DUE PROCESS IN IMMIGRATION PROCEEDINGS

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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 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) (order). "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 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 an alien 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."). "Due process always requires, at a minimum, notice and an opportunity to respond." *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014) (failure to inform petitioner of the charge against him and to provide him with the opportunity to review the sworn statement constituted a violation of petitioner's due process rights).

This court reviews de novo claims of due process violations. *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 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).

Due process violations have been identified in cases where the IJ delegated his duties to develop an unrepresented petitioner'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 alien, *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007-09 (9th Cir. 2003), and where the IJ pressured an alien to drop a claim for relief that he was entitled to pursue, *Cano-Merida*, 311 F.3d at 964-65. The court also 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 aliens 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 an alien 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 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 alien 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 Gomez-Velazco v. Sessions*, 879 F.3d 989 (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. United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014) (holding that a showing of prejudice was not necessary where agency violated regulation that protected fundamental due process rights); *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 Dent v. Holder*, 627 F.3d 365, 373 (9th Cir. 2010) (to show prejudice petitioner must show "the outcome of proceeding "may have been affected" by the alleged violation) (internal quotation and citation omitted); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010); *Cano-Merida*, 311 F.3d at 965.

"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)); *Zolotukhin*, 417 F.3d at 1077; *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000). "'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: *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 alien's IJ hearing, which "resulted in the IJ's fatal misunderstanding of a dispositive moment" in the alien'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 alien'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 alien from his son would have on hardship); *Agyeman v. INS*, 296 F.3d 871, 884-85 (9th Cir. 2002) (pro se alien 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 alien 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 alien demonstrated prejudice); *Colmenar*, 210 F.3d at 972 (alien prejudiced by IJ preventing a full examination of the alien and prejudging the alien's case).

Examples of cases where prejudice has not been established include: *C.J.L.G. v. Sessions*, No. 16-73801, 2018 WL 576761, at *21 (9th Cir. Jan. 29, 2018) ("[T]o the extent the IJ failed to provide all the trappings of a full and fair hearing, any shortcomings did not prejudice the outcome because the IJ adequately developed the record on issues that are dispositive to C.J.'s claims for relief."); *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, alien 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 alien "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 alien not eligible for relief as a matter of law).

1. Presumption of Prejudice

Where counsel's error deprives an alien 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 alien 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 alien can show plausible grounds for relief. *Siong*, 376 F.3d at 1037; *Ray*, 439 F.3d at 587. To determine if the alien 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).

Examples of cases where prejudice was presumed include: *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).

C. Exhaustion Requirement

8 U.S.C. § 1252(d)(1) mandates exhaustion and generally bars this court from reaching the merits of a claim not presented in administrative proceedings below. *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004). "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). The court may not entertain due process claims that allege a procedural error correctable by the BIA unless exhausted before the agency. *See Barron*, 358 F.3d at 678 (alleged errors of absence of counsel and lack of opportunity to present case were procedural in nature and required to be exhausted); *see also Sola v. Holder*, 720 F.3d 1134, 1135-36 (9th Cir. 2013) (per

curiam) (no jurisdiction to review unexhausted due process claim where agency could have addressed it); *Brezilien v. Holder*, 569 F.3d 403, 412 (9th Cir. 2009) (no jurisdiction to review due process claim regarding waiver of right to counsel where petitioner failed to exhaust the issue); *de Mercado v. Mukasey*, 566 F.3d 810, 815 n.4 (9th Cir. 2009) (as amended) (claim that IJ failed to serve as an impartial adjudicator and denied petitioner a full and fair hearing was unreviewable where the claim was not asserted in brief to BIA); *Huang v. Mukasey*, 520 F.3d 1006, 1008 (9th Cir. 2008) (per curiam) (dismissing claims of incompetent translation and denial of opportunity to testify because petitioner failed to exhaust the claims before the BIA); *Sanchez-Cruz v. INS*, 255 F.3d 775, 779-80 (9th Cir. 2001) (determining that petitioner presented a colorable due process claim based on IJ's failure to act as neutral fact-finder, but concluding claim could not be considered for failure to exhaust).

"Presenting an argument to the BIA requires reasoning sufficient to put the BIA on notice that it was called on to decide the issue. A general challenge to the IJ's decision is insufficient; the alien must specify particular issues on appeal to the BIA." *Young v. Holder*, 697 F.3d 976, 982 (9th Cir. 2012) (en banc) (citation omitted), *abrogated in part on other grounds by Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). 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 alien 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).

"[T]he principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide." *Barron*, 358 F.3d at 678; *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) because exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation). 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 Saravia-Paguada v. Gonzales*,

488 F.3d 1122, 1130 (9th Cir. 2007) (considering retroactivity challenge raising due process concerns, even though not exhausted), *implied overruling on other grounds as recognized by* *Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013); *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). Additionally, exhaustion is not required where it would be "futile or impossible." *See* *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004).

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* *Bazua-Cota v. Gonzales*, 466 F.3d 747, 748-49 (9th Cir. 2006) (per curiam) (order) (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 both 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* *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1166 (9th Cir. 2004) (due process and equal protection challenges to voluntary departure regime); *Munoz v. Ashcroft*, 339 F.3d 950, 954-56 (9th Cir. 2003) (due process, ineffective assistance of counsel, and equitable tolling contentions); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107-09 (9th Cir. 2003) (due process claim); *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 869 (9th Cir. 2003) (en banc) (superseded by regulation on other grounds) (due process challenge to the BIA's refusal to allow applicant for suspension of deportation to supplement the record); *Agyeman v. INS*, 296 F.3d 871, 876-77 (9th Cir. 2002) (suspension of deportation applicant's due process claim); *cf.* *Padilla-Martinez v. Holder*, 770 F.3d 825 (9th Cir. 2014) (holding the court lacks jurisdiction even when a constitutional issue is raised if there is no final

order of removal); *Alcala v. Holder*, 563 F.3d 1009, 1016 (9th Cir. 2009) (same). 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.

E. Examples

1. Notice to Appear

"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). This 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 alien'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 this 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 alien did not deprive the immigration court of jurisdiction. *See Lazaro v. Mukasey*, 527 F.3d 977, 980 (9th Cir. 2008).

The court has held that that where an alien is informed of the requirement to notify the government of a change of address, and then the alien fails to do so, an in absentia order of removal does not violate due process rights based on purportedly insufficient notice. *Popa v. Holder*, 571 F.3d 890, 897-98 (9th Cir. 2009) (concluding that where Notice to Appear was sent to petitioner, combined with hearing notice that was subsequently sent, petitioner was provided with required notice of time and place of removal hearing).

2. Notice of Hearing

Due process requires notice of an immigration hearing that is reasonably calculated to reach the alien. *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). Note that the "time and date of a removal proceeding can be sent after the first notice to appear." *Popa v. Holder*, 571 F.3d 890, 895 (9th Cir. 2009).

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). *Cf. Dobrota v. INS*, 311 F.3d 1206, 1211-13 (9th Cir. 2002) (remanding where government's efforts to provide alien notice were not reasonably calculated to reach alien because he reasonably relied on notice being provided to his attorney); *Flores-Chavez*, 362 F.3d at 1162-63 (holding that due process concerns counsel against accepting government's position that regulations do not require notice of proceedings to be given to responsible "adults taking custody of minor aliens"). "Actual notice is, however, sufficient to meet due process requirements." *Khan*, 374 F.3d at 829-30 (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) (alien demonstrated nonreceipt of hearing notice for purpose of rescinding in absentia order).

"[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." *Al Mutarreb v. Holder*, 561 F.3d 1023, 1028 n.6 (9th Cir. 2009). Note 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." *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009).

3. Hearing Date

This court has found that an IJ's unilateral advancement of a hearing date did not violate the alien's due process rights where a hearing was held and the alien 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 alien'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) (alien'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); *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 alien).

An IJ's pre-judgment of the merits of an alien's case has been held to violate an alien'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 alien 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) (alien deprived of neutral judge where IJ indicated that he had "already judged" the pro se alien'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 alien 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").

"[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 alien 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).

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).

6. Apparent Eligibility for Relief

"'[F]ailure to advise an alien of 'apparent eligibility' to apply for relief is a due process violation.'" *C.J.L.G. v. Sessions*, No. 16-73801, 2018 WL 576761, at *19 (9th Cir. Jan. 29, 2018) (quoting *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th Cir. 2013)). "[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)). The IJ must inform an alien of "apparent eligibility" for relief. *See 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 alien of apparent eligibility for relief violates due process and can serve as the basis for a collateral attack to a deportation order); *Bui v. INS*, 76 F.3d 268, 270-71 (9th Cir. 1996); *see also United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1130-31 (9th Cir. 2013). However, an IJ's duty to inform an alien 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).

"Apparent eligibility" for relief under immigration laws is a "reasonable possibility that the alien may be eligible for relief." *Lopez-Velasquez*, 629 F.3d at 896; *C.J.L.G.*, 2018 WL 2018 WL 576761, at *19-21 (concluding the IJ was not required to inform C.J. that he might be eligible for Special Immigrant Juvenile status); *Bui*, 76 F.3d at 270; *see also United States v. Melendez-Castro*, 671 F.3d

950, 954 (9th Cir. 2012) (per curiam) (alien not meaningfully advised of right to seek voluntary departure); *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204-05 (9th Cir. 2004) (per curiam) (due process violation where IJ failed to inform alien he was eligible for voluntary departure). *Cf. United States v. Moriel-Luna*, 585 F.3d 1191, 1197-98 (9th Cir. 2009) (concluding there was no due process violation where the alien 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").

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 alien; 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 Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000) (due process violation where alien appeared pro se and IJ failed sufficiently to explain that alien could be a witness even without an attorney, inadequately explained hearing procedures, and failed to explain what the alien had to prove to establish eligibility for asylum).

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). The IJ's exclusion of proffered evidence may result in a due process violation. *See 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 an alien from presenting testimony that may corroborate claims of past persecution may also result in a due process violation by depriving an alien 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) (alien'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 alien'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). 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).

729 F.3d at 889-90.

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 alien'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 alien about anything that was in written application, thereby preventing alien 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 alien was not deprived of due process where allowed to present evidence, including expert testimony and country reports, and alien was able to testify at length).

9. Exclusionary Rule and Admission of Evidence

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 rule generally does not apply in immigration proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); *see also 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.

However, the exclusionary rule may apply in immigration proceedings where the Fourth Amendment violation is egregious. *See Martinez-Medina*, 673 F.3d at 1033-34; *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448-49 (9th Cir. 1994). "For the exclusionary rule to apply in civil removal proceedings, a noncitizen must first establish (1) a prima facie case that law enforcement violated his or her Fourth Amendment rights; and (2) that the Fourth Amendment violation was egregious." *Sanchez v. Sessions*, 870 F.3d 901, 908 (9th Cir. 2017).

"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 (internal quotation, alteration, and citation omitted) (concluding IJ erred by denying motion to suppress where statements were obtained immediately following the unconstitutional entry of alien's home); *see also Sanchez*, 870 F.3d at 910-11 (concluding that Coast Guard officers egregiously violated Sanchez's Fourth Amendment rights, and holding that exclusionary rule applied); *Martinez-Medina*, 673 F.3d at 1034. Where egregious violations of the Fourth Amendment occur, the exclusionary rule may apply. *See Lopez-Rodriguez*, 536 F.3d at 1016-1019.

As the court explained in *Hong*, "[t]he blanket rule announced in *Lopez-Mendoza* did not address the potential exclusion of evidence in two circumstances. First, the rule did not cover instances where transgressions implicate fundamental fairness and undermine the probative value of the evidence obtained. Second, the Court did not address challenges to the INS's own internal regulations." *Hong*, 518 F.3d at 1035 (internal quotation marks and citations omitted).

"The inadmissibility of evidence that undermines fundamental fairness stems from the Fifth Amendment due process guarantee that operates in removal proceedings." *Hong*, 518 F.3d at 1035. However, not all violations of agency regulations result in the exclusion of evidence in proceedings:

> Instead, the BIA has adopted from the Ninth Circuit a two-prong test to evaluate the potential exclusion of evidence obtained through a violation of agency regulations. First, the regulation must serve a purpose of benefit to the alien. Second, the regulatory violation will render the proceeding unlawful only if the violation prejudiced interests of the alien protected by the regulation.

Id. (internal quotation marks and citation omitted). *See generally id*. at 1035-36 (concluding that the admission of evidence showing that cancellation applicant derived her permanent resident status as a minor through her father, who had inappropriately secured his own status, did not violate due process); *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)).

See also de Rodriguez-Echeverria v. Mukasey, 534 F.3d 1047, 1051 & 1053 n.4 (9th Cir. 2008) (declining to reach issue of whether IJ erred by admitting I-213 or by refusing to allow alien to testify, but concluding that alien was under arrest at the time she was interrogated and remanding for BIA to determine whether officers were required to warn her that she had a right to counsel and that her statements could be used against her).

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)). 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. This 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.

11. Right to Confront and Cross-Examine Witnesses

"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).

> The Supreme Court has explained that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269, 90 S. Ct. 1011. 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.' " *Id.* at 269–70, 90 S. Ct. 1011 (quoting *Greene v. McElroy*, 360 U.S. 474, 496–97, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959)).

Ching v. Mayorkas, 725 F.3d 1149, 1158-59 (9th Cir. 2013) (due process required a hearing with an opportunity for Ching to confront the witnesses against her). *See also Angov v. Holder*, 788 F.3d 893, 899 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 896 (2016) (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); *Hammad v. Holder*, 603 F.3d 536, 545-46 (9th Cir. 2010);

Gonzales, 454 F.3d 1014, 1021 (9th Cir. 2006); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997).

"[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 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 alien's counsel during the deposition, and official was made available during alien's hearing if additional testimony was needed); *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988).

"[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 that the alien engaged in alien smuggling 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; *Saidane*, 129 F.3d at 1065.

a. Opportunity to Examine Evidence

In *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013), the court held that IJ violated the 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. Holder*, 788 F.3d 893, 899 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 896 (2016) (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).

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 alien'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 alien'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 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 Alien 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); *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000). *Cf. Khan v. Ashcroft*, 374 F.3d 825, 829-30 (9th Cir. 2004) (alien's due process rights were not violated by IJ's failure to translate proceedings at master calendar hearing, where the alien 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 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) (no due process violation where alien 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).

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 alien 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 Gomez-Velazco v. Sessions*, 879 F.3d 989 (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 (9th Cir. 2008); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9th Cir. 2004). 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). This 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).

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." *Id*. (internal citations omitted); *see also 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 may be an abuse of discretion. *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."). "If the prejudice is so great as to potentially affect the outcome of the proceedings, the denial of counsel amounts to a violation of due process." *Tawadrus*, 364 F.3d at 1103; *see also Ram*, 529 F.3d at 1242. 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).

"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 alien was denied his statutory right to counsel); *see also Mendoza-Mazariegos*, 509 F.3d at 1084 (same).

Although for due process violations there must be a showing of prejudice for relief to be granted, it is an open question in this circuit whether a petitioner must show prejudice when he has been denied the statutory right to counsel in removal proceedings. *See Mendoza-Mazariegos*, 509 F.3d at 1084-85; *Hernandez-Gil*, 476 F.3d at 808; *Biwot*, 403 F.3d at 1100; *Baltazar-Alcazar*, 386 F.3d at 947.

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

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

Neither the due process clause nor the INA creates a categorical right to court-appointed counsel at government expense for alien minors. *See C.J.L.G. v. Sessions*, No. 16-73801, 2018 WL 576761, at *21 (9th Cir. Jan. 29, 2018) (holding that it is not established law that minors are categorically entitled to government-funded, court-appointed counsel, and C.J. failed to demonstrate a necessity for such counsel to safeguard his due process right to a full and fair hearing). Note that *C.J.LG*. did not hold, or even discuss, whether the Due Process Clause mandates counsel for unaccompanied minors. *Id*. at *22 (Owens, J. concurring).

See also Gomez-Velazco v. Sessions, 879 F.3d 989 (9th Cir. 2018) ("Gomez–Velazco was required to show prejudice in order to prevail on his due process claim. 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."); *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) 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). "[R]eliance upon the advice of a non-attorney cannot form the basis of a claim for ineffective assistance of counsel." *Hernandez*, 524 F.3d at 1020 (rejecting due process claim based on deficient advice from non-attorney immigration consultant).

"[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). An alien must also show prejudice by demonstrating the alleged violation affected the outcome of the proceedings. *See id.* *See also Lopez-Chavez*, 524 F.3d at 1017 (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."). This court has explained that "aliens 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 alien 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). "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) (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 an alien to provide correspondence from the Bar indicating receipt of complaint in order to comply with *Lozada* where the alien provided a copy of the complaint, along with a declaration from the attorney admitting responsibility and absolving his client of any culpability. *See Correa-Rivera v. Holder*, 706 F.3d

1128, 1131-34 (9th Cir. 2013) (holding the alien 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).

"[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 insure 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).

See also United States v. Lopez-Chavez, 757 F.3d 1033, 1041-42 (9th Cir. 2014) (counsel's concession that an alien'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*, 575 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 (9th Cir. 2012); *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 alien 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 aliens, 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. *Pallares–Galan*, 359 F.3d at 1096." 786 F.3d at 796.

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). Additionally, the court should "indulge every reasonable presumption against waiver and should not presume acquiescence in the loss of fundamental rights." *Id*. The foregoing is especially true where an uncounseled individual purportedly waived his right to appeal. *Id*.

In *United States v. Gomez*, this court held that the stipulated removal proceeding violated petitioner's due process rights because the government's introduction of a signed waiver did not prove by clear and convincing evidence that petitioner waived his right to appeal where the petitioner had difficulty reading Spanish, was uncounseled, and the immigration officer did not review the purported waiver with petitioner during their individual meeting. *Id*. 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.

19. Right to File Brief

The BIA's refusal to allow an appellant to file a brief may violate an alien's due process rights. *See Singh v. Ashcroft*, 362 F.3d 1164, 1168-69 (9th Cir. 2004) (BIA violated due process by refusing to accept late brief where alien 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).

This court has held that due process was violated when the BIA dismissed a motion before the expiration of the filing deadline based on an alien'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 an alien's due process rights 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); *see also 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. INS*, 361 F.3d 1152, 1157 (9th Cir. 2004) (summary dismissal appropriate where alien 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 an alien'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). However, for an alien to prevail on such a due process claim, the alien must overcome the presumption that the BIA considered the evidence. *Id.* 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 an alien 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 alien was incarcerated provided alien with notice required by due process).

23. Sua Sponte Credibility Determinations

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"). *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).

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).

Cross-reference: Credibility Determinations.

24. Detention

The Attorney General's statutory authority to detain aliens 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 Prieto-Romero v. Clark*, 534 F.3d 1053, 1067-68 (9th Cir. 2008). 8 U.S.C. § 1226(a) does not authorize indefinite detention. However, where an alien'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. "[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). *See also Rodriguez v. Robbins*, 804 F.3d 1060, 1078 (9th Cir. 2015), (addressing whether individuals detained under §§ 1226(c), 1225(b), 1226(a), and 1231(a) are entitled to bond hearings after they have been detained for six months and discussing history of cases concerning detention), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

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) (order) (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 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. Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." (internal citation and quotation marks omitted)).

Where the IJ inexplicably delegates his duties to develop the record in an unrepresented alien's case to the government attorney, the IJ creates an unfair conflict of interest on the government and deprives the alien of development of the record, thereby violating due process. *See Pangilinan*, 568 F.3d at 709-10.

See also 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).

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); *see also 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. Record of 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.*

28. Notice of Deadline

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 law was enacted by Congress and regulation that established procedures for filing motions to reopen. *See Luna v. Holder*, 659 F.3d 753, 75960 (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)). Although hearings by video conference are authorized, this 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 (the court rejected the petitioner's contention that his admission was coerced where he stated his statements were voluntary, he was treated fine, and held for only a brief period).

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. Notice and Opportunity to Respond

"Due process always requires, at a minimum, notice and an opportunity to respond." *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014). In *Raya-Vaca*, the court held that where an immigration officer failed, during expedited removal proceedings, to inform petitioner of the charge against him and to provide petitioner with the opportunity to review the sworn statement prepared by the officer, petitioner's due process rights were violated. *Id*. at 1202-06.

33. 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").

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 v. Sessions*, 868 F.3d 1118, 1121-22 (9th Cir. 2017), the court held the BIA abused its discretion by failing to explain why it allowed the IJ to disregard rigorous procedural requirements set forth in *In re M-A-M-*, 25 I. N. Dec. 474 (B.I.A. 2011), which explains that if an applicant shows an indicia of incompetency, the IJ has an independent duty to determine whether the applicant is competent.

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, this 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. 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 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).

"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. However, note that "the post IIRIRA reinstatement provision is impermissibly retroactive […] when applied to an [alien] 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).

However, reinstatement of a removal order is improper if the underlying removal proceedings are invalidated on constitutional grounds. *See Villa-Anguiano v. Holder*, 727 F.3d 873 (9th Cir. 2013). For instance, in *Villa-Anguiano*, the court held 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.

3. IIRIRA

The application of IIRIRA to place aliens 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) (alien 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 alien, 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*, 132 S. Ct. 1479 (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*, 132 S. Ct. 1479 (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 alien 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).

4. Adjustment of Status

The lawful denial of adjustment of status does not violate an alien's or the alien'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).

5. 8 C.F.R. § 245.2(a)(2)(i)(B)

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

6. 8 U.S.C. § 1231(b)(3)(B)(ii)

In *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013), the petitioner raised a facial challenge to 8 U.S.C. § 1231(b)(3)(B)(ii), "maintaining that the provision is unconstitutionally vague because the statute provides no definition of 'particularly serious crime.'" *Id.* at 1041-42. The court held that the petitioner's facial challenge failed because "there is an ascertainable group of circumstances as to which the statute, as interpreted, provides 'an imprecise but comprehensible normative standard ... rather [than] ... no standard ... at all.'" *Id.* at 1043 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.2 (1982)).

7. 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.'" *Alphonsus [v. Holder]*, 705 F.3d [1031, 1042 (9th Cir. 2013)] (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983))." *Dimaya v. Lynch*, 803 F.3d 1110, 1112–13 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016). In *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015), the Supreme Court noted the need for "efficiency, fairness, and predictability in the administration of immigration law." *Id.* 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 court "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 United States v. Hernandez-Lara*, 817 F.3d 651, 651 (9th Cir. 2016) (per curiam); *Dimaya*, 803 F.3d at 1120. However, the decision in *Dimaya*, did not cast any 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. Note that the United States Supreme Court granted certiorari in *Dimaya* in September 2016. *See* 137 S. Ct. 31 (2016).

8. 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), *cert. denied*, No. 17-313, 2018 WL 311332 (U.S. Jan. 8, 2018). In *Ledezma-Cosino*, the court determined that the "habitual drunkard" provision 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).

II. MISCELLANEOUS CONSTITUTIONAL ISSUES

A. Equal Protection Generally

Aliens 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." *Id.* (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).

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 Dillingham v. INS*, 267 F.3d 996, 1007 (9th Cir. 2001), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc). 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) ("[petitioner] has the burden to negate every conceivable basis which might support a legislative classification ... whether or not the basis has a foundation in the record." (internal quotation marks and citation omitted). "The government has no obligation to produce evidence to sustain the rationality of a statutory classification." *Gonzalez-Medina*, 641 F.3d at 336 (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) (NACARA §§ 202 and 203's nationality-based classifications 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

This court has held that treating those aliens 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 aliens 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. 8 C.F.R. § 1003.44

8 C.F.R. § 1003.44(k)(2), which permits aliens who were in proceedings before a certain date to file a motion to reopen to seek discretionary relief, but excludes aliens 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) (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. 8 U.S.C. § 1182 Waiver

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] aggravated felons while denying such a waiver to [lawful permanent resident] aggravated felons," the distinction does not violate equal

protection. *Id.* at 957-58; *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). Additionally, the court has held that there exists a rational basis for applying the seven-year residency requirement to lawful permanent residents ("LPR"), 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).

Additionally, this court has rejected an equal protection challenge to the "absence of a waiver provision in 8 U.S.C. § 1182(a)(2)(A)(i)(II) 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

This court previously 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), this 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. 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. 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), *cert. denied*, No. 17-313, 2018 WL 311332 (U.S. Jan. 8, 2018). "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. 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. 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. 8 C.F.R. § 245.2(a)(2)(i)(B)

"Under the regulation, 8 C.F.R. § 245.2(a)(2)(i)(B), [religious workers] are among the categories of applicants for lawful permanent resident … status who cannot file their visa applications concurrently with the petitions of their

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

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. 8 U.S.C. §§ 1401 and 1409

"The gender-based distinction infecting §§ 1401(a)(7) and 1409(a) and (c), … , violates the equal protection principle." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1700–01 (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*.

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.). "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 requires some judicial intervention in deportation cases. *See Lolong v. Gonzales*, 484 F.3d 1173, 1177 (9th Cir. 2007) (en banc).

The elimination of habeas corpus review over final orders of removal and deportation does not violate the Suspension Clause where judicial review of petitioner's claims by a court of appeals exists as a substitute. *See Puri v. Gonzales*, 464 F.3d 1038, 1042 (9th Cir. 2006).

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).

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 alien's expedited removal order did not violate the suspension clause).

C. 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 RFRA. *Id*. at 486.

D. 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, note that 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).