is the date of the noncitizen's lawful entry to the United States upon inspection and authorization by an immigration officer. *See Shivaraman v. Ashcroft*, 360 F.3d 1142, 1148-49 (9th Cir. 2004). The noncitizen's subsequent adjustment to lawful permanent resident status will not trigger the five-year provision if he or she continued to maintain lawful presence in the United States after an initial lawful entry. *See id.* at 1149 (applicant was not removable because his CIMT was not committed within five years of his initial lawful admission).

When an individual has multiple admissions preceding a conviction for a CIMT, the relevant admission is the admission that led to his presence in the United States when the crime was committed. *Route v. Garland*, 996 F.3d 968, 977 (9th Cir. 2021) (deferring to the BIA's interpretation that the relevant admission for purposes of 8 U.S.C. § 1227(a)(2)(A)(i)(I) is the admission that led to petitioner's presence in the United States when he committed the crime).

Where the noncitizen enters the United States without inspection or admission, "[c]ertain events, such as adjustment to LPR status or acceptance into the Family Unity Program (FUP), qualify as 'admission' for immigration purposes." *United States v. Hernandez-Arias*, 757 F.3d 874, 880 (9th Cir. 2014); *see also Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 798 (9th Cir. 2015) ("Because Hernandez-Gonzalez entered the United States without inspection or admission, the date of his adjustment of status serves as a date of admission that triggers the five-year clock under 8 U.S.C. § 1227(a)(2)(A)(i)."); *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001) (applicant's adjustment of status could constitute an "admission" for purposes of removability based on a conviction of an aggravated felony where he initially entered the United States without inspection).

See also Lara-Garcia v. Garland, 49 F.4th 1271, 1280-82 (9th Cir. 2022) (BIA erred in basing its denial of sua sponte reopening on its determination that petitioner's remaining, non-vacated convictions for Cal. Penal Code § 459 (burglary), Cal. Penal Code 496(a) (receiving stolen property), and Cal. Health & Safety Code § 11364(a) (possession of drug paraphernalia) were crimes involving moral turpitude such that he remained removable under 8 U.S.C. § 1227(a)(2)(A)(i)).

(i) Sentence of One Year or Longer

"Any alien who is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and . . . for which a sentence of one year or longer *may be* imposed, is deportable." 8 U.S.C. § 1227(a)(2)(A)(i)(I)-(II) (emphasis added). The court "consider[s] the maximum sentence at the time of conviction" rather than the actual sentence imposed. *Walcott v. Garland*, 21 F.4th 590, 601 (9th Cir. 2021).

In *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081, 1089 (9th Cir. 2021), the court held that California's amendment to § 18.5 of the California Penal Code, which retroactively reduces the maximum misdemeanor sentence to 364 days for purposes of state law, cannot be applied retroactively for purposes of § 1227(a)(2)(A)(i).

b. Multiple Offenses at Any Time

"Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable." 8 U.S.C. § 1227(a)(2)(A)(ii); *see also Orellana v. Barr*, 967 F.3d 927, 938 (9th Cir. 2020) (holding that LPR's convictions for two counts of criminal stalking did not arise out of a single scheme of conduct); *Coquico v. Lynch*, 789 F.3d 1049, 1053-55 (9th Cir. 2015) (granting petition and remanding where one of the two crimes at issue, "unlawful laser activity" was not a crime involving moral turpitude, so as to subject petitioner to removal); *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) ("[A]n immigrant is removable if, after being admitted, he is convicted of two or more CIMTs that did not arise out of a single scheme of criminal misconduct." (citation, internal quotation marks, and alteration omitted)). For purposes of removability under 8 U.S.C. § 1227(a)(2)(A)(ii), the government must prove that the crimes were not part of a single scheme of criminal misconduct. *See Ye v. INS*, 214 F.3d 1128, 1134 n.5 (9th Cir. 2000) (rejecting argument that the court lacked jurisdiction, because INS did not show that the two counts of vehicle burglary arose out of different criminal schemes); *Leon-Hernandez v. INS*, 926 F.2d 902 (9th Cir. 1991) (conviction for two counts of oral copulation, one month apart, were not part of a single scheme); *Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990) (two robberies at same bank arose out of a single scheme).

"The INA does not define 'single scheme of criminal misconduct.'" *Orellana v. Barr*, 967 F.3d 927, 938-39 (9th Cir. 2020). However, the BIA interpreted the phrase "single scheme of criminal misconduct" in *Matter of Adetiba*, 20 I. & N. Dec. 506 (BIA 1992). *See Orellana*, 967 F.3d at 939-40 (discussing the BIA's decision in *Adetiba*); *Szonyi v. Barr*, 942 F.3d 874, 891 (9th Cir. 2019) (same); *see also Lopez v. Garland*, 116 F.4th 1032, 1045 (9th Cir. 2024) (explaining that in *Szonyi*, "we endorsed *Adetiba* as a reasonable interpretation of the statute," and concluding that following *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), *Szonyi* "remains precedential authority which binds us"). In *Adetiba*, the BIA explained:

> when an alien has performed an act, which, in and of itself constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct.

20 I. & N. Dec. at 509. The BIA announced in *Matter of Islam*, 25 I. & N. Dec. 637, 641 (BIA 2011), that the *Adetiba* standard should be applied uniformly across all circuits. *See Szonyi*, 942 F.3d at 891-96.

In *Orellana v. Barr*, the court held that the BIA reasonably concluded that petitioner's conviction for two CIMTs, which occurred on different dates over different periods of time, did not arise out of a single scheme of criminal misconduct, and therefore he was removable as charged pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii). *Orellana*, 967 F.3d at 938-40.

In *Szonyi v. Barr*, the court affirmed the BIA's determination that petitioner's multiple crimes committed over a five to six hour period did not arise from a "single scheme of criminal misconduct," and thus that he was removable under 8 U.S.C. § 1227(a)(2)(A)(ii). *Szonyi*, 942 F.3d at 890-91 (concluding that the BIA properly applied its interpretation of "single scheme of criminal misconduct" and that application of the interpretation was not impermissibly retroactive). In *Lopez v. Garland*, the court held that where petitioner was convicted of four "complete, individual, and distinct" criminal municipal charges of petit larceny, the crimes did not form "a single scheme of criminal misconduct" that would exempt him from deportation under 8 U.S.C. § 1227(a)(2)(A)(ii), notwithstanding that they followed in quick succession and in response to similar material circumstances. *Lopez*, 116 F.4th at 1045 (rejecting as precluded by *Szonyi* petitioner's argument that his four convictions arose out of "single scheme of criminal misconduct").

2. Inadmissibility Pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I)

A noncitizen convicted or who admits the essential elements of a crime involving moral turpitude ("CIMT") is inadmissible. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I); *see also Safaryan v. Barr*, 975 F.3d 976, 981, 988 (9th Cir. 2020) (concluding that the BIA properly held that petitioner's conviction was a CIMT and that he was therefore inadmissible and ineligible for adjustment of status); *Romo v. Barr*, 933 F.3d 1191, 1195 (9th Cir. 2019) ("[P]ursuant to § 1101(a)(13)(C)(v), an alien who is a legal permanent resident is treated as one seeking admission if the alien 'has committed an offense identified in section 1182(a)(2).' And pursuant to § 1182(a)(2)(A)(i)(I), as relevant here, an 'alien convicted of . . . a crime involving moral turpitude . . .or an attempt or conspiracy to commit such a crime . . . is inadmissible.'"); *Mtoched v. Lynch*, 786 F.3d 1210, 1216 (9th Cir. 2015) ("Under 8 U.S.C. § 1182(a)(2)(A)(i)(I), an alien may be removed from the United States if convicted of a CIMT.").

a. Petty Offense Exception

A noncitizen with one CIMT is not inadmissible if he or she meets the petty offense exception. *See* 8 U.S.C. § 1182(a)(2)(A)(ii). "The petty offense exception applies if 'the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months.'" *Lafarga v. INS*, 170 F.3d 1213, 1214-15 (9th Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161-62 (9th Cir. 2009) ("Castillo-Cruz's single conviction for a crime of moral turpitude—petty theft–may fall within the petty offenses exception set forth at 8 U.S.C. § 1182(a)(2)(A)(ii)(II)."). For purposes of the petty offense exception, "'the maximum penalty possible' . . . refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed." *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008) (offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years). This court has deferred to the BIA's reasonable approach of considering the sentence that could have been imposed, not the actual sentence. *See Mancilla-Delafuente v. Lynch*, 804 F.3d 1262, 1265 (9th Cir. 2015) (citing *Matter of Cortez*, 25 I. & N. Dec. 301, 307 (BIA 2010)).

See also Vasquez-Borjas v. Garland, 36 F.4th 891, 899-900 (9th Cir. 2022) (holding that conviction for forgery in violation of Cal. Penal Code § 472 is a crime involving moral turpitude barring cancellation of removal, and that petitioner failed to administratively exhaust a petty offense exception argument); *Ballinas-Lucero v. Garland*, 44 F.4th 1169, 1180 (9th Cir. 2022) (remanding for the BIA to determine in the first instance whether petitioner's remaining, non-vacated conviction qualifies as a CIMT, and if so, whether the petty offense exception under 8 U.S.C. § 1182(a)(2)(A)(ii)(II) applies to it, as well as whether petitioner satisfies the other eligibility requirements for cancellation of removal).

b. Youthful Offender Exception

The youthful offender exception will apply if

> the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States.

8 U.S.C. § 1182(a)(2)(A)(ii)(I).

3. Definition of Crime Involving Moral Turpitude

"The INA does not define the term 'crime involving moral turpitude.'" *Fugow v. Barr*, 943 F.3d 456, 457 (9th Cir. 2019) (per curiam). Absent a statutory definition, "[w]e have 'traditionally divided' CIMTs into two types, defining them as 'involving either fraud or base, vile, and depraved conduct that shocks the public conscience." *Murillo-Chavez v. Bondi*, 128 F.4th 1076, 1087-88 (9th Cir. 2025) (citing *Ortiz v. Garland*, 25 F.4th 1223, 1227 (9th Cir. 2022)); *see also Ortiz*, 25 F.4th at 1227 ("While there is no federal statutory definition of a CIMT, we have defined it as involving 'either fraud or base, vile, and depraved conduct that shocks the public conscience.'" (quoting *Fugow*, 943 F.3d at 458)); *Walcott v. Garland*, 21 F.4th 590, 598 (9th Cir. 2021) ("Although the immigration statutes do not specifically define offenses constituting crimes involving moral turpitude, a crime involving moral turpitude is generally a crime that (1) is vile, base, or depraved and (2) violates accepted moral standards." (citation and internal quotation marks omitted)); *Diaz-Flores v. Garland*, 993 F.3d 766, 769 (9th Cir. 2021) ("[T]he Immigration and Nationality Act neither defines moral turpitude nor provides any rules for determining whether a crime involves moral turpitude."); *Safaryan v. Barr*, 975 F.3d 976, 981 (9th Cir. 2020) (noting that the court has "described the statutory phrase 'moral turpitude' as 'perhaps the quintessential example of an ambiguous phrase'"); *see also Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 801 (9th Cir. 2015) ("[I]mmigration statutes do not specifically define offenses constituting crimes involving moral turpitude[.]" (citations and internal quotation marks omitted)); *Ceron v. Holder*, 747 F.3d 773, 779-80 (9th Cir. 2014) (en banc) (same); *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (same).

> The BIA has defined a crime involving moral turpitude as having "two essential elements: [1] reprehensible conduct and [2] a culpable mental state." *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 834 (BIA 2016). Conduct is reprehensible if it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 1, 3 (BIA 2017) (citation omitted).

Ortega-Lopez v. Barr, 978 F.3d 680, 685 (9th Cir. 2020); *see also Lemus-Escobar v. Bondi*, 158 F.4th 944, 959 (9th Cir. 2025) (as amended) ("'To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state.' We have adopted that definition as our own, independent of any deference to the agency." (citing *Matter of Silva-Trevino*, 26 I. & N. Dec. 826; additional citation omitted)); *Silva v. Garland*, 993 F.3d 705, 712 (9th Cir. 2021) ("The BIA has further explained that to involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." (citation and internal quotation marks omitted)), *abrogated on other grounds by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), *as recognized in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *Safaryan*, 975 F.3d at 981 ("In determining whether a crime involves this sort of enhanced reprehensibility, we consider the actus reus and the mens rea in concert to determine whether the behavior they describe is sufficiently culpable to be labeled morally turpitudinous." (citation and internal quotation marks omitted)).

> "[F]raud crimes are categorically crimes involving moral turpitude, simply by virtue of their fraudulent nature." *Planes v. Holder*, 652 F.3d 991, 997 (9th Cir. 2011). "Non-fraudulent CIMTs 'almost always involve an intent to harm someone,'" *Saavedra-Figueroa*, 625 F.3d at 626 . . . or "intent to injure, actual injury, or a protected class of victim," *Turijan v. Holder*, 744 F.3d 617, 619 (9th Cir. 2014) (citation omitted). In determining whether an offense is a CIMT, the BIA has examined "whether the act is accompanied by a vicious motive or a corrupt mind" because "evil or malicious intent is . . . the essence of moral turpitude." *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (citations omitted).

Linares-Gonzalez v. Lynch, 823 F.3d 508, 514 (9th Cir. 2016) (citation omitted);*see also Murillo-Chavez*, 128 F.4th at 1088 ("[A]lthough there is no litmus test about whether a particular crime is 'base, vile, and depraved,' we have stressed that '[n]on-fraudulent CIMTs will almost always involve an intent to injure someone, an actual injury, or a protected class of victims.'" (citing *Turijan v. Holder*, 744 F.3d 617, 621 (9th Cir. 2014); additional citation omitted)); *Walcott v. Garland*, 21 F.4th 590, 598-99 (9th Cir. 2021) (explaining that the court has described CIMTs as offenses that offend society's most fundamental values, or shock society's conscience,". . . and [has] observed that non-fraudulent CIMTs 'almost always' involve the intent to injure, actual injury, or a protected class of victims." (citations and internal quotation marks omitted)).

"Not every offense that runs against 'accepted rules of social conduct' will qualify as a CIMT, however . . . . Rather, '[o]nly truly unconscionable conduct surpasses the threshold of moral turpitude.'" *Turijan*, 744 F.3d at 621 (citation omitted) (holding that "felony false imprisonment under California law does not qualify as a categorical CIMT").

The phrase "crime involving moral turpitude" is not unconstitutionally vague. *See Martinez-de Ryan v. Whitaker*, 909 F.3d 247, 252 (9th Cir. 2018).

"Almost every Term, the Supreme Court issues a 'new' decision with slightly different language that forces federal judges, litigants, lawyers and probation officers to hit the reset button once again" in determining whether a crime is a CIMT. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483 (9th Cir. 2015) (en banc) (Owens, J., concurring); *see also Conejo-Bravo v. Sessions*, 875 F.3d 890, 893 (9th Cir. 2017) (quoting *Almanza-Arenas* and noting that the current approach to CIMTs and crimes of violence can lead to unpredictable results).

The court has noted that it is often helpful to determine whether a state crime involves moral turpitude by comparing it with crimes that have previously been found to involve moral turpitude. *Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012).

"When the only 'benefit' the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude." *See Latu v. Mukasey*, 547 F.3d 1070, 1074 (9th Cir. 2008) (citation omitted) (concluding that violation of Hawaii Revised Statute § 291C-12.5(a), which requires the driver to give an address or vehicle registration number following an accident resulting in substantial bodily injury, was not a CIMT).

"Crimes involving fraud are considered to be crimes involving moral turpitude." *Tijani v. Holder*, 628 F.3d 1071, 1075-79 (9th Cir. 2010) (citation omitted) (convictions for using false statements to obtain credit cards in violation of California law were inherently fraudulent). *See Ibarra-Hernandez v. Holder*, 770 F.3d 1280, 1281-82 (9th Cir. 2014) (per curiam) (under the modified categorical approach, violation of Arizona Revised Statutes § 13-2008(A) was a CIMT because stealing a real person's identity for the purpose of obtaining employment is inherently fraudulent); *Espino-Castillo v. Holder*, 770 F.3d 861, 864 (9th Cir. 2014) (Arizona's conviction for forgery was a crime involving moral turpitude); *Hernandez de Martinez v. Holder*, 770 F.3d 823 (9th Cir. 2014) (per curiam) (conviction for criminal impersonation by assuming a false identity with intent to defraud is categorically a CIMT); *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011) ("crimes that have fraud as an element . . . are categorically crimes involving moral turpitude"); *Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994)

(California conviction for grand theft is a CIMT); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (per curiam) (conspiracy to affect the market price of stock by deceit with intent to defraud is a CIMT); *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir. 1978) (dealing in counterfeit obligations is a CIMT); *see also United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999) (stating in illegal reentry case that petty theft constitutes a CIMT); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-20 (9th Cir. 2005) (burglary convictions under Wash. Rev. Code §§ 9A.52.025(1) and 9A.08.020(3) do not categorically meet the definition of CIMT, but do meet the definition under the modified categorical approach because petitioner intended to steal property, a fraud crime), *abrogated on other grounds by Holder v. Martinez Guetierrez*, 566 U.S. 583 (2012).

"Although non-fraudulent CIMTs generally involve an 'intent to injure, actual injury, or a protected class of victims,'. . . , [the court has] held that certain reckless endangerment offenses qualify as CIMTs." *Fugow*, 943 F.3d at 458-59 (quoting *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213 (9th Cir. 2013)) (holding that first-degree unlawful imprisonment under Hawaii law is categorically a CIMT). In *Lemus-Escobar v. Bondi*, the court held that a conviction under California Penal Code § 246 for shooting a firearm at an inhabited dwelling categorically qualifies as a CIMT because it requires the use of a deadly weapon—typically an aggravating factor in assessing moral turpitude—and circumstances posing a significant risk of bodily harm to another. *Lemus-Escobar*, 158 F.3d at 960-61 (explaining that "although <u>most</u> turpitudinous crimes have an element of an intent to harm or substantial risk of harm, not <u>all</u> turpitudinous crimes do").

The court has held that "because [California Penal Code] § 114 does not require fraudulent intent, it is not categorically a crime involving moral turpitude." *Jauregui-Cardenas v. Barr*, 946 F.3d 1116, 1121 (9th Cir. 2020) (holding that a conviction for using false document to conceal citizenship in violation of CPC § 114 does not qualify as an aggravated felony or a CIMT for purposes of eligibility for cancellation of removal).

Crimes against property that do not involve fraud are generally not considered CIMTs. *See Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 n.5 (9th Cir. 1995) (crime of malicious mischief was not CIMT).

Strict liability offenses and crimes against the state are generally not CIMTs. *See Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007) (statutory rape under California Penal Code § 261.5(d) is not a categorical CIMT because statute proscribes some conduct that is *malum prohibitum* rather than *malum in se*);

Beltran-Tirado v. INS, 213 F.3d 1179, 1184 (9th Cir. 2000) (noting difference between *malum prohibitum*, an act only statutorily prohibited, and *malum in se*, an act inherently wrong); *see also Notash v. Gonzales*, 427 F.3d 693, 697 (9th Cir. 2005) (concluding that a conviction for attempted entry of goods by means of a false statement was not a CIMT); *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118-19 (9th Cir. 2003) (Arizona aggravated driving under the influence is not a categorical CIMT where person may be convicted without actually driving); *Murillo-Salmeron v. INS*, 327 F.3d 898, 902 (9th Cir. 2003) (simple DUI convictions are not CIMTs); *Beltran-Tirado*, 213 F.3d at 1183-84 (convictions for making a false attestation on an employment verification form and using a false Social Security number do not constitute CIMTs); *United States v. Chu Kong Yin*, 935 F.2d 990, 1003-04 (9th Cir. 1991) (gambling crimes did not necessarily involve moral turpitude).; *but see Marmolejo-Campos v. Holder*, 558 F.3d 903, 917 (9th Cir. 2009) (en banc) (concluding that DUI offenses committed with the knowledge that one's driver's license has been suspended or otherwise restricted are crimes involving moral turpitude).

A bribery conviction under 18 U.S.C. § 666(a)(2) categorically qualifies as a crime involving moral turpitude, because it requires proof of a "corrupt mind." *Martinez-de Ryan v. Whitaker*, 909 F.3d 247, 250 (9th Cir. 2018) (stating that the court's holding comports with "decades-old decisions by the BIA and by the Second, Fourth, and Fifth Circuits that bribery involves moral turpitude").

A witness tampering conviction in violation of Oregon Revised Statutes § 162.285 is overbroad, and not categorically a CIMT because the minimum conduct it criminalizes is not necessarily fraudulent, base, vile, or depraved. *Vasquez-Valle v. Sessions*, 899 F.3d 834, 840 (9th Cir. 2018); *see also Escobar v. Lynch*, 846 F.3d 1019, 1028 (9th Cir. 2017) (holding that witness tampering in violation of Cal. Penal Code § 136.1(a) was not categorically a crime of moral turpitude, and remanding for the agency to consider if the statute was divisible and if so to conduct the modified categorical analysis).

Simple battery is generally not a CIMT, although it may be rendered such by aggravating circumstances. *See Morales-Garcia v. Holder*, 567 F.3d 1058, 1067 (9th Cir. 2009) (concluding that conviction under Cal. Penal Code § 273.5(a) for abuse of a cohabitant was not categorically a CIMT); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1167 (9th Cir. 2006) (Arizona domestic assault statute is not categorically a CIMT because it penalizes reckless conduct); *but see Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993) (willful infliction of injury to a spouse is a

CIMT), *superseded by statute on other grounds as stated in Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011).

The court explained in *Altayar v. Barr*:

> [A]n aggravated assault presents a very different situation than mere simple assault. . . . "[S]ome assault statutes . . . have been held to be CIMTs. Those statutes include as an element 'some aggravating dimension' sufficient to increase the culpability of an assault or battery and so to transform the offense into one categorically a CIMT." . . . As a result, "to rise to the level of moral turpitude, an assault crime must involve a particular type of aggravating factor, one that says something about the turpitude or blameworthiness inherent in the action."

947 F.3d 544, 551 (9th Cir. 2020) (citations omitted). In *Altayar*, applying the modified categorical approach, the court held that "an aggravated assault conviction under [Arizona Revised Statutes] §§ 13-1203(A)(2) and 13-1204(A)(2) involving the use of a deadly weapon or dangerous instrument qualifies as a crime involving moral turpitude." *Altayar*, 947 F.3d at 551-55; *see also Safaryan v. Barr*, 975 F.3d 976, 988 (9th Cir. 2020) (holding that the BIA correctly determined that that petitioner's conviction under Cal. Penal Code § 245(a)(1), which proscribes certain aggravated forms of assault, was categorically a "crime involving moral turpitude" rendering him ineligible for status adjustment).

"[A California Penal Code] § 646.9(a) conviction [for criminal stalking] is categorically a CIMT." *Orellana v. Barr*, 967 F.3d 927, 938 (9th Cir. 2020) (holding that the BIA did not err in concluding that a § 646.9(a) criminal stalking conviction is a CIMT, and that the BIA reasonably concluded the two § 646.9(a) counts of conviction did not arise out of a single scheme of criminal misconduct).

Sex-related offenses (other than statutory rape) are generally considered to be CIMTs. *See Rohit v. Holder*, 670 F.3d 1085, 1089-90 (9th Cir. 2012) (conviction for Cal. Penal Code § 647(b), disorderly conduct involving solicitation of prostitution, is a CIMT); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) ("Incest . . . involves an act of baseness or depravity contrary to accepted moral standards, and we hold that it too is a 'crime involving moral turpitude.'"); *see also Zavaleta-Gallegos v. INS*, 261 F.3d 951, 955 (9th Cir. 2001) (petitioner did not contest that his conviction for stalking was a CIMT); *but see Nicanor-Romero v. Mukasey*, 523 F.3d 992, 997-1008 (9th Cir. 2008) (conviction under Cal. Penal Code § 647.6(a) for annoying or molesting a child under the age of 18 was not categorically a CIMT), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc). "In the context of sexual offenses, whether the crime involves moral turpitude turns on whether there is (1) actual harm or (2) a protected class of victim." *Gonzalez-Cervantes*, 709 F.3d at 1267 (conviction for misdemeanor sexual battery under Cal. Penal Code § 243.4(e) involved moral turpitude).

In *Menendez v. Whitaker*, the court held that a conviction for lewd or lascivious conduct in violation of California Penal Code § 288(c)(1) is not categorically a crime involving moral turpitude. *Menendez v. Whitaker*, 908 F.3d 467, 472-74 (9th Cir. 2018), *abrogation recognized by Diaz-Rodriguez v. Garland*, 12 F.4th 1126, 1136 (9th Cir. 2021), *vacated on reh'g en banc*, 55 F.4th 697 (9th Cir. 2022) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024). The court stated that although § 288(c)(1) involves a protected class of persons (minors aged 14 or 15), not all criminal statutes intended to protect minors involve moral turpitude. *Menendez*, 908 F.3d at 473.

In *Syed v. Barr*, 969 F.3d 1012, 1015 (9th Cir. 2020), distinguishing *Menendez*, the court held that a conviction under California Penal Code § 288.3(a), attempting to communicate with a child with the intent to commit lewd or lascivious acts upon that child, categorically constitutes a crime involving moral turpitude.

Indecent exposure under California Penal Code § 314(1) is categorically a CIMT. *Betansos v. Barr*, 928 F.3d 1133, 1146 (9th Cir. 2019). In *Betansos*, the court recognized that although the court's prior decision in *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010), held to the contrary, a subsequent published BIA decision, *Matter of Cortes Medina*, 26 I. & N. Dec. 79 (BIA 2013), which held that § 314(1) is categorically a CIMT, was entitled to deference. *Betansos*, 928 F.3d at 1136. Additionally, the court determined that *Cortes Medina* applied retroactively in Betansos's case. *Id.* at 1143-46 (applying the test adopted in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), to determine whether the BIA's decision in *Cortes Medina* should apply retroactively, and noting that the retroactive analysis is conducted on a case-by-case basis).

In contrast, "indecent exposure to a person under the age of fourteen pursuant to Wash. Rev. Code § 9A.88.010(2)(b) is not categorically a crime involving moral turpitude." *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1123 (9th Cir. 2018) (further concluding that Wash. Rev. Code § 9A.88.010(2)(b) is indivisible and that the modified categorical approach is inapplicable). The court in *Barrera-Lima* stated, "Other indecent exposure statutes aimed at protecting a class of victims, such as children, may categorically qualify as crimes involving moral turpitude because they include any number of the elements missing from Wash. Rev. Code § 9A.88.010(2)(b)—sexual motivation, actual observation, or specific intent—but we are not called upon to assess those statutes." *Barrera-Lima*, 901 F.3d at 1123.

Knowing possession of child pornography is a CIMT. *See United States v. Santacruz*, 563 F.3d 894, 897 (9th Cir. 2009).

Communication with a minor for immoral purposes in violation of Revised Code of Washington § 9.68A.090 is a crime of moral turpitude. *See Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1251 (9th Cir. 2019); *see also Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007), *abrogated on other grounds in Anaya-Ortiz v. Holde*r, 594 F.3d 673, 677-78 (9th Cir. 2010).

"[D]rug trafficking crimes are generally crimes involving moral turpitude." *Romo v. Barr*, 933 F.3d 1191, 1195 (9th Cir. 2019); *see also Walcott v. Garland*, 21 F.4th 590, 599 (9th Cir. 2021). For example, solicitation to possess a large quantity of marijuana is a CIMT for purposes of removability under § 1227(a)(2)(A)(i)(I), *see Barragan-Lopez v. Mukasey*, 508 F.3d 899, 904 (9th Cir. 2007), and for purposes of inadmissibility under § 1182(a)(2)(A)(i)(I), *see Romo*, 933 F.3d at 1199 (holding that a conviction in Arizona for solicitation to possess at least four pounds of marijuana for sale constitutes a crime involving moral turpitude for purposes of § 1182(a)(2)(A)(i)(I)).

Misdemeanor false imprisonment under California Penal Code § 236 is not categorically a CIMT because it "does not require the defendant to have had the intent to harm necessary for the crime to be 'base, vile, or depraved.'" *Saavedra-Figueroa*, 625 F.3d at 626. Similarly, "[s]imple kidnapping under [California Penal Code § 207(a) also] does not require an intent to injure, actual injury, or a special class of victims." *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213 (9th Cir. 2013), *overruled on other grounds by Ceron v. Holder*, 747 F.3d 773, 782 n.2 (9th Cir. 2014) (en banc). As such, simple kidnapping is not categorically a CIMT. *Castrijon-Garcia*, 704 F.3d. at 1207, 1214 (explaining that the court has held that "non-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim" and holding that simple kidnapping under Cal. Penal Code § 207(a) is not categorically a crime of moral turpitude (citation omitted)).

Making threats with intent to terrorize under California Penal Code § 422 is categorically a CIMT. *Latter-Singh v. Holder*, 668 F.3d 1156, 1161-63 (9th Cir. 2012); *cf. Coquico v. Lynch*, 789 F.3d 1049, 1055 (9th Cir. 2015) (discussing *Latter-Singh*, and concluding that a violation of Cal. Penal Code § 417.26, unlawful laser activity, is not categorically a crime involving moral turpitude). In *Flores-Vasquez v. Garland*, 80 F.4th 921 (9th Cir. 2023), the court held that a conviction under Oregon's menacing statute, Or. Rev. Stat. § 163.190, is not categorically a CIMT, contrasting it with the statute at issue in *Latter-Singh* and explaining that the Oregon statute "is not limited to 'conduct which results in substantial harm.'" *Id.* at 928 (citing *Latter-Singh*, 668 F.3d at 1162). In *Cervantes v. Holder*, 772 F.3d 583 (9th Cir. 2014), the court held that a conviction under California Penal Code § 422 for threatening to commit a crime resulting in death or great bodily injury categorically was a CIMT. *Id*. at 589.

In *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 809 (9th Cir. 2015), the court held that the gang sentencing enhancement under California law did not categorically elevate the petitioner's conviction for unlawful possession of a weapon to a crime involving moral turpitude.

A robbery conviction under California Penal Code § 211 is a CIMT for purposes of 8 U.S.C. § 1182(a)(2)(A)(i)(I). *See Mendoza v. Holder*, 623 F.3d 1299, 1303-04 (9th Cir. 2010).

"Oregon's first-degree burglary statute, when involving a dwelling, is a 'crime involving moral turpitude' under § 1182(a)(2)(A)(i)(I)." *Diaz-Flores v. Garland*, 993 F.3d 766, 773-74 (9th Cir. 2021) (holding that petitioner was statutorily ineligible for cancellation of removal).

"Petty theft is a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I)[,]" *Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (per curiam), as is a conviction for credit card fraud in violation of California Penal Code § 532a(1), *see Tijani*, 628 F.3d at 1075-77 (convictions for using false statements to obtain credit cards in violation of California law were inherently fraudulent). *See also Lopez v. Garland*, 116 F.4th 1032, 1042 (9th Cir. 2024) (convictions for petit larceny under Reno Municipal Code § 8.10.040 were categorically CIMTs making petitioner removable); *Silva v. Garland*, 993 F.3d 705, 717 (9th Cir. 2021) (concluding that petty theft under section 484(a) of the California Penal Code is a crime involving moral turpitude), *abrogated on other grounds by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), *as recognized in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024). However, a conviction for receipt of stolen property under California Penal Code § 496 is not categorically a CIMT. *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). Likewise, the court held in *Lozano-Arredondo v. Sessions*, 866 F.3d 1082 (9th Cir. 2017), "that petit theft under Idaho law does not qualify categorically as a crime involving moral turpitude,. because it penalizes short-term takings of property with no substantial erosion of property rights. *Id.* at 1087 & n.3 (remanding for the BIA to determine whether petitioner's conviction qualifies as a crime involving moral turpitude under the modified categorical approach).

California Vehicle Code § 10851(a), which criminalizes theft and unlawful driving or taking of a vehicle, is not categorically a CIMT. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 476 (9th Cir. 2016) (en banc) (as amended). Likewise, "California's Vehicle Code § 2800.2 [vehicular flight from a police officer] is not categorically a crime of moral turpitude." *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1307 (9th Cir. 2017); *cf. Moran v. Barr*, 960 F.3d 1158, 1164 (9th Cir. 2020) (California Vehicle Code § 2800.4, felony vehicular flight from a pursuing police car while driving against traffic, is categorically a crime involving moral turpitude). In *Zhovtonizhko v. Garland*, 69 F.4th 1038 (9th Cir. 2023), the court held that the BIA erred in failing to address substantive changes to Washington Revised Code § 46.61.024, attempting to elude police, which removed language requiring "wanton or willful disregard for the lives or property of others" and replaced it with a requirement that an individual drive "in a reckless manner," and subsequent case law holding that this change in statutory language reduced the mental state necessary to prove the crime. *See id.* at 1042-43 (remanding for the BIA to reconsider whether the revised statute of conviction was categorically a crime involving moral turpitude).

In *Diaz-Lizarraga*, the BIA held that "a theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1294 (9th Cir. 2018) (citing *In re Diaz-Lizarraga*, 26 I. & N. Dec. 847, 849 (BIA 2016)). In so holding, the BIA overruled its previous approach, which had required a literal intent to permanently deprive an owner of property. *See Garcia-Martinez*, 886 F.3d at 1294 (explaining change of law in *Diaz-Lizarraga*). In *Lopez v. Garland*, this court determined that the BIA's decision in *Diaz-Lizarraga* is entitled to respect under *Skidmore*, and held that the BIA's interpretation of the phrase "crimes involving moral turpitude," as applied to theft offenses, is correct. *Lopez*, 116 F.4th at 1039-41. Thus, consistent with *Diaz-Lizarraga*, "as applied to theft offenses, the statutory phrase 'crimes involving moral turpitude,' 8 U.S.C.

§ 1227(a)(2)(A)(ii), encompasses offenses that require the government to prove the defendant acted with an intent to permanently deprive an owner's property *or* substantially erode the owner's property rights." *Lopez*, 116 F.4th at 1041. "Offenses that criminalize less culpable conduct, including temporary takings with the intent to return to the owner shortly thereafter, however, are still categorically overbroad." *Id.*

In *Garcia-Martinez*, the court held that *Diaz-Lizarraga*'s new rule expanding the CIMT definition of a theft offense should not be applied retroactively to petitioner. *Garcia-Martinez*, 886 F.3d at 1294-96 (balancing of interests and basic fairness indicated the BIA's new CIMT rule should not be applied to petitioner, where petitioner's theft offenses in Oregon were not CIMTs at the time petitioner committed them); *see also Barbosa v. Barr*, 926 F.3d 1053, 1058 (9th Cir. 2019) (as amended) (explaining that although "the BIA recently adopted a more expansive standard for determining whether a theft offense constitutes a CIMT . . . [b]ecause Petitioner pleaded no contest to the relevant charge before the BIA changed its interpretation, the new standard does not apply retroactively to his case").

This court has held that the BIA reasonably concluded that a noncitizen's conviction for knowingly sponsoring or exhibiting an animal in an animal fighting venture under 7 U.S.C. § 2156(a)(1) is a crime involving moral turpitude. *Ortega-Lopez v. Barr*, 978 F.3d 680, 681 (9th Cir. 2020).

See also Lara-Garcia v. Garland, 49 F.4th 1271, 1280-82 (9th Cir. 2022) (in denying sua sponte reopening, BIA erred in concluding that petitioner's remaining, non-vacated convictions for Cal. Penal Code § 459 (burglary), Cal. Penal Code 496(a) (receiving stolen property), and Cal. Health & Safety Code § 11364(a) (possession of drug paraphernalia) were for crimes involving moral turpitude such that he remains removable under 8 U.S.C. § 1227(a)(2)(A)(i)); *Ortiz v. Garland*, 25 F.4th 1223, 1228 (9th Cir. 2022) (holding that voluntary manslaughter in violation of California Penal Code § 192(a) qualifies as a crime involving moral turpitude under 8 U.S.C § 1227(a)(2)(A)); *Maie v. Garland*, 7 F.4th 841, 853 (9th Cir. 2021) (concluding that Haw. Rev. Stat. § 708-833(1) is overbroad and indivisible, and thus that Maie's convictions for fourth degree theft are not categorically CIMTs); *Barbosa v. Barr*, 926 F.3d 1053, 1059 (9th Cir. 2019) (as amended) (holding that, although robbery under Oregon Revised Statutes § 164.395 involves a taking of property and the threatened or actual use of force, the minimal force required for conviction is insufficient to categorically label the crime a CIMT); *Conejo-Bravo v. Sessions*, 875 F.3d 890, 892-93 (9th Cir. 2017) (concluding that conviction under California Vehicle Code § 20001(a) for felony hit and run qualified as a CIMT); *Rivera v. Lynch*, 816 F.3d 1064, 1074-75 (9th Cir. 2016) (Cal. Penal Code § 118 perjury is not categorically a crime involving moral turpitude that would render petitioner ineligible for cancellation of removal); *Nguyen v. Holder*, 763 F.3d 1022, 1027 (9th Cir. 2014) ("Misuse of a passport to facilitate an act of international terrorism is categorically a crime involving moral turpitude."); *Robles-Urrea v. Holder*, 678 F.3d 702, 707-11 (9th Cir. 2012) (concluding that BIA erred in determining that misprision of felony was categorically a CIMT); *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010) (concluding that prior conviction in Canada for aggravated assault did not categorically qualify as CIMT); *Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008) (holding that crime of providing false identification to a peace officer is not categorically a CIMT); *Cerezo v. Mukasey*, 512 F.3d 1163, 1166-69 (9th Cir. 2008) (concluding that California conviction for leaving the scene of an accident resulting in bodily injury or death in violation of Cal. Vehicle Code § 20001(a) was not categorically a CIMT).

B. Controlled Substances Offenses

1. Deportation Ground – 8 U.S.C. § 1227(a)(2)(B)(i)

Noncitizens may be removable for drug offenses. *See* 8 U.S.C. § 1227(a)(2)(B)(i); *see also Ruiz-Vidal v. Lynch*, 803 F.3d 1049, 1052 (9th Cir. 2015) ("An alien is removable if the government proves by clear and convincing evidence that he's been convicted of certain offenses 'relating to a controlled substance' covered by the Controlled Substances Act ('CSA')." (citation omitted)). This section is broader than the aggravated felony deportation ground since it relates to all controlled substance offenses rather than just illicit trafficking offenses. *Compare* 8 U.S.C. § 1227(a)(2)(B)(i) *with* 8 U.S.C. § 1101(a)(43)(B). 8 U.S.C. § 1227(a)(2)(B)(i) provides:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) 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 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(B)(i); *see also Villavicencio v. Sessions*, 904 F.3d 658, 664 (9th Cir. 2018) (as amended) ("In other words, (1) any alien (2) convicted of a

conspiracy under state law (3) relating to a controlled substance as defined under 21 U.S.C. § 802, is deportable."); *Medina v. Ashcroft*, 393 F.3d 1063, 1065 (9th Cir. 2005) (Nevada conviction of attempting to be under the influence of THC-carboxylic acid, a controlled substance, was not a removable offense because it came within the statutory exception for possession of 30 grams or less of marijuana).

"[C]onstruction of § 1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of 'controlled substance,' for removal purposes, to the substances controlled under § 802." *Mellouli v. Lynch*, 575 U.S. 798, 813 (2015). The Supreme Court rejected "the argument that *any* drug offense renders an alien removable, without regard to the appearance of the drug on a § 802 schedule. Instead, to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the conviction to a drug "defined in [§ 802]." *Mellouli*, 575 U.S. at 813.

> The operative statutory phrase, 'relating to a controlled substance,' modifies 'law or regulation.' The ordinary meaning of the term 'relate' is 'to show or establish a logical or causal connection between.' Thus, [the court] look[s] to the language of the statute of conviction to determine whether it establishes a logical or causal connection to a controlled substance as defined in 21 U.S.C. § 802, section 102 of the Controlled Substances Act [].

Mielewczyk v. Holder, 575 F.3d 992, 994-95 (9th Cir. 2009) citations omitted); *see also Mellouli*, 575 U.S. at 811 ("The removal provision is thus satisfied when the elements that make up the state crime of conviction relate to a federally controlled substance."); *Villavicencio*, 904 F.3d at 665.

"[S]ection 1227(a)(2)(B)(i) exempts from removability solely those aliens who have (1) committed only one controlled substance offense, where (2) that offense is possession for personal use of less than 30 grams of marijuana." *Rodriguez v. Holder*, 619 F.3d 1077, 1079 (9th Cir. 2010) (per curiam) (discussing "personal use exception" of § 1227(a)(2)(B)(i) and holding that it does not apply to noncitizens who have more than one drug conviction); *see also Medina*, 393 F.3d at 1065 (Nevada conviction of attempting to be under the influence of THC-carboxylic acid, a controlled substance, was not a removable offense because it came within the statutory exception for possession of 30 grams or less of marijuana). "[T]he personal-use exception calls for an inquiry into the specific circumstances surrounding the offense." *Bogle v. Garland*, 21 F.4th 637, 642, 646

(9th Cir. 2021) (concluding that circumstances specific to this case clearly established that the amount of marijuana in Bogle's possession exceeded thirty grams).

See also Romero-Millan v. Garland, 46 F.4th 1032, 1040 (9th Cir. 2022) (drug possession in violation of Arizona Revised Statute (A.R.S.) § 13-3408, and possession of drug paraphernalia in violation of A.R.S. § 13-3415, are divisible as to drug type, and the BIA did not err in concluding that petitioners were convicted of controlled substance offenses that supported their orders of removal); *Lazo v. Wilkinson*, 989 F.3d 705, 714 (9th Cir. 2021) (holding that Cal. Health & Safety Code § 11350, possession of a controlled substance, is divisible as to controlled substance, and that petitioner's conviction documents unambiguously established that his conviction was a violation of law "relating to a controlled substance"); *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1153-54 (9th Cir. 2020) (applying the realistic probability test and concluding that a conviction of possession for sale of methamphetamine in violation of Cal. Health & Safety Code § 11378 is categorical match to the federal definition of a controlled substance offense); *Tejeda v. Barr*, 960 F.3d 1184, 1188 (9th Cir. 2020) (per curiam) ("Where, as here, the controlled-substance requirement of a state statute [—in this case, Cal. Health & Safety Code § 11550(a)—] is divisible and where, as here, the relevant substance is shown by application of the modified categorical approach to be federally controlled, then there is a direct link between an alien's crime of conviction and a particular federally controlled drug such that 8 U.S.C. § 1227(a)(2)(B)(i) is satisfied."); *Villavicencio*, 904 F.3d at 667 (concluding that petitioner was not removable under 8 U.S.C. § 1227(a)(2)(B)(i) and that Nevada Revised Statutes §§ 199.480 and 454.351 are overbroad and indivisible, and cannot be used as a predicate offense to support removal); *Ruiz-Vidal*, 803 F.3d at 1055 ("Because there is clear and convincing evidence in the documents permissible for review that Ruiz-Vidal pleaded to—and was convicted of—possession of methamphetamine, a controlled substance, he is removable."); *Padilla-Martinez v. Holder*, 770 F.3d 825, 831-32 n.3 (9th Cir. 2014) (conviction under Cal. Health & Safety Code § 11378 is an aggravated felony under modified categorical approach); *Alvarado v. Holder*, 759 F.3d 1121 (9th Cir. 2014) (conviction for attempted possession of dangerous drug constituted a violation of state law relating to a controlled substance); *Cabantac v. Holder*, 736 F.3d 787, 790 (9th Cir. 2013) (as amended) (conviction under Cal. Health & Safety Code § 11377(a) for possession of a controlled substance supported order of removal); *Pagayon v. Holder*, 675 F.3d 1182, 1189-90 (9th Cir. 2011) (per curiam) (state conviction for possessing methamphetamine constituted a controlled substance offense rendering petitioner removable, where petitioner made a pleading-stage admission to the conviction); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) (explaining that a conviction under Cal. Health & Safety Code § 11379 does not necessarily entail a "controlled substance offense" under 8 U.S.C. § 1227 (a)(2)(B)(i)); *Retuta v. Holder*, 591 F.3d 1181, 1185-89 (9th Cir. 2010) (minute order was sufficient to show that petitioner pled guilty to charge of possession of a controlled substance, methamphetamine, in violation of Cal. Health & Safety Code § 11377(a), but government failed to prove that petitioner was "convicted" because "the definition of 'conviction' does not include criminal judgments whose only consequence is a suspended non-incarceratory sanction").

In the removal context, the government bears the burden of proving that the substance underlying a state law conviction is one covered by § 802 of the Controlled Substances Act ("CSA"). *See Ragasa v. Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014) ("Because the statute of conviction identifies a number of controlled substances by referencing various [state] drug schedules and statutes and criminalizes the possession of any one, it is a divisible statute, and we may resort to the modified categorical approach to determine whether Ragasa's crime of conviction is a removable offense." (citation and internal quotation marks omitted)); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076-77 (9th Cir. 2007) (conviction under California possession statute was not a categorical controlled substance offense because California regulates the possession and sale of many substances not covered by the CSA), *abrogated on other grounds by Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011). The government also must demonstrate that the conviction is one "relating to a controlled substance," although this requirement has been construed broadly. *See*, *e.g.*, *Johnson v. INS*, 971 F.2d 340, 342-43 (9th Cir. 1992) (conviction for violation of the Travel Act, 18 U.S.C. § 1952, was a violation of a law relating to a controlled substance); *but see Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153 (9th Cir. 2003) (as amended) (Arizona money laundering offense is not a crime relating to a controlled substance); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (Arizona solicitation conviction is not a violation of a law relating to a controlled substance, and therefore is not a deportable offense).

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

Additional grounds of inadmissibility bar the admission of noncitizens who are convicted of or admit the essential elements of a crime related to a controlled substance or who are controlled substance traffickers. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance crime), § 1182(a)(2)(C) (controlled substance traffickers); *see also* Coronado v. Holder, 759 F.3d 977, 981 (9th Cir. 2014) ("[T]he government satisfied its burden of proving that Coronado was twice convicted of possessing methamphetamine, a controlled substance listed in the Controlled Substances Act. Therefore, the BIA did not err in finding Coronado inadmissible based on his prior convictions."); *Hernandez-Aguilar v. Holder*, 594 F.3d 1069, 1073 (9th Cir. 2010) (holding "that a conviction under [Cal. Health & Safety Code] § 11379(a), irrespective of whether the underlying offense was solicitation, qualifies for removal under § 1182(a)(2)(A)(i)(II), so long as the substance involved in the conviction is determined to have been a controlled substance under the modified categorical approach").

A noncitizen inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II) may be granted a waiver of inadmissibility if his conviction was for simple possession of 30 grams or less of marijuana and he can establish that denial of his admission would result in extreme hardship to his United States citizen or lawful permanent resident spouse, parent, son or daughter. *See* 8 U.S.C. § 1182(h).

V. CATEGORIES OF CRIMINAL OFFENSES THAT ARE GROUNDS OF REMOVABILITY ONLY

A. Aggravated Felony

Under the INA, noncitizens convicted of an "aggravated felony" at any time after admission are removable from the United States. 8 U.S.C. § 1227(a)(2)(A)(iii); *see also* *Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 (9th 2010) (noting that the aggravated felony ground of removal does not have a statutory counterpart as a ground of inadmissibility). The Act defines "aggravated felony" to cover a broad range of federal and state crimes. *See* § 1101(a)(43); *Pugin v. Garland*, 599 U.S. 600, 603 (2023); *see also* *Cortes-Maldonado v. Barr*, 978 F.3d 643, 647 (9th Cir. 2020) ("Under the INA, any noncitizen who is convicted of an aggravated felony suffers several consequences, such as becoming deportable, inadmissible [where seeking admission after prior removal], and ineligible for cancellation of removal." (citing 8 U.S.C. § 1227(a)(2)(A)(iii), § 1182(a)(9)(A)(i)-(ii), and § 1229b(a)(3))).

Several dozen offenses are categorized as aggravated felonies under 8 U.S.C. § 1101(a)(43). Each crime enumerated in 8 U.S.C. § 1101(a)(43) is an aggravated felony irrespective of whether it violates federal, state, or foreign law. *Torres v. Lynch*, 578 U.S. 452, 460-62 (2016); *see also* *Sessions v. Dimaya*, 584 U.S. 148, 153 (2018) ("The INA defines 'aggravated felony' by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes." (citations omitted)).

An applicant is removable if convicted of an aggravated felony at any time after admission. *See Torres*, 578 U.S. at 454 (noncitizen convicted of an aggravated felony after entering the United States is deportable, ineligible for certain discretionary relief, and subject to expedited removal); *see also Mero v. Barr*, 957 F.3d 1021, 1022 (9th Cir. 2020) ("The Immigration and Nationality Act authorizes the removal of any non-citizen who, after admission to the United States, is convicted of an aggravated felony[.]"); *Lopez v. Sessions*, 901 F.3d 1071, 1074 (9th Cir. 2018) ("Any alien who is 'convicted of an aggravated felony at any time after admission is deportable.'" (quoting 8 U.S.C. § 1227(a)(2)(A)(iii)); *Sales v. Sessions*, 868 F.3d 779, 784 (9th Cir. 2017) (affirming the BIA's ruling that a "conviction of second degree murder as an aider and abettor was an aggravated felony for purposes of the removal proceedings"); *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010) ("'Any alien who is convicted of an aggravated felony at any time after admission is deportable.'" (quoting 8 U.S.C. § 1227(a)(2)(A))); *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) ("An immigrant convicted of an aggravated felony after being admitted to this country is removable."); *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134 (9th Cir. 2001).

Aggravated felons are also disqualified from many forms of relief including asylum, voluntary departure, and cancellation of removal (although some noncitizens may remain eligible for § 212(c) relief). *See Torres*, 578 U.S. at 454;*see also Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1070 (9th Cir. 2021) ("A lawful permanent resident is statutorily ineligible for cancellation of removal if he has been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(3)."); *Habibi v. Holder*, 673 F.3d 1082, 1085 (9th Cir. 2011) ("Under 8 U.S.C. § 1229b(a)(3), an LPR convicted of an 'aggravated felony' is ineligible for cancellation of removal. 'Aggravated felony' is defined by 8 U.S.C. § 1101(a)(43)(F) as including a 'crime of violence . . . for which the term of imprisonment [is] at least one year.'").

Additionally, "[a] person who has been convicted of an aggravated felony, as defined by 8 U.S.C. § 1101(a)(43), . . . is permanently ineligible for naturalization." *Elmakhzoumi v. Sessions*, 883 F.3d 1170, 1172 (9th Cir. 2018).

Although a noncitizen previously removed for having been convicted of an aggravated felony is permanently inadmissible under 8 U.S.C. § 1182(a)(9)(A)(i), absent consent of the Attorney General, there is no independent ground of inadmissibility for having been convicted of an aggravated felony.

The aggravated felony provisions in the INA were first introduced by the Anti-Drug Abuse Act of 1988 and included murder, drug trafficking, arms trafficking, and any attempt or conspiracy to commit such acts. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 915-16 (9th Cir. 2004). Subsequent legislation expanded the definition incrementally, until § 321 of IIRIRA added new offenses to the definition and dramatically broadened the definition's reach by expanding the terms of many offenses. *See*, *e.g*., *INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1044-45 & n.3 (9th Cir. 2004). 8 U.S.C. § 1227(a)(2)(A)(iii) does not apply to convictions that occurred prior to enactment of the Anti-Drug Abuse Act of 1988. *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011); *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1080 (9th Cir. 2010).

The expanded definition of aggravated felony applies to all "actions taken" by the Attorney General on or after September 30, 1996, regardless of the date of conviction. *See* IIRIRA § 321(b) and (c); *Aragon-Ayon v. INS*, 206 F.3d 847, 852 (9th Cir. 2000) (citing *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997)). The Ninth Circuit has upheld the retroactive application of IIRIRA's expanded definition of aggravated felony. *See Aragon-Ayon*, 206 F.3d at 853; *see also Becker v. Gonzales*, 473 F.3d 1000, 1002 (9th Cir. 2007); *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 852 (9th Cir. 2006); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1054 (9th Cir. 2005).

"When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA, we generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The reason is that the INA asks what offense the noncitizen was "convicted" of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed. "[C]onviction" is the relevant statutory hook." *Id*. at 191. A state offense will count as a § 1101(a)(43) aggravated felony even if it lacks an interstate commerce element, but corresponds to a federal offense in all other ways. *Torres*, 578 U.S. at 454 ("[T]he absence of such a jurisdictional element is immaterial: A state crime of that kind is an aggravated felony.").

Note that the Ninth Circuit found in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), that the INA definition of an "aggravated felony" crime of violence at § 16(b) was unconstitutionally vague, while § 16(a) survives. The court explained that

> section 16(b) (as incorporated in 8 U.S.C. § 1101(a)(43)(F)) requires courts to 1) measure the risk by an indeterminate standard of a "judicially imagined 'ordinary case,'" not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under *Johnson* [*v. United States*, 576 U.S. 591 (2015)], these uncertainties render the INA provision unconstitutionally vague.

Dimaya v. Lynch, 803 F.3d 1110, 1120 (9th Cir. 2015). *See also Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016). Affirming the Ninth Circuit's decision that § 16(b) as incorporated into the INA is unconstitutional, the Supreme Court held that "§ 16(b) 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Sessions v. Dimaya*, 584 U.S. 148, 175 (2018) (quoting *Johnson v. United States*, 576 U.S. at 598).

Cross-reference: Cancellation of Removal, Suspension of Deportation, and Former 212(c) Relief, Section 212(c) Relief, Application of Retroactivity Analysis.

1. Murder, Rape or Sexual Abuse of a Minor – 8 U.S.C. § 1101(a)(43)(A)

a. Murder

This court has held that the federal generic definition of murder in the INA's aggravated felony provision means the unlawful killing of a human being with malice aforethought. *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1091 (9th Cir. 2020). In *Gomez Fernandez*, the court concluded that California Penal Code § 187(a) is broader than the federal generic definition of murder because it includes an unborn fetus. The court further determined that the statute was divisible, and in applying the modified categorical approach, Gomez's § 187(a) conviction was an aggravated felony. *Id.* at 1090-91 (looking to the conviction documents in the record to determine if Gomez's particular conviction met the federal definition of murder).

"There is no dispute that a California conviction for second degree murder is an aggravated felony under federal law." *Sales v. Sessions*, 868 F.3d 779, 780 (9th Cir. 2017).

b. Rape

"Although the term 'rape' itself is not further defined by the INA, the term encompasses convictions obtained under either federal or state law." *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000) (holding that Cal. Penal Code § 261(a)(3), which penalizes the act of engaging in non-consensual sexual intercourse with a person whose ability to resist has been substantially impaired by drugs or other intoxicants, qualifies as aggravated felony rape); see *also United States v. Gonzalez-Reyes*, 172 F.4th 1088, 1093 (9th Cir. 2026) (holding that "California Penal Code §261(a)(2)—which appears to recognize rape perpetrated through threats of non-physical force—is a categorical match with the generic federal definition of rape," and therefore that petitioner's "state rape conviction is a valid predicate offense to qualify him as an aggravated felon under federal law"); *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 Cal. Penal Code § 261(a)(4), is an aggravated felony barring cancellation of removal); *United States v. Yanez-Saucedo*, 295 F.3d 991, 996 (9th Cir. 2002) (third-degree rape under Washington law meets the definition of rape even though it does not necessarily include an element of physical force), *abrogated by Descamps v. United States*, 570 U.S. 254 (2013).

In *Elmakhzoumi v. Sessions*, 883 F.3d 1170 (9th Cir. 2018), the court concluded that petitioner's conviction under California Penal Code § 286(i) qualified as a rape offense under the INA. *Elmakhzoumi*, 883 F.3d at 1173 (California sodomy conviction where victim cannot consent in violation of Cal. Penal Code § 286(i) is an aggravated felony).

c. Sexual Abuse of a Minor

The court has "developed two definitions specifying the elements of the federal generic offense of sexual abuse of a minor." *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1200 (9th Cir. 2018); *see also Mero v. Barr*, 957 F.3d 1021, 1023 (9th Cir. 2020). The first definition applies mainly to statutory rape offenses, and "requires that the offender engage in 'a sexual act . . . with a minor between the ages of 12 and 16.'" *Mero*, 957 F.3d at 1023 (emphasis omitted; citing *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150, 1152 (9th Cir. 2008) (en banc), *abrogated on other grounds by Descamps v. United States*, 570 U.S. 254 (2013), 798 F.3d 900, 904 (9th Cir. 2015). The second definition applies to all other offenses and "requires proof of three elements: (1) sexual conduct, (2) with a minor, (3) that constitutes abuse." *Quintero-Cisneros*, 891 F.3d at 1200; *see also*

Mero, 957 F.3d at 1023; *Sanchez-Avalos v. Holder*, 693 F.3d 1011, 1016 (9th Cir. 2012) ("A state crime may qualify as the federal generic offense of 'sexual abuse of a minor' if: (1) the conduct prohibited by the criminal statute is sexual, (2) *the statute protects a minor*, and (3) the statute requires abuse."), *abrogated in part by Descamps v. United States*, 570 U.S. 254 (2013). "Participation in some form of sexual conduct with a minor is a requirement of every state offense [the court has] held to qualify as 'sexual abuse of a minor.'" *Mero*, 957 F.3d at 1023. In *Mero v. Barr*, the court held that a conviction under Nevada Revised Statute § 200.730 for possession of visual presentation depicting sexual conduct of a minor did not qualify as "sexual abuse of a minor" because it did not require the offender himself to have participated in any form of sexual conduct with the minor depicted in the image. *Mero*, 957 F.3d at 1023-24.

A criminal statute includes the element of "abuse" if it expressly prohibits conduct that causes "physical or psychological harm in light of the age of the victim in question." *Sanchez-Avalos*, 693 F.3d at 1016 (citation omitted) (conviction of noncitizen on charge of sexual battery under California law did not qualify as sexual abuse of minor and thus did not qualify as aggravated felony that prevented noncitizen from being eligible for waiver of inadmissibility); *Rivera-Cuartas v. Holder*, 605 F.3d 699, 702 (9th Cir. 2010) (Arizona Revised Statute § 13-1405, which criminalizes sexual conduct with a minor under the age of 18, did not constitute an aggravated felony); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012-16 (9th Cir. 2009) (sexual abuse of a minor under Cal. Penal Code § 261.5(d) (1997) was not categorically an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(A)); (concluding that California convictions under §§ 261.5(c), 286(b)(1), 288a(b)(1), or 289(h) do not categorically constitute "sexual abuse of a minor"), *abrogated on other grounds by Descamps v. United States*, 570 U.S. 254 (2013); *Rebilas v. Mukasey*, 527 F.3d 783, 786-87 (9th Cir. 2008) (Arizona conviction for attempted public sexual indecency to a minor is not a categorical aggravated felony because the statute does not require actual touching, the minor does not need to be aware of the perpetrator's conduct, and Arizona's definition of attempt is broader than the federal definition); *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 996-97 (9th Cir. 2008) (conduct under Cal Penal Code § 647.6(a), which prohibits annoying or molesting a child under age 18, does not constitute sexual abuse of a minor), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); *Parrilla v. Gonzales*, 414 F.3d 1038, 1043-44 (9th Cir. 2005) (conviction for communicating with a minor for immoral purposes under Wash. Rev. Code § 9.68A.090 did not categorically qualify as sexual abuse of a minor, but under the modified categorical approach, the information and the Certification for Determination of Probable Cause incorporated by reference into the guilty plea demonstrated that applicant was convicted of sexual abuse of a minor); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 (9th Cir. 2003) (Nevada conviction for lewdness with a child under 14 constitutes sexual abuse of a minor).

The Supreme Court has held that "in the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of 'sexual abuse of a minor' under § 1101(a)(43)(A) requires the age of the victim to be less than 16." *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 398 (2017).

See also Flores v. Barr, 930 F.3d 1082, 1087 (9th Cir. 2019) (per curiam) (stating that the court has "repeatedly held that California Penal Code § 288(a) categorically involves 'sexual abuse of a minor' under 8 U.S.C. § 1101(a)(43)(A)"); *Quintero-Cisneros*, 891 F.3d at 1202 (holding that assault of a child in the third degree with sexual motivation under Washington law is a categorical match for the federal generic offense of sexual abuse of a minor, an aggravated felony that bars the relief from removal that petitioner requested); *Diego v. Sessions*, 857 F.3d 1005, 1015 (9th Cir. 2017) ("We hold that paragraph 163.427(1)(a) of the Oregon Revised Statutes is divisible, and a conviction under subparagraph 163.427(1)(a)(A) is sexual abuse of a minor within the generic federal definition and therefore an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)."); *United States v. Martinez*, 786 F.3d 1227, 1233 (9th Cir. 2015) ("A conviction premised on a violation of Wash. Rev. Code § 9A.44.089 (2001) does not categorically meet the generic definition of sexual abuse of a minor due to the missing elements in the statutory provision."); *United States v. Gomez*, 757 F.3d 885, 900 (9th Cir. 2014) (prior state conviction for attempted sexual conduct with a minor categorically qualified as "sexual abuse of a minor"); *United States v. Baza-Martinez*, 464 F.3d 1010, 1012 (9th Cir. 2006) (North Carolina conviction for taking indecent liberties with a child is not categorically sexual abuse of a minor because the statute prohibits conduct that is not necessarily physically or psychologically harmful); *United States v. Alvarez-Gutierrez*, 394 F.3d 1241, 1244 (9th Cir. 2005) (Nevada conviction for statutory sexual seduction constituted sexual abuse of a minor for sentencing purposes); *United States v. Pallares-Galan*, 359 F.3d 1088, 1100-03 (9th Cir. 2004) (misdemeanor California conviction for annoying or molesting child under age 18 does not categorically constitute sexual abuse of minor for immigration purposes); *United States v. Marin-Navarette*, 244 F.3d 1284, 1287 (9th Cir. 2001) (Washington conviction for third-degree attempted child molestation was an aggravated felony for sentencing purposes); *United States v. Mendoza-Iribe*, 198 F.3d 742, 744-45 (9th Cir. 1999) (per curiam) (California conviction for penetrating genital or anal openings of child under 14 with foreign object constituted sexual abuse of a minor for sentencing purposes); *United States v. Baron-Medina*, 187 F.3d 1144, 1146-47 (9th Cir. 1999) (California conviction for lewd conduct with a child under 14 constituted sexual abuse of a minor for sentencing enhancement purposes).

2. Illicit Trafficking in a Controlled Substance – 8 U.S.C. § 1101(a)(43)(B)

"Congress defined the term 'aggravated felony' to include, among other offenses, 'illicit trafficking in a controlled substance.' § 1101(a)(43)(B)." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 647 (9th Cir. 2020). "The INA does not define the phrase 'illicit trafficking.'" *Id.* at 649. The BIA "has understood that the term 'essentially' involves a 'business or merchant nature' or 'the trading or dealing of goods,' [and has also held that] 'illicit trafficking' means 'a commercial transaction, or passing of goods from one person to another for money or other consideration.'" *Id.* (citations omitted) (stating that the BIA's interpretation matches closely with how federal courts have interpreted the term).

"[I]llicit trafficking in a controlled substance[] is a 'generic crime.'" *Moncrieffe v. Holder*, 569 U.S. 184, 192 (2013) (citation and internal quotation marks omitted). The aggravated felony provision is narrower than the controlled substances offense provision of 8 U.S.C. § 1227(a)(2)(B)(i) because the aggravated felony provision covers only drug trafficking offenses. A controlled substances offense is an aggravated felony if it (1) includes an element of illicit trafficking or (2) would be a felony drug trafficking crime under federal law. *See* 8 U.S.C. § 1101(a)(43)(B); *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004). "Any state crime that is a categorical match to an offense under the Controlled Substances Act ('CSA') constitutes an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2)." *Lopez v. Sessions*, 901 F.3d 1071, 1074 (9th Cir. 2018).

If the noncitizen was actually convicted of a drug trafficking crime under federal law, then the analysis is straightforward. If, however, the noncitizen is convicted of a state crime, then the court must determine whether the crime would be punishable as a felony drug trafficking crime under federal law. First, the offense must be punishable as a felony under federal law; the state's designation of the crime as a felony is not sufficient to render it an aggravated felony. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (state felony possession offense was not an aggravated felony because the federal Controlled Substances Act punishes simple possession as a misdemeanor). Alternatively, the substantive crime can be analogous to a federal drug trafficking felony. *See Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1128 (9th Cir. 2007) (California transportation of controlled substances offense was not a categorical aggravated felony because the statute punishes solicitation which is not mentioned in the federal Controlled Substances Act), *overruled on other grounds by Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), *abrogated in part by Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1067-68 (9th Cir. 2006) (conviction under Cal. Health & Safety Code § 11366 for opening or maintaining a place for the purpose of selling, giving away, or using a controlled substance was an aggravated felony because it was analogous to a federal offense); *Olivera-Garcia v. INS*, 328 F.3d 1083, 1086-87 (9th Cir. 2003) (conviction for being an accessory after the fact to the manufacture of methamphetamine was an aggravated felony because petitioner was convicted under substantive federal drug statute); *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (conviction under generic solicitation statute rather than substantive drug statute was not an aggravated felony because it was not analogous to federal drug offense).

If the state crime is not a categorical match to the generic federal offense, and the state statute is divisible, the court may apply the modified categorical approach to determine if the elements of the underlying offense of conviction are a match to the generic federal offense. *Dominguez v. Barr*, 975 F.3d 725, 734-35 (9th Cir. 2020) (as amended). In *Dominguez v. Barr*, the court held that the Oregon statute prohibiting manufacture of a controlled substance, Or. Rev. Stat. § 475.992(1)(a), did not qualify as an aggravated felony under the categorical approach. However, the statute was divisible, and thus the modified categorical approach applied. Looking to the charging documents, the court held that the "Oregon conviction for manufacture of a controlled substance under § 475.992(1)(a) [was] a categorical match with the generic drug trafficking offense, meaning Dominguez was convicted of an aggravated felony." *Dominguez*, 975 F.3d at 740.

"'[I]illicit trafficking' does not include solicitation offenses." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 653 (9th Cir. 2020) (holding that Oregon's former crime of marijuana delivery for consideration, Or. Rev. Stat. § 475.860(2)(a), does not qualify as an aggravated felony under § 1101(a)(43)(B)).

See also Medina-Rodriguez v. Barr, 979 F.3d 738, 746 (9th Cir. 2020) (holding that noncitizen's prior conviction of California offense of possession with intent to distribute marijuana, in violation of Cal. Health & Safety Code § 11359, for which he was subject to sentence in excess of one year, was a categorical match with the generic federal aggravated felony drug offense, and thus he was subject to removal); *Lopez v. Sessions*, 901 F.3d 1071, 1075 (9th Cir. 2018) ("Because Lopez's [conviction for possession for sale of cocaine salt in] violation of Cal. Health & Safety Code § 11351 encompasses all of the elements of a felony punishable under the CSA, it qualifies as an aggravated felony."); *Sandoval v. Sessions*, 866 F.3d 986, 989 (9th Cir. 2017) (concluding that because Oregon's definition of "delivery" includes solicitation, Or. Rev. Stat. § 475.992(1)(a) (1998) is not a categorical match to a "drug trafficking crime," and petitioner's conviction for delivery of heroin did not qualify as an aggravated felony); *Roman-Suaste v. Holder*, 766 F.3d 1035, 1038-40 (9th Cir. 2014) (California offense of possession of marijuana for sale constituted an aggravated felony); *Daas v. Holder*, 620 F.3d 1050, 1053-54 (9th Cir. 2010) (conviction for distributing ephedrine and pseudoephedrine with reasonable cause to believe they would be used to manufacture methamphetamine qualified as a "drug trafficking crime" and thus was an aggravated felony); *Rendon v. Mukasey*, 520 F.3d 967, 976 (9th Cir. 2008) (holding that possession of a controlled substance with the intent to sell contains a trafficking element and is an aggravated felony).

Although "recidivist simple possession" can be a felony under the Controlled Substances Act, the Supreme Court held in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), that "second or subsequent simple possession offenses are not aggravated felonies under § 1101(a)(43), when . . . the state conviction is not based on the fact of a prior conviction." *Id.* at 566.

3. Illicit Trafficking in Firearms – 8 U.S.C. § 1101(a)(43)(C)

An aggravated felony includes "illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title)." 8 U.S.C. § 1101(a)(43)(C).

A federal conviction for importing, manufacturing, or dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A) qualifies as an "aggravated felony" under the INA because it categorically fits within the generic definition of "illicit trafficking in firearms." *Chacon v. Wilkinson*, 988 F.3d 1131, 1136 (9th Cir. 2021) (citing 8 U.S.C. § 1101(a)(43)(C)).

4. Money Laundering – 8 U.S.C. § 1101(a)(43)(D)

An aggravated felony includes "an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000." 8 U.S.C. § 1101(a)(43)(D). In order for a conviction for money laundering to constitute an aggravated felony under this section, the amount of funds laundered must be over $10,000. *See Fuentes v. Lynch*, 788 F.3d 1177, 1180 (9th Cir. 2015) (per curiam); *Chowdhury v. INS*, 249 F.3d 970, 973-75 (9th Cir. 2001) (conviction for money laundering was not an aggravated felony because amount of funds laundered was less than $10,000).

5. Explosives, Firearms and Arson – 8 U.S.C. § 1101(a)(43)(E)

An aggravated felony includes:

an offense described in –

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses).

8 U.S.C. § 1101(a)(43)(E); *see also Torres v. Lynch*, 578 U.S. 452 (2016) (conviction for arson under New York law qualified as an aggravated felony under the INA); *Togonon v. Garland*, 23 F.4th 876, 879 (9th Cir. 2022) (holding that noncitizen's California arson conviction in violation of Cal. Penal Code § 451(b) was not an "aggravated felony" under the INA; although both the federal and California statute includes the term "maliciously," California courts have interpreted that term to include a broader range of conduct than its federal counterpart); *United States v. Mendoza-Reyes*, 331 F.3d 1119, 1122 (9th Cir. 2003) (Washington conviction for first-degree unlawful possession of a firearm is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii) for sentencing purposes); *United States v. Castillo-Rivera*, 244 F.3d 1020, 1024 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E) for sentencing purposes); *United States v. Sandoval-Barajas*, 206 F.3d 853, 856-57 (9th Cir. 2000) (Washington conviction for possession of firearm by non-citizen was not an aggravated felony for sentencing purposes).

6. Crimes of Violence ("COV") – 8 U.S.C. § 1101(a)(43)(F)

> [A]n aggravated felony includes "a crime of violence (as defined in section 16 of title 18 . . . for which the term of imprisonment [is] at least one year." [8 U.S.C.] § 1101(a)(43)(F). The specified statute, 18 U.S.C. § 16, provides the federal criminal code's definition of "crime of violence." Its two parts, often known as the elements clause and the residual clause, cover:
>
> > "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > "(b) 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."

Sessions v. Dimaya, 584 U.S. 148, 153 (2018) ; *see also* 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16.

"In the crime of violence context, [the court] compare[s] the state statute to 18 U.S.C. § 16(a), rather than a generic assault statute . . . ." *Amaya v. Garland*, 15 F.4th 976, 980 (9th Cir. 2021).

Section 16(b), as incorporated into the definition of "crime of violence" in the INA, is unconstitutionally vague and cannot be the basis for an aggravated felony. *See Dimaya*, 584 U.S. at 162, *affirming Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015); *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018). Note that in *Dimaya v. Lynch*, the Ninth Circuit did "not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast any doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence." *Dimaya v. Lynch*, 803 F.3d at 1120 n.17.

The "language [of the statute] requires [the court] to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v. Ashcroft*, 543 U.S. 1, 6-7 (2004) (concluding that Florida DUI offenses were not crimes of violence under either § 16(a) or §16(b)); *see also Dent*, 900 F.3d at 1084 ("[W]e examine what the state conviction necessarily involved, not the facts underlying the case, and so must presume that the conviction rested upon nothing more than the least of the acts criminalized." (citation omitted)); *Camacho-Cruz v. Holder*, 621 F.3d 941, 942 (9th Cir. 2010) (stating that "[t]o determine whether a state law conviction is categorically a 'crime of violence,' we compare the elements of the state law crime to the elements of a 'crime of violence,' as defined in 18 U.S.C. § 16," and holding that a conviction for assault with use of deadly weapon under Nevada law was a crime of violence under 18 U.S.C. § 16(a)). The court has "squarely held that the force necessary to constitute a crime of violence must actually be violent in nature." *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (citation, internal quotation marks, and alteration omitted) (Oregon conviction for harassment was not a crime of violence under § 16(a)).

a. Negligent and Reckless Conduct Insufficient

"The critical aspect of § 16(a) is that a crime of violence is one involving the use . . . of physical force against the person or property of another." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (citation, internal quotation marks, and emphasis omitted). "[U]se requires active employment," and "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* (citations omitted). *Leocal v. Ashcroft* and subsequent cases "confirm that the generic crime of violence defined in section 16(a) requires a *mens rea* of purposeful or knowing," and "does not 'include offenses committed through the reckless, or grossly negligent, use of force.'" *Gutierrez v. Garland*, 106 F.4th 866, 875 (9th Cir. 2024) (citing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc)); *see also Amaya v. Garland*, 15 F.4th 976, 983 (9th Cir. 2021) (explaining that § 16(a) requires a higher degree of intent than negligent or merely accidental conduct).

> In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes . . . .

Leocal, 543 U.S. at 11; *Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221 (9th Cir. 2005) (explaining that gross negligence "does not constitute the kind of *active* employment of force against another that *Leocal* requires for a crime of violence"). *See also Bolanos v. Holder*, 734 F.3d 875, 878 (9th Cir. 2013) (holding that conviction for brandishing firearm in presence of occupant of motor vehicle under

Cal. Penal Code § 417.3 qualified categorically as a crime of violence under 18 U.S.C. § 16(a) and rendered petitioner ineligible for cancellation of removal).

Likewise, "the reckless use of force is 'accidental' and crimes of recklessness cannot be crimes of violence" under 18 U.S.C. § 16(a) or 16(b). *Fernandez-Ruizs*, 466 F.3d at 1130 (holding that the offense underlying petitioner's misdemeanor domestic violence conviction was not a categorical crime of violence under 18 U.S.C. § 16(a)). The court has stated: "Neither gross negligence in failing to perceive, nor conscious disregard of a substantial and unjustifiable risk of injury implies that physical force is instrumental to carrying out the crime, such as the plain meaning of the word 'use' denotes." *Id.* (citations and internal quotation marks omitted); *see also Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1084 (9th Cir. 2007) (focusing on § 16(b) and concluding that Cal. Penal Code § 646.9 is not a crime of violence because it penalizes reckless conduct).

State driving under the influence offenses that either do not have a *mens rea* component, or require only a showing of negligence in the operation of a vehicle, do not qualify as crimes of violence. *See Leocal*, 543 U.S. at 8-10 (Florida conviction for felony DUI causing injury); *see also Lara-Cazares*, 408 F.3d at 1221-22 (California conviction for gross vehicular manslaughter while intoxicated) (overruling *Park v. INS*, 252 F.3d 1018, 1023-25 (9th Cir. 2001), and its progeny to the extent that they are inconsistent with *Leocal*); *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (per curiam) (California felony conviction of DUI with multiple prior convictions).

This court has said that "a crime with a mens rea of knowledge qualifies as a crime of violence under § 16(a)." *United States v. Alvarez*, 60 F.4th 554, 562, 566 (9th Cir. 2023) (holding, in context of an illegal reentry case in which petitioner challenged his underlying removal order, conviction for felonious assault on a police officer in violation of Ohio Revised Code § 2903.13(A) categorically is a crime of violence under § 16(a) and thus qualifies as an aggravated felony pursuant to § 1101(a)(43)(F)).

b. Force Against Another

18 U.S.C. § 16 defines a crime of violence as one involving the use of force against another person or another's property, and thus a crime that could involve the use of force against oneself or one's own property does not meet the definition. "Section 16(a) does not require an actual application of force or an injury to the victim. Rather, the threatened use of force is sufficient for a crime to constitute a

crime of violence." *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010) (explaining that whether the defendant actually intends to harm the victim or whether any harm results is irrelevant); *see also United States v. Flores-Cordero*, 723 F.3d 1085, 1086 (9th Cir. 2013) (stating that in "all of the federal contexts, the definitions require application or risk of 'physical force' for a prior crime to be considered violent," and concluding that resisting arrest under Arizona law is not categorically a crime of violence).

"In 2010, the United States Supreme Court issued *Johnson v. United States*, [559 U.S. 133, 140 (2010)], which held that the physical force that a crime of violence entails must be '*violent* force—that is, force capable of causing physical pain or injury to another person.'" *Solorio-Ruiz v. Sessions*, 881 F.3d 733, 736 (9th Cir. 2018), *overruling recognized by United States v. Baldon*, 956 F.3d 1115, 1121 (9th Cir. 2020). As explained by *Solorio-Ruiz*, "*Johnson* altered [the court's] understanding of *how violent* a crime must be to qualify as a crime of violence." *Solorio-Ruiz*, 881 F.3d 736. The court explained that to determine whether a crime constitutes a crime of violence, it considers "whether *every* violation of the statute *necessarily* involves violent force." *Id*. at 737 (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)). Applying *Johnson*, the court held that California carjacking is not a crime of violence under 8 U.S.C. § 1101(a)(43)(F). *Solorio-Ruiz*, 881 F.3d at 738. The court stated that prior cases holding otherwise were no longer good law because they did not consider whether the statute at issue required the use of *violent* force as required by *Johnson*. *Solorio-Ruiz*, 881 F.3d at 736-37.

However, in 2019 the Supreme Court revisited *Johnson* in *Stokeling v. United States*, 586 U.S. 73 (2019), *abrogating Solorio-Ruiz*, 881 F.3d 733. *See United States v. Baldon*, 956 F.3d 1115, 1121 (9th Cir. 2020). In *Baldon*, the court held that the Supreme Court's decision in *Stokeling* was clearly irreconcilable with *Solorio-Ruiz*.

> The [Supreme] Court explained that at common law the terms "violence" and "force" were used interchangeably, and that "[t]he common law also did not distinguish between gradations of 'violence.' If an act physically overcame a victim's resistance, 'however slight' that resistance might be, it necessarily constituted violence." *Stokeling*, 139 S. Ct. at 550. This understanding of "physical force" aligns with *Johnson* because "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*, and 'suggest[s] a degree of power that would not be satisfied by the

> merest touching.' " *Id.* at 552-53 (quoting *Johnson*, 559 U.S. at 139, 130 S. Ct. 1265).
>
> This clarification of "violent force" (any force sufficient to overcome a victim's physical resistance) is "clearly irreconcilable" with our reasoning in *Solorio-Ruiz*. Our opinion rested on the analytical distinction between substantial and minimal force. This distinction no longer exists. *See Ward v. United States*, 936 F.3d 914, 919 (9th Cir. 2019). As a result, *Solorio-Ruiz*'s holding is no longer good law.

Baldon, 956 F.3d at 1121; *see also Gutierrez v. Garland*, 106 F.4th 866, 871-72 (9th Cir. 2024) (recounting this history in holding that a conviction for carjacking under Cal. Penal Code § 215(a) is not categorically a crime of violence for purposes of 18 U.S.C. § 16 because the California statute proscribes the use of "force or fear" rather than requiring force, and criminalizes merely reckless use of force); *United States v. Alvarez*, 60 F.4th 554, 566 (9th Cir. 2023) (petitioner's conviction for felonious assault on a police officer in violation of Ohio Revised Code § 2903.13(A) categorically is a crime of violence and an aggravated felony where § 2903.13(A)'s text only reaches, and Ohio courts have only applied the statute to, conduct where force is capable of causing physical pain or injury (citing *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) and *Johnson v. United States*, 559 U.S. 133, 140 (2010))).

Prior to *Sessions v. Dimaya*, 584 U.S. 148 (2018), this court held that "Section 16(b) does not require actual violence, but rather only a substantial risk of violence." *United States v. Sandoval Orellana*, 714 F.3d 1174, 1179 (9th Cir. 2013) (conviction for sexual penetration by foreign object was categorically a crime of violence); *see also Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127-33 (9th Cir. 2012) (per curiam) (ordinary kidnapping under Cal. Penal Code § 207(a) is a crime of violence because it results in a substantial risk of force, thereby categorically triggering § 16(b)). In *Sessions v. Dimaya*, however, the Supreme Court determined that § 16(b), as incorporated into the INA's definition of "aggravated felony" is impermissibly vague in violation of the Due Process Clause of the Fifth Amendment. 584 U.S. at 162.

c. Specific Crimes Considered

Examples of cases finding an offense to be a crime of violence include: *Rodriguez-Hernandez v. Garland*, 89 F.4th 742 (9th Cir. 2023) (holding that petitioner's conviction of misdemeanor harassment-domestic violence in violation of Wash. Rev. Code § 9A.46.020 was categorically a crime of violence), *cert. denied*, 145 S. Ct. 337 (2024); *United States v. Alvarez*, 60 F.4th 554, 562, 566 (9th Cir. 2023) (holding, in the context of an illegal reentry case in which petitioner challenged his underlying removal order, that a conviction for felonious assault on a police officer in violation of Ohio Revised Code § 2903.13(A) categorically is a crime of violence under § 16(a) and thus qualifies as an aggravated felony pursuant to § 1101(a)(43)(F)); *Olea-Serefina v. Garland*, 34 F.4th 856, 865 (9th Cir. 2022) (holding that petitioner's conviction for corporal injury upon a child in violation of Cal. Penal Code § 273d(a), for which he was convicted to a jail term of 365 days, constitutes an aggravated felony "crime of violence" under 18 U.S.C. § 16, rendering petitioner ineligible for cancellation of removal); *Amaya v. Garland*, 15 F.4th 976, 986 (9th Cir. 2021) (holding that Wash. Rev. Code § 9.36.011 is categorically a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F)); *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (determining that strangulation, as defined at Or. Rev. Stat. § 163.187(1), is "an offense that has as an element the use . . . of physical force" and is a crime of violence within the meaning of § 16(a)); *United States v. Guizar-Rodriguez*, 900 F.3d 1044, 1046 (9th Cir. 2018) (holding that battery committed with the use of a deadly weapon under Nevada Revised Statute § 200.481(2)(e)(1) is a crime of violence as defined in 18 U.S.C. § 16(a)); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1130-32 (9th Cir. 2016) (a conviction under Cal. Penal Code §§ 422 and 644 is categorically a crime of violence as defined under 18 U.S.C. § 16(a)); *United States v. Colon-Arreola*, 753 F.3d 841 (9th Cir. 2014) (violation of Cal. Penal Code § 243(c)(2) is categorically a crime of violence under USSG § 2L1.2 for purposes of sentencing enhancement); *United States v. Cabrera-Perez*, 751 F.3d 1000, 1007 (9th Cir. 2014) (conviction under Arizona Revised Statutes § 13-203(A)(2) and § 13-1204(A)(2) for aggravated assault constituted a crime of violence under the modified categorical approach for purposes of § 16(a)); *United States v. Gomez*, 757 F.3d 885, 903 (9th Cir. 2014) (conviction for sexual conduct with a minor under Arizona Revised Statutes § 13-1405 did not constitute a crime of violence under USSG § 2L1.2(b)(1)(A)(ii) for purposes of sentencing enhancement);*Camacho-Cruz v. Holder*, 621 F.3d 941, 942-43 (9th Cir. 2010) (holding that conviction for assault with use of a deadly weapon under Nev. Rev. Stat. § 200.471 was a crime of violence under § 16(a)); *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 941 (9th Cir. 2004) (conviction for exhibiting deadly weapon with intent to evade arrest under California Penal Code § 417.8 is a crime of violence, citing § 16(a)); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) (conviction for making terrorist threats under California Penal Code § 422 is a crime of violence under § 16(a)); *Matsuk v. INS*, 247 F.3d 999, 1001 n.10 (9th Cir. 2001) (petitioner's convictions for assaulting his wife and children were crimes of violence under

18 U.S.C. § 16(a)), *overruled on other grounds by Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc).

Examples of cases finding that an offense is *not* a crime of violence include: *United States v. Taylor*, 596 U.S. 845, 859 (2022) (attempted Hobbs Act robbery does not qualify as a crime of violence for purposes of a sentencing enhancement under 18 U.S.C. § 924(c)(3)(A)); *Gutierrez v. Garland*, 106 F.4th 866, 872 (9th Cir. 2024) (holding that a conviction for carjacking under Cal. Penal Code § 215(a) is not categorically a crime of violence); *United States v. Martinez-Hernandez*, 932 F.3d 1198 (9th Cir. 2019) (as amended) (holding that although California robbery conviction under Cal. Penal Code § 211 does not qualify categorically as a crime of violence, it met the definition of "theft offense" and thus qualified as a removable aggravated felony); *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018) (holding that third-degree escape under Arizona Revised Statutes § 13-2502 is not a crime of violence, nor an aggravated felony; it does not necessarily involve the physical force required by § 16(a), and after *Dimaya*, § 16(b) cannot be the basis for an aggravated felony because it is unconstitutional); *United States v. Garcia-Lopez*, 903 F.3d 887, 893 (9th Cir. 2018) (holding that the court's recent decisions and the Supreme Court's decision in *Dimaya* firmly establish that California robbery (Cal. Penal Code § 211) is not a "crime of violence" under § 16(a) or § 16(b) for removal purposes), *overruled on other grounds by United States v. Gomez*, 165 F.4th 1199, 1205-07 (9th Cir. 2026) (en banc), *cert. denied*, __ S. Ct. __, 2026 WL 1377030 (U.S. May 18, 2026);*Ramirez v. Lynch*, 810 F.3d 1127, 1134 (9th Cir. 2016) (conviction under Cal. Penal Code § 273a(a) for felony child abuse is not categorically a crime of violence); *Flores-Lopez v. Holder*, 685 F.3d 857, 862-65 (9th Cir. 2012) (Cal. Penal Code § 69 is not a categorical crime of violence under § 16(a) or § 16(b)); *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1055 (9th Cir. 2011) (California conviction for shooting at an inhabited dwelling or vehicle was not categorically a crime of violence under § 16(b)); *Cortez-Guillen v. Holder*, 623 F.3d 933, 935-36 (9th Cir. 2010) (Alaska conviction for coercion was not categorically a crime of violence because it criminalized conduct outside the contours of the federal definition of a crime of violence); *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1227 (9th Cir. 2008) (comparing elements of statute to definition in § 16(a) and concluding "Washington fourth degree assault statute is categorically overbroad, and the modified categorical approach does not establish that Suazo was convicted of a 'crime of violence'"); *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (Oregon harassment offense did not require sufficient force to constitute a crime of violence under § 16(a)).

Section 16(b) is unconstitutionally vague as incorporated into the INA's definition of "crime of violence" and cannot be the basis for an aggravated felony. *See Sessions v. Dimaya*, 584 U.S. 148, 162 (2018); *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018). Examples of cases that found an offense was a crime of violence under § 16(b) **prior** to *Dimaya* finding that section unconstitutional include: *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 863 (9th Cir. 2013) (holding that a conviction under Cal. Penal Code § 288(c)(1) was a crime of violence under § 16(b) and thus an aggravated felony); *Barragan-Lopez v. Holder*, 705 F.3d 1112, 1115-17 (9th Cir. 2013) (conviction for false imprisonment under Cal. Penal Code § 210.5 was categorically a crime of violence under § 16(b), making the petitioner removable as an aggravated felon); *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1133 (9th Cir. 2012) (per curiam) (ordinary kidnapping under Cal. Penal Code § 207(a) constitutes a "crime of violence" under § 16(b)); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111-12 (9th Cir. 2011) (holding that conviction for residential burglary under Cal. Penal Code § 459 constitutes a crime of violence under § 16(b) because it is a felony that involves a substantial risk that physical force against the person or property of another may be used in committing the offense); *Prakash v. Holder*, 579 F.3d 1033, 1034 (9th Cir. 2009) (holding that convictions for solicitation to commit rape by force, in violation of Cal. Penal Code § 653f(c), and solicitation to commit assault by means of force likely to produce great bodily injury, in violation of Cal. Penal Code § 653f(a), constitute crimes of violence under § 16(b)); *Estrada-Rodriguez v. Mukasey*, 512 F.3d 517, 520-21 (9th Cir. 2007) (conviction for resisting arrest under Arizona Revised Statutes § 13-2508 is a crime of violence under § 16(b)); *Lisbey v. Gonzales*, 420 F.3d 930, 932-34 (9th Cir. 2005) (conviction for sexual battery under Cal. Penal Code § 243.4(a) is a crime of violence for purposes of § 16(b)); *Ruiz-Morales v. Ashcroft*, 361 F.3d 1219, 1222 (9th Cir. 2004) (conviction for mayhem under California Penal Code § 203 is a crime of violence under § 16(b)).

Cross-reference: Domestic Violence Crimes.

7. Theft or Burglary – 8 U.S.C. § 1101(a)(43)(G)

The definition of aggravated felony includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G); *see also Chmukh v. Garland*, 124 F.4th 670, 677-79 (9th Cir. 2024) (conviction for possession of a stolen vehicle under Revised Code of Washington § 9A.56.068 qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) making petitioner ineligible for asylum, and was also a particularly serious crime barring withholding of removal under 8

U.S.C. § 1231(b)(3)(B)); *United States v. Orozco-Orozco*, 94 F.4th 1118, 1120-21 (9th Cir. 2024) (conviction for carjacking in violation of Cal. Penal Code § 215 is not a categorical match for a generic theft offense and thus is not an aggravated felony under the INA because a person can violate § 215 without the intent to steal required by a generic theft offense); *Guzman-Maldonado v. Garland*, 92 F.4th 1155, 1159 (9th Cir. 2024) (conviction for armed robbery in violation of Arizona Revised Statutes § 13- 904(A), for which the term of imprisonment imposed is at least one year, is categorically an aggravated felony theft offense); *Alfred v. Garland*, 64 F.4th 1025, 1043-48 (9th Cir. 2023) (en banc) (reviewing Washington case law to see if there is a "realistic probability, not a theoretical possibility" that the state applies accomplice liability for second-degree robbery to conduct that falls outside of the generic crime, and concluding that Washington accomplice liability is a categorical match with the generic theft definition), *overruling United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), and *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018); *Mendoza-Garcia v. Garland*, 36 F.4th 989, 994-95 (9th Cir. 2022) (recognizing that *United States v. Stitt*, 586 U.S. 27 (2018)—which held that the inclusion of nonpermanent structures "designed or adapted for overnight use" does not expand a statute beyond the definition of general burglary—overruled *United States v. Cisneros*, 826 F.3d 1190 (9th Cir. 2016), in which this court held that first-degree robbery in violation of Or. Rev. Stat. § 164.225 is not a categorical match to generic burglary because the state definition of "building" is overbroad); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (holding that third-degree robbery in violation of Or. Rev. Stat. § 164.395 is facially overbroad and indivisible, and thus does not qualify as a categorical theft offense under § 1101(a)(43)(G)); *United States v. Martinez-Hernandez*, 932 F.3d 1198, 1202 (9th Cir. 2019) (as amended) (holding that a robbery conviction in violation of Cal. Penal Code § 211 qualifies as a generic theft offense under 8 U.S.C. § 1101(a)(43)(G), and is an aggravated felony); *United States v. Flores*, 901 F.3d 1150, 1161 (9th Cir. 2018) (conviction for receipt of stolen property under Cal. Penal Code § 496(a), along with a sentence of more than one year of imprisonment, is categorically an aggravated felony); *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1202 (9th Cir. 2014) (Washington conviction for second-degree robbery was an aggravated felony); *Alvarez-Reynaga v. Holder*, 596 F.3d 534, 536 (9th Cir. 2010) (conviction under Cal. Penal Code § 496d(a) constitutes a conviction for an aggravated felony); *Verdugo-Gonzales v. Holder*, 581 F.3d 1059, 1060 (9th Cir. 2009) (conviction for receipt of stolen property under Cal. Penal Code § 496(a) categorically qualified as an aggravated felony conviction); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 750-54 (9th Cir. 2009) (conviction for owning and operating a chop shop under Cal. Veh. Code § 10801 did not constitute an aggravated felony of theft), overruled in part as stated in

Lopez-Valencia v. Lynch, 798 F.3d 863, 872 n.6 (9th Cir. 2015); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002); *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000).

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Supreme Court recognized that several circuits and the BIA have adopted a generic definition of a theft offense as "the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id*. at 184 (citation and internal quotation marks omitted); *see also United States v. Alvarado-Pineda*, 774 F.3d 1198, 1202 (9th Cir. 2014) ("Generic theft, in other words, requires (1) the taking of (2) property (3) without consent (4) with the intent 'to deprive the owner of rights and benefits of ownership.'" (citation omitted)); *Arteaga v. Mukasey*, 511 F.3d 940, 947 (9th Cir. 2007) ("Arteaga cites to no authority to support his assertion that a theft offense requires an intent to *permanently* deprive another of property." (emphasis added)).

The Supreme Court rejected the Ninth Circuit's ruling in *Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006), that Cal. Vehicle Code § 10851 is broader than the generic theft definition because it includes aiding and abetting liability. *See Duenas-Alvarez*, 549 U.S. at 184. While not directly overruling them, the Supreme Court's decision calls into question the rule of *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4, and *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005), *abrogated on other grounds by United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), in which the Ninth Circuit had found other California theft offenses to be broader than the generic definition of theft due to the inclusion of aiding and abetting liability. In *United States v. Vidal*, 504 F.3d 1072, 1090 (9th Cir. 2007) (en banc), *abrogated on other grounds as recognized by United States v. Bautista*, 989 F.3d 698, 704 (9th Cir. 2021), this court held that a conviction under California Vehicle Code § 10851(a) is not categorically an aggravated felony because it includes accessory after the fact liability. *See also Penuliar v. Mukasey*, 528 F.3d 603, 611-12 (9th Cir. 2008) (unlawful driving or taking of a vehicle under Cal. Vehicle Code § 10851(a) does not categorically qualify as a theft offense because it extends liability to accessories after the fact), *abrogated on other grounds as recognized by United States v. Martinez*, 771 F.3d 672 (9th Cir. 2014), *cert. granted, judgment vacated*, 576 U.S. 1080 (2015).

To qualify as an aggravated felony theft offense, the term of imprisonment actually imposed by the trial judge must be at least one year. *See Alberto-Gonzalez* *v. INS*, 215 F.3d 906, 910 (9th Cir. 2000) (rejecting government's contention that "term of imprisonment" refers to the potential sentence that the judge could have imposed).

See also Alfred v. Garland, 64 F.4th 1025, 1032-48 (9th Cir. 2023) (en banc) (holding that, in evaluating whether Washington convictions for second-degree robbery and attempted second-degree robbery are aggravated felony theft offenses under § 1101(a)(43)(G), Washington accomplice liability must be considered as part of the categorical analysis, and concluding that Washington accomplice liability is a categorical match with generic theft) (overruling *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), and *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018)); *Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1073 (9th Cir. 2021) (holding that noncitizen's conviction for theft of a vehicle under Cal. Veh. Code § 10851(a) was not predicate "aggravated felony" under the INA); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (holding that Oregon Revised Statutes § 164.395 is facially overbroad and indivisible, and thus does not qualify as a categorical theft offence under § 1101(a)(43)(G)); *Lopez-Valencia v. Lynch*, 798 F.3d 863, 866-67 (9th Cir. 2015) (a conviction under California's theft statute is not an aggravated felony because it is not a "theft offense" as defined by 8 U.S.C. § 1101(a)(43)(G); "conviction for 'theft' in California is categorically not a 'generic theft offense' because it is both 'overbroad' and 'indivisible,' and thus not susceptible to the 'modified categorical approach'"); *Garcia v. Lynch*, 786 F.3d 789, 794 (9th Cir. 2015) (conviction under Cal. Penal Code § 487(a) is not categorically an aggravated felony theft offense because state statute is "doubly overbroad"); *Ramirez-Villalpando v. Holder*, 645 F.3d 1035, 1041 n.1 (9th Cir. 2011) (California conviction for grand theft under Cal. Penal Code § 487(a) did not categorically qualify as an aggravated felony; however, under the modified categorical approach, the conviction was one of personal property that qualified it as an aggravated felony); *Mandujano-Real v. Mukasey*, 526 F.3d 585, 589-91 (9th Cir. 2008) (Oregon identity theft conviction was not categorically an aggravated felony theft offense); *Nevarez-Martinez v. INS*, 326 F.3d 1053, 1055 (9th Cir. 2003) (Arizona conviction for theft of a means of transportation is not categorically an aggravated felony); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (Arizona conviction for possession of a stolen vehicle is not categorically an aggravated felony); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (federal conviction for possession of stolen mail qualifies as an aggravated felony); *United States v. Perez-Corona*, 295 F.3d 996, 1001 (9th Cir. 2002) (Arizona conviction for unlawful use of means of transportation is not a theft offense for sentencing purposes).

8. Ransom Offenses – 8 U.S.C. § 1101(a)(43)(H)

The definition of aggravated felony includes "an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)." 8 U.S.C. § 1101(a)(43)(H).

9. Child Pornography Offenses – 8 U.S.C. § 1101(a)(43)(I)

The definition of aggravated felony includes "an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)." 8 U.S.C. § 1101(a)(43)(I).

In *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015), the court held that a conviction under California Penal Code § 311.11(a) for possessing child pornography did not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(I). *Chavez-Solis*, 803 F.3d at 1012-14. The court held that the state statute was broader than the generic federal definition, and thus did not categorically qualify as an "aggravated felony" conviction. *Id.* at 1012. The court also held that the modified categorical approach did not apply because the statute was not divisible. *Id.* at 1013; *see also United States v. Reinhart*, 893 F.3d 606, 617 n.8 (9th Cir. 2018) (applying the analysis in *Chavez-Solis* in a sentencing case).

In *Aguilar-Turcios v. Holder*, 740 F.3d 1294 (9th Cir. 2014), applying *Descamps v. United States*, 570 U.S. 254 (2013), the court held that petitioner's Article 92 conviction for violating a Department of Defense directive prohibiting the use of government computers except for official use and authorized purposes, did not qualify as an aggravated felony, even though a violation of the directive could have involved pornography. *Aguilar-Turcios*, 740 F.3d 1300-01.

10. RICO Offenses – 8 U.S.C. § 1101(a)(43)(J)

The definition of aggravated felony includes

> an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed.

8 U.S.C. § 1101(a)(43)(J). In *Murillo-Prado v. Holder*, 735 F.3d 1152 (9th Cir. 2013) (per curiam), applying the modified categorical approach, the court held that the indictment, plea agreement, and sentencing order provided clear and convincing evidence that petitioner was convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(J). *Murillo-Prado*, 735 at 1156.

11. Prostitution and Slavery Offenses – 8 U.S.C. § 1101(a)(43)(K)

The definition of aggravated felony includes

an offense that –

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581–1585 or 1588–1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons).

8 U.S.C. § 1101(a)(43)(K).

12. National Defense Offenses – 8 U.S.C. § 1101(a)(43)(L)

The definition of aggravated felony includes

an offense described in–

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents).

8 U.S.C. § 1101(a)(43)(L).

13. Fraud or Deceit Offenses – 8 U.S.C. § 1101(a)(43)(M)

The definition of aggravated felony includes

an offense that–

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

8 U.S.C. § 1101(a)(43)(M).

To establish that a noncitizen has been convicted of a fraud offense, the offense must involve fraud and the loss must be more than $10,000. The court has applied the categorical and modified categorical approach to find these elements. *See Carlos-Blaza v. Holder*, 611 F.3d 583, 590 (9th Cir. 2010) (applying the modified categorical approach and concluding that conviction for misapplication of funds was one that involved "fraud or deceit" and was therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i)); *Kharana v. Gonzales*, 487 F.3d 1280, 1283-85 (9th Cir. 2007) (amount of loss determined under the modified categorical approach); *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098-1100 (9th Cir. 2004) (same), *abrogated on other grounds by Nijhawan v. Holder*, 557 U.S. 29 (2009).

In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Supreme Court held that the monetary threshold in 8 U.S.C. § 1101(a)(43)(M)(i) "applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion," rather than to an element of the fraud or deceit crime. *Nijhawan*, 557 U.S. at 40 (concluding that where defendant's own stipulation, produced for sentencing purposes, involved losses considerably greater than $10,000, and the court's restitution order showed the same, clear and convincing evidence supported the conclusion that the conviction fell within the scope of 8 U.S.C. § 1101(a)(43)(M)(i)); *Orellana v. Mayorkas*, 6 F.4th 1034, 1040 (9th Cir. 2021) (recognizing that *Nijhawan* established a "circumstance-specific" approach);

Wang v. Rodriguez, 830 F.3d 958, 961 (9th Cir. 2016) ("We use a 'circumstance-specific' approach to assess whether the loss to the victim exceeded $10,000." (citing *Nijhawan*, 557 U.S. at 38-39)). In determining the amount of loss, the court is not limited to the record of conviction used for the modified categorical approach. *See Nijhawan*, 557 U.S. at 40-42.

> Because the "loss to the victim" inquiry in § 1101(a)(43)(M)(i) requires an examination of the offender's actual conduct, a court is not limited to reviewing the language of the statute of conviction, as would be the case under the categorical approach. For the same reason, the court is not limited to reviewing a specified set of documents to determine which part of a divisible statute was at issue, as would be the case under the modified categorical approach. Instead, the court must determine whether the offender's actual conduct underlying the state crime of conviction matches the conduct described in the generic federal offense. Courts making this sort of inherently factual finding (the "specific way in which an offender committed the crime" of conviction,. . .) are generally free to consider any admissible evidence relevant to making such a determination.

Orellana, 6 F.4th at 1040-41 (citation omitted); *see also Khalulyan v. Garland*, 63 F.4th 1207, 1210 (9th Cir. 2023) (holding that, in evaluating whether the government has satisfied the "exceed[ing] $10,000" requirement for a fraud or deceit aggravated felony at 8 U.S.C. § 1101(a)(43)(M)(i), the agreed-upon sentencing enhancement in petitioner's plea agreement was sufficient to prove that his offense of conviction involved more than $10,000 in losses).

"The scope of [8 U.S.C. § 1101(a)(43)(M)(i)] is not limited to offenses that include fraud or deceit as formal elements. Rather, Clause (i) refers more broadly to offenses that 'involv[e]' fraud or deceit—meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, 565 U.S. 478, 483-84 (2012) (holding that petitioner's tax crimes qualified as an aggravated felony involving fraud or deceit); *see also Wang*, 830 F.3d at 961 ("[A]n individual has been convicted of an aggravated felony under subsection (M)(i) only if the elements of the offense for which she was convicted necessarily entail fraudulent or deceitful conduct.").

14. "Alien Smuggling" – 8 U.S.C. § 1101(a)(43)(N)

The definition of aggravated felony includes

> an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.

8 U.S.C. § 1101(a)(43)(N).

The "offense of harboring illegal aliens under section 1324(a)(1)(A)(iii) is an aggravated felony pursuant to section 1101(a)(43)(N)." *Castro-Espinosa v. Ashcroft*, 257 F.3d 1130, 1132 (9th Cir. 2001); *see also United States v. Galindo-Gallegos*, 244 F.3d 728, 734 (9th Cir.), *amended by* 255 F.3d 1154 (9th Cir. 2001) ("transporting aliens [already in the United States] under 8 U.S.C. § 1324(a)(1)(A)(ii) is an aggravated felony under 8 U.S.C. § 1101(a)(43)(N)" for sentence enhancement purposes).

Note that the aggravated felony provision requires that a noncitizen be convicted of a criminal offense relating to "alien smuggling", whereas the smuggling inadmissibility ground under 8 U.S.C. § 1182(a)(6)(E) and deportability ground under 8 U.S.C. § 1227(a)(1)(E) require no such conviction.

15. Illegal Reentry after Deportation for Aggravated Felony – 8 U.S.C. § 1101(a)(43)(O)

The definition of aggravated felony includes "an offense described in section 1325(a) [Improper entry by alien] or 1326 [Reentry of removed aliens] of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph." 8 U.S.C. § 1101(a)(43)(O).

Note that an independent section provides that a noncitizen previously removed for having been convicted of an aggravated felony is permanently inadmissible. *See* 8 U.S.C. § 1182(a)(9)(A)(i). This bar to admission applies unless "the Attorney General has consented to the alien's reapplying for admission." *Id.* § 1182(a)(9)(A)(iii).

16. Passport Forgery – 8 U.S.C. § 1101(a)(43)(P)

The definition of aggravated felony includes

> an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.

8 U.S.C. § 1101(a)(43)(P).

In *Jauregui-Cardenas v. Barr*, 946 F.3d 1116 (9th Cir. 2020), the court held that a conviction under California Penal Code § 114 for using false documents to conceal citizenship did "not constitute an aggravated felony for purposes of eligibility for cancellation of removal." *Id.* at 1120-21 (holding that conviction for using false document to conceal citizenship in violation of CPC § 114 did not qualify as an aggravated felony, where it was overbroad and not divisible, and that it did not qualify as a CIMT because it did not require fraudulent intent).

17. Failure to Appear for Service of Sentence – 8 U.S.C. § 1101(a)(43)(Q)

The definition of aggravated felony includes "an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more." 8 U.S.C. § 1101(a)(43)(Q).

18. Commercial Bribery and Counterfeiting – 8 U.S.C. § 1101(a)(43)(R)

The definition of aggravated felony includes "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(R). A federal conviction for possession of counterfeit obligations is an aggravated felony under this section. *See Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073-74 (9th Cir. 2000).

The court has adopted a generic core definition of forgery that requires intent to defraud and includes a mental state requirement of knowledge of the fictitious nature of the instrument. *See Morales-Algeria v. Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006) (California conviction for forgery of a check, in violation of Cal. Penal Code § 476(a), categorically qualifies as an aggravated felony because it requires knowledge of the fictitious nature of the instrument).

See also Escobar Santos v. Garland, 4 F.4th 762, 765-67 (9th Cir. 2021) (holding that Cal. Penal Code § 470a constitutes an offense "relating to . . . forgery"); *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 877 (9th Cir. 2008) (California conviction for offense of forgery in violation of Cal. Penal Code § 475(c) is not categorically an offense "relating to . . . forgery" within the meaning of 8 U.S.C. § 1101(a)(43)(R)).

19. Obstruction of Justice – 8 U.S.C. § 1101(a)(43)(S)

The definition of aggravated felony includes "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(S). For purposes of § 1101(a)(43)(S), obstruction of justice includes "threatening a witness to prevent the witness from reporting a crime to the police," and " does not require that an investigation or proceeding be pending." *Pugin v. Garland*, 599 U.S. 600, 602, 610 (2023); *see Cordero-Garcia v. Garland*, 105 F.4th 1168, 1172-73 (9th Cir. 2024) (applying *Pugin* following remand from the Supreme Court, and holding that petitioner's conviction for dissuading a witness from reporting a crime under Cal. Penal Code § 136.1(b)(1) is an "offense relating to obstruction of justice" within the meaning of the INA's definition of "aggravated felony").

See Godoy-Aguilar v. Garland, 125 F.4th 985, 991 (9th Cir. 2025) (conviction for dissuading a witness by force or threat under Cal. Penal Code § 136.1(c)(1) is a categorical match for the generic federal offense of an aggravated felony relating to obstruction of justice under 8 U.S.C. § 1101(a)(43)(S)); *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1079 (9th Cir. 2008) (conviction under 18 U.S.C. § 3146 qualifies as generic crime of "obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S)); *see also Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 824 (9th Cir. 2016) (remanding to agency so that it could offer either offer a new construction of INA § 101(a)(43)(S) or apply the previous, plausible construction as set forth in *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (BIA 1999) (en banc)).

20. Failure to Appear before a Court – 8 U.S.C. § 1101(a)(43)(T)

The definition of aggravated felony includes "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed." 8 U.S.C. § 1101(a)(43)(T).

See Renteria-Morales v. Mukasey, 551 F.3d 1076, 1079 (9th Cir. 2008) (conviction under 18 U.S.C. § 3146 for failing to appear in court, or "bail jumping," was not categorically an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(T)).

21. Attempt or Conspiracy to Commit an Aggravated Felony – 8 U.S.C. § 1101(a)(43)(U)

The definition of aggravated felony includes "an attempt or conspiracy to commit an offense described in this paragraph." 8 U.S.C. § 1101(a)(43)(U); *see also Alfred v. Garland*, 64 F.4th 1025, 1032-48 (9th Cir. 2023) (en banc) (holding that, in evaluating whether Washington convictions for second-degree robbery and attempted second-degree robbery are aggravated felony theft offenses under § 1101(a)(43)(G), Washington accomplice liability must be considered as part of the categorical analysis, and concluding that Washington accomplice liability is a categorical match with generic theft) (overruling *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), and *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018)); *Villavicencio v. Sessions*, 904 F.3d 658, 665 (9th Cir. 2018) (as amended) (holding that Nevada conspiracy statute was overbroad and was not divisible, and thus could not be a basis for petitioner's removal); *Rendon v. Holder*, 764 F.3d 1077, 1084 (9th Cir. 2014) (violation of Cal. Penal Code § 459 not a categorical match to the federal generic attempted theft offense); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1100 (9th Cir. 2011) (same); *Ngaeth v. Mukasey*, 545 F.3d 796, 800-01 (9th Cir. 2008) (per curiam) (discussing definition of "attempt"). Conspiracy under 8 U.S.C. § 1101(a)(43)(U) "requires proof of an overt act … ." *United States v. Garcia-Santana*, 774 F.3d 528, 543 (9th Cir. 2014), *superseded on other grounds as recognized by Yim v. Barr*, 972 F.3d 1069, 1078 n.2 (9th Cir. 2020)).

"[T]he definition of aggravated felony includes 'an attempt or conspiracy to commit an offense,' but does not include solicitation." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 650 (9th Cir. 2020).

22. Particularly Serious Crimes

> For asylum purposes, an aggravated felony is *per se* a particularly serious crime. *Id.* (citing 8 U.S.C. § 1158(b)(2)(B)(i)). However, for withholding of removal claims, aggravated felonies are only *per se* particularly serious crimes when punished by a term of incarceration of at least five years. *Id.* (citing 8 U.S.C. § 1231(b)(3)(B)). When the petitioner is sentenced to fewer than five years in prison, . . . there is a discretionary inquiry into whether the crime of conviction was a particularly serious one.

Dominguez v. Barr, 975 F.3d 725, 740 (9th Cir. 2020) (as amended); *see also Edgar G.C. v Bondi*, 136 F.4th 832, 842 (9th Cir. 2025) ("Aliens 'convicted of particularly serious crimes . . . are barred from obtaining withholding of removal.' While an aggravated felony punishable by five or more years imprisonment is categorically a particularly serious crime, the BIA may also conclude on a case-by-case basis that a crime punishable by less than five years imprisonment is particularly serious." (citing *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 990 (9th Cir. 2018); additional citations omitted)); *Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1070 (9th Cir. 2021) ("[F]or purposes of asylum, an aggravated felony is automatically a particularly serious crime."); *Chacon v. Wilkinson*, 988 F.3d 1131, 1133 (9th Cir. 2021) ("Under the INA, an alien is ineligible for asylum if he has been convicted of a 'particularly serious crime,' which includes any 'aggravated felony.'").

For a discussion of the particularly serious crime bar, see: Relief from Removal, Asylum, Bars to Asylum, Particularly Serious Crime Bar; Relief from Removal, Withholding of Removal or Deportation, Bars to Withholding, Particularly Serious Crime Bar.

For a discussion of this court's jurisdiction to review particularly serious crime determinations, see: Jurisdiction over Immigration Petitions, Limitations on Judicial Review of Discretionary Decisions.

B. Domestic Violence and Child Abuse Offenses

1. General Definition

In 1996, IIRIRA added a ground of removability for state or federal convictions of crimes of domestic violence. *See* 8 U.S.C. § 1227(a)(2)(E). There is no such ground of inadmissibility. *See Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d

649, 650 (9th Cir. 2004). The ground of removability applies to convictions or violations of protective orders occurring after September 30, 1996. *See* IIRIRA § 350(b).

The statute covers "[a]ny alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i); *see also Valdez v. Garland*, 28 F.4th 72, 77 (9th Cir. 2022); *Tokatly v. Ashcroft*, 371 F.3d 613, 619 (9th Cir. 2004). The act also covers violators of protective orders. *See* 8 U.S.C. § 1227(a)(2)(E)(ii); *Diaz-Quirazco v. Barr*, 931 F.3d 830, 846 (9th Cir. 2019) (Quirazco's violation of protection order qualified as removable conduct as described under § 1227(a)(2)(E)(ii)).

A "crime of domestic violence" means

> any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

8 U.S.C. § 1227(a)(2)(E)(i).

A crime of violence is

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) 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; *see also Singh v. Ashcroft*, 386 F.3d 1228, 1231 n.2 (9th Cir. 2004). This is the same definition of crime of violence used in the aggravated felony context. *See* 8 U.S.C. § 1101(a)(43)(F). Note that § 16(b) is unconstitutionally vague as incorporated into the INA's definition of "crime of

violence." *See Sessions v. Dimaya*, 584 U.S. 148, 162 (2018); *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018).

Cross-Reference: Criminal Issues in Immigration Law, Categories of Criminal Offenses that are Grounds of Removability Only, Aggravated Felony, Crimes of Violence.

"In order to determine that [a petitioner] was convicted of a 'crime of domestic violence' under section 237(a)(2)(E)(i), we would have to conclude that his crime was not only one of 'violence,' but also that the violence was 'domestic' within the meaning of that section." *Tokatly*, 371 F.3d at 619; *see also Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393-94 (9th Cir. 2006). To ascertain whether a conviction constitutes a crime of domestic violence, the adjudicating authority may not go beyond the record of conviction. *See Cisneros-Perez*, 465 F.3d at 393 (inferences and admissions in the administrative record could not be used to determine whether a conviction was for domestic violence).

In *Leon-Briviesca v. Blanche*, 179 F.4th 1180 (9th Cir. 2026) (mandate not issued as of Aug. 12, 2026), this court considered the statutory phrase "crime of child abuse, child neglect, or child abandonment" and held that "the best reading of § 1227(a)(2)(E)(i), is that: (1) it covers child endangerment; (2) requires a *mens rea* of at least criminal negligence; (3) requires an *actus reus* of placing a child in a situation where the child's person or health is endangered under circumstances or conditions likely to produce bodily or mental harm; and (4) applies to a defendant who is not the child's parent or guardian." *Id.* at 1183; *see also id.* at 1185-87 (recounting this court's complicated case law prior to *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), concerning whether to defer to the BIA's interpretation of the statutory phrase "crime of child abuse, child neglect, or child abandonment," and whether the statute covers negligent child endangerment offenses).

Prior to *Leon-Briviesca*, this court's case law addressing whether negligent child endangerment offenses fall within § 1227(a)(2)(E)(i), and whether to afford *Chevron* deference to the BIA's interpretation of the phrase "crime of child abuse, child neglect, or child endangerment," had a complicated history. In *Martinez-Cedillo*, 896 F.3d 979 (9th Cir. 2018), *vacated on reh'g en banc*, 923 F.3d 1162 (9th Cir. 2019), the panel deferred to the BIA's interpretation of the phrase as including child endangerment offenses committed with a *mens rea* of at least criminal negligence. *Id.* at 992-94. The full court subsequently voted to rehear *Martinez-Cedillo* en banc, and the en banc court dismissed the appeal as moot and vacated the panel's decision. In the interim, however, two other panels issued published decisions that relied on *Martinez-Cedillo* in holding that the BIA's interpretation of the statutory phrase was entitled to deference. *See Menendez v. Whitaker*, 908 F.3d 467, 474 (9th Cir. 2018), *abrogation recognized by Diaz-Rodriguez v. Garland*, 12 F.4th 1126, 1136 (9th Cir. 2021), *vacated on reh'g en banc*, 55 F.4th 697 (9th Cir. 2022) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024); *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 781 (9th Cir. 2018); *abrogation recognized by Diaz-Rodriguez*, 12 F.4th 1126, *vacated on reh'g en banc*, 55 F.4th 697, *cert. granted, judgment vacated*, 144 S. Ct. 2705. Subsequently, in *Diaz-Rodriguez v. Garland*, 12 F.4th 1126 (9th Cir. 2021), *vacated on reh'g en banc*, 55 F.4th 697, *cert. granted, judgment vacated*, 144 S. Ct. 2705, the panel held that neither *Menendez* nor *Alvarez-Cerriteno* constituted binding precedent, because both had simply followed *Martinez-Cedillo* without engaging in independent analysis. *Diaz-Rodriguez*, 12 F.4th at 1130. Considering the issue anew, the *Diaz-Rodriguez* court held that the BIA's interpretation was not entitled to deference under *Chevron*, and the text of § 1227(a)(2)(E)(i) unambiguously forecloses its interpretation of the crime of child abuse as encompassing negligent child endangerment offenses. *Id.* at 1132, 1135. The full court then voted to hear *Diaz-Rodriguez* en banc, and a plurality of the en banc court held that the BIA's interpretation of the statutory phrase was entitled to *Chevron* deference. *Diaz-Rodriguez v. Garland*, 55 F.4th 697, 727, 735 (9th Cir. 2022) (en banc). However, the Supreme Court vacated the en banc court's decision and remanded for this court to reconsider the issue in light of *Loper Bright Enterprises v. Raimondo*, which rejected *Chevron* deference and directed that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright*, 603 U.S. at 412; *see Diaz-Rodriguez v. Garland*, 144 S. Ct. 2705 (2024). On remand, the en banc court terminated proceedings and relinquished priority over the disposition of the question whether a conviction for child endangerment constitutes a crime of child abuse for purposes of § 1227(a)(2)(E)(i). *Diaz-Rodriguez v. Bondi*, 136 F.4th 984 (9th Cir. 2025) (order). Subsequently, in *Leon-Briviesca,* this court conducted an independent analysis and held "that the best reading of § 1227(a)(2)(E)(i), is that . . . it covers child endangerment." 179 F.4th at 1183.

In *Diaz-Quirazco v. Barr*, 931 F.3d 830 (9th Cir. 2019), the court held that the BIA reasonably interpreted §§ 1227(a)(2)(E)(ii) and 1229b(b)(1)(C), and thus deferred to the BIA's framework set forth in *Matter of Medina-Jimenez*, 27 I. & N. Dec. 399, 401 (BIA 2018), for analyzing whether a noncitizen is ineligible for cancellation of removal under § 1229b for an offense of violating a protection order. *Id.* at 838-43. Under *Matter of Medina-Jimenez*, the "categorical approach does not apply in assessing whether an alien is ineligible for cancellation of removal under § 1229b(b)(1)(C) based on an offense of violating a protection order under § 1227(a)(2)(E)(ii)." *Diaz-Quirazco*, 931 F.3d at 838.

> The BIA articulated a two-step approach [in *Matter of Medina-Jimenez*, 27 I. & N. Dec. 399 (BIA 2018)] for analyzing whether an alien is ineligible for cancellation of removal under § 1229b(b) for an offense of violating a protection order under § 1227(a)(2)(E)(ii): (1) "whether the offense at issue resulted in a 'conviction' within the statutory definition set forth at section [1101](a)(48)(A) of the [INA]"; and (2) "whether the State court has found that the alien 'engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection ordered was issued,' as directed by section [1227](a)(2)(E)(ii)." *Id.* at 401-02 (footnote omitted). In analyzing the second step, IJs must "follow the analysis provided in *Matter of Obshatko*—that is, they should review the probative and reliable evidence regarding whether the State court's findings that a protection order has been violated meet the requirements of section [1227](a)(2)(E)(ii)." *Id.* at 402.

Diaz-Quirazco, 931 F.3d at 841 (deferring to the BIA's framework in *Matter of Medina-Jimenez* and its interpretation of §§ 1227(a)(2)(E)(ii) and 1229b(b)(1)(C)).

2. Cases Considering Domestic Violence Convictions

See Valdez v. Garland, 28 F.4th 72, 78 (9th Cir. 2022) (holding that petitioner was convicted of a crime of domestic violence under Cal. Penal Code § 273.5(a)); *Carrillo v. Holder*, 781 F.3d 1155, 1157-60 (9th Cir. 2015) (holding that a conviction under Cal. Penal Code § 273.5(a), which criminalizes willful infliction of corporal injury upon a spouse or cohabitant, is categorically a crime of domestic violence, and rejecting petitioner's argument that *Banuelos-Ayon v. Holder*, 611 F.3d 1080 (9th Cir. 2010), was not determinative because it held that § 273.5(a) was a crime of violence without expressly considering "the limiting adjective—domestic"); *Habibi v. Holder*, 673 F.3d 1082, 1085 (9th Cir. 2011) (noting petitioner's concession that his conviction under Cal. Penal Code § 243(e)(i) for battery of a current or former significant other was a crime of violence); *Banuelos-Ayonr*, 611 F.3d at 1083-86 (holding that a conviction under Cal. Penal Code § 273.5(a) is categorically a crime of violence); *Alanis-Alvarado v. Holder*, 558 F.3d 833, 839-40 (9th Cir. 2009) (conviction under Cal. Fam. Code

§ 6320 categorically qualified as violating a "protection order" under 8 U.S.C. § 1227(a)(2)(E)(ii)); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) (Arizona domestic violence/assault statute penalizing reckless conduct was not a crime of violence and thus not a crime of domestic violence); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1014-15 (9th Cir. 2006) (California battery conviction under Penal Code § 242 is not categorically a crime of violence and thus not a crime of domestic violence); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393-94 (9th Cir. 2006) (California battery conviction under Penal Code § 242 is not categorically a crime of domestic violence because it encompasses violence against strangers); *Tokatly v. Ashcroft*, 371 F.3d 613, 623 (9th Cir. 2004) (Oregon convictions for burglary and attempted kidnaping are not crimes of domestic violence under categorical and modified categorical approaches); *Singh v. Ashcroft*, 386 F.3d 1228, 1230 (9th Cir. 2004) (Oregon's harassment law, "which outlaws intentionally harassing or annoying another person by subjecting that person to offensive physical contact," was not crime of violence and thus not a crime of domestic violence).

3. Cases Considering Child Abuse Convictions

In *Leon-Briviesca v. Blanche*, 179 F.4th 1180 (9th Cir. 2026) (mandate not issued as of Aug. 12, 2026), the court held that 8 U.S.C. § 1227(a)(2)(E)(i) covers negligent child endangerment offenses, and that petitioner's convictions under California Penal Code § 273a(a) for cruelty to a child and Oregon Revised Statutes § 164.545 for child neglect were categorically crimes of child abuse, child neglect, or child abandonment. *Id.* at 1187-91, 1196-1201. Applying *Leon-Briviesca*, the court subsequently held that a conviction for violating Oregon Revised Statutes § 163.670, using a child in a display of sexually explicit conduct, was categorically a crime of child abuse, child neglect, or child abandonment, *Gonzalez-Godinez v. Blanche*, __ F.4th __, 2026 WL 2292276, at *1 (9th Cir. Aug. 10, 2026) (mandate not issued as of Aug. 12, 2026); and that a conviction under California Penal Code § 288.2(b), distribution of "harmful matter" to a minor for the purpose of, among other things, seducing the minor, was categorically a crime of child abuse, child neglect, or child abandonment, *Adame Garcia v. Blanche*, __ F.4th __, 2026 WL 2291923 at *2 (9th Cir. Aug. 10, 2026) (mandate not issued as of Aug. 12, 2026). *See also Roberto Diaz-Boyzo v. Blanche*, __ F.4th __, *3-4, 2026 WL 2121080 (9th Cir. July 23, 2026) (mandate not issued as of Aug. 12, 2026) (applying *Leon-Briviesca* and holding that under the modified categorical approach, a conviction for fourth-degree assault in the presence of a child under Oregon Revised Statutes § 164.160(3)(c) (2013) (current Or. Rev. Stat. § 160.163(3)(a)) was a crime of child abuse, child neglect, or child abandonment).

See Menendez v. Whitaker, 908 F.3d 467, 474 (9th Cir. 2018) (holding that Cal. Penal Code § 288(c)(1) is not categorically a "crime of child abuse" under 8 U.S.C. § 1227(a)(2)(E)(i)), *abrogation recognized by Diaz-Rodriguez v. Garland*, 12 F.4th 1126, 1136 (9th Cir. 2021), *vacated on reh'g en banc*, 55 F.4th 697 (9th Cir. 2022) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024)); *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 777 (9th Cir. 2018) (concluding that because Nevada statute was broader than the generic federal crime of child abuse it was not categorically a "crime of child abuse," and remanding for the BIA to determine if a conviction was a "crime of child abuse" under the modified categorical approach), *abrogation recognized by Diaz-Rodriguez v. Garland*, 12 F.4th 1126, 1136 (9th Cir. 2021), *vacated on reh'g en banc*, 55 F.4th 697 (9th Cir. 2022) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024)); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 863 (9th Cir. 2013) (concluding that "section 288(c)(1) is a felony that raises a substantial risk of physical force in the ordinary case" and "[a]ccordingly, Rodriguez's state crime of conviction constitutes a categorical 'crime of violence,' for purposes of § 16(b). As such, it is an 'aggravated felony' for purposes of § 1101(a)(43)(F), and the BIA did not err in upholding this basis for removal."); *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1170-71 (9th Cir. 2011) (holding that conviction for child molestation in the third degree under Wash. Rev. Code § 9A.44.089 constitutes a categorical crime of child abuse within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i)); *Fregozo v. Holder*, 576 F.3d 1030, 1038 (9th Cir. 2009) (concluding that "a conviction under California Penal Code [§] 273a(b) is not categorically a 'crime of child abuse' within the meaning of [§] 237(a)(2)(E)(i) of the INA"), *abrogation recognized by Diaz-Rodriguez v. Garland*, 55 F.4th 697, 729-30 (9th Cir. 2022) (en banc), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024); *see also United States v. Martinez*, 786 F.3d 1227, 1233 (9th Cir. 2015) (holding that a "conviction premised on a violation of Wash. Rev. Code § 9A.44.089 (2001) does not categorically meet the generic definition of sexual abuse of a minor due to the missing elements in the statutory provision" and distinguishing between "sexual abuse of a minor" and "child abuse"; explaining that the latter is less stringent).

4. Cases Considering Violators of Protection Orders

See Diaz-Quirazco v. Barr, 931 F.3d 830, 841 (9th Cir. 2019) (deferring to the BIA and concluding that judgment for contempt of court for violating a protection order qualified as a conviction, and that violation of the protection order qualified as a removable offense); *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009) (using the categorical/modified approach and holding that judgment holding noncitizen in contempt for disobeying the stay away portion of a restraining order issued pursuant to Oregon's Family Abuse Prevention Act qualified as a violation of a protection order under the INA).

C. Firearms Offenses

8 U.S.C. § 1227(a)(2)(C) provides:

> Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18, United States Code) in violation of any law is deportable.

This provision has been read broadly to include the "entire panoply of firearms offenses." *See Valeria-Ochoa v. INS*, 241 F.3d 1092, 1095 (9th Cir. 2001) (holding that California conviction for willfully discharging firearm in grossly negligent manner under California Penal Code § 246.3 was removable firearms offense); *see also Bolanos v. Holder*, 734 F.3d 875 (9th Cir. 2013) (holding that conviction for brandishing firearm in presence of occupant of motor vehicle under Cal. Penal Code § 417.3 qualified categorically as a crime of violence under 18 U.S.C. 16(a) and rendered noncitizen ineligible for cancellation of removal); *Malilia v. Holder*, 632 F.3d 598, 602-04 (9th Cir. 2011) (discussing how § 1227 was intended to apply broadly, and concluding that conviction for knowingly delivering a firearm without first providing written notice to the carrier rendered petitioner removable).

Note that "the INA expressly excludes 'antique firearms' from the generic definition of a 'firearm.'" *Medina-Lara v. Holder*, 771 F.3d 1106, 1115 (9th Cir. 2014) (holding as a matter of law that Medina's conviction under Cal. Penal Code §12022 for carrying a firearm during a felony offense is not a predicate for removal under 8 U.S.C. § 1227(a)(2)(C)); *see also Murillo-Chavez v. Bondi*, 128 F.4th 1076, 1083-84 (9th Cir. 2025) (holding that a conviction under Oregon Revised Statutes § 166.250(1)(b) was a qualifying firearms offense under § 1227(a)(2)(C), even though some subsections of the state statute prohibit conduct involving antique firearms, because the statute prohibits a disjunctive set of offenses and is therefore divisible); *United States v. Aguilera-Rios*, 769 F.3d 626, 633-34 (9th Cir. 2014) (holding that California firearms statute was not a categorical match for federal aggravated felony firearms offense because it lacked an exception for antique firearms).

D. Miscellaneous Removable Offenses

The statute lists several other miscellaneous removable offenses. *See*, *e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iv) (conviction for high speed flight); 8 U.S.C. § 1227(a)(2)(A)(v) (conviction for failure to register as sex offender); 8 U.S.C. § 1227(a)(2)(D) (convictions for espionage, treason, violations of the Military Selective Service Act or the Trading with the Enemy Act).

VI. ELIGIBILITY FOR RELIEF DESPITE CRIMINAL CONVICTIONS

Some types of relief or protection remain available to individuals in removal proceedings despite their criminal convictions, although criminal convictions or conduct can create bars to relief eligibility even if they are not charged as grounds of removability or inadmissibility. In addition to references to relief contained in this section, the effects of criminal convictions on relief eligibility are discussed in other sections of this outline addressing particular forms of relief that may be available. Examples of potential relief include: Cancellation of Removal, including VAWA Relief under 8 U.S.C. § 1229b(5); Suspension of Deportation; NACARA Suspension or Cancellation Relief; Cuban Adjustment Act Relief; Former 212(c) Relief; Section 212(h) Relief; Adjustment of Status; Registry; Asylum; Withholding of Removal; CAT Relief; Naturalization.

DUE PROCESS IN IMMIGRATION PROCEEDINGS

Table of Contents

I. DUE PROCESS 1
A. Generally 1
B. Prejudice Requirement 4
1. Presumption of Prejudice 7
C. Exhaustion Requirement 9
D. Discretionary Decisions 11
E. Examples 12
1. Notice to Appear 12
2. Notice of Hearing 14
3. Hearing Date 15
4. Right to a Neutral Fact-Finder 15
5. Pressure to Withdraw Application 17
6. Apparent Eligibility for Relief 18
7. Explanation of Procedures 19
8. Exclusion of Evidence or Testimony 20
9. Exclusionary Rule and Admission of Evidence 22
10. Notice of Classified Evidence 23
11. Right to Confront and Cross-Examine Witnesses 23
a. Opportunity to Examine and Rebut Evidence 26
12. Production of Documents 27
13. New Country of Deportation 27
14. Right to Translation 27
15. Administrative Notice of Facts 28
16. Right to Counsel 29
17. Ineffective Assistance of Counsel 33
18. Waiver of Appeal 37

19. Right to File Brief 39
20. Consideration of Evidence by Agency 40
21. Notice of Evidentiary Requirements....................40
22. Intervening Law 40
23. Sua Sponte Credibility Determinations 41
a. Pre-REAL ID Act 41
b. Post-REAL ID Act 41
24. Detention....................42
25. Duty to Probe All Relevant Facts 43
26. Reasoned Explanation....................44
27. Bond Hearing 44
28. Notice of Deadline 45
29. Video Conference 46
30. Confessions 46
31. Consideration of Guilty Plea....................47
32. Competence During Proceedings....................47
33. Deliberate Indifference 49
34. Retroactivity....................50
a. Retroactivity of Board Decisions 51
35. Procedural Delays 53
36. Notice and Opportunity to be Heard....................53
F. Due Process Challenges to Certain Procedures and Statutory Provisions 54
1. Summary Affirmance....................54
2. Summary Dismissal 54
3. Cross-Appeals 55
4. Reinstated Removal Proceedings....................55
5. IIRIRA 58
6. Adjustment of Status....................59

7. Void-for-Vagueness Challenges 60
a. Particularly Serious Crime, 8 U.S.C. § 1231(b)(3)(B)(ii) 61
b. Crime of Violence, 18 U.S.C. § 16(b) 61
c. Habitual Drunkard, 8 U.S.C. § 1101(f)(1) 62
d. Crime Involving Moral Turpitude 62
e. Alien Smuggling, 8 U.S.C. § 1182(a)(6)(E)(i) 63
12. Statutory Cap on Grants of Cancellation of Removal, 8 U.S.C. § 1229b(e) 63
II. MISCELLANEOUS CONSTITUTIONAL ISSUES 63
A. Equal Protection Generally 63
1. NACARA 64
2. Voluntary Departure 65
3. Regulation Excluding Noncitizens Who Illegally Reentered With Final Order of Removal 65
4. 212(h) Waiver, 8 U.S.C. § 1182 65
5. Availability of Discretionary Relief 66
6. Federal First Offender Act ("FFOA") 67
7. Convictions for Juvenile Offenders, 8 U.S.C. § 1101(a)(48)(A) 67
8. Habitual Drunkard, 8 U.S.C. § 1101(f)(1) 67
9. Good Moral Character Period of Confinement, 8 U.S.C. § 1101(f)(7) 68
10. One-Year Filing Deadline 68
11. Calculation of Continuous Physical Presence, 8 U.S.C. § 1229b 68
12. Application of Law Where There is a Circuit Split 69
13. Specific Rules for Religious Workers 69
14. Child Status Protection Act 69
15. Gender-Based Distinctions, 8 U.S.C. §§ 1401 & 1409 70

16. Naturalization of Adopted, Foreign-Born Children, 8 U.S.C. § 1433 70

17. Derivative Citizenship, 8 U.S.C. § 1432(a)(3) (1984) 70

B. Suspension Clause 71

C. Free Speech Clause of the First Amendment 72

D. Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act 73

E. Fourth Amendment Exclusionary Rule 73

F. Fifth Amendment Right Against Self-Incrimination 76

DUE PROCESS IN IMMIGRATION PROCEEDINGS

I. DUE PROCESS

A. Generally

"Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process." *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended); *see also Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020); *Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013) (as amended); *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012); *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009).

> "[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry." *Leng May Ma v. Barber*, [357 U.S. 185, 187] (1958). Aliens "who have once passed through our gates, even illegally," are afforded the full panoply of procedural due process protections, and "may be expelled only after proceedings conforming to traditional standards of fairness." *Shaughnessy v. United States ex rel. Mezei*, [345 U.S. 206, 212] (1953). But those . . . who have never technically "entered" the United States have no such rights. *Id.* For [those who have never technically entered], procedural due process is simply "[w]hatever the procedure authorized by Congress" happens to be. *Id.* (internal quotation marks omitted); *see also Landon v. Plasencia*, [459 U.S. 21, 32] (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application. . . .").

Angov v. Lynch, 788 F.3d 893, 898 (9th Cir. 2015).

"[A]n alien in civil removal proceedings is not entitled to the same bundle of constitutional rights afforded defendants in criminal proceedings . . . various protections that apply in the context of a criminal trial do not apply in a deportation hearing." *Hussain v. Rosen*, 985 F.3d 634, 642 (9th Cir. 2021) (quoting *Valencia v. Mukasey*, 548 F.3d 1261, 1263 (9th Cir. 2008)), *cert. denied sub nom. Hussain v. Garland*, 142 S. Ct. 1121 (2022).

"A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings. . . . A court will grant a petition on due process grounds only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (citations and quotation marks omitted); *see also Grigoryan*, 959 F.3d at 1240; *Rizo v. Lynch*, 810 F.3d 688, 693 (9th Cir. 2016); *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002); *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) ("[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf."). Removing a noncitizen from the United States without any procedural safeguards of a formal hearing may result in a due process violation. *See Salgado-Diaz*, 395 F.3d at 1162-63 ("[F]ailing to afford petitioner an evidentiary hearing on his serious allegations of having been unlawfully stopped and expelled from the United States, aborting his pending immigration proceedings and the relief available to him at the time, violated his right to due process of law.").

The court reviews de novo claims of due process violations. *Olea-Serefina v. Garland*, 34 F.4th 856, 866 (9th Cir. 2022); *Benedicto v. Garland*, 12 F.4th 1049, 1058 (9th Cir. 2021); *Grigoryan*, 959 F.3d at 1239; *Liu v. Holder*, 640 F.3d 918, 930 (9th Cir. 2011) (as amended); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006). "The BIA's decision will be reversed on due process grounds if (1) the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case, and (2) the alien demonstrates prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation." *Ibarra-Flores*, 439 F.3d at 620-21 (internal quotation marks and citations omitted); *see also Grigoryan*, 959 F.3d at 1240; *Zetino v. Holder*, 622 F.3d 1007, 1013 (9th Cir. 2010) (en banc); *Gutierrez v. Holder*, 730 F.3d 900, 903 (9th Cir. 2013) (no due process violation); *Dent v. Holder*, 627 F.3d 365, 373 (9th Cir. 2010); *Hammad v. Holder*, 603 F.3d 536, 545 (9th Cir. 2010) (explaining that although the rules of evidence are not applicable to immigration hearings, proceeding must be conducted in accordance with due process standards of fundamental fairness); *Shin v. Mukasey*, 547 F.3d 1019, 1024 (9th Cir. 2008) (explaining that to successfully attack the conclusions and orders made during removal hearings on due process grounds "it must be shown that the proceedings were manifestly unfair and that the actions of the [immigration judge] were such as to prevent a fair investigation" (internal quotation marks omitted)).

"Where an alien is given a full and fair opportunity to be represented by counsel, prepare an application for . . . relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process." *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926-27 (9th Cir. 2007). *See also Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019) ("The Due Process Clause of the Fifth Amendment guarantees that aliens in removal proceedings have 'a full and fair opportunity to be represented by counsel, to prepare an application for . . . relief, and to present testimony and other evidence in support of [that] application.'" (citation omitted)).

Due process violations have been identified in cases where the IJ delegated his duties to develop an unrepresented applicant's case to the government attorney, *Pangilinan*, 568 F.3d at 709-10, prevented full examination of the applicant, *Colmenar*, 210 F.3d at 972, the IJ stood in moral judgment of the applicant, *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007-09 (9th Cir. 2003), and where the IJ pressured an applicant to drop a claim for relief that he was entitled to pursue, *Cano-Merida*, 311 F.3d at 964-65. The court also has concluded that a petitioner was denied due process where the petitioner was denied a continuance and limitations were placed on her testimony, thereby preventing petitioner from fully and fairly presenting her case. *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010).

Although noncitizens are entitled to due process of law, they "must in the first instance possess a liberty or property interest." *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1330 n.13 (9th Cir. 2006). If a noncitizen was never eligible for the discretionary relief sought, then he does not have a liberty or property interest that can be affected. *See id.* (rejecting due process claim that 8 U.S.C. § 1229b(d)(1)(B) as applied to petitioner's case denied him due process because he was not eligible for discretionary relief, and thus had no liberty or property interest); *see also Mendoza-Linares v. Garland*, 51 F.4th 1146, 1167 (9th Cir. 2022), *petition for cert. pending*, No 23-606 (docketed Dec. 6, 2023) (mandate not issued as of Feb. 10, 2024) ("[A]ny rights [petitioner] may have in regard to removal or admission are purely statutory in nature and are not derived from, or protected by, the Constitution's Due Process Clause."); *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) (per curiam). The denial of discretionary relief cannot violate a substantive due process interest because discretionary relief is a privilege created by Congress. *See Lim v. Holder*, 710 F.3d 1074, 1076 (9th Cir. 2013) ("Cancellation of removal is a form of discretionary relief which does not give rise to a substantive interest protected by the Due Process Clause." (internal quotation marks and citation omitted)); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004) (voluntary departure); *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) (cancellation of removal). However, note that violations of procedural due process and claims of ineffective assistance of counsel, "which are predicated on the right to a full and fair hearing, are not affected by the nature of the relief sought." *Fernandez v. Gonzales*, 439 F.3d 592, 602 n.8 (9th Cir. 2006) (citation omitted); *see also United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050-51 (9th Cir. 2004) (concluding that petitioner was prejudiced by "the IJ's unconstitutional failure to inform him that he was eligible for § 212(c) relief").

B. Prejudice Requirement

In addition to showing a due process violation, an applicant generally must show prejudice. *See Rodriguez-Jimenez v. Garland*, 20 F.4th 434, 440 (9th Cir. 2021); *Zamorano v. Garland*, 2 F.4th 1213, 1226 (9th Cir. 2021);*Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020) ("To prevail on a due process challenge to deportation proceedings, [the Grigoryans] must show error and substantial prejudice."); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) ("As a general rule, an individual may obtain relief for a due process violation only if he shows that the violation caused him prejudice, meaning the violation potentially affected the outcome of the immigration proceeding."); *Padilla-Martinez v. Holder*, 770 F.3d 825, 830 (9th Cir. 2014); *Cano-Merida v. INS*, 311 F.3d 960, 965 (9th Cir. 2002). *Cf. Lazaro v. Mukasey*, 527 F.3d 977, 981 (9th Cir. 2008) (explaining that prejudice is not necessary where agency action was *ultra vires*).

"An alien bears the burden of proving the alleged violation prejudiced his or her interests." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011). Prejudice is shown where the violation potentially affected the outcome of the proceedings. *See Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021) ("To warrant reversal for a violation of due process, the petitioner must also show prejudice, which means that the outcome of the proceeding *may* have been affected by the alleged violation.") (internal quotation marks and citation omitted)); *Grigoryan*, 959 F.3d at 1240 ("Substantial prejudice is established when the outcome of the proceeding may have been affected by the alleged violation." (internal quotation marks and citation omitted)); *Dent v. Sessions*, 900 F.3d 1075, 1083 (9th Cir. 2018) (to show prejudice petitioner must show the outcome of proceeding may have been affected by the alleged violation) (internal quotation and citation omitted)); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) (due process claim failed where petitioners failed to demonstrate prejudice); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010) (concluding procedural deficiencies may have affected the outcome of proceedings where IJ denied continuance and limited testimony); *Cano-Merida*, 311 F.3d at 965 (where IJ pressured noncitizen to drop asylum claim before developing facts, and made other decisions indicating he was not interested in hearing evidence or adequately explaining procedures, the "IJ's conduct undercut the normal course of the proceedings," and noncitizen demonstrated prejudice).

"The standard does not demand absolute certainty . . . ." *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1077 (9th Cir. 2005). An applicant "need not explain exactly what evidence he would have presented in support of his application, and [the court] may infer prejudice in the absence of any specific allegation as to what evidence [the applicant] would have presented." *Cano-Merida*, 311 F.3d at 965 (internal quotation marks and citation omitted); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1156-57 (9th Cir. 2013) ("The prejudice standard does not demand absolute certainty; rather prejudice is shown if the violation *potentially* affects the outcome of the proceedings." (internal quotation marks and citation omitted)); *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000) (noncitizen prejudiced by IJ preventing a full examination of the noncitizen and prejudging the noncitizen's case). "'To show prejudice, [a petitioner] must present plausible scenarios in which the outcome of the proceedings would have been different if a more elaborate process were provided.'" *Tamayo-Tamayo v. Holder*, 725 F.3d 950, 954 (9th Cir. 2013) (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007) (en banc)) (discussing prejudice and concluding that petitioner failed to establish prejudice where he failed to show outcome would have been different where no relief was available to him).

Examples of cases where prejudice has been established include: *Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1114 (9th Cir. 2021) (concluding the IJ's failure to put petitioner on notice of central issue in his case potentially affected the outcome of the proceedings, and thus, petitioner suffered prejudice); *Grigoryan*, 959 F.3d at 1240-41 (holding that IJ's admission of and reliance on the record of investigation prepared by the DHS resulted in substantial prejudice); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (petitioner prejudiced by counsel's deficient performance); *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (IJ violated due process in not allowing the petitioner a continuance to investigate a forensic report where the government did not provide a reasonable opportunity to investigate the report); *Dent*, 627 F.3d at 374-75 (concluding prejudice was plain where government failed to provide petitioner with documents contained in his Alien File that might show petitioner is a naturalized United States citizen); *Cruz Rendon*, 603 F.3d at 1111 (concluding procedural deficiencies may have affected the outcome of proceedings where IJ denied continuance and limited testimony); *Cinapian v. Holder*, 567 F.3d 1067, 1075-76 (9th Cir. 2009) (concluding petitioners were prejudiced where government failed to disclose DHS forensic reports in advance of the hearing or make the reports' author available for cross-examination); *Circu v. Gonzales*, 450 F.3d 990, 994-95 (9th Cir. 2006) (en banc) (IJ failed to give petitioner advance notice of reliance on State Department country report containing disputable facts that were not in record); *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006) (BIA refused to consider new evidence submitted with motion to reconsider, and thereby compounded the harm of faulty translation at noncitizen's IJ hearing, which "resulted in the IJ's fatal misunderstanding of a dispositive moment" in the noncitizen's testimony); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 621 (9th Cir. 2006) (IJ refused to order the government to produce voluntary departure form for petitioner and outcome of proceedings "may have been affected if the requested discovery had been ordered"); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058-59 (9th Cir. 2005) (IJ violated due process in refusing to hear relevant expert testimony regarding domestic violence, where the testimony could have affected the IJ's assessment of credibility); *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1164 (9th Cir. 2005) (as amended) ("[T]he failure of the IJ to hold an evidentiary hearing prejudiced petitioner by denying him the opportunity to show he would never have been taken out of his deportation proceeding."); *Zolotukhin*, 417 F.3d at 1077 (concluding outcome of case may have been different absent cumulative due process violations); *Kaur v. Ashcroft*, 388 F.3d 734, 737-38 (9th Cir. 2004) (IJ's failure to allow petitioner's son to testify as a corroborating witness resulted in prejudice); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008-09 (9th Cir. 2003) (IJ's bias prevented IJ from "considering, yet alone weighing, the impact" that the separation of the petitioner from his son would have on hardship); *Agyeman v. INS*, 296 F.3d 871, 884-85 (9th Cir. 2002) (pro se noncitizen was prejudiced by IJ's failure to explain adequately how to prove existence of marriage, and IJ's failure to sufficiently develop the record); *Cano-Merida*, 311 F.3d at 965 (where IJ pressured noncitizen to drop asylum claim before developing facts, and made other decisions indicating he was not interested in hearing evidence or adequately explaining procedures, the "IJ's conduct undercut the normal course of the proceedings," and noncitizen demonstrated prejudice); *Colmenar*, 210 F.3d at 972 (noncitizen prejudiced by IJ preventing a full examination of the noncitizen and prejudging the noncitizen's case). *See also United States v. Valdivia-Flores*, 876 F.3d 1201, 1210 (9th Cir. 2017), *overruled on other grounds by Alfred v. Garland*, 64 F.4th 1025 (9th Cir. 2023) (en banc) (in collateral attack of removal order, the court concluded that petitioner was deprived of due process, and that he was prejudiced by his inability to seek judicial review of the underlying removal order).

Examples of cases where prejudice was not established include: *Rodriguez-Jimenez v. Garland*, 20 F.4th 434, 441 (9th Cir. 2021) ("Because Rodriguez-Jimenez does not establish any prejudice from the alleged BIA errors, his due process claim fails."); *Benedicto v. Garland*, 12 F.4th 1049, 1058 (9th Cir. 2021) (petitioner failed to demonstrate prejudice); *Zamorano v. Garland*, 2 F.4th 1213, 1228 (9th Cir. 2021) ("Zamorano fails to show any prejudice that could support his due process claim."); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) (due process claim failed where petitioners failed to demonstrate prejudice); *Gomez-Velazco*, 879 F.3d at 996 (even if improperly denied the right to counsel during initial interaction with DHS officers, no showing that the denial prejudiced petitioner); *Pagayon v. Holder*, 675 F.3d 1182, 1191-92 (9th Cir. 2011) (per curiam) (even if there was agency error, petitioner failed to show prejudice); *Bingham v. Holder*, 637 F.3d 1040, 1047 (9th Cir. 2011) (rejecting petitioner's due process claim where petitioner failed to show that alleged unknowing waiver under the Visa Waiver Program resulted in prejudice); *United States v. Ramos*, 623 F.3d 672, 684 (9th Cir. 2010) (although court concluded that DHS violated Ramos's right to due process, he suffered no prejudice where he was not eligible for the relief sought); *Avila-Sanchez v. Mukasey*, 509 F.3d 1037, 1041 (9th Cir. 2007) (even if there were some error resulting from different IJs presiding over portions of separate proceedings, petitioner failed to show prejudice); *Ngongo v. Ashcroft*, 397 F.3d 821, 823-24 (9th Cir. 2005) (no prejudice where witnesses were presented in a different order than originally planned); *United States v. Jimenez-Borja*, 378 F.3d 853, 859 (9th Cir. 2004) (although IJ's failure to advise petitioner of available relief resulted in a due process violation, there was no prejudice because petitioner "could not plausibly demonstrate" eligibility for the relief); *Simeonov v. Ashcroft*, 371 F.3d 532, 538 (9th Cir. 2004) (even assuming a due process violation there was no prejudice because petitioner not eligible for relief as a matter of law).

1. Presumption of Prejudice

"Certain types of ineffective assistance entitle a petitioner to a rebuttable presumption of prejudice." *Montes-Lopez v. Holder*, 694 F.3d 1085, 1090 (9th Cir. 2012). For example, where counsel's error deprives a noncitizen of appellate proceedings, there is a presumption of prejudice. *See Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006). *See also Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) ("When a lawyer's error results in an alien being denied his right to appeal altogether, we apply a 'presumption of prejudice.'").

If the noncitizen is entitled to a presumption of prejudice because she was deprived of appellate review, that presumption may be rebutted by the government. *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004); *see also Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826-28 (9th Cir. 2003) (applying presumption of prejudice, but denying petition for review because presumption was rebutted). The presumption is not rebutted if the noncitizen can show plausible grounds for relief. *Siong*, 376 F.3d at 1037; *Ray*, 439 F.3d at 587. To determine if the noncitizen has demonstrated plausible grounds for relief, the court looks to whether "the [IJ or the BIA] could plausibly have held that [the petitioner] was [eligible for relief] based on the record before it." *Ray*, 439 F.3d at 589 (internal quotation marks omitted).

"[W]here . . . compliance with [a] regulation is mandated by the Constitution, prejudice may be presumed." *Sanchez v. Sessions*, 904 F.3d 643, 652 (9th Cir. 2018) (internal quotation marks and citation omitted) (presuming prejudice where Coast Guard officers failed to abide by regulation that was promulgated for the benefit of petitioners, and mandated by the Constitution, in case concerning exclusionary rule).

Examples of cases where prejudice was presumed include: *Usubakunov v. Garland*, 16 F.4th 1299, 1307 (9th Cir. 2021) (explaining that because petitioner was wrongly denied assistance of counsel at his merits hearing, he need not show prejudice); *Orozco-Lopez v. Garland*, 11 F.4th 764, 779 (9th Cir. 2021) (because Orozco-Lopez's statutory right to counsel was denied, he did not need to show prejudice); *Sanchez*, 904 F.3d at 652 (presuming prejudice where Coast Guard officers failed to abide by regulation that was promulgated for the benefit of petitioners, and mandated by the Constitution, in case concerning exclusionary rule); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921-22 (9th Cir. 2015) ("To cause an alien to completely forfeit the right to appeal because of a totally mistaken view on the availability of other relief is an abdication of counsel's duty."); *Ray*, 439 F.3d at 588-89 (multiple attorneys failed to litigate alien's case in timely fashion); *Siong*, 376 F.3d at 1038 (counsel failed to file a timely notice of appeal); *Rojas-Garcia*, 339 F.3d at 826 (counsel failed to file brief with BIA, resulting in summary dismissal of alien's appeal); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000) (counsel failed to file a timely petition for review).

"[I]n *Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012), [the court] carved out an exception to the general rule requiring a showing of prejudice[, holding that where] an individual who is wrongly denied the assistance of counsel at the merits hearing[, prejudice is] conclusively presumed and automatic reversal is required." *Gomez-Velazco*, 879 F.3d at 993. This is due to the difficulty in assessing the effect of the error. *See id*. However, "not all violations of the right to counsel are treated as structural errors mandating automatic reversal. If the right to counsel has been wrongly denied only at a discrete stage of the proceeding, and an assessment of the error's effect can readily be made, then prejudice must be found to warrant reversal." *Id.* at 993-94 (concluding that petitioner was required to show prejudice where he may have been improperly denied the right to counsel only during his initial interaction with DHS officers). In *Gomez-Velazco*, there was no presumption of prejudice, where although petitioner may have been improperly denied counsel during initial interaction with DHS officers, he was able to consult with counsel before the removal order was executed, and the prejudicial effect could be assessed. *Id.* (distinguishing the case from instances where counsel is precluded from participating in the merits hearing before an immigration judge). The court in *Gomez-Velazco* assumed without deciding that petitioner's right to counsel had been violated. *Id.* at 992.

"[W]hen ineffective assistance leads to in absentia removal, [the court has] 'followed the BIA's usual practice of not requiring a showing of prejudice.'" *Sanchez Rosales v. Barr*, 980 F.3d 716, 720 (9th Cir. 2020) (quoting *Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003)). In *Sanchez-Rosales*, the court concluded that the "BIA erred by treating Petitioners' failure to show prejudice caused by the alleged ineffective assistance as a basis for denying their motion to reopen proceedings[,]" because "[a] showing of prejudice is not required when ineffective assistance leads to an in absentia order of removal." 980 F.3d at 718-19 (ineffective assistance provided by a non-attorney notario).

C. Exhaustion Requirement

"The exhaustion requirement applies to claims that an alien was denied a full and fair hearing." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (internal quotation marks and citation omitted). *See also Plancarte Sauceda v. Garland*, 23 F.4th 824, 835 (9th Cir. 2022) (as amended) (holding petitioner failed to exhaust due process claim).

For a claim to have been exhausted, petitioner must have raised the claim before the agency such that the agency was sufficiently on notice of the claim, and it had an opportunity to pass on the issue. *Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020) (citing *Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004) (per curiam)). "A conclusory statement does not apprise the BIA of the particular basis for [the petitioner's] claim nor meaningfully challenge the IJ's decision on appeal." *Amaya v. Garland*, 15 F.4th 976, 986 (9th Cir. 2021) (internal quotation marks and citation omitted) (holding that neither petitioner's notice of appeal nor his attachment thereto made a clear, non-conclusory argument in support of his claim, and thus he failed to exhaust his due process claim of IJ bias). Although a general challenge is insufficient, exhaustion does not require "the issue to have been raised in a precise form during the administrative proceeding. . . . Rather, the petitioner may raise a general argument in the administrative proceeding and then raise a more specific legal issue on appeal." *Bare*, 975 F.3d at 960 (citations omitted) (holding that petitioner exhausted his legal claims before the BIA).

A due process claim may be sufficiently exhausted even if the phrase "due process" is not used before the agency. *See Agyeman*, 296 F.3d at 877-78 (due process claim was exhausted even though petitioner did not use phrase "due process violation" before the agency). When a petitioner raises his claims before the agency pro se, the court will construe them liberally. *Id.* at 878; *see also Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) (holding that ineffective assistance of counsel claims raised in pro se brief to BIA were sufficient to put BIA on notice of due process claim, but dismissing petition with respect to equal protection claim that was raised for the first time in the petition for review). *Cf. Tall v. Mukasey*, 517 F.3d 1115, 1120 (9th Cir. 2008) (concluding that petitioner's claim that he was denied a full and fair hearing was not properly exhausted, where petitioner raised a different procedural claim before the BIA).

"Futility is a traditional exception to judicially created exhaustion requirements because '[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.'" *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 895 (9th Cir. 2021) (quoting *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021)); *see also Perez-Guzman v. Lynch*, 835 F.3d 1066, 1073 (9th Cir. 2016) (exhaustion is not required where it would be futile to raise a particular issue before the agency); *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004) ("It is axiomatic that one need not exhaust administrative remedies that would be futile or impossible to exhaust."). The futility exception "to the exhaustion requirement has been carved for constitutional challenges to [DHS] procedures." *Iraheta-Martinez v. Garland*, 12 F.4th 942, 949 (9th Cir. 2021). As to due process claims in particular, "[t]he key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the BIA's ken." *Id. See also Coyt v. Holder*, 593 F.3d 902, 905 (9th Cir. 2010) (considering challenge to validity of 8 C.F.R. § 1003.2(d) (2010) because exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation); *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) ("[T]he principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide.").

For example, substantive due process claims that the agency has no power to adjudicate need not be raised before the BIA. *See Morgan v. Gonzales*, 495 F.3d 1084, 1089-90 (9th Cir. 2007); *see also Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005) (per curiam) ("Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims."); *but see Lee v. Holder*, 599 F.3d 973, 976 (9th Cir. 2010) (per curiam) (stating that petitioner's apparent challenge to the validity of the regulations was not at issue, and that the court lacked jurisdiction because it was not exhausted).

D. Discretionary Decisions

The court lacks jurisdiction to review an abuse of discretion argument that is merely recharacterized as a due process argument. *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (contention that the agency violated due process by misapplying facts to the applicable law did not state a colorable constitutional claim); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (same, post-REAL ID Act); *see also Idrees v. Barr*, 923 F.3d 539, 542-43 & n.3 (9th Cir. 2019) (concluding that BIA's decision not to certify ineffective assistance of counsel claim was committed to agency discretion, and that petitioner's challenge to that decision did not present a colorable due process claim, where there was no legal or constitutional error asserted); *Bazua-Cota v. Gonzales*, 466 F.3d 747, 748-49 (9th Cir. 2006) (per curiam) (claim that BIA violated due process by failing properly to weigh equities before denying adjustment of status application was not a colorable constitutional claim).

However, the court retains jurisdiction to consider constitutional claims and questions of law raised in a petition for review of a discretionary decision. *See* 8 U.S.C. § 1252(a)(2)(D); *see also Patel v. Garland*, 596 U.S. 328, 338-40 (2022) (where the agency denies a form of relief listed in 8 U.S.C. § 1252(a)(2)(B)(i), federal courts have jurisdiction to review constitutional claims and questions of law); *Monroy v. Lynch*, 821 F.3d 1175, 1177 (9th Cir. 2016) (recognizing that there was "jurisdiction to review colorable constitutional claims and questions of law raised in a petition for review of a discretionary denial of NACARA cancellation" but concluding no such colorable claims were raised); *Vilchez v. Holder*, 682 F.3d 1195, 1198 (9th Cir. 2012) (the court has jurisdiction to review constitutional claims, including due process claims, raised in a petition for review, however, lacks jurisdiction to review merits of discretionary decision to deny cancellation of removal); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1166 (9th Cir. 2004) (jurisdiction to review due process and equal protection challenges to voluntary departure regime); *Munoz v. Ashcroft*, 339 F.3d 950, 954-56 (9th Cir. 2003) (jurisdiction to review due process, ineffective assistance of counsel, and equitable tolling contentions). To invoke the court's jurisdiction, the constitutional claim must be colorable. *See Torres-Aguilar*, 246 F.3d at 1271. "To be colorable in this context, the alleged [constitutional] violation need not be substantial, but the claim must have some possible validity." *Id.* (internal quotation marks and citation omitted); *see also Martinez-Rosas*, 424 F.3d at 930.

A noncitizen's conclusory assertion of a due process violation, without substantiation or any allegation of a specific due process violation, is insufficient to permit the court to exercise jurisdiction. *See Safaryan v. Barr*, 975 F.3d 976, 989 (9th Cir. 2020) (concluding that court lacked jurisdiction to consider unsubstantiated assertion of a due process violation in the denial of a § 212(h) waiver).

E. Examples

1. Notice to Appear

"A notice to appear serves as the basis for commencing a grave legal proceeding. . . . [I]t is like an indictment in a criminal case [or] a complaint in a civil case." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482 (2021). "The [Notice to Appear] served on an alien in removal proceedings must contain the nature of the proceedings against the alien, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, and the charges against the alien and the statutory provisions alleged to have been violated." *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (citing 8 U.S.C. § 1229(a)(1)) (internal quotation marks omitted). The court has held that "due process does not require inclusion of charges in the [Notice to Appear] that are not grounds for removal but are grounds for denial of relief from removal." *Id.* (rejecting petitioner's claim that his due process rights were violated where he was denied relief from removal based on a conviction that was not alleged in the Notice to Appear as a ground for removal); *see also United States v. Gomez*, 757 F.3d 885, 899 n.9 (9th Cir. 2014) ("[E]ven when the NTA fails to include a reference to an aggravated felony, that omission would not bar the government from introducing such a conviction later in an immigration proceeding as a basis for the IJ to find an alien ineligible for voluntary departure."). Note that the court has held that the failure of the Notice to Appear to designate which subsection of the statute defining aggravated felony was applicable to the noncitizen did not deprive the immigration court of jurisdiction. *See Lazaro v. Mukasey*, 527 F.3d 977, 980 (9th Cir. 2008).

"The Supreme Court's decisions in *Pereira* [*v. Sessions*, 138 S. Ct. 2105 (2018)] and *Niz-Chavez* [*v. Garland*, 141 S. Ct. 1474 (2021)], along with the text and structure of the statutory provisions governing *in absentia* removal orders and Notices to Appear, unambiguously require the government to provide [a noncitizen] with a Notice to Appear as a single document that include[s] all the information set forth in 8 U.S.C. § 1229(a)(1), including the time and date of the removal proceedings." *Singh v. Garland*, 24 F.4th 1315, 1320 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (U.S. June 30, 2023) (No. 22-884) (holding that failure to state time or date of noncitizen's removal hearing in notice to appear was not cured by subsequent hearing notices, discussing the Supreme Court's decisions in *Pereira* and *Niz-Chavez*).

Proper service of a notice of hearing amending the date and time of a removal hearing, does *not* establish proper service of an amended notice to appear and the charges therein, where the amended notice to appear replaces the underlying factual allegations lodged against the noncitizen. *See Martinez v. Barr*, 941 F.3d 907, 923 (9th Cir. 2019). In *Martinez*, the record provided no evidence that petitioner was served with the amended notice to appear, as required by regulation and due process. *Id.* (explaining that although petitioner submitted a change of address form, the amended NTA included only petitioner's former address, and the certificate of service section was not completed). As such, the court held that the BIA abused its discretion in failing to reopen proceedings that had a facially apparent due process violation and granted the petition for review, remanding to the BIA with instructions to reopen the removal proceedings. *Id.* at 924.

As a general matter, absent a showing of prejudice, improper service of an NTA can be cured. *B.R. v. Garland*, 26 F.4th 827, 837 (9th Cir. 2022) (as amended). In *B.R. v. Garland*, the panel explained that the statute does not require notice at a particular moment and that nothing in the statute or regulations requires termination in this context. The panel also considered *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020), where the court addressed the similar issue of the service of a defective NTA. *B.R.*, 26 F.4th at 837-38. There, the court held that the remedy is to provide DHS an opportunity to cure the defect in the NTA rather than to order termination. The panel concluded that it logically proceeds that the remedy for improper service of an NTA is for proper service to be provided at a later time, provided the alien is not prejudiced. *Id.* at 838.

2. Notice of Hearing

Due process requires notice of an immigration hearing that is reasonably calculated to reach the noncitizen. *See Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155-56 (9th Cir. 2004); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (as amended). If petitioners do not receive actual or constructive notice of deportation proceedings, "it would be a violation of their rights under the Fifth Amendment of the Constitution to deport them in absentia." *Andia v. Ashcroft*, 359 F.3d 1181, 1185 (9th Cir. 2004) (per curiam). *See generally Jones v. Flowers*, 547 U.S. 220 (2006).

A petitioner does not always "have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." *Farhoud*, 122 F.3d at 796 (holding with respect to former 8 U.S.C. § 1252b(c)(1) that notice was sufficient where mailed to applicant's last address). *See also Dent v. Sessions*, 900 F.3d 1075, 1084 (9th Cir. 2018) (concluding due process claim failed where INS was not deliberately indifferent to adult petitioner's application for citizenship; even though the INS sent one of the hearing notices to an outdated address and failed to follow several of its usual practices when petitioner was unreachable, the INS attempted to schedule several hearings for petitioner, but petitioner failed to update the INS with changes to his mailing address). *Cf. Dobrota v. INS*, 311 F.3d 1206, 1211-13 (9th Cir. 2002) (remanding where government's efforts to provide petitioner notice were not reasonably calculated to reach petitioner because he reasonably relied on notice being provided to his attorney); *Flores-Chavez*, 362 F.3d at 1162-63 (due process concerns raised by government's position that regulations do not require notice of proceedings to be given to responsible "adults taking custody of minor aliens").

For cases involving notice to minors, refer to: Motions to Reopen, Time and Numerical Requirements, Exceptions to the 90-Day/One-Motion Rule, In Absentia Orders, Reopening and Recission Based on Improper Notice of Hearing, Actual or Constructive Notice, Notice to Juvenile.

"Actual notice is . . . sufficient to meet due process requirements." *Khan*, 374 F.3d at 828 (holding that a second notice in English was sufficient to advise petitioner of his hearing when petitioner had earlier appeared in response to a notice in English but reserving the question whether due process requires the government to provide translation at a master calendar hearing). *Cf. Sembiring v. Gonzales*, 499 F.3d 981, 988-89 (9th Cir. 2007) (petitioner demonstrated nonreceipt of hearing notice for purpose of rescinding in absentia order).

Cross-Reference: Motions to Reopen or Reconsider Immigration Proceedings, Time and Numerical Limitations, Exceptions to the Ninety-Day/One-Motion Rule, In Absentia Orders, Reopening and Recission Based on Improper Notice of Hearing

3. Hearing Date

This court has found that an IJ's unilateral advancement of a hearing date did not violate the noncitizen's due process rights where a hearing was held and the noncitizen had the opportunity to argue on his behalf, was given an opportunity to explain the circumstances regarding a change in attorneys, and where he was given three months in which to file his applications for relief. *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008).

4. Right to a Neutral Fact-Finder

"A neutral judge is one of the most basic due process protections." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (internal quotation marks omitted). Where an IJ fails to act as a neutral fact-finder, but rather as a partisan adjudicator, the noncitizen's due process rights may be violated. *See Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (due process violation where "the IJ behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel"); *see also Jiang v. Holder*, 754 F.3d 733, 741 (9th Cir. 2014) (noncitizen's due process rights may be deprived when the IJ's on-the-record view of the petitioner's personal relationships prevented the IJ from acting as a neutral fact-finder), *overruled on other grounds by Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021); *Reyes-Melendez*, 342 F.3d at 1006-09 (holding that due process required remand in suspension of deportation case where IJ was "aggressive," "snide," and accused applicant of moral impropriety and that IJ's moral bias against petitioner precluded full consideration of the relevant hardship factors). *Cf. Rivera v. Mukasey*, 508 F.3d 1271, 1276 (9th Cir. 2007) (concluding that the IJ's comments did not rise to the level of prejudgment or a due process violation and that petitioner failed to show "the IJ had a deep-seated favoritism or antagonism that would make fair judgment impossible" (internal quotation marks omitted)); *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926 (9th Cir. 2007) (allegations of bias were undermined by the IJ's professional behavior and the decision considered all issues raised by noncitizen). "A petitioner must show that the denial of his or her right to a neutral fact-finder potentially affected the outcome of the proceedings." *Arrey v. Barr*, 916 F.3d 1149, 1159 (9th Cir. 2019) (internal quotation marks and citation omitted).

An IJ's pre-judgment of the merits of a noncitizen's case has been held to violate a noncitizen's due process rights. *See Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075 (9th Cir. 2005) (due process violation where IJ's pre-judgment, including the exclusion of the testimony of several key witnesses, led to the noncitizen not receiving a full and fair opportunity to present evidence on his behalf); *see also Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058-59 (9th Cir. 2005) (concluding the petitioner's right to due process was violated because "the IJ's disbelief of Petitioner rested on personal speculation, bias, conjecture, and prejudgment" and the IJ refused to allow petitioner to challenge those views by presenting expert testimony); *Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002) (noncitizen deprived of neutral judge where IJ indicated that he had "already judged" the pro se noncitizen's asylum claim); *cf. Liu v. Holder*, 640 F.3d 918, 930-31 (9th Cir. 2011) (as amended) (petitioner alleged IJ prejudged merits of her claim; the court concluded even if IJ's initial actions were improper, petitioner failed to establish prejudice).

If the factual record adequately supports the denial of relief, the court cannot conclude that the IJ's alleged bias was the basis for the denial of the application. *See Rivera*, 508 F.3d at 1276.

In cases where a due process violation was established, the court has on occasion directed that a case be reassigned to a new IJ on remand. *See Nuru v. Gonzales*, 404 F.3d 1207, 1229 (9th Cir. 2005) (directing that case be reassigned on remand where some of the IJ's comments during the hearing and in his oral decision were "highly caustic and without substance"); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1054 (9th Cir. 2005) (directing BIA not to return the case to the IJ who originally heard the matter); *Lopez-Umanzor*, 405 F.3d at 1059 (remanding for a new hearing and suggesting it be held before a different IJ); *Perez-Lastor v. INS*, 208 F.3d 773, 783 (9th Cir. 2000) (suggesting to the BIA that a new hearing be held before a different IJ).

Note that the due process clause does not prevent an IJ from examining a witness. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003) (rejecting due process claim based on the IJ's aggressive and harsh questioning); *see also*

Liu, 640 F.3d at 931 (record failed to show IJ improperly assumed a prosecutorial role, and that active questioning of petitioner did not show a "predisposition to discredit" petitioner's testimony such that IJ's impartiality should be questioned) (internal quotation and citation omitted); *Halaim v. INS*, 358 F.3d 1128, 1137 (9th Cir. 2004) (recognizing that IJ has authority to interrogate, examine and cross-examine the noncitizen and any witnesses, and concluding that the alleged misconduct did not rise to level of intimidation or advocacy for the agency); *Antonio-Cruz v. INS*, 147 F.3d 1129, 1131 (9th Cir. 1998) (rejecting due process claim premised on fact that IJ conducted "the lion's share of cross-examination" in a "harsh manner and tone").

> Although an IJ may "aggressively and sometimes harshly" question a witness, *Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003), he or she may not become a "partisan adjudicator seeking to intimidate" the petitioner rather than "a neutral fact-finder interested in hearing the petitioner's evidence," *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000).

Arrey, 916 F.3d at 1158-59. In *Arrey*, the court recognized that although the IJ was rude and harsh to the Arrey, she failed to show that the harshness or rudeness prejudiced her. *Id.* at 1159 (holding that the IJ held a complete hearing and made a thorough decision that fully examined the underlying factual matters). *See also Gonzalez-Veliz v. Garland*, 996 F.3d 942, 949 (9th Cir. 2021) (holding that petitioner was not deprived of right to a neutral arbiter, even if the IJ may have expressed frustration at times).

"[A] mere showing that the IJ was unfriendly, confrontational, or acted in an adversarial manner is not enough to" show that the underlying proceeding was fundamentally unfair, such that the noncitizen was prevented from reasonably presenting his case. *Rizo v. Lynch*, 810 F.3d 688, 693 (9th Cir. 2016) (record indicated IJ conducted hearing in aggressive manner, but IJ did not deny petitioner a fair hearing). Furthermore, "[a]n alien 'is not denied a fair hearing merely because the [IJ] has a point of view about a question of law or policy.'" *Bartolome v. Sessions*, 904 F.3d 803, 815 (9th Cir. 2018) (quoting *Matter of Exame*, 18 I. & N. Dec. 303, 306 (BIA 1982)).

5. Pressure to Withdraw Application

An IJ's pressuring an applicant to withdraw an application for relief without providing an opportunity to present testimony may result in a due process violation. *See Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002) (due process violation where the IJ pressured a pro se asylum applicant to withdraw his application and to accept voluntary departure, without giving him an opportunity to present oral testimony at the hearing); *cf. Troncoso-Oviedo v. Garland*, 43 F.4th 936, 941-42 (9th Cir. 2022) (IJ did not violate due process by failing to question petitioner directly about waiving his applications for relief where petitioner was represented by counsel, the IJ relied on counsel's statements to find the claims had been withdrawn, and petitioner did not contend that his counsel was ineffective or that the waiver was not knowing and voluntary).

6. Apparent Eligibility for Relief

"An IJ is required to inform a petitioner subject to removal proceedings of 'apparent eligibility to apply for any of the benefits enumerated in this chapter.' 8 C.F.R. § 1240.11(a)(2) [2019]." *C.J.L.G. v. Barr*, 923 F.3d 622, 626 (9th Cir. 2019) (en banc) (granting petition for review where IJ erroneously failed to advise petition about his eligibility for Special Immigrant Juvenile status, as required by regulation, but not addressing due process). *See also Zamorano v. Garland*, 2 F.4th 1213, 1222-23 (9th Cir. 2021) (discussing 8 C.F.R. § 1240.11 (2021)); *United States v. Lopez-Velasquez*, 629 F.3d 894, 896-97 (9th Cir. 2010) (en banc) (explaining the court has repeatedly held that an IJ's failure to advise the noncitizen of apparent eligibility for relief violates due process and can serve as the basis for a collateral attack to a deportation order). "The 'apparent eligibility' standard of 8 C.F.R. § 1240.11(a)(2) [2019] is triggered whenever the facts before the IJ raise a 'reasonable possibility that the petitioner may be eligible for relief.'" *C.J.L.G.*, 923 F.3d at 627 (quoting *Moran-Enriquez v. INS*, 884 F.2d 420, 423 (9th Cir. 1989)). *See also Olea-Serefina v. Garland*, 34 F.4th 856, 866-67 (9th Cir. 2022) (BIA properly rejected petitioner's contentions that the IJ violated due process rights by failing to develop the record where the IJ adequately explored the possibility of asylum with her and provided her with an application); *Zamorano*, 2 F.4th at 1223, 1227-28 (concluding IJ did not have a duty to advise pro se noncitizen of right to apply for or his apparent eligibility for asylum or withholding of removal, where noncitizen did not express a fear of persecution that could support a plausible claim for relief, nor a duty to advise him of his apparent eligibility for a U visa); *Lopez-Velasquez*, 629 F.3d at 896 ("Apparent eligibility" for relief under immigration laws is a "reasonable possibility that the alien may be eligible for relief."); *see also United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204-05 (9th Cir. 2004) (per curiam) (due process violation where IJ failed to inform noncitizen he was eligible for voluntary departure); *Bui v. INS*, 76 F.3d 268, 270-71 (9th Cir. 1996). *Cf. United States v. Moriel-Luna*, 585 F.3d 1191, 1197-98 (9th

Cir. 2009) (concluding there was no due process violation where the noncitizen did "not make the IJ aware of a pending engagement to a U.S. citizen or the possibility of the alien's parents later filing for citizenship").

"[F]ailure to advise an alien of 'apparent eligibility' to apply for relief is a due process violation." *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th Cir. 2013); *see also United States v. Garcia-Santana*, 774 F.3d 528, 533 (9th Cir. 2014) (failure to advise a noncitizen of apparent eligibility for relief from removal, including voluntary departure, violates his due process rights), *abrogated on other grounds as recognized by Yim v Barr*, 972 F.3d 1069 (9th Cir. 2020). "A failure to advise can be excused only when the petitioner's eligibility for relief is not 'plausible.'" *C.J.L.G.*, 923 F.3d at 627. *See also Zamorano*, 2 F.4th at 1223 ("Given that the fear of starting a new life in a new country was his only stated fear, Zamorano did not raise a 'reasonable possibility' that he may be eligible for asylum or withholding of removal that would trigger the IJ's duty to inform Zamorano of his 'apparent eligibility' to apply for such forms of relief under § 1240.11(a)(2) [2021].").

"[W]ith narrow exceptions, 'an IJ's duty is limited to informing an alien of a reasonable possibility that the alien is eligible for relief at the time of the hearing.'" *United States v. Guzman-Ibarez*, 792 F.3d 1094, 1101 (9th Cir. 2015) (quoting *United States v. Lopez-Velasquez*, 629 F.3d 894, 895 (9th Cir. 2010) (en banc)). However, an IJ's duty to inform a noncitizen of apparent eligibility does not require anticipation of future changes in law. *See United States v. Vidal-Mendoza*, 705 F.3d 1012, 1017 (9th Cir. 2013); *see also Guzman-Ibarez*, 792 F.3d at 1101 (IJ could not have been expected to know what relief might be possible under the circumstances).

"When the IJ fails to provide the required advice, the appropriate course is to 'grant the petition for review, reverse the BIA's dismissal of [the petitioner's] appeal of the IJ's failure to inform him of this relief, and remand for a new [ ] hearing.'" *C.J.L.G.*, 923 F.3d at 628 (quoting *Bui*, 76 F.3d at 271).

7. Explanation of Procedures

"[T]he IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (due process violation where IJ failed adequately to explain procedures to pro se applicant; IJ had an obligation to assist the pro se applicant in determining what evidence was relevant, and to explain how he could prove his claims); *see also Zamorano v. Garland*, 2 F.4th 1213, 1225 (9th Cir. 2021) (IJ has an obligation to explain what noncitizen must prove to establish the basis for the relief he seeks); *Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000) (due process violation where noncitizen appeared pro se and IJ failed sufficiently to explain that noncitizen could be a witness even without an attorney, inadequately explained hearing procedures, and failed to explain what the noncitizen had to prove to establish eligibility for asylum).

In *Hussain v. Rosen*, the court held "the IJ provided [petitioner] due process by providing details about the structure of the hearing, the availability of counsel, and asking numerous questions through which Hussain had ample opportunity to develop his testimony. 985 F.3d 634, 645 (9th Cir. 2021), *cert. denied sub nom. Hussain v. Garland*, 142 S. Ct. 1121 (2022).

8. Exclusion of Evidence or Testimony

"[A]n alien who faces deportation is entitled to a . . . reasonable opportunity to present evidence on his behalf." *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *see also Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021). The IJ's exclusion of proffered evidence may result in a due process violation. *See Flores-Rodriguez*, 8 F.4th at 1113 ("If an IJ's actions prevent the introduction of 'significant testimony,' that generally violates due process."); *Ladha v. INS*, 215 F.3d 889, 905 (9th Cir. 2000) (remanding for clarification of petitioner's due process claims based on the exclusion of two documents), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam). However, for the court to determine if a due process violation resulted, the record "must contain a sufficient indication of the content of excluded evidence to allow [the court] to review the exclusion for fundamental fairness." *Ladha*, 215 F.3d at 905.

Preventing a noncitizen from presenting testimony that may corroborate claims of past persecution may also result in a due process violation by depriving the noncitizen of a reasonable opportunity to present evidence in support of his claim. *See Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075-76 (9th Cir. 2005) (petitioner's due process rights violated where the IJ barred him from presenting his mother's testimony, refused to permit family members to develop the record as to the family's persecution, and refused to hear testimony from petitioner's expert witness). "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 . . . ." *Oshodi v. Holder*, 729 F.3d 883, 890 (9th Cir. 2013) (due process right violated at removal hearing where IJ cut off petitioner's testimony on the events of his alleged past persecution that were the foundation of his withholding of removal and CAT claims). In *Oshodi*, the court explained:

> The importance of an asylum or withholding applicant's testimony cannot be overstated, and the fact that Oshodi submitted a written declaration outlining the facts of his persecution is no response to the IJ's refusal to hear his testimony. An applicant's testimony of past persecution and/or his fear of future persecution stands at the center of his claim and can, if credible, support an eligibility finding without further corroboration. 8 U.S.C. § 1158(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a) [2013]. Every asylum and withholding applicant is required to be examined under oath as to the contents of his application. 8 C.F.R. § 1240.11(c)(3)(iii) [2013].

729 F.3d at 889-90.

"Due process does not mandate the right to present new evidence to an appellate tribunal when a litigant has been afforded a reasonable opportunity to present evidence to the first-instance decision-maker." *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1195 (9th Cir. 2021) (holding that the reasonable fear screening procedures before asylum officer did not violate due process, notwithstanding that the proceedings do not afford noncitizens the right to present new evidence during the review hearing before an immigration judge).

See also Morgan v. Mukasey, 529 F.3d 1202, 1210-11 (9th Cir. 2008) (IJ violated due process by refusing to allow applicants' two children to testify on the basis that they did not appear on the pretrial witness list because the testimony could have corroborated the mother's testimony regarding persecution in Egypt after her credibility had been put in doubt); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058-59 (9th Cir. 2005) (IJ violated due process in refusing to hear relevant expert testimony regarding domestic violence); *Kaur v. Ashcroft*, 388 F.3d 734, 737-38 (9th Cir. 2004) (IJ's failure to allow noncitizen's son to testify as a corroborating witness resulted in prejudice); *Colmenar*, 210 F.3d at 972 (transcript showed the IJ pre-judged case and refused to hear testimony from noncitizen about anything that was in written application, thereby preventing noncitizen from elaborating on fears). *Cf. Pagayon v. Holder*, 675 F.3d 1182, 1191-92 (9th Cir. 2011) (per curiam) (no due process violation where IJ refused to allow telephonic testimony from family and declined to allow petitioner time to submit a letter recapitulating his oral testimony, because petitioner failed to establish prejudice);

Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) (no violation of due process rights by excluding telephonic testimony of three witnesses because there were other witnesses present and prepared to testify as to the same character evidence); *Haile v. Holder*, 658 F.3d 1122, 1128 (9th Cir. 2011) ("The sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." (quotation marks and citation omitted)); *Lanuza v. Holder*, 597 F.3d 970, 972 (9th Cir. 2010) (per curiam) (rejecting contention that IJ deprived petitioner of opportunity to present evidence on her behalf); *Almaghzar v. Gonzales*, 457 F.3d 915, 921 (9th Cir. 2006) (concluding petitioner was not deprived of due process where allowed to present evidence, including expert testimony and country reports, and was able to testify at length).

9. Exclusionary Rule and Admission of Evidence

"The inadmissibility of evidence that undermines fundamental fairness stems from the Fifth Amendment due process guarantee that operates in removal proceedings." *Hong v. Mukasey*, 518 F.3d 1030, 1035 (9th Cir. 2008) (holding that where it did not appear the agency violated its regulations, and any alleged violation would still not have deprived the petitioner of any protected right, the evidence was properly admitted).

The exclusionary rule provides that in criminal proceedings "evidence obtained in violation of a defendant's Fourth Amendment rights may not be introduced to prove the defendant's guilt." *Martinez-Medina v. Holder*, 673 F.3d 1029, 1033 (9th Cir. 2011). "The exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights." *Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008) (internal quotation marks omitted).

The exclusionary rule generally does not apply in immigration proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); *see also B.R. v. Garland*, 26 F.4th 827, 841 (9th Cir. 2022) (as amended); *Perez Cruz v. Barr*, 926 F.3d 1128, 1137 (9th Cir. 2019); *Sanchez v. Sessions*, 904 F.3d 643, 649 (9th Cir. 2018) (noting it is well-established that the exclusionary rule generally does not apply to removal proceedings); *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1129 n.5 (9th Cir. 2013) ("[T]he exclusionary rule generally does not apply in civil deportation proceedings . . . ."); *Hong*, 518 F.3d at 1034 (same). "There are, however, two critical exceptions to this rule: (1) when the agency violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner's protected interests; and (2) when the agency egregiously violates a petitioner's Fourth Amendment rights[.]" *B.R.*, 26 F.4th at 841 (citing *Sanchez*, 904 F.3d at 649) (internal quotation marks omitted). *See also*; *Perez Cruz*, 926 F.3d at 1137 (holding suppression of evidence was appropriate for evidence gathered as a result of detention that violated regulation).

For more on the exclusionary rule, *see infra* section II.E.

10. Notice of Classified Evidence

"The regulations governing immigration proceedings permit the use of classified information." *Kaur v. Holder*, 561 F.3d 957, 960 (9th Cir. 2009) (citing 8 C.F.R. § 1240.33(c)(4) [2009]) However, "the use of secret evidence is cabined by constitutional due process limitations." *Id.* at 962. The court has "long held that there are limits on the admissibility of evidence and that the test for admissibility includes fundamental fairness." *Id.* (internal quotation marks omitted). The evidence must be probative and its use fundamentally fair so as not to violate due process of law. The court has determined that the BIA violated due process by using secret evidence against a petitioner for the first time after she had already been granted CAT relief. *See id.* at 962-63. *See also Zerezghi v. United States Citizenship & Immigr. Servs.*, 955 F.3d 802, 813 (9th Cir. 2020) (holding that because United States citizen and his noncitizen wife received only a vague reference to unspecified 'records,' they had no meaningful opportunity to respond to the undisclosed documents, and thus the USCIS violated due process).

11. Right to Confront and Cross-Examine Witnesses

"Due process requires 'a full and fair hearing,' . . . which, at a minimum, includes a reasonable opportunity to present and rebut evidence and to cross-examine witnesses . . . ." *Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020) (citations omitted); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1158-59 (9th Cir. 2013). "The Federal Rules of Evidence . . . do not apply in immigration hearings. Rather, the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." *Sanchez v. Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012) (per curiam) (citation and quotation marks omitted) (determining that the IJ did not abuse his discretion by admitting Form I-213, even though the petitioner was not given an opportunity to cross-examine the preparer).

An opportunity to confront and cross examine "is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Ching*, 725 F.3d at 1158 (internal quotation marks and citations omitted) (due process required a hearing with an opportunity for Ching to confront the witnesses against her). *See also* *Angov v. Lynch*, 788 F.3d 893, 899 (9th Cir. 2015) (statutory right to cross-examine witnesses not violated where government made "a reasonable effort to obtain a witness from the Department of State but was prevented from doing so by the State's policy of not releasing follow-up information regarding its overseas investigations"); *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014) (due process claim foreclosed by *Angov*); *Go v. Holder*, 640 F.3d 1047, 1055 (9th Cir. 2011) (rejecting petitioner's due process objection to the admission of evidence because he had the opportunity to cross-examine government's live witness, present contrary evidence, and to impeach testimony); *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006) (holding that "where an asylum applicant's testimony consists of hearsay evidence, the statements by the out-of-court declarant may be accorded less weight by the trier of fact when weighed against non-hearsay evidence."); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005) (admission of hearsay statement of declarant whom government had deported as sole evidence of crime violated due process).

"Congress has specifically provided that an alien in removal proceedings must be given 'a reasonable opportunity . . . to cross-examine witnesses presented by the Government,' [and the court has] held that the government deprives the alien of a fundamentally fair hearing when it fails 'to make a good faith effort to afford the alien a reasonable opportunity to confront and to cross-examine the witness against him.'" *Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1231 (9th Cir. 2021) (quoting 8 U.S.C. § 1229a(b)(4)(B) and *Saidane v. INS*, 129 F.3d 1063, 1066 (9th Cir. 1997) (holding that because the BIA failed to make a good-faith effort to let Alcaraz confront the witnesses against him, the BIA's reliance on the probation officer's report was error, and further holding that the error was prejudicial). "[T]he government must make a reasonable effort in [immigration] proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her." *Saidane*, 129 F.3d at 1065 (internal quotation marks omitted); *see also* *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (IJ violated due process in not allowing the petitioner a continuance to investigate a forensic report where the government did not provide the petitioner a reasonable opportunity to investigate the report); *Hammad*, 603 F.3d at 545-46 (no due process violation where government informed petitioner of spouse's testimony two days prior to hearing, and petitioner had opportunity to cross-examine spouse and offer rebuttal witness); *Cinapian v. Holder*, 567 F.3d 1067, 1075 (9th Cir. 2009) (holding "the combination of the government's failure to disclose the DHS forensic reports in advance of the hearing or to make the reports' author available for cross-examination and the IJ's subsequent consideration of the reports under these circumstances denied Petitioners a fair hearing."); *Shin v. Mukasey*, 547 F.3d 1019, 1024-25 (9th Cir. 2008) (admission of deposition testimony from former federal immigration official did not violate due process where official was cross-examined by noncitizen's counsel during the deposition, and official was made available during hearing if additional testimony was needed); *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988) (reliance on hearsay documents submitted by noncitizen's wife stating marriage was a sham was fundamentally unfair given government's failure to make reasonable effort to produce wife for cross-examination).

Cf. Hernandez v. Garland, 52 F.4th 757, 767-68 (9th Cir. 2022) (rejecting petitioner's contention that admission of Form I-213 was not fundamentally fair because he was not given an opportunity to cross-examine the officer who prepared the form where petitioner did not contest the information in the presumptively reliable document) (distinguishing *Alcaraz-Enriquez*).

"[H]earsay is admissible in immigration proceedings. . . . [I]n immigration proceedings the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003) (internal quotation marks and citation omitted). Although hearsay is admissible, "the constitutional and statutory guarantees of due process require that the government's choice whether to produce a witness or to use a hearsay statement [not be] wholly unfettered." *Hernandez-Guadarrama*, 394 F.3d at 681 (internal quotation marks omitted) (alteration in original). For example, admission of a hearsay statement of an allegedly unavailable declarant whom the government deported as sole evidence of crime may violate due process. *See id*. at 681-82 (due process violation found where government failed to make any reasonable effort to produce declarant, and where the declarant had been at risk of felony prosecution when he provided the statement); *see also Cinapian*, 567 F.3d at 1075 (petitioners were prejudiced where government failed to disclose DHS forensic reports in advance of the hearing or make the reports' author available for cross-examination); *Saidane*, 129 F.3d at 1065-66 (admission of hearsay evidence fundamentally unfair where did not make a good faith effort to afford the alien a reasonable opportunity to confront and to cross-examine the witness against him).

a. Opportunity to Examine and Rebut Evidence

In *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013), the court held that the IJ violated petitioner's due process rights by not allowing him a continuance to investigate a forensic report where the government did not provide a reasonable opportunity to investigate the report. Comparing the case to *Cinapian v. Holder*, 567 F.3d 1067, 1075 (9th Cir. 2009), the court explained that the "due process right to a timely production of an adverse forensic report goes beyond the inability to cross-examine its author." In *Bondarenko*, the IJ found the petitioner not credible based in large part on the forensic report introduced by the government that concluded a medical document submitted by petitioner was fraudulent. The IJ denied the petitioner an opportunity to investigate the manner in which the forensic report had been prepared and to question the preparer of the report. Concluding the denial of the request violated his due process rights and resulted in prejudice, the court granted the petition for review. *Id*. at 906-07. *Cf. Angov v. Lynch*, 788 F.3d 893, 899 (9th Cir. 2015) (concluding statutory right to examine evidence not violated where record showed he was allowed ample time to examine the evidence and given ample time to produce substantial evidence to rebut it); *Sanchez v. Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012) (per curiam) (rejecting argument that IJ should have excluded Form I-213 from evidence where the petitioner was not given an opportunity to cross-examine the preparer because there was no evidence of coercion or that the statements in the form were not that of the petitioner).

See also Grigoryan v. Barr, 959 F.3d 1233, 1240 (9th Cir. 2020) (holding that IJ's admission of and reliance on a record of investigation prepared by the Department of Homeland Security, as a basis for terminating asylum status did not comport with constitutional due process, where the Grigoryans were not afforded a meaningful opportunity to rebut its allegations); *Zerezghi v. United States Citizenship & Immigration Servs.*, 955 F.3d 802, 813 (9th Cir. 2020) (USCIS violated United States citizen spouse's due process rights where it failed to disclose document on which it relied in making determination that noncitizen spouse previously committed marriage fraud); *Kaur v. Holder*, 561 F.3d 957, 961 (9th Cir. 2009) (holding the BIA's "use of the secret evidence without giving Kaur a proper summary of that evidence was fundamentally unfair and violated her due process rights[,]" noting that she could not rebut what had not been alleged).

12. Production of Documents

An IJ's refusal to order production of documents that may affect the outcome of proceedings may result in a violation of the noncitizen's due process rights. *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620-21 (9th Cir. 2006) (directing IJ on remand to order production of all forms referencing noncitizen's prior departure, because the government's inability to produce a voluntary departure form would be evidence that may affect the outcome of proceedings); *see also Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021) ("If an IJ's actions prevent the introduction of 'significant testimony,' that generally violates due process." (citation omitted)); *Dent v. Holder*, 627 F.3d 365, 374-75 (9th Cir. 2010) (concluding petitioner was denied the opportunity to fully and fairly litigate his removal and claim of defensive citizenship where government failed to provide petitioner with documents contained in his A-File that could show he is a naturalized United States citizen).

13. New Country of Deportation

The IJ's last-minute switch of the country of deportation has been found to violate due process where there was lack of proper notice. *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999) (asylum applicant, who had operated under belief based on instructions on agency forms and from the IJ that he needed to present evidence in support of his claim regarding Azerbaijan, was not informed of designation of Armenia as country of deportation until after the close of evidence).

14. Right to Translation

"Due process requires that an applicant be given competent translation services" if he or she does not speak English. *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *see also United States v. Reyes-Bonilla*, 671 F.3d 1036, 1044 (9th Cir. 2012) ("A waiver of rights cannot be found to have been considered or intelligent where there is no evidence that the detainee was first advised of those rights in a language he could understand."); *United States v. Ramos*, 623 F.3d 672, 680 (9th Cir. 2010) (petitioner's "waiver of appeal and of the due process rights specified in the Stipulated Removal form was not 'considered or intelligent' because he did not receive a competent Spanish language translation of his right to appeal when he signed the form."); *Perez-Lastor v. INS*, 208 F.3d 773, 777-78 (9th Cir. 2000) (due process violated where incompetent translation prevented petitioner from presenting relevant evidence and caused the BIA to find him not credible). *Cf. Khan v. Ashcroft*, 374 F.3d 825, 829-30 (9th Cir. 2004) (petitioner's due process rights were not violated by IJ's failure to translate proceedings at master calendar hearing, where the petitioner requested and received a continuance, indicating that he was able to protect his interests at the hearing).

"In order to make out a due process violation, . . . the alien must show that a better translation would have made a difference in the outcome of the hearing." *Kotasz v. INS*, 31 F.3d 847, 850 n.2 (9th Cir. 1994) (internal quotation marks omitted); *see also Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (concluding there was no due process violation where petitioner did not explain how the problems with the interpreter affected his testimony or otherwise impacted the hearing's fairness); *Bartolome v. Sessions*, 904 F.3d 803, 811-12 (9th Cir. 2018) (concluding that even if there was error in only providing a Spanish-language interpreter, instead of an interpreter in petitioner's native language of Chuj, petitioner failed to show prejudice, because he was able to ultimately present his whole story to the IJ); *Ramos*, 623 F.3d at 680 (concluding petitioner did not receive a competent Spanish language translation of his waiver of his right to appeal, but ultimately concluding petitioner failed to establish prejudice where he was not eligible for relief); *Aden v. Holder*, 589 F.3d 1040, 1046-47 (9th Cir. 2009) (concluding there was no due process violation where petitioner failed to demonstrate prejudice from alleged errors in translation).

"In evaluating incompetent translation claims, [the court has] identified three types of evidence which tend to prove that a translation was incompetent. These are: direct evidence of incorrectly translated words, unresponsive answers by the witness, and the witness' expression of difficulty understanding what is said to him." *Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004) (internal quotation marks and citations omitted). *See also Bartolome*, 904 F.3d at 811-12 (rejecting petitioner's due process claim where petitioner did "not specifically indicate (outside of vague references to his political activities) what evidence he was unable to present[, and the record did] not demonstrate that [petitioner] was prevented (based on the interview in Spanish) from providing the evidence that establishe[d] that he fear[ed] returning to Guatemala").

15. Administrative Notice of Facts

When the agency takes administrative notice of events occurring after the merits hearing, it must provide notice to the parties and, in some cases, an opportunity to respond. *See Circu v. Gonzales*, 450 F.3d 990, 994-95 (9th Cir. 2006) (en banc) (IJ violated due process by taking judicial notice of a new country conditions report without providing noncitizen notice and an opportunity to respond). Notice of intent to take administrative notice is all that is required if extra-record facts and questions are "legislative, indisputable, and general." *Id.* at 993 (internal quotation marks omitted); *see also Gonzales v. INS*, 82 F.3d 903, 911-12 (9th Cir. 1996); *Getachew v. INS*, 25 F.3d 841, 846-47 (9th Cir. 1994); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1027-29 (9th Cir. 1992). However, "more controversial or individualized facts require *both* notice to the [alien] that administrative notice will be taken *and* an opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts." *Circu*, 450 F.3d at 993 (emphasis and alteration in original) (internal quotation marks omitted). An example of an indisputable fact is a political party's victory in an election, whereas a controversial fact is whether the election has vitiated any previously well-founded fear of persecution. *Id*. at 994.

If an IJ takes administrative notice of changed country conditions during the hearing, there is no violation of due process because the applicant has an opportunity to respond with rebuttal evidence. *See Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995); *see also Kotasz v. INS*, 31 F.3d 847, 855 n.13 (9th Cir. 1994) (petitioners "were given ample opportunity to discuss the effect of [political] changes"); *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993) ("petitioners had ample opportunity to argue before the immigration judges and before the [BIA] that their fear of persecution remained well-founded").

16. Right to Counsel

"Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004); *see also Usubakunov v. Garland*, 16 F.4th 1299, 1303 (9th Cir. 2021) (stating, "noncitizens have the right to counsel in removal proceedings, albeit not the right to counsel paid for by the government."); *Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019) (stating, "Both Congress and our court have recognized the right to retained counsel as being among the rights that due process guarantees to petitioners in immigration proceedings" and citing 8 U.S.C. § 1362); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) ("The right to be represented by counsel at one's own expense is protected as an incident of the right to a fair hearing under the Due Process Clause of the Fifth Amendment."); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) ("No constitutional right to counsel in deportation proceedings, but must be accorded due process under the Fifth Amendment."); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1044 (9th Cir. 2012) (petitioner denied due process right to counsel during expedited removal proceeding, however, he failed to establish prejudice); *Ram v. Mukasey*, 529 F.3d 1238, 1241-42 (9th Cir. 2008) (petitioner denied right to counsel where IJ failed to adequately assess whether petitioner's waiver of right to counsel was knowing and voluntary); *Biwot v. Gonzales*, 403 F.3d 1094, 1098-1000 (9th Cir. 2005) (petitioner denied right to counsel, and petitioner's "compliance with the IJ's exhortation that he proceed on his own" was not an effective waiver); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 944-47 (9th Cir. 2004) (petitioners denied right to counsel of choice, and there was no knowing and voluntary waiver).

The right to counsel is codified at 8 U.S.C. § 1362. "[T]he statutory right to counsel exists so that an alien has a competent advocate acting on his or her behalf at removal proceedings." *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 808 (9th Cir. 2007); *see also Arrey*, 916 F.3d at 1157. The court reviews de novo whether the statutory right to counsel was violated. *See Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1080 (9th Cir. 2007). *See also Zetino v. Holder*, 622 F.3d 1007, 1014-15 (9th Cir. 2010) (rejecting petitioner's contention that the IJ violated his due process rights by failing to advise him of his right to counsel, where the IJ advised petitioner of his procedural rights).

"Non-citizens have no statutory right to counsel at the initial stage of reinstatement proceedings, during which an immigration officer performs the 'ministerial' task of determining whether the non-citizen's prior removal order should be reinstated." *Zuniga v. Barr*, 946 F.3d 464, 465 n.8 (9th Cir. 2019) (per curiam) (as amended) (explaining *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 491, 497 (9th Cir. 2007), and distinguishing it). However, noncitizens subject to expedited removal do have a statutory right to counsel in reasonable fear proceedings before immigration judges. *Zuniga*, 946 F.3d at 469 & n.8 (distinguishing the initial stage of reinstatement proceedings from subsequent reasonable fear review before an IJ). In *Orozco-Lopez*, this court held that noncitizens with reinstated removal orders are statutorily entitled to counsel, at no expense to the government, at their reasonable fear hearings before the IJ, but that this "statutory entitlement is cabined by 8 C.F.R. § 208.31(g)(1)'s requirement that, '[i]n the absence of exceptional circumstances,' such hearings "shall be conducted by the [IJ] within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court." 11 F.4th 764, 780 (9th Cir. 2021).

An IJ's failure to inquire as to whether a petitioner wants an attorney present may violate due process. *See Tawadrus*, 364 F.3d at 1105. For an applicant to appear pro se, there must be a knowing and voluntary waiver of the right to counsel. *Id*. at 1103. For a waiver to be valid, the IJ must "(1) inquire specifically as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response." *Tawadrus*, 364 F.3d at 1103. (internal citations omitted); *see also Arrey*, 916 F.3d at 1157 (concluding petitioner did not explicitly waive her right to counsel); *Hernandez-Gil*, 476 F.3d at 806 (concluding petitioner did not knowingly and voluntarily waive his right to counsel); *United States v. Ramos*, 623 F.3d 672, 682-83 (9th Cir. 2010) (concluding "that [petitioner's] waiver of counsel was invalid and a violation of his due process right to counsel"). Failure to obtain a knowing and voluntary waiver is a denial of the right to counsel and may be an abuse of discretion. *See Hernandez-Gil*, 476 F.3d at 806; *Tawadrus*, 364 F.3d at 1103; *see also Ram*, 529 F.3d at 1242 ("[E]ven for the most competent alien, the IJ has an affirmative duty to assess whether any waiver of counsel is knowing and voluntary."). Whether a petitioner is competent may affect the inquiry of whether waiver of counsel is knowing and voluntary. *See Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1184 (9th Cir. 2018) (declining to address the waiver of counsel argument because a determination whether petitioner was competent may affect the inquiry).

In *Orozco-Lopez*, the court held that Orozco-Lopez could not possibly have waived his statutory right to counsel, because the IJ did not mention the possibility of legal representation at the hearing. 11 F.4th at 779. In contrast, the court has held that an "IJ's denial of [a] request for a continuance to find a lawyer did not amount to a denial of [petitioner's] statutory right to counsel." *Id.* (holding that petitioner Gonzalez's right to counsel was not denied where the asylum officer provided Gonzalez a list of free legal services, Gonzalez had eight days to find counsel, Gonzalez did not indicate when, if ever, he might be able to obtain counsel, and the IJ noted the regulation requires IJs to hear reasonable fear reviews within ten days).

"When a petitioner does not waive the right to counsel, 'IJs must provide [the petitioner] with reasonable time to locate counsel and permit counsel to prepare for the hearing.'" *Arrey*, 916 F.3d at 1158 (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1098-99 (9th Cir. 2005)). A petitioner is not denied the right to counsel where continuing the hearing would be futile or where the IJ has done everything he reasonably could to permit the petitioner to obtain counsel. *Arrey*, 916 F.3d at 1158. In *Arrey*, the court held that although petitioner did not waive the right to counsel, the IJ had provided her with reasonable time to locate counsel, and therefore, she was not deprived of her due process right to retained counsel. *Id*. at 1157-58.

"When an immigrant has engaged counsel and the IJ is aware of the representation, if counsel fails to appear, the IJ must take reasonable steps to ensure that the immigrant's statutory right to counsel is honored." *Hernandez-Gil*, 476 F.3d at 808 (concluding petitioner was denied his statutory right to counsel); *see also Mendoza-Mazariegos*, 509 F.3d at 1084 (same).

Where a "a non-citizen's statutory right to counsel has been denied, . . . he need not show prejudice." *Orozco-Lopez*, 11 F.4th at 779 (in IJ reasonable fear review context). *See also Montes-Lopez v. Holder*, 694 F.3d 1085, 1090-94 (9th Cir. 2012) ("An alien who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney."); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) (recognizing that *Montes-Lopez* "carved out an exception to the general rule requiring a showing of prejudice" and that where "an individual who is wrongly denied the assistance of counsel at the merits hearing[, prejudice is] conclusively presumed and automatic reversal is required."). In *Montes-Lopez*, the court held that petitioner's right to counsel was violated where the IJ required petitioner to proceed with the hearing, although his retained attorney was suspended from practice. *See Montes-Lopez*, 694 F.3d at 1089 (noting there was no basis to conclude that the petitioner had been aware of his attorney's suspension for very long or was derelict in responding to it).

Although "an individual who is wrongly denied the assistance of counsel at the merits hearing need not show prejudice in order to prevail[,]" "not all violations of the right to counsel are treated as structural errors mandating automatic reversal." *Gomez-Velazco*, 879 F.3d at 993 (referencing the rule set out in *Montes-Lopez*, 694 F.3d at 1090). Rather, "[i]f the right to counsel has been wrongly denied only at a discrete stage of the proceeding, and an assessment of the error's effect can readily be made, then prejudice must be found to warrant reversal." *Gomez-Velazco*, 879 F.3d at 993, 995-96 (holding that petitioner failed to show denial of right to counsel caused him any prejudice by potentially affecting the outcome of the proceeding). In *Gomez-Velazco*, there was no presumption of prejudice, where petitioner was denied right to counsel during initial interaction with DHS officers, but was able to consult with counsel before the removal order was executed, and the prejudicial effect could be assessed. *Id.* (distinguishing the case from instances where counsel is precluded from participating in the merits hearing before an immigration judge).

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

See also Gonzaga-Ortega v. Holder, 736 F.3d 795, 804 (9th Cir. 2013) (as amended) (holding that the petitioner, a lawful permanent resident, did not have a right to counsel at secondary inspection when entering the country under 8 C.F.R. § 292.5(b) (2013) where he fell within the express exception to the regulation as an applicant for admission who had not become the focus of a criminal investigation).

17. Ineffective Assistance of Counsel

> The right to effective assistance of counsel in immigration proceedings stems from the Fifth Amendment's guarantee of due process. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). As in a criminal case, a lawyer's performance in an immigration proceeding is not measured using "specific guidelines," *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), but is instead a context-dependent inquiry into whether the attorney acted with "sufficient competence," *Mohammed*, 400 F.3d at 793. And just as a criminal defendant can establish prejudice without showing that a competent lawyer definitely would have earned an acquittal, *see Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an alien's burden is to demonstrate that his lawyer's errors "may have affected the outcome of the proceedings," *Mohammed*, 400 F.3d at 794 & n. 11 (quoting *Iturribarria v. I.N.S.*, 321 F.3d 889, 900 (9th Cir. 2003)).

Salazar-Gonzalez v. Lynch, 798 F.3d 917, 921 (9th Cir. 2015) (concluding that Salazar-Gonzalez demonstrated his counsel performed deficiently and that he suffered prejudice as a result); *see also United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) ("No constitutional right to counsel in deportation proceedings, but must be accorded due process under the Fifth Amendment."); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) (explaining "[i]ndividuals in immigration proceedings do not have Sixth Amendment rights, so ineffective assistance of counsel claims are analyzed under the Fifth Amendment's due process clause" and denying ineffective assistance of counsel claim because petitioner failed to show that counsel's performance denied him a right to a "full and fair hearing" where "counsel diligently examined and cross-examined witnesses, argued points of law before the IJ and informed [petitioner] of his right to appeal."); *Hernandez v. Mukasey*, 524 F.3d 1014, 1017 (9th Cir. 2008) ("[I]f an individual chooses to retain counsel, his or her due process right includes a right to *competent representation*." (internal quotation marks omitted) (emphasis in original)).

"An alien's right to a full and fair presentation of his claim includes the right to have an attorney who would present a viable legal argument on his behalf supported by relevant evidence, if he could find one willing and able to do so." *Lopez-Chavez*, 757 F.3d at 1041 (internal quotation marks and citation omitted). *Cf. Hernandez-Ortiz v. Garland*, 32 F.4th 794, 803-04 (9th Cir. 2022) (holding that petitioner failed to show prior counsel acted deficiently, explaining that "[t]he Fifth Amendment's due process right did not require petitioner's prior lawyers to follow a 'scorched earth' strategy in which they pursued every possible avenue for relief, regardless of the legal impediments.").

"[I]n assessing an attorney's performance, the proper focus of [the court's] inquiry is whether the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case." *Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009) (rejecting petitioner's contention that he received IAC where attorney conceded petitioner's alienage and did not inform him about the advantages of remaining silent). A noncitizen must also show prejudice by demonstrating the alleged violation affected the outcome of the proceedings. *See id. See also Lopez-Chavez*, 757 F.3d at 1041 (To establish ineffective assistance of counsel in immigration proceedings in violation of the right to due process, a petitioner must show (1) that "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case," and (2) prejudice."). A showing of prejudice can be made if counsel's performance "was so inadequate that it may have affected the outcome of the proceedings." *Iturribarria v. INS*, 321 F.3d 889, 899-90 (9th Cir. 2003) (internal quotation marks omitted); *see also Flores v. Barr*, 930 F.3d 1082, 1087 (9th Cir. 2019) (stating "the petitioner need only demonstrate that counsel's deficient performance 'may have affected the outcome of the proceedings' by showing 'plausible' grounds for relief"). The court has explained that noncitizens "shoulder a heavier burden of proof in establishing ineffective assistance of counsel under the Fifth Amendment than under the Sixth Amendment." *Torres-Chavez*, 567 F.3d at 1100 (internal quotation marks omitted).

Due process claims based on ineffective assistance of counsel must generally comply with the requirements set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1071-72 (9th

Cir. 2003). The noncitizen must: "(1) provide an affidavit describing in detail the agreement with counsel; (2) inform counsel of the allegations and afford counsel an opportunity to respond; and (3) report whether a complaint of ethical or legal violations has been filed, and if not, why." *Id.* at 1072; *see also Tamang v. Holder*, 598 F.3d 1083, 1089 (9th Cir. 2010). "Compliance with *Lozada* ensures that the BIA has an objective basis "for assessing the substantial number of claims of ineffective assistance of counsel that come before [it]." *See Al Ramahi v. Holder*, 725 F.3d 1133, 1139 (9th Cir. 2013) (concluding it was reasonable for BIA to conclude it lacked a basis from which to analyze petitioner's claim that counsel's advice was deficient).

However, "[t]he *Lozada* factors are not rigidly applied, especially where their purpose is fully served by other means." *Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008) (concluding that petitioner substantially complied with *Lozada* requirements, despite failure to confront attorney directly or report misconduct to a disciplinary authority); *see also Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 n.2 (9th Cir. 2015) ("Strict compliance with *Lozada* is not always necessary for equitable tolling."); *Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (observing that the court has "not hesitated to address ineffective assistance of counsel claims even when an alien fails to comply strictly with *Lozada*"). For example, this court has held the BIA abused its discretion by requiring a noncitizen to provide correspondence from the Bar indicating receipt of complaint in order to comply with *Lozada* where the noncitizen provided a copy of the complaint, along with a declaration from the attorney admitting responsibility and absolving his client of any culpability. *See Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-34 (9th Cir. 2013) (holding the noncitizen was prejudiced by his attorney's failure to file an application for cancellation of removal). Noncompliance with *Lozada* will be excused where the "facts are plain on the face of the administrative record." *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000) (internal quotation marks omitted); *see also Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (per curiam) (explaining that because petitioner failed to comply with the procedural requirements of *Lozada*, he was entitled to relief only if "the ineffectiveness of counsel was plain on its face" and determining that the record did not show counsel performed deficiently).

"[D]ue process rights to assistance of counsel do not extend beyond the fairness of the hearing itself." *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008). The "Fifth Amendment simply does not apply to preparation and filing of a petition that does not relate to the fundamental fairness of an ongoing proceeding." *Id.* at 1051. Furthermore, the legal services must be rendered "*while* *proceedings were ongoing*." *Id.* at 1050 (concluding there was no ineffective assistance of counsel, where attorney failed to properly file visa application and the deficiency did not relate to the substance of an ongoing proceeding).

Impinging on a petitioner's "authority to decide whether, and on what terms, to concede his case" by failing to ensure counsel's withdrawal will not prejudice the petitioner can "effectively deprive[] [the petitioner] of the ability to present his case . . . ." *See Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008) (concluding that counsel's performance was deficient where counsel pressured client to accept voluntary departure under threat of counsel's withdrawal two hours before hearing).

"[W]hen ineffective assistance leads to in absentia removal, [the court has] 'followed the BIA's usual practice of not requiring a showing of prejudice.'" *Sanchez Rosales v. Barr*, 980 F.3d 716, 720 (9th Cir. 2020) (quoting *Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003)). In *Sanchez-Rosales*, the court concluded that petitioners were not required to demonstrate that the ineffective assistance provided by a non-attorney notario caused them prejudice. 980 F.3d at 719.

See also Guan v. Barr, 925 F.3d 1022, 1033 (9th Cir. 2019) (ineffective assistance of counsel claim failed where there was no reason to suspect that counsel's failure to object to the admission of the asylum officer's notes may have affected the outcome of the proceedings); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041-42 (9th Cir. 2014) (counsel's concession that a noncitizen's prior drug conviction was an aggravated felony under the INA and the failure to appeal the question to the Court of Appeals constituted deficient performance); *Kwong v. Holder*, 671 F.3d 872, 880-81 (9th Cir. 2011) (counsel's performance was not constitutionally deficient where counsel interrogated petitioner and presented sufficient evidence in support of petitioner's claim for withholding of removal to permit the IJ to make a reasoned decision on the merits of that claim); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835-36 (9th Cir. 2011) (petitioner was prejudiced by counsel's ineffective assistance where counsel admitted to factual allegations without any factual basis for doing so).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Ineffective Assistance of Counsel.

18. Waiver of Appeal

"A waiver of the right to appeal a removal order must be considered and intelligent or it constitutes a deprivation of the right to appeal and thus of the right to a meaningful opportunity for judicial review." *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (internal quotation marks omitted); *see also Chavez-Garcia v. Sessions*, 871 F.3d 991, 996 (9th Cir. 2017) ("an alien may validly waive his right to appeal his removal order as long as his waiver is 'considered' and 'intelligent.'"); *United States v. Hernandez-Arias*, 757 F.3d 874, 879-80 (9th Cir. 2014) (no due process violation prevented defendant's waiver of appeal from being knowing and intelligent); *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1021 (9th Cir. 2013) (waiver of appeal rights was considered and intelligent); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1044-45 (9th Cir. 2012) (government failed to meet its burden of proving petitioner's waiver of his right to appeal was knowing and intelligent where no evidence he was advised of rights in a language he understood); *United States v. Ramos*, 623 F.3d 672, 680-81 (9th Cir. 2010) (petitioner's waiver of his right to appeal was not considered or intelligent and was thus invalid); *Rendon v. Mukasey*, 520 F.3d 967, 972 (9th Cir. 2008) (rejecting due process contention that petitioner's waiver "of his right to challenge the finding of removability based on" a conviction was not "considered and intelligent" where IJ gave detailed instructions on how to file an appeal, and petitioner failed to present arguments concerning his conviction before the BIA where he had ample opportunity to do so); *United States v. Jimenez-Borja*, 378 F.3d 853, 859 (9th Cir. 2004) (where noncitizen consented to deportation and waiver of appeal, the IJ's failure to advise him of available relief resulted in a due process violation; however, there was no prejudice because he was not ultimately eligible for the relief); *Matter of Rodriguez-Diaz*, 22 I. & N. Dec. 1320, 1323, 1324 n.2 (BIA 2000) (in cases involving unrepresented noncitizens, more detailed explanations of appeal rights are often needed).

> "Where 'the record contains an inference that the petitioner is eligible for relief from deportation,' but the IJ fails to 'advise the alien of this possibility and give him the opportunity to develop the issue,' we do not [regard] an alien's waiver of his right to appeal his deportation order [as] 'considered and intelligent.'" *United States v. Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004) (quoting *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001)) (some internal quotation marks omitted).

Garcia v. Lynch, 786 F.3d 789, 792 (9th Cir. 2015) (per curiam). In *Garcia*, "the IJ 'believed, incorrectly, that [Garcia's] conviction . . . constituted a[n] . . . aggravated felony,' and so 'erred when [ ]he told [Garcia] that no relief was available' for that reason." 786 F.3d at 796 (quoting *Pallares-Galan*, 359 F.3d at 1096). Because of the IJ's error, Garcia's "waiver of his right to appeal was not considered and intelligent." *Garcia*, 786 F.3d at 796.

The government must prove a valid waiver by "clear and convincing evidence." *United States v. Gomez*, 757 F.3d 885, 894 (9th Cir. 2014); *see also United States v. Valdivia-Flores*, 876 F.3d 1201, 1205 (9th Cir. 2017), *overruled on other grounds by Alfred v. Garland*, 64 F.4th 1025 (9th Cir. 2023) (en banc). The government "may not simply rely on the signed document purportedly agreeing to the waiver." *Valdivia-Flores*, 876 F.3d at 1205 (citing *Gomez*, 757 F.3d at 895). Additionally, the court should "indulge every reasonable presumption against waiver and should not presume acquiescence in the loss of fundamental rights." *Gomez*, 757 F.3d at 894. The foregoing is especially true where an uncounseled individual purportedly waived his right to appeal. *Id.* "Because [the court] cannot rely on [a] contested waiver document itself, [the court] evaluate[s] the surrounding circumstances to determine whether the government can overcome the presumption against waiver." *Valdivia-Flores*, 876 F.3d at 1205.

In *United States v. Gomez*, the court held that the stipulated removal proceeding violated noncitizen defendant's due process rights because the government's introduction of a signed waiver did not prove by clear and convincing evidence that he waived his right to appeal where he had difficulty reading Spanish, was uncounseled, and the immigration officer did not review the purported waiver with him during their individual meeting. 757 F.3d at 894-96.

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

In *Valdivia-Flores*, the court held that Valdivia-Flores's waiver of his right to seek judicial review of his underlying removal order was not considered or intelligent. 876 F.3d at 1205-06. Although he was issued a notice of intent to issue a final administrative removal order that described the window in which he could respond to the charges or petition for judicial review, the notice did not explicitly inform him that he could "refute, through either an administrative or judicial procedure, the legal conclusion underlying his removability." *Id*. Furthermore, the Notice of Intent was issued without a hearing before an immigration judge, despite Valdivia-Flores's request for a hearing. *Id.* at 1206.

19. Right to File Brief

The BIA's refusal to allow an appellant to file a brief may violate due process. *See Singh v. Ashcroft*, 362 F.3d 1164, 1168-69 (9th Cir. 2004) (BIA violated due process by refusing to accept late brief where noncitizen followed all regulations and procedures but the BIA sent the briefing schedule and transcript to an incorrect address). *Cf. Zetino v. Holder*, 622 F.3d 1007, 1013-14 (9th Cir. 2010) (no due process violation when BIA refused to accept untimely brief where it was petitioner's own fault that the brief was untimely and notice of appeal contained coherent argument); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 822 (9th Cir. 2003) (no due process violation where failure to file a brief was caused by counsel's mistake, as opposed to a deficiency in BIA's procedures).

The court has held that due process was violated when the BIA dismissed a motion before the expiration of the filing deadline based on a noncitizen's failure to file a supporting brief. *See Yeghiazaryan v. Gonzales*, 439 F.3d 994, 998-99 (9th Cir. 2006) (BIA violated due process in dismissing motion prior to expiration of 90-day time limitation on motions to reopen, because supporting documentation need not be submitted concurrently with the motion).

The BIA may violate due process if it summarily dismisses an appeal for failing to file a brief, where the notice of appeal is sufficiently detailed to put the BIA on notice of the issues on appeal. *See Garcia-Cortez v. Ashcroft*, 366 F.3d 749, 753-54 (9th Cir. 2004) (petitioners "provided sufficiently detailed reasons on their Notice of Appeal explaining how and why the IJ erred."); *see also Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1012 (9th Cir. 2021) ("[W]hen an alien gives detailed reasons to support h[er] appeal, either in a separate brief or on the Notice of Appeal itself, summary dismissal under 8 C.F.R. § 1003.1(d)(2)(i)(E) [2021] [(failure to file a brief)] violates the alien's due process rights as guaranteed by the Fifth Amendment.") (citing *Garcia-Cortez*, 366 F.3d at 753)); *Zetino*, 622 F.3d at 1014 (noting that BIA may violate due process where it summarily dismisses an appeal where the notice of appeal is sufficient to put BIA on notice of issues on appeal). *Cf. Singh v. Ashcroft*, 361 F.3d 1152, 1157 (9th Cir. 2004) (summary dismissal appropriate where noncitizen failed to file a brief when he indicated he would on the appeal form and his notice of appeal failed to describe grounds for appeal with requisite specificity).

20. Consideration of Evidence by Agency

The BIA may violate a noncitizen's due process rights on appeal if it fails to consider relevant evidence. *See Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000) (due process claim that BIA failed to review all relevant evidence submitted in suspension of deportation case); *see also Aguilar-Osorio v. Garland*, 991 F.3d 997, 999 (9th Cir. 2021) (per curiam) (rejecting due process claim and stating, "[t]here is nothing in the record to indicate that there was relevant evidence that the BIA failed to consider in making its hardship decision"). However, for a noncitizen to prevail on such a due process claim, the noncitizen must overcome the presumption that the BIA considered the evidence. *Larita-Martinez*, 220 at 1095-96; *see also Vilchez v. Holder*, 682 F.3d 1195, 1200-01 (9th Cir. 2012) (concluding the agency gave adequate consideration to all of the positive and negative equities in the record and noting that the IJ does not have to write an exegesis on every contention); *Fakhry v. Mukasey*, 524 F.3d 1057, 1066 n.12 (9th Cir. 2008) (concluding IJ did not violate due process despite IJ's initial statement that he had not fully reviewed the record, where IJ went off record to review the record and later stated he had reviewed the complete record).

21. Notice of Evidentiary Requirements

The BIA may violate due process by imposing new proof requirements without notice. *See Singh v. INS*, 213 F.3d 1050, 1053-54 (9th Cir. 2000) (due process violation where BIA newly required noncitizen moving to reopen proceedings held in absentia to produce an affidavit from his employer or doctor, and to have contacted the immigration court). *Cf. Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891-92 (9th Cir. 2002) (petitioner had notice of BIA's evidentiary requirements and did not explain lack of evidence or failure to notify immigration court).

22. Intervening Law

Application of intervening law without notice does not violate due process. *See Theagene v. Gonzales*, 411 F.3d 1107, 1112-13 (9th Cir. 2005). *See also Khan v. Holder*, 584 F.3d 773, 778-79 (9th Cir. 2009) (concluding no due process violation in denying petitioner opportunity to present evidence to meet higher standard post-REAL ID Act); *Williams v. Mukasey*, 531 F.3d 1040, 1043 (9th Cir.

2008) (concluding that publication in the Federal Register of regulations implemented while noncitizen was incarcerated provided noncitizen with notice required by due process).

23. Sua Sponte Credibility Determinations

a. Pre-REAL ID Act

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) (pre-REAL ID Act) (superseded by statute) (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) [2003] "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"). *Cf. Lin v. Gonzales*, 472 F.3d 1131, 1136 n.1 (9th Cir. 2007) (BIA did not violate due process by denying asylum application on a ground not previously discussed by IJ, where IJ discussed the asylum requirements and gave petitioner notice that he failed to meet his burden of proof).

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 credibility was at issue. *Pal v. INS*, 204 F.3d 935, 939 (9th Cir. 2000) (pre-REAL ID Act).

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 required a remand for a new hearing. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000) (as amended).

b. Post-REAL ID Act

Although there is a rebuttable presumption of credibility 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*, 141 S. Ct. 1669, 1679 (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*, 141 S. Ct. 1669, 1679-80 (2021) (observing that the court ignored whether the agency's statements could be fairly understood as rejecting [the applicant's] credibility). "If it appears that the BIA considers 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. . . . And, once more, a reviewing court must uphold that decision unless a reasonable adjudicator would have been compelled to reach a different conclusion. *Garland v. Ming Dai*, 141 S. Ct. 1669, 1679 (2021); *Ming Dai v. Garland*, 9 F.4th 1142, 1145 (9th Cir. 2021) ("[W]e conclude that the BIA implicitly considered Dai's statutory rebuttable presumption of credibility on appeal to have been conclusively rebutted by the factual record. There is no other rational way to read its decision" where BIA stated Dai had not been truthful about probative and damaging facts.)

Cross-reference: Relief from Removal, Asylum, Withholding of Removal, and Convention Against Torture, Credibility Determinations.

24. Detention

The Attorney General's statutory authority to detain noncitizens whose administrative review is complete but whose removal is stayed pending the court of appeals' resolution of a petition for review is grounded in 8 U.S.C. § 1226(a). *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1193-94 (9th Cir. 2022) (in habeas petition challenging petitioner's continued immigration detention under 8 U.S.C. § 1226(a), holding that due process does not require the agency to provide a second bond hearing at which the government bears the burden of proof by clear and convincing evidence); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1067-68 (9th Cir. 2008). 8 U.S.C. § 1226(a) does not authorize indefinite detention; where a noncitizen's detention is prolonged by pursuit of judicial review of his administratively final removal order, the detention continues to be authorized by § 1226(a). *See Prieto-Romero*, 534 F.3d at 1068 (rejecting petitioner's challenge to his three-year detention under § 1226(a)). "[D]ue process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 1065 (internal quotation marks omitted). In

Rodriguez v. Marin, the Ninth Circuit court remanded to the district court for it to consider "the minimum requirements of due process to be accorded to [noncitizens who were subject to prolonged detention pursuant to statute] that will ensure a meaningful time and manner of opportunity to be heard . . . ." 909 F.3d 252, 257 (9th Cir. 2018) (order) (on remand from the Supreme Court). While leaving the constitutional question to the district court to address in the first instance, the court noted:

> We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so. Arbitrary civil detention is not a feature of our American government. "[L]iberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, [481 U.S. 739, 755] (1987). Civil detention violates due process outside of "certain special and narrow nonpunitive circumstances." *Zadvydas v. Davis*, [533 U.S. 678, 690] (2001) (internal quotation marks and citation omitted).

Rodriguez, 909 F.3d at 256-57.

25. Duty to Probe All Relevant Facts

"'[A]liens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (quoting *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002)) (internal quotation marks omitted). "An IJ cannot correct his failure to probe more deeply by simply asking the alien whether he has anything to add in support of his claim." *Id.* (explaining that obligation to probe into relevant facts is founded in statutory duty to "administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses" under 8 U.S.C. § 1229a(b)(1)) (internal quotation marks omitted). *See also Zamorano v. Garland*, 2 F.4th 1213, 1226 (9th Cir. 2021) ("[I]f the alien is proceeding pro se, the IJ has an obligation to fully develop the record, meaning the IJ must 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" (internal citation and quotation marks omitted)); *Dent v. Holder*, 627 F.3d 365, 373-74 (9th Cir. 2010) ("When the alien appears pro se, it is the IJ's duty to fully develop the record.

Cf. Olea-Serefina v. Garland, 24 F.4th 856, 866-67 (9th Cir. 2022) (BIA properly rejected petitioner's contentions that the IJ violated her due process rights by failing to develop the record where the IJ adequately explored the possibility of asylum with her and provided her with an application); *Zetino v. Holder*, 622 F.3d 1007, 1014-15 (9th Cir. 2010) (rejecting petitioner's contention that IJ violated due process by failing to develop a factually complete record or advise him of right to counsel, where court concluded IJ did both).

Where the IJ inexplicably delegates his duties to develop the record in an unrepresented noncitizen's case to the government attorney, the IJ creates an unfair conflict of interest on the government and deprives the noncitizen of development of the record, thereby violating due process. *See Pangilinan*, 568 F.3d at 709-10.

26. Reasoned Explanation

"Due process and this court's precedent require a minimum degree of clarity in dispositive reasoning and in the treatment of a properly raised argument." *She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010) (superseded by statute); *see also Hernandez-Galand v. Garland*, 996 F.3d 1030, 1034 (9th Cir. 2021) (stating BIA abuses its discretion when it fails to provide a reasoned explanation for its actions); *Tadevosyan v. Holder*, 743 F.3d 1250, 1258 (9th Cir. 2014) (stating the BIA decision lacked reasoned decisionmaking); *Vilchez v. Holder*, 682 F.3d 1195, 1200-01 (9th Cir. 2012) (rejecting challenge to denial of cancellation of removal, concluding the agency gave adequate consideration to all of the positive and negative equities in the record and noting that the IJ does not have to write an exegesis on every contention); *Antonyan v. Holder*, 642 F.3d 1250, 1256-57 (9th Cir. 2011) (recognizing that BIA must provide reasons for denying relief, but concluding that contrary to petitioner's assertion, BIA adequately addressed CAT claim). In *She*, although the BIA surmised that the IJ made a finding of firm resettlement, the court concluded the IJ did not. 629 F.3d at 963. As such, the court could not "confidently infer the reasoning behind the IJ's conclusion" of firm resettlement and remanded the case to the BIA for clarification. *Id.* at 963-64.

27. Bond Hearing

Due process requires a contemporaneous record of bond hearings. *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011). "[In] lieu of providing a transcript, the immigration court may record [bond] hearings and make the audio recordings available for appeal upon request." *Id.* Although such audio recordings satisfy due process, the court has not decided whether they are the only constitutional adequate alternative to a transcript. *Id.* *See also Rodriguez v. Robbins*, 715 F.3d 1127, 1136 (9th Cir. 2013) (reiterating that due process requires a contemporaneous record of bond hearings, such as a transcript or an audio recording available on request).

In *Jennings v. Rodriguez*, 583 U.S. 281 (2018), petitioner sought a writ of habeas corpus, on behalf of himself and a certified class of noncitizens, challenging prolonged detention pursuant to immigration detention statutes, namely 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c), without individualized bond hearings and determinations to justify continued detention. Avoiding the constitutional question, the Supreme Court "concluded that as a matter of statutory construction, the only exceptions to indefinite detention were those expressly set forth in the statutes or related regulations. *See* 8 U.S.C. § 1182(d)(5)(A) (humanitarian parole); 8 U.S.C. § 1226(a)(2)(A) (bond); 8 U.S.C. § 1226(c)(2) (witness protection); 8 C.F.R. §§ 236.1(d)(1) [2018], 1236.1(d)(1) [2018] (bond hearing)." *Rodriguez v. Marin*, 909 F.3d 252, 255 (9th Cir. 2018) (on remand from the Supreme Court). Ultimately, the constitutional question was remanded to the district court for it to consider and determine "the minimum requirements of due process to be accorded to all claimants that will ensure a meaningful time and manner of opportunity to be heard . . . ." 909 F.3d 252, 257 (9th Cir. 2018).

This court has applied *Jennings v. Rodriguez*, 583 U.S. 281 (2018) and *Prieto-Romero v. Clark*, 69 F.4th 525 (9th Cir. 2023) to hold that a noncitizen who was initially subject to mandatory detention under 8 U.S.C. § 1226(c) is not entitled to a bond hearing under 8 U.S.C. § 1226(a) while awaiting a decision from this court on a petition for review. *Avilez v. Garland*, 69 F.4th 525, 537-38 (9th Cir. 2023) (as amended) (abrogating *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008)).

Due process does not require the agency to consider alternatives to detention, such as conditional parole, before deciding petitioner is a danger to the community and denying release on bond. *Martinez v. Clark*, 36 F.4th 1219, 1231 (9th Cir. 2022), *petition for cert. pending*, No. 23-5673 (docketed Sept. 29, 2023).

28. Notice of Deadline

While IJs can set and enforce filing deadlines pursuant to 8 C.F.R. § 1003.31(h) (2023), previously at 8 C.F.R. § 1003.3(c) (2018), they cannot do so in a manner that deprives noncitizens of due process. *Arizmendi-Medina v. Garland*, 69 F.4th 1043, 1047-48 (9th Cir. 2023) (petitioner's immigration proceedings were fundamentally unfair where (1) the purported deadline was ambiguous; (2) petitioner's counsel offered to submit the application on the day of the apparent deadline while the IJ was still on the bench; and (3) the IJ's denial of a continuance so that recently-retained counsel could submit the application was an abuse of discretion).

Notice of the deadline to file a special motion to reopen to apply for § 212(c) relief was presumptively in compliance with due process where the law was enacted by Congress and a regulation established the procedures for filing motions to reopen. *See Luna v. Holder*, 659 F.3d 753, 759-60 (9th Cir. 2011).

29. Video Conference

"The INA expressly authorizes hearings by video conference, even without an alien's consent." *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012) (citing 8 U.S.C. § 1229a(b)(2)(A)(iii) and 8 C.F.R. § 1003.25(c) [2012]). Although hearings by video conference are authorized, the court has recognized "that in a particular case video conferencing may violate due process or the right to a fair hearing guaranteed by 8 U.S.C. § 1229a(b)(4)(B)." *Vilchez*, 682 F.3d at 1199. However, whether a particular video-conference hearing violates a petitioner's due process rights must be determined on a case-by-case basis. *Id*. In *Vilchez*, the court held there was no due process violation, where petitioner was represented by counsel, testified at length, had three witnesses speak on his behalf, and failed to establish the outcome of the proceeding may have been affected by video conference. *Id*. at 1200.

30. Confessions

"'Expulsion cannot turn upon utterances cudgeled from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.'" *Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013) (as amended) (quoting *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960)). To prevail on a due process claim that a confession was coerced, the petitioner must demonstrate error and substantial prejudice. *Gonzaga-Ortega*, 736 F.3d at 804 (rejecting petitioner's contention that his admission was coerced where he stated his statements were voluntary, he was treated fine, and held for only a brief period).

Immigration officers do not have to advise a petitioner of the prophylactic rules of *Miranda* before questioning about citizenship. *Zuniga De La Cruz v. Garland*, 86 F.4th 1236, 1241 (9th Cir. 2023) (holding that the agency did not err in rejecting petitioner's motion to suppress).

31. Consideration of Guilty Plea

"As a general rule, a voluntary guilty plea to criminal charges is probative evidence that the petitioner did, in fact, engage in the charged activity, even if the conviction is later overturned for a reason unrelated to voluntariness." *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014). "[T]here may be instances in which an overturned conviction may require the BIA to give little or no weight to a guilty plea." *Id.* In *Chavez-Reyes*, the petitioner alleged the BIA violated his due process rights by considering his guilty plea because the conviction was overturned on appeal. However, because petitioner's conviction was overturned on a reason unrelated to the voluntariness of his guilty plea, the court concluded that his due process rights were not violated. *Id.*

32. Competence During Proceedings

> The Immigration and Nationality Act ("INA") requires that, "[i]f it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien," 8 U.S.C. § 1229a(b)(3) (INA § 240(b)(3)).

Calderon-Rodriguez v. Sessions, 878 F.3d 1179, 1182 (9th Cir. 2018). In *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011), the BIA drew on the general due process principles for assuring competence in criminal proceedings. *See Calderon-Rodriguez*, 878 F.3d at 1182. The BIA explained in *Matter of M-A-M-*:

> [T]he test for determining whether an alien is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.

Matter of M-A-M-, 25 I. & N. Dec. at 479. "Under *Matter of M-A-M-*, if there are indicia of incompetence—which may 'include a wide variety of observations and evidence,' ranging from 'medical reports or assessments from past medical treatment' to 'school records' and 'testimony from friends,' *id.* at 479-80—'the Immigration Judge must make further inquiry to determine whether the alien is competent for purposes of immigration proceedings,' *id.* at 484." *Calderon-Rodriguez*, 878 F.3d at 1182. *See also Mejia v. Sessions*, 868 F.3d 1118, 1121-22 (9th Cir. 2017) (holding that the indicia of incompetence required the IJ "to explain whether Petitioner was competent and whether procedural safeguards were needed").

"The standard for mental incompetency as set by the BIA in *Matter of M-A-M-*, and endorsed by our court in *Calderon-Rodriguez* and *Mejia*, is a stringent one." *Salgado v. Sessions*, 889 F.3d 982, 989 (9th Cir. 2018). "[A]lleged poor memory without some credible evidence of an inability to comprehend or meaningfully participate in the proceedings does not constitute indicia of incompetency." *Salgado*, 889 F.3d at 989 (concluding petitioner failed to show indicia of incompetency where there was no evidence that he did not comprehend the nature and object of the proceedings, nor evidence that he was unable to meaningfully assist his counsel's defense efforts).

In *Calderon-Rodriguez*, 878 F.3d 1179 (9th Cir. 2018), the court held that substantial evidence did not support the BIA's determination that petitioner was competent to participate in removal proceedings.

In *Mejia*, 868 F.3d at 1121-22, the court held the BIA abused its discretion by failing to explain why it allowed the IJ to disregard rigorous procedural requirements set forth by the BIA in *M-A-M-*, which explains that if an applicant shows an indicia of incompetency, the IJ has an independent duty to determine whether the applicant is competent.

When an IJ makes a mental incompetency finding, the IJ must provide adequate "'safeguards to protect [the noncitizen's] rights and privileges' during the proceedings, such that he could 'have a reasonable opportunity to examine the evidence and to present evidence on [his] own behalf.'" *Benedicto v. Garland*, 12 F.4th 1049, 1058 (9th Cir. 2021) (quoting 8 U.S.C. § 1229a(b)(3)). "'[T]he ultimate determination of which safeguards to implement and whether they are adequate to ensure the fairness of proceedings is discretionary.'" *Benedicto*, 12 F.4th at 1058 (quoting *Matter of M-J-K-*, 26 I. & N. Dec. 773, 776 (BIA 2016)). In *Benedicto*, the court held that on the record in the case, "the IJ's safeguards sufficed to provide Benedicto with due process . . . ." 12 F.4th at 1058.

Agency regulations preclude an IJ from accepting an admission of removability from a pro se noncitizen who is incompetent. *Cuenca v. Barr*, 956 F.3d 1079, 1083 n.2 (9th Cir. 2020) (amended) (citing 8 C.F.R. § 1240.10(c) [2019]).

33. Deliberate Indifference

A petitioner can succeed on a due process claim by showing that the INS was 'deliberately indifferent to whether his application was processed,' . . . and that he or she suffered prejudice, 'which means that the outcome of the proceeding *may have been affected* by the alleged violation[.]'" *Dent v. Sessions*, 900 F.3d 1075, 1083 (9th Cir. 2018) (internal citations omitted).

> Under *Brown v. Lynch*, 831 F.3d 1146 (9th Cir. 2016) ("*Brown II*"), to establish deliberate indifference in the immigration context, a petitioner must present:
>
> > (1) a showing of an objectively substantial risk of harm; and (2) a showing that the officials were subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and (a) the official actually drew that inference or (b) that a reasonable official would have been compelled to draw that inference.
>
> *Id.* at 1150 (internal quotation marks omitted). Even gross negligence does not amount to deliberate indifference. *Brown [v. Holder*, 763 F.3d 1141, 1150 n.5 (9th Cir. 2014)]. Nor does an agency's failure to comply with its own regulations amount to deliberate indifference. *Id.* at 1148.

Dent, 900 F.3d at 1083 (concluding INS was not deliberately indifferent to processing citizenship applications). Note that the court in *Dent*, recognized that although *Brown II* provides a subjective standard for evaluating deliberate indifference claims in the immigration context, an objective standard was used to evaluate a deliberate indifference claim in the prison context in *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc). The court in *Dent*, did not decide whether the *Brown II* standard should be revised after *Castro* because the claims failed under either standard.

34. Retroactivity

"[L]egislation does not apply retroactively absent a clear indication that Congress intended to make the statute retroactive." *Reyes Afanador v. Garland*, 11 F.4th 985, 990 (9th Cir. 2021); *see Koonwaiyou v. Blinken*, 69 F.4th 1004, 1012 (9th Cir. 2023) (holding that the 1986 amendments to 8 U.S.C. § 1408 apply retroactively where the plain text makes clear that Congress intended to bestow the same status on those born before, on, or after the date of enactment: "national[], but not citizen, of the United States at birth.").

"The presumption against retroactive legislation . . . 'embodies a legal doctrine centuries older than our Republic.' . . . Several provisions of the Constitution . . . embrace the doctrine, among them, the *Ex Post Facto* Clause, the Contract Clause, and the Fifth Amendment's Due Process Clause." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66 (1994)). "[D]ue process 'protects the interests in fair notice and repose that may be compromised by retroactive legislation.'" *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1052 (9th Cir. 2004) (Pregerson, J., concurring) (quoting *Landgraf*, 511 U.S. at 266).

> Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect. . . . A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

I.N.S. v. St. Cyr, 533 U.S. 289, 316 (2001) (internal citations and quotation marks omitted) (holding that IIRIRA § 304(b) was impermissibly retroactive as applied to noncitizens who pleaded guilty to deportable offenses before its effective date).

The Supreme Court has set forth a two-step process to determine whether a civil statute may apply retroactively.

> First, when a statute is enacted after the events at issue in a suit, the court must determine whether Congress expressly provided that the statute should apply retroactively. *Landgraf*, 511 U.S. at 280, 114 S. Ct. 1483. If the answer is yes, then the inquiry is complete and the

> statute applies retroactively. *Id.* If the answer is no, then the court must proceed to the second step and determine whether the statute would have a retroactive effect. *Id.* If the statute would operate retroactively, then the court must apply the traditional presumption against retroactivity and prohibit retroactive application of the statute. *Id.*

Cardenas-Delgado v. Holder, 720 F.3d 1111, 1115 (9th Cir. 2013). "[S]omeone seeking to show that a civil statute is impermissibly retroactive is not required to prove any type of reliance . . . ." *Id.* at 1119 (explaining that after *Vartelas*, it is clear that reliance on prior law is not a necessary predicate for proving retroactivity). "[T]he essential inquiry is whether the new statute attaches new legal consequences to events completed before the enactment of the statute." *Id.*

See, *e.g.*, *Reyes Afanador v. Garland*, 11 F.4th 985, 990 (9th Cir. 2021) (discussing underlying principles of retroactivity and holding that the BIA impermissibly gave retroactive effect to its adjudicatory rule that indecent exposure was a crime involving moral turpitude); *Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018) (holding that statute at issue did not attach new legal consequences to events completed before its enactment, and thus contention that statute was impermissibly retroactive failed); *Cardenas-Delgado*, 720 F.3d at 1119 (holding that repeal of § 212(c) relief impermissibly attached new legal consequences to the trial convictions of noncitizens like Cardenas-Delgado, and thus could not be applied retroactively); *Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011) (concluding the post-IIRIRA reinstatement provision is impermissibly retroactive); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 939 (9th Cir. 2005) (holding that application of the continuous presence requirement of 8 U.S.C. § 1229b(d)(2) did not violate due process through an impermissible retroactive effect).

"Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims." *Garcia-Ramirez*, 423 F.3d at 938.

a. Retroactivity of Board Decisions

"When an agency decides to create a new rule through adjudicatory action, that new rule may apply retroactively to regulated entities." *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1276 (9th Cir. 2018). "[T]he agency may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted. . . . [A]lthough the agency [is] free to change or modify its position, the agency's interest in doing so must be 'balanc[ed] [against] a regulated party's interest in being able to rely on the terms of a rule as it is written.'" *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2012) (en banc) (citation omitted). To balance these interests, the court applies the five-factor test set forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982). The factors are:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Garfias-Rodriguez, 702 F.3d at 518 (holding that where the court overturns its own precedent following a contrary statutory interpretation by an agency, the test applies to determine whether the agency's statutory interpretation applies retroactively). *See also Reyes Afanador*, 11 F.4th at 992-26 (discussing underlying principles of retroactivity and holding that the BIA impermissibly gave retroactive effect to its adjudicatory rule that indecent exposure was a crime involving moral turpitude); *Olivas-Motta*, 910 F.3d at 1276 (stating the test has been applied in the immigration context to determine whether Board decisions may apply retroactively); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1295 (9th Cir. 2018) (balancing factors and holding that BIA's new CIMT rule should not apply retroactively).

Before *Montgomery Ward* is implicated, there must have been a change in law. *See Olivas-Motta*, 910 F.3d at 1277-78 (concluding *Montgomery Ward* did not apply because there was no change of law, where prior to petitioner's plea, the BIA had never previously determined in a precedential opinion whether felony endangerment in Arizona was a crime of moral turpitude, and thus, the subsequent precedential opinion could not have attached a new disability to his guilty plea; rather, 8 U.S.C. § 1227(a)(2)(A)(ii) had already created the legal consequences of his plea, and it was merely unclear whether it would apply).

35. Procedural Delays

"[P]rocedural delays, such as routine processing delays, do not deprive aliens of a substantive liberty or property interest unless the aliens have a 'legitimate claim of entitlement' to have their applications adjudicated within a specified time." *Mendez-Garcia v. Lynch*, 840 F.3d 655, 666 (9th Cir. 2016) (noncitizens lacked any legitimate claim of entitlement to having their applications adjudicated before their sons turned 21, and thus denial of their applications due to lack of a qualifying relative at the time of the IJ's final decision did not deprive them of a substantive right). Additionally, the agency's delay in adjudicating the applications did not violate petitioners' procedural due process rights. *Id.* at 667.

However, where the adjudication of a non-citizen's visa application implicates the constitutional rights of a U.S. citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest. *Muñoz v. U.S. Department of State*, 50 F.4th 906, 921-22 (9th Cir. 2022), *cert. granted*, 2024 WL 133818 (U.S. Jan. 12, 2024) (No. 23-334) (mandate not issued as of Feb. 28, 2024) (concluding that the government's nearly three-year delay in providing the reason for the visa denial did not meet the requirements of due process, thus precluding the application of the doctrine of consular nonreviewability).

36. Notice and Opportunity to be Heard

"Notice and an opportunity to be heard are fundamental elements of due process that have been long established in our law." *Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021). In *Flores-Rodriguez*, the court held that the immigration judge denied the noncitizen due process by failing to give him notice that his alleged false claim of citizenship would be at issue in the final hearing. *Id.* The court explained:

> The IJ's failure to put Flores-Rodriguez on notice of this central issue in his case denied him "a full and fair hearing" by preventing him from submitting significant testimony and other evidence. . . . Because the IJ's conduct potentially affected the outcome of the proceedings, Flores-Rodriguez has also suffered prejudice. . . . For these reasons, a due process violation warranting reversal has occurred.

Id. at 1114 (quoting *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000)).

F. Due Process Challenges to Certain Procedures and Statutory Provisions

1. Summary Affirmance

The BIA's summary affirmance procedure does not violate due process. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848 (9th Cir. 2003) (cancellation of removal); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078-79 (9th Cir. 2004) (same in asylum context); *see also Tijani v. Holder*, 628 F.3d 1071, 1074 n.1 (9th Cir. 2010) ("This court has held that streamlining does not violate an alien's due process rights."); *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1323 (9th Cir. 2006) (rejecting challenge to BIA's streamlining procedure because streamlining does not violate due process under *Falcon Carriche*, and petitioner failed to show that court could not adequately determine BIA's reasons for denying relief, or that BIA abused its own regulations in streamlining); *Jiang v. Gonzales*, 425 F.3d 649, 654 (9th Cir. 2005) (rejecting petitioner's argument that summary affirmance procedures violated his right to an administrative appeal and concluding that the contention was foreclosed by *Falcon Carriche*); *Kumar v. Gonzales*, 439 F.3d 520, 523-24 (9th Cir. 2006) (although BIA violated regulation governing summary affirmance procedures by including a footnote, the addition of the footnote did not prejudice petitioners or affect the outcome of proceedings).

Note that the BIA errs by summarily affirming the IJ's decision where the petitioner challenges procedural irregularities of the proceedings before the IJ. *See Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007). Furthermore, the BIA abuses its discretion when it reduces the voluntary departure period in a streamlined opinion. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980-81 (9th Cir. 2006). Additionally, where the IJ denies relief on alternative reviewable and unreviewable grounds and the BIA issues a streamlined opinion, the court may remand to the BIA. *See Lanza v. Ashcroft*, 389 F.3d 917, 932 (9th Cir. 2004) (remanding where IJ denied relief on alternative grounds and the court was unable to determine whether BIA's streamlined opinion was based on a reviewable or unreviewable ground).

Cross-reference: Streamlined Cases.

2. Summary Dismissal

Whether the BIA's summary dismissal of an appeal violated a petitioner's due process rights is a question of law that is reviewed de novo. *Nolasco-Amaya v.*

Garland, 14 F.4th 1007, 1012 (9th Cir. 2021). In *Nolasco-Amaya*, the court held that the BIA violated pro se petitioner's right to due process by summarily dismissing her appeal where petitioner's Notice of Appeal was sufficiently specific to inform the BIA of the issues she was challenging. *Id.* at 1014-15.

3. Cross-Appeals

In reviewing a BIA's decision not to consider petitioner's challenges to a portion of the immigration's decision because petitioner had failed to file a cross-appeal, this court has noted that the BIA has authority to proscribe its own rules of procedure as long as it acts within the broad limits imposed by the Due Process Clause, and has held that the BIA does not have a duty to sua sponte consider waiving the cross-appeal rule. *Lopez v. Garland*, 60 F.4th 1208, 1212-13 (9th Cir. 2023).

4. Reinstated Removal Proceedings

In *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495-96 (9th Cir. 2007) (en banc), the court held that the reinstatement procedures in 8 C.F.R. § 241.8 (2007) constitute a valid interpretation of the INA and do not offend due process. *See also Martinez-Merino v. Mukasey*, 525 F.3d 801, 803-05 (9th Cir. 2008) (discussing *Morales-Izquierdo*).

"Reinstatement of a prior removal order – regardless of the process afforded in the underlying order – does not offend due process because reinstatement of a prior order does not change the alien's rights or remedies." *Morales-Izquierdo*, 486 F.3d at 497; *see also Tomczyk v. Garland*, 25 F.4th 638, 648 (9th Cir. 2022) (concluding reinstatement of prior removal order did not violate due process even though reinstatement would deny noncitizen the ability to stay in the United States with his United States citizen wife and stating the "lawful denial of immigration relief does not violate any of a noncitizen's or a noncitizen's family's substantive rights protected by the Due Process Clause."); *Vega-Anguiano v. Barr*, 982 F.3d 542, 550 (9th Cir. 2020) (as amended) (discussing *Morales-Izquierdo*).

The court, however, has upheld challenges to a reinstated removal order based on a "gross miscarriage of justice. " In *Vega-Anguiano*, the court explained that although *Morales-Izquierdo* addressed "due process" and overruled prior case law which held a removal order that did not comport with due process could not be reinstated, *Morales-Izquierdo* said nothing about collaterally attacking a final order of removal based on a "gross miscarriage of justice." *Vega-Anguiano*, 982 F.3d at

550. As such, the court held that Vega-Anguiano had shown a gross miscarriage of justice where the removal order lacked a valid legal basis at the time of his removal, and thus could not be reinstated. *Id.* at 550-51 (distinguishing between a collateral attack of a final order of removal based on a gross miscarriage of justice, and a collateral attack based on an alleged due process violation); *see also Cuenca v. Barr*, 956 F.3d 1079, 1087 (9th Cir. 2020) (as amended) (noting that collateral attack on an underlying order during reinstatement proceedings may be available if the petitioner can show that he suffered a gross miscarriage of justice in the initial proceeding).

A gross miscarriage of justice, however, is not a ground for reopening reinstated removal proceedings. *See Bravo-Bravo v. Garland*, 54 F.4th 634, 636 (9th Cir. 2022) (the departure bar at 8 U.S.C. § 1231(a)(5) is not subject to an exception for removal orders that result in a gross miscarriage of justice, and the agency lacks authority to reopen such reinstated removal orders sua sponte); *Perez-Camacho v. Garland*, 54 F.4th 597, 605 (9th Cir. 2022) (as amended) (no exception to the MTR filing limitations for arguing a gross miscarriage of justice).

"[T]he post IIRIRA reinstatement provision is impermissibly retroactive . . . when applied to [a noncitizen] who applied for immigration relief prior to IIRIRA's effective date." *See Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011) (concluding the post-IIRIRA reinstatement provision is impermissibly retroactive).

In *Villa-Anguiano v. Holder*, 727 F.3d 873 (9th Cir. 2013) the court held that ICE improperly reinstated a removal order after the district court found the underlying removal proceedings violated noncitizen's due process rights. The court concluded that when:

> a district court finds constitutional infirmities in the prior removal proceedings that invalidate the prior removal for purposes of criminal prosecution, the agency cannot simply rely on a pre-prosecution determination to reinstate the prior removal order. Instead the agency must—as it may well ordinarily do—(1) provide the alien with an opportunity *after* the criminal prosecution is dismissed to make a written or oral statement addressing the expedited reinstatement determination in light of the facts found and the legal conclusions reached in the course of the criminal case; and (2) independently reassess whether to rely on the order

> issued in the prior proceedings as the basis for deportation or instead to instigate full removal proceedings.

Id. at 880.

"Aliens subject to reinstated orders of removal are placed in reasonable fear screening proceedings, if they express fear of persecution or torture in their country of removal." *Bartolome v. Sessions*, 904 F.3d 803, 807 (9th Cir. 2018).

> These reasonable fear proceedings, as outlined in 8 C.F.R. §§ 208.31 [2018], 1208.31 [2018], are intended to provide a fair determination of whether an alien has a reasonable fear of persecution or torture, which fear would require the alien to be referred to an IJ to review eligibility for withholding of removal or relief under the Convention Against Torture ("CAT"). However, these reasonable fear proceedings are to be streamlined, not intended to have full evidentiary hearings, because the alien continues to be subject to the expedited removal process used for previously removed aliens with reinstated orders of removal. Thus, an IJ's failure specifically to address all of the evidence and claims before him or her (during the reasonable fear review proceedings) does not violate the alien's due process rights.

Bartolome, 904 F.3d at 807. "Although previously removed aliens in the United States are entitled to due process protections, they are not entitled to all of the same protections granted to aliens not previously removed." *Id.* at 812 (concluding that Bartolome's due process allegations lacked merit).

"Due process does not mandate the right to present new evidence to an appellate tribunal when a litigant has been afforded a reasonable opportunity to present evidence to the first-instance decision-maker." *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1195 (9th Cir. 2021) (concluding that reasonable fear proceedings did not violate due process, notwithstanding that the proceedings did not afford noncitizen the right to present new evidence during review hearing before immigration judge). *See also Orozco-Lopez v. Garland*, 11 F.4th 764, 779 (9th Cir. 2021) (rejecting petitioner's due process claim "because the purpose of the hearing is to conduct a de novo review of the record prepared by the asylum officer, and the IJ may (but need not) accept additional evidence.") (citation and internal quotation marks omitted).

5. IIRIRA

The application of IIRIRA to place noncitizens in removal rather than deportation proceedings does not by itself amount to a due process violation. *See Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1008-09 (9th Cir. 2003); *see also Lopez-Urenda v. Ashcroft*, 345 F.3d 788, 796 (9th Cir. 2003) (rejecting claim that "placement in removal proceedings is so fundamentally unfair as to amount to a denial of due process"); *Ramirez-Zavala v. Ashcroft*, 336 F.3d 872, 874-75 (9th Cir. 2003) (noncitizen who tried to file for suspension of deportation was not eligible for such relief because her removal proceedings commenced with the filing of a Notice to Appear); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 600 (9th Cir. 2002) (same). *Cf. Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 935-44 (9th Cir. 2007) (concluding that IIRIRA's repeal of suspension of deportation under former 8 U.S.C. § 1254(a)(2) was impermissibly retroactive as applied to the noncitizen, who had the right to seek suspension of deportation when she applied for naturalization 18 months prior to IIRIRA's effective date), *implied overruling recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013) (explaining that after *Vartelas v. Holder*, 566 U.S. 257 (2012), "it is clear that someone seeking to show that a civil statute is impermissibly retroactive is not required to prove any type of reliance and the essential inquiry is whether the new statute attaches new legal consequences to events completed before the enactment of the statute.").

In *Vartelas v. Holder*, 566 U.S. 257 (2012), the Supreme Court held that it was impermissible to retroactively apply an IIRIRA provision to a lawful permanent resident whose conviction was obtained prior to enactment of IIRIRA. The Court made clear 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) (explaining *Vartelas* and how Ninth circuit cases had previously held otherwise). *Cf. Peng v. Holder*, 673 F.3d 1248, 1256 (9th Cir. 2012) (decided before *Vartelas* and holding that applying IIRIRA § 304(b) retroactively may result in impermissible retroactive effect, where the noncitizen demonstrates reasonable reliance on pre-IIRIRA law).

The retroactive application of the stop-time rule in § 309(c)(5)(A) of IIRIRA does not violate due process. *See Ram v. INS*, 243 F.3d 510, 516-19 (9th Cir. 2001).

Additionally, the ten-year continuous physical presence requirement for cancellation of removal eligibility in 8 U.S.C. § 1229b(b)(1)(A) and the stop-time rule of § 1229b(d)(1) do not violate substantive due process. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978-79 (9th Cir. 2006).

IIRIRA's limitations on habeas review were found to be constitutional as applied in *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020). In that case, Thuraissigiam contended that "IIRIRA violate[ed] his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding." The Supreme Court rejected that argument holding that where Thuraissigiam entered the country illegally, he did not have a federal constitutional procedural right to judicial review of an allegedly flawed credible fear determination in expedited removal proceedings. *Id.* at 1981-84. The Court explained that because he had entered the country illegally, he was to be treated as an "applicant for admission" and had only those rights regarding admission that Congress provided by statute. "In [Thuraissigiam's] case, Congress provided the right to a 'determin[ation]' whether he had 'a significant possibility' of 'establish[ing] eligibility for asylum,' and he was given that right. … Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made." *Id*. at 1983 (quoting §§ 1225(b)(1)(B)(ii), (v)). The Court held, in short, that "neither the Suspension Clause nor the Due Process Clause of the Fifth Amendment require[d] any further review of [Thuraissigiam's] claims, and IIRIRA's limitations on habeas review [were] constitutional as applied." *Thuraissigiam*, 140 S. Ct. at 1964.

See also Mendoza-Linares v. Garland, 51 F.4th 1146, 1168 (9th Cir. 2022), *petition for cert. pending*, No 23-606 (docketed Dec. 6, 2023) (mandate not issued as of Feb. 10, 2024) (explaining that *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) expressly rejected the theory that a complete denial of judicial review in expedited removal cases effects an unconstitutional suspension of the writ of habeas corpus); *Rauda v. Jennings*, 55 F.4th 773, 779-80 (9th Cir. 2022) (as amended) (applying *Thuraissigiam* to reject petitioner's contention that the Suspension Clause preserves judicial review of a challenge to the government's execution of his removal order).

6. Adjustment of Status

The lawful denial of adjustment of status does not violate a noncitizen's or the noncitizen's family's substantive rights protected by the Due Process Clause." *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1091 (9th Cir. 2010), *overruled in part on other grounds by Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (en banc). *See also Tomczyk v. Garland*, 25 F.4th 638, 648 (9th Cir. 2022) (stating "lawful denial of immigration relief does not violate any of a noncitizen's or a noncitizen's family's 'substantive rights protected by the Due Process Clause.'"). *Cf. Muñoz v. U.S. Department of State*, 50 F.4th 906, 921-22 (9th Cir. 2022), *cert. granted*, 2024 WL 133818 (U.S. Jan. 12, 2024) (mandate not issued as of Feb. 28, 2024) (where the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest).

In *Ruiz-Diaz v. United States*, 703 F.3d 483 (9th Cir. 2012), a class of noncitizen religious workers, as beneficiaries of five-year special immigrant religious worker visas, challenged 8 C.F.R. § 245.2(a)(2)(i)(B) (2012),the regulation governing the process for religious workers to apply for adjustment of status. The court explained that plaintiffs could not claim "that their due process rights [were] violated unless they ha[d] some 'legitimate claim of entitlement' to have the petitions approved before their visas expire." *Id*. at 487. The court rejected the due process claim, explaining that even if the regulation "ma[de] it more difficult for plaintiffs to obtain adjustment of status, it d[id] not violate due process as there is no legitimate statutory or constitutional claim of entitlement to concurrent filings." *Id.* at 487-88.

7. Void-for-Vagueness Challenges

"The void-for-vagueness doctrine stems from the Fifth Amendment's guarantee of due process." *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1281 (9th Cir. 2018) (rejecting argument that 8 U.S.C. § 1227(a)(2)(A)(ii) is unconstitutionally vague), *cert. denied*, 140 S. Ct. 1105 (2020). "The Fifth Amendment provides that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.' [Supreme Court] cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). "Because 'deportation is "'a particularly severe penalty,'" which may be of greater concern to a convicted alien than "'any potential jail sentence,'" ' a provision of immigration law making an alien deportable is subject to the void-for-vagueness doctrine." *Olivas-Motta*, 910 F.3d at 1281 (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018)).

a. Particularly Serious Crime, 8 U.S.C. § 1231(b)(3)(B)(ii)

In *Guerrero v. Whitaker*, 908 F.3d 541, 542 (9th Cir. 2018), the court addressed the argument that the statutory phrase "particularly serious crime" in 8 U.S.C. § 1231(b)(3)(B)(ii), is unconstitutionally vague on its face following the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Applying the reasoning of *Johnson* and *Dimaya*, the court held that the "particularly serious crime" provision is not unconstitutionally vague on its face. *Guerrero*, 908 F.3d at 543-45 (explaining that the incorrect legal standard had been applied previously to the same question in *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013), and therefore addressing the question with "fresh" eyes).

b. Crime of Violence, 18 U.S.C. § 16(b)

"The Fifth Amendment's Due Process Clause 'requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Dimaya v. Lynch*, 803 F.3d 1110, 1112-13 (9th Cir. 2015) (citations omitted), *affirmed by*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). In *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015), the Supreme Court noted the need for "efficiency, fairness, and predictability in the administration of immigration law." In *Dimaya*, this court explained that "[v]ague immigration statutes significantly undermine these interests by impairing non-citizens' ability to anticipate the immigration consequences of guilty pleas in criminal court." *Dimaya*, 803 F.3d at 1114 (internal quotation marks and citation omitted).

In *Dimaya*, the Ninth Circuit "concluded that 8 U.S.C. § 1101(a)(43)(F)'s definition of 'crime of violence' was void for vagueness as it related to 18 U.S.C. § 16(b)." *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016); *see also Dimaya*, 803 F.3d at 1120. Affirming the Ninth Circuit decision that § 16(b) as incorporated into the INA is unconstitutional, the Supreme Court held "§ 16(b) 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015)).

Because "§ 16(b) is unconstitutionally vague [it] cannot be the basis for an aggravated felony" that would make someone removable. *Dent v. Sessions*, 900

F.3d 1075, 1085 (9th Cir. 2018) (granting petition for review where's petitioner's Arizona conviction for third-degree escape was not a crime of violence, and thus not an aggravated felony that would make him removable).

The Ninth Circuit's decision in *Dimaya*, did not cast doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of crime of violence. *See Arellano Hernandez*, 831 F.3d at 1131-32.

c. Habitual Drunkard, 8 U.S.C. § 1101(f)(1)

"A statute is unconstitutionally vague if it is so standardless that it authorizes or encourages seriously discriminatory enforcement or if it fails to provide a person of ordinary intelligence fair notice of what is prohibited." *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1047 (9th Cir. 2017) (en banc) (internal quotation marks and citation omitted). In *Ledezma-Cosino*, the court determined that the "habitual drunkard" provision in 8 U.S.C. § 1101(f)(1) is not unconstitutionally vague. *Id*. *See also Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1184 (9th Cir. 2018) (holding that equal protection argument which rested on a case prior to the en banc *Ledezma-Cosino* decision failed).

d. Crime Involving Moral Turpitude

The phrase "crime involving moral turpitude" is not unconstitutionally vague. *Jordan v. De George*, 341 U.S. 223, 231-32 (1951); *see also Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1250 (9th Cir. 2019) (rejecting challenge to 8 U.S.C. § 1227(a)(2)(A)(i)), *cert. denied sub nom. Islas-Veloz v. Barr*, 140 S. Ct. 2704 (2020). As explained in *Islas-Veloz*, the Supreme Court's decisions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) and *Johnson v. United States*, 576 U.S. 591 (2015), "did not reopen the inquiry into the constitutionality of the phrase." *Islas-Veloz*, 914 F.3d at 1250. Rather, the court has "repeatedly echoed the holding that the Supreme Court laid down in *De George*" and no subsequent cases have changed the constitutionality of that phrase. *Islas-Veloz*, 914 F.3d at 1250; *see also Diaz-Flores v. Garland*, 993 F.3d 766, 774 (9th Cir. 2021) (stating that even if the panel agreed with petitioner that the phrase "crime involving moral turpitude" is unconstitutionally vague, precedent binds the court from holding so); *Martinez-De Ryan v. Whitaker*, 909 F.3d 247, 251-52 (9th Cir. 2018) (rejecting challenge to 8 U.S.C. § 1182(a)(2)(A)(i)(I), and holding that the phrase is not unconstitutionally vague); *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1281 (9th Cir. 2018) (rejecting argument that 8 U.S.C. § 1227(a)(2)(A)(ii) is unconstitutionally vague), *cert. denied*, 140 S. Ct. 1105 (2020); *Tseung Chu v. Cornell*, 247 F.2d 929, 938-39 (9th

Cir. 1957) (citing *De George* in ruling that the phrase "crime involving moral turpitude" was constitutional in the immigration context).

But see Jauregui-Cardenas v. Barr, 946 F.3d 1116, 1121 (9th Cir. 2020) (Berzon, J., concurring) (reiterating her view that the phrase "crime involving moral turpitude" is unconstitutionally vague) (citing *Barbosa v. Barr*, 926 F.3d 1053, 1060-61 (9th Cir. 2019) (Berzon, J., concurring); *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1258-61 (9th Cir. 2019) (Fletcher, J., concurring)).

e. Alien Smuggling, 8 U.S.C. § 1182(a)(6)(E)(i)

In *Marquez-Reyes v. Garland*, this court determined that 8 U.S.C. § 1182(a)(6)(E)(i), the statute that makes a noncitizen removable or ineligible for certain relief due to alien smuggling, is not unconstitutionally vague on its face where petitioner admitted that his actions were covered by the statute, 36 F.4th 1195, 1207 (9th Cir. 2022) (citing *Kashem v. Barr*, 941 F.3d 358, 377 (9th Cir. 2019) as suggesting that a party whose conduct is clearly covered by a statute might be able to bring a facial vagueness challenge in "exceptional circumstances," such as when a statute is "plagued by such indeterminacy that [it] might be vague even as applied to the challengers.").

12. Statutory Cap on Grants of Cancellation of Removal, 8 U.S.C. § 1229b(e)

The court held in *Mendez-Garcia v. Lynch*, that petitioner's due process right to a "fundamentally fair proceeding" was not violated by the application of the statutory cap on grants of applications for cancellation of removal pursuant to 8 U.S.C. § 1229b(e). 840 F.3d 655, 669 (9th Cir. 2016) (holding although the statutory cap may have deprived Mendez-Garcia of the ability to receive cancellation of removal relief, the right to receive that relief unrestricted by the cap was "a right he never had", and thus, the due process challenge failed).

II. MISCELLANEOUS CONSTITUTIONAL ISSUES

A. Equal Protection Generally

Noncitizens are entitled to the benefits of the Equal Protection Clause. *Halaim v. INS*, 358 F.3d 1128, 1135 (9th Cir. 2004) (Lautenberg Amendment, which lowered the burden of proof for some categories of refugees, did not violate equal protection). "[B]ecause federal authority in the areas of immigration and naturalization is plenary, federal classifications distinguishing among groups of aliens . . . are valid unless wholly irrational." *Halaim*, 358 F.3d at 1135 (internal quotation marks omitted); *see also Lawrence v. Holder*, 717 F.3d 1036, 1041 n.9 (9th Cir. 2013) (addressing a "half-hearted" equal protection argument, the court note that Congress can "draw lines that specify effective dates when it enacts or amends relief statutes."); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1163-64 (9th Cir. 2002) (filing deadline for NACARA relief did not violate equal protection); *Perez-Oropeza v. INS*, 56 F.3d 43, 45-46 (9th Cir. 1995) (limited eligibility for family unity waiver did not violate equal protection).

"The Constitution's guarantee of equal protection forbids governmental decisionmakers from treating differently persons who are in all *relevant* respects alike." *Roy v. Barr*, 960 F.3d 1175, 1183 (9th Cir. 2020) (internal quotation marks and citation omitted), *cert. denied sub nom. Roy v. Wilkinson*, 141 S. Ct. 1517 (2021). An "equal protection claim turns upon [the petitioner's] ability to demonstrate that the treatment . . . differed from that of similarly situated persons." *Cruz Rendon v. Holder*, 603 F.3d 1104, 1110 n.2 (9th Cir. 2010); *see also Lopez v. Sessions*, 901 F.3d 1071, 1078 (9th Cir. 2018) (rejecting equal protection claim where petitioner was convicted after the effective date of AEDPA and was therefore not similarly situated to lawful permanent residents who could have relied on the availability of 212(c) relief because their pleas were entered prior to the effective date). To establish an equal protection violation, the petitioner bears "the burden to negate every conceivable basis which might support [a legislative classification] . . . whether or not the basis has a foundation in the record." *de Martinez v. Ashcroft*, 374 F.3d 759, 764 (9th Cir. 2004) (as amended) (internal quotation marks omitted); *see also Gonzalez-Medina v. Holder*, 641 F.3d 333, 336 (9th Cir. 2011) ("The government has no obligation to produce evidence to sustain the rationality of a statutory classification." (internal quotation marks and citation omitted)).

1. NACARA

Limitations by country of origin on the availability of NACARA special rule cancellation of removal do not violate equal protection. *See 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) (nationality-based classifications in sections 202 and 203 of NACARA do not violate equal protection); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1163-65 (9th Cir. 2002) (NACARA limitation based on whether an applicant filed an asylum application by April 1, 1990, deadline does not violate equal protection or due process).

2. Voluntary Departure

The court has held that treating noncitizens permitted voluntary departure differently, with respect to the window for filing a motion to reopen, from those not granted voluntary departure, does not violate equal protection. *See de Martinez v. Ashcroft*, 374 F.3d 759, 764 (9th Cir. 2004) (as amended).

Furthermore, 8 U.S.C. § 1229c(b)(1)(A), which draws a distinction for purposes of voluntary departure eligibility between noncitizens present in the United States for at least a year, and those present for less than a year, does not violate equal protection. *See Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). Although "some people under somewhat similar circumstances might manage to remain long enough to accrue some benefit or other . . . the [petitioner's] constitutional rights have [not] been violated." *Id.* (internal quotation marks omitted).

3. Regulation Excluding Noncitizens Who Illegally Reentered With Final Order of Removal

8 C.F.R. § 1003.44(k)(2) (2007), which permits noncitizens who were in proceedings before a certain date to file a motion to reopen to seek discretionary relief, but excludes noncitizens who were issued a final order of deportation or removal and then illegally returned to the United States, does not violate equal protection. *See Avila-Sanchez v. Mukasey*, 509 F.3d 1037, 1041 (9th Cir. 2007); *see also Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1174 (9th Cir. 2001) (rejecting equal protection challenge to 8 C.F.R. § 3.44(i) (2001), explaining that "[t]he government has a legitimate interest in discouraging aliens who have already been deported from illegally reentering, and this distinction is rationally related to that purpose").

4. 212(h) Waiver, 8 U.S.C. § 1182

8 U.S.C. § 1182(h) "provides the Attorney General with discretion to waive certain deportation orders." *Taniguchi v. Schultz*, 303 F.3d 950, 956 (9th Cir. 2002). Although § 1182(h) provides "a waiver of deportation to non-[lawful permanent resident ("LPR")] aggravated felons while denying such a waiver to [LPR] aggravated felons," the distinction does not violate equal protection. *Id.* at

957-58 (distinction is supported by a rational basis: namely, the judgment that LPRs, who "enjoy substantial rights and privileges not shared by other aliens" should be held to "a higher standard and level of responsibility than non-LPRs" and that aggravated felon LPRs are "less deserving of a 'second chance' than [non-LPRs]"); *see also 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."); *Hing Sum v. Holder*, 602 F.3d 1092, 1095 (9th Cir. 2010) (212(h) does not violate equal protection). Additionally, the court has held that there exists a rational basis for applying the seven-year residency requirement to LPRs, and not to non-LPRs, convicted of crimes involving moral turpitude, and thus does not violate equal protection. *See Peng v. Holder*, 673 F.3d 1248, 1258-59 (9th Cir. 2012).

The court has also rejected an equal protection challenge to the "absence of a waiver provision in 8 U.S.C. § 1182(a)(2)(A)(i)(II) [ground of inadmissibility] for a state pardon, although a waiver is available in similar circumstances to deportable aliens, pursuant to 8 U.S.C. § 1227(a)(2)(A)(vi)." *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1252 (9th Cir. 2008).

5. Availability of Discretionary Relief

Previously, the court held that "when the basis upon which the [government] seeks deportation *is identical to a statutory ground for exclusion* for which discretionary relief [under former INA § 212(c)] would be available, the equal protection component of the fifth amendment . . . requires that discretionary relief be accorded in the deportation context as well." *Komarenko v. INS*, 35 F.3d 432, 434 (9th Cir. 1994), *abrogated by Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam); *see also Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1198-99 (9th Cir. 2002); *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981), *overruled by Abebe*, 554 F.3d at 1207.

In *Abebe v. Mukasey*, 554 F.3d 1203, 1206-07 (9th Cir. 2009) (en banc) (per curiam), the court overruled *Tapia-Acuna*'s holding "that there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation[,]" and held that the BIA did not "violate petitioner's right to equal protection by finding him ineligible for section 212(c) relief from deportation" where petitioner was not eligible for 212(c) relief in the first place. The court explained that "Congress has particularly broad and sweeping powers when it comes to immigration, and is therefore entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens. .

. . [The court's task] is to determine, not whether the statutory scheme makes sense . . . , but whether [the court] can conceive of a rational reason Congress may have had in adopting it." *Id*. at 1206.

6. Federal First Offender Act ("FFOA")

"[T]he constitutional guarantee of equal protection does not require treating, for immigration purposes, an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the FFOA." *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc), *overruling* the holdings to the contrary in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), *Rice v. Holder*, 597 F.3d 952, 956 (9th Cir. 2010); *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 806-07 (9th Cir. 2009); *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); and *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000). Note the rule in *Nunez-Reyes* applies prospectively only. 646 F.3d at 690-94.

7. Convictions for Juvenile Offenders, 8 U.S.C. § 1101(a)(48)(A)

"[W]here a juvenile offender is charged and convicted as an adult under state law, the offender has a 'conviction' for purposes of [8 U.S.C. § 1101(a)(48)(A)]." *Rangel-Zuazo v. Holder*, 678 F.3d 967 (9th Cir. 2012) (per curiam). It does not violate equal protection "to treat differently offenders who have reached eighteen years of age before conviction or adjudication from those who have not reached eighteen years of age before conviction or adjudication." *Id.*

8. Habitual Drunkard, 8 U.S.C. § 1101(f)(1)

"The statutory 'habitual drunkard' provision does not violate equal protection principles." *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1048 (9th Cir. 2017) (en banc). "Congress reasonably could have concluded that, because persons who regularly drink alcoholic beverages to excess pose increased risks to themselves and to others, cancellation of removal was unwarranted." *Id. See also Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1184 (9th Cir. 2018) (holding that equal protection argument which rested on a case prior to the en banc *Ledezma-Cosino* decision failed).

9. Good Moral Character Period of Confinement, 8 U.S.C. § 1101(f)(7)

Congress has "established eight categories of individuals who are conclusively presumed to *lack* good moral character." *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1330 (9th Cir. 2013) (citing 8 U.S.C. § 1101(f)). In *Romero-Ochoa*, the petitioner challenged on equal protection grounds § 1101(f)(7), which classifies individuals who have been "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more" as lacking good moral character. 712 F.3d at 1130. The court denied the petition for review, concluding that there is a rational basis for § 1101(f)(7). *See id*. at 1331-32.

10. One-Year Filing Deadline

"The BIA has held that the one-year deadline for filing an asylum application restarts if an alien leaves the United States and then reenters – an application may be filed within one year of reentry, even if the applicant previously lived in the United States for more than a year and was gone for only a brief period." *Gonzalez-Medina v. Holder*, 641 F.3d 333, 336-37 (9th Cir. 2011). "Leaving the country resets the deadline only if the applicant's departure is for a 'legitimate' reason and not 'solely or principally . . . to overcome the 1-year time bar." *Id*. at 337 (citation omitted). Applying the one-year deadline for filing an asylum application to an "alien who has been in the United States for more than a year but has not left" does not violate equal protection. *Id*. (concluding the government's treatment of Gonzalez-Medina was "rationally related to a legitimate government purpose," and that she failed to establish an Equal Protection claim).

11. Calculation of Continuous Physical Presence, 8 U.S.C. § 1229b

There exists a rational basis for "Congress to require a ten-year span with exceptions for intermittent absences as opposed to a total-number-of-days requirement" for purposes of calculating continuous physical presence for cancellation of removal. *See Hernandez-Mancilla v. Holder*, 633 F.3d 1182, 1185-86 (9th Cir. 2011).

12. Application of Law Where There is a Circuit Split

"[T]he mere existence of a circuit split on an issue of statutory interpretation" violates neither due process, nor equal protection. *Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) (as amended) (rejecting contention that the differing application of the law in different circuits violates equal protection).

13. Specific Rules for Religious Workers

"Under the regulation, 8 C.F.R. § 245.2(a)(2)(i)(B) [2012], [religious workers] are among the categories of applicants for lawful permanent resident . . . status who cannot file their visa applications concurrently with the petitions of their sponsoring employers. The employees must wait for the Citizenship and Immigration Service . . . to approve their employers' petitions before they can file applications." *Ruiz-Diaz v. United States*, 703 F.3d 483, 485 (9th Cir. 2012). The court has held that 8 C.F.R. § 245.2(a)(2)(i)(B) (2012) does not violate equal protection. In *Ruiz-Diaz*, the court concluded that the regulation had a "rational basis" where the government demonstrated "that there have been concerns about fraud in the religious worker visa program, and as a result, the government has encountered difficulties in determining which applicants are bona fide religious workers." 703 F.3d at 486-87.

14. Child Status Protection Act

"[T]he failure of Congress to apply the [Child Status Protection Act] to NACARA [does not] violate equal protection." *Tista v. Holder*, 722 F.3d 1122, 1128 (9th Cir. 2013). The Child Status Protection Act "was designed to protect individuals who seek relief as derivative beneficiaries when their parents obtain [asylum] relief. A common difficulty arose in cases where the child was under the age of twenty-one years when the child's parents applied for relief, but was over that age when the parents were granted that relief. That is, it was designed to prevent a determination that the child had 'aged out' of eligibility." *Id*. at 1125 (internal quotation marks omitted). The court explained that "children of those who have obtained NACARA relief are in a category that is significantly distinct from children of those who have obtained asylum relief." *Id*. at 1127.

15. Gender-Based Distinctions, 8 U.S.C. §§ 1401 & 1409

"The gender-based distinction infecting [8 U.S.C.] §§ 1401(a)(7) and 1409(a) and (c) . . . violates the equal protection principle." *Sessions v. Morales-Santana*, 582 U.S. 47, 76-77 (2017). The statutes in question created different continuous physical presence requirements based on gender, before an unwed parent could pass citizenship status to their children. *Id*. The Supreme Court determined the appropriate remedy was to apply the longer requirement prospectively, rather than to extend the benefit of the shorter requirement. *Id*.

16. Naturalization of Adopted, Foreign-Born Children, 8 U.S.C. § 1433

In *Dent v. Sessions*, 900 F.3d 1075, 1080 (9th Cir. 2018), petitioner brought "a facial challenge to 8 U.S.C. § 1433 (1982), a citizenship statute in effect when he began the naturalization process." Applying rational basis review, the court concluded that a legitimate governmental interest was rationally related to § 1433's requirement that citizen parents petition to naturalize their adopted, foreign-born children," and thus did not violate the Fifth Amendment's Equal Protection Clause. *Dent*, 900 F.3d at 1082.

17. Derivative Citizenship, 8 U.S.C. § 1432(a)(3) (1984)

In *Roy v. Barr*, 960 F.3d 1175 (9th Cir. 2020), *cert. denied sub nom. Roy v. Wilkinson*, 141 S. Ct. 1517 (2021), the court concluded that petitioner failed to establish an equal protection violation with respect to former 8 U.S.C. § 1432(a)(3) (1984), the applicable derivative-citizenship statute. "Section 1432(a)(3)'s second clause grants citizenship to a child upon 'the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation.'" *Roy*, 960 F.3d at 1179. Petitioner alleged that the clause discriminated by gender and legitimacy. The court held that although the second clause discriminates on the basis of gender, petitioner's gender-discrimination claim failed because she was not similarly situated to persons who derived citizenship under § 1432(a)(3)'s second clause. *See Roy*, 960 F.3d at 1181-82. The panel also rejected the petitioner's legitimacy-discrimination claim, concluding that, because both fathers and mothers can legitimate a child after the child's birth, legitimation is not inherently discriminatory on the basis of gender. *See id.* at 1183-84. *See also United States v. Mayea-Pulido*, 946 F.3d 1055 (9th Cir. 2020) (upholding as constitutional the first clause of 8 U.S.C. § 1432(a)(3) (1996), which grants citizenship to a child upon the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents).

B. Suspension Clause

"The Suspension Clause provides that '[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.'" *Singh v. Mukasey*, 533 F.3d 1103, 1106 (9th Cir. 2008) (quoting U.S. Const. art. 1, § 9, cl. 2.); *see also Perez v. Barr*, 957 F.3d 958, 963 (9th Cir. 2020) (same). "Congress may eliminate the writ without running afoul of the Suspension Clause so long as it provides a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Singh*, 533 F.3d at 1106 (internal quotation marks omitted); *see also Negrete v. Holder*, 567 F.3d 419, 422 (9th Cir. 2009) (per curiam) ("The Suspension Clause does not require habeas review; rather it requires that an adequate and effective 'collateral remedy' be available to a petitioner." (citations omitted)).

The Suspension Clause requires some judicial intervention in deportation cases. *See Lolong v. Gonzales*, 484 F.3d 1173, 1177 (9th Cir. 2007) (en banc). *See also Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1981 (2020) (noting that, in *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001), the Court had observed that "Because of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" (internal citation omitted)).

The court has "held the REAL ID Act does not violate the Suspension Clause because a petition for review under §1252(a)(5) is 'an adequate substitute for habeas proceedings.'" *Perez*, 957 F.3d at 964 (9th Cir. 2020) (quoting *Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006)). "[I]f a substitute remedy provides the same scope of review as a habeas remedy, it is adequate and effective." *Puri*, 464 F.3d at 1042; *see also Perez*, 957 F.3d at 964.

In *Perez v. Barr*, the court held that the Suspension Clause does not require government compensation of court-appointed counsel, at least as long as the court can obtain the assistance of pro bono counsel. 957 F.3d at 964. The court explained, "[t]he unavailability of compensation for counsel does not reduce the scope of the 'review' or 'relief' available to REAL ID Act petitioners who obtain competent pro bono representation." *Id.*

The court has also determined that a potential motion to reopen with the agency to assert a nationality claim can suffice to alleviate Suspension Clause concerns. *See Iasu v. Smith*, 511 F.3d 881, 892-93 (9th Cir. 2007).

Additionally, the court held in *Rauda v. Jennings*, 55 F.4th 773, 781 (9th Cir. 2022) (as amended) that 8 U.S.C. § 1252(g) bars judicial review of Attorney General's action to execute removal, neither the Suspension nor the Due Process Clauses preserves judicial review, and the statutorily provided process satisfies due process.

The Supreme Court held in *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020) that, as applied in that case, 8 U.S.C. § 1252(e)(2), which limits the review that an alien in expedited removal proceedings may obtain via a petition for a writ of habeas corpus, does not violate the Suspension Clause or the Due Process Clause. *See also Mendoza-Linares v. Garland*, 51 F.4th 1146, 1167 (9th Cir. 2022), *petition for cert. pending*, No 23-606 (docketed Dec. 6, 2023) (mandate not issued as of Feb. 10, 2024) (explaining that *Thuraissigiam* expressly rejected petitioner's alternative theory that a complete denial of judicial review in expedited removal cases effects an unconstitutional suspension of the writ of habeas corpus).

See also Negrete, 567 F.3d at 422 ("The fact that neither [the court of appeals] nor the district court has jurisdiction to hear . . . discretionary claims does not present a Suspension Clause problem because review of discretionary determinations was not traditionally available in habeas proceedings."); *Garcia de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133, 1141 (9th Cir. 2008) (jurisdictional limitations on review of noncitizen's expedited removal order did not violate the suspension clause).

C. Free Speech Clause of the First Amendment

In *United States v. Hansen*, the Supreme Court held that 8 U.S.C. § 1324(a)(1)(A)(iv), which prohibits "encourag[ing] or induc[ing]" illegal immigration, is not unconstitutionally overbroad under the First Amendment where it forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law. *United States v. Hansen*, 599 U.S. 762, 766 (2023) (reversing and remanding *United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022)).

D. Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act

Fernandez v. Mukasey, 520 F.3d 965, 966 (9th Cir. 2008) (per curiam) held that the qualifying relative requirement for cancellation of removal did not substantially burden the petitioners' religious exercise. Petitioners had argued that the qualifying relative requirement violated free exercise of their religion where they were unable to have a child, and religious beliefs prevented them from using in vitro fertilization. *Id.*

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

E. Fourth Amendment Exclusionary Rule

The exclusionary rule provides that in criminal proceedings "evidence obtained in violation of a defendant's Fourth Amendment rights may not be introduced to prove the defendant's guilt." *Martinez-Medina v. Holder*, 673 F.3d 1029, 1033 (9th Cir. 2011). "The exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights." *Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008) (internal quotation marks omitted).

> As a general matter, the Fourth Amendment's exclusionary rule does not apply to immigration proceedings. *See* [*INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984)]. There are, however, two longstanding exceptions: (1) "when the agency violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner's protected interests" and (2) "when the agency egregiously violates a petitioner's Fourth Amendment rights." *Sanchez v. Sessions*, 904 F.3d 643, 649 (9th Cir. 2018); *see also Adamson v. Comm'r*, 745 F.2d 541, 546 (9th Cir. 1984) (egregious Fourth Amendment violations); *United States v. Calderon-Medina*, 591 F.2d 529, 531-32 (9th Cir. 1979) (regulatory violations).

Perez Cruz v. Barr, 926 F.3d 1128, 1137 (9th Cir. 2019). *See also Zuniga De La Cruz v. Garland*, 86 F.4th 1236, 1241 (9th Cir. 2023) (immigration officers do not have to advise a petitioner of the prophylactic rules of *Miranda* before questioning about citizenship, and the agency did not err in rejecting petitioner's motion to suppress); *B.R. v. Garland*, 26 F.4th 827, 832 (9th Cir. 2022) ("The exclusionary rule is generally not available in immigration proceedings, but we hold that once an alien makes a prima facie showing of an egregious regulatory or Fourth Amendment violation warranting suppression and submits specific evidence that the government's evidence is tainted, the government has the burden and opportunity to rebut that claim of taint.").

Not all violations of agency regulations result in the exclusion of evidence in proceedings. *See Hong*, 518 F.3d at 1035-36 (holding that where it appears the regulation was not violated, and any alleged violation would still not have deprived Petitioner of any protected right, the evidence was properly admitted). The court has explained:

> For nearly four decades, it has been the law in our circuit that evidence may be excluded for a regulatory violation as long as three conditions are satisfied: (1) the agency violated one of its regulations; (2) the subject regulation serves a "purpose of benefit to the alien"; and (3) the violation "prejudiced interests of the alien which were protected by the regulation."

Sanchez v. Sessions, 904 F.3d 643, 650 (9th Cir. 2018) (citation omitted) (concluding that regulation at issue was "for the benefit" of petitioners like Sanchez and that prejudice was presumed where Coast Guard's failed to abide by the regulation, and remanding for the agency to determine whether termination of the removal proceedings without prejudice was appropriate). *See also Gonzalez-Villalobos*, 724 F.3d at 1129 n.5 (Although the exclusionary rule generally does not apply in civil deportation proceedings, . . . it does apply where the immigration agency violates its own rules if (1) "the regulation serves a purpose of benefit to the alien," and (2) "the violation prejudiced interests of the alien which were protected by the regulation." (citations omitted)); *Hong*, 518 F.3d at 1035 (explaining that to evaluate the potential exclusion of evidence obtained through a violation of agency regulations, the regulation must serve a purpose of benefit to the noncitizen, and the violation prejudiced the interests of the noncitizen which were protected by the regulation).

Where "compliance with the regulation is mandated by the Constitution, prejudice may be presumed." *Sanchez*, 904 F.3d at 652 (internal quotation marks and citation omitted) (presuming prejudice where the regulation violated by Coast Guard officers reflected the Fourth Amendment's requirement that brief detentions be supported by reasonable suspicion); *see also Perez Cruz*, 926 F.3d at 1145-46 (citing *Sanchez* and presuming prejudice where compliance with the regulation was mandated by the Constitution). "The regulation need not explicitly invoke the Constitution for the Constitution to mandate compliance with the regulation." *Sanchez*, 904 F.3d at 652 n.10 (concluding that the regulation at issue was intended to reflect constitutional restrictions on the ability of immigration officials to interrogate and detain persons in this country – doctrine rooted in the Fourth Amendment – and thus it was promulgated for the benefit of petitioners like Sanchez).

This court has held that "petitioners may be entitled to termination of their removal proceedings without prejudice for egregious regulatory violations." *Sanchez*, 904 F.3d at 653 ("Because Sanchez has made a prima facie showing that he was detained solely on the basis of his race and that his detention was contrary to the requirements of § 287.8(b)(2), we grant his petition for review and remand for the agency to determine in the first instance whether termination without prejudice is appropriate here."); *see also Perez Cruz*, 926 F.3d at 1146 (recognizing that where evidence of alienage is suppressed and the government offers no other evidence to show alienage, termination of proceedings is warranted).

"A Fourth Amendment violation is egregious if evidence is obtained by deliberate violations of the Fourth Amendment or by conduct a *reasonable officer should have known* is in violation of the Constitution." *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018, 1016-19 (9th Cir. 2012) (internal quotation, alteration, and citation omitted) (concluding IJ erred by denying motion to suppress where statements were obtained immediately following the unconstitutional entry of noncitizen's home); *see also Martinez-Medina*, 673 F.3d at 1034 (concluding that even if Fourth Amendment rights were violated, the violation was not egregious). Where egregious violations of the Fourth Amendment occur, the exclusionary rule may apply. *See Lopez-Rodriguez*, 536 F.3d at 1016-19. *See also Perez-Cruz*, 926 F.3d at 1136 (discussing *Lopez-Rodriguez*, and distinguishing between evidence pertaining to "alienage" resulting from an egregious Fourth Amendment violation, which may be suppressed, and evidence pertaining to "identity" which is not subject to suppression).

See also B.R. v. Garland, 26 F.4th 827, 832 (9th Cir. 2022) (remanding to agency for it to determine in the first instance whether DHS did in fact commit an egregious regulatory violation, including whether the claimed violation prejudiced B.R.); *Lopez-Mendoza*, 468 U.S. at 1051-52 (announcing blanket rule that exclusionary rule generally does not apply in immigration proceedings, but noting that in the present case there was no challenge to the INS's own internal regulations, and also that the Court was not dealing with egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained); *Martinez-Medina*, 673 F.3d at 1033-34 (noting an exception to the exclusionary rule exists in immigration proceedings where the Fourth Amendment violation is egregious, and holding that there was no egregious violation of petitioners' Fourth Amendment rights); *Hong*, 518 F.3d at 1035 (noting the rule in *Lopez-Mendoza* did not cover transgressions that implicate fundamental fairness and undermine probative value of evidence, nor challenges to the INS's own internal regulations); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448-49 (9th Cir. 1994) (noting *Lopez-Mendoza* limited its holding to situations that do not involve egregious violations of the Fourth Amendment).

F. Fifth Amendment Right Against Self-Incrimination

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

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

Table of Contents

I. THE STATUTE 1
II. CASELAW 3
 A. Jurisdiction 3
 B. Filing Deadline 3
 C. Prevailing Party 4
 D. Position of the United States 5
 E. Substantial Justification 5
 F. Scope of EAJA Fees 9
 G. Enhanced Fees 9
III. COURT PROCEDURES 10

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

I. THE STATUTE

28 U.S.C. § 2412(d)(1)(A) provides:

> [A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

See also Meza-Vazquez v. Garland, 993 F.3d 726, 728 (9th Cir. 2021) (order) ("To be awarded attorneys' fees under the EAJA, (1) the party seeking fees must be a prevailing party, (2) the government's position must not have been substantially justified, and (3) there must not be special circumstances rendering an award unjust." (citing 28 U.S.C. § 2412(d)(1)(A))).

Eligible parties include "an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed." *Id*. § 2412(d)(2)(B)(i).

Section 2412(d)(1)(B) requires that an EAJA applicant,

> within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the

> agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

See also id. § 2412(d)(2)(D) (defining "position of the United States" to mean, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based").

> "Fees and other expenses" include:
>
> the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees[.] (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

Id. § 2412(d)(2)(A). *But see id.* § 2412(d)(2)(D) (stating that "fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings").

An order awarding or denying EAJA fees is reviewed for abuse of discretion. *See Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1089 (9th Cir. 2022) (reviewing denial of fees); *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1166 (9th Cir. 2019) (en banc) (reviewing award of fees); *Gardner v. Berryhill*, 856 F.3d 652, 656 (9th Cir. 2017) (reviewing denial of fees); *Decker v. Berryhill*, 856 F.3d 659, 663 (9th Cir. 2017) (reviewing denial of fees). A district court's interpretation of the EAJA is reviewed de novo. *See Ibrahim*, 912 F.3d at 1166. "[A] district court's fee award will be overturned if it is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Id.* (internal quotation marks and citation omitted). "[B]ecause the EAJA is a limited waiver of the government's sovereign immunity, it must be strictly construed in favor of maintaining immunity not specifically and clearly waived." *In re Sisk*, 973 F.3d

945, 946 (9th Cir. 2020) (as amended) (internal quotation marks and citation omitted).

II. CASELAW

This section outlines selected Ninth Circuit immigration cases addressing EAJA. Because EAJA applies in other contexts as well, readers of this outline should also consult precedents beyond the immigration field.

A. Jurisdiction

In order for a court to award fees under EAJA, it must have jurisdiction over the underlying action. *See* 28 U.S.C. § 2412(d)(1)(A); *Zambrano v. INS*, 282 F.3d 1145, 1149-50 (9th Cir. 2002) (as amended) (no jurisdiction under EAJA where district court dismissed underlying action for lack of jurisdiction).

B. Filing Deadline

"Under the EAJA, the deadline to file for attorney's fees is 30 days after a final judgment—that is, 30 days after the date when a petition for a writ of certiorari would be untimely." *Lizardi v. Wilkinson*, 986 F.3d 1294 (9th Cir. 2021), *as amended* (Feb. 10, 2021). *See also Li v. Keisler*, 505 F.3d 913, 916-17 (9th Cir. 2007) ("The thirty-day deadline to file an application for attorney's fees under EAJA does not begin to run until after the . . . period during which a party may seek a writ of certiorari from the United States Supreme Court."); *Zheng v. Ashcroft*, 383 F.3d 919, 920 (9th Cir. 2004) (order) ("After a 'final judgment,' a petitioner has thirty days to file a motion for attorney's fees under the EAJA. . . . We have interpreted 'final judgment' for EAJA purposes as the date on which a petition for certiorari would be untimely." (citation omitted)). "[A] party need not wait until the judgment is final to move for attorney's fees." *Lizardi*, 986 F.3d 1294 (holding that motion for attorney's fees under the EAJA was not premature). To be timely, an application must be received, not mailed, on or before the deadline. *See Arulampalam v. Gonzales*, 399 F.3d 1087, 1090 (9th Cir. 2005) (order).

EAJA's thirty-day deadline is not affected by when this court's mandate issues. "[T]he Supreme Court's explicit rule starts the time to file a petition for a writ of certiorari on the date of judgment or order to be reviewed, not on the date mandate issues. Running from the date of judgment or order, there are ninety days before that petition is untimely, rendering the order or judgment 'final' for EAJA purposes." *Zheng v. Ashcroft*, 383 F.3d 919, 921 (9th Cir. 2004) (order). "Because filing a petition for rehearing or a petition for rehearing en banc tolls the time period for filing a petition for a writ of certiorari, *see* Sup. Ct. R. 13(3), it follows that the EAJA clock [is] similarly tolled." *Id*. at 921 n.3.

C. Prevailing Party

"As the Supreme Court recently reiterated, '[b]efore deciding whether an award of attorney's fees is appropriate . . . a court must determine whether the party seeking fees has prevailed in the litigation.'" *Wood v. Burwell*, 837 F.3d 969, 973 (9th Cir. 2016) (quoting *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422 (2016)). Prevailing party status requires a material alteration of the legal relationship between the parties that was judicially sanctioned. *See Wood*, 837 F.3d at 973; *Li v. Keisler*, 505 F.3d 913, 917 (9th Cir. 2007) (order) (citing *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 604-05 (2001)). "[T]he petitioner's success in obtaining the desired relief from the federal court is critical to establishing prevailing party status under *Buckhannon*, regardless of whether the federal court's order addressed the merits of the underlying case." *Li*, 505 F.3d at 917. The court has held that a Circuit Mediator's remand order satisfies this standard. *Id*. at 918. "Procedural remedies can constitute a material alteration in the parties' legal relationship." *Wood*, 837 F.3d at 974. Note that the "material alteration and the judicial sanction are two separate requirements." *Klamath Siskiyou Wildlands Center v. United States Bureau of Land Management*, 589 F.3d 1027, 1030 (9th Cir. 2009).

When a petitioner has obtained a remand for further consideration, he or she is a prevailing party. *Rueda-Menicucci v. INS*, 132 F.3d 493, 495 (9th Cir. 1997). *See also Wood*, 837 F.3d at 978 ("the retention of jurisdiction for practical and equitable reasons did not undermine the reality that the Wood plaintiffs were a prevailing party" where the remand was not interim relief, but rather represented success on the challenge); *Carbonell v. INS*, 429 F.3d 894, 899-902 (9th Cir. 2005) (holding that a district court's order incorporating a voluntary stipulation to a stay of deportation materially altered the relationship between Carbonell and the government, and that the alteration was judicially sanctioned, making the applicant a prevailing party); *Perez-Arellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002) (holding that applicant who was granted naturalization at the administrative level while the federal court action was held in abeyance was not a prevailing party because he "unmistakably did not gain a change in his legal relationship with the INS by judgment or consent decree").

D. Position of the United States

"[T]he 'position of the United States' as defined by EAJA encompasses both the DHS's litigation position and the underlying agency decision rendered by the BIA or an IJ. . . ." *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (order); *see also Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1168 (9th Cir. 2019) (en banc) ("When evaluating the government's 'position' under the EAJA, [the court considers] both the government's litigation position and the 'action or failure to act by the agency upon which the civil action is based.'" (quoting 28 U.S.C. § 2412(d)(1)(B)); *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013) (social security case) ("As EAJA provides, position of the United States means, in addition to the position taken by the United States in the civil action, *the action or failure to act by the agency upon which the civil action is based*." (internal quotation marks and citation omitted)).

E. Substantial Justification

"The government bears the burden of demonstrating substantial justification." *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (order); *see also Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1089-91 (9th Cir. 2022) (government's litigation position was substantially justified); *Meza-Vazquez v. Garland*, 993 F.3d 726, 729 (9th Cir. 2021) (order) (explaining that the government bears the burden of showing that it was substantially justified in both its litigation position and the underlying agency action giving rise to the civil action, meaning that both the immigration judge's decision and the BIA's decision must have been substantially justified); *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1167 (9th Cir. 2019) (en banc); *Tobeler v. Colvin*, 749 F.3d 830, 832 (9th Cir. 2014).

"[T]he substantial justification test is comprised of two inquiries, one directed toward the government agency's conduct, and the other toward the government's attorneys' conduct during litigation." *Ibrahim*, 912 F.3d at 1168 (citation omitted). "'Substantial justification' in this context means 'justification to a degree that could satisfy a reasonable person[.]'" *Al-Harbi v. INS*, 284 F.3d

1080, 1084 (9th Cir. 2002) (order) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); *see also Meza-Vazquez*, 993 F.3d at 729; *Decker v. Berryhill*, 856 F.3d 659, 664 (9th Cir. 2017); *Tobeler*, 749 F.3d at 832; *Meier v. Colvin*, 727 F.3d 867, 870-72 (9th Cir. 2013) (social security case). "The government's position is not substantially justified simply because . . . precedents have not squarely foreclosed the position." *Decker*, 856 F.3d at 664.

The court has "interpreted the term substantial justification as describing a position that has a reasonable basis both in law and fact." *Renee v. Duncan*, 686 F.3d 1002, 1017 (9th Cir. 2012) (internal quotation marks, alterations, and citation omitted); *see also Meza-Vazquez*, 993 F.3d at 729; *Ibrahim*, 912 F.3d at 1168; *Decker*, 856 F.3d at 664. "The test is not whether the government was correct, but whether it was for the most part justified in taking the position that it did. . . . A position that was not contrary to clearly established law is thus substantially justified." *Meza-Vazquez*, 993 F.3d at 729 (internal quotation marks and citation omitted). It is a "decidedly unusual case in which there is substantial justification under the EAJA even though the agency's decision was reversed as lacking in reasonable, substantial and probative evidence in the record." *Al-Harbi*, 284 F.3d at 1085 (internal quotation marks and citation omitted); *see also Decker*, 856 F.3d at 664; *Thangaraja*, 428 F.3d at 874; *Campbell v. Astrue*, 736 F.3d 867, 868-69 (9th Cir. 2013) (order).

"In assessing whether the government's position was substantially justified, we also consider any 'extraneous circumstances bearing upon the reasonableness of the government's decision' [which] can include 'relevant legal or factual precedents.'" *Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1090 (9th Cir. 2022) (internal citations omitted). "A 'string of losses' or a 'string of successes' can be an objective indicator of reasonableness[,]" though the fact that a lower court initially agreed with the government's position "is not 'conclusive of whether or not the government was reasonable.'" *Id.* at 1090-91 (internal citations omitted) (the circumstances—that "no fewer than six federal judges" had been persuaded by the government's position on issue of first impression—supported the district court's conclusion that the government's position was not unreasonable despite this court's en banc ruling against that position).

When the court "decide[s] whether the government's litigation position is substantially justified, the EAJA . . . favors treating a case as an inclusive whole, rather than as atomized line items." *Al-Harbi*, 284 F.3d at 1084-85 (internal quotation marks and citation omitted). *See also* *Ibrahim*, 912 F.3d at 1169-71 (explaining that EAJA favors treating a case as an inclusive whole, rather than as atomized line-items, and concluding that the district court erred in its "piecemeal approach" to substantial justification, particularly where the agency's original action of erroneously placing petitioner on a No Fly list was "not justified at all, much less substantially").

"Fees may be denied when the litigation involves questions of first impression, but 'whether an issue is one of first impression is but one factor to be considered.'" *Ibrahim*, 912 F.3d at 1168 (quoting *United States v. Marolf*, 277 F.3d 1156, 1162 n.2 (9th Cir. 2002)).

"That the government lost (on some issues) does not raise a presumption that its position was not substantially justified." *Ibrahim*, 912 F.3d at 1168.

The government's failure to address contrary circuit precedent weighs against substantial justification. *See* *Singh v. Gonzales*, 502 F.3d 1128, 1129 (9th Cir. 2007) (government position not substantially justified where it repeated an argument already rejected by this court without acknowledging the case that rejected it, particularly where the Department of Justice was involved in previous case); *Thangaraja*, 428 F.3d at 874-75. "Relitigation of a previously decided issue is a strong factor weighing against the government in determining substantial justification." *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1460 (9th Cir. 1988) (order) (internal quotation marks and citation omitted), *receded from on other grounds by* *Sorenson v. Mink*, 239 F.3d 1140 (9th Cir. 2001). Whether a BIA opinion is consistent with caselaw in other circuits "is irrelevant to whether the government was substantially justified" when Ninth Circuit law is to the contrary. *Ratnam v. INS*, 177 F.3d 742, 743 n.1 (9th Cir. 1999).

"A lack of judicial precedent adverse to the government's position does not preclude a fee award under the EAJA." *Ramon-Sepulveda*, 863 F.2d at 1459. Subsequent caselaw "only support[s] a finding that the government's position was 'substantially justified' if the government contested the petitions . . . on the ground on which those cases were decided." *Abela v. Gustafson*, 888 F.2d 1258, 1265 (9th Cir. 1989). Partial concessions by the government do not necessarily constitute substantial justification, as the court "expect[s] nothing less than such candid and rigorous evaluations of the agency's explanations of its decisions in all parties' briefs." *Thangaraja*, 428 F.3d at 875.

In a situation where the government seeks a voluntary remand, "EAJA's standards are best served by considering the likely reason behind the voluntary remand in question." *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007). *See also Meza-Vazquez v. Garland*, 993 F.3d 726, 729 (9th Cir. 2021) ("When the government seeks a voluntary remand, [the court] evaluate[s] substantial justification based on whether the request was motivated by 'subsequent, novel considerations,' which undercut a previously justified agency action.").

> If the government seeks a remand because the record indicates that the Agency's prior action was not consistent with clearly established law at the time the case was before it, then the government's position would not be substantially justified and the petitioner would be entitled to EAJA fees. In other words, the petitioner would be entitled to reasonable attorney's fees where the government requests a remand to reevaluate the prior proceedings due to a misapplication of, or failure to apply, controlling law and where there is no new law or claims of new facts.

Li, 505 F.3d at 919. However, in cases where the government seeks a remand "due to intervening case law, because of unclear controlling case law, or where the Agency should have an opportunity to adjudicate a new claim for relief in the first instance . . . , the government's position may have been substantially justified at the time the Agency acted, even though subsequent, novel considerations have since undercut the underlying Agency decision." *Id.* (citation omitted). *See also Meza-Vazquez*, 993 F.3d at 729 ("[S]o long as the IJ's and BIA's decisions were not contrary to controlling law at the time that they were made, the government's position is substantially justified.").

See also Meza-Vazquez, 993 F.3d at 729 (holding that EAJA fees were not appropriate where the government was substantially justified in its position); *Li*, 505 F.3d at 920 (holding that, "[i]n the absence of guidance from this court, the government's position was substantially justified"). *Compare id.* at 921 (holding that petitioners in two companion cases were entitled to reasonable attorney's fees pursuant to EAJA).

F. Scope of EAJA Fees

EAJA allows for the recovery of reasonable attorney's fees and other expenses including expert witness fees and the cost of any study, analysis, report, or test. 28 U.S.C. § 2412(d)(1)(A).

In *Hensley v. Eckerhart*, the Supreme Court set out a two-pronged approach for determining the amount of fees to be awarded when a plaintiff prevails on only some of his claims for relief or achieves "limited success." *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983)). First, the court asks, "did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?" *Hensley*, 461 U.S. at 434. Second, the court asks whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id*.

Applying *Hensley*, this court clarified that "when a district court awards complete relief on one claim, rendering it unnecessary to reach alternative claims, the alternative claims cannot be deemed unsuccessful for the purpose of calculating a fee award." *Ibrahim v. DHS*, 912 F.3d 1147, 1166 (9th Cir. 2019) (en banc) (explaining that all petitioner's legal theories ultimately challenged the same government action underlying the lawsuit: the government's placement of petitioner's name on the No Fly list without justification).

G. Enhanced Fees

Enhanced hourly rates in immigration cases are not available "pursuant to the statutory exception for limited availability of qualified attorneys where the litigation in question required no 'distinctive knowledge' or 'specialized skill.'" *Thangaraja v. Gonzales*, 428 F.3d 870, 876 (9th Cir. 2005) (order) (citation omitted). Although "a speciality in immigration law could be a special factor warranting an enhancement of the statutory rate," *Rueda-Menicucci v. INS*, 132 F.3d 493, 496 (9th Cir. 1997), counsel must establish that his or her distinct qualifications were necessary to litigating the particular case, *see id*. *See also Thangaraja*, 428 F.3d at 876 (citing *Rueda-Menicucci*, 132 F.3d at 496). *See generally United States v. Real Prop. Known as 22249 Dolorosa St.*, 190 F.3d 977, 985 (9th Cir. 1999) (as amended) (requiring for enhanced fees a showing that "no suitable counsel would have taken on claimants' case at the statutory rate").

See also *Nadarajah v. Holder*, 569 F.3d 906, 912-15 (9th Cir. 2009) (attached to order denying motion for reconsideration is the Appellate Commissioner's order awarding attorneys' fees, which details the calculation of fees and explains why enhanced fees were warranted).

III. COURT PROCEDURES

Ninth Circuit Rule 39-1 addresses "Costs and Attorneys Fees on Appeal." Rule 39-1.6(b) states:

> A request for an award of attorney's fees must be supported by a memorandum showing that the party seeking fees is legally entitled to them and must be accompanied by Form 9 or a document that contains substantially the same information, along with:
>
> > (1) a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task;
> >
> > (2) a showing that the hourly rates claimed are legally justified; and
> >
> > (3) an affidavit or declaration attesting to the accuracy of the information. All applications must include a statement that sets forth the application's timeliness. The request must be filed separately from any cost bill.

Id. EAJA applicants should also submit EAJA Form AO 291.

Ninth Circuit Rule 39-1.7 states that oppositions to requests for attorneys fees, and subsequent replies, must be filed according to the "time periods set forth in [Federal Rule of Appellate Procedure] 27(a)(3)(A) and (4) for responses and replies to motions. . . ." Where the government does not file an opposition, panels have discretion to grant an application without reaching the merits (as long as entitlement to fees is shown or apparent) when the government fails timely to file a request for extension of time to oppose an application. *Gwaduri v. INS*, 362 F.3d 1144, 1145-46 (9th Cir. 2004) (order).

Form AO 291, Application for Fees and Other Expenses Under the Equal Access to Justice Act, is available on the Ninth Circuit website:

http://www.ca9.uscourts.gov/datastore/uploads/forms/EAJA-Fees.pdf

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

https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/