

# Immigration Law: A Primer

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## Dedication

In memory of my immigrant ancestors, including Christopher Bierman (arrived in Pennsylvania from Germany in 1754); Abraham Smelser (arrived in Texas–Republic of Mexico from the United States in 1829); Sarah and Henry Lonis (arrived in Texas–Republic of Mexico from the United States in 1830); Rafaela Adelina Sablich (arrived in the United States from Croatia in 1887); and Ivan (John Michael) Skaprlenda (arrived in the United States from Croatia in 1887).

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# Introduction

This monograph serves as an introduction to and overview of immigration law (and, to a lesser extent, the law governing noncitizens outside of the immigration context). A clear incongruity marks American immigration law and policy. We are, in a very real sense, a nation of immigrants. Our history testifies that we have generously taken in the “huddled masses yearning to breathe free.”<sup>1</sup> For example, during the fifteen-year period from 1991–2005, the United States granted legal permanent residence to nearly 14 million people,<sup>2</sup> more than four times the entire population of the state of Oklahoma. At times, however, racial, religious, and ideological biases have served as the primary building blocks of our immigration policy.<sup>3</sup>

For different reasons, the Supreme Court’s alienage jurisprudence contains a clear dichotomy.<sup>4</sup> In one line of cases, the Supreme Court employs the plenary power doctrine, giving near total deference to Congress’s substantive immigration policy choices. In another line of cases, the Supreme Court employs strict scrutiny to strike down state laws discriminating against legal aliens. Compare *Fiallo v. Bell*,<sup>5</sup> where the Court upheld a gender discriminatory provision of the Immigration and Nationality Act underscoring “the limited scope of judicial inquiry into immigration legislation,”<sup>6</sup> with *Graham v. Richardson*,<sup>7</sup> where the Supreme Court used strict scrutiny to strike down a state law that dis-

1. Emma Lazarus, *The New Colossus*, available at <http://www.libertystatepark.com/emma.htm>.

2. See Department of Homeland Security, Office of Immigration Statistics, 2008 Yearbook of Immigration Statistics 5, available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois\\_yb\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf).

3. See, e.g., Select Commission on Immigration and Refugee Policy, Staff Report: U.S. Immigration Policy and the National Interest 161–216 (1981); Kevin Johnson, *The “Huddled Masses” Myth: Immigration and Civil Rights* (2004).

4. See, e.g., Michael Scaperlanda, *Illusions of Liberty and Equality: An “Alien’s” View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 *Cath. U.L. Rev.* 5 (2005); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 *Iowa L. Rev.* 707 (1996).

5. 430 U.S. 787 (1977).

6. *Id.* at 792 (“This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admissions of aliens.”) (internal quotation marks omitted).

7. 403 U.S. 365 (1971).

criminated against noncitizens, concluding that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”<sup>8</sup> How the Supreme Court reconciles these lines of cases is addressed *infra* Part III. For now, we turn to a brief history of U.S. immigration law.

From the founding of the Republic until 1875, the only federal immigration legislation was the unpopular 1798 Alien and Sedition Act,<sup>9</sup> which expired in 1800.<sup>10</sup> Before 1875, states often imposed their own restrictions on immigration.<sup>11</sup> In 1875, Congress began regulating various aspects of immigration. Over the next forty years, Congress created broad categories of excludable aliens, a narrower class of deportable aliens, and the beginnings of an immigration bureaucracy. Prostitutes, certain convicts, idiots, lunatics, the feeble-minded, the insane, paupers, polygamists, epileptics, those suffering from certain contagious diseases, and persons likely to become public charges were among the excludable class. The exclusion of Chinese nationals (in 1882) and anarchists (after the assassination of President McKinley) established the principle that noncitizens could be excluded based on race or ideology. This period also witnessed the first immigration laws (contract labor laws) designed to protect the U.S. labor market.

To the qualitative restrictions on immigration, in 1921 Congress added numerical restrictions for the first time as a temporary measure. Numerical restrictions became a permanent part of the immigration landscape in 1924. Admissions were allocated by national origin under a formula that severely curtailed immigration from eastern and southern Europe, barred immigration by those coming from the Orient, and left immigration from the western hemisphere without numerical restriction.

In 1952, over the veto of President Truman, Congress enacted the McCarran-Walter Act,<sup>12</sup> codifying and modifying existing immigration law. This act, designated the Immigration and Nationality Act (INA),

8. *Id.* at 372.

9. Act of June 25, 1798, 1 Stat. 570.

10. For a more detailed historical overview, see 1 Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, *Immigration Law and Procedure* §§ 2.01–2.04 (1997).

11. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833 (1993).

12. Pub. L. No. 82-414, 66 Stat. 163 (1952).

has been modified several times in the ensuing years and still governs immigration law. Major amendments to the INA came in 1965, including the elimination of racial and national-origin discrimination, which had been part of the quota formula from the beginning of numerical restrictions. Congress enacted comprehensive refugee legislation in the form of the Refugee Act of 1980.<sup>13</sup> “It is now the principal domestic statutory law governing both overseas refugees and . . . noncitizens who have reached United States territory and seek either asylum or nonrefoulement.”<sup>14</sup>

Several pieces of immigration legislation became law in 1986, chiefly the Immigration Reform and Control Act of 1986 (IRCA)<sup>15</sup> and the Immigration Marriage Fraud Amendments Act of 1986 (IMFA).<sup>16</sup> Pursuant to IRCA, several million unauthorized aliens were legalized under what has generally been known as an amnesty for illegal aliens. The act also created a system of employer sanctions, which requires employers to check the identity and work authorization of all new employees. Employer sanctions were designed to eliminate job opportunities for unauthorized workers, thereby reducing if not eliminating a powerful immigration pull factor. To combat possible discrimination, the act forbids employers from looking beyond the face of documents showing identity and work authorization, and created an antidiscrimination regime to remedy potential discrimination. Under the IMFA, those who immigrate based on a marriage that is less than two years old are conditional permanent residents for their first two years in the United States. Those convicted of aggravated felonies became deportable pursuant to the Anti-Drug Abuse Act of 1988.<sup>17</sup> As we shall see, from its humble beginnings, this deportability ground has grown to dominate the field of criminal deportations.

The Immigration Act of 1990<sup>18</sup> ushered in an era of increased immigration as the annual ceiling for worldwide immigration increased to 700,000, exclusive of the 125,000 refugee slots. Congress prioritized

13. Pub. L. No. 96-212, 94 Stat. 102 (1980).

14. Stephen Legomsky & Cristina M. Rodríguez, *Immigration and Refugee Law and Policy* 883 (5th ed. 2009).

15. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

16. Pub. L. No. 99-639, 100 Stat. 3537 (1986).

17. Pub. L. No. 100-690, § 5, 102 Stat. 4181 (1988).

18. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

family unity, reserving a supermajority of the annual allotment for relatives of U.S. citizens and permanent resident aliens. The act reorganized and added new categories for employment-based immigration and created a new immigrant stream through a “diversity” lottery.<sup>19</sup> It also added new, and amended existing, nonimmigrant categories and reorganized and updated the grounds for exclusion and deportation.

The Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>20</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>21</sup> were two of the major pieces of legislation affecting aliens and passed in 1996. In the wake of the Oklahoma City bombing, these acts were enforcement-oriented, expanding the categories of inadmissible and deportable aliens, restricting relief from deportation, streamlining removal and other immigration procedures, providing for increased detention of removable aliens, and attempting to strip courts of jurisdiction to review numerous immigration matters. Similarly, post-September 11, 2001, much of the immigration legislation has focused on enforcement and combating terrorism. The USA Patriot Act of 2001<sup>22</sup> increased border security in both numbers and technology, expanded the definition of “terrorist” and “terrorist organization,” provided for increased interagency contact and cooperation, granted the Department of Justice greater powers to detain, and expanded the monitoring of foreign students. The Homeland Security Act of 2002<sup>23</sup> created the Department of Homeland Security (DHS) and abolished the Immigration and Naturalization Services (INS), dispersing its functions to the United States Citizen and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP), all agencies within DHS. The REAL ID Act of 2005<sup>24</sup> further broadened the definition of “terrorism” and greatly restructured the process for judicial review of immigration decisions, eliminating general habeas jurisdiction but granting courts of appeals jurisdiction to hear constitutional claims and questions of law pursuant to petitions for review.

19. Diversity lottery is discussed *infra* Part IV.B.3.

20. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

21. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

22. Pub. L. No. 107-56, 115 Stat. 272 (2001).

23. Pub. L. No. 107-296, Title IV, Subtitles B, D, E, & F, 116 Stat. 2135 (2002).

24. Pub. L. No. 109-13, 119 Stat. 231 (2005).

## I. Administrative Structure

Immigration law is governed largely by the Immigration and Nationality Act (INA)<sup>25</sup> as amended over the years since its initial enactment in 1952. Several federal administrative agencies implement the nation's immigration laws. Until 2003, the Immigration and Naturalization Service (INS), located within the Department of Justice, played a central role. With the creation of the Department of Homeland Security (DHS) in the aftermath of September 11, 2001, the immigration bureaucracy was radically restructured, with major responsibilities given to DHS.

The U.S. Citizenship and Immigration Services (USCIS), an entity within DHS, provides a wide range of immigration services and benefits to noncitizens seeking entry into or continued stay within the United States.<sup>26</sup> Among other tasks, the USCIS adjudicates immigrant petitions, naturalization petitions, and asylum petitions through its headquarters in Washington, D.C., and its various field offices and service centers throughout the United States and across the globe. The two enforcement entities, both located within DHS, are the U.S. Customs and Border Protection (CBP)<sup>27</sup> and the U.S. Immigration and Customs Enforcement (ICE).<sup>28</sup> CBP provides border enforcement, including enforcement at interior points of entry. ICE is responsible for interior investigation and enforcement.

The Department of State's Bureau of Consular Affairs<sup>29</sup> adjudicates visa applications at U.S. embassies and consulates throughout the world. The Department of Labor<sup>30</sup> plays a central role in administering many of the employment-based immigrant and nonimmigrant categories for admission into the United States. The Office of Refugee Resettlement in the Department of Health and Human Services (HHS) is charged with the care of unaccompanied minors.<sup>31</sup> HHS also coordi-

25. The McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (as amended).

26. *See generally* <http://www.uscis.gov/portal/site/uscis>.

27. *See generally* <http://www.cbp.gov/>.

28. *See generally* <http://www.ice.gov/index.htm>.

29. *See generally* [http://travel.state.gov/visa/visa\\_1750.html](http://travel.state.gov/visa/visa_1750.html).

30. *See generally* <http://www.foreignlaborcert.doleta.gov/>.

31. *See generally* <http://www.acf.hhs.gov/programs/orr/programs/index.html>.

nates the effort to deny entry to aliens on statutorily mandated health-related grounds.<sup>32</sup>

The Executive Office for Immigration Review (EOIR)<sup>33</sup> resides in three units within the Department of Justice. Within the EOIR, the Office of the Chief Immigration Judge<sup>34</sup> oversees the fifty-four immigration courts throughout the nation where immigration judges (IJs) conduct formal removal hearings, adjudicating whether to deny entry, deport, or grant relief to aliens facing removal. The Board of Immigration Appeals (BIA)<sup>35</sup> hears appeals (mostly “paper reviews”) from IJ decisions and certain decisions made by the USCIS. The Office of the Chief Administrative Hearing Officer (OCAHO),<sup>36</sup> within the EOIR, coordinates a team of administrative law judges who hear cases involving unauthorized employment and unlawful employment practices as mandated by the INA.

32. *See generally* <http://www.cdc.gov/ncidod/dq/health.htm>.

33. *See generally* <http://www.usdoj.gov/eoir/>. In the fall of 2009, the National Association of Immigration Judges began an effort to have immigration judges reclassified as Article I judges, giving them independence from the Department of Justice. *See* Marcia Coyle, *Immigration Judges Seek Article I Status*, Nat'l L.J. (Aug. 10, 2009), available at [http://law.psu.edu/\\_file/immigrants/Marcia\\_Coyle\\_article.pdf](http://law.psu.edu/_file/immigrants/Marcia_Coyle_article.pdf).

34. *See generally* <http://www.usdoj.gov/eoir/ocijinfo.htm>.

35. *See generally* <http://www.usdoj.gov/eoir/biainfo.htm>.

36. *See generally* <http://www.usdoj.gov/eoir/ocahoinfo.htm>.

## II. Judicial Review

Questions of scope and standard of review will be addressed at various points throughout the monograph. This section focuses specifically on three aspects of judicial review: jurisdictional issues; the interplay between the BIA's structural reforms and judicial review; and deference to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>37</sup> (hereinafter referred to as “*Chevron* deference”). As to jurisdiction, since 1996 “Congress . . . tried to reduce the quantity and quality of judicial review of administrative removal orders” by attempting “to both narrow the appeals process and to bar categories of claims and claimants from federal court review of these administrative orders.”<sup>38</sup> This congressional strategy did not work. “The litigation response was to argue about whether a person was within the barred group or making a disfavored claim.”<sup>39</sup> Professor Stephen Legomsky reports some remarkable trends in judicial review of immigration cases. “In 2002 . . . only 5% of the BIA decisions were being appealed to the federal courts. By November 2004 that figure was 25%. Conversely, in 2001 immigration cases accounted for approximately 3% of the combined dockets of the U.S. courts of appeals; by 2003, that figure had leaped to 15%.”<sup>40</sup> “In 2006, immigration cases made up an astounding 40% of the entire Ninth Circuit docket.”<sup>41</sup> After a 781% increase in filings of immigration cases in the Second Circuit, “44% of the Second Circuit’s total docket” was immigration cases for the year ending in June of 2004.<sup>42</sup> As Profes-

37. 467 U.S. 837 (1984).

38. Lenni Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in Federal Courts*, 51 N.Y.L. Sch. L. Rev. 37, 41 (2006–2007).

39. *Id.*

40. Stephen Legomsky & Cristina M. Rodríguez, *Immigration and Refugee Law and Policy* 758 (5th ed. 2009) (citations omitted). “As of September 2005, the immigration cases represented 18% of the appellate civil docket.” Benson, *supra* note 38, at 39.

41. Legomsky & Rodríguez, *supra* note 40, at 758 (citations omitted).

42. *Id.* at 759. Professor Lenni Benson reports a “970% increase in the total number of cases seeking judicial review of immigration orders” in the decade between 1996 and 2006. Lenni Benson, *Seeking Review: Immigration Law and Federal Court Jurisdiction*, 51 N.Y.L. Sch. L. Rev. 3, 4 (2006–2007). For another excellent article on this subject, see John Palmer, Stephen Yale-Loehr, & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent*

sor Lenni Benson predicted in 1997, Congress’s “efforts to ‘streamline’ the removal of noncitizens from the United States has not created a more efficient structure. In fact, it has inadvertently returned to an historical model of judicial review in immigration proceedings that was inefficient in its form and often ineffective in expediting the removal of noncitizens.”<sup>43</sup>

Before the enactment of the Immigration and Nationality Act in 1952, habeas corpus provided the vehicle by which aliens could have their deportation orders reviewed by federal district courts.<sup>44</sup> Between 1952 and 1961, the Administrative Procedure Act’s provisions for judicial review applied to immigration cases.<sup>45</sup> In 1961, Congress amended the INA to provide for appeal of deportation orders directly to the courts of appeals, leaving exclusion orders to be reviewed by district courts in habeas proceedings.<sup>46</sup>

This regime remained fairly stable for the next thirty-five years until major immigration reform in 1996. Two statutes enacted that year—the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—purported to restrict judicial review by certain disfavored groups (e.g., many categories of criminal aliens) and of certain disfavored claims (e.g., discretionary denials) while restructuring the review process as a whole. These measures spurred a decade of litigation over the jurisdiction of federal courts to review immigration cases,

*Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 94 (2005). The authors conclude: “our data support the hypothesis that appeal rate has increased as a result of a surge in BIA decisions that leave non-detained aliens with final expulsion orders and a fundamental shift in behavior among lawyers and their clients, causing them to focus their litigation in the courts of appeals for the first time. We think this fundamental shift was triggered by the high volume of final expulsion orders that began to be issued starting in March 2002 and a general dissatisfaction with the BIA’s review.” *Id.*

In his 2005 Annual Report, Second Circuit Chief Judge John M. Walker, Jr. noted that “[i]n fiscal year 2001, we had 170 BIA appeals filed with our court. In 2005, we received 4,568 immigration appeals.” U.S. Courts Second Circuit Report 2005, *available at* <http://www.ca2.uscourts.gov/Reports/05/2005%20Annual%20Report%20-%20FINAL.htm>.

43. Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411, 1417 (1997).

44. See Gerald Seipp, *Federal Court Jurisdiction to Review Immigration Decisions: A Tug of War between the Three Branches*, 07-04 Immigr. Briefings 1 (Apr. 2007).

45. *Id.*

46. *Id.*

the scope of such review, and the standard of review. Since much of this case law has been affected by the REAL ID Act of 2005, an extended exploration of the issues raised by the court-stripping provisions of AEDPA and IIRIRA and various solutions arrived at by the courts is beyond the scope of this monograph, although such a review may be helpful for putting into context the current situation facing the federal courts.<sup>47</sup>

The 1996 provisions caused much immigration litigation to shift from the courts of appeals via petitions for review to the district courts via habeas petitions. In *Immigration and Naturalization Service v. St. Cyr*,<sup>48</sup> the Supreme Court held that the 1996 amendments to the INA had not stripped the courts of habeas jurisdiction to review a question of law pertaining to whether certain statutorily provided discretionary relief was available for a deportable alien. Since the statute did not clearly foreclose habeas review, and since such foreclosure would raise serious constitutional questions with respect to the suspension of habeas corpus, the Court construed the statute as allowing review.<sup>49</sup> In a footnote, the Court added: “As to the question of timing and congruent means of review, we note that Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.”<sup>50</sup>

### A. *The REAL ID Act’s Effect on Judicial Review*

With the REAL ID Act, Congress has done just this, amending the statute explicitly to substitute direct appeals to the courts of appeals for the unwieldy habeas process that had been a norm for ten years. INA § 242 requires that an appeal of a removal order (except one that is issued in an expedited removal) be filed directly with the courts of appeals.<sup>51</sup>

47. For an excellent review of this decade of litigation, see David McDonnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996–2005)*, 51 N.Y.L. Sch. L. Rev. 75, 82–104 (2006–2007).

48. 533 U.S. 289 (2001).

49. *Id.* at 314.

50. *Id.* at 314 n.38.

51. 8 U.S.C. § 1252(a)(1) (2006). Limited habeas review remains available in the district courts—although limited to three specific and narrow issues—for those challenging an expedited removal order on one of the narrow grounds. *Id.* at (e).

According to the Act, this petition for review is the exclusive method for getting a removal order before the court:

Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms “judicial review” and “jurisdiction to review” include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).<sup>52</sup>

Congress has placed several restrictions on this exclusive method of judicial review, stripping courts of jurisdiction to consider a number of aspects of the removal order. The Act strips courts of jurisdiction to review agency judgments with respect to the granting or denying of waivers of criminal and fraud grounds of inadmissibility under INA § 212(h) or (i).<sup>53</sup> Review of decisions regarding cancellation of removal pursuant to INA §§ 240A and 240B and review of agency discretionary decisions are also prohibited.<sup>54</sup> The Act also strips courts of jurisdiction to review removal orders that are based on certain criminal grounds of inadmissibility or deportability.<sup>55</sup> In what appears to be a recognition of the constitutional issues raised by the Supreme Court in

52. INA § 242(a)(5), 8 U.S.C. § 1252(a)(1) (2006). *See also* 8 U.S.C. § 1252(a)(5) (2006) (pertaining to review of claims under the Convention Against Torture). As if to drive home the point, the Act also says: “Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.” 8 U.S.C. § 1252(b)(9) (2006).

53. *Id.* § 1252(a)(2)(B).

54. *Id.*

55. *Id.* § 1252(a)(2)(C).

*St. Cyr*, Congress has specifically provided that the court-stripping provisions shall not “be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court in accordance with this section.”<sup>56</sup>

INA § 242 provides fairly tight deadlines for aliens seeking review of removal orders.<sup>57</sup> It also provides certain guidelines for the scope and standard of review:

Except as provided in paragraph (5)(B)–

- (A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,
- (B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,
- (C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and
- (D) the Attorney General’s discretionary judgment whether to grant relief under section 1158(a) [asylum] of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B) [asylum], 1229a(c)(4)(B) [relief from removal], or 1231(b)(3)(C) [withholding of removal] of this title, unless the court finds, pursuant to section 1252(b)(4)(B) [B above] of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.<sup>58</sup>

What is the practical effect upon the federal courts of INA § 242 as amended by the REAL ID Act? Perhaps the biggest impact is that the REAL ID Act forecloses all (or nearly all) habeas claims from those seeking review of removal orders, shifting work from the federal district courts to the courts of appeals and from habeas to petitions for review. The First Circuit said: “The plain language of these amendments, in

56. *Id.* § 1252(a)(2)(D).

57. *Id.* § 1252(b)(1) & (3)(C).

58. *Id.* § 1252(b)(4).

effect, strips the district court of habeas jurisdiction over final orders of removal, including orders issued prior to the enactment of REAL ID Act.”<sup>59</sup> The Fifth Circuit said: “The REAL ID Act . . . supplies, in this context, the ‘clear statement of congressional intent to repeal habeas jurisdiction’ that the *St. Cyr* Court found lacking.”<sup>60</sup> The REAL ID Act also specifically grants courts jurisdiction to review constitutional issues and questions of law even in cases where review is otherwise barred. The Third Circuit said:

Congress evidenced its intent to restore judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders. This now permits all aliens, including criminal aliens, to obtain review of constitutional claims and questions of law upon the filing of a petition for review with an appropriate court of appeals.<sup>61</sup>

The Second Circuit said: “[A] primary effect of the REAL ID Act . . . is . . . to limit all aliens to one bite of the apple . . . [and thereby] streamline what the Congress saw as uncertain and piecemeal review of orders of removal, divided between the district courts (habeas corpus) and the courts of appeals (petitions for review).”<sup>62</sup> One practitioner-commentator has suggested that “it appears for the moment that the REAL ID Act has restored order to the INA’s judicial review procedures, and has eliminated the potential for confusion.”<sup>63</sup>

But many questions remain unresolved. Does INA § 242 provide an adequate alternative to habeas review in all cases, or will there still be some cases where habeas review is either dictated by statutory construction or constitutional mandate? What is a question of law that can be reviewed? Does it include so-called mixed questions of law and fact? What are discretionary acts of the immigration authorities? Do the courts, for example, have jurisdiction to review questions of statutory eligibility for discretionary relief?

59. *Ishak v. Gonzales*, 422 F.3d 22, 29 (1st Cir. 2005).

60. *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 512 (5th Cir. 2006).

61. *Papageorgiou v. Gonzales*, 413 F.3d 356, 358 (3d Cir. 2005).

62. *Xiao Ji Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 324 n.3 (2d Cir. 2006) (internal quotation marks and citations omitted).

63. David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996–2005)*, 51 N.Y.L. Sch. L. Rev. 75, 110 (2006–2007).

A few cases have addressed the argument that Congress has unconstitutionally suspended the writ of habeas corpus by stripping courts of habeas jurisdiction without providing an adequate and effective alternative. To date, all courts have found that the Act provides a constitutionally adequate substitute, at least as applied in the cases before them.<sup>64</sup> In *Mohamed v. Gonzales*, Mohamed challenged the REAL ID Act as applied, arguing that the

court cannot consider his commitment order, because it is not part of the record before this court. Mohamed contends that essential to habeas review is the ability to offer evidence outside the record. Mohamed concludes that the Act does not provide an adequate and effective alternative to habeas review, and violates the Suspension Clause as applied to him.<sup>65</sup>

The Eighth Circuit noted that

Mohamed could have introduced the order during the removal proceedings, on appeal to the Board (when he was represented by counsel), or through a motion to reopen. . . . That Mohamed here failed to make such a motion, or otherwise to introduce the commitment order until now, does not make the remedy inadequate or ineffective as a matter of law.<sup>66</sup>

Since “Congress has created a remedy as broad in scope as a habeas petition, [i]t is an adequate and effective substitute to test the legality of a person’s detention.”<sup>67</sup>

Other cases have addressed the issue of what is a “question of law” for which judicial review has been preserved by INA § 242(a)(2)(D). Several courts of appeals have concluded, for example, that the timeliness of the filing of an asylum claim, which involves a determination of the date of entry by the alien into the United States, is a factual question for which there is no judicial review.<sup>68</sup> But questions of great complexity lurk beneath the surface.

The Second Circuit has said:

The term “constitutional claims” clearly relates to claims brought pursuant to provisions of the Constitution of the

64. See, e.g., *Enwonwu v. Gonzales*, 438 F.3d 22 (1st Cir. 2006).

65. 477 F.3d 522, 525–26 (8th Cir. 2007) (internal citation omitted).

66. *Id.* at 526.

67. *Id.*

68. E.g., *Yakovenko v. Gonzales*, 477 F.3d 631, 635 (8th Cir. 2007).

United States. By contrast, “questions of law” does not have a similarly clear meaning, and the terms of the REAL ID Act provide no guidance as to the precise content of that phrase, which is subject to countless interpretations. Construed in the broadest sense possible, “questions of law” would encompass any question related to law or having any legal dimension—that is, anything pertaining to the work in which courts are engaged, including virtually all decisions in the immigration field.<sup>69</sup>

Finding the text ambiguous, the court “construe[d] the intent of Congress’s restoration under the REAL ID Act rubric of ‘constitutional claims or questions of law’ to encompass the same types of issues that courts traditionally exercised in habeas review over Executive detentions.”<sup>70</sup> It suggested that “questions of law” encompassed more than statutory interpretation, possibly including statutory eligibility for discretionary relief, abuse of discretion, applying an improper standard when exercising discretion, and improperly failing to apply discretion.<sup>71</sup> Even after the REAL ID Act, the courts remain without jurisdiction (in reviewing discretionary decisions and orders related to the removal of certain criminal aliens) to review “the correctness of an IJ’s fact-finding or the wisdom of his exercise of discretion.”<sup>72</sup>

But to determine which side of the divide (discretionary decision/fact-finding or questions of law) a claim falls on requires careful analysis. Fact-finding “flawed by an error of law, such as might arise where the IJ states that his decision was based on petitioner’s failure to testify to some pertinent fact when the record of the hearing reveals unambiguously that the petitioner *did* testify to that fact” is reviewable.<sup>73</sup> Similarly, “a discretionary decision [that] is argued to be an abuse of discretion because it was made without rational justification or based on a legally erroneous standard” involves questions of law.<sup>74</sup>

In teasing out the line between “questions of law” and factual/discretionary issues, several cancellation-of-removal cases are in-

69. *Xiao Ji Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 324 (2d Cir. 2006).

70. *Id.* at 326–27.

71. *Id.* at 327–28.

72. *Id.* at 329. *See also, e.g.*, *Rodrigues-Nascimento v. Gonzales*, 485 F.3d 60, 62 (1st Cir. 2007).

73. *Xiao Ji Chen*, 471 F.3d at 329.

74. *Id.*

structive. Constitutional questions and questions of law that arise in the context of a claim for cancellation of removal are reviewable by the courts under the REAL ID Act.<sup>75</sup> Courts have jurisdiction to review the agency's fact-finding using the substantial-evidence standard for questions of statutory eligibility—the threshold issues—such as the question of good moral character and continuous physical presence.<sup>76</sup> But determination as to whether the applicant has shown “exceptional and extremely unusual hardship” requires discretionary judgment, which is unreviewable.<sup>77</sup> The circuits are split, however, over whether the “extreme cruelty” provision is discretionary or factual/legal.<sup>78</sup>

The issue of court jurisdiction to review the revocation of an immigrant visa has occasioned another circuit split. The question is “whether the decision to revoke a visa pursuant to 8 U.S.C. section 1155 involve[s] the exercise of discretion, thus stripping [the courts of appeals] of jurisdiction to review the decision.”<sup>79</sup> Following the Third<sup>80</sup> and the Seventh Circuits,<sup>81</sup> the Fifth Circuit held that review was precluded.

The statutory language indicates that the decision is left to the discretion of the Secretary [of Homeland Security]. The only language that indicates that the discretion could be limited is the “good and sufficient cause” phrase. However, when read in context and as a whole, the statute makes clear that Congress delegates to the Secretary the decision to determine what constitutes

75. *E.g.*, *Elysee v. Gonzales*, 437 F.3d 221, 223 (1st Cir. 2006).

76. *See, e.g.*, *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850–51 (9th Cir. 2004) (continuous physical presence); *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (whether character of alien fell within one of the “per se exclusion” characters, which bar finding of good moral character).

77. *E.g.*, *De La Vega v. Gonzales*, 436 F.3d 141, 146 (2d Cir. 2006).

78. *Compare* *Wilmore v. Gonzales*, 455 F.3d 524, 526–29 (5th Cir. 2006) (discretionary), *with* *Hernandez v. Ashcroft*, 345 F.3d 824, 833–34 (9th Cir. 2003) (factual).

79. *Ghanem v. Upchurch*, 481 F.3d 222, 223 (5th Cir. 2007).

80. *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196 (3d Cir. 2006).

81. *El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004). *See also* *Holy Virgin Prot. Cathedral v. Chertoff*, 499 F.3d 658, 662 (7th Cir. 2007) (passage of the REAL ID Act does not alter outcome).

good and sufficient cause. . . . Congress's intent is apparent: the good and sufficient cause is what the Secretary deems it to be.<sup>82</sup>

The Fifth Circuit concluded: "We interpret the phrase 'for what he deems' as vesting complete discretion in the Secretary. . . . To suggest otherwise and create a judicial standard or 'clarification' for good and sufficient cause would replace the Secretary's judgment with judicial oversight clearly not contemplated by the statute."<sup>83</sup>

In contrast, the Ninth Circuit found jurisdiction. In *Ana Intern, Inc. v. Way*, that court said that "[t]o put a purely subjective construction on the statute is to render the words 'good and sufficient cause' meaningless."<sup>84</sup> In that circuit, "[t]he rule is that any purely legal, non-discretionary question that was a decision factor remains reviewable, whether or not the decision as a whole is discretionary."<sup>85</sup>

The reasoning employed by the courts in the cancellation-of-removal and visa-revocation contexts could also be applied to other cases where the agency exercises some level of discretion. Adjustment of status, removal of conditional residence status, bond determinations, motions for continuances, the ultimate asylum determination, and motions to reopen or reconsider, for instance, all involve discretion. But the exercise of discretion in these cases is subject to judicial review to the extent that the review petition raises constitutional questions or questions of law as defined by the courts.<sup>86</sup>

82. *Ghanem*, 481 F.3d at 224 (quoting the statute: "The Secretary . . . may, at any time, *for what he deems to be* good and sufficient cause, revoke the approval of any petition approved by him . . .").

83. *Id.* at 225.

84. *Ana Intern, Inc. v. Way*, 393 F.3d 886, 893 (9th Cir. 2004).

85. *Id.* at 895 ("When the [Secretary of Homeland Security] relies upon discrete legal classifications of an individual or an act to reach a decision, even where that decision involves a certain measure of discretion, the meaning of that particular legal classification nevertheless remains a reviewable point of law.").

86. In its October 2009 Term, the Supreme Court will decide whether INA § 242(a)(2)(B)(ii) precludes judicial review of BIA decisions denying motions to reopen immigration proceedings. See *Kucana v. Holder*, 533 F.3d 534 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3594 (U.S. Apr. 27, 2009) (No. 08-911).

### *B. Board of Immigration Appeals Streamlining and Judicial Review*

The dramatic increase in the federal courts of appeals' immigration docket may be at least partially the result of lack of confidence in the administrative process occasioned by the BIA streamlining its review process.<sup>87</sup> Historically, the BIA sat in three-member panels and issued written opinions in nearly every case.<sup>88</sup> In 1999, the BIA began the process of affirming without opinion (AWO) in a small number of cases.<sup>89</sup> Faced with lengthening backlogs, in 2002 the Attorney General promulgated a Board reform rule, which expanded the authority of a single BIA member to issue an AWO.<sup>90</sup> In fiscal year 2007, AWOs accounted for 10% of the BIA's decisions.<sup>91</sup> Since the reform, the backlog, which had been 56,000 pending cases in 2002, including 10,000 that were more than three years in the queue, had been reduced to 27,000 by June 2008, with 90% of the pending cases filed in fiscal years 2007 and 2008.<sup>92</sup>

87. See John Palmer, Stephen Yale-Loehr, & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 94 (2005).

88. See Department of Justice, Executive Office for Immigration Review, "Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents," 73 Fed. Reg. 34,654, 34,655 (proposed June 18, 2008) [hereinafter EOIR, *Proposed Rule*].

89. *Id.*

90. *Id.* ("Under the current regulations, a single Board member will affirm an immigration judge's decision without opinion when he or she is satisfied that the immigration judge's decision reached the correct result, that any errors were harmless or nonmaterial, and that the issues on appeal are either (1) squarely controlled by precedent and do not require an application of precedent to a novel factual scenario, or (2) are not so substantial as to warrant the issuance of a written opinion in the case.").

91. *Id.* at 34,655–56.

92. *Id.* at 34,656 ("At present, the principal cause of delay in the Board's adjudications relates to the time required for preparation of transcripts of the immigration judge proceedings and other steps needed to complete the record. EOIR is already working to reduce those delays in response to another Attorney General directive.").

The reforms have survived due process and administrative law challenges in the courts of appeals.<sup>93</sup> But in several cases, the courts of appeals have criticized “some cases where the immigration judge’s conduct was intemperate or abusive, raising the concern that such conduct was not adequately addressed by the Board’s decisions, particularly in cases where the Board issued an AWO.”<sup>94</sup> In response to the criticism, the Department of Justice undertook an extensive review of the immigration courts and the BIA, with the Attorney General ordering a reform of the reform at the conclusion of the review process.<sup>95</sup> The BIA expanded from eleven members to fifteen members and, in June 2008, the Executive Office for Immigration Review proposed a rule that would “encourage the increased use of one-member written opinions to address poor or intemperate immigration judge decisions, instead of issuing affirmances without opinion.”<sup>96</sup>

The success of the 2002 and 2008 reforms rests on a delicate balance—providing fair proceedings, efficiently. Annually, 220 immigration judges adjudicate 350,000 cases,<sup>97</sup> and the BIA issues over 40,000 decisions.<sup>98</sup> As the Second Circuit noted, “[t]he BIA’s ‘streamlining’ regulations were enacted in response to a crushing backlog of immigration appeals, the continuing existence of which prevents the speedy resolution of proceedings vitally important to thousands of aliens.”<sup>99</sup>

93. See, e.g., *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272 (4th Cir. 2004); *Zhang v. U.S. Dep’t of Justice*, 362 F.3d 155 (2d Cir. 2004); *Yuk v. Ashcroft*, 355 F.3d 1222 (10th Cir. 2004); *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc).

94. EOIR, *Proposed Rule*, *supra* note 88, at 34,656. For further detail, see cases cited *infra* notes 206–07 and accompanying text.

95. *Id.* at 34,655.

96. *Id.* “The Board may consider exercising its discretion to issue a written order in those cases in which the immigration judge’s decision would otherwise meet the criteria for AWO, but the immigration judge exhibited inappropriate conduct at the hearing or made intemperate comments in the oral decision.” *Id.* at 34,656.

97. *Id.* at 34,659 n.3. This caseload takes a toll on immigration judges who “face significant risks of stress and burnout,” experiencing more burnout than prison wardens and doctors serving busy hospitals. See Stuart Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Study*, 23 *Geo. Immigr. L.J.* 57 (2008).

98. EOIR, *Proposed Rule*, *supra* note 88, at 34,659 n.3.

99. *Guyadin v. Gonzales*, 449 F.3d 465, 469 (2d Cir. 2006).

The percentage of BIA decisions issued AWO decreased from 36% in fiscal year 2003 to 10% in fiscal year 2007.<sup>100</sup> The proposed rule, which will expand the ability of a single member of the BIA to issue an opinion, ought to reduce that percentage even further.

The courts of appeals are split on the question of whether they possess the jurisdiction to review the choice of an AWO in a specific case. In *Ngure v. Ashcroft*, the Eighth Circuit said that “[s]everal considerations lead us to conclude that the BIA’s decision whether to employ the AWO procedure in a particular case is committed to agency discretion and not subject to judicial review.”<sup>101</sup> First, the decisions over the allocation of an agency’s scarce resources are not typically subject to judicial review.<sup>102</sup> Second, the streamlining regulations were a management tool and did not create substantive rights.<sup>103</sup> “Third, the specific determinations that Ngure would have us review are not amenable to judicial consideration.”<sup>104</sup> The Tenth Circuit agrees with the Eighth.<sup>105</sup>

The First Circuit disagrees. In *Haoud v. Ashcroft*, that court said

the Board’s own regulation provides more than enough “law” by which a court could review the Board’s decision to streamline. . . . [T]he Board cannot affirm an IJ’s decision without opinion if the decision is incorrect, errors in the decision are not harmless or immaterial, the issues on appeal are not squarely controlled by Board or federal court precedent and involve the application of precedent to a novel fact situation, or the issues raised on appeal are so substantial that a full written opinion is necessary.<sup>106</sup>

Therefore, the First Circuit concluded that the streamlining provisions were not beyond judicial review as committed to agency discretion.<sup>107</sup> The Third and the Ninth Circuits follow this approach.<sup>108</sup>

100. EOIR, *Proposed Rule*, *supra* note 88, at 34,656.

101. *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004).

102. *Id.*

103. *Id.* at 983–84.

104. *Id.* at 985.

105. *Tsegay v. Ashcroft*, 386 F.3d 1347, 1355–58 (10th Cir. 2004).

106. *Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003).

107. *Id.* (“Especially when the Board’s review of an IJ’s decision often hinges on Circuit court precedent, we are well-equipped, both statutorily and practically, to review a decision to streamline.”).

The question of whether the alien has exhausted the available administrative remedies has also become an issue with the BIA's use of AWO and short opinions where the BIA merely adopts the opinion of the immigration judge. In *Abebe v. Gonzales*, the Ninth Circuit held that summary affirmance, without qualification, meant that the BIA had considered every issue litigated before the IJ; therefore, issues litigated before the IJ but not raised on appeal to the BIA passed through the BIA and could be raised on appeal.<sup>109</sup>

### C. *The Scope of Chevron Deference*

“It is well-established that Congress delegated to the BIA the authority to promulgate rules, on behalf of the Attorney General, that carry the force of law ‘through a process of case-by-case adjudication.’”<sup>110</sup> Therefore, *Chevron*<sup>111</sup> deference is due the BIA's precedential legal interpretations whether or not those decisions are inconsistent with past agency decisions.<sup>112</sup> Additionally, “prior judicial construction of a statute trumps [a later] agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no

108. *Smriko v. Ashcroft*, 387 F.3d 279, 292–93 (3d Cir. 2004); *Chen v. Ashcroft*, 378 F.3d 1081, 1087–88 (9th Cir. 2004).

109. *Abebe v. Gonzales*, 432 F.3d 1037, 1040–41 (9th Cir. 2005) (en banc). *See also* *Pasha v. Gonzales*, 433 F.3d 530, 534 (7th Cir. 2005).

110. *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012 (9th Cir. 2006) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)). *See also* 8 U.S.C. § 1103(a)(1) (2006); 8 C.F.R. § 1003.1(d)(1) (2006).

111. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

112. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. For if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” (internal quotations omitted)).

room for agency discretion.”<sup>113</sup> Following this reasoning, the Tenth Circuit, in *Hernandez-Carrera v. Carlson*,<sup>114</sup> concluded that even the Supreme Court’s interpretation of an ambiguous statute is tentative, subject to a reasonable revision by the agency entrusted with the power to administer the statute.<sup>115</sup> In *Hernandez-Carrera*, the Tenth Circuit concluded that the Supreme Court’s method, in *Zadvydas v. Davis*,<sup>116</sup> of narrowing the scope of the broad statute permitting detention pending removal of an alien from the United States in order to avoid constitutional difficulties “is not the only permissible one. The AG, pursuant to his statutory delegation of regulatory authority, has selected a different method of conforming the statute to the requirements of the Constitution.”<sup>117</sup> The Fifth Circuit disagreed, concluding “that the *Zadvydas* court resolved this ambiguity.”<sup>118</sup>

Given the many gaps yet to be filled in the immigration statutes, the large number of nonprecedent decisions issuing from the BIA,<sup>119</sup> and the BIA streamlining provisions, the courts of appeals have grappled with how to apply appropriate deference to the BIA. *United States v. Mead*<sup>120</sup> limits *Chevron* deference to those situations where it “appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation

113. *Id.* at 982. See, e.g., *Zhang v. Mukasey*, 543 F.3d 851 (6th Cir. 2008). See also *Gonzales v. Dep’t of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007):

Although a three-judge panel is usually bound by the opinion of a prior three-judge panel, we have recognized an exception where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, such that the prior three-judge panel’s decision has been “effectively overruled.” This is such a situation. The Supreme Court’s opinions in *Chevron* and *Brand X* together hold that to the extent that [our prior decision] was grounded in the ambiguous language of the statute, the BIA’s reasonable discretionary construction of the statute in [its own later decision] has effectively overruled [our] contrary holdings.

*Id.* at 1236 n.7 (internal quotations and citations omitted).

114. 547 F.3d 1237 (10th Cir. 2008).

115. *Id.* at 1248.

116. 533 U.S. 678 (2001).

117. *Hernandez-Carrera*, 547 F.3d at 1248 (quoting *Thai v. Ashcroft*, 389 F.3d 967, 971 (9th Cir. 2004) (Kozinski, J., dissenting from denial of en banc)).

118. *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008).

119. The BIA issues over 40,000 decisions annually. See EOIR, *Proposed Rule*, *supra* note 88, at 34,659. Forty were designated as “precedent decisions in 2007 and another twenty-five were so designated in 2006.” *Id.*

120. 533 U.S. 218 (2001).

claiming deference was promulgated in the exercise of that authority.”<sup>121</sup> Nonprecedential interpretation made by an IJ or the BIA is subject to *Skidmore*<sup>122</sup> deference, which means that a court is bound to follow the interpretation only if that interpretation is found persuasive.<sup>123</sup>

Courts have held that *Chevron* deference is not due an IJ interpretation that is only summarily affirmed by the BIA.<sup>124</sup> In explaining its conclusion, the Second Circuit said:

[W]ere we to accord *Chevron* deference to non-binding IJ statutory interpretations, we could find ourselves in the impossible position of having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction we had affirmed as reasonable the Monday before. Such a scenario cannot be countenanced in a system of law.<sup>125</sup>

The Seventh Circuit, relying on *INS v. Aguirre-Aguirre*,<sup>126</sup> concluded that the decision of a single BIA member was entitled to *Chevron* deference where the BIA member “provided reasoning, albeit brief, to which [the court could] defer.”<sup>127</sup> The Ninth Circuit came to the opposite conclusion and refused to grant *Chevron* deference to the unpublished decision of a single BIA member.<sup>128</sup> That the decision was made by a single BIA member, and that it was unpublished, provided independent justifications for denying *Chevron* deference.<sup>129</sup> The Ninth Circuit distinguished *Aguirre-Aguirre*, noting that it was decided prior to

121. *Id.* at 226–27. See also *Brand X*, *supra* note 112.

122. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

123. See, e.g., *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1014 (9th Cir. 2006).

124. *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 924 (9th Cir. 2006); *Lin v. U.S. Dep’t of Justice*, 416 F.3d 184, 187 (2d Cir. 2005).

125. *Lin*, 416 F.3d at 190.

126. 526 U.S. 415, 425 (1999) (“In addition [to *Chevron* deference], we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’”).

127. *Gutnik v. Gonzales*, 469 F.3d 683, 690 (7th Cir. 2006).

128. *Garcia-Quintero*, 455 F.3d at 1012–13. See also *Rotimi v. Gonzales*, 473 F.3d 55, 57–58 (2d Cir. 2007).

129. *Garcia-Quintero*, 455 F.3d at 1012–13. “The BIA’s Practice Manual reiterates this requirement that three-member panels decide precedential cases.” *Id.* at 1013. “[A]ccording to the Board’s own internal policies, unpublished decisions are binding on the parties to the decision but are *not* considered precedent for unrelated cases.” *Id.* (internal quotations omitted).

*Mead* and that “the unpublished order in *Aguirre-Aguirre* relied on a statutory interpretation . . . that the BIA had adopted in an earlier precedential decision.”<sup>130</sup>

The courts have also faced the issue of how to proceed with questions of statutory interpretation in the absence of guidance from the BIA. In *INS v. Orlando Ventura*, the Supreme Court said:

Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance in the immigration context. The BIA has not yet considered the “changed circumstances” issue. And every consideration that classically supports the law’s ordinary remand requirement does so here. The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.<sup>131</sup>

Following *Ventura* and *Gonzales v. Thomas*, the Second Circuit remanded an asylum case to the BIA, offering the agency the opportunity to exercise its mandate and expertise to formulate uniform rules. In *Ucelo-Gomez v. Gonzales*,<sup>132</sup> the Second Circuit faced the question of whether “affluent Guatemalans” constitute a “particular social group” for asylum purposes.<sup>133</sup>

The BIA has not decided whether affluent Guatemalans constitute a “particular social group” within the meaning of the INA. Nor has the BIA decided the scope of the statutory term in a fact context sufficiently analogous to those presented here that we can rule now with assured confidence that petitioners are or are not part of a particular social group. Because there is no basic asylum eligibility decision by the BIA, we remand.<sup>134</sup>

130. *Id.* at 1014.

131. *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002). *See also* *Gonzales v. Thomas*, 547 U.S. 183, 186–87 (2006).

132. 464 F.3d 163 (2d Cir. 2006).

133. For further discussion of what constitutes a “particular social group” for asylum purposes, see *infra* Part X.B.1.

134. *Ucelo-Gomez*, 464 F.3d at 170. *See also* *Velazquez-Herrera v. Gonzales*, 466 F.3d 781, 783 (9th Cir. 2006) (“Given that the Board has twice touched upon the issue of child abuse without authoritatively defining the term, and that the Board’s two definitions are

The court noted that although the BIA remains free on remand to issue a precedential or nonprecedential ruling, it hoped that the BIA would provide precedential guidance because of “a press of cases raising similar questions in this Court, in the BIA, and before immigration judges; [therefore] the common project of deciding asylum cases promptly will be advanced by prompt guidance.”<sup>135</sup>

not consistent with each other, we think it prudent to allow the BIA in the first instance to settle upon a definition of child abuse in a precedential opinion.”).

135. *Ucelo-Gomez*, 464 F.3d at 172. The court gave the BIA forty-nine days to issue a responsive opinion. *Id.*

### III. Constitutional Framework

The Constitution expressly grants Congress the authority to regulate foreign commerce<sup>136</sup> and to adopt a uniform rule of naturalization.<sup>137</sup> There is, however, no express immigration or alienage power enumerated in the Constitution. Who has the authority to regulate noncitizens generally and the admission, exclusion, and deportation of noncitizens more specifically? What is the scope of that authority? On these issues, the constitutional text is silent.

The Supreme Court has concluded that the immigration power is plenary and rests in the hands of the political branches of the federal government, stating repeatedly “that ‘over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.’”<sup>138</sup> And “[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.”<sup>139</sup> From the beginning of its immigration jurisprudence, “the Supreme Court has recognized the power to exclude aliens is ‘inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.’”<sup>140</sup> This

136. U.S. Const. art. I, § 8, cl. 3.

137. *Id.* at cl. 4.

138. *E.g.*, *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978 (9th Cir. 2006) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotation marks deleted)).

139. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

140. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889)).

“plenary power”<sup>141</sup> over immigration encompasses questions of expulsion and deportation as well as admission and exclusion.<sup>142</sup>

Although the Supreme Court grants extreme deference to Congress and the executive branch with respect to the review of substantive immigration law, the jurisprudence governing the constitutional rights of noncitizens is nuanced and complex. In addition to substantive constitutional issues in the immigration context, courts address an array of procedural due process questions as well as substantive constitutional questions outside the context of admission, exclusion, and deportation of noncitizens. The following section explores those issues.

### A. State Power Over Immigration and Noncitizens

States have no immigration power,<sup>143</sup> and local laws can be preempted by the federal government’s immigration power.<sup>144</sup> “But the [Supreme] Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”<sup>145</sup>

141. For a sampling of the abundant scholarly literature on the plenary power doctrine, see, e.g., Juliet Stumpf, *Citizens of An Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. Davis L. Rev. 79 (2004); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 Geo. Immigr. L.J. 339 (2002); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. 925 (1995); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 Wis. L. Rev. 965 (1993).

142. E.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners . . . rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent entrance into the country.”), *quoted in Kay v. Reno*, 94 F. Supp. 2d 546, 551 (M.D. Pa. 2000); *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002).

143. *Herrera-Inirio v. INS*, 208 F.3d 299, 307 (1st Cir. 2000) (“In short, immigration is uniquely a matter of federal, not local, concern.”).

144. *Id.* at 307–08 (“Because Congress possesses plenary authority over immigration-related matters, it may freely displace or preempt state laws in respect to such matters,” disallowing state “legislative choices respecting subjects the States may consider important.”).

145. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

## 1. Strict Scrutiny

The general rule, laid down in *Graham v. Richardson*,<sup>146</sup> is that state discrimination will be strictly scrutinized because “classifications based on alienage, like those based on nationality or race, are inherently suspect . . . Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”<sup>147</sup> Using strict scrutiny, the Supreme Court struck down state classifications that denied permanent resident aliens, or some subset of this group, welfare benefits,<sup>148</sup> college financial aid,<sup>149</sup> the opportunity to compete for state civil service jobs,<sup>150</sup> and the opportunity to work as an attorney,<sup>151</sup> civil engineer,<sup>152</sup> and notary public.<sup>153</sup>

The Fifth Circuit, however, has distinguished between permanent resident aliens and resident nonimmigrant aliens, concluding that the latter are not members of a suspect or quasi-suspect class entitled to heightened judicial review. The plaintiffs in *LeClerc v. Webb*<sup>154</sup> unsuccessfully challenged a Louisiana bar rule that made nonpermanent resident aliens ineligible for law licensure. After determining that the *Graham* strict scrutiny standard was inapplicable, the court upheld the Louisiana rule using the rational basis test.<sup>155</sup> Seven judges dissented from the denial of a petition for rehearing en banc, concluding that “the court reache[d] [its] result by judicially crafting a subset of aliens, scaled by how it perceives the aliens’ proximity to citizenship. This is a bold step not sanctioned by Supreme Court precedent.”<sup>156</sup>

146. 403 U.S. 365 (1971).

147. *Id.* at 372–73.

148. *Id.* at 376.

149. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

150. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

151. *In re Griffiths*, 413 U.S. 717 (1973).

152. *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976).

153. *Bernal v. Fainter*, 467 U.S. 216 (1984).

154. 419 F.3d 405 (5th Cir. 2005). *See also* *League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 533 (6th Cir. 2007). *But see* *Kirk v. N.Y. State Dep’t of Educ.*, 562 F. Supp. 2d 405, 411 (W.D.N.Y. 2008) (applied strict scrutiny to cases involving nonimmigrant aliens, specifically rejecting the rationale offered in *LeClerc* and *LULAC*).

155. *LeClerc*, 419 F.3d at 422. *See also* *LULAC*, 500 F.3d at 533 (distinguishing between lawful permanent residents and lawful temporary residents in issuing drivers’ licenses).

156. *LeClerc v. Webb*, 444 F.3d 428, 429 (5th Cir. 2006) (Higginbotham, J., dissenting from denial of petition for rehearing en banc).

## 2. Public Function Exception

The general rule of strict scrutiny of state laws gives way to a more deferential standard when state government discriminates against aliens (or some subset of aliens) with respect to employment “intimately related to the process of democratic self-government.”<sup>157</sup> In other words, the Supreme Court sees no relevant difference between legal aliens (at least permanent resident aliens) and citizens when it comes to the state distributing the ordinary benefits and burdens of society. But when the state is engaged in the process of forming the political community, the Court holds that the state can consider the citizenship distinction decisive.<sup>158</sup> Because the Court refuses to strictly scrutinize all state laws adversely affecting resident aliens, it has developed a test for determining when to jettison strict scrutiny. If the classification is not tailored to encompass only those positions that “go to the heart of representative government,” the law receives strict scrutiny. If, however, the classification is sufficiently narrow to restrict access to only those jobs involving the development, implementation, and execution of “broad public policy,” then the Court will employ a more deferential standard of review akin to rational basis.<sup>159</sup>

The public function exception to strict scrutiny has been used by the Supreme Court to uphold state laws that place a citizenship requirement for employment eligibility as public school teachers,<sup>160</sup> police officers,<sup>161</sup> and probation officers.<sup>162</sup> More recently, however, in *Chang v. Glynn County School District*,<sup>163</sup> a district court applied strict scrutiny in enjoining a school district from terminating the employment of two resident alien teachers. Distinguishing *Ambach v. Nor-*

157. *Bernal v. Fainter*, 467 U.S. 216, 220 (1984).

158. *See Foley v. Connelie*, 435 U.S. 291, 295–96 (1978).

159. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982).

160. *Ambach v. Norwick*, 441 U.S. 68 (1979).

161. *Foley*, 435 U.S. 291.

162. *Cabell*, 454 U.S. 432.

163. 457 F. Supp. 2d 1378 (S.D. Ga. 2006).

wick,<sup>164</sup> the court concluded that the Georgia law swept too broadly, “generally banning aliens from all public employment.”<sup>165</sup>

### 3. Federal Authorization of State Discrimination

Federal preemption provided a second rationale for striking down the discriminatory welfare provisions in *Graham v. Richardson*.<sup>166</sup> “State alien residency requirements that either deny welfare benefits to non-citizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.”<sup>167</sup> But what if Congress, pursuant to its immigration power, authorized the states to enact discriminatory laws? Citing *Shapiro v. Thompson*,<sup>168</sup> the *Graham* Court, in dicta, reiterated that “Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.”<sup>169</sup> Therefore, to avoid the constitutional problem, the Court concluded that Congress had not authorized the states to impose citizenship or durational residency requirements on the receipt of welfare benefits.<sup>170</sup>

In *Soskin v. Reinertson*,<sup>171</sup> the Tenth Circuit addressed the issue of whether Congress is constitutionally authorized to allow states to develop standards differentiating on the basis of alienage, where such authorization would be impermissible if distinctions were drawn between classes of citizens. Acting pursuant to congressional authorization given in the Welfare Reform Act,<sup>172</sup> Colorado made a class of legal aliens ineligible for certain Medicaid benefits. Analyzing *Graham*, the Tenth Circuit said that “[t]he question is not whether Congress can authorize” the states to violate the Equal Protection Clause; the “ques-

164. 441 U.S. 68 (1979).

165. *Chang*, 457 F. Supp. 2d at 1381. The court found that the Georgia statute suffered defects similar to those present in the statute struck down in *Sugarman v. Dougall*, 413 U.S. 634 (1973).

166. 403 U.S. 365 (1971).

167. *Id.* at 380.

168. 394 U.S. 618, 641 (1969).

169. *Graham*, 403 U.S. at 382.

170. *Id.* at 382–83.

171. 353 F.3d 1242 (10th Cir. 2004).

172. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105 (1996).

tion is what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens,” given Congress’s plenary power over such questions.<sup>173</sup> Since Congress had authorized the discriminatory measures at issue, the court concluded that the deferential rational-basis review should be employed rather than strict scrutiny.<sup>174</sup> One judge dissented, arguing that strict scrutiny was the proper standard for reviewing state alienage discrimination.<sup>175</sup>

## B. Federal Power Over Immigration and Noncitizens

### 1. Government Benefits

In *Mathews v. Diaz*,<sup>176</sup> the Supreme Court upheld federal legislation that employed alienage discrimination to deny some permanent resident aliens federal welfare benefits, concluding that “it is unquestionably reasonable for Congress to make an alien’s eligibility depend on both the character and the duration of his residence.”<sup>177</sup> The Court rejected the strict scrutiny test applied in *Graham v. Richardson*,<sup>178</sup> stating that “significantly different considerations” are at play when the federal government makes distinctions based on alienage because, unlike the states, “it is the business of the political branches of the Federal Government . . . to regulate the conditions of entry and residence of aliens.”<sup>179</sup>

In *Hampton v. Mow Sun Wong*,<sup>180</sup> the Court invalidated the Civil Service Commission rule that restricted employment in the federal civil service to citizens on the ground that the commission has “no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies.”<sup>181</sup> The Court assumed, however, that Congress and the President had the

173. *Soskin*, 353 F.3d at 1254–55.

174. *Id.* at 1255 (citing *Mathews v. Diaz*, 426 U.S. 67, 78–83 (1976)).

175. *Id.* at 1275 (Henry, J., dissenting).

176. 426 U.S. 67 (1976).

177. *Id.* at 82–83. *See also* *City of Chicago v. Shalala*, 189 F.3d 598 (7th Cir. 1999) (using rational-basis review, court upheld Welfare Reform Act of 1996 despite fact that it significantly restricted permanent resident aliens’ access to welfare benefits).

178. 403 U.S. 365 (1971).

179. *Mathews*, 426 U.S. at 84.

180. 426 U.S. 88 (1976).

181. *Id.* at 114.

power to prohibit aliens from receiving jobs in the federal civil service.<sup>182</sup>

## 2. Criminal Prosecution

The Supreme Court has held that aliens are entitled to the same criminal procedural rights as citizens before criminal punishment can be imposed on them.<sup>183</sup> Lower courts have said, however, that Congress can distinguish between citizens and aliens, making some substantive criminal statutes only applicable against aliens. For example, several courts of appeals have held that the Hostage Taking Act<sup>184</sup> is constitutional, despite the fact that its criminal penalties are only imposed on aliens.<sup>185</sup>

Significantly, the Supreme Court has consistently concluded that neither deportation nor exclusion constitute punishment.<sup>186</sup> Therefore, an alien being deported or excluded is not entitled to a government-funded attorney or the other procedural protections offered criminal defendants by the Constitution.<sup>187</sup> Similarly, the constitutional prohibition of *ex post facto* laws does not apply in the immigration context.<sup>188</sup>

182. *Id.* Following the *Hampton* decision, President Ford, through an executive order, reinstated the ban on alien employment in the competitive civil service, and this order was upheld by lower courts. See *Vergara v. Hampton*, 581 F.2d 1281, 1286–87 (7th Cir. 1978); *Santin Ramos v. U.S. Civil Serv. Comm’n*, 430 F. Supp. 422, 424–25 (D.P.R. 1977); *Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 44–46 (N.D. Cal. 1977), *aff’d sub nom.* *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980).

183. See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). The Court has held, however, that an alien sitting in a United States prison is not entitled to the Fourth Amendment’s exclusionary rule protection for a search conducted in Mexico. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–75 (1990). See also Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 912 (1991); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive United States v. Verdugo-Urquidez?*, 56 Mo. L. Rev. 213, 224 (1991).

184. Pub. L. No. 98-473, Title II, § 2002(a), 98 Stat. 2186 (1984), *codified as amended at* 18 U.S.C. § 1203 (2006).

185. See, e.g., *United States v. Ferreira*, 275 F.3d 1020 (11th Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002); *United States v. Montenegro*, 231 F.3d 389 (7th Cir. 2000); *United States v. Santos-Riviera*, 183 F.3d 367 (5th Cir. 1999); *United States v. Lue*, 134 F.3d 79 (2d Cir. 1998); *United States v. Lopez-Flores*, 63 F.3d 1468 (9th Cir. 1995).

186. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

187. E.g., *Murgia-Melendrez v. U.S. INS*, 407 F.2d 207, 209 (9th Cir. 1969).

188. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594–95 (1952).

### 3. Substantive Immigration Law

When the Supreme Court addresses substantive immigration issues—issues of admission, exclusion, and expulsion—it approaches, but does not embrace, the complete deference attendant in the political question doctrine. Deference is due, the Court has said, because “any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”<sup>189</sup> Therefore, “responsibility for regulating the relationship between the United States and our alien visitors” is “frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.”<sup>190</sup> This “plenary power” is at its zenith with respect to aliens outside the United States as the “Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”<sup>191</sup>

Despite criticism from the bench<sup>192</sup> and from many scholarly commentators,<sup>193</sup> the Court has steadfastly refused to assimilate its federal alienage jurisprudence into mainstream constitutional law.<sup>194</sup> Instead of applying heightened scrutiny, as would be required by domestic constitutional norms, the Court has exercised deference in sanction-

189. *Id.* at 588–89.

190. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

191. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

192. For a look at the history of dissent in federal alienage cases, see generally Michael Scaperlanda, *Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases*, 47 Okla. L. Rev. 55 (1994).

193. See, e.g., Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 Cal. L. Rev. 553 (2008); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 Cal. L. Rev. 373 (2004); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 Geo. Immigr. L.J. 339 (2002); Gabriel Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 Iowa L. Rev. 707 (1996); Stephen Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. 925 (1995); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 Wis. L. Rev. 965 (1993); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992).

194. Scaperlanda, *Partial Membership*, *supra* note 193, at 723–24.

ing the discriminatory exclusion and/or deportation of aliens on the basis of race,<sup>195</sup> speech,<sup>196</sup> and gender.<sup>197</sup>

#### 4. Procedural Due Process

The decision to remove (by exclusion or deportation) an alien from the United States has long been considered a civil matter, not a criminal one; therefore, the alien in removal proceedings is entitled to none of the panoply of constitutional criminal procedure rights.<sup>198</sup> Any alien, whether in the United States legally or not, is entitled to the protections afforded by the Due Process Clause of the Fifth Amendment with respect to any removal decision.<sup>199</sup> A permanent resident alien who is returning to the United States after a non-lengthy trip abroad is similarly entitled to due process protection.<sup>200</sup>

Aliens who have not entered the country and do not fall within the exception for returning permanent residents receive no constitutional due process protection with respect to the government's decision to deny entry, even if the denial leads to indefinite confinement.<sup>201</sup> Aliens at ports of entry (including interior airports) and aliens who have been

195. *E.g.*, *The Chinese Exclusion Case*, *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (“If . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed . . .”); *Fong Yue Ting v. United States*, 149 U.S. 698, 730–32 (1893) (upholding expulsion of Chinese citizens).

196. *E.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 765–70 (1972) (upholding exclusion based on political opinion); *Galvan v. Press*, 347 U.S. 522, 528–32 (1954) (upholding deportation because of prior membership in Communist Party). *Mandel* does allow “limited judicial review of First Amendment claims” to challenge either “a consular officer’s visa denial” or “the Attorney General’s denial of a waiver of admissibility.” *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 124–25 (2d Cir. 2009).

197. *E.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 68–73 (2001) (upholding citizenship statute that treats father–child relationship less favorably than mother–child relationship); *Fiallo v. Bell*, 430 U.S. 787, 797–800 (1977) (upholding law that treated relationship between natural mother and her offspring more favorably than relationship between natural father and his offspring for immigration purposes).

198. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

199. *See, e.g.*, *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903).

200. *Landon v. Plasencia*, 459 U.S. 21 (1982).

201. *See id.* at 32 (“Court has long held that an alien seeking initial admission to the United States requests a privilege and has no Constitutional rights regarding his application.”).

paroled into the country have not entered the country; therefore, unless they are returning permanent residents, they are not entitled to due process. The Court, in *Shaughnessy v. United States ex rel. Mezei*,<sup>202</sup> rejected a noncitizen's claim to due process even though he faced indefinite detention on Ellis Island pending removal to a third country. Mezei, a permanent resident alien who had resided in the United States for a quarter of a century, had made a twenty-one-month trip abroad. Upon his attempted return, the government permanently excluded him and refused to reveal its evidence of excludability, even *in camera*, to a U.S. district court judge. The Supreme Court rejected Mezei's due process claim, holding that the constitutional guarantee of due process did not extend to an alien at the border (a legal fiction because of his actual physical presence on U.S. soil). "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>203</sup>

For those aliens entitled to due process in immigration proceedings—aliens who have entered the country (whether legally or not) or permanent residents who are returning after a short period abroad—the question is what process is due. In determining the process due, the Court, in *Landon v. Plasencia*,<sup>204</sup> used the balancing test it had adopted in *Mathews v. Eldridge*: "In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the cur-

202. 345 U.S. 206 (1953). In *Landon v. Plasencia*, 459 U.S. 21, 33–34 (1982), the Court distinguished *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), because the alien in *Mezei* had been absent from the United States for "some twenty months," not "only a few days."

203. *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). See also Gerald L. Neuman, *Discretionary Deportation*, 20 Geo. Immigr. L.J. 611, 635 (2006) ("Since 1996, tens of thousands of aliens are denied entry every year in reliance on *Knauff*, without the opportunity to consult an attorney or present witnesses, because immigration inspectors have concluded that their papers are defective or that they are lying. On the other hand, deportation from within the United States requires procedural due process, evaluated by the usual standards.").

204. 459 U.S. 21 (1982).

rent procedures rather than additional or different procedures.”<sup>205</sup> Because the proceedings prescribed by statute and rule clearly exceed the constitutional minima in most cases, claims of denial of due process often rest on case-specific facts, with the alien prevailing in some cases<sup>206</sup> and the government in others, especially when no prejudice is shown.<sup>207</sup>

*a. Due Process and Detention*

The detention of noncitizens raises a host of difficult constitutional issues.<sup>208</sup> For what reasons and for how long can an alien be detained pending a removal hearing and during the removal process? For what reasons and for how long can an alien be detained pending removal from the country after an order of removal has been entered? Can noncitizens be detained indefinitely? Under what conditions?

*Demore v. Kim*<sup>209</sup> addressed a question of mandatory detention. In that case, the Supreme Court concluded that Congress acted within constitutional bounds when it required *mandatory* detention of certain criminal aliens “during removal proceedings.”<sup>210</sup> In accord with this

205. *Id.* at 34 (paraphrasing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)). *See also* Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. Pa. L. Rev. 1267 (1975) (discussing elements of a fair hearing).

206. *See, e.g.*, *Florioiu v. Gonzales*, 481 F.3d 970 (7th Cir. 2007) (manifestation of clear bias by immigration judge against aliens constituted denial of due process); *Cham v. Att’y Gen. of U.S.*, 445 F.3d 683 (3d Cir. 2006) (verbal abuse, brow beating of witness, belligerence in questioning, refusal to consider significant evidence, and “wholesale nitpicking” by immigration judge amounted to violation of due process); *Ray v. Gonzales*, 439 F.3d 582 (9th Cir. 2006) (ineffective assistance of counsel in deportation proceedings can amount to due process violation); *Amadou v. INS*, 226 F.3d 724 (6th Cir. 2000) (alien deprived of due process because of interpreter incompetence).

207. *See, e.g.*, *United States v. DeLeon*, 444 F.3d 41 (1st Cir. 2006) (year-long delay in preparing transcript not due process violation absent showing of prejudice); *Khan v. Att’y Gen. of U.S.*, 448 F.3d 226 (3d Cir. 2006) (no due process violation in denying continuance absent showing of prejudice); *Gishta v. Gonzales*, 404 F.3d 972 (6th Cir. 2005) (alleged problems with interpreter not a due process violation where immigration judge had no notice of problems).

208. Detention of aliens for national security reasons not directly involving immigration questions is beyond the scope of this monograph. For further reading, see *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

209. 538 U.S. 510 (2003).

210. *Id.* at 531. Detention during removal proceedings is a constitutionally permissible part of that process. *See, e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)

ruling, where Congress has determined that a category of criminal aliens ought to be detained during removal proceedings and the affected alien falls within that category, the Constitution does not always require an individualized hearing to determine potential flight risk or danger to the community posed by the alien.

The Supreme Court addressed indefinite detention in *Zadvydas v. Davis*.<sup>211</sup> Using the clear statement rule or the doctrine of constitutional avoidance,<sup>212</sup> the Court construed an immigration statute authorizing extended detention pending removal as not permitting indefinite detention. Reaffirming that an alien who has entered the United States is entitled to due process, the Court opined that a statute that would allow indefinite and possibly permanent detention without a showing that the alien would be a danger to the community and without adequate judicial review “would raise a serious constitutional problem.”<sup>213</sup>

*Zadvydas* and *Demore* leave several questions unanswered. Neither case addressed the detention of inadmissible aliens. It is unclear whether *Mezei*, in which the Court concluded that a permanent resident, returning after an extended absence, could be held indefinitely and potentially permanently without a hearing where the only other option was to release him into the United States,<sup>214</sup> survives these cases. On the one hand, the *Zadvydas* Court said:

(“We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid.”).

211. 533 U.S. 678 (2001).

212. The Court stated: “[I]t is a cardinal principle’ of statutory interpretation, however, that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’ *Crowell v. Benson*, 285 U.S. 22, 62 (1932).” *Zadvydas*, 533 U.S. at 689. The Court went on to state: “Despite this constitutional problem, if ‘Congress has made its intent’ in the statute ‘clear, “we must give effect to that intent.”” *Miller v. French*, 530 U.S. 327, 336 (2000).” *Zadvydas*, 533 U.S. at 696 (internal citation omitted).

213. *Id.* at 690. See *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008) (habeas petition granted; statute, as interpreted by *Zadvydas* and *Clark*, does not permit indefinite detention of any class of removable aliens, even those who are mentally ill and may pose a threat to the community).

214. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (discussed *supra* notes 202–03 and accompanying text).

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint."<sup>215</sup>

In *Clark v. Martinez*,<sup>216</sup> the Court concluded that the detention statute interpreted in *Zadvydas* as not allowing indefinite detention of deportable aliens applies in the same way to inadmissible aliens despite the dissimilarity in constitutional concerns. The question remains open as to whether aliens who have not been admitted have a constitutional due process right against indefinite detention<sup>217</sup> and, if so, whether they have a constitutional right to release from custody or a right to an individualized hearing to determine the question of release.

On the other hand, the *Zadvydas* Court distinguished *Mezei*:

Although *Mezei*, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect. As the Court emphasized, the alien's extended departure from the United States required him to seek entry into this country once again. His presence on Ellis Island did not count as entry into the United States. Hence, he was "treated," for constitutional purposes, "as if stopped at the border." And that made all the difference.<sup>218</sup>

215. *Zadvydas*, 533 U.S. at 690 (internal citations omitted).

216. 543 U.S. 371 (2005).

217. See *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 78 U.S.L.W. 3237 (U.S. Oct. 20, 2009) (No. 08-1234) (no due process rights). *But see* *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005) (citing *Zadvydas* and *Clark* as providing analogous reasoning for releasing two Guantanamo Bay prisoners who were held for nine months after a determination that they were no longer enemy combatants).

218. *Zadvydas*, 533 U.S. at 693 (internal citations omitted).

It will be left to future judicial decisions, therefore, to tease out the effects of *Zadvydas*, if any, on the due process rights of detained aliens who have not yet entered the country.

The questions presented in *Zadvydas* and *Demore* intersect in cases where the removal proceeding drags on for months or even years. In *Tijani v. Willis*,<sup>219</sup> the Ninth Circuit construed *Demore* narrowly, concluding that mandatory detention during a removal process that had lasted nearly three years was of doubtful constitutionality.<sup>220</sup> *Demore* also “left open the question of whether mandatory detention . . . is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable.”<sup>221</sup> Another question left open by *Demore* is whether mandatory detention can constitutionally be extended to aliens who are allegedly removable on noncriminal and nonterrorist grounds, such as visa overstays.

219. 430 F.3d 1241 (9th Cir. 2005). *But see* *Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004) (prolonged detention upheld while leaving open possibility of remedial action if appeals not concluded in timely fashion).

220. *Tijani*, 430 F.3d at 1242.

221. *Gonzalez v. O’Connell*, 355 F.3d 1010, 1019–20 (7th Cir. 2004).

## IV. Admission Categories

The Immigration and Nationality Act classifies noncitizens as either immigrants or nonimmigrants. Most nonimmigrant categories require the alien to have a foreign residence that she has no intention of abandoning and a “nonimmigrant” intent: in other words, an intent to stay in the United States temporarily. A noncitizen seeking to enter the United States must demonstrate that she fits into one of the immigrant or nonimmigrant categories. Even if the noncitizen fits within one of the categories, and is thereby affirmatively eligible to enter the United States, the noncitizen will still be excluded if she falls within one of the grounds for inadmissibility, which is the subject of Part V.

### A. *Nonimmigrant Categories*

The nonimmigrant categories are a veritable alphabet soup. Tourists and those in the United States on business obtain B visas. Treaty traders and treaty investors seek E visas. Students receive F visas unless they receive a J visa or an M visa. The Tenth Circuit held that it had jurisdiction to review an immigration judge’s holding that a student had terminated or abandoned her course of study since the holding involved statutory interpretation and a question of law.<sup>222</sup> The court concluded that affirmative action is required on the part of the alien to terminate or abandon, and that the school closing does not constitute termination or abandonment of course study.<sup>223</sup> H, L, O, and P are all nonimmigrant work visas. Section 101(a)(15)(a)–(v) of the INA lists the nonimmigrant visas with each visa’s common name corresponding to its subsection number.<sup>224</sup> Many nonimmigrant categories have derivative visas allowing the spouse and children to accompany the primary visa holder. In 2007, the United States admitted 37 million nonimmigrants; 74.4% were B-2 visitors for pleasure and another 15% were B-1 visitors for business.<sup>225</sup> After providing an overview of the nonimmigrant

222. *Lee v. Mukasey*, 527 F.3d 1103, 1104 n.4 (10th Cir. 2008).

223. *Id.* at 1107.

224. *See* 8 U.S.C. § 1101(a)(15) (2006).

225. *See* Office of Immigration Statistics, 2007 Yearbook of Immigration Statistics, *available at* [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois\\_2007\\_yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf).

grant categories, this section will sample an issue that arises in court with respect to nonimmigrants.

A and G visas are for foreign government representatives. C and D visas are for aliens in transit and alien crewmembers, respectively. F, J, and M visas are for students. F is the general student visa; M is more restrictive and is for vocational students; and J visas are for those—students or others—who are participants in a United States Information Agency designated program. Fiancés and those recently married to a U.S. citizen are eligible for K visas. V visas are available for certain spouses and children of permanent resident aliens who have endured long waits because of numerical backlogs for permanent visas. S, T, and U visas are for a subset of those who have “critical reliable information” needed by our government on criminal or terrorist organizations, those who have been victims of human trafficking, and those who have “suffered substantial physical or mental abuse” as crime victims, respectively. E, H, I, L, O, P, Q, and R visas are all work-related visas. Nonimmigrant intracompany transfers of executives, managers, and those possessing specialized knowledge receive L visas; foreign media receive I visas; and nonimmigrant religious workers receive R visas. O’s and P’s are for those persons who possess “extraordinary ability,” such as athletes, artists, and entertainers. H-2 visas are for general and agricultural workers who are coming to the United States temporarily to perform a temporary job (notice the double temporary requirement). More highly skilled jobs—work and workers meeting the definition of a “specialty occupation”<sup>226</sup> and fashion models—are eligible for H1-b visas. United States policy favors protecting the domestic workforce; therefore a statutory requirement mandates that the labor market be tested before the granting of H visas to ensure that no domestic workers are available to do the job and that the prospective employer will not, by hiring the alien, depress wages and working conditions in the United States.

An alien can be denied a visa, denied entry, or be removed from the United States for engaging in activities in the United States that fall outside the scope permissible for his nonimmigrant category. For instance, in *Mwongera v. Immigration and Naturalization Service*,<sup>227</sup> the

226. 8 U.S.C. § 1184(i)(1) (2006).

227. 187 F.3d 323 (3d Cir. 1999).

Third Circuit upheld the BIA's determination that the alien had been properly denied entry into the United States because he didn't plan on staying in the United States on a temporary basis, and the scope of his activities exceeded those of someone traveling as a B-1 visitor for business.<sup>228</sup>

As in *Mwongera*, a tension can persist between "business," for which the relatively accessible B-1 visa is available, and "labor" or "employment," for which another, harder-to-obtain visa would be required. Can a foreign company bring into the United States its own employees to install or repair a complicated machine or must it hire domestic employees for such purposes? Can an alien who is in the United States to take orders for suits to be sewn in Hong Kong take the measurements of his buyers, or is this skilled labor for which he must either hire domestically or satisfy the labor market tests? Can a Canadian citizen drive a bus between Montreal and New York City on a B-1 visa? What if passengers are picked up and dropped off in U.S. cities along the way?

In *International Longshoremen's & Warehousemen's Union v. Meese*,<sup>229</sup> the Ninth Circuit addressed the issue of foreign labor, but in a slightly different context. That case involved a Canadian company that owned two logging vessels. In consultation with the INS, the company designated onboard crane operators as "alien crewmen"—D visa holders. The union objected, arguing that the crane operators were performing domestic labor and, therefore, would need to obtain work visas, which would be difficult if not impossible given the domestic workers available and willing to do the work. Interpreting BIA precedent, the court concluded that the crane operators were engaged in domestic labor and that the "alien crewmen" designation was improper. In concluding that they were not "alien crewmen," the court relied on three nonexclusive factors: "First, cargo handling is not an activity associated with traditional crewmen, but is ordinarily associated with longshore laborers. Second, these operators do not aid in the navigation like fulltime cooks because their primary and substantial duties occur not while the ship is underway, but rather once they have

228. *Id.* at 328–29. The court also affirmed the BIA's determination that the alien had engaged in misrepresentation.

229. 891 F.2d 1374 (9th Cir. 1989).

entered United States territorial waters to load or unload the cargo. . . . Third, these operators do not have a permanent connection with the ship. Although they travel with the ships on trips to the United States ostensibly to comply with the immigration laws, it is undisputed that they frequently fly to the ship on the trips within Canada when it is time to load or unload the cargo.”<sup>230</sup>

## B. Immigrant Categories

The INA divides immigrants into three major categories: family-sponsored immigrants, employment-based immigrants, and diversity immigrants. The Act imposes numerical limits on all but one important subcategory of family-based immigrants. Coupled with worldwide limits, per-country limits can lead to long waiting periods in some categories.<sup>231</sup> In the five-year period ending in 2005, the United States added on average just under 1 million new permanent resident aliens a year.<sup>232</sup> Of the 2005 total of 1.1 million<sup>233</sup> new permanent resident aliens, 650,000 immigrated based on family relationship, 250,000 based on employment, 140,000 as refugees and asylees, and 50,000 won the diversity lottery.<sup>234</sup> An alien might simultaneously be waiting for a USCIS decision on a pending immigrant visa petition while fighting deportation in a removal proceeding.

### 1. Family Reunification

U.S. citizens can, without numerical limits, file an immigration petition on behalf of their “immediate relatives”—spouses, children (unmarried, under twenty-one years of age), and parents.<sup>235</sup> Within specified

230. *Id.* at 1382–83.

231. For example, there was a seven-and-a-half-year backlog for spouses of permanent resident aliens from Mexico as of March 2009. *See* U.S. Dep’t of State, Visa Bulletin for March 2009, *available at* [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4428.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_4428.html).

232. *See* Office of Immigration Statistics, 2005 Yearbook of Immigration Statistics, *available at* [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf).

233. This is the sixth highest number of new permanent resident aliens on record, exceeded only in the years 1907, 1913, 1914, 1990, and 1991. *See id.*

234. *Id.* Refugee law and asylum are addressed *infra* Part X. Diversity lottery is discussed *infra* Part IV.B.3.

235. 8 U.S.C. § 1151(b)(2)(A)(i) (2006). A citizen must be at least twenty-one to file an immigration petition on behalf of his or her parents.

numerical limits, U.S. citizens can file an immigration petition on behalf of their unmarried sons and daughters,<sup>236</sup> their married sons and daughters,<sup>237</sup> and their brothers and sisters.<sup>238</sup> Subject to numerical limits, permanent resident aliens can file an immigration petition on behalf of their spouses, children, and unmarried sons and daughters.<sup>239</sup>

*a. Marriage*

Citizens and permanent residents can file an immigrant petition on behalf of their spouse, the beneficiary of the petition. To minimize the potential for marriage fraud, Congress adopted the Immigration Marriage Fraud Amendment Act of 1986. Under this Act, if the qualifying marriage is less than two years old at the time of immigration, the immigrant beneficiary becomes a conditional permanent resident alien for a period of two years.<sup>240</sup> At the end of the two-year period, the spouses must jointly (unless the petitioning spouse is deceased) file a petition to remove the condition. The statute provides exceptions, allowing the immigration officials discretionary authority to lift the condition without joint filing “if the alien demonstrates that (A) extreme hardship would result if such alien is removed, (B) the qualifying marriage was entered in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing [to jointly petition], or (C) the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was subject to extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing” to jointly file the petition to remove the condition.<sup>241</sup>

236. *Id.* § 1153(a)(1). “Sons” and “daughters” are twenty-one years of age or older.

237. *Id.* § 1153(a)(3).

238. *Id.* § 1153(a)(4).

239. *Id.* § 1153(a)(2)(A) & (B).

240. *Id.* § 1186a. For an extensive look at the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified in part at 8 U.S.C. § 1186a), see Beth Stickney, *Conditional and Permanent Residency Through Marriage: Part I*, 99-10 Immigr. Briefings (Oct. 1999), and *Conditional and Permanent Residency Through Marriage: Part II*, 99-11 Immigr. Briefings (Nov. 1999).

241. 8 U.S.C. § 1186a(c)(4) (2006).

In *Cho v. Gonzales*,<sup>242</sup> the First Circuit reviewed a BIA determination that the alien had not entered the marriage in “good faith,” and, therefore, did not statutorily qualify for a waiver under (B). The court disagreed and concluded that the alien had shown the marriage was entered into in “good faith.”<sup>243</sup> According to the court, the BIA had looked at two factors—the timing of the marriage and the timing of the separation—in isolation when it should have placed them into the overall context, which included a two-year trans-Pacific courtship with extensive interaction in person and telephonically, living together after marriage until separation, and joint health insurance, tax returns, credit cards, bank accounts, and auto loans.<sup>244</sup>

*b. Parents, Children, Sons, and Daughters*

The Act defines “child” as “an unmarried person under twenty-one years of age” who has a specified relationship with her parent.<sup>245</sup> “Sons” and “daughters” are those who possess the requisite relationship but are twenty-one years old or older. Since unmarried offspring are entitled to greater immigration benefits, there is a possibility of fraudulent divorce for the purpose of obtaining immigration benefits.<sup>246</sup> The following categories of persons qualify as children under the statute: legitimate children; stepchildren, provided the marriage creating the relationship occurred before the child turns eighteen; legitimated children, provided the legitimating parent has custody and the legitimization occurs before the child turns eighteen; illegitimate children with respect to the natural mother; illegitimate children with respect to the natural father if there is a “bona fide parent–child relationship”;<sup>247</sup> and certain adopted children.<sup>248</sup>

242. 404 F.3d 96 (1st Cir. 2005).

243. *Id.* at 104.

244. *Id.* See also *Damon v. Ashcroft*, 360 F.3d 1084 (9th Cir. 2004) (immigration judge’s finding that marriage was not entered in good faith lacked substantial evidence). Cf. *Nyonzele v. INS*, 83 F.3d 975 (8th Cir. 1996) (BIA properly considered all factors and, therefore, did not abuse its discretion in finding lack of “good faith”).

245. 8 U.S.C. § 1101(b)(1) (2006).

246. See generally *Onyeme v. U.S. INS*, 146 F.3d 227 (4th Cir. 1998).

247. The less favorable treatment of the father–illegitimate child relationship is not unconstitutional gender discrimination. See *Nguyen v. INS*, 533 U.S. 53 (2001); *Fiallo v. Bell*, 430 U.S. 787 (1977).

248. 8 U.S.C. § 1101(b)(1)(A)–(F) (2006).

Because of the immigration benefits conferred by the parent–child–sibling relationship, this has been a fruitful area for litigation. Several questions arise: Can a person file an immigration petition on behalf of both her biological mother, who was not married to her father at the time of birth, and her stepmother, who was married to her father at that time?<sup>249</sup> After an adoption, does the biological sibling relationship survive for immigration purposes?<sup>250</sup> Is an adoption that occurs pursuant to a society’s cultural norms a valid adoption for immigration purposes if it is outside the “law”?<sup>251</sup> Are “A” and “B” siblings for immigration purposes if “A” became the stepchild of “B’s” mother but turned twenty-one before “B” was born so that they were not “children” of a common parent at the same time but each were “children” of the common parent at one time?<sup>252</sup>

At times questions of parent–child–sibling relationships can involve intricate questions of foreign law and foreign custom. For example, in the Kingdom of Tonga it is not uncommon “for relatives to raise and maintain children, including legitimate children as part of the family and to treat them in all respects as if they were legally adopted.”<sup>253</sup> What is the status of these “customary adoptions” for immigration purposes under the statute? “The BIA has expressly held that it is not necessary for an adoption to be recognized by a juridical act before it can be recognized as valid for immigration purposes.”<sup>254</sup> Therefore, the BIA framed what it saw as the relevant question this way: “We must therefore determine whether customary adoption in Tonga

249. *Cf.* Matter of Fong, 17 I. & N. Dec. 212 (BIA 1980) (allowing U.S. citizen to file visa petition for stepmother).

250. Although the statute is silent on this question, the BIA concluded the sibling relationship depends on the parent–child relationship, and since the adoption terminates the parent–child relationship for immigration purposes, it also terminates the sibling relationship. Matter of Li, 20 I. & N. Dec. 700 (BIA 1993). *See also* Young v. Reno, 114 F.3d 879 (9th Cir. 1997) (applying *Chevron* deference in following *Li*); Kosak v. Devine, 439 F. Supp. 2d 410 (E.D. Pa. 2006) (same).

251. Yes, if it “creates a legal status which is recognized by the government in that country as carrying with it substantial legal rights and obligations.” Matter of Fakalata, 18 I. & N. Dec. 213 (BIA 1982).

252. *See* Matter of Mourillon, 18 I. & N. Dec. 122 (BIA 1981) (yes).

253. Kaho v. Ilchert, 765 F.2d 877, 883 (9th Cir. 1985) (quoting the Crown Solicitor of Tonga).

254. *Id.* at 885.

creates a legal status which is recognized by the government in that country as carrying with it substantial legal rights and obligations.”<sup>255</sup> Based on letters from the Tongan Crown Solicitor and a treatise of Tongan adoptions, the BIA concluded that customary adoptions were not legally cognizable in Tonga because (1) only adoption of illegitimate children receive legal sanction, (2) customarily adopted children lack inheritance rights, and (3) the adoption does not sever the parental relationship with the biological parents.<sup>256</sup> The Ninth Circuit disagreed with the BIA’s conclusions. In responding to each of the BIA’s points, the court saw a logical reason why Tonga had created law with respect to adoption of illegitimate children while continuing to rely on custom for other adoptions.<sup>257</sup> It also said that neither illegitimates under juridical adoption nor legitimates under customary adoption receive inheritance rights, therefore the issue of inheritance is irrelevant to the question of whether customary adoptions are legally cognizable.<sup>258</sup> Finally, the court found the BIA’s analysis based on the “fluidity” and nonexclusivity of Tongan customary adoptions flawed. It said: “For an adoption to be valid under 1101(b)(1)(E), an adoption need not conform to the BIA’s or Anglo-American notions of adoption; the adoption need only be recognized under the law of the country where the adoption occurred.”<sup>259</sup> The Ninth Circuit’s reading of the Crown Solicitor’s correspondence—particularly his second letter—and the treatise differed from the BIA’s, and the Ninth Circuit concluded that “Tongan courts will enforce the rights and duties stemming” from customary adoptions.<sup>260</sup>

## 2. Employment

The statute divides employment-based immigration into five categories.<sup>261</sup> Priority workers, otherwise known as EB-1s, are further divided into three subcategories: (1) aliens of “extraordinary ability in the sciences, arts, education, business, or athletics”; (2) outstanding profes-

255. *Matter of Fakalata*, 18 I. & N. Dec. 213 (BIA 1982).

256. *Id.* at 216–17.

257. *Kaho*, 765 F.2d at 884–85.

258. *Id.* at 885.

259. *Id.*

260. *Id.*

261. 8 U.S.C. § 1153(b)(1)–(5) (2006).

sors and researchers; and (3) certain multinational executives and managers.<sup>262</sup> Persons “who are members of the professions holding advanced degrees or their equivalent” and persons possessing “exceptional ability in the sciences, arts, or business” fit the EB-2 category.<sup>263</sup> The statute subdivides EB-3s into three subcategories: skilled workers, professionals, unskilled labor.<sup>264</sup> Special Immigrants—EB-4s—consist of a myriad of disparate categories, including religious workers, certain former U.S. government employees, and certain abused juveniles.<sup>265</sup> The employment creation (or EB-5) category allows those with money to spend to immigrate on the condition that they invest a certain amount of capital and create a certain number of jobs in the United States.<sup>266</sup>

*a. Extraordinary Ability*

The regulations in the Act guide the U.S. Citizenship and Immigration Services (USCIS) in determining whether an alien meets the criteria for EB-1 as a person of extraordinary ability.<sup>267</sup> In *Lee v. Ziglar*,<sup>268</sup> the court upheld the INS’s determination that the plaintiff did not qualify as an EB-1 “extraordinary ability” alien. Lee served as a coach for the Chicago White Sox and applied for EB-1 status based on his ability as a baseball player, “arguably one of the most famous baseball players in Korean history.”<sup>269</sup> In concluding that the INS had not abused its discretion, the court said: “Lee’s extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.”<sup>270</sup>

262. *Id.* § 1153(b)(1)(A)–(C).

263. *Id.* § 1153(b)(2)(A).

264. *Id.* § 1153(b)(3)(A)(i)–(iii).

265. *Id.* §§ 1153(b)(4) & 1101(a)(27)(A)–(M).

266. *Id.* § 1153(b)(5).

267. 8 C.F.R. § 204.5(h) (2008). *See also* *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994) (INS abused its discretion in several ways in refusing to classify Albanian physician as “extraordinary” based on the documentation presented).

268. 237 F. Supp. 2d 914 (N.D. Ill. 2002).

269. *Id.* at 915.

270. *Id.* at 918.

In contrast, the court in *Grimson v. INS*<sup>271</sup> held that the INS had abused its discretion in failing to designate a Canadian hockey player as a person of “extraordinary ability.” As the team’s “enforcer,” the petitioner fought “when necessary, but also protect[ed] the team stars from being roughed up by the opposing team,” and served as a deterrent against additional fights.<sup>272</sup> In that case, the Administrative Appeals Unit (AAU) had affirmed the INS’s denial of visa petition on the ground that the record failed to show that the petitioner “has achieved sustained national or international acclaim required for the classification,” despite the fact that he had played in the National Hockey League for a number of years and that he was “the third rated and third highest paid enforcer in the NHL.”<sup>273</sup> In reversing the AAU, the court said that “[i]t is apparent . . . that at the heart of defendant’s refusal to grant plaintiff a visa (as it had to other comparable NHL players) is its distaste for the role he plays on a hockey team. As stated in the Director’s decision, . . . ‘The *necessity* of such a role [enforcer] appears to be debatable. The service does argue that the sport itself has never condoned the kind of activity that petitioner is known for, as evidenced by the number of penalty minutes he is charged.’”<sup>274</sup> The court concluded that the AAU could not simply ignore the fact “that the role of the enforcer” is “both a necessary and accepted element of the game.”<sup>275</sup>

*b. Labor Certification*

The desire to protect the domestic workforce acts as a strong counterweight against immigration. To protect domestic labor, EB-2s (members of the professions holding advanced degrees and exceptional ability aliens) and EB-3s (professionals, skilled and unskilled workers) are inadmissible unless the employer receives labor certification from the Department of Labor (DOL),<sup>276</sup> although both a job offer and labor certification can be waived for an EB-2 if the USCIS determines that granting the waiver is in the national interest.<sup>277</sup> To obtain labor certifi-

271. 934 F. Supp. 965 (N.D. Ill. 1996).

272. *Id.* at 969.

273. *Id.* at 967.

274. *Id.* at 968.

275. *Id.* at 969.

276. 8 U.S.C. §§ 1182(a)(5) & 1153(b)(3)(C) (2006).

277. *See id.* § 1153(b)(2)(B).

cation, the employer must show that “there are not sufficient workers who are able, willing, qualified [equally qualified for teachers] and available” for hire and that “the employment of such alien will not adversely affect the wages and working conditions of workers in the United States and similarly employed.”<sup>278</sup> To streamline the labor certification process and to eliminate long backlogs, the DOL replaced its old system of “file and approve” with an attestation and audit system in March 2005,<sup>279</sup> although much of the substantive law pertaining to labor certification remains intact.

Most administrative litigation and rulings have centered on the following issues:

- (1) whether a bona fide job opportunity open to U.S. workers exists (e.g., considering the totality of the circumstances such as the alien’s relationship to the employer);<sup>280</sup>
- (2) whether the job offer lists unduly restrictive requirements (i.e., requirements above those normally required for a position) and, if so, whether the employer has justified such a requirement on business necessity grounds;
- (3) whether the job offer lists the actual minimum requirements (e.g., if the alien was initially hired with less experience or education, the employer must establish that the prior employment was in a different position or [the employer] currently lacks the ability to train new workers);
- (4) whether the wage offered meets prevailing wage standards (involving an assessment of DOL wage data or employer wage data);
- (5) whether any U.S. workers responding to the employer’s recruitment campaign were rejected for lawful, job-related reasons;
- (6) whether the recruitment campaign was conducted in good faith (e.g., apparently qualified U.S. applicants were contacted in a reasonable and timely manner);

278. *Id.* § 1182(a)(5)(A)(i)(I)–(II).

279. *See* 20 C.F.R. § 656.10 (2008).

280. *See, e.g.,* *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989) (denial of labor certification was not arbitrary or capricious; no bona fide job opportunity for a domestic worker existed where owner of company had company seek labor certification for himself).

(7) whether the employer's documentation conforms to DOL standards governing reliability.<sup>281</sup>

An employer seeking labor certification must avoid "unduly restrictive" job requirements and duties. If the job requirements or duties appear "unduly restrictive," the employer must demonstrate "business necessity."<sup>282</sup> "Business necessity" need not be shown, however, if the job duties fall within one of the job categories described in the O\*Net Job Zones online database and the requirements are "those normally required for the occupation and [do] not exceed the Specific Vocational Preparation level assigned to the occupation" in O\*Net.<sup>283</sup> "To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner."<sup>284</sup>

Requiring education or experience above that normally required for the job, combining two traditionally separate jobs (e.g., film projectionist and accountant) into one, requiring proficiency in a foreign language, and requiring that the employee live on-site usually require the showing of business necessity. *Kwan v. Donovan*<sup>285</sup> involved an immigration attorney who filed for labor certification of an alien who was to perform bookkeeping, secretarial, and translation duties. The Department of Labor denied the petition for labor certification, concluding that the combination of duties and the language requirements were unduly restrictive and not warranted by business necessity. The DOL's certifying officer said: "The fact that the employer has other individuals performing translation tasks demonstrates that he has alternative means to perform these duties. While it may be advantageous to have a bookkeeper perform part-time secretarial and translation duties, it is clearly not a business necessity, but rather an employer preference or convenience. It is not the job of a bookkeeper to perform translation duties

281. Austin T. Fragomen Jr., Careen Shannon, & Daniel Montalvo, *Labor Certification Handbook* § 6:1 (2008).

282. 20 C.F.R. § 656.17(h)(1) (2005).

283. *Id.* See also O\*Net Online, <http://online.onetcenter.org/find/>.

284. 20 C.F.R. § 656.17(h)(1) (2008). See also *Matter of Info. Indus., Inc.*, 88 INA 82 (BALCA 1989) (en banc).

285. 777 F.2d 479 (9th Cir. 1985).

and hence precludes the referral of qualified U.S. workers.”<sup>286</sup> The court affirmed on the grounds that the agency’s decision was not arbitrary and capricious.<sup>287</sup>

### 3. Diversity Immigrants

Every year the United States selects up to 55,000 persons for immigrant visas in a diversity lottery.<sup>288</sup> The lottery is weighted in favor of persons coming from “low-sending” countries in low-sending regions<sup>289</sup> pursuant to an intricate formula designed to diversify the immigrant stream. To be eligible, the alien must have “at least a high school education or its equivalent” and within the last five years have “at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.”<sup>290</sup>

The statute states that diversity lottery winners “shall remain eligible to receive such visa only through the end of the specific fiscal year for which they are selected.”<sup>291</sup> In several cases, aliens who qualified for diversity visas filed suit to obtain them after being denied visas by the immigration authorities on the ground that eligibility expired with the end of the fiscal year.<sup>292</sup> The courts recognized that the denials were “the result of sheer bureaucratic ineptitude or intransigence” and that the “plaintiffs were victims of [a] bureaucratic nightmare.”<sup>293</sup> Nev-

286. *Id.* at 482.

287. *Id.*

288. *See* 8 U.S.C. §§ 1151(e) & 1153(c) (2006).

289. For diversity lottery purposes, the world is divided into six regions: Africa, Asia, Europe, North America (excluding Mexico), Oceania, and South America (including Mexico, Central America, and the Caribbean). The Department of Homeland Security annually divides the world between low-sending and high-sending regions and foreign states: high-sending regions are regions that during the previous five years accounted for more than 1/6th of all immigrant visas; high-sending states are those that received more than 50,000 visas during the period. Nationals of high-sending states (e.g., Brazil, Canada, Columbia) are ineligible for the diversity lottery. The lottery is weighted in favor of immigrants from low-sending regions. *Id.* § 1153(c). For a recent list of the worldwide distribution of diversity lottery winners, see Diversity Lottery 2008 (DV–2008) Results, available at [http://travel.state.gov/visa/immigrants/types/types\\_1317.html](http://travel.state.gov/visa/immigrants/types/types_1317.html).

290. 8 U.S.C. § 1153(c)(2) (2006).

291. *Id.* § 1154(a)(1)(I)(ii)(II).

292. *See, e.g., Coraggioso v. Ashcroft*, 355 F.3d 730 (3d Cir. 2004).

293. *Mohamed v. Gonzales*, 436 F.3d 79, 81 (2d Cir. 2006) (internal quotations and citations omitted).

ertheless the court, in *Mohamed v. Gonzales*, held “that because the INS lacks the statutory authority to grant the relief sought by plaintiffs under the DV [Diversity] Program, plaintiffs’ claims are now moot.”<sup>294</sup> It continued: “The relevant statutes and regulations impose a strict one-year time limit on the granting of diversity visas. . . . Despite the harsh consequences of this result, we are compelled, as our sister circuits have recognized, to apply the unambiguous language of the operative statutory framework.”<sup>295</sup>

294. *Id.* at 80.

295. *Id.* at 80–81. *See also* Carrillo-Gonzalez v. INS, 353 F.3d 1077, 1079 (9th Cir. 2003) (doctrine of equitable tolling inapplicable).

## V. Grounds for Inadmissibility

Even an alien who fits within one of the immigrant or nonimmigrant categories will be denied admission if she falls within one or more of the grounds for inadmissibility. Most inadmissibility grounds, however, have waiver provisions, and nonimmigrants can seek a general waiver.<sup>296</sup> The statute divides the grounds of inadmissibility into ten categories:<sup>297</sup> health-related grounds; criminal and related grounds; security and related grounds; public charge grounds;<sup>298</sup> labor certification;<sup>299</sup> illegal entrants and immigration violators; failure to have proper documents; ineligible for citizenship; aliens previously removed; and a miscellaneous category (which includes practicing polygamists, among others). Conceptually, it may be helpful to classify the grounds of inadmissibility as follows: grounds related to immigration control; political and national security grounds; criminal grounds; economic grounds; and public health and morals.<sup>300</sup>

### A. *Immigration Control*

Aliens present in the United States without having been admitted or paroled<sup>301</sup>—in other words, surreptitious entrants—are inadmissible and, therefore, subject to removal.<sup>302</sup> And “[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any

296. For the general waiver, see 8 U.S.C. § 1182(d)(3) (2006).

297. 8 U.S.C. § 1182(a)(1)–(10) (2006).

298. See generally Kevin K. Ban, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Are You Wealthy Enough to be Reunited With Your Alien Family Members?*, 99-05 Immigr. Briefings 1 (May 1999).

299. Labor certification is addressed *supra* Part IV.B.2.b. Although failure to receive labor certification is considered a ground for inadmissibility, conceptually it makes sense to treat the need for labor certification as part of the affirmative case for admission.

300. See Stephen Legomsky & Cristina M. Rodríguez, *Immigration and Refugee Law and Policy*, chap. 5 (5th ed. 2009).

301. The USCIS may allow someone to come into the United States “for urgent humanitarian reasons or significant public benefit” without ever admitting them into the United States, creating the legal fiction that the person is not present. See 8 U.S.C. § 1182(d)(5) (2006).

302. 8 U.S.C. § 1182(a)(6)(A)(i) (2006). An exception exists for certain battered spouses and children. *Id.* § 1182(a)(6)(A)(ii).

other alien to enter or to try to enter the United States in violation of the law is inadmissible.”<sup>303</sup> A waiver is available for this ground where the alien smuggling only involved close family members.<sup>304</sup> Additionally, one who has been ordered removed during the process of seeking admission is subject to a nondiscretionary five-year bar to admission, and one who has been ordered removed after having been admitted is subject to a nondiscretionary ten-year bar to readmission.<sup>305</sup> An alien “who has been unlawfully present in the United States for an aggregate period of more than 1 year, or has been ordered removed . . . and who enters or attempts to reenter the United States without being admitted is inadmissible.”<sup>306</sup> According to the BIA, “[s]ection 212(a)(9)(C)(i)<sup>307</sup> differs significantly from section 212(a)(9)(A)(ii)<sup>308</sup> in that it incorporates no temporal limits on inadmissibility; an individual who has reentered or attempted to reenter the United States [without seeking admission] after removal or prior unlawful presence is permanently inadmissible.”<sup>309</sup>

Failure to have the proper documents—passport, visa, and any other necessary document—renders a person inadmissible.<sup>310</sup> Fraud and willful misrepresentation for the purpose of gaining an immigration benefit are also grounds for denial of admission.<sup>311</sup> After an administrative hearing, a person engaged in document fraud can be ordered to cease and desist and can be assessed a civil money penalty.<sup>312</sup> “An alien who is the subject of a final order” under these document fraud provisions is also inadmissible.<sup>313</sup>

An alien’s unlawful presence in the United States for more than 180 days but less than a year makes the alien inadmissible for three years

303. *Id.* § 1182(a)(6)(E).

304. *Id.* § 1182(d)(11).

305. *Id.* § 1182(a)(9)(A)(i) & (ii). The alien can seek advance consent to reapply prior to the end of the five- or ten-year period. *See id.* § 1182(a)(9)(A)(iii).

306. *Id.* § 1182(a)(9)(C)(i).

307. *Id.*

308. *Id.* § 1182(a)(9)(A)(ii).

309. *In re Torres-Garcia*, 23 I. & N. Dec. 866, 873 (BIA 2006).

310. 8 U.S.C. § 1182(a)(7) (2006).

311. *Id.* § 1182(a)(6)(C)(i). For possible waiver, see *id.* § 1182(i). There is also a related ground of inadmissibility for falsely claiming U.S. citizenship. *Id.* § 1182(a)(6)(C)(ii).

312. *Id.* § 1324c.

313. *Id.* § 1182(a)(6)(F)(i). For a potential waiver, see *id.* § 1182(d)(12).

after his or her departure from the United States.<sup>314</sup> A ten-year bar applies to those who have been unlawfully present for a year or more.<sup>315</sup> Much complexity lies in the intricacies of these statutes, in the agency's interpretation, and in the court's equitable powers.<sup>316</sup> The statute reads:

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (. . .) prior to the commencement of [removal] proceedings . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.<sup>317</sup>

A key question is during what period of time is an alien accruing unlawful presence? Aliens who stay beyond the period authorized and those who enter surreptitiously are unlawfully present.<sup>318</sup> The statute tolls the period of unlawful presence for 120 days for those aliens who were admitted or paroled, who have filed a nonfrivolous application for extension or change of status, and who have not engaged in unauthorized employment.<sup>319</sup> Because of backlogs in processing, this period of tolling has been administratively extended to cover the entire period

314. *Id.* § 1182(a)(9)(B)(i)(I).

315. *Id.* § 1182(a)(9)(B)(i)(II).

316. For an in-depth treatment of these issues, see James Feroli, *Unlawful Presence, Voluntary Departure, and Stays of Voluntary Departure*, 06-01 Immigr. Briefings 1 (Jan. 2006).

317. 8 U.S.C. § 1182(a)(9)(B) (2006). *See id.* at (B)(iii) for exceptions (minors, asylees, family unity, and abused spouses and children) and (B)(iv) for a waiver based on extreme hardship.

318. *Id.* § 1182(a)(9)(B)(ii).

319. *Id.* § 1182(a)(9)(B)(iv).

the application is pending as long as the other requirements are met.<sup>320</sup> In order to benefit from the tolling provisions, the application for extension or change of status must have been filed prior to the expiration of authorized stay, and an alien cannot prolong this safe harbor by filing successive applications for extension or change of status once the period of authorized stay has expired.<sup>321</sup>

The three-year bar applies only if the alien takes voluntary departure prior to the commencement of removal proceedings. In contrast, the ten-year bar is triggered solely by the passage of time. Therefore, once removal proceedings have begun with the Notice to Appear, an alien who has been unlawfully present for more than 180 days but less than one year is not subject to either bar so long as she does not remain “unlawfully present” for a year. The period allowed for the alien to voluntarily depart “is considered a period of authorized stay,” but “unlawful presence accrues as of the date the privilege of voluntary departure expires and the order of removal takes effect.”<sup>322</sup>

As a result of this interpretation, someone who has been unlawfully present in the United States for 150 days and is granted 100 days to depart voluntarily prior to the commencement of the proceedings can stay in the United States for those 100 days without slipping into the three-year bar. And someone who has been in the United States in an unauthorized status for 360 days, and who accepts an order of voluntary departure (requiring him to depart in 60 days) after commencement of proceedings, will escape both the three- and the ten-year bar as long as he leaves on or before the expiration of the 60-day period. In actuality, this period can be extended by many months or years because the voluntary departure order, like most orders issued by an immigration judge, is stayed automatically during the pendency of an appeal to the BIA.<sup>323</sup>

320. Janice Podolny, U.S. Dep’t of Justice Memorandum for Thomas E. Cook, Interpretation of “Period of Stay Authorized by the Attorney General” in determining “unlawful presence” under INA § 212(a)(9)(B)(ii), 2003 WL 21101810 (Mar. 27, 2003).

321. *Id.*

322. Paul W. Virtue, U.S. Dep’t of Justice Memorandum, Section 212(a)(9)(B) Relating to Unlawful Presence 2 (Sept. 19, 1997), *reprinted in* 74 No. 37 Interpreter Releases Appendix III (Sept. 29, 1997).

323. 8 C.F.R. § 1003.6(a) (2008).

Can the period of unlawful presence be further stayed or tolled during the process of judicial review? Several courts of appeals have said yes on either legal or equitable ground, concluding that the judiciary possesses the authority to stay the voluntary departure.<sup>324</sup> One court has said no.<sup>325</sup> Among the circuits that have concluded that they have the authority to stay an order of voluntary departure, there exists a split as to whether the alien has to specifically request a stay of the voluntary departure order or whether seeking stay of removal will be automatically treated as also seeking a stay of the voluntary departure order.<sup>326</sup> It is unclear whether the Supreme Court's decision in *Dada v. Mukasey*<sup>327</sup> will affect these rulings. In that case, the Court held that the period for voluntary departure is not tolled during the pendency of a motion to reopen removal proceedings.<sup>328</sup>

### B. Political and National Security Grounds

Immigration and Nationality Act § 212(a)(3)<sup>329</sup> organizes security and related grounds for inadmissibility into five categories: (1) those who seek to enter the United States to spy, engage in the export of prohibited technology or information, engage in other unlawful activity, or

324. *E.g.*, *Thapa v. Gonzales*, 460 F.3d 323, 329 (2d Cir. 2006) (and cases cited therein).

325. *Ngarurih v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004).

326. *Compare Iouri v. Ashcroft*, 487 F.3d 76, 85 (2d Cir. 2007) (“we join the First and Seventh Circuits, both of which have held that an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay”), *with Rife v. Ashcroft*, 374 F.3d 606, 616 (8th Cir. 2004) (“Because a motion to stay voluntary departure complements and in many cases may be ancillary to a motion to stay removal pending judicial review, we agree with the Ninth Circuit [and] hold that where an alien files a motion to stay removal before the period of voluntary departure expires, we will construe the motion to stay removal as including a timely motion to stay voluntary departure.” (internal quotation omitted)).

327. 128 S. Ct. 2307 (2008).

328. Finding no statutory authority for tolling in this situation, the Court concluded that:

If the alien is permitted to stay in the United States past the departure date to wait out the adjudication of the motion to reopen, he or she cannot then demand the full benefits of voluntary departure; for the benefit to the Government—a prompt and costless departure—would be lost.

*Id.* at 2319.

329. 8 U.S.C. § 1182(a)(3) (2006).

overthrow the United States government by force;<sup>330</sup> (2) terrorists broadly defined;<sup>331</sup> (3) those who pose serious adverse foreign policy consequences;<sup>332</sup> (4) immigrant aliens who are members of the Communist or other totalitarian party;<sup>333</sup> and (5) those who participated in Nazi persecution or other forms of genocide.<sup>334</sup>

The terrorist-related grounds of inadmissibility<sup>335</sup> have been the subject of expansion since 1996 and the Oklahoma City bombing.<sup>336</sup> The broad “definition of ‘terrorist activity’ certainly encompasses more conduct than our society, and perhaps even Congress, has come to associate with traditional acts of terrorism, *e.g.*, car bombs and assassinations,” but it is not unconstitutionally vague or overbroad.<sup>337</sup>

“Terrorist activity” falls into one of six categories of unlawful conduct: sabotage or hijacking “of any conveyance”; kidnapping under some circumstances; attacking an “internationally protected person”; assassination; the use of any “biological agent, chemical agent, or nuclear weapon” or the use of ordinary weapons for a purpose other than monetary gain; or “a threat, attempt, or conspiracy to do any of the forgoing.”<sup>338</sup> Under the definition, the conduct must be “unlawful un-

330. *Id.* § 1182(a)(3)(A).

331. *Id.* § 1182(a)(3)(B) & (F).

332. *Id.* § 1182(a)(3)(C).

333. *Id.* § 1182(a)(3)(D).

334. *Id.* § 1182(a)(3)(E).

335. For a comprehensive look at the terrorism-related grounds for inadmissibility, see Nicholas J. Perry, *The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA*, 06-10 Immigr. Briefings 1 (Oct. 2006). “The terrorism-related grounds of inadmissibility bar most other immigration benefits.” *Id.* (discussing cancellation of removal, temporary protected status, registry, voluntary departure, § 212(c), and family unity together with limited exceptions and waivers).

336. See *supra* text accompanying notes 20–21.

337. *McAllister v. Att’y Gen.*, 444 F.3d 178, 187 (3d Cir.), *cert. denied*, 127 S. Ct. 667 (2006).

Malachy, a Nationalist Catholic, concededly committed two criminal acts in Belfast twenty-five years ago, and so he is branded guilty of “terrorist activity.” Those were terrible days which saw, among other horrors, rioting, the burning of vehicles, the demolition of buildings, and the harassment of Catholic children playing and walking to school. It was a time of violent political conflict. But that was then. No one now suggests that Malachy poses a threat to anyone, much less to our national security, but this is a fact that Congress does not permit us to consider.

*Id.* at 191–92 (Barry, J., concurring).

338. 8 U.S.C. § 1182(a)(3)(B)(iii) (2006).

der the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).<sup>339</sup> It is an open question whether “unlawful” should be interpreted to mean “criminal.”<sup>340</sup> And the BIA has said that it cannot assess unlawfulness by looking at the totality of the circumstance: “[W]e find that Congress intentionally drafted the terrorist bars . . . very broadly, to include even those people described as ‘freedom fighters,’ and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic.”<sup>341</sup>

A person “engage[s] in terrorist activity” if she fits into one or more of six categories of conduct: committing or inciting to commit a terrorist activity; preparing or planning a terrorist activity; reconnoitering potential targets; soliciting funds for a terrorist activity or terrorist organization; soliciting individuals to engage in terrorist activity or for membership in a terrorist organization; and providing material support to terrorists or terrorist organizations.<sup>342</sup>

This last category is expansive. A person engages in a terrorist activity if she commits “an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation, weapons, explosives, or training” for terrorist activity, to terrorists, or to a terrorist organization.<sup>343</sup> Where the government proves that an alien has provided support to a terrorist organization, it need not further prove that the alien intended that support as aid to the terrorist activity of the organization.<sup>344</sup> The alien’s activity need not be illegal. In *In re S-K-*, the BIA concluded that an alien who had given \$1,100 Singapore dollars (1/8th of her income) to

339. *Id.*

340. See Perry, *supra* note 335.

341. *In re S-K-*, 23 I. & N. Dec. 936, 941 (BIA 2006) (“Rather, Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals.”).

342. 8 U.S.C. § 1182(a)(3)(B)(iv) (2006).

343. *Id.* § 1182(a)(3)(B)(iv)(VI).

344. See, e.g., *Hussain v. Mukasey*, 518 F.3d 534, 538–39 (7th Cir. 2008).

a terrorist organization over an eleven-month period had provided material support.<sup>345</sup> The BIA left for another day and another set of facts the question of whether *de minimus* support would make someone inadmissible. The Third Circuit held that the BIA did not act in an arbitrary or capricious manner in concluding that providing food and “setting up tents” constituted material support.<sup>346</sup>

The Act contemplates three types of terrorist organizations: first, foreign terrorist organizations so designated by the Secretary of State pursuant to section 219 of the INA;<sup>347</sup> second, terrorist organizations so designated by the Secretary of State in consultation with the Attorney General and Secretary of Homeland Security upon finding that the organization engages in terrorist activities as described in this ground of inadmissibility;<sup>348</sup> and third, other undesignated groups (at least two people) engaging in terrorist activities as described in this ground of inadmissibility.<sup>349</sup>

The Act creates nine categories of aliens inadmissible for terrorist activities:<sup>350</sup>

- “An alien who has engaged in a terrorist activity.”
- Aliens who the government “knows, or has a reasonable ground to believe, is engaged in or is likely to engage after entry in a terrorist activity.”
- “An alien who has under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity.”
- A representative of a terrorist organization or “a political, social, or other group that endorses or espouses terrorist activity.”<sup>351</sup>
- A member of a designated terrorist organization.
- A member of an undesignated terrorist organization “unless the alien can demonstrate by clear and convincing evidence

345. *S-K-*, 23 I. & N. Dec. at 945.

346. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 299 (3d Cir. 2004).

347. *See* 8 U.S.C. § 1182(a)(3)(B)(vi)(I) (2006).

348. *Id.* § 1182(a)(3)(B)(vi)(II).

349. *Id.* § 1182(a)(3)(B)(vi)(III).

350. *Id.* § 1182(a)(3)(B)(i)(I)–(IX).

351. For a definition of “representative,” *see id.* § 1182(a)(3)(B)(v).

that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization.”

- “An alien who endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support for a terrorist organization.”
- “An alien who has received military-type training<sup>352</sup> from or on behalf of” a terrorist organization.
- “Any alien who is the spouse or the child of an alien who is inadmissible under this paragraph, if the activity causing the inadmissibility occurred within the last five years.”

Aliens determined by the Secretary of State or the Attorney General, in consultation with the other, to be associated with a terrorist organization, and whose presence in the United States could pose a danger, are inadmissible under a separate ground.<sup>353</sup> The Secretary of State, in consultation with the Secretary of Homeland Security and the Attorney General, or the Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, can exempt certain individuals and certain groups from many of the terrorist grounds of inadmissibility.<sup>354</sup>

### *C. Criminal and Related Grounds*

The statute contains several categories of inadmissibility based on criminal and related grounds. Any alien convicted of or admitting to committing a “crime involving moral turpitude” or most drug-related crimes is inadmissible.<sup>355</sup> An exception exists for non-drug-related crimes if the alien was younger than eighteen at the time the crime was committed and more than five years have elapsed since release.<sup>356</sup> A second exception exists for non-drug-related crimes where “the maximum penalty possible for the crime . . . did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was

352. See 18 U.S.C. § 2339D(c)(1) (2006) (defining military-type training).

353. 8 U.S.C. § 1182(a)(3)(F) (2006).

354. *Id.* § 1182(d)(3)(B), as amended by the Consolidated Appropriations Act, 2008, Pub. L. 110-161, Div. J., § 691, 121 Stat. 1844 (Dec. 26, 2007).

355. *Id.* § 1182(a)(2)(A)(i) & (C).

356. *Id.* § 1182(a)(2)(A)(ii)(I).

not sentenced to a term of imprisonment in excess of 6 months” regardless of the term served.<sup>357</sup>

A crime involving moral turpitude “refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”<sup>358</sup> These crimes require “acts [that] are considered *malum in se*: that is, the acts are criminal because their nature is morally reprehensible and are not criminal simply by reason of statutory prohibition.”<sup>359</sup> Normally the offense must “require the offender to act with a vicious motive or corrupt mind” such that intent is important in determining moral turpitude.<sup>360</sup>

Rather than retrying the criminal case to determine whether the alien committed a crime involving moral turpitude, the immigration judge, the Board of Immigration Appeals, and any reviewing court apply a modified categorical approach, looking at the statute to determine whether the crime involves moral turpitude. “The starting point in determining whether a crime involves moral turpitude is the language of the statute itself”<sup>361</sup> as seen through the prism of judicial interpretation.<sup>362</sup> “As a general rule, when the statute under which an alien is convicted includes some crimes which may, and some which may not, involve moral turpitude, an alien is not excludable or deportable on moral turpitude grounds unless the record of conviction itself demonstrates that the particular offense involved moral turpitude.”<sup>363</sup>

357. *Id.* § 1182(a)(2)(A)(ii)(II).

358. *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994), *aff’d*, 72 F.3d 571 (8th Cir. 1995).

359. *Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007).

360. *E.g.*, *Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 n.6 (8th Cir. 2006) (recklessness without more insufficient for finding that crime involves moral turpitude). *But see* *Knapik v. Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004) (deferring to BIA’s determination that recklessness sometimes involves moral turpitude).

361. *In re L-V-C-*, 22 I. & N. Dec. 594, 597 (BIA 1999). *See also* *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

362. *See L-V-C-*, 22 I. & N. Dec. at 597–98.

363. *Id.* at 603. The Ninth Circuit has concluded that the modified categorical approach applies only “when the particular elements in the crime of conviction are broader than the generic crime. When the crime of conviction is missing an element of the generic crime altogether, we can never find that ‘a jury was actually required to find all the elements of’ the generic crime.” *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007).

Therefore, “the crime of causing a financial institution to fail to file currency transaction reports and structuring currency transactions to evade reporting requirements” was not a crime involving moral turpitude where “not all the offenses under the statute involved . . . a deliberate concealment.”<sup>364</sup> But where the relevant statute “requires proof of a deliberate act to conceal . . . illegal activity [e.g., money laundering activity]. . . a violation of that statute is categorically a crime involving moral turpitude.”<sup>365</sup>

In *In re Babaisakov*,<sup>366</sup> the BIA held that

the categorical and modified categorical approaches, as we understand *Taylor* and *Shepard*, properly apply only when the statute currently being implemented or administered demands a focus exclusively on the elements of a prior conviction. Further, neither *Taylor* nor *Shepard* demands the use of the categorical or the modified categorical approach to any currently required determination that is *not* tied to an element of a prior conviction.<sup>367</sup>

The BIA went on to state that, while

the removal provision demands a prior conviction for fraud or deceit . . . the statute also requires a separate finding as to loss that is not tied to the elements of any State or Federal criminal statute. The categorical and modified categorical approaches properly govern the assessment as to whether the elements of the conviction for fraud or deceit are present, but they do not apply when assessing the additional “nonelement” factor of victim loss.<sup>368</sup>

“The question, then, is whether the conviction record is an adequate source for the information demanded by the removal statute.”<sup>369</sup> When “looking for a fact that was part of the crime, but not a fact that must have been proved to establish guilt, the independent assessment of that fact during a removal hearing does not encroach on the principal pur-

364. *In re Tejwani*, 24 I. & N. Dec. 97, 99 (BIA 2007).

365. *Id.*

366. 24 I. & N. Dec. 306 (BIA 2007) (aggravated felony case).

367. *Id.* at 309.

368. *Id.*

369. *Id.* at 318.

pose of the criminal proceedings, which was the determination of guilt under the elements of the criminal statute.”<sup>370</sup>

Assault with intent to injure a person or the property of another has been found to be a crime involving moral turpitude.<sup>371</sup> But assault without such intent or some other aggravating factor has been found not to be a crime involving moral turpitude.<sup>372</sup> Child abuse,<sup>373</sup> spousal abuse,<sup>374</sup> contributing to the delinquency of a minor,<sup>375</sup> child pornography,<sup>376</sup> aggravated driving under the influence,<sup>377</sup> manslaughter,<sup>378</sup> arson,<sup>379</sup> burglary,<sup>380</sup> receipt of stolen property,<sup>381</sup> fraud in obtaining food stamps,<sup>382</sup> immigration fraud,<sup>383</sup> and fraud in obtaining student financial aid<sup>384</sup> have been found to be crimes involving moral turpitude.

An “alien convicted of 2 or more offenses” where the “aggregate sentences to confinement were 5 years or more is inadmissible” whether or not the crimes involved moral turpitude, the convictions occurred in a single trial, or “the offenses arose from a single scheme of misconduct.”<sup>385</sup> Drug traffickers, persons involved in prostitution and commercialized vice, certain criminal aliens who are immune from prosecution, foreign government officials who severely violate religious freedom, traffickers in persons and those who benefit from

370. *Id.* at 321.

371. *See, e.g.,* *Nguyen v. Reno*, 211 F.3d 692, 694–95 (1st Cir. 2000).

372. *See, e.g.,* *Partyka v. Att’y Gen. of U.S.*, 417 F.3d 408, 416 (3d Cir. 2005) (assault on police officer not necessarily a crime involving moral turpitude).

373. *Garcia v. Att’y Gen. of U.S.*, 329 F.3d 1217, 1222 (11th Cir. 2003).

374. *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993).

375. *Sheikh v. Gonzales*, 427 F.3d 1077, 1082 (8th Cir. 2005).

376. *In re Olquin-Rufino*, 23 I. & N. Dec. 896 (BIA 2006).

377. *In re Lopez-Meza*, 22 I. & N. Dec. 1188, 1194–95 (BIA 1999). *But see* *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, *reh’g denied*, 343 F.3d 1075 (9th Cir. 2003).

378. *Carter v. INS*, 90 F.3d 14, 18 (1st Cir. 1996).

379. *Vuksanovic v. U.S. Att’y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006).

380. *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005).

381. *Smriko v. Ashcroft*, 387 F.3d 279, 282–83 (3d Cir. 2004).

382. *Abdelqadar v. Gonzales*, 413 F.3d 668, 671–72 (7th Cir. 2005).

383. *Omagah v. Ashcroft*, 288 F.3d 254, 261 (5th Cir. 2002).

384. *Izedonmwen v. INS*, 37 F.3d 416, 417 (8th Cir. 1994).

385. 8 U.S.C. § 1182(a)(2)(B) (2006).

such trafficking, and money launderers are also inadmissible.<sup>386</sup> Some of these grounds can be waived.<sup>387</sup>

Conviction for purposes of the immigration laws means either “a formal judgment of guilt of the alien entered by a court” or (1) there has been a finding of guilt, guilty plea, a plea of *nolo contendere*, or the admission of “sufficient facts to warrant a finding of guilt,” and (2) “the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty.”<sup>388</sup> Deferred adjudication,<sup>389</sup> probation,<sup>390</sup> convictions that have been expunged,<sup>391</sup> and convictions that will be vacated after the completion of a rehabilitation program<sup>392</sup> are all considered convictions under the Act. A question exists, however, as to whether deferred adjudications under state first-time offender acts constitute convictions. The Board of Immigration Appeals answered in the affirmative<sup>393</sup> and some circuits have deferred to the BIA’s analysis.<sup>394</sup> The Ninth Circuit, however, disagreed.<sup>395</sup> A conviction vacated on substantive grounds is not a conviction under the Act.<sup>396</sup>

#### *D. Economic, Public Health, and Morals Grounds*

Aliens who are “likely at any time to become a public charge [are] inadmissible.”<sup>397</sup> In determining this ground of inadmissibility, immigration officials take into account the alien’s age, health, family status, financial resources, education, and skills.<sup>398</sup> In some instances, a binding affidavit of support from the petitioning relative will be required to satisfy the immigration authorities.<sup>399</sup>

386. *Id.* § 1182(a)(2)(C)–(E) & (G)–(I).

387. *See id.* § 1182(h).

388. *Id.* § 1101(a)(48)(A).

389. *Salazar-Regino v. Trominski*, 415 F.3d 436, 447–48 (5th Cir. 2005).

390. *Uritsky v. Gonzales*, 399 F.3d 728, 735 (6th Cir. 2005).

391. *Resendiz-Alcaraz v. U.S. Att’y Gen.*, 383 F.3d 1262 (11th Cir. 2004).

392. *Herrera-Inirio v. INS*, 208 F.3d 299, 306 (1st Cir. 2000).

393. *See In re Salazar-Regino*, 23 I. & N. Dec. 223 (BIA 2002); *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (BIA 1999).

394. *E.g.*, *Salazar-Regino v. Trominski*, 415 F.3d 436, 448 (5th Cir. 2005).

395. *Lujan-Armendariz v. INS*, 222 F.3d 728, 749 (9th Cir. 2000).

396. *Pinho v. Gonzales*, 432 F.3d 193, 215 (3d Cir. 2005).

397. 8 U.S.C. § 1182(a)(4) (2006).

398. *Id.* § 1182(a)(4)(B)(i)(I)–(V).

399. *Id.* § 1182(a)(4)(B)(ii).

Practicing polygamists,<sup>400</sup> prostitutes,<sup>401</sup> drug abusers,<sup>402</sup> and drug addicts<sup>403</sup> are inadmissible. Persons with certain infectious diseases, as laid out by statute or determined by the Secretary for Health and Human Services, and persons with certain physical and mental disorders are likewise inadmissible.<sup>404</sup>

400. *Id.* § 1182(a)(10)(A).

401. *Id.* § 1182(a)(2)(D).

402. *Id.* § 1182(a)(1)(A)(iv).

403. *Id.*

404. *Id.* § 1182(a)(1)(A)(iii)(I).

## VI. Admission Procedures

The process for obtaining an immigrant visa begins either with the filing of a labor certification application with the Department of Labor where required or with the filing of a visa petition with the U.S. Citizenship and Immigration Services (USCIS). Except in those few instances where the statute allows self-petitioning, the petitioner is the family member or employer whose relationship with the noncitizen beneficiary provides the basis for the petition. The USCIS adjudicates the visa petition, determining whether the noncitizen beneficiary qualifies for the relevant immigrant visa. Upon approval by the USCIS of the visa petition, the beneficiary can file a visa application with the appropriate U.S. consulate. Before a visa is issued, the visa consular official will determine—with the help of a personal interview, police reports, and a medical report—whether any one of the grounds for inadmissibility applies. Once the immigrant visa is issued, the noncitizen has six months in which to travel to the United States.

Although the process for obtaining certain nonimmigrant visas begins in the United States with application made to either the Department of Labor or the USCIS, the process for obtaining most nonimmigrant visas begins at the appropriate U.S. consulate abroad. The noncitizen must demonstrate that she meets the requirements for the applied-for visa and that she is not inadmissible. Once the immigrant visa is issued, the noncitizen can travel to the United States and seek entry pursuant to the terms of the visa. For example, F-1 student visas are generally issued for the duration of student status and allow multiple entries into the United States. Noncitizens from certain countries with low rates of immigration fraud can travel to the United States for short periods of time without having to obtain a visa.

Upon arrival at a U.S. port of entry, the noncitizen faces inspection by U.S. Customs and Border Protection (CBP). The U.S. immigration scheme provides a double-check entry system, with the CBP making a determination—independent of the visa consular official's determination—of the alien's admissibility or inadmissibility. If the alien has made material misrepresentations or does not have the proper documents, she is placed in expedited removal proceedings.<sup>405</sup> For other

405. *Id.* §§ 1225(b)(1)(A) & 1182(a)(6)(C), (7).

aliens, the burden is on the noncitizen to show that she is “clearly and beyond a doubt entitled to be admitted.”<sup>406</sup> Assuming that the alien makes the requisite showing—and with over one million arrivals daily, most of these reviews are cursory—the alien is admitted into the United States permanently (if an immigrant) or for a certain period of time (if a nonimmigrant). If, however, the alien has failed to demonstrate that she is “clearly and beyond a doubt entitled to be admitted,” the alien will be detained and placed in a removal proceeding<sup>407</sup> unless she is permitted to withdraw her application for admission.<sup>408</sup>

### A. Expedited Removal of Arriving Aliens

As stated above, arriving aliens who are determined to be inadmissible because of material misrepresentation or for failure to have the proper entry documents are subject to expedited removal. Additionally, aliens who have not been admitted or paroled (i.e., clandestine entrants) and are found within 100 miles of the border are placed in expedited removal unless they can show that they have been continuously present in the United States for the previous fourteen days.<sup>409</sup> Noncitizens who are granted advance parole are not considered arriving aliens for expedited removal purposes.<sup>410</sup>

Those subject to expedited removal are ordered removed “without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”<sup>411</sup> Unless paroled into the country for exigent circumstances, an alien in expedited removal is detained until removed.<sup>412</sup> In *American Immigration Lawyers Ass’n v. Reno*,<sup>413</sup> the court upheld the expedited removal proceedings against various challenges, including a procedural due process challenge. Following the long line of plenary power cases, the court dis-

406. *Id.* § 1225(b)(2)(A).

407. *Id.*

408. *Id.* § 1225(a)(4).

409. Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01 (Aug. 11, 2004).

410. *Bona v. Gonzales*, 425 F.3d 663, 667–68 (9th Cir. 2005).

411. 8 U.S.C. § 1225(b)(1)(A)(i) (2006).

412. 8 C.F.R. §§ 235.3(b)(2)(iii) & 1235.3(b)(2)(iii) (2008).

413. 18 F. Supp. 2d 38 (D.D.C. 1998).

missed the due process arguments, concluding that arriving aliens “have no due process rights.”<sup>414</sup>

Congress has stripped courts of jurisdiction to review most matters pertaining to expedited removal. Pursuant to the INA, courts may not “enter declaratory, injunctive, or other equitable relief,” except as provided by statute, or “certify a class” in any action brought to review expedited removal.<sup>415</sup> A person subject to expedited removal can bring a habeas corpus proceeding to claim (1) that he was not ordered removed pursuant to the expedited removal procedures, (2) that he is a citizen, or (3) that he is a lawfully admitted permanent resident alien, a refugee, or an asylee.<sup>416</sup> Congress also provided for limited review in the U.S. District Court for the District of Columbia to determine whether the expedited removal statute and its implementing regulations are constitutional and to determine whether implementation is in accord with the statute.<sup>417</sup>

### *B. Removal of Other Arriving Aliens*

The Illegal Immigration Reform & Immigration Responsibility Act of 1996 abolished the distinction between exclusion proceedings and deportation proceedings, replacing them with a generic removal proceeding.<sup>418</sup> An Immigration and Customs Enforcement attorney prosecutes the case for removal before an immigration judge who is an employee of the Department of Justice’s Executive Office for Immigration Review. The immigration judge possesses powers and responsibilities similar to any other administrative law judge.<sup>419</sup> The alien has the right to be represented by an attorney (at no expense to the government)

414. *Id.* at 60.

415. 8 U.S.C. § 1252(e)(1) (2006).

416. *Id.* § 1252(e)(2). See *Brumme v. INS*, 275 F.3d 443, 448 (5th Cir. 2001) (distinguishing *INS v. St. Cyr*, 533 U.S. 289 (2001), the court concluded that it had no jurisdiction to review the questions of whether alien was admissible or entitled to relief from inadmissibility). But see *American–Arab Anti-Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d 650, 663 (E.D. Mich. 2003) (distinguishing *Brumme*, “the Court [found] that under the circumstances here, it has jurisdiction on habeas review to determine whether the expedited removal statute was lawfully applied to petitioners in the first place”).

417. 8 U.S.C. § 1252(e)(3) (2006).

418. See *id.* § 1229a.

419. See *id.* § 1229a(b)(1).

together with the usual bundle of procedural rights (i.e., right to confront, cross-examine, and impeach adverse evidence; right to present evidence).

Although the determinations to remove inadmissible and deportable aliens both occur in removal proceedings, an important difference exists between the removal of inadmissible aliens and the removal of deportable aliens. In both cases, the alien has the burden of proof with respect to issues pertaining to relief from removal.<sup>420</sup> In a deportation action, once the alien has established “by clear and convincing evidence” that he is in the United States lawfully, the burden shifts to the government to prove by the same standard that the alien is deportable.<sup>421</sup> In contrast, an alien applicant for admission has the burden of proving that he “is clearly and beyond doubt entitled to be admitted and is not inadmissible.”<sup>422</sup>

One question that may arise with respect to returning permanent residents is whether they are seeking admission into the United States for immigration purposes. If they are deemed to be seeking admission, the statute treats them—both substantively and procedurally—just like it does first-time entrants. Procedurally, “[t]he question of whether an alien is an applicant for admission is important because such applicants must demonstrate that they are ‘clearly and beyond doubt entitled to be admitted and [are] not inadmissible’.”<sup>423</sup> Substantively, for a few aliens this can be a crucial question because an alien might be inadmissible but not deportable; therefore, for these aliens, the *fact* of seeking admission may be determinative of the question of removability. The statute is silent as to who bears the burden of proving whether a returning permanent resident alien is seeking an admission.<sup>424</sup> To ameliorate the harshness of such a result, the INA provides that

an alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the

420. *Id.* § 1229a(c)(4).

421. *Id.* § 1229a(c)(2)(B) & (3).

422. *Id.* § 1229a(c)(2)(A). Judicial review of removal orders is discussed *supra* Part II.

423. *Sandoval-Loffredo v. Gonzales*, 414 F.3d 892, 894 (8th Cir. 2005).

424. *Id.* at 895 (court didn’t decide the question because immigration judge had concluded that the government had shown by clear and convincing evidence that alien had committed a crime while outside the United States and was thus required to be treated as an alien seeking admission).

United States for purposes of the immigration laws unless the alien (i) has abandoned or relinquished that status, (ii) has been absent from the United States for a continuous period in excess of 180 days, (iii) engaged in illegal activity after having departed the United States, (iv) has departed from the United States while under legal process seeking removal . . . , (v) has committed an offense [rendering the alien inadmissible unless offense is waived], or (vi) is attempting to enter [clandestinely].<sup>425</sup>

425. 8 U.S.C. § 1101(a)(13)(C) (2006). At one time the statute defined “entry” rather than “admission,” and the issue was whether a returning permanent resident alien was attempting to “enter” the United States. *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (interpreting statute to mean that alien is not seeking “entry” where trip abroad was “innocent, casual, and brief”). Since “admission” requires a “lawful entry,” 8 U.S.C. § 1101(a)(13)(A) (2006), and since some grounds of deportability are tied to “entry” and not “admission,” e.g., 8 U.S.C. § 1227(a)(1)(A) (2006), there is a question of whether the *Fleuti* doctrine survives the definitional switch from “entry” to “admission” in the statute. *See, e.g., Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 501–02 (5th Cir. 2006) (consistent with Third and Seventh Circuits, court held that *Fleuti* was superseded by statute). For a more in-depth look at the meanings of “entry” and “admission,” see Gerald Seipp, *Law of “Entry” and “Admission”: Simple Words, Complex Concepts*, 05-11 Immigr. Briefings 1 (Nov. 2005).

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## VII. Grounds for Deportation

The Immigration and Nationality Act divides deportation grounds into six broad categories: immigration status violations; criminal offenses; failure to register and document falsification; security and related grounds; public charge grounds; and unlawful voting.<sup>426</sup> The discussion of some of the grounds for inadmissibility, particularly dealing with national security issues and crimes involving moral turpitude, will be relevant to this deportability section.<sup>427</sup>

### A. *Immigration Status Violations*

Aliens are deportable who were inadmissible “at the time of entry or adjustment of status,” are “present in the United States in violation of the Act,” have violated the terms of their nonimmigrant status, have violated the conditions of admission, or have had their conditional residence terminated.<sup>428</sup> In *Francis v. Gonzales*,<sup>429</sup> the Second Circuit reviewed an order that found an alien removable for being inadmissible at the time of entry because he had two marijuana convictions prior to entry. In vacating the order, the court concluded that a Jamaican “rap sheet” was insufficient to establish deportability by clear and convincing evidence: “In identifying reliable evidence, there are good reasons to prefer records emanating from neutral courts and magistrates instead of from agencies whose jobs are to seek to detect and prosecute crimes.”<sup>430</sup>

An alien who knowingly encourages, induces, assists, abets, or aids “any other alien to enter or to try to enter the United States in violation of the law is deportable,” provided that the act occurred prior to, at the

426. INA § 237(a)(1)–(6), 8 U.S.C. § 1227(a)(1)–(6) (2006).

427. *See supra* Part V.B–C.

428. 8 U.S.C. § 1227(a)(1)(A)–(D) (2006).

429. 442 F.3d 131 (2d Cir. 2006).

430. *Id.* at 143 (“Even if we were to credit a domestic rap sheet, moreover, a report from a foreign police department is even less reliable. We ordinarily are without dependable means to assess accurately the reliability of a foreign jurisdiction’s prosecutorial or police records, and there is no indication that the IJ here had dependable means either.”).

time of, or within five years of “the date of any entry.”<sup>431</sup> Deferring to the agency’s interpretation of the statute pursuant to *Chevron*, the Ninth Circuit, in *Hernandez-Guadarrama v. Ashcroft*,<sup>432</sup> concluded that aliens can be deported for alien smuggling even when they don’t assist in the border crossing itself.<sup>433</sup>

Two provisions cover deportation for marriage fraud. A conditional permanent resident whose marriage ends within two years of admission is deportable unless “the alien establishes . . . that the marriage was not contracted for the purposes” of obtaining immigration benefits.<sup>434</sup> An alien can also be deported if it is determined that “the alien has failed or refused to fulfill the alien’s marital agreement” where the marriage was entered into for the purpose of obtaining an immigration benefit.<sup>435</sup>

## B. Criminal Offenses

Over the past two decades, Congress has greatly expanded the category of crimes for which an alien can be deported, and the executive branch has greatly increased the number of aliens who have been physically deported for criminal offenses. Deportable crimes include crimes involving moral turpitude,<sup>436</sup> “aggravated felonies,”<sup>437</sup> drug crimes, firearms offenses, and crimes involving domestic violence. Additionally, drug abusers and drug addicts are deportable without need for a criminal conviction. A survey of the moral turpitude and aggravated felony grounds for deportation will serve to expose some of the issues raised with respect to criminal deportation grounds generally.

431. 8 U.S.C. § 1227(a)(1)(E) (2006). There is no longer a statutory definition of “entry.” See *supra* note 425.

432. 394 F.3d 674 (9th Cir. 2005).

433. *Id.* at 678–79 (conditional permanent resident alien could be deported for knowingly transporting illegal entrants as part of the scheme to get them from Point A in Mexico to Point B in the United States even though the conditional permanent resident took no part in the actual border crossing).

434. 8 U.S.C. § 1227(a)(1)(G)(i) (2006).

435. *Id.* § 1227(a)(1)(G)(ii).

436. For a discussion of the meaning of “moral turpitude,” see *supra* Part V.C.

437. For the definition of “aggravated felony,” see 8 U.S.C. § 1101(a)(43)(A)–(U) (2006). See also *infra* Part VII.B.2.

## 1. Crimes Involving Moral Turpitude

An alien is deportable upon conviction<sup>438</sup> of a single crime of moral turpitude, provided that the criminal activity occurred within five years after admission<sup>439</sup> and the conviction is for a crime for “which a sentence of one year or longer may be imposed.”<sup>440</sup> One question is whether adjustment from nonimmigrant to immigrant status is an “admission” for purposes of the five-year time frame. The court in *Abdelqadar v. Gonzales*<sup>441</sup> distinguished *In re Rosas-Ramirez*,<sup>442</sup> concluding that, for purposes of the moral turpitude deportation ground, an alien does not make a new “admission” into the United States at the time of adjustment of status.<sup>443</sup>

An alien is deportable upon conviction of more than one crime of moral turpitude “not arising out of a single scheme of criminal misconduct” regardless of how long he has been in the United States, whether he was confined pursuant to the conviction, or “whether the convictions were in a single trial.”<sup>444</sup> The courts of appeals have split on the meaning of “single scheme of criminal misconduct.”

*Abdelqadar* represents the majority view. That case involved a permanent resident alien ordered removed after being convicted twice of the crime of “purchasing food stamps from welfare recipients.”<sup>445</sup> The acts, which were the basis of the conviction, occurred two days apart.<sup>446</sup> Acknowledging that these two crimes would be treated as a single scheme under the Sentencing Guidelines, the Seventh Circuit nonetheless rejected that approach and followed the Board of Immigration Ap-

438. For a discussion of the definition of “conviction,” see *supra* notes 388–96 and accompanying text.

439. For a discussion of the definition of “admission,” see *supra* note 425.

440. 8 U.S.C. § 1227(a)(2)(A)(i) (2006). See *Aquino-Encarnacion v. INS*, 296 F.3d 56 (1st Cir. 2002) (alien deportable although sentence reduced to eleven months probation because actual sentence imposed is irrelevant to question of deportability).

441. 413 F.3d 668 (7th Cir. 2005).

442. 22 I. & N. Dec. 616, 624 (BIA 1999) (en banc) (BIA determined that clandestine entrant was “admitted” after adjustment of status and was, therefore, deportable because she was convicted of an aggravated felony “after admission”).

443. *Abdelqadar*, 413 F.3d at 673–74.

444. 8 U.S.C. § 1227(a)(2)(A)(ii) (2006).

445. *Abdelqadar*, 413 F.3d at 671 (purchasing food stamps from welfare recipients is considered a crime involving moral turpitude because fraud is an element of the crime).

446. *Id.* at 674.

peals in applying the recidivist statutes.<sup>447</sup> Deferring to the BIA, the court said:

[T]wo offenses are not part of a “single scheme of criminal misconduct” when the acts are distinct and neither offense causes (or constitutes) the other. Robbing six people at one poker game therefore would be a single scheme even if it led to multiple convictions, as would all lesser included offenses of a criminal transaction. . . . [However,] a series of securities frauds by a broker who finds a new “mark” daily [are] distinct offenses rather than aspects of a single scheme, because the broker could stop after any of the frauds.<sup>448</sup>

The Ninth Circuit disagrees. In *Gonzalez-Sandoval v. U.S. Immigration and Naturalization Service*,<sup>449</sup> the court addressed the issue of “whether two bank robberies occurring within two days of each other, at the same bank, and which petitioner conceived and planned at the same time, constituted crimes ‘arising out of a single scheme of criminal misconduct,’” which would exempt the alien from deportation.<sup>450</sup> The court concluded that “where credible, uncontradicted evidence, which is consistent with the circumstances of the crimes, shows that the two predicate crimes were planned at the same time and executed in accordance with that plan, we must hold that the government has failed in its burden to establish that the conviction did not arise out of ‘a single scheme of criminal misconduct.’”<sup>451</sup>

## 2. Aggravated Felonies

For much of the twentieth century, “the chief criminal deportation ground” was the moral turpitude deportation provision.<sup>452</sup> Beginning in 1988, Congress began expanding the crimes for which one could be deported while cutting back on procedural protection and discretionary relief.<sup>453</sup> The Anti-Drug Abuse Act of 1988 (ADAA) added “aggra-

447. *Id.* at 675 (referring to *Matter of Adetiba*, 20 I. & N. Dec. 506 (BIA 1992)).

448. *Id.* (citations omitted).

449. 910 F.2d 614 (9th Cir. 1990).

450. *Id.* at 614–15.

451. *Id.* at 616.

452. See Thomas Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 725 (4th ed. 1998).

453. See generally Brent Newcomb, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Con-*

vated felony” as a new but very limited ground for deportation, reserved for serious crimes (e.g., murder and drug and weapons trafficking), regardless of the sentence imposed and the longevity of the alien’s residence in the United States.<sup>454</sup> The Immigration Act of 1990 expanded the scope of aggravated felony to include nonpolitical crimes of violence for which a prison sentence of at least five years was imposed.<sup>455</sup> The Immigration and Nationality Technical Corrections Act of 1994 further broadened the definition of aggravated felony to include crimes such as theft and burglary where a five-year sentence was imposed.<sup>456</sup> In addition to being deportable, “aggravated felons” receive a streamlined removal process, are subject to mandatory detention pending removal, and are ineligible for most forms of relief from deportation, including cancellation of removal and asylum.

“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”<sup>457</sup> The statute defines twenty types of offenses that are considered aggravated felonies for immigration purposes.<sup>458</sup> Because of the breadth of the definition and the severe consequences of a finding that an alien has been convicted of an aggravated felony, this has been an area of much litigation. Below is a small sampling of the myriad of cases, with a focus on the methodology by which the courts concluded that a particular crime either was or was not an aggravated felony. It should be noted initially that *Chevron* deference is not due the Board of Immigration Appeals with respect to interpretation of state and federal criminal statutes.<sup>459</sup>

The Supreme Court has addressed the “aggravated felony” question in recent years. In *Lopez v. Gonzales*,<sup>460</sup> the Court addressed the

*victed of Aggravated Felonies*, 51 Okla. L. Rev. 697, 698–701 (1998) (brief history of congressional action since 1988).

454. Pub. L. No. 100-690, 102 Stat. 4181 (1988).

455. Pub. L. No. 101-649, 104 Stat. 4978 (1990). This Act also eliminated important discretionary relief for certain “aggravated felons.”

456. Pub. L. No. 103-416, 108 Stat. 4305 (1994).

457. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006). For purposes of this statute, “admission” includes adjustment of status. *See* Matter of Rosas, 23 I. & N. Dec. 448 (BIA 2002).

458. 8 U.S.C. § 1101(a)(43)(A)–(U) (2006).

459. *See, e.g.,* Parrilla v. Gonzales, 414 F.3d 1038, 1041 (9th Cir. 2005).

460. 549 U.S. 47 (2006). *See also,* Nijhawan v. Holder, 129 S. Ct. 2294 (2009) (applying a “circumstance-specific” and not a “categorical” method of reading the “fraud and deceit” provisions of the “aggravated felony” statute); Flores-Figueroa v. United States,

question of whether a state felony conviction for aiding and abetting the possession of cocaine was an aggravated felony where the offense would have only been a misdemeanor under the federal Controlled Substances Act (CSA). The case involved the interplay between two provisions in the definition of “aggravated felony.” First, “[i]llicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)” is an aggravated felony.<sup>461</sup> “The general phrase ‘illicit trafficking’ is left undefined, but § 924(c)(2) of Title 18 identifies the subcategory by defining ‘drug trafficking crime’ as ‘any felony punishable under the Controlled Substances Act.’”<sup>462</sup> Second, the term “aggravated felony” “applies to an offense described in [section 1101(a)(43) of Title 8] whether in violation of Federal or State law . . . .”<sup>463</sup>

Examining the state statute, the majority found that “Lopez’s state conviction was for helping someone else possess cocaine in South Dakota, which state law treated as the equivalent of possessing the drug, a state felony. Mere possession is not, however, a felony under the federal CSA.”<sup>464</sup> Since South Dakota views this felony as similar to “simple possession,” it cannot, according to the Court, be easily characterized as involving “illicit trafficking.”<sup>465</sup> Therefore, although “Congress can define an aggravated felony of illicit trafficking in an unexpected way . . . there are good reasons to think it was doing no such thing here.”<sup>466</sup> Addressing specifically the statutory proviso that makes state offenses aggravated felonies, the Court said it had two purposes: “it provides that a generic description of ‘an offense . . . in this paragraph,’ one not specifically couched as a state offense or a federal one, covers either one, and it confirms that a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony.”<sup>467</sup>

129 S. Ct. 1886 (2009) (holding aggravated identity theft requires knowledge that means of ID belonged to someone else).

461. 8 U.S.C. § 1101(a)(43)(B) (2006).

462. *Lopez*, 549 U.S. at 50.

463. 8 U.S.C. § 1101(a)(43) (2006) (proviso after § U).

464. *Lopez*, 549 U.S. at 53 (internal citations omitted).

465. *See id.* at 54.

466. *Id.* at 54–55.

467. *Id.* at 57.

The Court went on to say that “if Lopez’s state crime actually fell within the general term ‘illicit trafficking,’ the state felony conviction would count as an ‘aggravated felony,’ regardless of the existence of a federal felony counterpart.”<sup>468</sup> In his dissent, Justice Thomas argued:

Lopez’s state felony offense qualifies as a “drug trafficking crime” as defined in § 924(c)(2). A plain reading of this definition identifies two elements: First, the offense must be a felony; second, the offense must be capable of punishment under the Controlled Substances Act (CSA). No one disputes that South Dakota punishes Lopez’s crime as a felony. Likewise, no one disputes that the offense was capable of punishment under the CSA. Lopez’s possession offense therefore satisfies both elements, and the inquiry should end there.<sup>469</sup>

Following *Lopez*, the Tenth Circuit affirmed a finding that an alien was deportable as an aggravated felon. *Gradiz v. Gonzales*<sup>470</sup> involved an alien who had been convicted under a Wyoming statute that made it illegal to “manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.”<sup>471</sup> The court concluded that “[a]ll three offenses chargeable under that statute—manufacture, delivery, and possession with intent to manufacture or deliver—are felonies under the Controlled Substances Act, and are therefore deportable aggravated felonies.”<sup>472</sup> The description of the charge in the arraignment record provided a slight wrinkle because it described the charge as “Unlawful Manufacture or Delivery or Possession, or Possession With intent to Manufacture or Deliver, a Controlled Substance.”<sup>473</sup> Since this charge included, as an alternative, the crime of simple possession, the court had to look beyond the charge to the defendant’s conduct as determined in the court’s papers. Since his plea agreement made it clear that he had actually distributed a controlled substance and not simply possessed it, the court concluded that he had been convicted of an “aggravated felony.”<sup>474</sup>

468. *Id.*

469. *Id.* at 61 (Thomas, J., dissenting) (internal citations omitted).

470. 490 F.3d 1206 (10th Cir. 2007).

471. *Id.* at 1210.

472. *Id.* (citations omitted).

473. *Id.*

474. *Id.* at 1211.

A circuit split has occurred with respect to how to apply *Lopez* to a second state conviction of simple possession where the alien might be subject to a recidivism statute. “The First, Third, and Sixth Circuits have held (in cases applying the INA) that a second simple-possession offense cannot be treated as a recidivist felony under the Controlled Substances Act unless the offense was prosecuted as a recidivist offense under state law.”<sup>475</sup> “By contrast, the Fifth and Seventh Circuits have held (in cases applying the Sentencing Guidelines) that a second simple-possession offense can be treated as a recidivist felony, since the conduct underlying the second possession could have been prosecuted as a recidivist felony under the CSA.”<sup>476</sup> In applying the INA and the Sentencing Guidelines to the question of whether a second conviction for simple possession is an aggravated felony, the Second Circuit agrees with the First, Third, and Sixth Circuits.<sup>477</sup> Noting that it is not entitled to deference with respect to the interplay of state and federal criminal law, the BIA has issued two opinions that are consistent with the decisions in the First, Second, Third, and Sixth Circuits.<sup>478</sup>

In *Leocal v. Ashcroft*,<sup>479</sup> the Court considered the meaning of “crime of violence”<sup>480</sup> in the context of a conviction for driving under the influence. A “crime of violence” is “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physi-

475. *United States v. Ayon-Robles*, 557 F.3d 110, 112 (2d Cir. 2009) (citing *Berhe v. Gonzales*, 464 F.3d 74, 85–86 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130, 137–38 (3d Cir. 2001); *Rashid v. Mukasey*, 531 F.3d 438, 442–48 (6th Cir. 2008)). Note that *Berhe* is a pre-*Lopez* case.

476. *Id.* at 113 (citing *United States v. Cepeda-Rios*, 530 F.3d 333, 334–36 (5th Cir. 2008) (per curiam); *United States v. Pacheco-Diaz*, 506 F.3d 545, 548–50 (7th Cir. 2007)). See also *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), cert. granted, 2009 U.S. LEXIS 9024 (Dec. 14, 2009) (No. 09-60).

477. See *Ayon-Robles*, 557 F.3d at 113 (applying Sentencing Guidelines); *Alsol v. Mukasey*, 548 F.3d 207, 219 (2d Cir. 2008) (applying INA).

478. *In re Carachuri*, 24 I. & N. Dec. 382, 385 (BIA 2007); *In re Thomas*, 24 I. & N. Dec. 416 (BIA 2007). But see *Fernandez v. Mukasey*, 544 F.3d 862, 868–69 (7th Cir. 2008) (rejecting BIA’s view in *Carachuri*).

479. 543 U.S. 1 (2004).

480. See 8 U.S.C. § 1101(a)(43)(F) (2006) (“a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year” is an aggravated felony).

cal force against the person or property of another may be used in the course of committing the offense.”<sup>481</sup>

The petitioner, Leocal, had lived in the United States for twenty years—thirteen as a permanent resident alien—when “he was charged with two counts of DUI causing serious bodily injury under [a Florida statute], after he caused an accident resulting in injury to two people. He pleaded guilty to both counts and was sentenced to 2½ years in prison.”<sup>482</sup> Leocal was ordered removed from the country on the ground that he was an aggravated felon because his DUI was a crime of violence.<sup>483</sup> The Court first noted that since the “crime of violence” provision focuses on the “offense,” it was required “to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime.”<sup>484</sup>

Several states, including Florida, had criminalized driving under the influence causing serious bodily injury, without specifying a *mens rea*, or requiring only negligence.<sup>485</sup> “The question here is whether § 16 can be interpreted to include such offenses.”<sup>486</sup> In other words, does the word “use” in “use of force” connote more than the act of using force and more than mere negligence in using force? In concluding that Leocal’s conviction was not a crime of violence under § 16(a), the Court reasoned:

While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would “use . . . physical force against” another when pushing him; however, we would not ordinarily say a person “use[s] . . . physical force against” another by stumbling and falling into him. When interpreting a statute, we must give words their “ordinary or natural” meaning.<sup>487</sup>

481. 18 U.S.C. § 16 (2006).

482. *Leocal*, 543 U.S. at 4.

483. *Id.* at 5.

484. *Id.* at 7.

485. *See id.* at 8.

486. *Id.*

487. *Id.* at 9.

In concluding that a DUI conviction under the Florida statute was not a crime of violence under § 16(b), the Court said:

§ 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime.<sup>488</sup>

Following *Leocal*, the Ninth Circuit concluded that gross vehicular manslaughter while intoxicated was not a crime of violence (and therefore not an aggravated felony) because the statute employed a negligence—albeit gross negligence—standard.<sup>489</sup>

As seen from the above mentioned cases, the determination of whether a particular conviction is for an aggravated felony will often turn on intricate statutory interpretation and the interplay between multiple statutes. In *Kharana v. Gonzales*,<sup>490</sup> for instance, the Ninth Circuit addressed the issue of whether someone can be guilty of an offense that “involves fraud or deceit in which the loss to the victim . . . exceeds \$10,000”<sup>491</sup> if the offender makes full restitution. Since “loss to the victim” is not defined by the INA, the petitioner argued that reference should be made to the Sentencing Guideline formula for theft offenses, which gauges the sentence by the amount of the loss but does not count as loss moneys returned *prior* to the detection of the crime.<sup>492</sup> Setting aside the question of whether the Sentencing Guideline formula ought to be applied to the immigration context, the court concluded that the petitioner could not benefit from the payback provisions because she made restitution only *after* the detection of her

488. *Id.* at 10 (“The classic example is burglary. A burglary would be covered under § 16(b) *not* because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.”).

489. *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005).

490. 487 F.3d 1280 (9th Cir. 2007).

491. INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) (2006).

492. *Kharana*, 487 F.3d at 1284.

crime.<sup>493</sup> Interpreting the same statute, the Tenth Circuit said that it was the loss to victims (\$24,000) and not the amount of the bad check (\$9,308) in an elaborate check-kiting scheme that was relevant in determining whether the \$10,000 threshold had been met.<sup>494</sup>

In *Chowdhury v. INS*,<sup>495</sup> the Ninth Circuit examined a different monetary aggravated felony provision. Money laundering, “if the amount of the funds exceeded \$10,000,” is an aggravated felony.<sup>496</sup> In *Chowdhury*, the petitioner pled guilty to laundering \$1,310 and was ordered to pay restitution of \$967,753.39. Subsequently, he was ordered removed as an aggravated felon because the amount of loss far exceeded the statutory amount.<sup>497</sup> The issue before the court was “whether the phrase ‘amount of the funds’ refers to the amount of money that was laundered or the amount of loss suffered by the victims of the underlying criminal activity.”<sup>498</sup> In concluding that the petitioner had not committed an aggravated felony, the court said: “The plain language of the statute is clear. The phrase ‘if the amount of the funds’ modifies the clause preceding it and, therefore, refers to the amount of money that was laundered. The statute does not mention the loss to the victim or the total proceeds of the criminal activity.”<sup>499</sup>

Pursuant to a modified categorical approach, the Ninth Circuit concluded that a person convicted in the State of Washington of the misdemeanor of communicating with a minor for immoral purposes had committed the aggravated felony of “sexual abuse of a minor” where it was clear from judicially noticeable documents that the criminal conduct fell within the BIA’s reasonable definition of “sexual abuse of a minor.”<sup>500</sup> There is no need to look to federal standards under the “sexual abuse of a minor”; therefore a state conviction for statutory rape of a 17-year-old can be an aggravated felony.<sup>501</sup> No contact is nec-

493. *Id.* at 1284–85.

494. *Khalayleh v. INS*, 287 F.3d 978, 980 (10th Cir. 2002).

495. 249 F.3d 970 (9th Cir. 2001).

496. INA § 101(a)(43)(D), 8 U.S.C. § 1101(a)(43)(D) (2006).

497. *Chowdhury*, 249 F.3d at 973 (internal citation omitted).

498. *Id.*

499. *Id.*

500. *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005).

501. *See Afridi v. Gonzales*, 442 F.3d 1212, 1216 (9th Cir. 2006) (“the term ‘aggravated felony’ is not limited to those crimes defined by federal law as sexual abuse of a minor for purposes of determining removability”).

essary under the “sexual abuse” provision; attempted solicitation is enough under some statutes.<sup>502</sup>

Other cases finding an aggravated felony include simple misdemeanor assault,<sup>503</sup> unauthorized use of a vehicle,<sup>504</sup> petit larceny,<sup>505</sup> possession of stolen mail,<sup>506</sup> theft of services,<sup>507</sup> forgery,<sup>508</sup> and criminal contempt of court.<sup>509</sup> Cases finding that a conviction was not an aggravated felony include intentional assault in the third degree,<sup>510</sup> credit card fraud,<sup>511</sup> grand theft,<sup>512</sup> and failure to appear.<sup>513</sup>

502. *E.g.*, Taylor v. United States, 396 F.3d 1322, 1328–29 (11th Cir. 2005).

503. Compare Singh v. Gonzales, 432 F.3d 533, 539 (3d Cir. 2006) (aggravated felony as crime of violence where misdemeanor assault statute required specific intent), with Popal v. Gonzales, 416 F.3d 249, 254–55 (3d Cir. 2005) (no aggravated felony as crime of violence where misdemeanor assault statute only required recklessness).

504. Ramirez v. Ashcroft, 361 F. Supp. 2d 650, 656 (S.D. Tex. 2005).

505. Jaafar v. INS, 77 F. Supp. 2d 360, 365 (W.D.N.Y. 1999).

506. Randhawa v. Ashcroft, 298 F.3d 1148, 1151 (9th Cir. 2002).

507. Ilchuk v. Att’y Gen. of U.S., 434 F.3d 618, 622–23 (3d Cir. 2006).

508. Richards v. Ashcroft, 400 F.3d 125, 129–30 (2d Cir. 2005).

509. Alwan v. Ashcroft, 388 F.3d 507, 514 (5th Cir. 2004).

510. Chrzanoski v. Ashcroft, 327 F.3d 188, 195 (2d Cir. 2003) (“under Connecticut law, it seems an individual could be convicted of intentional assault in the third degree for injury caused not by physical force, but by guile, deception, or even deliberate omission”).

511. Soliman v. Gonzales, 419 F.3d 276, 284–86 (4th Cir. 2005).

512. Jaggernauth v. U.S. Att’y Gen., 432 F.3d 1346, 1354–55 (11th Cir. 2005).

513. Barnaby v. Reno, 142 F. Supp. 2d 277, 280 (D. Conn. 2001).

## VIII. Relief from Deportation (and in Some Cases, Inadmissibility)

The Immigration and Nationality Act provides several types of relief for statutorily eligible deportable aliens. Some forms of available relief allow the alien to stay in the country while other forms ameliorate some of the harsher consequences of deportation. Absent exceptional circumstances, aliens who fail to appear at their removal hearings are barred from seeking relief for ten years after the order of removal.<sup>514</sup> Likewise, those who fail to comply with the terms of their voluntary departure are ineligible for relief for ten years.<sup>515</sup> Aggravated felons and in some instances those being deported for other criminal offenses are ineligible for most relief.<sup>516</sup> Similarly, terrorists and others being deported for national security reasons are ineligible for most relief.<sup>517</sup>

To obtain relief, the alien has the burden of proving that she is statutorily eligible and, in those cases where relief is discretionary, that she “merits a favorable exercise of discretion.”<sup>518</sup> While the circuit courts have jurisdiction with respect to questions of law, including issues of statutory eligibility, it is important to emphasize that many forms of relief are ultimately discretionary, including cancellation, voluntary departure, and adjustment of status. Judicial review is generally unavailable for discretionary denials.<sup>519</sup>

The alien must corroborate credible testimony if required by the immigration judge unless the alien shows that he does not have and cannot reasonably obtain such evidence.<sup>520</sup> And courts cannot reverse an immigration judge’s determination regarding “the availability of

514. INA § 240(b)(7), 8 U.S.C. § 1229a(b)(7) (2006).

515. INA § 240B(d), 8 U.S.C. § 1229c(d) (2006).

516. *See, e.g.*, INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2006).

517. *See, e.g.*, INA § 240A(c)(4), 8 U.S.C. § 1229b(c)(4) (2006).

518. INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (2006).

519. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2006). *See, e.g.*, *Hassan v. Chertoff*, 543 F.3d 564, 566 (9th Cir. 2008) (district court lacked jurisdiction to review agency’s discretionary decision); *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 42 (2d Cir. 2008) (court lacks jurisdiction to review “mere quarrel over the correctness of the factual findings or the justification for discretionary choices made by the agency”) (internal quotations omitted); *De La Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006) (same).

520. INA § 240(c)(4)(B), 8 U.S.C. § 1229a(c)(4)(B) (2006).

corroborating evidence” unless the court concludes “that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.”<sup>521</sup> According to one court, “[a]ll that this means is that an immigration judge’s determination that if there were evidence to corroborate the alien’s testimony the alien could and should have presented it is entitled to reasonable deference. The precondition to deference is that the immigration judge explain (unless it is obvious) why he thinks corroborating evidence, if it existed, would have been available to the alien.”<sup>522</sup> Where an immigration judge confronts “an inherently implausible story” and the alien contradicts himself, the court found that a reasonable adjudicator would not be compelled to disagree with the immigration judge.<sup>523</sup>

### A. Cancellation of Removal Part A

Cancellation of Removal Part A, under § 240A of the INA, provides permanent relief from deportation and continuing permanent residence for certain qualifying, long-term, permanent resident aliens.<sup>524</sup> To be eligible for Cancellation of Removal Part A, an alien must have been a permanent resident for at least five years and have resided in the United States “continuously for 7 years after having been admitted in any status.”<sup>525</sup> An alien who received permanent residence by fraud or mistake has not been “lawfully admitted for permanent residence” for purposes of eligibility for the now repealed § 212(c) relief<sup>526</sup> and

521. INA § 242(b)(4), 8 U.S.C. § 1252(b)(4) (2006).

522. *Hor v. Gonzales*, 421 F.3d 497, 500–01 (7th Cir. 2005).

523. *Zheng v. Gonzales*, 417 F.3d 379, 383 (3d Cir. 2005).

524. In 1996, Congress replaced an older form of relief from deportation with Cancellation of Removal Part A. Cancellation of Removal Part A’s predecessor, known as § 212(c) relief, is still a viable option in a dwindling number of cases. To explore the differences between the statutes, see Elwin Griffith, *The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240A of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation*, 12 *Geo. Immigr. L.J.* 65 (1997).

525. See INA § 240A(a), 8 U.S.C. § 1229b(a) (2006).

526. *E.g., Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1187 (8th Cir. 2005) (“Arellano-Garcia may have received the adjustment through lawful procedure, and thus he reaped the benefits of permanent residence status until the mistake was discovered, but we defer to the BIA’s reasoned statutory interpretation and conclusion that he never ‘lawfully’ acquired the status through that mistake. We will not ‘deem’ him to be a ‘lawfully admit-

presumably would not have been “lawfully admitted for permanent residence” for purposes of eligibility for Cancellation of Removal Part A. Continuous residence ends, for eligibility purposes, at the earlier of either (1) service of notice to appear and face removal charges or (2) the commission of a crime that makes the alien inadmissible or deportable.<sup>527</sup>

In addition to statutory eligibility, an alien seeking Cancellation of Removal Part A must also warrant a favorable exercise of discretion by the immigration judge. In *In re C-V-T*,<sup>528</sup> the Board of Immigration Appeals discussed the standards by which discretion will be exercised. The Board said that the immigration judge

“must balance the adverse factors evidencing the alien’s undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of . . . relief appears in the best interest of this country.” . . . [F]avorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country’s armed forces, a history of employment, and existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent’s good character. Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of exclusion or deportation (now removal) that are at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent’s bad character or undesirability as a permanent resident of this country.<sup>529</sup>

Some aliens, particularly those who are deportable based on plea agreements or convictions predating April 24, 1996, may be entitled to

ted permanent resident’ when he obtained permanent residence status through a mistake and was not otherwise eligible for the status adjustment.”).

527. See INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2006).

528. 22 I. & N. Dec. 7 (BIA 1998).

529. *Id.* at 11 (quoting *Matter of Marin*, 16 I. & N. Dec. 581, 584–85 (BIA 1978)).

apply for forms of relief that are no longer available, such as § 212(c) relief.<sup>530</sup>

### *B. Cancellation of Removal Part B*

Cancellation of Removal Part B provides permanent relief in the form of permanent residence for certain aliens, whether or not lawfully in the United States. To be eligible for Cancellation of Removal Part B, the inadmissible or deportable alien must have been “physically present in the United States for a continuous period of not less than 10 years immediately preceding the date” of application for relief, must have “been a person of good moral character during such period,” and must not have been convicted of crimes that would render an alien inadmissible or deportable.<sup>531</sup> The alien must also establish “that removal would result in exceptional and extremely unusual hardship to the alien’s [citizen or permanent resident] spouse, parent, or child.”<sup>532</sup> Additionally, the alien must warrant a favorable exercise of discretion. This remedy is available for permanent residents who do not meet the requirement of Cancellation of Removal Part A and for all other aliens, whether or not they were ever lawfully admitted into the United States. There are more relaxed rules for battered spouses and children.<sup>533</sup>

Continuous physical presence ends, for eligibility purposes, at the earlier of either (1) service of notice to appear and face removal charges or (2) the commission of a crime that makes the alien inadmissible or deportable.<sup>534</sup> Absence from the United States for a single period of more than 90 days or an aggregate period of more than 180 days will break the period of continuous physical presence.<sup>535</sup>

Several cases have addressed the ten-year requirement. In *Lagandaon v. Ashcroft*,<sup>536</sup> the Ninth Circuit determined that the statute’s plain meaning indicated that someone who was physically present from May

530. See *INS v. St. Cyr*, 533 U.S. 289 (2001). For a more detailed look at questions of retroactivity and the continued availability of § 212(c) relief, see Ira Kurzban, *Immigration Law Sourcebook* 806–15 (10th ed. 2006).

531. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2006).

532. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2006).

533. INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2006).

534. See INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2006).

535. INA § 240A(d)(2), 8 U.S.C. § 1229b(d)(2) (2006).

536. 383 F.3d 983 (9th Cir. 2004).

14, 1987, until receipt of a notice to appear on May 13, 1997, had been physically present for the requisite ten-year period “immediately preceding the date” of application for cancellation of removal.<sup>537</sup> In *Santana-Albarran v. Ashcroft*,<sup>538</sup> the Sixth Circuit concluded that an alien’s tax returns that were prepared several years late, and that were not supported by W-2s or proof of employment, were insufficient to corroborate the alien’s testimony as to the length of physical presence.<sup>539</sup> In *Lopez-Alvarado v. Ashcroft*,<sup>540</sup> however, the Ninth Circuit held that, in the absence of an adverse credibility finding, there was no need for further documentary evidence to support the ten-year physical presence claim of a woman who had not worked outside the home.<sup>541</sup>

The Act provides a list of traits, which, if possessed by a person during the relevant time frame, make a person statutorily ineligible for a finding of good moral character. Habitual drunks, gamblers, those who have engaged in acts that would make them inadmissible on certain grounds, those who have served an aggregate of 180 days or more in prison, and those who have perjured themselves to obtain immigration benefits cannot, under the statute, be regarded as persons of good moral character.<sup>542</sup>

Applying *Chevron* deference, the Eighth Circuit upheld an immigration judge’s finding that a single act of soliciting a prostitute rendered an alien statutorily ineligible for an affirmative finding of good moral character.<sup>543</sup> With respect to false testimony, issuing false statements under oath to any immigration official makes one ineligible for an affirmative finding of good moral character.<sup>544</sup> The statements need

537. *Id.* at 988.

538. 393 F.3d 699 (6th Cir. 2005).

539. *Id.* at 706–07 (applying substantial evidence standard).

540. 381 F.3d 847 (9th Cir. 2004).

541. *Id.* at 854.

542. INA § 101(f), 8 U.S.C. § 1101(f) (2006) (anyone who has ever been convicted of an aggravated felony is also ineligible for a favorable finding of good moral character).

543. *Amador-Palomares v. Ashcroft*, 382 F.3d 864, 867–68 (8th Cir. 2004). *But see* *Mirabal-Balon v. Esperdy*, 188 F. Supp. 317 (S.D.N.Y. 1960) (single act of solicitation does not support finding of deportability).

544. *In re R-S-J-*, 22 I. & N. Dec. 863, 864 (BIA 1999) (false statements to asylum officer).

not be material.<sup>545</sup> To be considered “false testimony,” however, the statements must be oral.<sup>546</sup> While an adverse finding with respect to credibility does not prove that testimony was false,<sup>547</sup> inconsistent and contradictory statements can provide the basis for upholding the immigration judge’s finding of false testimony.<sup>548</sup>

The statutory list of traits is not exhaustive. An immigration judge has discretion to make an adverse finding regarding good moral character.<sup>549</sup> Past conduct, including expunged convictions, may be considered in determining an applicant’s good moral character.<sup>550</sup> Likewise, pending criminal charges may be considered despite the fact that the alien may later be acquitted.<sup>551</sup> It is reversible error, however, for the immigration judge to focus solely on negative factors and not consider positive factors when exercising discretion.<sup>552</sup>

Several cases have addressed the criminal bar to Cancellation of Removal Part B, which makes an alien ineligible for this relief if he has been convicted of an offense that makes him inadmissible or deportable.<sup>553</sup> In *Gonzalez-Gonzalez v. Ashcroft*,<sup>554</sup> the Ninth Circuit reviewed the denial of cancellation of removal for an alien who had been living in the United States for more than ten years without being inspected or admitted. The alien conceded his removability on the ground that he was inadmissible and applied for Cancellation of Removal Part B. The immigration judge found the alien ineligible for this relief because the alien had been convicted of “assault in the fourth degree/domestic violence.”<sup>555</sup> The BIA affirmed. On appeal, the alien argued that since this was a deportable offense with no corresponding ground for inadmissi-

545. *Opere v. INS*, 267 F.3d 10 (1st Cir. 2001) (following the denaturalization case of *Kungys v. United States*, 485 U.S. 759 (1988)).

546. *Beltran-Resendez v. INS*, 207 F.3d 284, 287 (5th Cir. 2000) (a false written statement is not false testimony under § 1101(f)).

547. *Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 507–08 (5th Cir. 1995).

548. *Akinwande v. Ashcroft*, 380 F.3d 517, 523 (1st Cir. 2004).

549. *See id.*

550. *Ikenokwalu-White v. INS*, 316 F.3d 798, 804 (8th Cir. 2003).

551. *Accord Parcham v. INS*, 769 F.2d 1001, 1005 (4th Cir. 1985) (reviewing discretionary denial of voluntary departure).

552. *Torres-Guzman v. INS*, 804 F.2d 531, 533 (9th Cir. 1986).

553. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2006).

554. 390 F.3d 649 (9th Cir. 2004).

555. *Id.* at 650.

bility, it did not apply to him since he was an inadmissible rather than deportable alien. The Ninth Circuit disagreed, concluding that the statute plainly means that anyone, whether inadmissible or deportable, is ineligible for Cancellation of Removal Part B if he has been convicted of a crime that is either a grounds for inadmissibility or deportability.<sup>556</sup>

An alien who has been physically present for ten years, is found to be of good moral character, and has no criminal conviction still must show that “removal would result in exceptional and extremely unusual hardship to the alien’s [citizen or lawful permanent resident] spouse, parent, or child.”<sup>557</sup> “[T]o establish exceptional and extremely unusual hardship under section 240A(b) of the Act, an alien must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person’s departure. [H]owever . . . the alien need not show that such hardship would be ‘unconscionable.’”<sup>558</sup> A single mother of six children, including four citizen children who had never been to Mexico, met the standard where she had no family in Mexico, her permanent resident mother helped with her children, her sibling lived legally in the United States, and she ran her own business in the United States.<sup>559</sup>

Following the Act’s definition of “child,”<sup>560</sup> the Ninth Circuit concluded that hardship to a daughter over the age of twenty-one years would not qualify the father for relief.<sup>561</sup> Hardship to nonrelatives, including a girlfriend’s son, was not statutorily relevant.<sup>562</sup> And although hardship to the applicant is not directly relevant, “factors that relate only to the [applicant] may also be considered to the extent that they affect the potential level of hardship to her qualifying relatives.”<sup>563</sup>

556. *Id.* at 652–53.

557. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2006).

558. *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 468 (BIA 2002).

559. *Id.* at 469–71.

560. INA § 101(b), 8 U.S.C. § 1101(b)(1) (2006).

561. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144–45 (9th Cir. 2002).

562. *Angamarca v. Gonzales*, 415 F.3d 897, 901 n.2 (8th Cir. 2005).

563. *Gonzalez Recinas*, 23 I. & N. Dec. at 471.

### *C. Section 212(c): Waiver of Inadmissibility (and Potentially Deportability)*

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) limited,<sup>564</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) eliminated, § 212(c) of the INA, replacing this ground for relief from deportation with Cancellation of Removal Part A.<sup>565</sup> Although more than a dozen years have passed since its repeal, § 212(c) continues to present complex questions in litigation as aliens with pre-IIRIRA convictions continue to seek relief pursuant to this provision.<sup>566</sup> Section 212(c) waivers are generally sought by lawful permanent residents (LPRs) who were convicted of crimes many years ago, who depart the United States, and who are stopped upon reentry. Because the system for readmitting LPRs does not seem to be consistent at our nation's borders, an LPR may depart and return to the United States several times before being stopped and placed in removal proceedings. Section 212(c) is also of continued importance because it provides broader relief than cancellation of removal—an alien may be eligible under § 212(c) relief for convictions that were recategorized as aggravated felonies under IIRIRA and for which cancellation of removal is consequently not available.

Section 212(c) provided that “aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not

564. “Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ‘AEDPA’, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277, which took effect on April 24, 1996, eliminated eligibility for section 212(c) relief for aliens convicted of specified crimes.” *Garcia-Padron v. Holder*, 558 F.3d 196, 200 (2d Cir. 2009).

565. “IIRIRA, enacted on September 30, 1996, and effective on April 1, 1997, repealed section 212(c) altogether. See IIRIRA § 304(b), 110 Stat. at 3009–597. IIRIRA replaced section 212(c) relief with the more restrictive procedure for cancellation of removal under INA section 240A, codified at 8 U.S.C. § 1229b(a).” *Garcia-Padron*, 558 F.3d at 200. See *supra* Part VIII.A.

566. See *INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (“§ 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect”). Cf. *Nadal-Ginard v. Holder*, 558 F.3d 61, 70 (1st Cir. 2009) (*St. Cyr* rule unavailable for aliens convicted pre-1996 after trial because such aliens did not rely on § 212(c) eligibility in deciding to go to trial rather than enter a plea bargain).

under order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to” many of the grounds for exclusion (now known as inadmissibility). Through a series of BIA and judicial opinions, this provision was extended to apply to deportable as well as excludable aliens.<sup>567</sup> In the courts, *Francis v. INS*<sup>568</sup> led the way in extending § 212(c) relief to deportable aliens. In *Blake v. Carbone*,<sup>569</sup> the Second Circuit revisited *Francis* and reaffirmed its reasoning. In framing the question, the court said: “At issue is a judicial amendment to an unconstitutional statute now repealed.”<sup>570</sup>

The petitioner in *Francis* never left the United States after he committed a narcotics offense (his ground for deportation). He argued the guarantee of equal protection implicit in the Due Process Clause of the Fifth Amendment would be violated if a § 212(c) waiver was available to lawful permanent residents who departed and returned to the United States yet unavailable to those who never left the country when the two classes of persons were identical in every other respect. We were convinced. Congress was discriminating between lawful permanent residents who had traveled abroad temporarily and those who had not—a classification requiring a rational justification. Finding no justification, we concluded that “an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time.” Rather than resolve the constitutional dilemma by striking the statute, we extended its reach. A § 212(c) waiver would be available to deportable lawful permanent residents who differed from excludable lawful permanent residents only in terms of a recent departure from the country.<sup>571</sup>

In a more recent case, *Abebe v. Mukasey*,<sup>572</sup> the Ninth Circuit rejected *Francis*’s equal protection rationale. The court found a rational

567. For a history of § 212(c)’s evolution, see *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009).

568. 532 F.2d 268 (2d Cir. 1976).

569. 489 F.3d 88 (2d Cir. 2007).

570. *Id.* at 90.

571. *Id.* at 95 (internal citations omitted).

572. 554 F.3d 1203 (9th Cir. 2009) (per curiam).

basis for treating returning LPRs more favorably than LPRs who had never left the country.

Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order to create an incentive for deportable aliens to leave the country. A deportable alien who wishes to obtain section 212(c) relief will know that he can't obtain such relief so long as he remains in the United States; if he departs the United States, however, he could become eligible for such relief. By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting these aliens.<sup>573</sup>

An alien is ineligible for § 212(c) relief, however, if the deportation ground upon which removal of the alien is sought has no counterpart in the grounds for inadmissibility.<sup>574</sup> Much of § 212(c) litigation involves this question of whether a particular deportation provision has a comparable inadmissibility or excludability ground. On this question, the Second Circuit disagrees with other circuits on the method of determining whether a counterpart exists.

The Sixth Circuit said:

The BIA made clear in *Matter of Jimenez-Santillano* that it is not the specific *conduct* of a petitioner that must correlate to a ground of exclusion. Rather, “[t]he essential analysis is to determine whether the deportation *ground* under which the alien has been adjudged deportable has a statutory counterpart among the exclusion *grounds* waivable by section 212(c).”<sup>575</sup>

Following this standard, the court affirmed the BIA's conclusion that deportation for violating 18 U.S.C. § 1546 relating to visa fraud had no counterpart in INA § 212(a)(6)(C), which makes an alien inadmissible on the ground of fraud or misrepresentation, because the deportation

573. *Id.* at 1206 (internal citations and quotations omitted).

574. 8 C.F.R. § 1212.3(f)(5) (2008) (“[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act”). The Ninth Circuit said that its equal protection “ruling might cause the government to reconsider the regulation, and eventually repeal it as no longer necessary.” *Abebe*, 554 F.3d at 1207.

575. *Koussan v. Holder*, 556 F.3d 403, 410 (6th Cir. 2009) (quoting *Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 574 (BIA 1996)).

ground was much broader than the inadmissibility ground.<sup>576</sup> Rejecting an equal protection challenge, the court said:

The unambiguous language of section 212(c) clearly applies only to exclusion/readmission proceedings. In *Francis*, however, the Second Circuit stretched [§ 212(c)] beyond its language in response to equal protection concerns. Additional judicial re-drafting would serve only to pull the statute further from its moorings in the legislative will.<sup>577</sup>

In contrast, the Second Circuit refused to defer to the BIA because “[a]ny difficulty in determining § 212(c)’s applicability to deportees arises not from the statutory language but from the BIA’s gloss on *Francis*.”<sup>578</sup> Rather than examining potential similarities between the statutory *grounds* for deportation and the statutory *grounds* for inadmissibility to determine whether a counterpart exists, the Second Circuit focuses on the *offense* committed by the deportable alien to determine if there is a ground upon which the alien might also be held inadmissible under INA § 212(a).<sup>579</sup> If there is, then the deportable alien is eligible for § 212(c) relief. “[P]etitioners’ eligibility for a § 212(c) waiver must turn on their particular criminal offenses. If the offense that renders a lawful permanent resident deportable would render a similarly situated lawful permanent resident excludable, the deportable lawful permanent resident is eligible for a waiver of deportation.”<sup>580</sup>

Deportations based on conviction of an aggravated felony present particular difficulties for two reasons: (1) because there is no corresponding aggravated felony inadmissibility ground; and (2) because the statute contains a laundry list of aggravated felonies, some of which might correspond to a statutory ground for inadmissibility. A deportable LPR might, for example, argue that his particular “aggravated felony” is similar to an inadmissible alien’s “crime involving moral turpitude,” thus making him eligible to apply for a § 212(c) waiver. “An ag-

576. “Such a conclusion makes intuitive sense, in light of the determination that it is not the petitioner’s actual *activity* resulting in an order of deportation that must find a section 212(a) counterpart, but rather the broader *ground* for deportation that must prove to be comparable to a waiver provision.” *Koussan*, 556 F.3d at 410.

577. *Id.* at 413 (internal quotations omitted).

578. *Blake v. Carbone*, 489 F.3d 88, 100 (2d Cir. 2007).

579. *Id.* at 101–03.

580. *Id.* at 103.

gravated felony need not be a crime involving moral turpitude. A crime involving moral turpitude similarly need not be an aggravated felony.”<sup>581</sup> Given its emphasis on the deportable *offense* and not the *ground* for deportation, the Second Circuit is more likely than other circuits that have addressed the issue to find correspondence between an “aggravated felony” deportation ground and a ground for inadmissibility.

In *Blake v. Carbone*, the Second Circuit remanded for the BIA to “consider whether Blake’s first degree sexual abuse of a minor conviction [an aggravated felony], Ho Yoon Chong’s racketeering conviction [an aggravated felony], Foster’s first degree manslaughter conviction [an aggravated felony], and Singh’s second degree murder conviction [an aggravated felony], could each form the basis of exclusion as a crime involving moral turpitude. If so, the merits of each petitioner’s § 212(c) applications should be considered.”<sup>582</sup>

In *Abebe*, the Ninth Circuit addressed the issue of whether an alien deportable as an aggravated felon (in this case, “sexual abuse of a minor”) could seek § 212(c) relief because his offense corresponded to “a crime involving moral turpitude,” which is a ground of inadmissibility. “[A] deportable alien can be eligible for section 212(c) relief only if his grounds for deportation are substantially identical to a ground for inadmissibility. Here, petitioner is deportable for committing an ‘aggravated felony,’ which the panel held isn’t substantially identical to the most analogous ground for inadmissibility—committing a ‘crime involving moral turpitude.’”<sup>583</sup>

#### *D. Other Forms of Permanent Relief*

Several other provisions of the INA provide potential avenues for relief from deportation, allowing the alien to stay in the United States. An alien can affirmatively file for adjustment of status, for asylum, for withholding of removal, and for relief under the Convention Against

581. *Id.* at 102.

582. *Id.* at 105.

583. *Abebe v. Mukasey*, 554 F.3d 1203, 1205 (9th Cir. 2009) (per curiam) (internal citations omitted). *See also* *Vo v. Gonzales*, 482 F.3d 363, 368–69 (5th Cir. 2007) (“crime of violence,” an aggravated felony, has no statutory counterpoint in grounds for inadmissibility); *Caroleo v. Gonzales*, 476 F.3d 158, 164–65 (3d Cir. 2007) (same).

Torture (CAT) with the USCIS. If the relief sought is denied, and the alien is subsequently put in deportation proceedings, or if the alien first applies or becomes eligible for such relief after deportation proceedings have commenced, the IJ will determine, in the context of the deportation hearing, whether to grant the relief requested. Asylum, withholding, and the CAT are covered more extensively elsewhere in this monograph. If an alien applying for relief is ineligible because of a criminal conviction, the alien may be eligible for and seek an INA § 212(h) waiver,<sup>584</sup> which provides that certain criminal grounds of inadmissibility may be waived in the case of an alien seeking admission or adjustment of status. Under § 212(h), the Attorney General may, in his discretion, grant a waiver for crimes of moral turpitude (except murder and torture), multiple criminal convictions, prostitution, diplomatic immunity, and a single offense of simple possession of marijuana (thirty grams or less). At times, the courts of appeals review § 212(h) issues.<sup>585</sup>

“Adjustment of status is a technical term describing a process whereby certain aliens physically present in the United States may obtain permanent resident status . . . without leaving the United States.”<sup>586</sup> An alien who has been “inspected and admitted or paroled” into the United States can apply for adjustment if “(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him.”<sup>587</sup> Certain activity, such as unauthorized employment, will make certain aliens ineligible for adjustment of status.<sup>588</sup> Several issues related to adjustment of status come before the courts of appeals, including:

584. 8 U.S.C. § 1182(h) (2006).

585. See, e.g., *Rotimi v. Holder*, 577 F.3d 133, 138–39 (2d Cir. 2009) (applying *Chevron* deference to BIA’s interpretation of the phrase “lawfully resided continuously”); *Samuels v. Chertoff*, 550 F.3d 252, 262 (2d Cir. 2008) (remand to BIA where BIA might have overlooked a regulatory factor in determining whether to grant waiver); *Martinez v. Mukasey*, 519 F.3d 532, 541–42 (5th Cir. 2008) (interpreting meaning of “admission” for § 212(h) purposes).

586. *Succar v. Ashcroft*, 394 F.3d 8, 13 (1st Cir. 2005) (internal quotation marks omitted).

587. 8 U.S.C. § 1255(a) (2006).

588. *Id.* § 1255(c).

whether a visa is immediately available;<sup>589</sup> whether an IJ has jurisdiction to adjudicate an arriving alien's adjustment petition;<sup>590</sup> whether a properly filed adjustment application should be held in abeyance until a visa becomes available, where the visa had been immediately available at the time of the adjustment application;<sup>591</sup> and whether to grant a continuance of the removal proceeding to allow the adjustment petition to be presented to the USCIS.<sup>592</sup>

An alien might also be eligible for relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA)<sup>593</sup> or one of the amnesty programs from the 1980s, such as the one for Special Agricultural Workers (SAW).<sup>594</sup> Registry is a form of relief that allows the alien to stay in the United States. A person may be registered as a permanent resident if he is not inadmissible on certain enumerated grounds, entered the United States prior to January 1, 1972, has continuously been a resident since entry, is of good moral character, and is not ineligible for citizenship.<sup>595</sup> The Ninth Circuit has held that, pursuant to the plain language of the statute, those for whom there is a record of lawful admission are ineligible for registry.<sup>596</sup>

589. *See, e.g., Bolvito v. Mukasey*, 527 F.3d 428, 435 (5th Cir. 2008) (“The central issue presented by this petition for review is whether the IJ erred as a matter of law when he determined that Bolvito’s priority date was January 3, 2002, rather than November 9, 1981.”).

590. *See, e.g., Brito v. Mukasey*, 521 F.3d 160 (2d Cir. 2008).

591. *See, e.g., Masih v. Mukasey*, 536 F.3d 370, 375 (5th Cir. 2008) (relying on INS operations instruction and BIA precedent, the court answered yes).

592. *See, e.g., Ceta v. Mukasey*, 535 F.3d 639, 647 (7th Cir. 2008) (to deny continuance, the IJ “must provide a reason consistent with the adjustment statute”) (internal quotations omitted).

593. Pub. L. 105-100, 111 Stat. 2160, tit. II, div. A (Nov. 19, 1997), as amended by Pub. L. 105-139, 111 Stat. 2644 (Dec. 2, 1997). *See, e.g., Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 219 (5th Cir. 2008) (“failure to meet a regulatory deadline under NACARA is a failure to exhaust administrative remedies that strips this court of jurisdiction to review a BIA decision”).

594. 8 U.S.C. § 1160 (2006). *See, e.g., Francis v. Gonzales*, 442 F.3d 131, 145 (2d Cir. 2006) (remanding to BIA to determine whether SAW status can be terminated and alien deported).

595. INA § 249, 8 U.S.C. § 1259 (2006).

596. *Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1150 (9th Cir. 2002).

### *E. Voluntary Departure*

The INA contains two types of voluntary departure: before the conclusion of removal proceedings, and at the conclusion of removal proceedings. As one court explained,

[v]oluntary departure is a discretionary form of relief that allows an alien who is subject to a deportation order a period of time in which to leave the country of his own volition. If adhered to, voluntary departure produces a win-win situation. It benefits the government by expediting departures and eliminating the costs associated with deportation. It benefits the alien because it allows him to choose the destination to which he will travel and to avoid the penalties attendant to removal (thereby easing a possible return to the United States).<sup>597</sup>

Under the first form of voluntary departure, an alien may be given up to 120 days to depart from the United States at his own expense, “in lieu of being subject to” removal proceedings or “prior to the completion of such proceedings.”<sup>598</sup> A bond may be required to ensure the alien’s departure.<sup>599</sup>

Under the second form, an immigration judge may grant voluntary departure at the end of removal proceedings, giving the alien up to sixty days to depart from the United States at his own expense. To qualify for voluntary departure at the conclusion of removal proceedings, the alien must have been physically present in the United States for the year preceding the notice to appear, have been a person of good moral character for the five years before the application for voluntary departure, and have the means to depart.<sup>600</sup> Aggravated felons and those being removed on national security grounds are ineligible for this second type of voluntary departure.<sup>601</sup> Bond shall be required to ensure departure.<sup>602</sup>

Eligibility for the first form of voluntary departure requires the alien to forego other potential avenues of relief and to waive any right

597. *Bocova v. Gonzales*, 412 F.3d 257, 264–65 (1st Cir. 2005) (internal citation omitted).

598. INA § 240B(a), 8 U.S.C. § 1220b(a) (2006).

599. *Id.* at (a)(3).

600. *Id.* at (b)(1).

601. *Id.*

602. *Id.* at (b)(3).

to appeal.<sup>603</sup> Otherwise, his application for voluntary departure will be judged by the more stringent standards for granting voluntary departure at the conclusion of a removal hearing.<sup>604</sup> The Second Circuit has held that the requirement of an alien to waive appeal rights in order to receive voluntary departure prior to the commencement of the removal hearing does not violate due process.<sup>605</sup>

The First Circuit, among others, has concluded that a court has no power to resurrect or reinstate voluntary departure on appeal once the time for voluntary departure has lapsed.<sup>606</sup> Interpreting the IIRIRA amendments, the court reasoned: “Reinstatement of a lapsed period of voluntary departure would be the functional equivalent of fashioning a new voluntary departure period, which would arrogate unto the court a power deliberately withheld by Congress and, in the bargain, contravene Congress’s clearly expressed intention.”<sup>607</sup> The court did opine, however, that it had the authority to stay an unexpired grant of voluntary departure.<sup>608</sup>

The courts of appeals split three ways on the granting of motions to stay voluntary departure. The Sixth, Eighth, and Ninth Circuits have held that the filing of a motion to stay removal prior to the expiration of the voluntary departure period will be treated as a motion to stay voluntary departure.<sup>609</sup> The First and Seventh Circuits require an express motion for stay of voluntary departure.<sup>610</sup> The Fourth Circuit concluded that under IIRIRA it lacked jurisdiction to hear a motion to

603. *Hashish v. Gonzales*, 442 F.3d 572, 579 (7th Cir. 2006).

604. *Id.*

605. *Cervantes-Ascencio v. INS*, 326 F.3d 83, 86 (2d Cir. 2003).

606. *E.g.*, *Naeem v. Gonzales*, 469 F.3d 33, 37 (1st Cir. 2006). *See also* *Sviridov v. Ashcroft*, 358 F.3d 722, 731 (10th Cir. 2004); *Mullai v. Ashcroft*, 385 F.3d 635, 639–40 (6th Cir. 2004).

607. *Naeem*, 469 F.3d at 37.

608. *Id.* at 38.

609. *Macotaj v. Gonzales*, 424 F.3d 464, 467 (6th Cir. 2005); *Desta v. Ashcroft*, 365 F.3d 741, 749 (9th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606, 616 (8th Cir. 2004).

610. *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005); *Alimi v. Ashcroft*, 391 F.3d 888 (7th Cir. 2004). The Second and Third Circuits agree with the First, Sixth, Seventh, Eighth, and Ninth Circuits that they have jurisdiction and authority to stay voluntary departure; these circuits, however, did not address whether a motion to stay removal will be treated as a motion to stay voluntary departure. *See* *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006); *Obale v. Att’y Gen. of U.S.*, 453 F.3d 151 (3d Cir. 2006).

stay voluntary departure.<sup>611</sup> Whether and how these cases will be affected by the Supreme Court's decision in *Dada v. Mukasey*<sup>612</sup> remains to be seen.

In *Dada*, the Supreme Court held that an alien does not forego the right to file a motion to reopen by accepting voluntary departure. The Court said: "Nothing in the statutes or past usage with respect to voluntary departure or motions to reopen indicates they cannot coexist."<sup>613</sup> Given the BIA's backlog,

[a]bsent tolling or some other remedial action by the Court, then, the alien who is granted voluntary departure but whose circumstances have changed in a manner cognizable by a motion to reopen is between Scylla and Charybdis: He or she can leave the United States in accordance with the voluntary departure order; but, pursuant to regulation, the motion to reopen will be deemed withdrawn. Alternatively, if the alien wishes to pursue reopening and remains in the United States to do so, he or she risks expiration of the statutory period and ineligibility for adjustment of status, the underlying relief sought.<sup>614</sup>

In reaching its conclusion, the Court was cognizant of the need to maintain the *quid pro quo* nature of voluntary departure.<sup>615</sup> Therefore, "the alien has the option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure; or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion."<sup>616</sup> Resolving a circuit split, the Court concluded, however, that the filing of a motion to reopen did not toll the period for voluntary departure.<sup>617</sup>

611. *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004).

612. 128 S. Ct. 2307 (2008).

613. *Id.* at 2316.

614. *Id.* at 2318 (citations omitted).

615. "If the alien is permitted to stay in the United States past the departure date to wait out the adjudication of the motion to reopen, he or she cannot then demand the full benefits of voluntary departure; for the benefit to the Government—a prompt and costless departure—would be lost. Furthermore, it would invite abuse by aliens who wish to stay in the country but whose cases are not likely to be reopened by immigration authorities." *Id.* at 2319.

616. *Id.* at 2319–20.

617. *Id.* at 2319.

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## IX. Removal Process

Deportation “is a practice that bristles with severities.”<sup>618</sup> “It may deprive a [person] of all that makes life worth while.”<sup>619</sup> “The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence.”<sup>620</sup> Despite the harsh consequences of deportation, the Supreme Court considers removal a civil—not criminal—process.<sup>621</sup> Because removal proceedings are civil, not criminal, the Sixth Amendment right to counsel does not apply. The immigrant may be represented by counsel, but at no expense to the government. While recognizing Congress’s right to determine the substantive provisions of the law of deportation pursuant to its plenary power over immigration issues,<sup>622</sup> the Supreme Court has, for over a century, recognized that aliens in the United States, whether in the United States lawfully or not, are entitled to due process in removal proceedings.<sup>623</sup> Subsequently, a court must resolve “any lingering ambiguities in deportation statutes in favor of the alien.”<sup>624</sup>

Dozens of recent cases have concluded that aliens were denied due process because of some deficiency in the removal process. For example, in *Alexandrov v. Gonzales*,<sup>625</sup> the Sixth Circuit concluded that a finding by the immigration judge that the alien’s asylum application was frivolous violated the alien’s due process rights where two unreliable hearsay memoranda from the U.S. embassy provided the basis for the determination.<sup>626</sup> The Seventh Circuit held that, looking at the totality of the circumstances, an alien was denied due process because

618. *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952).

619. *Id.* at 600 (Douglas, J., dissenting).

620. *Bridges v. Wixon*, 326 U.S. 135, 164 (1945).

621. *E.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

622. *See supra* text accompanying notes 138–42.

623. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 306 (1993).

624. *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

625. 442 F.3d 395 (6th Cir. 2006).

626. *Id.* at 407. *Cf. Lin v. U.S. Dep’t of Justice*, 459 F.3d 255, 269 (2d Cir. 2006) (refusing to reach the constitutional due process question but arriving at the same conclusion by determining that the unreliable hearsay evidence did not provide substantial evidence to support the BIA’s finding against the alien).

the alien clearly had not been afforded a “meaningful opportunity to be heard.” The alien’s qualified experts were not allowed to testify, and the immigration judge continually interrupted the proceedings, almost taking on the role of the government’s attorney, thereby limiting the alien’s attorney’s ability to question witnesses and limiting the alien’s responses.<sup>627</sup>

In denying a due process claim based on ineffective assistance of counsel in pursuing asylum, the Eighth Circuit determined that the asylum applicant had no liberty or property interest in the asylum claim because it was a statutory benefit given at the discretion of the executive branch.<sup>628</sup> Although it had doubts, the court did assume, without deciding, that an alien has a due process right to effective assistance of counsel with respect to an application for withholding of removal since that remedy is mandatory, not discretionary, once statutory eligibility is established.<sup>629</sup> To establish a claim of ineffective assistance of counsel, the Board of Immigration Appeals requires the complaining party to support the motion with an affidavit; to inform allegedly ineffective counsel, giving counsel an opportunity to respond; and, in the motion, to state that a bar complaint has been made, or, if not, the reasons for not filing a complaint.<sup>630</sup> Additionally, the alien must show that ineffective assistance caused prejudice.<sup>631</sup>

The removal proceedings commence with a written notice to appear, which serves as a charging document. The written notice advises the alien of the nature of the proceedings, the legal authority that forms the basis for the proceedings, factual allegations, the legal charges, notice that the alien must keep Homeland Security current on the alien’s address and phone number, notice of the time and place of the proceedings, and that the alien may obtain counsel at no cost to the gov-

627. *E.g.*, *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 539–40 (7th Cir. 2005). *But see* *Apouviapseakoda v. Gonzales*, 475 F.3d 881, 886 (7th Cir. 2007) (although “IJ’s conduct was hardly a model of patience and decorum,” no due process violation).

628. *Obleshchenko v. Ashcroft*, 392 F.3d 970, 971 (8th Cir. 2004). *But see* *Mohammed v. Gonzales*, 400 F.3d 785, 793–94 (9th Cir. 2005) (assumes right to effective counsel in adjudicating asylum claim).

629. *Obleshchenko*, 392 F.3d at 971–72.

630. *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988).

631. *E.g.*, *Zheng v. Gonzales*, 422 F.3d 98, 107 (3d Cir. 2005).

ernment, along with a “list of counsel.”<sup>632</sup> “The decision to issue such an order is a matter of prosecutorial discretion, essentially equivalent to the decision to initiate a criminal prosecution.”<sup>633</sup>

The government bears the burden of proving by clear and convincing evidence that the person targeted for removal is a noncitizen.<sup>634</sup> The burden then shifts to the alien to prove by clear and convincing evidence his or her lawful presence in the United States.<sup>635</sup> Finally, the government “has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based on reasonable, substantial, and probative evidence.”<sup>636</sup> The statute provides a list of documents that “constitute proof of a criminal conviction.”<sup>637</sup> The alien has the burden of proving that he is statutorily eligible for relief from removal and, where required, that he warrants a “favorable exercise of discretion.”<sup>638</sup>

The Federal Rules of Evidence are not strictly applied at the removal hearing.<sup>639</sup> Hearsay is admissible as long as it is “probative and its admission is fundamentally fair.”<sup>640</sup> But “[a] single affidavit from a self-interested witness not subject to cross-examination simply does not rise to the level of clear, unequivocal, and convincing evidence re-

632. INA § 239(a)(1), 8 U.S.C. § 1229(a)(1) (2006).

633. *Cervantes v. Perryman*, 954 F. Supp. 1257, 1265 (N.D. Ill. 1997) (noncitizens could not force immigration authorities to institute deportation proceedings to enable noncitizens to apply for relief). Once the proceeding begins, it is error, however, not to grant continuance where the affected alien has a pending immigrant visa petition, which would allow him to adjust status. *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005). *But see* *Pede v. Gonzales*, 442 F.3d 570, 571 (7th Cir. 2006) (not improper to deny continuance where adjustment application hopeless).

634. *See, e.g.,* *Murphy v. INS*, 54 F.3d 605, 608–09 (9th Cir. 1995).

635. INA § 240(c)(2)(B), 8 U.S.C. § 1229a(c)(2)(B) & INA § 291, 8 U.S.C. § 1361 (2006) (in removal proceedings, alien has burden of showing time, place, and manner of entry into the United States).

636. INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2006).

637. INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2006).

638. INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (2006). For standards used to determine whether an alien warrants a favorable exercise of discretion, see *supra* text accompanying notes 518–19.

639. *Matter of Wadud*, 19 I. & N. Dec. 182, 188 (BIA 1984).

640. *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003).

quired to prove deportability.”<sup>641</sup> In *Hernandez-Guadarrama v. Ashcroft*, Hernandez, a conditional permanent resident, sought review of a removal order, which was based on a finding that he was an alien smuggler. Hernandez’s truck was stopped in Idaho by INS agents “who were conducting anti-smuggling ‘traffic observations’” and became suspicious of Hernandez’s truck.<sup>642</sup> One of the passengers, an alien who had been previously deported, gave a sworn statement.

According to that statement, Hernandez and his wife picked up the seven individuals in their home town in Mexico and drove them to a town near the Mexico–United States border. They dropped the seven passengers off before they reached the border, at which point the passengers made arrangements with a smuggler to cross into the United States. The seven aliens each paid the smuggler \$750, and after they crossed the border, the smuggler made arrangements for them to meet up with Hernandez in Phoenix, Arizona. From there, they expected to ride with [Hernandez] to Prosser, Washington.<sup>643</sup>

At the hearing, the immigration judge refused the Hernandezes’ request to cross-examine the arresting agents regarding the reasons for stopping Hernandez’s vehicle. The passenger’s affidavit was introduced into evidence, but she was not produced for cross-examination because the INS had already deported her.<sup>644</sup> In determining that admission of the passenger’s sworn statement was fundamentally unfair, the court said: “[i]t is clear that ‘the burden of producing a government’s hearsay declarant that a petitioner may wish to cross-examine’ is on the government, not the petitioner. The government may not evade its obligation to produce its witness by taking affirmative steps, such as deportation, that render the witness unavailable. Indeed, the government’s burden is greater, not lesser, when it exercises custodial power over the witness in question.”<sup>645</sup>

Several cases have addressed the question of authentication admissibility and the weight given to documents. The regulations provide a

641. *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 683 (9th Cir. 2005).

642. *Id.* at 676.

643. *Id.*

644. *Id.* at 682.

645. *Id.* (internal quotations and citations omitted).

method for authenticating domestic and foreign documents.<sup>646</sup> Courts have routinely held that 8 C.F.R. § 287.6 is “not an absolute rule of exclusion, and is not the exclusive means of authenticating records before an immigration judge.”<sup>647</sup> In *Cao He Lin v. U.S. Department of Justice*,<sup>648</sup> for example, the court concluded that the immigration judge “erred by rejecting the notarial birth certificate” simply because it had not been authenticated pursuant to “regulation.”<sup>649</sup> The court did not, however, provide guidance as to an alternative method for authentication.

The courts of appeals split on how to determine whether there is substantial evidence to uphold a finding that an alien has been found deportable by clear and convincing evidence. In *Francis v. Gonzales*,<sup>650</sup> the Second Circuit said, “[a]s a preliminary matter, we must ascertain whether the substantial evidence test becomes more demanding as the government’s underlying burden of proof increases.”<sup>651</sup> Following the Sixth and Ninth Circuits, the court concluded: “under the substantial evidence test, in order to grant a petition for review of an order of the BIA, we are not required to find that any rational trier of fact would be compelled to conclude that [alien was *not* deportable]. Rather, we must find that any rational trier of fact would be compelled to conclude that the proof did not rise to the level of clear and convincing evidence.”<sup>652</sup> In contrast, the Eleventh Circuit, in *Adefemi v. Ashcroft*,<sup>653</sup> said “[w]e apply the substantial evidence test even when, as in this case, the government is required to prove its case by clear and convincing evidence in the administrative forum. In other words, the fact that the INS was required to prove [the alien’s] deportability by clear and convincing evidence in the BIA does not make our review of the BIA’s decision more stringent.”<sup>654</sup>

646. 8 C.F.R. § 287.6 (2006).

647. *E.g.*, *Sukwanputra v. Gonzales*, 434 F.3d 627, 636 (3d Cir. 2006).

648. 428 F.3d 391 (2d Cir. 2005).

649. *Id.* at 405.

650. 442 F.3d 131 (2d Cir. 2006).

651. *Id.* at 138.

652. *Id.* at 138–39.

653. 386 F.3d 1022 (11th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 1035 (2005).

654. *Id.* at 1027 (footnotes omitted).

The courts of appeals have grown increasingly impatient with the demeanor of immigration judges, even apart from issues of due process and substantial evidence. Noting a “disturbing pattern of IJ misconduct . . . notwithstanding the fact that some of our sister circuits have repeatedly echoed our concerns,” a clearly frustrated Third Circuit said “[t]ime and time again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings. Three times this year we have had to admonish immigration judges who failed to treat the asylum applicants in their court with the appropriate respect and consideration.”<sup>655</sup> The Third and Sixth Circuits have suggested that a different immigration judge be assigned the case on remand where it appeared from the immigration judge’s conduct at the original hearing that bias might be present.<sup>656</sup>

Congress has mandated that “no court shall enjoin the removal of any alien pursuant to a final order [of removal] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.”<sup>657</sup> This provision does not apply to judicial stays of removal, which continue to be governed by the traditional standards for determining whether to stay an order.<sup>658</sup>

655. *Wang v. Att’y Gen. of U.S.*, 423 F.3d 260, 267–68 (3d Cir. 2005).

656. *See, e.g., id.* at 268; *Elias v. Gonzales*, 490 F.3d 444, 450 (6th Cir. 2007) (“While we have stated our concerns about the IJ’s credibility determination, we are especially troubled by the conduct of the IJ during the hearing and its effect on the petitioner’s ability to testify accurately. We cannot conclude that the IJ’s adverse credibility determination is supported by substantial evidence due to the IJ’s behavior during the hearing.”).

657. 8 U.S.C. § 1253(f)(2) (2006).

658. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009).

## X. Asylum and Refugee Law, Withholding of Removal, and Convention Against Torture

At the end of 2007, the United Nations High Commissioner for Refugees (UNHCR) estimated that there were 21.5 million refugees and internally displaced persons in the world.<sup>659</sup> A small portion of these are eligible for specific legal relief under international and domestic law. Refugee status, asylum, and withholding of removal (nonrefoulement) are designed to provide refuge from persecution. The Convention Against Torture (CAT) is designed to provide protection for those who are likely to face torture if they are forced to return home.

The definition of “refugee,” which continues to form the basis of U.S. asylum and withholding-of-removal law, originated in the 1951 Convention Relating to the Status of Refugees, and includes any person who, “[a]s a result of the events occurring before January 1, 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>660</sup> Article 33 of the convention provides that “[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.”<sup>661</sup> The convention allows contracting states to refuse relief to those who either pose a security threat to the country or who, because of conviction for “a particularly serious crime” pose “a danger to the community.”<sup>662</sup> As a party to the 1967 Protocol Relating to the Status of Refugees<sup>663</sup> (which also re-

659. See 2007 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons (UNHCR June 17, 2008), available at <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>.

660. 1951 Convention Related to the Status of Refugees, Article 1(A)(2), 189 U.N.T.S. 137, signed July 28, 1951, entered into force, Apr. 22, 1954.

661. *Id.* at Art. 33(1).

662. *Id.* at Art. 33(2).

663. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, signed Jan. 31, 1967, entered into force, Oct. 4, 1967.

moved the convention's 1951 time-bar), the United States is derivatively bound to the convention's main substantive provision.

For the purposes of this monograph, INA §§ 101(a)(42), 208, and 241(b)(3) are the most important statutory provisions addressing asylum and withholding of removal. Following the convention, the INA defines "refugee" to mean "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>664</sup> In response to China's population control policy, those who have been forced, or who have a well-founded fear of being forced, "to abort a pregnancy or to undergo involuntary sterilization, or who [have] been persecuted for failure or refusal to undergo such a program, or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion."<sup>665</sup> Persons within the United States or arriving at our borders are eligible for asylum if they fit within the definition of "refugee."<sup>666</sup>

An application for asylum is also treated as an application for withholding of removal, which is covered by INA § 241(b)(3).<sup>667</sup> The receipt of asylum allows the recipient to stay in the United States and, after a year, apply for permanent resident status. Withholding of removal, on the other hand, does not put the recipient on the path to regularized status in the United States; it merely (albeit importantly) forbids the United States from removing him to the country of persecution. The proof required to establish statutory eligibility is lower for asylum than for withholding of removal, but the grant of asylum is discretionary.<sup>668</sup> If the applicant establishes statutory eligibility for the

664. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006). Those applicants who have themselves been persecutors are ineligible for relief as a refugee or asylee. *See id.* The Supreme Court has remanded a case to the BIA for its determination of "whether coercion or duress is relevant in determining if an alien" is a persecutor. *Negusie v. Holder*, 129 S. Ct. 1159, 1164 (2009).

665. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

666. INA § 208(b), 8 U.S.C. § 1158(b) (2006). INA § 207, 8 U.S.C. § 1157 (2006), addresses the admission of overseas refugees.

667. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006).

668. *See* Legal Standard of Proof, *infra* Part X.C.1.

withholding of removal, the grant of such relief is mandatory. Therefore, asylum applicants would prefer to be granted asylum with its greater benefits, but will hedge their bets and attempt to establish eligibility for withholding of removal in case they are statutorily barred from seeking asylum or receive a negative exercise of discretion from the immigration judge.

Pursuant to its treaty obligation under the Convention Against Torture (CAT), the United States will not return a person to a country where the person is likely to be tortured. There are two types of CAT relief available: withholding and deferral of removal.<sup>669</sup> “[I]f an alien has been convicted of a ‘particularly serious crime,’ and is ineligible for withholding of removal under the CAT, an IJ is required to grant deferral of removal if the alien can establish the likelihood of torture upon return.”<sup>670</sup> The CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>671</sup> Federal regulations govern the implementation of the CAT.<sup>672</sup> Applications for relief pursuant to the CAT are filed on the same form as asylum applications and will normally only be considered if asylum and withholding of removal are unavailable.

669. 8 C.F.R. § 1208.16(c) & (d) (2008).

670. *E.g.*, *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083 (9th Cir. 2008); *Khouzam v. Att’y Gen.*, 549 F.3d 235 (3d Cir. 2008).

671. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984). *See also* *Pierre v. Att’y Gen.*, 528 F.3d 180, 189 (3d Cir. 2008) (“The lack of medical care and likely pain that Pierre will experience is an unfortunate but unintended consequence of the poor conditions in the Haitian prisons,” but an unintended consequence is not torture, which requires a specific intent).

672. *See* 8 C.F.R. §§ 208.16–208.18 & 208.30–208.31 (2008).

### A. *Persecution*

Neither the Convention Against Torture nor U.S. statutory law defines the term “persecution.”

Some cases are easy, but a great many fall at the margin and present surprisingly difficult issues. When does application of a uniform national policy constitute persecution? When does prosecution under the criminal law become persecution? Can there be persecution without intent to harm? Does persecution imply action by state officials or does it apply to nongovernmental officials acting singly or in groups? To what extent do these questions turn ultimately on deciding whether another nation’s punishments are in some sense illegitimate? If so, how can adjudicators develop standards for judging?<sup>673</sup>

And what degree of harm must someone be threatened with to classify it as persecution?

The BIA and the courts of appeals have offered various definitions of the term “persecution.” The BIA has said that persecution is “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”<sup>674</sup> In the Third Circuit, persecution includes “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom . . . [P]ersecution refers only to severe conduct and does not encompass all treatment our society regards as unfair, unjust or even unlawful or unconstitutional.”<sup>675</sup> The Fifth Circuit has defined persecution as “[t]he infliction or suffering of harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage, or the deprivation of liberty, food, housing, employment, or other essentials of life.”<sup>676</sup> The Seventh Circuit has defined persecution as “punishment or the infliction of harm for political, re-

673. David Martin et al., *Forced Migration: Law and Policy* 98 (2007).

674. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

675. *Kibinda v. Att’y Gen. of U.S.*, 477 F.3d 113, 119 (3d Cir. 2007) (internal citations and quotations omitted).

676. *Chen v. Gonzales*, 470 F.3d 1131, 1135 (5th Cir. 2006).

ligious, or other reasons that this country does not recognize as legitimate. Although the term ‘persecution’ includes actions less severe than threats to life or freedom, ‘actions must rise above the level of mere harassment to constitute persecution.’<sup>677</sup> It has provided a list of examples: “Actions that might constitute persecution include detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings or torture, or threats of such action.”<sup>678</sup> The Eighth Circuit has said that persecution is “the infliction of or threat of death, torture, or injury to one’s person or freedom.”<sup>679</sup> But “[a]bsent physical harm, the incidents of harassment, unfulfilled threats of injury, and economic deprivation are not persecution.”<sup>680</sup> The Ninth Circuit defines persecution as “the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive. . . . [P]ersecution is an extreme concept that does not include every sort of treatment our society regards as offensive. Discrimination on the basis of race or religion, as morally reprehensible as it may be, does not ordinarily amount to “persecution” within the meaning of the Act.’ However, discrimination can in ‘extraordinary cases, be so severe and pervasive as to constitute “persecution” within the meaning of the Act.’<sup>681</sup> In deciding whether an applicant for asylum has been persecuted or has a well-founded fear of persecution, the fact finder should aggregate various hardships likely to be suffered or hardships suffered at the hand of the oppressor and not look at each hardship in isolation.<sup>682</sup>

The courts of appeals have said that the following constitute persecution:

677. *Bace v. Ashcroft*, 352 F.3d 1133, 1137–38 (7th Cir. 2003) (internal citations and quotations omitted).

678. *Koval v. Gonzales*, 418 F.3d 798, 805 (7th Cir. 2005) (internal citations and quotations omitted).

679. *Ngure v. Ashcroft*, 367 F.3d 975, 990 (8th Cir. 2004).

680. *Quomsieh v. Gonzales*, 479 F.3d 602, 606 (8th Cir. 2007).

681. *Mansour v. Ashcroft*, 390 F.3d 667, 672 (9th Cir. 2004) (internal citations omitted).

682. *E.g.*, *Zhang v. Gonzales*, 408 F.3d 1239, 1249 (9th Cir. 2005).

- “[D]eliberate imposition of substantial economic disadvantage” short of “total deprivation of livelihood” sufficient “to demonstrate economic persecution.”<sup>683</sup>
- “Denial of access to educational opportunities available to others on account of a protected ground can constitute persecution.”<sup>684</sup>
- Being threatened; beaten up; “deprived of food, water, a livelihood and the ability to leave [one’s] house” constitute persecution.<sup>685</sup>
- Single episode of detention and physical abuse was severe enough to constitute persecution where applicant was tied up during home invasion, slapped, kicked, had gun pointed to her head with death threat, and was threatened with rape even though physical harm was not severe.<sup>686</sup>
- “Rape or sexual assault may constitute . . . persecution.”<sup>687</sup>

The courts of appeals have held that adverse treatment did not amount to persecution in the following cases:

- Five-day detention accompanied by mistreatment that required several stitches did not constitute persecution.<sup>688</sup>
- Harassment and general economic difficulties do not amount to persecution.<sup>689</sup>
- Loss of job as a result of whistleblowing generally not persecution.<sup>690</sup>
- Watching father being assaulted and watching others being executed does not rise to level of persecution.<sup>691</sup>
- Denial of passport and other identity documents necessary “to the exercise of basic citizenship rights reflect discrimination, but do not rise to the level of persecution.”<sup>692</sup>

683. *Koval v. Gonzales*, 418 F.3d 798, 806 (7th Cir. 2005).

684. *Zhang*, 408 F.3d at 1247.

685. *Ouda v. INS*, 324 F.3d 445, 454 (6th Cir. 2003).

686. *Nakibuka v. Gonzales*, 421 F.3d 473, 476–77 (7th Cir. 2005).

687. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1072 (9th Cir. 2004).

688. *Kibinda v. Att’y Gen. of U.S.*, 477 F.3d 113, 119–20 (3d Cir. 2007).

689. *Ahmed v. Gonzales*, 467 F.3d 669, 674 (7th Cir. 2006).

690. *Musabelliu v. Gonzales*, 442 F.3d 991, 994 (7th Cir. 2006) (“Asylum is not a form of unemployment compensation.”).

691. *Rodriguez-Ramirez v. Ashcroft*, 398 F.3d 120, 124 (1st Cir. 2005).

*B. On Account of Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion*

Even if the asylum applicant's treatment rises to the level of persecution, he must also demonstrate that the persecution was on account of one of the five enumerated grounds. In *INS v. Elias-Zacarias*,<sup>693</sup> the Supreme Court stated that "[t]he ordinary meaning of the phrase 'persecution on account of . . . political opinion' in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's."<sup>694</sup> To show that the persecution is "on account of" one of the five statutory factors and "[t]o establish the objective reasonableness of a well-founded fear of persecution, an applicant must prove that (1) he possesses a belief or characteristic a persecutor seeks to overcome by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien."<sup>695</sup> The victim does not have to actually possess one of the five characteristics as long as the persecutor imputes to the victim the relevant trait.<sup>696</sup>

The asylum applicant has the burden of proving a nexus between the persecution and one of the five relevant statutory characteristics. In *Ruzi v. Gonzales*,<sup>697</sup> the Eighth Circuit reviewed the denial of asylum and withholding of removal of a person who had fled Albania after being placed on the Democratic Party's "extermination list" and beaten by officials of the Democratic Party so badly that he required nine days of hospitalization.<sup>698</sup> Following the requirement of proving a nexus, the court said that "while Mehmet is not required to establish the exact motive for persecution, he must present credible evidence that the persecution was at least partly motivated by his political opinion, or another statutorily-protected ground."<sup>699</sup> The court affirmed the BIA's

692. *Berte v. Ashcroft*, 396 F.3d 993, 997 (8th Cir. 2005).

693. 502 U.S. 478 (1992).

694. *Id.* at 482.

695. *See, e.g., Chen v. Gonzales*, 470 F.3d 1131, 1135–36 (5th Cir. 2006).

696. *E.g., Rivera v. U.S. Att'y Gen.*, 487 F.3d 815, 820 (11th Cir. 2007).

697. 441 F.3d 611 (8th Cir. 2006).

698. *Id.* at 613.

699. *Id.* at 615.

denial of withholding of removal based on “[t]he BIA’s analysis of [the] evidence,” which “was that the Democrats’ motive for persecuting Mehmet was his non-cooperation during the referendum, not his political opinion.”<sup>700</sup>

By way of contrast, in *De Brenner v. Ashcroft*,<sup>701</sup> the Eighth Circuit reversed a BIA decision that had denied asylum and concluded that the applicants’ persecution had been based on their wealth and not one of the five relevant characteristics.<sup>702</sup> The court rejected the BIA’s decision for two reasons. First,

The BIA itself, in its denial of the petitioners’ motion to reconsider, stated, “even though the Shining Path members may have believed that the respondent was affiliated with the then-governing party in Peru, we believe that the impetus for her difficulties with the guerrillas was her alleged wealth, as we stated in our opinion.” This statement make[s] clear that the BIA in this instance improperly demanded that persecution occur *solely* due to a protected basis. There is no such requirement in the statute and the BIA’s insertion of such a requirement is not the type of reasonable agency interpretation that demands our deference. Given the overwhelming evidence of an imputed political opinion in this case, and given the BIA’s apparent imposition of a single motive requirement, we do not find substantial evidence to support the BIA’s conclusion.<sup>703</sup>

Second, the

decision is also based on the BIA’s failure to acknowledge the relationship between the Shining Path’s economic and political agendas. In this case, there is a strong argument that the Shining Path imputed certain political opinions to all wealthy Peruvians. Of course, we do not hold today that all threats or attacks upon wealthy individuals by radical communist insurgents amount to politically motivated persecution.<sup>704</sup>

700. *Id.*

701. 388 F.3d 629 (8th Cir. 2004).

702. *Id.* at 635.

703. *Id.* at 637 (internal citations omitted).

704. *Id.*

But in such cases “it is an oversimplification to label the threats as simple extortion without carefully examining the record for particularized evidence of imputed political opinion.”<sup>705</sup>

Ordinarily prosecution is not considered persecution because residents of a country are usually expected to abide by that country’s laws of general applicability.<sup>706</sup> “If, however, the alien shows the prosecution is based on a statutorily-protected ground, and if the punishment under that law is sufficiently extreme to constitute persecution, the law may provide the basis for asylum or withholding of removal even if the law is generally applicable.”<sup>707</sup> In *Scheerer v. United States Attorney General*,<sup>708</sup> the asylum applicant, a German chemist, argued that his fourteen-month jail sentence for violating Germany’s racial hatred law constituted persecution. After studying soil samples from Auschwitz, he had published his result, including an inference that the Holocaust’s mass killings could not have occurred as history records them.<sup>709</sup> Scheerer argued that his conviction was based on imputed political opinion, specifically that the German government ascribed an anti-Semitic meaning to his scientific conclusions. He also argued that his sentence was “disproportionately severe.”<sup>710</sup> The Eleventh Circuit held that substantial evidence supported the immigration judge’s denial of asylum. As to the first argument, the court concluded that

the administrative record is devoid of any evidence that the German government ascribed a political opinion to him and then punished him for that imputed belief. Rather, as the IJ held, the evidence only reflects that Scheerer was “held to account by a highly developed and sophisticated legal system, . . . received due process, was convicted, and sentenced to a term well below the statutorily established maximum.”<sup>711</sup>

705. *Id.*

706. *See, e.g., Scheerer v. U.S. Att’y Gen.*, 445 F.3d 1311, 1315 (11th Cir. 2006) (“Fear of prosecution under fairly administered laws, on the other hand, does not ordinarily entitle an alien to asylum or withholding of removal.”).

707. *E.g., id.* at 1316.

708. 445 F.3d 1311 (11th Cir. 2006).

709. *Id.* at 1314.

710. *Id.* at 1316.

711. *Id.*

As to the second, the court found that Scheerer offered no evidence to support the claim.<sup>712</sup>

Where a law of general applicability is applied unevenly in a way that targets a particular group, such discrimination can rise to the level of persecution. In *Miljkovic v. Ashcroft*,<sup>713</sup> the asylum applicant claimed that the punishment meted out for not reporting to military duty pursuant to a draft notice would constitute persecution. “According to his uncontradicted testimony, draft notices were sent only to persons who were either opposed to the Milosevic regime or had been born in a part of Yugoslavia other than Serbia; Miljkovic satisfied both criteria.”<sup>714</sup> The Seventh Circuit held that “picking on an ethnic minority for hazardous military duty goes well beyond mere ‘discrimination,’” such that it can constitute persecution.<sup>715</sup>

In extreme situations, punishment for actively resisting a regime can constitute persecution on account of political opinion. *Matter of Izatula*<sup>716</sup> involved an Afghani male who was wanted by the Soviet-controlled government of Afghanistan for aiding the mujahedin who were attempting to overthrow the government. The immigration judge denied the asylum application on the ground that the government simply sought to prosecute Izatula for his acts of aiding those who would overthrow the government.<sup>717</sup> In reversing the immigration judge, the BIA said:

we find no basis in the record to conclude, as the immigration judge did, that any punishment which the Afghan Government might impose on the applicant on account of his support for the mujahedin would be an example of a legitimate and internationally recognized government taking action to defend itself from an armed rebellion. The *Country Reports* explain that in Afghanistan, “[c]itizens have neither the right nor the ability peacefully to change their government. Afghanistan is a totalitarian state under the control of the [People’s Democratic Party of Afghanistan], which is kept in power by the Soviet Union.”

712. *Id.*

713. 376 F.3d 754 (7th Cir. 2004).

714. *Id.* at 755.

715. *Id.* at 756.

716. 20 I. & N. Dec. 149 (BIA 1990).

717. *Id.* at 152.

We accordingly find the existing political situation in Afghanistan to be different from that of countries where citizens have an opportunity to seek change in the political structure of the government via peaceful processes.<sup>718</sup>

### 1. Particular Social Group

The vague and elastic phrase “membership in a particular social group” has given rise to much litigation, with the determination of what kind of group qualifies left to be decided on a case-by-case basis. The BIA used the doctrine of *ejusdem generis* (“of the same kind”) to construe the meaning of “membership in a particular social group.”<sup>719</sup> Since the four other grounds for asylum—persecution on account of race, religion, nationality, and political opinion—each involve an immutable characteristic defined as “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed,” the BIA concluded that “social group” refers to “a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.”<sup>720</sup>

718. *Id.* at 153–54 (internal citation omitted) (citing *Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988), which held “general rule [that] prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution . . . [is not] applicable in countries where a coup is the only means through which a change in the political regime can be effected”).

719. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (“That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.”).

720. *Id.* at 233–34 (“[W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. . . . By construing ‘persecution on account of membership in a particular social group’ in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”).

The Ninth Circuit took a different approach in *Sanchez-Trujillo v. INS*:<sup>721</sup>

The statutory words “particular” and “social” which modify “group,” indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase “particular social group” implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.<sup>722</sup>

Pursuant to this definition, immediate families are a consummate example of a “particular social group” and “the class of young, working class, urban males of military age” is not because it is not a “cohesive, homogeneous group.”<sup>723</sup>

Recognizing its variance from the standard in *Matter of Acosta*,<sup>724</sup> the Ninth Circuit, in an attempt to harmonize its approach with the BIA’s, modified its approach in *Hernandez-Montiel v. INS*.<sup>725</sup> In that case, the court said: “[A] ‘particular social group’ is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”<sup>726</sup>

The Board of Immigration Appeals’ approach to defining “particular social group” has been followed in the First,<sup>727</sup> Second,<sup>728</sup> Third,<sup>729</sup>

721. 801 F.2d 1571 (9th Cir. 1986).

722. *Id.* at 1576.

723. *Id.* at 1576–77.

724. 19 I. & N. Dec. 211 (BIA 1985). *See also supra* notes 674 & 719–20 and accompanying text.

725. 225 F.3d 1084 (9th Cir. 2000).

726. *Id.* at 1093.

727. *Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir. 2005) (applying, at least to some extent, *Chevron* deference).

728. *Koudriachova v. Gonzales*, 490 F.3d 255 (2d Cir. 2007) (applying *Chevron* deference).

729. *Fatin v. INS*, 12 F.3d 1233, 1239–40 (3d Cir. 1993) (applying *Chevron* deference).

Sixth,<sup>730</sup> Seventh,<sup>731</sup> Tenth,<sup>732</sup> and Eleventh Circuits.<sup>733</sup> Without comment, the Fifth Circuit has cited *Acosta* for the meaning of “particular social group.”<sup>734</sup> The Eighth Circuit appears to have a test similar to the Ninth Circuit’s test in *Hernandez-Montiel*.<sup>735</sup>

In an ongoing dialogue with the courts of appeals, the BIA continues to refine the meaning of “particular social group.” Continuing to affirm *Acosta*, the BIA holds “that membership in a purported social group requires that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility.”<sup>736</sup> “The essence of the ‘particularity’ requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. . . . [T]he key question is whether the proposed description is sufficiently ‘particular,’ or is ‘too amorphous.’”<sup>737</sup> The “social visibility” question “must be considered in the context of the country of concern and the persecution feared.”<sup>738</sup> Using this refinement of *Acosta*, the BIA has determined that “Salvadoran youth who refused recruitment into the MS-13 criminal gang,”<sup>739</sup> affluent Guatemalans,<sup>740</sup> and “former noncriminal government informants working against the Cali drug cartel”<sup>741</sup> do not constitute particular social groups for asylum purposes.

730. *Castellano-Chacon v. INS*, 341 F.3d 533, 546–47 (6th Cir. 2003) (applying *Chevron* deference).

731. *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998) (adopting *Acosta* standard and recognizing *Chevron* deference).

732. *Niang v. Gonzales*, 422 F.3d 1187, 1198–99 (10th Cir. 2005) (applying *Chevron* deference).

733. *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1196–97 (11th Cir. 2006) (granting deference to BIA).

734. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352–53 (5th Cir. 2002).

735. *See Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994), *superseded by statute on other grounds recognized by Rife v. Ashcroft*, 374 F.3d 606, 614 (8th Cir. 2004).

736. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008), reopened by BIA order dated July 28, 2009 (order on file with author).

737. *Id.* at 584.

738. *Id.* at 586–87.

739. *Id.* at 590. *See also Matter of E-A-G-*, 24 I. & N. Dec. 591, 596 (BIA 2007) (neither gang membership nor imputed gang membership constitutes a “particular social group”).

740. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007).

741. *In re C-A-*, 23 I. & N. Dec. 951, 957 (BIA 2006).

Agreeing that “visibility” is a relevant criterion, the First Circuit has said that

[t]he BIA has construed *In re C-A-* to stand for three factors in addition to the immutability requirement for defining a social group. In addition to immutability, the BIA requires that a “particular social group”: (1) have “social visibility,” meaning that members possess “characteristics . . . visible and recognizable by others in the [native] country,” (2) be defined with sufficient particularity to avoid indeterminacy, and (3) not be “defined *exclusively* by the fact that its members have been targeted for persecution.”<sup>742</sup>

The Ninth Circuit, while seeming to defer to the BIA’s “visibility” criterion,<sup>743</sup> said: “Various factors, such as immutability, cohesiveness, homogeneity, and visibility, are helpful in various contexts, but they are not exhaustive. The traditional common law approach, looking at hypothetical cases and commonalities in cases that go one way or the other, is more prudent.”<sup>744</sup>

## 2. Gender-Related Claims

Gender-related claims—specifically claims by women—for asylum have presented a particular challenge for the BIA and the courts. Rape, for instance, can provide a basis for asylum if the woman was raped partly because of her race, religion, nationality, political opinion, or membership in a particular social group.<sup>745</sup> But can the category of “woman” by itself comprise a “particular social group” such that if a woman receives harsh treatment in her country because of her gender, she can be granted asylum if the harsh treatment crosses the line from discrimination to persecution? The characteristic—gender—is clearly

742. *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009) (citations omitted). *See also Santos-Lemus v. Mukasey*, 542 F.3d 738, 745 (9th Cir. 2008) (court has “adopted the Board’s particularity and social visibility requirements”); *Savchuck v. Mukasey*, 518 F.3d 119, 123 (2d Cir. 2008) (“BIA’s interpretation of the ambiguous phrase ‘particular social group’ is reasonable”); *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1199 (11th Cir. 2006).

743. *Donchev v. Mukasey*, 553 F.3d 1206, 1216–19 (9th Cir. 2009).

744. *Id.* at 1220. *See also Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008) (“We have no need to reach the broader questions regarding the BIA’s use of a social visibility test in its definition of a particular social group.”).

745. *See, e.g., In re D-V-*, Applicant, 21 I. & N. Dec. 77 (BIA 1993).

immutable, but an affirmative answer would mean that one-half or more of any given population constitutes a “particular social group.” The Tenth Circuit addressed this issue:

There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there. But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted “on account of” their membership. It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution. The issue then becomes whether the protesting women constitute a social group.<sup>746</sup>

What about a subset of women? Can women who dissent from the cultural and legal norms of a society receive asylum if those generally applicable cultural and legal norms offend western sensibilities? An affirmative answer potentially solves the numbers problem, but it raises other problems. Dissenting from societal norms is not clearly immutable and, therefore, would not qualify for “social group” status under *Acosta*. Additionally, in many cases, the dissenting women will not be able to show that they are in a “cohesive, homogeneous group,” and thus will be unable to satisfy the Ninth Circuit’s *Sanchez-Trujillo*<sup>747</sup> test for “social group” status.

In an early case interpreting *Acosta*, the Third Circuit struggled with these issues. *Fatin v. INS* involved an Iranian woman who based her asylum claim, in part, on the fact that her feminist beliefs would be compromised by the treatment of women in Iran.<sup>748</sup> In defining “social group,” the court, following *Acosta*, concluded that “to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted. She has not, however, satisfied the third element; that is, she has not shown that she would suffer or that she has a well-

746. *Niang v. Gonzales*, 422 F.3d 1187, 1199–1200 (10th Cir. 2005).

747. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

748. *Fatin v. INS*, 12 F.3d 1233, 1236–37 (3d Cir. 1993).

founded fear of suffering ‘persecution’ based solely on her gender.”<sup>749</sup> Fatin argued, however, that she belonged to a narrower social group as “a member of ‘a very visible and specific subgroup: Iranian women who *refuse to conform* to the government’s gender-specific laws and social norms.”<sup>750</sup> The court suggested that this might constitute a “social group” under the *Acosta* immutability test. This group

does not include all Iranian women who hold feminist views. Nor does it include all Iranian women who find the Iranian government’s “gender-specific laws and repressive social norms” objectionable or offensive. Instead, it is limited to those Iranian women who find those laws so abhorrent that they “refuse to conform”—even though, according to the petitioner’s brief, “the routine penalty” for noncompliance is “74 lashes, a year’s imprisonment, and in many cases brutal rapes and death.”

Limited in this way, the “particular social group” identified by the petitioner may well satisfy the BIA’s definition of that concept, for if a woman’s opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as “so fundamental to [her] identity or conscience that [they] ought not be required to be changed.”<sup>751</sup>

In *Gao v. Gonzales*,<sup>752</sup> the Second Circuit applied *Acosta* and concluded that the applicant’s “social group consists of women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable.”<sup>753</sup> And in *In re Kasinga*,<sup>754</sup> the BIA held that female genital mutilation (FGM) constituted persecution in the applicant’s case and granted asylum, concluding that the applicant had a well-founded fear of persecution on account of her membership in a particular social group. The BIA defined the applicant’s social group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>755</sup> The

749. *Id.* at 1240.

750. *Id.* at 1241.

751. *Id.* (internal citation omitted).

752. 440 F.3d 62 (2d Cir. 2006).

753. *Id.* at 70.

754. 21 I. & N. Dec. 357 (BIA 1996).

755. *Id.* at 365.

Attorney General, on review from the BIA, has recognized that a woman who has already undergone FGM might nevertheless be entitled to asylum or withholding of removal because FGM isn't necessarily a one-time event in the life of a woman; and, more broadly, "where an alien demonstrates that she suffered past persecution on account of one of the statutory bases, it is 'presumed' that her life or freedom would be threatened in the future . . . on account of the same *statutory ground*."<sup>756</sup>

The Tenth Circuit has questioned the BIA's definition of social group in *Kasinga*, wondering why the social group is not defined solely on gender and tribal grounds. In *Niang v. Gonzales*,<sup>757</sup> the court said that

[i]n accordance with *Acosta*, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a "young woman" and a "member of the Tchamba-Kunsuntu Tribe" cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.<sup>758</sup>

The court found "it noteworthy that *Kasinga*'s explanation provides no reason why more than gender or tribal membership would be required to identify a social group," concluding that "opposition is not a necessary component of a social group otherwise defined by gender and tribal membership."<sup>759</sup>

In 2008, the Attorney General asked the BIA to review gender asylum claims in light of judicial and administrative developments in asylum law generally. In *Matter of R-A*,<sup>760</sup> a victim of domestic violence in Guatemala applied for asylum, contending "that the serious harm inflicted on her by her husband constituted persecution on account of

756. *Matter of A-T*, 24 I. & N. Dec. 617, 622 (AG 2008) (BIA made both a factual error in concluding that FGM was necessarily a one-time event and a legal error in placing on alien, who suffered persecution in past, the burden of demonstrating likelihood of persecution in future).

757. 422 F.3d 1187 (10th Cir. 2005).

758. *Id.* at 1200.

759. *Id.*

760. 24 I. & N. Dec. 629 (AG 2008).

her membership in a particular social group, defined as ‘Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.’”<sup>761</sup> The BIA had denied the claim in 1999; the Attorney General vacated that decision in 2001, staying reconsideration until a regulation was issued. But a final rule was never adopted.<sup>762</sup> In returning the case to the BIA, the Attorney General said:

In the years since the issuance of the stay order, both the Board and courts of appeals have issued numerous decisions relating to various aspects of asylum law under the existing statutory and regulatory provisions. Although these intervening decisions may not have directly resolved the issues presented in *Matter of R-A-*, some of them have addressed, for example, the terms “persecution,” “on account of,” and “particular social group,” and thus may have relevance to the issues presented with respect to asylum claims based on domestic violence.<sup>763</sup>

### *C. Applying for Asylum, Withholding of Removal, and Convention Against Torture Relief*

An application for asylum is treated as an application for withholding of removal under § 241(b)(3) of the INA, and, where the facts warrant or the alien pleads, as an application for withholding of removal under the Convention Against Torture (CAT).<sup>764</sup> Asylum issues arise in three contexts: (1) upon the alien’s arrival into the United States with a “credible fear” determination as ascertained by an asylum officer; (2) when the alien makes an affirmative application for asylum with U.S. Citizenship and Immigration Services (USCIS); and (3) when the alien seeks asylum as a ground for relief from removal in the context of a removal hearing before an immigration judge.

First, arriving aliens who lack documents or possess only fraudulent or invalid documents are placed in expedited removal.<sup>765</sup> If, how-

761. *Id.*

762. *Id.*

763. *Id.* at 630.

764. See 8 C.F.R. §§ 208.1(a) & 208.13(c)(1) (2008).

765. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2006). The substantive grounds for inadmissibility can be found at INA § 212(a)(6)(C) & (a)(7), 8 U.S.C. § 1182(a)(6)(C) & (a)(7) (2006).

ever, “the alien indicates either an intention to apply for asylum . . . or a fear of persecution,” the alien is not immediately removed but instead is interviewed by an asylum officer.<sup>766</sup> At this stage, the asylum officer is asked to make a “credible fear” determination. If the alien is found to possess a credible fear of persecution, she is entitled to a full hearing on the claim; but if the asylum officer determines that no credible fear exists, the alien is subject to removal with a right to seek review of the credible fear determination by an immigration judge.<sup>767</sup> There is no federal court review of the credible fear determination, and habeas review is limited only to questions of the person’s status (e.g., citizenship or permanent residence).<sup>768</sup>

Second, applications for asylum must be filed within one year of the alien’s arrival in the United States unless there are “extraordinary circumstances” for the delay, or the application is based on changed circumstances that materially alter the alien’s eligibility for asylum.<sup>769</sup> Unless the alien is in removal proceedings during this time frame, the alien will file an asylum application with the USCIS, and the case will be referred to an asylum officer for adjudication. Prior to deciding the case, the asylum officer will conduct an interview with the applicant “in a nonadversarial manner.”<sup>770</sup> The asylum officer can grant the application, deny the application if the alien has some other authorized status in the United States, or refer the alien for a removal proceeding where the alien can renew the asylum claim before an immigration judge.<sup>771</sup>

The third way that asylum claims arise is as a defensive measure before an immigration judge in the context of a removal hearing. The removal proceeding may have been initiated by an asylum officer’s referral of an arriving alien after a determination that the alien has a “credible fear” of persecution or torture. Or it may have been initiated by an asylum officer’s referral of an alien after the adjudication of the

766. INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (2006).

767. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2006). The asylum officer can also determine whether the alien has a credible fear of torture. 8 C.F.R. § 208.30(e)(3) (2008).

768. INA § 242(e)(2) & (5), 8 U.S.C. § 1252(e)(2) & (5) (2006).

769. INA § 208(a)(2)(B) & (D), 8 U.S.C. § 1158(a)(2)(B) & (D) (2006). This limitation applies only to asylum claims and not withholding of removal or relief under the CAT.

770. 8 C.F.R. §§ 208.9(b), 1208.9(b) (2008).

771. 8 C.F.R. §§ 208.14, 1208.14 (2008). The asylum officer does not rule on the application for withholding of removal or claims under the CAT.

alien's affirmative asylum application. Finally, the asylum claim may arise for the first time in the context of a removal proceeding initiated in the normal course of immigration enforcement. In addition to the claim of asylum, assuming it was timely filed, the immigration judge will also consider claims for withholding of removal and CAT relief. Unlike the decisions of an asylum officer, decisions by an immigration judge are subject to BIA review.

Whether before an asylum officer or an immigration judge, the asylum applicant bears the burden of establishing that she is entitled to asylum, withholding of removal, or CAT relief.<sup>772</sup> With respect to asylum applications, the applicant's testimony alone "may be sufficient to sustain the applicant's burden without corroboration" if the trier of fact is satisfied "that the applicant's testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."<sup>773</sup> Where called for by the trier of fact, the applicant must provide corroborating evidence "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."<sup>774</sup>

### 1. Legal Standard of Proof

In the 1980s, the Supreme Court decided two cases involving the standard of proof in withholding of removal cases and asylum cases, respectively. In *INS v. Stevic*,<sup>775</sup> the Court interpreted the withholding of removal statute to determine the meaning of the phrase "alien's life or freedom would be threatened." It held that an applicant for withholding of removal had the burden of establishing a "clear probability of persecution" if returned home, and that this meant such persecution was "more likely than not."<sup>776</sup>

The INS argued that the same standard should apply to asylum claims, which require a showing of persecution or a well-founded fear of persecution. The Supreme Court disagreed. It concluded that the two standards were plainly different and that an alien could establish a claim for asylum without showing that persecution was more likely than not: "One can certainly have a well-founded fear of an event hap-

772. See INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

773. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

774. *Id.*

775. 467 U.S. 407 (1984).

776. *Id.* at 429–30.

pening when there is less than a 50% chance of the occurrence taking place.”<sup>777</sup> Noting some ambiguity in the phrase “well-founded fear,” the Court recognized the agency’s role in further defining the term consistent with the Court’s opinion.<sup>778</sup> The regulations state the alien must show (1) “fear of persecution” and (2) that “[t]here is a reasonable possibility of suffering such persecution if he or she were to return to that country.”<sup>779</sup>

With respect to CAT, the convention’s nonreturn provision refers to those who have “substantial grounds” for the belief that they will suffer torture if sent to the proposed country of removal.<sup>780</sup> The regulations provide that the applicant must “establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”<sup>781</sup>

## 2. Substantial Evidence in the Asylum Context

The reviewing court will uphold the decision of the Board of Immigration Appeals (or the immigration judge) if the decision “is supported by reasonable, substantial, and probative evidence.”<sup>782</sup> Where the BIA summarily affirms the immigration judge’s decision, the courts impute the immigration judge’s reasoning to the BIA.<sup>783</sup> Despite the deferential standard, the courts reverse a substantial number of asylum cases for lack of substantial evidence. What follows is a representative sample.

*Yan v. Gonzales*<sup>784</sup> involved a pro se petitioner seeking review of a BIA order that summarily affirmed the immigration judge, denying the

777. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

778. *Id.* at 448.

779. 8 C.F.R. §§ 208.13(b)(2) & 1208.13(b)(2) (2008). *See also* *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987) (“a reasonable person in [alien’s] circumstances would fear persecution”).

780. *See* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Art. 3, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984).

781. 8 C.F.R. §§ 208.16(c)(2) & 1208.16(c)(2) (2008).

782. *E.g.*, *Gomes v. Gonzales*, 473 F.3d 746, 752 (7th Cir. 2007) (remand because denial of asylum not supported by substantial evidence). The court continued: “Under the statute, ‘the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.’” *Id.*

783. *See, e.g.*, *Yan v. Gonzales*, 438 F.3d 1249, 1251 (10th Cir. 2006).

784. 438 F.3d 1249 (10th Cir. 2006).

petitioner asylum, withholding of removal, and CAT relief.<sup>785</sup> Yan, a Christian, claimed asylum based on religious persecution in his native China. The IJ disbelieved Yan because the judge “had ‘concerns about [Mr. Yan’s] commitment to Christianity’ sufficient to give him ‘serious doubts about [Mr. Yan’s] credibility,’” and the judge ruled “that Mr. Yan had not shown ‘that it is likely that he would be or would have been targeted by the authorities in China on account of his religious activity.’”<sup>786</sup> The court concluded that the IJ’s determinations were not supported by substantial evidence.<sup>787</sup>

In questioning Yan’s Christian commitment, the IJ concluded that Yan “seemed to have only rudimentary knowledge of [the] Christian religion.”<sup>788</sup> Although the Tenth Circuit ultimately concluded “that a detailed knowledge of Christian doctrine may be irrelevant to the sincerity of an applicant’s belief,”<sup>789</sup> it was troubled with two aspects of the IJ’s finding. First, the IJ “gave no good reason for rejecting Mr. Yan’s testimony about his personal experiences with Christianity.”<sup>790</sup> In examining the record, the court found a rich account of Yan’s encounter with a Christian while recuperating in a hospital, his attendance at Sunday worship service and other meetings of Christians, and his baptism on December 25, 1998. In response to a question about how he felt after being baptized, Yan answered, “I [felt] that I have gone through a rebirth experience . . . Before, I didn’t know that in this world, there’s such a loving God that will have his son to die for me.”<sup>791</sup> Second, even the IJ’s finding that Yan knew little about Christianity was not supported by the evidence. The record revealed that Immigration and Customs Enforcement’s trial attorney cross-examined Yan on “his knowledge of the Bible and Christian doctrine,” including

785. *Id.* at 1250–51.

786. *Id.* at 1251.

787. *Id.* For another of the myriad of cases remanding for lack of substantial evidence, see *Gomes v. Gonzales*, 473 F.3d 746 (7th Cir. 2007) (Catholics facing persecution in Bangladesh). *But see* *Lolong v. Gonzales*, 484 F.3d 1173, 1181 (9th Cir. 2007) (upholding BIA’s determination that subjective fear of persecution felt by Chinese Christian in Indonesia was not objectively reasonable).

788. *Yan*, 438 F.3d at 1252.

789. *Id.* at 1255.

790. *Id.*

791. *Id.* at 1253.

the use of trick questions.<sup>792</sup> Quoting extensively from this testimony, the Tenth Circuit made several observations:

First, Mr. Yan's responses to the Bible questions were fairly accurate. He was able to complete the Beatitudes question, notwithstanding an error by the interpreter. He knew four of the first five books of the Bible, and referred to the first five books of Moses as the "Book of the Law," consistent with Jewish practice, which calls these five books as the Torah, or "law." He had, unsurprisingly, never heard of the book of Nephi, which is found in the Book of Mormon and not the Bible. He knew what the Psalms are. While he became confused about confirmation, that may be understandable if his particular group was Protestant and non-sacramental.<sup>793</sup>

With respect to persecution, Yan had testified that governmental authorities "broke up his home church, confiscated his Bible, and threw him in jail, where he was beaten."<sup>794</sup> The Tenth Circuit found that the IJ's conclusion that "a 'small and unobtrusive' house church like Mr. Yan's . . . would have been tolerated by the authorities, if they knew about it at all," had "at least some support in a State Department Country Religious Freedom Report."<sup>795</sup> The court was troubled by the immigration judge's reasoning because the immigration judge "appears to have made an assumption that just because the authorities do not ordinarily attack home churches, they would not have done so in Mr. Yan's case."<sup>796</sup> In concluding that the IJ's finding was not supported by substantial evidence, the court said: "The IJ gave no reason, other than the minor inconsistency previously noted, to discount the particular facts Mr. Yan related concerning persecution he endured as a Christian."<sup>797</sup>

*Gao v. Board of Immigration Appeals*<sup>798</sup> involved a claim by a Chinese couple who applied for asylum based on the wife's forced sterilization. The IJ denied the claims and the BIA affirmed. The denial cen-

792. *Id.*

793. *Id.* at 1254.

794. *Id.* at 1256.

795. *Id.*

796. *Id.*

797. *Id.*

798. 482 F.3d 122 (2d Cir. 2007).

tered solely on the IJ's "determination that the couple lacked credibility."<sup>799</sup> The "adverse credibility determination was grounded exclusively on three purported inconsistencies in their testimony."<sup>800</sup> In reversing, the Second Circuit concluded that the first two factual findings were not supported by substantial evidence and that it did not have to address the third because the BIA had not relied on it in its holding.<sup>801</sup>

The first purported inconsistency centered around the birthplace of the couple's first child. The IJ concluded that Mrs. Gao's testimony was "internally inconsistent" and that Mr. Gao's testimony had changed from a previous hearing to the current one. The IJ concluded that Mrs. Gao had testified that her first child was born at an aunt's house and then also testified that the child was born in a hospital. In reviewing this finding, the court said: "When explaining Mrs. Gao's internal inconsistency regarding the *first* child, the IJ mistakenly discussed the birth of the Gaos' son, who is their *second* child."<sup>802</sup> It appears that translation problems may have caused the immigration judge's confusion, but "[i]n short, it is not accurate to say that Mrs. Gao 'testified that her son was born at her aunt's house [and] . . . then recanted that testimony and indicated that her son was born in the hospital.'"<sup>803</sup>

The IJ also found that Mr. Gao had changed his story as to birthplace from an earlier hearing to the instant one. The transcript from the earlier hearing was, however, unavailable and, therefore, never introduced into evidence. In finding no substantial evidence to support the IJ's conclusion, the court said that the "IJ appears simply to have adopted the assumption implicit in the cross-examiner's question; an assumption underlying a question, however, is not evidence."<sup>804</sup> The IJ asserted a second inconsistency with respect to problems associated with Mrs. Gao's second pregnancy. "The IJ asserted that Mr. Gao had previously testified 'that they had *no difficulties* during her second pregnancy, had *no confrontations with anyone*, and had *no problems with the Chinese government*.' Again, there was no record of any such

799. *Id.* at 123.

800. *Id.*

801. *Id.* at 123, 126.

802. *Id.* at 128.

803. *Id.* at 129.

804. *Id.*

testimony in evidence. Rather, during the 2002 hearing, the government attorney and the IJ repeatedly stated simply that Mr. Gao had indicated in 1999 that the couple had ‘no problems’ during the second pregnancy.”<sup>805</sup> The court concluded: “That finding by the IJ is a complete misreading of the record that cannot survive appellate review, however deferential.”<sup>806</sup>

### 3. Corroborating Evidence

The regulations say that an applicant’s testimony alone, if found credible, can be enough to meet the applicant’s burden of proof.<sup>807</sup> The INA, as amended by the REAL ID Act, however, now requires the asylum applicant to corroborate credible testimony when such corroboration is called for by the trier of fact “unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”<sup>808</sup> Regarding judicial review of the availability of corroborating evidence, the amended Act reads: “No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.”<sup>809</sup> Interpreting this amendment, the Second Circuit has said that it will remand “where the IJ has not relied on substantial evidence in the record in finding that documentation was reasonably available.”<sup>810</sup>

Prior to the REAL ID Act, the courts had already developed an extensive body of cases on the subject of corroboration. And much in these cases survives the statute’s mandate requiring deference to the immigration judge’s decision on the availability of corroborating evidence. The Third Circuit has held that even an otherwise credible applicant’s case may be undermined by the failure to provide corroborating evidence “where (1) the IJ identifies facts for which it is reasonable to expect the applicant to produce corroboration, (2) the applicant fails to corroborate, and (3) the applicant fails to adequately explain

805. *Id.* at 130.

806. *Id.* at 132.

807. 8 C.F.R. §§ 208.16(b) & 1208.16(b) (2008).

808. *E.g.*, INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

809. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (2006).

810. *Edimo-Doualla v. Gonzales*, 464 F.3d 276, 285 (2d Cir. 2006).

that failure.”<sup>811</sup> Recognizing the deference it owes to the trier of fact on the availability of corroborating evidence, the court held that “the REAL ID Act does not change our rules regarding the IJ’s duty to develop the applicant’s testimony, and in particular, to develop it in accord with the [three] steps” because it “cannot ascertain whether the trier of fact would be compelled to find the evidence unavailable unless the applicant is given a chance to explain why he thinks it is unavailable.”<sup>812</sup> The court will vacate and remand if the IJ fails to follow these three steps, fails to give notice of what facts are expected to be corroborated, or fails to give the applicant adequate time to provide such evidence or explain its absence.<sup>813</sup>

“To ensure that IJs have the freedom to require supporting evidence, yet do not inappropriately demand it,” the Seventh Circuit “require[s] that, before denying a claim for lack of corroboration, an IJ must: (1) make an explicit credibility finding; (2) explain why it is reasonable to have expected additional corroboration; and (3) explain why the petitioner’s reason for not producing that corroboration is inadequate.”<sup>814</sup> Where neither the IJ nor the BIA “make[s] an explicit credibility finding, or even indicate[s] why [an applicant’s] testimony fails to carry [the] burden of proof,” it was improper to demand corroborating evidence.<sup>815</sup> But the Second Circuit has held that where the trier of fact makes an adverse credibility determination based on the applicant’s testimony, the trier of fact need not “(a) identify the particular pieces of missing, relevant documentation, and (b) show that the documentation at issue was reasonably available to the petitioner.”<sup>816</sup>

Without discussing the implications of the REAL ID Act for the court’s review of an IJ’s requirement of corroboration, the Ninth Circuit concluded “it is inappropriate to base an adverse credibility determination on an applicant’s inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United

811. *Chukwu v. Att’y Gen. of U.S.*, 484 F.3d 185, 192 (3d Cir. 2007).

812. *Id.*

813. *Id.*

814. *Ikama-Obambi v. Gonzales*, 470 F.3d 720, 725 (7th Cir. 2006).

815. *Id.* at 726–27.

816. *Diallo v. Gonzales*, 445 F.3d 624, 633 (2d Cir. 2006).

States—such corroboration is almost never easily available.”<sup>817</sup> “It was even more inappropriate . . . for the IJ to support his adverse credibility determination with [applicant’s] inability to obtain live testimony from persons living abroad.”<sup>818</sup>

817. *Zhou v. Gonzales*, 437 F.3d 860, 866 (9th Cir. 2006) (citing *Sidhu v. INS*, 220 F.3d 1085, 1091–92 (9th Cir. 2000) (citing *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (1996))).

818. *Id.*

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## XI. The Intersection of Criminal Law and Immigration Law: Ineffective Assistance of Counsel in Criminal Proceedings

Criminal law and immigration law intersect in two distinct places. The INA criminalizes some immigration violations and, as we have seen, some criminal violations have adverse immigration consequences, including making a person inadmissible, deportable, and ineligible for certain forms of relief. A discussion of the criminal consequences of violating the immigration laws is beyond the scope of this monograph.<sup>819</sup> The immigration consequences of criminal behavior have been discussed at various points throughout this monograph. This section provides an overview of an emerging ethical and constitutional issue with respect to one aspect of the intersection.

The intersection of criminal law and immigration law has become increasingly important over the last two decades, especially with the continued expansion of the aggravated felony definition and stepped-up immigration enforcement efforts. In 1986, immigration enforcement resulted in the removal of 1,978 criminal aliens.<sup>820</sup> That number had grown to 71,597 by 2001.<sup>821</sup> And in 2008, the Department of Homeland Security removed 97,100 criminal aliens.<sup>822</sup>

In *INS v. St. Cyr*, the Supreme Court said: “Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence,”<sup>823</sup> recognizing that “competent defense counsel, following the advice of numerous practice guides,

819. For a detailed look, see Robert McWhirter, *The Criminal Lawyer’s Guide to Immigration Law: Questions and Answers* 190–346 (2006).

820. Department of Homeland Security, Office of Immigration Statistics, 2001 Statistical Yearbook of the Immigration and Nationalization Service, Enforcement Section 6.

821. *Id.*

822. Department of Homeland Security, Office of Immigration Statistics, Annual Report (July 2009), Immigration Enforcement Actions: 2008, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_08.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf).

823. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting Bender, Criminal Defense Techniques §§ 60A.01 & 60A.02[2] (1999)) (internal quotes omitted). See also *United States v. Kwan*, 407 F.3d 1005, 1016 (9th Cir. 2005) (quoting *St. Cyr* and holding that attorney provided ineffective assistance of counsel by providing criminal defendant wrong advice about the immigration consequences of criminal proceeding).

would have advised” the client of the immigration consequences of the criminal proceedings.<sup>824</sup> But does the Sixth Amendment right to counsel require counsel to advise an alien criminal defendant of the potential immigration consequences of a guilty plea or a criminal conviction? In other words, can a criminal conviction be set aside on the grounds of ineffective assistance of counsel where the defense counsel provides an alien who is a criminal defendant with inaccurate or no advice regarding such immigration consequences?<sup>825</sup>

*Strickland v. Washington*<sup>826</sup> established a two-part test for determining when the Sixth Amendment is breached by the criminal defense counsel’s failure to provide effective assistance of counsel. “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.”<sup>827</sup> To prevail on the first prong, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.”<sup>828</sup> To test reasonableness, “[t]he Sixth Amendment . . . relies . . . on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.”<sup>829</sup> “Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable.”<sup>830</sup>

The ABA Standards for Criminal Justice provide specific norms providing “an objective standard of reasonableness” for criminal defense attorneys.<sup>831</sup> Standard 14-3.2 states that “[t]o the extent possible, defense counsel should determine and advise the defendant . . . as to the possible collateral consequences that might ensue from entry of the

824. *St. Cyr*, 533 U.S. at 323 n.50.

825. For an in-depth look at this question, see Gabriel Chin & Richard Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (2002).

826. 466 U.S. 668 (1984).

827. *Id.* at 687.

828. *Id.* at 688.

829. *Id.*

830. *Id.* (citations omitted).

831. *See id.* (referring to ABA Standards).

contemplated plea.”<sup>832</sup> The commentary to standard 14-3.2 states that “defense counsel should . . . tak[e] the initiative to learn about rules in this area rather than waiting for questions from the defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty . . . plea.”<sup>833</sup>

Counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client’s particular circumstances. . . . For example, . . . it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.<sup>834</sup>

The courts of appeals (and other courts) split on the question of whether the failure to properly advise an alien criminal defendant of the immigration consequences of a guilty plea or conviction can constitute ineffective assistance of counsel under the Sixth Amendment.<sup>835</sup> Three views have emerged: (1) counsel’s failure does not constitute ineffective assistance because the immigration consequences are merely collateral to the criminal proceeding; (2) inaccurate advice and no advice present different cases, with inaccurate advice creating the stronger case for an ineffective assistance claim; and (3) both inaccurate advice and failure to advise can constitute ineffective assistance.

A number of courts have impliedly injected a third prong into *Strickland*’s “ineffective assistance” calculus: the defendant must show that counsel’s deficient performance pertained to matters directly related to the criminal proceeding and not to the collateral consequences of a criminal conviction, no matter how harsh those consequences. This is known as the “collateral consequences doctrine,” which grows out of a judge’s duty under the Fifth Amendment to advise defendants of the direct consequences of a guilty plea. According to these courts,

832. ABA Standards for Criminal Justice 116 (3d ed. 1999).

833. *Id.* at 127.

834. *Id.*

835. The Supreme Court will review this question in a case argued in October 2009. See *Padilla v. Kentucky*, 129 S. Ct. 1317, *cert. granted*, 130 S. Ct. 42 (U.S. Sept. 4, 2009) (No. 08-651).

the failure of defense counsel to properly research and advise a criminal defendant about the collateral consequences of a conviction does not amount to ineffective assistance of counsel. In *Broomes v. Ashcroft*, for example, the Tenth Circuit said: “deportation remains a collateral consequence of a criminal conviction, and counsel’s failure to advise a criminal defendant of its possibility does not result in a Sixth Amendment deprivation.”<sup>836</sup>

Referring to *INS v. St. Cyr*,<sup>837</sup> the Second Circuit, in *United States v. Couto*, said that “recent Supreme Court authority supports [a] broader view of attorney responsibility.”<sup>838</sup> Rejecting the logic underlying the collateral consequences doctrine, the court held that “affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable.”<sup>839</sup> *Couto*’s holding implicitly rejects the collateral consequences doctrine because misadvice by a criminal defense attorney, like nonadvice, does “not alter the collateral nature of deportation to a criminal proceeding.”<sup>840</sup>

Other courts have explicitly rejected the collateral consequences doctrine, at least in cases where the ineffective assistance of counsel claim involves either the failure to advise a criminal defendant of the immigration consequences of a criminal proceeding or the rendering of inaccurate advice.<sup>841</sup> The California Supreme Court, for instance, rejected the collateral consequences doctrine in an ineffective-assistance case<sup>842</sup> on three grounds. First, it noted *Strickland*’s holding that “the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”<sup>843</sup>

836. *Broomes v. Ashcroft*, 358 F.3d 1251, 1256–57 (10th Cir. 2004).

837. 533 U.S. 289 (2001).

838. *United States v. Couto*, 311 F.3d 179, 187–88 (2d Cir. 2002).

839. *Id.* at 188. “Because . . . Defendant was affirmatively misled by her attorney,” the court did not “reconsider whether the standards of attorney competence have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable.” *Id.*

840. *Broomes*, 358 F.3d at 1256. However, “[a] consequence is collateral if it ‘remains beyond the control and responsibility of the district court in which that conviction was entered.’” *Id.* (citing *United States v. Gonzales*, 202 F.3d 20, 27 (1st Cir. 2000)).

841. See *State v. Paredez*, 101 P.3d 799 (N.M. 2004); *In re Resendiz*, 19 P.3d 1171 (Cal. 2001); *People v. Pozo*, 746 P.2d 523 (Colo. 1987).

842. E.g., *In re Resendiz*, 19 P.3d 1171 (Cal. 2001).

843. *Id.* at 1179.

Second, the collateral consequences doctrine and ineffective assistance claims have separate origins. Recognition of the right to competent representation in the guilty plea context directly stemmed from the Sixth Amendment's general principle that all defendants . . . are entitled to the effective assistance of competent counsel. The collateral consequences doctrine, on the other hand, originated as a policy-based adjunct to the due process requirement that a court ensure the guilty pleas it accepts are voluntarily given.<sup>844</sup>

Defense counsel, the court said,

clearly has far greater duties toward the defendant than has the court taking a plea. Effective counsel, for example, has a general duty to conduct a reasonable investigation of the case enabling counsel to make informed decisions about how best to represent the client. The court has no such duty.<sup>845</sup>

The court concluded:

For the foregoing reasons, to tie defense counsel's Sixth Amendment duties to the constitutional minima the due process clause requires of courts, by carving out, for erroneous advice concerning immigration consequences, an exception to the general requirement that counsel perform with reasonableness under prevailing professional norms would be illogical and counterproductive.<sup>846</sup>

Third, deportation is a unique collateral consequence—therefore, the holding is not necessarily transferable to other contexts.<sup>847</sup>

844. *Id.* at 1179–80 (internal quotations and citations omitted).

845. *Id.* at 1181–82 (“the court’s function and duties quintessentially *exclude* . . . assistance, advocacy and consultation”).

846. *Id.* at 1182 (internal quotations and citations omitted).

847. *Id.*

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## XII. Issues of Workplace and State-Assisted Enforcement

### A. Employer Sanctions

Employer sanctions were a key component of the Immigration Reform and Control Act of 1986 (IRCA). IRCA amended the INA, making it, for the first time, unlawful to employ unauthorized noncitizens. In other words, IRCA made it unlawful to hire an alien who entered and remains in the United States clandestinely, who has overstayed the period of authorized admission, or who holds a visa that does not authorize employment. IRCA makes it unlawful to knowingly hire, recruit, or refer for a fee unauthorized aliens.<sup>848</sup> It is also unlawful to continue to employ an alien knowing that the alien is or will become unauthorized.<sup>849</sup> The Ninth Circuit has interpreted “knowing” to include constructive knowledge.<sup>850</sup> “[A] deliberate failure to investigate suspicious circumstances imputes knowledge to an employer.”<sup>851</sup> In addition to the civil and criminal penalties for knowingly hiring an unauthorized alien, the employer can also face criminal prosecution for harboring an illegal alien.<sup>852</sup>

Compliance with IRCA’s employment verification system provides a safe harbor for employers;<sup>853</sup> failure to comply provides an independent ground of unlawfulness.<sup>854</sup> To verify employment eligibility, every employer must document the identity and work authorization of every prospective employee.<sup>855</sup> At the time of employment, the employer must present the prospective employee with a form, which is known as the I-9 form. The prospective employee should sign the form, attesting, under penalty of perjury, that she is a U.S. citizen,

848. INA § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A) (2006).

849. *Id.* at (a)(2).

850. *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir. 1989).

851. *New El Rey Sausage Co., Inc. v. INS*, 925 F.2d 1153, 1158 (9th Cir. 1991) (internal quotations omitted).

852. *See United States v. Kim*, 193 F.3d 567 (2d Cir. 1999).

853. INA § 274A(a)(3), 8 U.S.C. § 1324a(3) (2006).

854. INA § 274A(a)(1)(B), 8 U.S.C. § 1324a(a)(1)(B) (2006).

855. INA § 274A(b), 8 U.S.C. § 1324a(b) (2006).

permanent resident alien, or an alien authorized for employment. The employer also must sign the form, attesting, under penalty of perjury, that the employer has verified the prospective employee's authorization to work by examining documents (a list of qualified documents is supplied by the agency) establishing the employee's identity and authorization to work in the United States.<sup>856</sup> The employer is required to retain the I-9 forms for a specified number of years, allowing the immigration enforcement authorities the opportunity to review and audit compliance.<sup>857</sup> The employer has complied "if the document reasonably appears on its face to be genuine."<sup>858</sup>

Upon being found by an administrative law judge to have knowingly employed unauthorized aliens, the employer can be ordered to pay civil money penalties ranging from \$250 to \$2,000 for each unauthorized alien for a first violation, up to between \$3,000 and \$10,000 per alien for a third violation.<sup>859</sup> Criminal penalties can be imposed for "pattern or practice" violations.<sup>860</sup> For violating the paperwork verification system, the employer can be fined between \$100 and \$1,000 for each employee whose identity and work authorization were not verified in accordance with the statute.<sup>861</sup>

### *B. Antidiscrimination Provisions*

Fearing that the prospect that employer sanctions might lead some employers to engage in discriminatory hiring practices, Congress included, in its 1986 reforms, antidiscrimination provisions to supplement Title VII of the Civil Rights Act of 1964. The INA prohibits national origin discrimination and discrimination because of the individual's citizenship status if the individual is a citizen or national of the United States or is a permanent resident, refugee, or asylum recipient who intends to become a citizen when eligible.<sup>862</sup> An employer violates this provision by failure to honor the identification and work authori-

856. INA § 274A(b)(1), 8 U.S.C. § 1324a(b)(1) (2006).

857. *Id.* at (b)(3).

858. *Id.* at (b)(1)(A).

859. *Id.* at (e)(4)(A)(iii).

860. *Id.* at (f).

861. *Id.* at (e)(5).

862. INA § 274B(a), 8 U.S.C. § 1324b(a) (2006).

zation documents tendered by the alien if those documents comply with the statute and appear genuine on their face. It is also a violation to request that the employee produce more or different documents to prove identity and work authorization.<sup>863</sup> Pursuant to an elaborate enforcement scheme, an administrative law judge can order several remedies against offending employers, including the hiring of individuals; assessing civil money penalties, which can escalate for successive violations; posting of notices in the workplace; and ordering implementation of workplace education programs.<sup>864</sup>

### *C. The Complex Interplay Between Employer Sanctions and the Antidiscrimination Provisions*

The interplay between employer sanctions and the antidiscrimination provisions can raise delicate problems for employers. The employer violates the antidiscrimination provisions if it asks for more or different documentation than required under the employer verification system. But the employer can also be sanctioned for knowingly hiring an unauthorized alien. And the employer's obligation to not knowingly employ unauthorized aliens is ongoing. Moreover, deliberate failure to investigate suspicious circumstances may impute knowledge to an employer.

In *Zamora v. Elite Logistics, Inc.*,<sup>865</sup> the Tenth Circuit addressed the issue of whether an employer can require more or different documents from the alien without running afoul of the antidiscrimination provisions. That case involved a Title VII claim of discrimination by a former employee who was asked to produce additional documents after the company discovered that someone else had been using the employee's Social Security number. The company had hired several hundred workers in the year 2000 without being in full compliance with the employment verification provisions of the Act. Zamora was hired in 2001 in full compliance with the Act's verification provisions. At the end of 2001, the company received a tip that the INS would be investigating firms in its area. Knowing of its problematic hiring practices in 2000, the company hired two independent contractors to verify its employees' Social Security numbers. The investigation revealed that an-

863. INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6) (2006).

864. *Id.* at (g).

865. 478 F.3d 1160 (10th Cir. 2007) (en banc).

other person had been using Zamora's Social Security number. At this point, the company asked Zamora for additional documentation and suspended him until he provided such documentation. Zamora brought in his annual Social Security Administration report, which raised more problems because the birthdate on the report did not match the birthdate on file with the company. The company later rejected his certificate of naturalization, and he sued for employment discrimination under Title VII. The Tenth Circuit held that "[b]ecause Zamora failed to present sufficient evidence establishing a genuinely disputed issue of fact as to whether or not Elite's proffered reason for firing Zamora was a pretext for discrimination, summary judgment for Elite was warranted on this claim."<sup>866</sup>

Since *Zamora* involved a Title VII claim, the Tenth Circuit did not need to address the interplay between the employer sanctions and the antidiscrimination provisions of the Act. A concurring and dissenting opinion, however, shed light on the difficulties faced by an employer attempting to comply with both the employer sanction and antidiscrimination provisions.

The concurrence rejected the relevance of the antidiscrimination provisions in adjudicating a Title VII claim.<sup>867</sup> It did, however, find IRCA's employer sanctions provision relevant:<sup>868</sup>

It may have been wrong, but it was not unreasonable for [the company] to believe that, under these circumstances, examination of the naturalization certificate would fail to bring [it] into compliance with IRCA. . . . [The company] may have reasonably believed that while examination of a facially valid naturalization certificate would satisfy [its] statutory duties at the *hiring stage*, once the company was confronted with a *specific* question about

866. *Id.* at 1167.

867. *Id.* at 1175 (McConnell, J., concurring and concurring in judgment) ("This case arises under Title VII—not IRCA's anti-discrimination provisions—and the principles we interpret will apply across the board to all Title VII claims. It would be contrary to congressional intent for us to 'broaden' Title VII by interpreting it to coincide with the IRCA anti-discrimination provisions. To confine our analysis to Title VII does not 'go far in insulating employers from national origin discrimination claims,' as the dissent charges.")

868. *Id.* at 1173 ("IRCA is relevant here in two respects") (McConnell, J., concurring).

a worker's documentation, it was under a duty to investigate and resolve that specific concern.<sup>869</sup>

Addressing the Ninth Circuit's rule that constructive knowledge is sufficient for a violation of the employer sanctions provisions, the concurrence said:

Whether or not this Court ultimately agrees with the Ninth Circuit's interpretation—which we need not decide in this case—*New El Rey Sausage* demonstrates that [the company's] diligence in seeking resolution of all reported SSN discrepancies was within the bounds of reasonableness and, therefore, that [its] continued focus on resolving Mr. Zamora's SSN problem does not constitute strong evidence of pretext.<sup>870</sup>

The dissent argued that IRCA's employer sanctions provisions could not be isolated from the antidiscrimination provisions.

Employer sanctions . . . represent only one side of the IRCA coin. When IRCA was initially debated, advocates and members of Congress voiced widespread concerns that the Act would become a tool of invidious discrimination against Hispanic-Americans and other minorities. Although the original bill introducing IRCA did not contain strong anti-discrimination measures, the full House voted to include a significant anti-discrimination amendment.<sup>871</sup>

According to the dissent,

[t]he concurrence . . . suggests that because employers face sanctions for knowingly continuing to employ unauthorized aliens, employers should be given a virtual safe-harbor against Title VII claims for investigating an employee, so long as they cite IRCA to defend their actions. Assuredly, employers should undertake meaningful investigation if an employee's lawful work status is legitimately called into question. However, fear of

869. *Id.* at 1177 (citation omitted) (McConnell, J., concurring).

870. *Id.*

871. *Id.* at 1189 (Lucero, J., dissenting). "I do not suggest that IRCA's anti-discrimination provisions necessarily guide our analysis. This dissent merely points out that allowing employers to cite IRCA concerns as a shield against Title VII claims is not contemplated by IRCA itself." *Id.* at 1190 n.9.

sanction for “knowing” employment of unauthorized aliens cannot justify discriminatory precautionary measures.<sup>872</sup>

Finally, the dissent disagreed with the concurrence’s characterization of the company as an employer diligently attempting to fulfill its duty to not employ unauthorized labor, arguing that no court has held that discrepancies in a credit report (related to the use of a Social Security number) give an employer constructive knowledge that an employee is unauthorized.<sup>873</sup>

#### *D. Worksite Enforcement*

Worksite enforcement by Immigration and Customs Enforcement (ICE) has increased dramatically in recent years. In fiscal year 2002, there were 485 administrative and 25 criminal worksite arrests. Those numbers had increased to 5,184 and 1,103, respectively, in fiscal year 2008.<sup>874</sup> In *Aguilar v U.S. Immigration and Customs Enforcement*,<sup>875</sup> a group of arrested and detained aliens brought suit alleging, among other claims, that ICE’s arrests and detentions infringed on the aliens’ right to counsel in violation of procedural due process and violated aliens’ substantive due process rights to family integrity.

On March 6, 2007, federal officers conducted a raid . . . and took more than 300 rank-and-file employees into custody for civil immigration infractions. The ICE agents cast a wide net and paid little attention to the detainees’ individual or family circumstances. . . . After releasing dozens of employees determined either to be minors or to be legally residing in the United States, ICE transported the remaining detainees to Fort Devens (a holding facility in Ayer, Massachusetts). Citing a shortage of available bed space in Massachusetts, ICE then began transferring substantial numbers of aliens to faraway detention and removal operations centers (DROs). For example, on March 7, 90 detainees were flown to a DRO in Harlingen, Texas, and the next day 116 more were flown to a DRO in El Paso, Texas.<sup>876</sup>

872. *Id.* at 1190.

873. *Id.* at 1190 n.10.

874. U.S. Immigration and Customs Enforcement, Worksite Enforcement Overview (Apr. 30, 2009), <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

875. 510 F.3d 1 (1st Cir. 2007).

876. *Id.* at 6.

Suit was brought in federal district court challenging various aspects of ICE's conduct, and the district court granted the government's motion to dismiss.<sup>877</sup> In its decision, the First Circuit distinguished the claims between those "arising from" the removal process and those "with only a remote or attenuated connection to the removal of an alien."<sup>878</sup> "We thus read the words 'arising from' in section 1252(b)(9) to exclude claims that are independent of, or wholly collateral to, the removal process."<sup>879</sup> The court concluded that the right-to-counsel claims "arise from" the removal process, and, therefore, "must be administratively exhausted."<sup>880</sup> In contrast, the court held that the "substantive due process claims, which allege violations of the Fifth Amendment right of parents to make decisions as to the care, custody, and control of their children,"<sup>881</sup> were "collateral to removal and, thus, outside the channeling mechanism of section 1252(b)(9)."<sup>882</sup> After concluding that the district court had jurisdiction to hear the substantive due process claims, the First Circuit concluded that the claims were without merit. "[N]either the petitioners' amended complaint nor their briefs offer any reason to believe that ICE's actions were so 'extreme, egregious, or outrageously offensive' as to cross the 'shock the conscience' line."<sup>883</sup>

### *E. State Assistance in Immigration Enforcement*

As stated in Part III of this monograph, states have no immigration power,<sup>884</sup> and local laws can be preempted by the federal government's immigration power.<sup>885</sup> "But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised."<sup>886</sup> States do, in fact, regulate in a number

877. *See id.* at 7.

878. *Id.* at 10.

879. *Id.* at 11.

880. *Id.* at 13.

881. *Id.* at 18–19.

882. *Id.* at 19.

883. *Id.* at 22 (quoting *DePoutot v. Raffaely*, 424 F.3d 112, 119 (1st Cir. 2005)).

884. *Herrera-Inirio v. INS*, 208 F.3d 299, 307 (1st Cir. 2000).

885. *Id.* at 307–08.

886. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

of ways that affect aliens, discriminating between aliens and citizens or between classes of aliens.<sup>887</sup> And, although a detailed look at preemption in the immigration context is beyond the scope of this monograph, it should be noted that several recent cases have addressed federal preemption of state and local laws affecting noncitizens.<sup>888</sup>

Additionally, § 287(g) of the INA contemplates written agreements between the Attorney General and states or their political subdivisions whereby trained state officials are authorized to aid immigration enforcement.<sup>889</sup> An ordinance requiring landlords to verify immigration status does not “demonstrate the city’s intent to assist the government in this manner.”<sup>890</sup>

887. More than 240 immigration bills became law in 46 states in 2007. *See* National Conference of State Legislatures, *Immigrant Policy Project: 2007 Enacted State Legislation Related to Immigrants and Immigration* (Nov. 29, 2007).

888. *See, e.g., We Are America/Somos America, Coalition of Arizona v. Maricopa County Bd. of Sup’rs*, 594 F. Supp. 2d 1104 (D. Ariz. Jan. 12, 2009) (not preempted); *Chamber of Commerce of the U.S. v. Henry*, No. CIV–08-109-C, 2008 U.S. Dist. LEXIS 44168 (W.D. Okla. June 4, 2008) (preliminary injunction issued against state law that is likely preempted); *Ariz. Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008) (not preempted); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008) (preempted); *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (preempted).

Another development to watch in the field of federal preemption is the issue of E-Verify, the federal system under which employers may check the work authorization status of employees and prospective employees against DHS and SSA databases. Five states have passed laws concerning the E-Verify system. The Ninth Circuit upheld the Arizona law, *see Chicanos por la Causa Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), while a federal district court found the Illinois law was preempted, *see United States v. Illinois*, No. 07-3261, 2009 U.S. Dist. LEXIS 19533 (C.D. Ill. Mar. 11, 2009).

889. 8 U.S.C. § 1357(g) (2006).

890. *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 873 (N.D. Tex. 2008).

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## Glossary

**admission**—Lawful entry of an alien after inspection and authorization by an immigration officer. An alien paroled into the United States has not been admitted.

**aggravated felony**—For a definition and lengthy list of applicable crimes, see 8 U.S.C. § 1101(a)(43)(A)–(U) (2006). An alien convicted of an aggravated felony is deportable and faces other procedural and substantive immigration consequences.

**asylee**—An alien present in the United States or at the border who demonstrates inability or unwillingness to return to his or her country of residence because of past “persecution or a well-founded fear of persecution on account of one of five statutory factors: race, religion, nationality, membership in a particular social group, or political opinion.” *See* INA § 101(a)(42).

**BALCA**—Board of Alien Labor Certification Appeals

**beneficiary**—The individual benefitting from an immigrant petition filed on behalf of that individual by a U.S. citizen, lawful permanent resident, or U.S. employer.

**BIA**—Board of Immigration Appeals

**cancellation of removal**—A congressional delegation of discretion to an immigration judge and the Board of Immigration Appeals to grant permanent residence to statutorily eligible lawful permanent residents and non-LPRs despite the fact that the alien is removable.

**CBP**—United States Customs and Border Protection

**conviction**—“A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where” the alien has been found guilty “or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” *See* INA § 101(a)(48)(A).

**deportation grounds**—One of a number of grounds found in INA § 237(a) upon which an alien who has been inspected and admitted into the United States can be ordered removed.

**employer sanctions**—Civil or criminal penalties imposed on employers who hire unauthorized workers or who fail to properly keep records of all hires.

**EOIR**—Executive Office for Immigration Review; part of the Department of Justice, includes immigration judges and the BIA.

**EWI**—entered without inspection

**ICE**—Immigrations and Customs Enforcement

**IJ**—immigration judge

**INA**—Immigration and Nationality Act

**inadmissibility grounds**—One of a number of grounds found in INA § 212(a) on which an alien who is at a port of entry or who is in the United States without being inspected and admitted can be ordered removed.

**IRCA**—Immigration Reform and Control Act of 1986

**labor certification**—Issued by the Department of Labor, this requires those who would employ certain categories of alien labor to show that there are no authorized persons in the United States willing and able to do the job, and that the employer will pay the prevailing wage; it is designed to protect U.S. wages and working conditions.

**LPR**—lawful permanent resident; *see permanent resident*

**NACARA**—Nicaraguan Adjustment and Central American Relief Act

**nonimmigrant**—An alien granted temporary admission into the United States. *See* INA § 101(a)(15) for a list of nonimmigrant categories and qualifications.

**overstay**—An alien who has exceeded the stay authorized upon entry into the country.

**parole**—An act by which a potentially inadmissible alien is allowed to enter the United States for humanitarian reasons or for some benefit to the United States. Parolees have not been admitted to the United States.

**permanent resident**—A noncitizen with permission to live in the United States permanently who can, after the requisite number of years and meeting other requirements, apply for citizenship. Permanent residents are commonly referred to as Green Card holders.

**petitioner**—A U.S. citizen, lawful permanent resident, or U.S. employer who petitions the U.S. government for an immigration benefit on behalf of an alien.

**priority date**—The date the first relevant document is filed in the immigrant visa application process. Since some immigrant categories have annual numerical limitations, the priority date establishes the alien's position in line.

**refugee**—An alien who is neither in the United States nor at the border who meets the definition of refugee found at INA § 101(a)(42); *see asylee*.

**removal proceeding**—The administrative adjudicatory proceeding whereby the immigration judge determines whether an alien is inadmissible or deportable and whether some form of relief from inadmissibility or deportability ought to be granted.

**SAW**—Special Agricultural Worker

**USCIS**—United States Citizenship and Immigration Services

**visa**—A document issued by a Department of State consular officer at a U.S. embassy or consulate. The visa entitles the alien to travel to a United States port of entry and present himself or herself for inspection by a CBP officer.

**voluntary departure**—A form of relief from removal in which the alien is given a certain amount of time to depart the United States and does not face other consequences—including future inadmissibility—resulting from a removal order.

**waiver**—Several provisions in the Immigration and Nationality Act allow an alien to petition the government for a waiver of a ground of inadmissibility or deportability.

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# Appendix

INA § 242, 8 U.S.C. § 1252 (2006)

## § 1252. Judicial review of orders of removal

### (a) Applicable provisions

#### (1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

#### (2) Matters not subject to judicial review

##### (A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

##### (B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether

the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

**(C) Orders against criminal aliens**

Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

**(D) Judicial review of certain legal claims**

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

**(3) Treatment of certain decisions**

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

**(4) Claims under the United Nations Convention**

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with

this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

**(5) Exclusive means of review**

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms “judicial review” and “jurisdiction to review” include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

**(b) Requirements for review of orders of removal**

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

**(1) Deadline**

The petition for review must be filed not later than 30 days after the date of the final order of removal.

**(2) Venue and forms**

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

**(3) Service**

**(A) In general**

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

**(B) Stay of order**

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

**(C) Alien's brief**

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

**(4) Scope and standard for review**

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

**(5) Treatment of nationality claims****(A) Court determination if no issue of fact**

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

**(B) Transfer if issue of fact**

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

**(C) Limitation on determination**

The petitioner may have such nationality claim decided only as provided in this paragraph.

**(6) Consolidation with review of motions to reopen or reconsider**

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

**(7) Challenge to validity of orders in certain criminal proceedings****(A) In general**

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

**(B) Claims of United States nationality**

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

**(C) Consequence of invalidation**

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

**(D) Limitation on filing petitions for review**

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

**(8) Construction**

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) of this title; and

(C) does not require the Attorney General to defer removal of the alien.

**(9) Consolidation of questions for judicial review**

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

**(c) Requirements for petition**

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

**(d) Review of final orders**

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

**(e) Judicial review of orders under section 1225(b)(1)**

**(1) Limitations on relief**

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

**(2) Habeas corpus proceedings**

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to

such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

**(3) Challenges on validity of the system**

**(A) In general**

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

**(B) Deadlines for bringing actions**

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

**(C) Notice of appeal**

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

**(D) Expeditious consideration of cases**

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

**(4) Decision**

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may

order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

**(5) Scope of inquiry**

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

**(f) Limit on injunctive relief**

**(1) In general**

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

**(2) Particular cases**

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

**(g) Exclusive jurisdiction**

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

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