

# IMMIGRATION LAW



## IN THE NINTH CIRCUIT

Selected Topics

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This outline is not intended to express the views or opinions of the Ninth Circuit, and it may not be cited to or by the courts of this circuit.

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# ASYLUM, WITHHOLDING and the CONVENTION AGAINST TORTURE

## THE CONTEXT

The heart of United States asylum law is the protection of refugees fleeing persecution. This court has recognized that independent judicial review is critical in this “area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death.” *Rodriguez-Roman v. INS*, 98 F.3d 416, 439 (9th Cir. 1996) (Kozinski, J., concurring).

In order to be eligible for protection, an applicant must show that she is a person who is unable or unwilling to return to her country of origin “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.” *Melkonian v. Ashcroft*, 320 F.3d 1061, 1064 (9th Cir. 2003) (citing 8 U.S.C. § 1101(a)(42)(A)).

### I. ASYLUM LAW

#### A. Persecution

The term “persecution” is not defined by the Immigration and Nationality Act. The Ninth Circuit has defined persecution as “the infliction of suffering or harm upon those who differ [] in a way regarded as offensive.” *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc). Persecution covers a range of acts and harms. *See* Forms of Persecution, below. The “inquiry is unique and depends to a great extent on the facts of the particular case.” *Li v. Ashcroft*, 312 F.3d 1094, 1101 (9th Cir. 2002), *reh’g en banc granted*, (9th Cir. July 7, 2003). Minor disadvantages or trivial inconveniences do not rise to the level of persecution. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

The cumulative effect of harms and abuses, which when considered individually may not rise to the level of persecution, may support a claim for asylum. *See Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (finding persecution where applicant witnessed violent attacks, and suffered extortion,

harassment, and threats); *see also Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (cumulative effect of severe harassment, threats, violence and discrimination against Israeli Arab and his family amounted to persecution); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (holding that harassment, wiretapping, staged car crashes, detention, and interrogation constituted persecution); *Popova v. INS*, 273 F.3d 1251 (9th Cir. 2001) (applicant was harassed, fired, interrogated, threatened, assaulted and arrested); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996).

A subjective intent to harm or punish an applicant is not required for a finding of persecution. *See Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997) (reversing BIA's determination that lesbian applicant could not establish that she was persecuted because the government was attempting to "cure," rather than punish, her). Moreover, harm can constitute persecution even if the persecutor had an "entirely rational and strategic purpose behind it." *Montecino v. INS*, 915 F.2d 518 (9th Cir. 1990).

## 1. Forms of Persecution

### a. Physical Violence

Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution. *See e.g., Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (kidnapped and wounded by guerrillas, husband and brother killed); *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001) (kidnapped, falsely imprisoned, hit, threatened with a gun); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (arrested and tortured, including electric shocks); *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000) (assaulted in front of family, held captive for a week, beaten unconscious); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (arrested, tortured and scarred); *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (beaten and raped at gunpoint); *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (beaten repeatedly, falsely accused of rape); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (raped and sexually assaulted); *Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) (repeatedly attacked and robbed, forced to leave home); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161-62 (9th Cir. 1999) (suffered repeated beatings and severe verbal harassment in the military); *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996) (jailed, beaten, suffered sadistic and

degrading treatment); *Lopez-Galarza v. INS*, 99 F.3d 954, 960 (9th Cir. 1996) (raped, abused, deprived of food, subjected to forced labor); *Singh v. Ilchert*, 69 F.3d 375 (9th Cir. 1995) (arrested, detained and tortured); *Singh v. Moschorak*, 53 F.3d 1031, 1032-34 (9th Cir. 1995) (arrested and tortured).

*But see Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (harassment, threats, and one beating not persecution); *Li v. Ashcroft*, 312 F.3d 1094, 1101 (9th Cir. 2002) (forced pregnancy examination did not compel finding of past persecution), *reh'g en banc granted*, (9th Cir. July 7, 2003); *Prasad v. INS*, 47 F.3d 336, 339-40 (9th Cir. 1995) (minor abuse during brief detention did not compel finding of past persecution).

#### b. Threats

Threats of serious harm, particularly when combined with confrontation or other mistreatment, may constitute persecution. *See Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (severe harassment, threats, violence and discrimination against Israeli Arab and his family amounted to persecution); *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002) (multiple death threats at home and business, “closely confronted” and actively chased); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074-75 (death threats, harm to family, and murders of his counterparts constituted past persecution), *as amended by* 290 F.3d 964 (9th Cir. 2002); *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000) (harassment, including threats, intimidation, and thefts); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (husband killed, applicant and family threatened); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (“we have consistently held that death threats alone can constitute persecution;” threatened, shot at, family members killed, mother beaten); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245 (9th Cir. 1999) (multiple death threats constituted past persecution); *Leiva-Montalvo v. INS*, 173 F.3d 749 (9th Cir. 1999) (harassed, detained and threatened); *Del Carmen Molina v. INS*, 170 F.3d 1247 (9th Cir. 1999) (two death threats, cousins killed); *Garrovillas v. INS*, 156 F.3d 1010, 1016-17 (9th Cir. 1998) (if credible, three death threat letters would appear to constitute past persecution); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (breaking into applicant’s home, beating his father, and making threats to the applicant would constitute persecution); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (death threats, including marking her

house, taking her ration card, and harassment of family constitute past persecution).

*But see Mendez-Gutierrez v. Ashcroft*, No. 02-70546, 2003 WL 21976473, \*5 n.6 (9th Cir. Aug. 20, 2003) (“unspecified threats” not “sufficiently menacing to constitute past persecution”); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats “constitute harassment rather than persecution”); *Lim v. INS*, 224 F.3d 929, 936-37 (9th Cir. 2000) (mail and telephone threats, without more, do not compel a finding of past persecution); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (no well-founded fear based on anonymous threat).

c. Detention

Involuntary civil confinement may constitute persecution. *See Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (suggesting that forced institutionalization could amount to persecution).

*But see Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (five to six day detention, without abuse or threats, did not amount to persecution); *Khourassany v. INS*, 208 F.3d 1096, 1100-01 (9th Cir. 2000) (short detentions did not constitute persecution); *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc) (brief detention and searches did not constitute persecution); *Mendez-Efrain v. INS*, 813 F.2d 279, 283 (9th Cir. 1987) (four-day detention, without more, did not rise to the level of persecution).

d. Mental, Emotional, and Psychological Harm

Physical harm is not required for a finding of persecution. *See Kovac v. INS*, 407 F.2d 102, 105-07 (9th Cir. 1969) (holding that persecution encompasses both physical and mental suffering); *see also Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (arrest of a family member at church could constitute persecution); *Khassai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (per curiam) (Reinhardt, J., concurring) (“[W]hen a young girl loses her father, mother and brother--sees her family effectively destroyed--she plainly suffers severe emotional and developmental injury.”).

e. Economic Sanctions and Deprivations

Substantial economic deprivation, which constitutes a threat to life or freedom, can constitute persecution. *See e.g., Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (severe harassment, threats, violence and discrimination made it virtually impossible for applicant to earn a living); *Surita v. INS*, 95 F.3d 814 (1996) (applicant suffered multiple robberies, house was looted by soldiers, threatened); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (threats, violence against family, and seizure of family land, ration card, and ability to buy business inventory); *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) (considering impact of extortion on ability to earn livelihood); *Samimi v. INS*, 714 F.2d 992, 995 (9th Cir. 1983) (holding that seizure of land and livelihood could contribute to a finding of persecution); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (“[P]ersecution may encompass a deliberate imposition of substantial economic disadvantage.”).

*But see Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003) (being fired from job did not rise to level of persecution); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (forced closing of applicant’s restaurant, when he continued to operate other businesses, did not constitute persecution); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1984) (denial of food discounts and special work permit did not amount to persecution).

f. Discrimination and Harassment

Severe and pervasive discriminatory measures can amount to persecution. *See Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (noting that the BIA has held that severe and pervasive discrimination can constitute persecution in “extraordinary cases”). Lesser forms of discrimination are relevant to an asylum claim, but are generally not sufficient to make a finding of persecution. *See Kotas v. INS*, 31 F.3d 847, 853 (9th Cir. 1994) (“Proof that the government or other persecutor has discriminated against a group to which the petition belongs is, accordingly, *always* relevant to an asylum claim.”); *see also Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (discrimination, harassment and violence can constitute persecution); *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1996) (finding persecution where applicant was branded as a traitor, harassed, threatened, home

vandalized and relative imprisoned); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (discrimination, harassment and violence can constitute persecution).

*Cf. Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003) (record does not compel finding that applicant who was “teased, bothered, discriminated against and harassed” suffered from past persecution); *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (harassment, inability to get a job, and violence against friend did not rise to level of past persecution, but did support a well-founded fear); *Singh v. INS*, 134 F.3d 962, 969 (9th Cir. 1998) (repeated vandalism, with no physical injury, or threat of injury, not persecution); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996 (en banc) (noting that persecution “does not include mere discrimination, as offensive as it may be.”)).

## B. Source or Agent of Persecution

In order to qualify for asylum, the source of the persecution must be the government, a quasi-official group, or persons or groups that the government is unwilling or unable to control. *See Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). The fact that financial considerations may account for the state’s inability to stop the persecution is not relevant. *Id.* at 1198.

### 1. Examples Discussing Agent of Persecution

*Rodas-Mendoza v. INS*, 246 F.3d 1237 (9th Cir. 2001) (fear of violence from cousin not sufficient); *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape by government official where government never prosecuted the perpetrator); *Ladha v. INS*, 215 F.3d 889, 902 (9th Cir. 2000) (government unable to control violence by non-state actors); *Mgoian v. INS*, 184 F.3d 1029, 1036-37 (9th Cir. 1999); *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999); *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc) (non-state actors); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) (ultra-nationalist group); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (government encouraged discrimination, harassment and violence); *Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (persecution by a government-sponsored group); *Gomez-Saballos v. INS*, 79 F.3d 912 (9th Cir. 1996) (fear of former National Guard members); *Ghaly v. INS*, 58 F.3d 1425

(denying asylum because feared harm was not “condoned by the state nor the prevailing social norm”); *Desir v. Ilchert*, 840 F.2d 723, 724 (9th Cir. 1988) (persecution by quasi-official security force); *Arteaga v. INS*, 836 F.2d 1227, 1231 (1988) (guerrilla movement); *Lazo-Majano v. INS*, 813 F.2d 1432, (9th Cir. 1987) (sergeant in the army), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996 (en banc)).

### C. Well-Founded Fear of Persecution

In order to qualify for asylum, an applicant must show that his or her fear of persecution is well founded. A well-founded fear must be subjectively genuine and objectively reasonable. *See Montecino v. INS*, 915 F.2d 518, 521 (9th Cir. 1990) (noting the importance of the applicant’s subjective state of mind). “A “well-founded fear’ . . . can only be given concrete meaning through a process of case-by-case adjudication.” *INS v. Caradoza-Fonseca*, 480 U.S. 421, 448 (1987).

#### 1. Subjective Prong

The subjective prong of the well-founded fear test is satisfied by an applicant’s credible testimony that he or she genuinely fears harm. *See Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995). “[F]ortitude in face of danger” does not denote an “absence of fear.” *Id.*; *cf. Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1996) (finding no subjective fear where applicant’s testimony was not credible); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1257-58 (9th Cir. 1992) (same).

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

#### 2. Objective Prong

The objective prong of the well-founded fear test requires “credible, direct, and specific evidence in the record that would support a reasonable fear of persecution.” *Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998)

(internal citation and punctuation omitted). “[E]ven a ten percent chance of persecution may establish a well-founded fear.” *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001). This court has stated that objective circumstances “must be determined in the political, social and cultural milieu of the place where the petitioner lived.” *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

A claim based solely on general civil strife or widespread random violence is not sufficient. *See e.g., Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991); *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986). However, the existence of general civil unrest does not preclude asylum eligibility. *See Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003).

### 3. Past Persecution Not Required

A showing of past persecution is not required to qualify for asylum. *See Velarde v. INS*, 140 F.3d 1305, 1309 (9th Cir. 1998) (“Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum.”); *Mendez-Gutierrez v. Ashcroft*, No. 02-70546, 2003 WL 21976473 (9th Cir. Aug. 20, 2003). However the past persecution of an applicant creates a rebuttable presumption that he will be persecuted in the future. *See* discussion of past persecution, below. Past harm not amounting to persecution is relevant to a determination of the well-foundedness of an applicant’s fear of future persecution. *See Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (harassment and inability to get a job not past persecution, but relevant to establishing a well-founded fear).

### 4. Demonstrating a Well-Founded Fear

An applicant’s fear must generally be based on an individualized, rather than generalized, risk of persecution. *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003). However, if the applicant is a member of a mistreated group, the level of individualized targeting that she must show is inversely related to the degree of persecution directed toward that group generally. *Id.* at 1182-83.

a. Targeted for Persecution

One way for an applicant to demonstrate a well-founded fear is to show that he has been targeted for persecution. *See e.g., Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription); *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000) (applicant was followed, appeared on a death list; several colleagues were killed); *Mendoza Perez v. INS*, 902 F.2d 760, 762 (9th Cir. 1990) (threatened by death squad).

b. Pattern and Practice of Persecution

An applicant is not required to show that she will be singled out individually for persecution if she can show a pattern or practice of persecution of similarly situated people. *See Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *Osorio v. INS*, 18 F.3d 1017, 1031-32 (9th Cir. 1994) (pattern and practice of persecution of union leaders in Guatemala). “[T]his ‘group’ of similarly situated persons is not necessarily the same as the more limited ‘social group’ category mentioned in the asylum statute.” *Mgoian*, 184 F.3d at 1036.

c. Membership in Disfavored Group

A member of a “disfavored group” that is not subject to a pattern or practice of persecution may also demonstrate a well-founded fear. *See Kotasz v. INS*, 31 F.3d 847, 853-54 (9th Cir. 1994) (disfavored group of active opponents of the Communist Regime in Hungary). “[T]his court will look to (1) the risk level of membership in the group (i.e., the extent and the severity of persecution suffered by the group) and (2) the alien’s individual risk level (i.e., whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution).” *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). “The relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be.” *Id*; *see also Hoxha v. Ashcroft*, 319 F.3d 1179, 1182-83 (9th Cir. 2003); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (Indo-Fijians).

#### d. Family Ties

Acts of violence against an applicant's family members and friends may establish a well-founded fear of persecution. *See Korablina*, 158 F.3d 1039, 1044 (9th Cir. 1998). However, the violence must "create a pattern of persecution closely tied to the petitioner." *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991). "[T]he death of one family member does not automatically trigger a sweeping entitlement to asylum eligibility for all members of her extended family. Rather, when evidence regarding a family history of persecution is considered, the relationship that exists between the persecution of family members and the circumstances of the applicant must be examined." *Navas v. INS*, 217 F.3d 646, 659 n.18 (9th Cir. 2000) (internal quotations, punctuation and citations omitted); *see also Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999) (violence and harassment against entire family); *Ramirez Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990) (member of a large historically politically active family).

#### 5. Countrywide Persecution

"The ability of an applicant to relocate to a place of safety within his country of origin may . . . be considered by the IJ in determining whether an applicant's fear is "well-founded." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003). "Specifically, the IJ may deny eligibility for asylum to an applicant who has otherwise demonstrated a well-founded fear of persecution where the evidence establishes that internal relocation is a reasonable option under all of the circumstances." *Id.* (remanding for a determination of the reasonableness of internal relocation). If the source of persecution is the government, a rebuttable presumption arises that the threat exists nationwide, and that internal relocation would be unreasonable. *Id.* at 1070; *see also Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986) (no need to demonstrate countrywide persecution if persecutor shows no intent to limit his persecution to one area, and applicant can be readily identified); *cf. Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (danger based on anonymous threat localized in a small geographic area).

Recently amended asylum regulations provide that the reasonableness of internal relocation should be based on considerations including, "whether the applicant would face other serious harm in the place of suggested

relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.” See 8 C.F.R. § 1208.13(b)(3) (2002).

## 6. Continued Presence of Applicant

An applicant’s continued presence in her country of persecution before flight, while relevant, does not necessarily undermine a well-founded fear. See e.g., *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (post-threat harmless period did not undermine well-founded fear). There is no “rule that if the departure was a considerable time after the first threat, then the fear was not genuine or well founded.” *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996); see also *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (8-year stay after release from prison did not negate claim based on severe past persecution); *Turcios v. INS*, 821 F.2d 1396, 1401-02 (9th Cir. 1987) (remaining in country for several months after release from prison did not negate fear); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (two-year stay after release not determinative); cf. *Lata v. INS*, 204 F.3d 1241, 1245 (9th Cir. 2000) (applicant’s fear undermined by two-year stay in country after incidents of harm); *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) (asylum denied where applicant remained over five years after interrogation without further harm or contacts from authorities).

## 7. Continued Presence of Family

The continued presence of family members in the country of origin does not necessarily rebut an applicant’s well-founded fear, unless there is evidence that the family was similarly situated or subject to similar risk. See *Rios v. Ashcroft*, 287 F.3d 895, 902 (9th Cir. 2002); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000); cf. *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (“An applicant’s claim of persecution upon return is weakened, even undercut, when similarly-situated family members continue to live in the country without incident, . . . or when the applicant has returned to the country without incident.” (internal quotation and citation omitted)); *Aruta v. INS*, 80 F.3d 1389, 1395 (9th Cir. 1996); *Mendez-Efrain v. INS*, 813 F.2d 279, 282 (9th Cir. 1987) (continued and unmolested presence of family undermined well-founded fear).

## 8. Cases Finding No Well-Founded Fear

*Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003) (possibility of future persecution too speculative); *Li v. Ashcroft*, 312 F.3d 1094, 1102 (9th Cir. 2002), *reh'g en banc granted*, (9th Cir. July 7, 2003); *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000); *Acewicz v. INS*, 984 F.2d 1056, 1060-61 (9th Cir. 1993) (based on changed political conditions in Poland); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988) (where potential persecutor was dead).

### D. Past Persecution

“In order to establish eligibility for asylum on the basis of past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is ‘on account of’ one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either ‘unable or unwilling to control.’” *Navas v. INS*, 217 F.3d 646, 655-56 (9th Cir. 2000).

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

Once an applicant establishes past persecution, a presumption arises that he or she has a well-founded fear of future persecution. *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001); *Singh v. Ilchert*, 63 F.3d 1501, 1510 (9th Cir. 1995) (“[O]nce an applicant has demonstrated that he suffered past persecution, there is a presumption that he faces a similar threat on return.”).

Past persecution need not be atrocious to give rise to the presumption. *See Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (holding that past persecution was not atrocious, but did give rise to a presumption of a well-founded fear). According to the 2002 asylum regulations, the presumption raised by a finding of past persecution applies only to a future fear based on the original claim, and not to a fear of persecution from a new source. *See* 8 C.F.R. § 1208.13(b)(1) (2002).

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

### a. Fundamental Change in Circumstances

Under the current version of 8 C.F.R. § 1208.13(b)(1)(i)(A), in order to rebut the presumption of a well-founded fear, the agency must show by a preponderance of the evidence that there has been a “fundamental change in circumstances such that the applicant no longer has a well-founded fear.” *Baballah v. Ashcroft*, 335 F.3d 981, 992 (9th Cir. 2003); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161 (9th Cir. 2002); *Gui v. INS*, 280 F.3d 1217, 1228 (9th Cir. 2002).

### b. Changed Country Conditions

Under the previous version of the regulation, formerly codified at 8 C.F.R. § 208.13(b)(1), the INS bore “the burden to demonstrate by a preponderance of the evidence that country conditions [had] changed sufficiently.” *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000). In order to meet this burden, the agency “is obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant’s specific grounds for his well-founded fear of future persecution.” *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001) (internal quotation omitted). “Information about general changes in the country is not sufficient.” *Garrovillas v. INS*, 156 F.3d 1010, 1017 (9th Cir. 1998).

#### (1) State Department Report

“[A] State Department report on country conditions, standing alone, is not sufficient to rebut the presumption of future persecution when a petitioner has established past persecution.” *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002). However, an individualized State Department report may be sufficient to rebut a well-founded fear. *See Marcu v. INS*, 147 F.3d 1078, 1081-82 (9th Cir. 1998) (Romania); *see also Molina-Estrada*, 293 F.3d at 1096 (noting that if no past persecution is established, the “IJ and the BIA are entitled to rely on all relevant evidence in the record, including a State Department report”); *but see Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003) (holding that the INS rebutted the presumption based on a 1997 Guatemala country report, which

was considered by the Supreme Court in *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)).

(2) Administrative Notice of Changed Country Conditions

The BIA may not take administrative notice of changed conditions in the applicant's country of feared persecution without giving the applicant notice of its intent to do so, and an opportunity to show cause why such notice should not be taken, or to present additional evidence. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1026-31 (9th Cir. 1992) (holding that the denial of pre-decisional notice violates due process, and showed a failure to make an individualized assessment of the applicant's claims); *see also Getachew v. INS*, 25 F.3d 841 (9th Cir. 1994) (holding that INS brief does not provide adequate notice); *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994); *Gomez-Vigil v. INS*, 990 F.2d 1111 (9th Cir. 1993) (per curiam).

If administrative notice regarding changed country conditions is taken by the immigration judge during proceedings, there is no violation of due process because the applicant had an opportunity to respond with rebuttal evidence. *See Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995); *Acewicz v. INS*, 984 F.2d 1056, 1060-61 (9th Cir. 1993) (finding that applicants "had ample opportunity to argue before the immigration judges and before the [BIA] that their fear of persecution remained well founded"); *Kotasz v. INS*, 31 F.3d 847, 855 n.13 (9th Cir. 1994) (applicants were given ample opportunity to discuss changes in Hungary).

This court may take judicial notice of recent events that occurred after the BIA's decision. *See Gafoor v. INS*, 231 F.3d 645, 655-56 (9th Cir. 2000) (taking judicial notice of recent events in Fiji, and noting that the INS will have an opportunity to challenge the significance of the evidence on remand). However, the court of appeals may not determine the issue of changed country conditions in the first instance. *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003).

c. Cases Finding that the INS Failed to Rebut  
Presumption Based on Changed  
Circumstances or Conditions

*Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (Israel); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161-62 (9th Cir. 2002); *Rios v. Ashcroft*, 287 F.3d 895, 901-02 (9th Cir. 2002) (Guatemala); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1076-77, *as amended by* 290 F.3d 964 (9th Cir. 2002) (Peru); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (Romania); *Popova v. INS*, 273 F.3d 1251, 1259-60 (9th Cir. 2001) (Bulgaria); *Lal v. INS*, 255 F.3d 998, 1010-11 (9th Cir. 2001) (Fiji) *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Agbuya v. INS*, 241 F.3d 1224, 1230-31 (9th Cir. 2001) (past persecution by NPA in the Philippines); *Kataria v. INS*, 232 F.3d 1107, 1115-16 (9th Cir. 2000) (State Department report stating that arrests and killings had declined significantly in India not sufficient); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (past persecution of religious minority in Iran); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexican police); *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Chanchavac v. INS*, 207 F.3d 584, 592 (9th Cir. 2000) (Guatemala); *Tarubac v. INS*, 182 F.3d 1114, 1119-20 (9th Cir. 1999) (State Department mixed assessment of human rights conditions in the Philippines insufficient); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1163 (9th Cir. 1999) (Guatemala); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (Philippines); *Leiva-Montalvo v. INS*, 173 F.3d 749, 751 (9th Cir. 1999) (El Salvador); *Meza-Manay v. INS*, 139 F.3d 759, 765-66 (9th Cir. 1998) (Peru); *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1996) (Nicaragua); *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996) (Fiji); *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995) (India).

d. Internal Relocation

“[B]ecause a presumption of well-founded fear arises upon a showing of past persecution, the burden is on the INS to demonstrate by a preponderance of the evidence, once such a showing is made, that the applicant can reasonably relocate internally to an area of safety.” *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003). Where the persecutor is the government, “[i]t has never been thought that there are safe places within a nation” for the applicant to return. *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995); *but see* 8 C.F.R. § 1208.13(b)(3)(ii) (“In cases in which the

persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.”); *see also Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002) (discussing reasonableness in light of threats).

### 3. Compelling Cases of Past Persecution

In cases of severe past persecution, an applicant may obtain asylum even if he has no well-founded fear in the future, provided that he or she has “compelling reasons” for being unwilling to return. *See Lal v. INS*, 255 F.3d 998, *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Vongsakdy v. INS*, 171 F.3d 1203, 1206-07 (9th Cir. 1999); *Lopez-Galarza v. INS*, 99 F.3d 954, 960-63 (9th Cir. 1996) (extreme physical abuse, including rape); *Rodriguez Matamoros v. INS*, 86 F.3d 158, 160-61 (9th Cir. 1996) (remanding for determination); *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988); 8 C.F.R. § 1208.13(b)(1)(iii).

#### a. Insufficiently Severe Past Persecution

*Rodas-Mendoza v. INS*, 246 F.3d 1237, 1240 (9th Cir. 2001); *Belayneh v. INS*, 213 F.3d 1488 (9th Cir. 2000); *Kumar v. INS*, 204 F.3d 931 (9th Cir. 2000) (past harm not severe enough to constitute atrocious persecution to override changed country conditions); *Marcu v. INS*, 147 F.3d 1078, 1082-83 (9th Cir. 1998); *Gonzalez v. INS*, 82 F.3d 903 (9th Cir. 1996); *Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995) (past harm not sufficiently severe)

#### E. Nexus to the Five Grounds

The past persecution or anticipated persecution must be “on account of” one of the five grounds enumerated in the statute: race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Sangha v. INS*, 103 F.3d 1482, 1486 (9th Cir. 1997). The applicant must provide some direct or circumstantial evidence that the persecutor was or would be motivated to persecute him because of a protected status. *Sangha*, 103 F.3d at 1486-87.

## 1. Proving a Nexus

Direct proof of motivation may consist of statements made by the persecutor to the victim, or by victim to persecutor. *See e.g., Gonzalez-Neyra v. INS*, 22 F.3d 1293, 1295 (9th Cir. 1997) (applicant told persecutor that he would not submit to extortion because of opposition), *amended by* 133 F.3d 726 (9th Cir. 1998). An applicant's credible testimony as to the persecutor's motivations may be sufficient to establish nexus. *See Shoaferra v. INS*, 228 F.3d 1070, 1074-75 (9th Cir. 2000) (applicant established through her credible testimony and witness testimony that the perpetrator was motivated to rape her based, in part, on her ethnicity).

Circumstantial proof of motivation may consist of severe or disproportionate punishment for violations of laws, or other evidence that the persecutor generally regards those who resist as political enemies. *See e.g., Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (severe punishment for illegal departure). "In some cases, the factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of political opinion, or one of the other protected grounds. Indeed, this court has held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue." *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) (internal citation omitted); *see also Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) ("[I]f there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political.") (internal quotations omitted); *Sangha v. INS*, 103 F.3d 1482, 1490 (9th Cir. 1997).

## 2. Race

Claims of race and nationality persecution often overlap. *See Duarte de Guinac*, 179 F.3d 1156, 1160 n.5 (9th Cir. 1999). Recent cases use the more precise term of "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality." *Shoaferra v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotations omitted); *see also Baballah v. Ashcroft*, 335 F.3d 981 n.10 (9th Cir. 2003).

### a. Cases Discussing Racial or Ethnic Persecution

*Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his ethnicity and religion); *Gafoor v. INS*, 231 F.3d 645, 651-52 (9th Cir. 2000) (Indo-Fijian persecuted on account of race and imputed political opinion); *Shoaferra v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape motivated in part by Amharic ethnicity); *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000) (Kanjobal Indian from Guatemala failed to establish asylum eligibility on basis of race); *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (well-founded fear of persecution on the basis of Armenian ethnicity); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (past persecution of Quiche Indian from Guatemala); *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996) (past persecution of Indo-Fijian); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese Filipino failed to establish a well-founded fear on account of race or ethnicity).

### 3. Religion

Persecution on the basis of religion may assume various forms. *See* examples below:

#### a. Cases Finding Eligibility on the Basis of Religion

*Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (severe harassment, threats, violence and discrimination against Israeli Arab); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his ethnicity and religion); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. 2001) (harassment and threats based on applicant's religious surname and political opinion); *Lal v. INS*, 255 F.3d 998, 1010-11 (9th Cir. 2001) (religious and political persecution), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (past persecution of Christian who attempted interfaith dating in Iran); *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (if credible, past persecution of Shia Muslims by Sunni Muslims in Pakistan); *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000) (persecution on basis of interfaith marriage); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) (past persecution of Jewish citizen of the

Ukraine); *Li v. INS*, 92 F.3d 985 (9th Cir. 1996) (arrest of family member at church may provide basis for eligibility); *Hartooni v. INS*, 21 F.3d 336, 341 (9th Cir. 1994) (if credible, Christian Armenian in Iran eligible for asylum).

#### b. Cases Finding no Religious Persecution

*Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003) (past harassment of Christian in Ukraine not persecution, future fear too speculative); *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001) (Ahmadi in Pakistan); *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000) (past torture had no nexus to applicant's religious beliefs); *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996) (conscription of Jehovah's Witness); *Abedini v. INS*, 971 F.2d 188, 191-92 (9th Cir. 1992); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc); *Ghaly v. INS*, 58 F.3d 1425 (9th Cir. 1995) (prejudice and discrimination against Egyptian Coptic Christian); *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1990) (religious converts in Egypt).

#### 4. Nationality

*See* cases cited under race, above; *see also Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000) (Armenian from Nagorno-Karabakh had no well-founded fear); *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999) (persecution of Armenian in Azerbaijan).

#### 5. Social Group

“[A] ‘particular social group’ is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that gay men with female sexual identities in Mexico constitute a particular social group). This court has also stated that a particular social group “implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.” *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (noting that a family is a “prototypical” example of a social group, but young working class urban males of military age are not).

The Ninth Circuit has held that large, internally diverse, demographic groups would rarely constitute distinct social groups. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986) (“Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct ‘social group’ for the purposes of establishing refugee status.”).

a. Types of Social Groups

(1) Family and Clans

This court has “recognized that, in some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes.” *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002); *see also Sanchez-Trujillo v. INS*, 801 F.2d 1572, 1576 (9th Cir. 1986) (noting that a family is a “prototypical” example of a social group); *but see Estrada-Posados v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (rejecting family membership claim where distant relatives were harmed, but closer relatives were not).

(2) Gender Claims

The Ninth Circuit has not yet decided whether the persecution of women could constitute persecution on account of membership in a particular social group. *See Fisher v. INS*, 79 F.3d 955, 965-66 (9th Cir. 1996) (en banc) (Canby, J., concurring). The BIA has recognized gender-defined groups as social groups. *See In re Kasinga*, Interim Dec. 3278 (BIA 1996) (granting asylum based on a gender-defined social group of “young women of the Tchamba-Kunsuntu Tribe, who have not had [female genital mutilation], as practiced by the tribe, and who oppose the practice”).

(3) Sexual Orientation

Sexual orientation and sexual identity can be the basis for establishing a particular social group. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094-95 (9th Cir. 2000) (holding that gay men with female sexual identities in Mexico constitute a particular social group).

#### (4) Former Status

An applicant's status based on her former occupations, associations, or shared experiences could be the basis for a claim based on social group. *See e.g., Cruz-Navarro v. INS*, 232 F.3d 1024, 1028-29 (9th Cir. 2000). "Persons who are persecuted because of their status as a former police or military officer, for example, may constitute a cognizable social group under the INA." *Id.* at 1029 (holding that current police or military are not a social group).

#### b. Cases Denying Social Group Claims

*Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002) (evidence did not compel a finding that applicant was persecuted on account of family membership); *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000) (Kanjolal Indians comprising large percentage of population in a given area are not a particular social group); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (persons of low economic status in China not a particular social group); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (military not a social group); *Estrada-Posados v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (family); *De Valle v. INS*, 901 F.2d 787, 792-93 (9th Cir. 1990) (family members of military deserter).

#### 6. Political Opinion

"[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted 'on account of' a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted him (or that he faces the prospect of such persecution) *because of his political opinion.*" *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (internal citation omitted).

Political Opinion encompasses more than electoral politics or formal political ideology or action. *See e.g., Al-Saheer v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (recognizing that an applicant's statements regarding the unfair distribution of food resulted in the imputation of an anti-government political opinion); *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000)

(“Refusal to accede to government corruption can constitute a political opinion for purposes of refugee status.”); *Borja v. INS*, 175 F.3d 732 (9th Cir. 2000) (en banc) (refusal to pay revolutionary tax in the face of threats constitutes an expression of political belief). A political opinion can be an actual opinion held by the applicant, or an opinion imputed to him or her by the persecutor. *See Sangha v. INS*, 103 F.3d 1482, 1488-89 (9th Cir. 1997).

a. Organizational Membership

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

b. Refusal to Support Organization

An applicant may manifest a political opinion by his refusal to join or support an organization, or departing from the same. *See e.g.*, *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (opposition to NPA); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (death threats and forced recruitment, where applicant did not agree with guerrillas); *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997) (refusal to make payments to guerrilla movement), *amended by* 133 F.3d 726 (9th Cir. 1998); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996) (refusal to support Sandinistas); *Gonzalez v. INS*, 82 F.3d 903, 906 (9th Cir. 1996).

c. Labor Union Membership and Activities

Cases recognizing the political nature of trade union activity include: *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998) (political opinion includes views on government economic policies); *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996); *Zavala-Bonilla v. INS*, 730 F.2d 562, 563 (9th Cir. 1984).

d. Other Expressions of Political Opinion

An applicant's resistance to rape and beating through flight constituted assertion of a political opinion opposing forced sexual subjugation. *See Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *see also Grava v. INS*, 205 F.3d 1177, 1181-82 (9th Cir. 2000) (whistle-blowing may be a political opinion); *Reyes-Guerrero v. INS*, 192 F.3d 1241 (9th Cir. 1999) (prosecuting members of another political party); *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000) (applicant's belief that his government should not sell nuclear technology to Iran).

e. Neutrality

The Ninth Circuit recognizes that a conscious choice not to side with any political faction can be a manifestation of a political opinion. *See Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997) (recognizing the doctrine of hazardous neutrality, noting that *Elias-Zacarias* questioned, but did not overrule neutrality theory); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir. 1995) (desertion from military established neutrality). An applicant's neutrality must be result of an affirmative decision to remain neutral, rather than mere apathy. *See Lopez v. INS*, 775 F.2d 1015, 1016-17 (9th Cir. 1985).

(1) Cases Discussing Neutrality

*Navas v. INS*, 217 F.3d 646, 656 n.12 (9th Cir. 2000); *Rivera-Moreno v. INS*, 213 F.3d 481 (9th Cir. 2000) (rejecting claim of neutrality); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 413-14 (9th Cir. 1991) (rejecting claim); *Cuadras v. INS*, 910 F.2d 567, 571 (9th Cir. 1990) (rejecting claim of neutrality); *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989) (applicant persecuted because of neutrality); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984) ("Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction."); *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985).

f. Opposition to Coercive Population Control Policies

Victims or those who fear being victims for resistance or opposition to coercive family planning policies shall be deemed to have been persecuted or

have a well-founded fear of persecution on account of political opinion. *See* 8 U.S.C. § 1101(a)(42)(B):

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

“The plain language of the statute provides that forced abortions are per se persecution and trigger asylum eligibility.” *Wang v. Ashcroft*, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003) (holding that applicant who had two forced abortions and involuntary insertion of an intrauterine contraceptive device suffered past persecution). The INA also protects individuals who have been forcibly sterilized, as well as their spouses. *Id.*; *see also Li v. Ashcroft*, 312 F.3d 1094, 1101 (9th Cir. 2002), *reh’g en banc granted*, (9th Cir. July 7, 2003).

g. Imputed Political Opinion

“Imputed political opinion is still a valid basis for relief after Elias-Zacarias.” *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992); *see also Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997). An imputed political opinion arises when “[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim’s views.” *Canas-Segovia*, 970 F.2d at 602. Under the imputed political opinion doctrine, the applicant’s own opinions are irrelevant. *See Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). “[O]ur analysis focuses on how the persecutor perceived the applicant’s actions and allegiances, and what motivated their abuse.” *Agbuya v. INS*, 241 F.3d 1224, 1229-30 (9th Cir. 2001) (NPA perceived applicant to be an enemy of the laborers, the communist cause and the NPA itself).

An imputed political opinion claim may arise from the applicant's associations with others, including family, organizational, governmental or personal affiliations, which cause assumptions to be made about him. "Typically, where killings and other acts of violence are inflicted on members of the same family by government forces, the inference that they are connected and politically motivated is an appropriate one." *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (imputation of pro-guerrilla political opinion) (internal quotations omitted); *see also Lopez-Galaraza v. INS*, 99 F.3d 954 (9th Cir. 1996) (imputed opinion based on family's ties to former government); *Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995) (imputed beliefs of Sikh separatists); *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990) (imputed opinion based on government employment); *Ramirez Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990) (imputed opinion based on association with large, historically politically active family).

(1) Other Cases Discussing Imputed Political Opinion

*Rios v. Ashcroft*, 287 F.3d 895, 900-01 (9th Cir. 2002) (perceived to be political opponents of the guerrillas); *Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001) (imputed political opinion based on evacuation from Iraq by United States); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (feared retaliation for testifying against guerrilla leaders); *Yazitchian v. INS*, 207 F.3d 1164 (9th Cir. 2000); *Chanchavac v. INS*, 207 F.3d 584 (9th Cir. 2000) (military accused applicant of being a guerrilla when beating him); *Cordon-Garcia v. INS*, 204 F.3d 985 (9th Cir. 2000) (guerrilla abductor told applicant that her teaching efforts undermined guerrilla recruitment efforts); *Briones v. INS*, 175 F.3d 727 (9th Cir. 1999) (en banc) (military informant); *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998) (president of street vendor's cooperative); *Velarde v. INS*, 140 F.3d 1305, 1312 (9th Cir. 1998) (bodyguard to President's family); *Meza-Manay v. INS*, 139 F.3d 759, 764 (9th Cir. 1998); *Rodriguez-Roman v. INS*, 98 F.3d 416, 429-30 (9th Cir. 1996) (illegal departure statute imputes disloyalty); *Gomez-Saballos v. INS*, 79 F.3d 912 (9th Cir. 1996); *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995); *Alonzo v. INS*, 915 F.2d 546, 549 (9th Cir. 1990); *Beltran-Zavala v. INS*, 912 F.2d 1027, 1029-30 (9th Cir. 1990) (based on friendship with guerrilla supporter) *overruled in part on other grounds by Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997); *Maldonado-Cruz v. INS*, 883

F.2d 788, 792 (9th Cir. 1989) (supposed association with the guerrillas); *Blanco-Lopez v. INS*, 858 F.2d 531, 533 (9th Cir. 1988) (imputation based on false accusation); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (refusal to accede to extortion); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (deliberate and cynical misattribution of a political viewpoint) *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996 (en banc)); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985).

## 7. Cases Finding no Nexus

*Molina-Estrada v. INS*, 293 F.3d 1089 (9th Cir. 2002) (no evidence to compel finding that guerrillas attacked applicant's family on account of imputed political opinion); *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001) (no nexus between rape by guerrillas and any protected ground); *Molina-Morales v. INS*, 237 F.3d 1048 (9th Cir. 2001) (rape and murder of aunt was personal dispute); *Cruz-Navarro v. INS*, 232 F.3d 1024 (9th Cir. 2000) (no evidence to show that guerrillas imputed contrary political opinion to police officer); *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000); *Kozulin v. INS*, 218 F.3d 1112, 1115-17 (9th Cir. 2000); *Belayneh v. INS*, 213 F.3d 488 (9th Cir. 2000); *Rivera-Moreno v. INS*, 213 F.3d 481 (9th Cir. 2000) (no nexus between bombing of applicant's home and her refusal to join guerrillas); *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000) (past torture had no nexus to applicant's religious beliefs); *Sangha v. INS*, 103 F.3d 1482, 1489-91 (9th Cir. 1997); *Li v. INS*, 92 F.3d 985, 987-88 (9th Cir. 1996) (fear of punishment from unpaid smugglers); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc); *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990) (no imputed neutrality); *De Valle v. INS*, 901 F.2d 787, 791 (9th Cir. 1990) (rejecting claim of "doubly imputed" political opinion based on husband's desertion); *Zayas-Marini v. INS*, 785 F.2d 801, 806 (9th Cir. 1986); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984).

## F. Mixed-motive Cases

A persecutor may have multiple motives for inflicting harm on an applicant. As long as the applicant produces evidence from which it is reasonable to believe that the persecutor's action was motivated, at least in

part, by a protected ground, the applicant is eligible for asylum. *See e.g.*, *Gafoor v. INS*, 231 F.3d 645, 652-54 (9th Cir. 2000) (race, political opinion, and personal vendetta); *Shoafra v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape by government official motivated in part by ethnicity); *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000) (“revenge plus” motive of guerillas to harm former police officer who testified against the NPA); *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (at least one motive was the imputation of pro-guerrilla political opinion); *Tarubac v. INS*, 182 F.3d 1114, 1118-19 (9th Cir. 1999) (political opinion and economic motives); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (extortion plus political motives); *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998).

## G. Prosecution

Ordinary prosecution for criminal activity is generally not persecution. *Chanco v. INS*, 82 F.3d 298 (9th Cir. 1996) (prosecution for involvement in military coup); *Mabugat v. INS*, 937 F.2d 426 (9th Cir. 1991) (prosecution for misappropriation of funds); *Fisher v. INS*, 79 F.3d 955, 961-62 (9th Cir. 1996) (en banc) (punishment for violation of dress and conduct rules); *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992) (punishment for distribution of Western videos and films).

### 1. Pretextual Prosecution

However, if the prosecution is motivated by a protected ground, and the punishment is sufficiently serious or disproportionate, the sanctions imposed could amount to persecution. *See Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (violation of law against public displays of affection can be basis for asylum claim). “If there is no evidence of a legitimate prosecutorial purpose for a government’s harassment of a person ... there arises a presumption that the motive for harassment is political.” *Navas v. INS*, 217 F.3d 646, 660 (9th Cir. 2000) (internal quotations omitted); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (extra-prosecutorial torture, even if conducted for intelligence gathering purposes, constitutes persecution); *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (illegal departure law); *Ramirez Rivas v. INS*, 899 F.2d 864, 867-68 (9th Cir. 1990); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (governmental harm without formal prosecutorial measures is persecution).

## H. Illegal Departure Laws

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

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

## I. Military and Conscription Issues

### 1. Conscription Generally

Punishment for evading a country’s military or conscription laws is generally not persecution. *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000); *Ubau-Marenco v. INS*, 67 F.3d 750, 754 (9th Cir. 1995), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992); *Castillo v. INS*, 951 F.2d 1117 (9th Cir. 1991); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990); *Kaveh-Haghigy v. INS*, 783 F.2d 1321, 1323 (9th Cir. 1986) (per curiam); *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984).

## 2. Exceptions

However, the Ninth Circuit has recognized that forced conscription or punishment for violation of military service rules can constitute persecution in the following circumstances:

### a. Disproportionately Severe Punishment

Where individual would suffer disproportionately severe punishment for evasion on account of one of the grounds. *See Ramos-Vasquez v. INS*, 57 F.3d 857, 864 (9th Cir. 1995); *Barraza-Rivera v. INS*, 913 F.2d 1443, 1451 (9th Cir. 1990).

### b. Inhuman Conduct

Where individual would be forced to engage in conduct that is condemned by the international community as contrary to basic rules of human conduct. *See Ramos-Vasquez v. INS*, 57 F.3d 857, 863-64 (9th Cir. 1995) (“Both this court and the BIA have recognized conscientious objection to military service as grounds for relief from deportation, where the alien would be required to engage in inhuman conduct were he to continue serving in the military.”); *Barraza-Rivera v. INS*, 913 F.2d 1443, 1450-52 (9th Cir. 1990) (no objection to military service per se, but fear of punishment for desertion given his refusal to assassinate two men); *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000) (prosecution for refusal to persecute Indo-Fijians).

### c. Moral or Religious Grounds

Where an individual refuses to serve based on moral or religious beliefs. *Barraza-Rivera v. INS*, 913 F.2d 1443, 1450-51 (9th Cir. 1990).

## 3. Participation in Coup

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

punishment for a failed coup against a regime which prohibits peaceful protest or change could be eligible for asylum. *See id.*

#### 4. Military Informers

An informer for the military in a conflict that is “political at its core” would be perceived as a political opponent by the group informed upon. *Mejia v. Ashcroft*, 298 F.3d 873, 877 (9th Cir. 2002) (holding that “if an informer against the NPA appears on a NPA hit list, he has a well-founded fear of persecution based on imputed political opinion”); *see also Briones v. INS*, 175 F.3d 727, 728-29 (9th Cir. 1999) (en banc); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000).

#### 5. Former Military Membership

To the extent that an applicant fears that he will be targeted as a current member of the military, this danger does not constitute persecution on account of political opinion or membership in a social group. *See Chanco v. INS*, 82 F.3d 298, 302-03 (9th Cir. 1996); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (“Military enlistment in Central America does not create automatic asylum eligibility.”). However, an applicant’s status based on his former service could be the basis for a claim based on social group or imputed political opinion. *See Cruz-Navarro v. INS*, 232 F.3d 1024, 1028-29 (9th Cir. 2000) (current police or military are not social group, though former police or military may be); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (ex-soldier who feared guerillas eligible for asylum because “persecutors identified [him] politically with the government [he] served”).

#### 6. Non-Governmental Conscription

A guerilla group’s attempt to conscript an asylum seeker does not necessarily constitute persecution on account of political opinion. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)). In order to establish asylum eligibility, the applicant must show that the guerillas will persecute him because of his political opinion, or other protected ground, rather than merely because he refused to fight with them. *Id.* (holding that applicant was eligible for asylum because

the Separatists specifically targeted him for conscription based on his ethnicity and religion); *see also Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000); *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000); *Sebastian-Sebastien v. INS*, 195 F.3d 504, 509 (9th Cir. 1999); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999); *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992); *Maldonado-Cruz v. INS*, 883 F.2d 788 (1989) (pre *Elias-Zacarias*).

## J. Exercise of Discretion

“If the applicant establishes statutory eligibility for asylum, the Attorney General must, by a proper exercise of [] discretion, determine whether to grant that relief.” *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000); 8 U.S.C. § 1158(b). The BIA must consider both favorable and unfavorable factors, including the severity of the past persecution suffered. *See Kazlauskas v. INS*, 46 F.3d 902, 907-08 (9th Cir. 1995); *see also Andriasian v. INS*, 180 F.3d 1033, 1043-47 (9th Cir. 1999) (temporary stay in a third country).

The Attorney General’s ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion. *See Andriasian v. INS*, 180 F.3d 1033, 1040 (9th Cir. 1999).

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

## K. Bars to Asylum

### 1. One-Year Bar

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her application for asylum was filed within one year after arrival in the United States. *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001); 8 U.S.C. § 1158(a)(2)(B). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ’s determination under this section. *Hakeem*, 273 F.3d at 815.

a. Exception

If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. See 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(5). However, the court lacks jurisdiction over the BIA's determination that no extraordinary circumstances excused the untimely filing of the application. *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) (citing 8 U.S.C. § 1158(a)(3)).

2. Previous-Denial Bar

An applicant who previously applied for and was denied asylum is barred. 8 U.S.C. § 1158(a)(2)(C). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. See 8 C.F.R. § 1208.13(c)(1) and (2).

3. Safe Third Country Bar

An applicant has no right to apply for asylum if he or she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality . . .) in which the alien's life or freedom would not be threatened on account of" the statutory grounds. 8 U.S.C. § 1158(a)(2)(A). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. See 8 C.F.R. § 1208.13(c)(1) and (2).

4. Firm Resettlement Bar

An applicant is not eligible for asylum if he or she has been firmly resettled within the meaning of 8 C.F.R. § 1208.15. See 8 U.S.C. § 1158 (b)(2)(A)(vi); *Andriasian v. INS*, 180 F.3d 1033, 1043-47 (9th Cir. 1999) (applicant not firmly resettled); *Cheo v. INS*, 162 F.3d 1227, 1230 (9th Cir. 1998) (applicants failed to rebut inference of firm resettlement based on three year stay in Malaysia); *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998) (applicant

ineligible based on firm resettlement of parents); *Yang v. INS*, 79 F.3d 932 (9th Cir. 1996).

#### 5. Persecution-of-Others Bar

A person who “ordered, incited, assisted, or otherwise participated in the persecution” of any person on account of one of the five grounds may not be granted asylum. 8 U.S.C. § 1158(b)(2)(A)(i); *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985) (insufficient evidence that applicant assisted or participated in persecution of others based on political beliefs).

#### 6. Particularly-Serious-Crime Bar

An applicant in removal proceedings is barred from relief if, “having been convicted by a final judgment of a particularly serious crime, [he] constitutes a danger to the community in the United States.” See 8 U.S.C. § 1158(b)(2)(A)(ii); see also *Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003) (noting that this statutory provision applies to immigration proceedings commenced on or after April 1, 1997). A person convicted of a particularly serious crime is considered per se to be a danger to the community. *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987) (upholding BIA’s decision not to balance the seriousness of the offense against the degree of persecution feared); see also *Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994) (noting that the bar “is based on the reasonable determination that persons convicted of particularly serious crimes pose a danger to the community”).

A person convicted of an aggravated felony “shall be considered to have been convicted of a particularly serious crime.” 8 U.S.C. § 1158(b)(2)(B)(i). For more information on aggravated felonies, see *Criminal Issues in Immigration Law*.

If an applicant pleaded guilty to the crime before October 1, 1990, the bar to asylum in 8 C.F.R. § 1208.13(c)(2)(i)(A) cannot be applied to categorically deny relief. See *Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003). Instead, the conviction may be considered in the exercise of discretion. *Id.*

## 7. Serious Non-Political Crime Bar

An applicant is barred from relief if there are serious reasons for believing that he or she committed a serious, non-political crime outside the United States prior to arrival. 8 U.S.C. § 1158(b)(2)(A)(iii); *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1986) (“serious reasons for believing” means probable cause). The IJ is not required to balance the seriousness of the offense against the degree of persecution feared. *See INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

## 8. Security Bar

An applicant is barred from relief if there are reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv).

## 9. Terrorism Bar

Those who have engaged in terrorism, or where there are reasonable grounds to believe they are engaged in or likely to engage in terrorist activity, are not eligible for relief. 8 U.S.C. § 1158(b)(2)(A)(v). Pursuant to 8 U.S.C. § 1158(b)(2)(D), this court lacks jurisdiction to review the IJ’s determination under this section.

## II WITHHOLDING OF REMOVAL

An application for asylum under 8 U.S.C. § 1158 is generally considered an application for withholding of removal under 8 U.S.C. § 1231(b)(3) as well. *See* 8 C.F.R. § 1208.3(b); *Ghadessi v. INS*, 797 F.2d 804, 804 n.1 (9th Cir. 1986). Where deportation or exclusion proceedings commenced before April 1, 1997, withholding of deportation was available under 8 U.S.C. § 1253(h). Withholding codifies the international norm of “nonrefoulement” or non-return to a country where an applicant would face persecution. *See Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1998) (en banc).

In order to qualify for withholding of removal, an applicant must show that her “life or freedom would be threatened” if she is returned to her

homeland, on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3).

A. Eligibility for Withholding

1. Higher Burden of Proof

“To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that he would be subject to persecution on one of the specified grounds.” *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation omitted). “This clear probability standard for withholding of removal is more stringent than the well-founded fear standard governing asylum.” *Id.* at 888-89. (internal quotations and citation omitted).

An applicant who is not eligible for asylum necessarily fails to satisfy the more stringent standard for withholding of removal. *See Li v. Ashcroft*, 312 F.3d 1094, 1099 (9th Cir. 2002), *reh’g en banc granted*, (9th Cir. July 7, 2003). However, if asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994).

2. Mandatory Relief

“Unlike asylum, withholding of removal is not discretionary. The Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the same protected grounds.” *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotations and citation omitted).

3. Nature of Relief

Under asylum, an applicant granted relief may apply for permanent residence after one year. Under withholding, the successful applicant is only given a right not to be removed to a specific country. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999).

4. Past Persecution

Past persecution generates a presumption of eligibility for withholding of removal. *See Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1164 (9th Cir. 1999); *Korablina v. INS*, 158 F.3d 1038, 1046 (9th Cir. 1998). Unlike asylum, however, past persecution is not a separate basis for withholding eligibility. An applicant can only show eligibility by demonstrating a likelihood of future persecution. *See e.g., Ladha v. INS*, 215 F.3d 889, 902 (9th Cir. 2000).

## 5. Entitled to Withholding

*Wang v. Ashcroft*, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003); *Baballah v. Ashcroft*, 335 F.3d 981 (9th Cir. 2003) (applicant and family suffered severe harassment, threats, violence and discrimination); *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002) (applicant received multiple death threats at home and business, was “closely confronted” and actively chased); *Cardenas v. INS*, 294 F.3d 1062 (9th Cir. 2002) (threats by Shining Path guerrillas); *Rios v. Ashcroft*, 287 F.3d 895, 902-03 (9th Cir. 2002) (kidnapped and wounded by guerrillas, husband and brother killed); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074-75 (death threats combined with harm to family and murders of his counterparts), *as amended by* 290 F.3d 964 (9th Cir. 2002); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. 2001) (applicant was harassed, fired, interrogated, threatened, assaulted and arrested); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on evacuation from Iraq by United States); *Agbuya v. INS*, 241 F.3d 1224, 1231 (9th Cir. 2001) (kidnapped, falsely imprisoned, hit, threatened with a gun); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (arrested, tortured, and scarred); *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000) (past sentence and would face treason trial if returned); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (past persecution of religious minority who engaged in prohibited interfaith commingling); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexican police); *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (summoned for interrogation based on effort to translate and distribute banned book); *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000) (husband killed, applicant and family threatened); *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1043 (9th Cir. 1999); *Duarte de Guinac v. INS*, 179 F.3d 1156

(9th Cir. 1999) (applicant beaten harassed and threatened with death by military); *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc); *Leiva-Montalvo v. INS*, 173 F.3d 749 (9th Cir. 1999) (death threats); *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998) (torture); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1297 (9th Cir. 1997), *as amended on denial of rehearing*, 133 F.3d 726 (9th Cir. 1998); *Korablina v. INS*, 158 F.3d 1038, 1045-46 (9th Cir. 1998) (past discrimination, harassment and violence); *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1996); *Montoya-Ulloa v. INS*, 79 F.3d 930, 932 (9th Cir. 1996) (harassed, threatened, beaten, placed on “black list”); *Gomez-Saballos v. INS*, 79 F.3d 912 (9th Cir. 1996); *Singh v. Ilchert*, 69 F.3d 375, 380-81 (9th Cir. 1995) (per curiam); *Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994) (applicant threatened and close colleagues persecuted); *Mendoza Perez v. INS*, 902 F.2d 760, 763-64 (9th Cir. 1990); *Ramirez Rivas v. INS*, 899 F.2d 864, 872-73 (9th Cir. 1990) (death squads killed many family members and a close friend).

## 6. Not Entitled to Withholding

*Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (given changes in Romania since departure); *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001); *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000); *Barraza Rivera v. INS*, 913 F.2d 1443, 1454 (9th Cir. 1990); *Arteaga v. INS*, 836 F.2d 1227, 1231 n.6 (9th Cir. 1988) (one-time threat of conscription sufficient for asylum, but not for withholding); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1373 (9th Cir. 1985) (no specific threat, and government unaware of his protest activities).

## B. Bars to Withholding

### 1. Nazis

Those who assisted in Nazi persecution or engaged in genocide are barred from withholding. 8 U.S.C. § 1231(b)(3)(B).

## 2. Persecution-of-Others Bar

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

## 3. Particularly Serious Crime Bar

Withholding is not available if the applicant, “having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States.” 8 U.S.C. § 1231(b)(3)(B)(ii). This bar is more narrowly defined than the bar in the asylum context because not all aggravated felonies are considered to be particularly serious. For cases filed on or after April 1, 1997, an aggravated felony conviction is considered to be a particularly serious crime if the applicant has been sentenced to an aggregate term of imprisonment of at least five years. *See id.*

The Attorney General has “discretion, pursuant to Section 1231(b)(3)(B)(ii), ‘to determine whether an aggravated felony conviction resulting in a sentence of less than 5 years is a particularly serious crime.’” *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001). This court lacks jurisdiction to review this discretionary finding under 8 U.S.C. § 1252(a)(2)(B)(ii). *Id.* (leaving open the question of whether the court would have jurisdiction over a non-discretionary denial of withholding). For more information on aggravated felonies, *see* Criminal Issues in Immigration Law.

## 4. Serious Non-Political Crime Bar

Withholding is not available if “there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before” arrival. 8 U.S.C. § 1231(b)(3)(B)(iii); *see also McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986) (holding that applicant was ineligible for withholding because he facilitated or assisted terrorists to commit serious non-political crimes).

## 5. Security and Terrorist Bar

Withholding is not available if “there are reasonable grounds to believe that the alien is a danger to the security of the United States,” including applicants who have engaged in any terrorist activity. 8 U.S.C. § 1231(b)(3)(B)(iv). This bar is more limited than the security bar in the asylum context because it is more narrowly confined to persons who actually have or are engaged in terrorist activities.

### III CONVENTION AGAINST TORTURE

Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits states from returning anyone to another state where he or she may be tortured. *See Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (“Article 3 provides that a signatory nation will not expel, return ... or extradite a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture.”) (internal quotations omitted).

The implementing regulations for the Convention are found in 8 C.F.R. § 1208.16 to 1208.18.

#### A. Standard of Review

This court reviews for substantial evidence the factual findings underlying the BIA’s determination that an applicant is not eligible for relief under the Convention Against Torture. *See Zheng v. Ashcroft*, 2003 WL 21397687 (9th Cir. June 18, 2003). The BIA’s interpretation of purely legal questions is reviewed de novo. *See id.*

#### B. Definition of Torture

“Torture is defined 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 her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her 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.” *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(1) (2002)). “Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.” *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(2) “Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” *Id.* (quoting 8 C.F.R. § 208.18(a)(3) (2002)).

### C. Burden of Proof

In order to be eligible for withholding of removal under the Convention Against Torture, the petitioner has the burden of proof “to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(2)). “The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.” *Id.* at 1282 (quoting 8 C.F.R. § 208.16(c)(2)). A “petitioner carries this burden whenever he or she presents evidence establishing ‘substantial grounds for believing that he [or she] would be in danger of being subjected to torture’ in the country of removal” *Id.* at 1284.

### D. Country Conditions Evidence

“[C]ountry conditions alone can play a decisive role in granting relief under the Convention.” *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1283 (9th Cir. 2001) (holding that a negative credibility finding in asylum claim does not preclude relief under the Convention, especially where documented country conditions information corroborated the “widespread practice of torture against Tamil males”). “[A]ll evidence relevant to the possibility of future torture shall be considered, including, but not limited to . . . [e]vidence of gross, flagrant or mass violations of human rights within the country of removal; and [o]ther relevant information regarding conditions in the country of removal.” *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3) (emphasis deleted)); *see also Abassi v. INS*, 305 F.3d 1028, 1029 (9th Cir. 2002) (holding that the BIA must consider the most recent State Department country conditions report where a pro se

applicant refers to the report in his moving papers); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that the BIA was required to consider relevant information in the State Department report).

#### E. Past Torture

Evidence of past torture is relevant to a determination of eligibility for relief. *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3)). However, unlike asylum, past torture does not provide a separate basis for eligibility.

#### F. Internal Relocation

“Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured” is relevant to the possibility of future torture. *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3)).

#### G. Differences From Asylum and Withholding

“[T]he Convention’s reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured ‘on account of’ a protected ground; it is narrower, however, because the petitioner must show that it is ‘more likely than not’ that he or she will be tortured, and not simply persecuted upon removal to a given country.” *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001).

#### H. Agent or Source of Torture

To qualify for relief under the Convention, the torture must be “inflicted by or at the instigation of or with the consent or *acquiescence* of a public official or other person acting in an official capacity.” *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003) (quoting 8 C.F.R. § 208.18(a)(1)) (internal quotations omitted). “Acquiescence” by government officials does not require actual knowledge or willful acceptance; awareness and willful blindness by governmental officials is sufficient. *See id.* (granting

Convention relief to applicant who feared being killed by the smugglers who brought him to the United States).

#### I. Mandatory Relief

The non-return provision is absolute, and unlike asylum and withholding, there are no mandatory bars. *See* 8 C.F.R. § 1208.16(c)(4) (stating that deferral of removal under 8 C.F.R. § 208.17(a) is available for applicants who would otherwise be barred from withholding of removal).

#### J. Nature of Relief

Unlike asylum, Convention relief does not confer a status on an eligible applicant, only a protection from return to the country where the applicant would be tortured. 8 C.F.R. § 1208.16(f).

#### K. Cases Finding Torture

*Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (repeated beatings and cigarette burns constitute torture).

#### L. Cases Not Finding Torture

*Li v. Ashcroft*, 312 F.3d 1094, 1103 (9th Cir. 2002) (involuntary pregnancy examination is not torture), *reh'g en banc granted*, (9th Cir. July 7, 2003); *Cano-Merida v. INS*, 311 F.3d 960, 965-66 (9th Cir. 2002) (affirming BIA's denial of motion to reopen to present Convention claim based on fear of return to Guatemala); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (harassment, wiretapping, staged car crashes, detention and interrogation do not amount to torture).

#### M. Exhaustion

This court will not address a Convention claim unless it was first raised before the BIA. *See Ortiz v. INS*, 179 F.3d 1148, 1152-53 (9th Cir. 1999) (granting a stay of the mandate to allow the applicants to move the BIA to reopen to apply for relief). The proper procedure is for the applicant to file a motion to reopen with the BIA to apply for protection. *See*

*Khourassany v. INS*, 208 F.3d 1096, 1100, 1101 (9th Cir. 2000) (denying applicant's motion to remand his case; staying the mandate to allow applicant to file motion to reopen with the BIA).

#### **IV SCOPE AND STANDARD OF REVIEW**

##### **A. Scope of Review**

“Where . . . the BIA reviews the IJ's decision de novo, our review is limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted.” *Shah v. INS*, 220 F.3d 1062, 1067 (9th Cir. 2000) (internal quotations omitted). “Where . . . the BIA has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's.” *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002). “If, however, the BIA reviews the IJ's decision for an abuse of discretion, we review the IJ's decision.” *De Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997).

This court's review is limited to the information in the administrative record. *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996 (en banc); *but see Lising v. INS*, 124 F.3d 996 (9th Cir. 1997) (holding that this court is not precluded from taking judicial notice of an agency's own records).

“[T]his court cannot affirm the BIA on a ground upon which it did not rely.” *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000).

##### **B. Standard of Review**

The BIA's factual findings are reviewed under the substantial evidence standard. *See Andriasian v. INS*, 180 F.3d 1033, 1040 (9th Cir. 1999). Factual findings will be sustained if they are “supported by reasonable, substantial, and probative evidence in the record.” *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003). Questions of law are reviewed de novo. *Id.* This court may grant a petition for review only if the evidence presented by the applicant is such that a reasonable fact-finder would have to conclude that the requisite fear of persecution existed. *See Khourassany v. INS*, 208 F.3d 1096, 1100 (9th Cir. 2000); *see also Gheblawi v. INS*, 28 F.3d 83, 85 (9th Cir. 1994) (“The Board's findings are entitled to respect; but they must

nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.”).

### C. Boilerplate Decisions

“[W]e do not allow the Board to rely on ‘boilerplate’ opinions ‘which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.’” *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995) (quoting *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991)). The BIA's decision “must contain a statement of its reasons for denying the petitioner relief adequate for us to conduct our review.” *Id.* However, this court will not impose “unnecessarily burdensome or technical requirements.” *Id.* As long as the BIA provides “a comprehensible reason for its decision sufficient for us to conduct our review and to be assured that the petitioner's case received individualized attention,” remand will not be required. *Id.*

## V CREDIBILITY DETERMINATIONS

### A. Standard of Review

Adverse credibility findings are reviewed under the substantial evidence standard. *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002).

Deference is given to the IJ's credibility determination, because the IJ is in the best position to assess the trustworthiness of the applicant's testimony. *See Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003); *Canjura-Flores v. INS*, 784 F.2d 885, 888 (9th Cir. 1985).

“While the substantial evidence standard demands deference to the IJ, we do not accept blindly an IJ's conclusion that a petitioner is not credible. Rather, we examine the record to see whether substantial evidence supports that conclusion and determine whether the reasoning employed by the IJ is fatally flawed.” *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002) (internal quotations omitted).

An IJ must articulate a legitimate basis to question the applicant's credibility, and must offer specific and cogent reasons for any stated disbelief. *Id.* "Any such reason must be substantial and bear a legitimate nexus to the finding." *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (internal quotations omitted). "Generalized statements that do not identify specific examples of evasiveness or contradiction in the petitioner's testimony" are insufficient. *Garrovillas v. INS*, 156 F.3d 1010, 1013 (9th Cir. 1997).

The IJ or BIA must explain "the significance of the discrepancy or point[] to the petitioner's obvious evasiveness when asked about it." *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000); *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003) (BIA failed to clarify why purported discrepancy was significant). Additionally, this court has reversed negative credibility findings where neither the IJ nor the BIA addressed the applicant's explanation for the identified discrepancy. *See Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001).

## B. Credibility Factors

### 1. Demeanor

Credibility determinations that are based on an applicant's demeanor are given "special deference." *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999) (deferring the IJ's observation that the applicant "began to literally jump around in his seat and to squirm rather uncomfortably while testifying" on cross examination). However, boilerplate demeanor findings are not appropriate. *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1048, 1051-52 (9th Cir. 2002) ("Cookie cutter credibility findings are the antithesis of the individualized determination required in asylum cases.").

### 2. Responsiveness

"To support an adverse credibility determination based on unresponsiveness, the BIA must identify particular instances in the record where the petitioner refused to answer questions asked of him." *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002); *see also Garrovillas v. INS*, 156 F.3d 1010, 1014-15 (9th Cir. 1997).

### 3. Specificity and Detail

The level of specificity in an applicant's testimony is an appropriate consideration. *See Singh-Kaur v. INS*, 183 F.3d 1147, 1153 (9th Cir. 1999) (approving IJ's finding that an applicant's testimony was suspicious given its lack of specificity); *cf Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (finding testimony to be sufficiently detailed and specific).

### 4. Consistency

“Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding.” *Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003); *see also Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000) (“Any alleged inconsistencies in dates that reveal nothing about a petitioner's credibility cannot form the basis of an adverse credibility finding.”). “[I]nconsistencies of less than substantial importance for which a plausible explanation is offered” also cannot serve as the sole basis for a negative credibility finding. *Garrovillas v. INS*, 156 F.3d 1010, 1014 (9th Cir. 1998).

Discrepancies that cannot be viewed as attempts to enhance claims of persecution have no bearing on credibility. *Wang v. Ashcroft*, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003); *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000).

Apparent inconsistencies based on faulty or unreliable translations may not be sufficient to support a negative credibility finding. *See He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) (“[W]e have long recognized that difficulties in interpretation may result in seeming inconsistencies, especially in cases . . . where there is a language barrier.”); *Singh v. INS*, 292 F.3d 1017, 1021-23 (9th Cir. 2002) (holding that perceived inconsistencies between applicant's airport interview and testimony did not constitute a valid ground for an adverse credibility determination, especially given the lack of an interpreter who spoke applicant's language). Discrepancies “capable of being attributed to a

typographical or clerical error . . . cannot form the basis of an adverse credibility finding.” *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000).

Substantial inconsistencies, however, damage a claim and support a negative credibility finding. *See e.g., Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001) (relating to “the events leading up to his departure and the number of times he was arrested”); *de Leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997) (inconsistency relating to the basis for the alleged fear).

## 5. Omissions

“[T]he mere omission of details is insufficient to uphold an adverse credibility finding.” *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000). For example, an omission of one detail included in an applicant’s oral testimony does not make a supporting document inconsistent or incompatible. *See Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (doctor’s letter failed to mention all of the applicant’s injuries). Where an applicant gives one account of persecution but then revises the story “so as to lessen the degree of persecution he experienced, rather than to increase it, the discrepancy generally does not support an adverse credibility finding.” *Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (internal quotation omitted); *see also Garrovillas v. INS*, 156 F.3d 1010, 1013-14 (9th Cir. 1997).

## 6. Timing

An applicant’s failure to relate details about sexual assault or abuse at the first opportunity “cannot reasonably be characterized as an inconsistency.” *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052-53 (9th Cir. 2002). An applicant persecuted by her government may be reluctant to reveal such information during her first meeting with government officials in this country. *Id.*; *see also Singh v. INS*, 292 F.3d 1017, 1023-24 (9th Cir. 2002). “That a woman who has suffered sexual abuse at the hands of male officials does not spontaneously reveal the details of that abuse to a male interviewer does not constitute an inconsistency from which it could reasonably be inferred that she is lying.” *Paramasamy*, 295 F.3d at 1053.

## 7. Incomplete Asylum Application

“It is well settled that an applicant’s testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application.” *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996); *see also Singh v. INS*, 292 F.3d 1017, 1021 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant’s initial statements at the airport). *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) (failure to mention two collateral incidents involving relatives on application not sufficient).

#### 8. State Department Reports

It is improper for the BIA to rely “on a factually unsupported assertion in a State Department report to deem [an applicant] not credible.” *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000); *cf. Chebchoub v. INS*, 257 F.3d 1038, 1043-44 (9th Cir. 2001) (IJ or BIA may place supplemental reliance on State Department report to discredit portions of testimony).

#### 9. Classified Information

If the IJ makes an adverse credibility determination on the basis of classified evidence, such evidence must be produced before this court. *Singh v. INS*, 328 F.3d 1205, 1206 (9th Cir. 2003) (order).

#### 10. Speculation and Conjecture

“Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence.” *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000); *see also Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (IJ’s hypothesis as to what motivated the applicant’s departure); *Singh v. INS*, 292 F.3d 1017, 1023-24 (9th Cir. 2002) (assumption regarding police motives); *Gui v. INS*, 280 F.3d 1217, 1226 (9th Cir. 2002) (IJ’s opinion “as to how best to silence a dissident” not a legitimate basis); *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (rejecting BIA’s unsupported assumptions regarding the plausibility of applicant’s political activities); *Bandari v. INS*, 227 F.3d 1160, 1167-68 (9th Cir. 2000) (“IJ’s subjective view of what a persecuted person would include in his asylum application,” personal belief that applicant should have bled when he was flogged, and speculation about a foreign

government's educational policies); *Shah v. INS*, 220 F.3d 1062, 1069, 1071 (9th Cir. 2000) (State Department conjecture about the effect electoral victory would have on existing political persecution, BIA's belief about what a letter should look like, and how many the applicant should have received); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) ("personal conjecture about what guerillas likely would and would not do" not sufficient).

## 11. Counterfeit Documents

Use of counterfeit documents is not a legitimate basis for a negative credibility finding if the evidence does not go to the heart of the asylum claim. *See Akinmade v. INS*, 196 F.3d 951, 955-56 (9th Cir. 1999) (use of false passport and false declaration that he was a Canadian citizen supported claim of persecution); *but see Pal v. INS*, 204 F.3d 935, 938 (9th Cir. 2000) (noting contradictions between testimony and doctor's letter).

## 12. Previous Misrepresentations

"Untrue statements by themselves are not reason for refusal of refugee status." *Turcios v. INS*, 812 F.2d 1396, 1400-01 (9th Cir. 1987) (holding that Salvadoran applicant's false claim to INS officials that he was Mexican did not undermine his credibility). These statements must be examined in light of all of the circumstances of the case. *Id.*; *see also Al-Harbi v. INS*, 242 F.3d 882, 889-90 (9th Cir. 2001) (affirming negative credibility finding based on applicant's "propensity to change his story regarding incidents of past persecution"); *Aguilara-Cota v. INS*, 914 F.2d 1375, 1382 n.7 (9th Cir. 1990); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1393 (9th Cir. 1985) (negative credibility based on applicant's lies to get passport, and under oath to INS officials, travel under an assumed name, and conviction of illegally transporting aliens in the United States).

### C. Presumption of Credibility

Where BIA does not make an adverse credibility finding, this court accepts factual contentions as true. *See Navas v. INS*, 217 F.3d 646, 652, n.3 (9th Cir. 2000); *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989) ("The BIA's refusal to consider credibility leads to the presumption that it found the petitioner credible").

#### D. Implied Credibility Findings

This court does not permit implicit adverse credibility determinations by an immigration judge. *See Shoafera v. INS*, 228 F.3d 1070, 1075 n.3 (9th Cir. 2000) (and cases cited therein); *Manimbao v. Ashcroft*, 329 F.3d 655, 658-59 (9th Cir. 2003) (“implicit credibility observations in passing” do not constitute credibility findings); *see also* section on Notice, below; *cf. Sebastian-Sebastian v. INS*, 195 F.3d 504 (9th Cir. 1999) (Wiggins, J., concurring) (giving deference to the IJ’s implied negative credibility finding).

When the BIA finds that an applicant’s testimony is “implausible,” but does not make an explicit credibility finding of its own, this court treats the implausibility finding as an adverse credibility determination. *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000)

#### E. Sua Sponte Credibility Determinations and Notice

The BIA may not make an adverse credibility determination in the first instance unless the applicant is afforded certain due process protections. *See Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003). In *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999), this court held that the BIA violated due process by sua sponte reversing an IJ’s favorable credibility finding, *see also Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (remanding to allow the applicant to explain issues raised in BIA’s sua sponte negative credibility finding). In *Abovian v. INS*, 219 F.3d 972 (9th Cir. 2000), this court extended the logic of *Campos-Sanchez* to include cases where the IJ fails to make a credibility finding, *as amended by* 228 F.3d 1127 *and* 234 F.3d 492 (9th Cir. 2000). In *Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003), the court found a due process violation where the IJ made a credibility observation, but failed to make an express credibility determination.

Where credibility is determinative, the BIA should remand to the IJ to make a legally sufficient credibility determination, or provide the applicant with specific notice that his credibility is at issue, and an opportunity to respond. *See Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003).

Where the IJ makes an adverse credibility determination and the BIA affirms that determination, but for different reasons, there is no due process

violation because the applicant was on notice that her credibility was at issue. *Pal v. INS*, 204 F.3d 935 (9th Cir. 2000).

Where an applicant had no notice that a negative credibility finding could be based on his failure to call his father as a witness, due process required a remand for a new hearing. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000).

#### F. Remand

When this court reverses the BIA's adverse credibility determination, it must ordinarily remand an asylum case so that the BIA can determine whether the applicant has met the other criteria for eligibility. *See He v. Ashcroft*, 328 F.3d 593, 603-04 (9th Cir. 2003) (citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)). However, if credibility is the only issue, remand may not be necessary. *See id.* (holding that applicant was statutorily eligible for asylum based on the forced sterilization of his spouse); *Wang v. Ashcroft*, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003) (same).

#### G. Cases Reversing Negative Credibility Findings

*Wang v. Ashcroft*, No. 02-47086, 2003 WL 22025136 (9th Cir. Aug. 29, 2003) (immaterial inconsistencies between two witnesses); *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003) (BIA failed to identify why purported inconsistency was significant); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (IJ misstated the evidence; other perceived problems explained); *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002) (minor omission in doctor's note; trivial inconsistency regarding location of rally; no examples of unresponsiveness); *Gui v. INS*, 280 F.3d 1217, 1225-28 (9th Cir. 2002) (based on mischaracterizations of testimony, speculation, and disbelief); *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) (rejecting boilerplate negative credibility finding); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (holding that an adverse credibility finding was not supported by substantial evidence where neither the IJ or the BIA addressed the applicant's explanation for the identified discrepancy); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (implausibility finding based on impermissible grounds); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000); *Zahedi v. INS*, 222 F.3d 1157

(9th Cir. 2000); *Shah v. INS*, 220 F.3d 1062, 1067-71 (9th Cir. 2000); *Chanchavac v. INS*, 207 F.3d 584 (9th Cir. 2000) (based on explainable inconsistencies and IJ's cultural assumptions); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999); *Osorio v. INS*, 99 F.3d 928, 931-32 (9th Cir. 1996); *Mosa v. Rogers*, 89 F.3d 601, 604-05 (9th Cir. 1996); *Ramos-Vasquez v. INS*, 57 F.3d 857, 861 (9th Cir. 1995) (based on circular reasoning); *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994) (remanding for credibility finding); *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990) ("failure to file an application form that was as complete as might be desired," and failure to present copy of threatening note, not a basis for negative credibility); *Vilorio-Lopez v. INS*, 852 F.2d 1137 (9th Cir. 1988) (minor inconsistency between testimony of two witnesses regarding year of death squad incident); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987) (discrepancy as to date father was killed); *Turcios v. INS*, 821 F.2d 1396, 1399-1401 (9th Cir. 1987); *Plateros-Cortez v. INS*, 804 F.2d 1127, 1131 (9th Cir. 1986) (uncertainty regarding dates, inconsistency regarding place and manner of employer's death); *Martinez-Sanchez v. INS*, 794 F.2d 1396 (9th Cir. 1986) (trivial date error, application listed two children, he testified that he had four); *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986) (concluding that failure to marry mother of children and discrepancy between application and testimony on birthdates of petitioner's children could not form a proper basis for an adverse credibility finding); *Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985) (out-of-wedlock child is impermissible factor); *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984).

#### H. Cases Upholding Negative Credibility Findings

*Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003) (geographic discrepancies going to heart of the claim); *Alvarez-Santos v. INS*, 332 F.3d 1245 (9th Cir. 2003) ("last-minute, uncorroborated story" regarding dramatic attack and stabbing); *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001) (material differences in two asylum applications regarding the basis of applicant's fear); *Chebchoub v. INS*, 257 F.3d 1038 (9th Cir. 2001) (inconsistent statements about number of arrests, implausibility of other testimony); *Belayneh v. INS*, 213 F.3d 488 (9th Cir. 2000) (testified to attempted rape only in passing); *Pal v. INS*, 204 F.3d 935 (9th Cir. 2000) (contradictions between testimony and doctor's letter); *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999) (applicant jumped around during cross examination,

inconsistent testimony, sudden change in name to coincide with newspaper article); *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997); *Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1997) (inconsistencies in testimony and failure to offer proof that applicant was a Jehovah's Witness); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256 (9th Cir. 1992) (discrepancies between testimony and application regarding number of arrests and lack of detail); *Ceballos-Castillo v. INS*, 904 F.2d 519 (9th Cir. 1990) (inconsistencies regarding identity of alleged persecutors); *Estrada v. INS*, 775 F.2d 1018 (9th Cir. 1985); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1985) (substantial inconsistencies between application and testimony).

## VI CORROBORATIVE EVIDENCE

### A. Generally Not Required

“Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone.” *Garrovillas v. INS*, 156 F.3d 1010, 1016-17 (9th Cir. 1998) (internal quotations omitted). Accordingly, when an applicant presents credible testimony, “[n]o further corroboration is required.” *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (internal quotation omitted) (applicant not required to produce evidence of organizational membership, political fliers or medical records).

### B. Exception

However, “where the IJ has reason to question the applicant’s credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review.” *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000); *see also Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1997) (inconsistencies in testimony and failure to offer proof that applicant was a Jehovah’s Witness).

#### 1. Easily Available Evidence

Corroborative documentation may not be “easily available” where the applicant fled his or her country in haste, or where it would be dangerous to

be caught with material evidence. *See Salaam*, 229 F.3d at 1239; *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000). “[I]t is inappropriate to base an adverse credibility determination on an applicant’s inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States--such corroboration is almost never easily available.” *Sidhu v. INS*, 220 F.3d 1085, 1091-92 (9th Cir. 2000). However, affidavits from close relatives in Western Europe and from individuals in the United States should be “easily available.” *Chebchoub v. INS*, 257 F.3d 1038, 1044-45 (9th Cir. 2001).

### C. Cases Discussing Corroboration

*See also Gui v. INS*, 280 F.3d 1217, 1227 (9th Cir. 2002) (“Where, as here, a petitioner provides some corroborative evidence to strengthen his case, his failure to produce still more supporting evidence should not be held against him.”); *Kataria v. INS*, 232 F.3d 1107, 1113-14 (9th Cir. 2000); *Ladha v. INS*, 215 F.3d 889, 900-01 (9th Cir. 2000) (thorough discussion of law of the circuit on corroborative evidence); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (corroborating letters or statements from mother in Guatemala and friend in Mexico not required).

### D. Forms of Evidence

Corroborative evidence can take the form of documents, testimony of witnesses, expert testimony, and physical evidence, such as scars. *See Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (country conditions reports, witness testimony and scars); *Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (burn marks on arms and doctor’s letter); *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1199 (9th Cir. 2000) (expert testimony). *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (relying on persuasive expert testimony).

### E. Country Conditions Evidence

Country conditions evidence generally provides the context for evaluating an applicant’s credibility, rather than corroborating specifics of a claim. *See Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999); *but see Chebchoub v. INS*, 257 F.3d 1038, 1044 (9th Cir. 2001) (affirming BIA’s use

of country reports to “refute a generalized statement, . . . not to discredit specific testimony regarding his individual experience.”).

#### F. Certification of Records

Failure to certify foreign official records under 8 C.F.R. § 1287.6(b) is not a basis to exclude corroborating documents. *See Khan v. INS*, 237 F.3d 1143 (9th Cir. 2001) (per curiam).

### VII DUE PROCESS ISSUES

#### A. Right to a Full and Fair Hearing

The Fifth Amendment guarantees due process in deportation proceedings. *See Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999). An applicant for asylum is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002). This court reviews de novo, and will reverse on due process grounds if the proceeding was “so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (internal quotation omitted).

#### B. Prejudice Requirement

In addition to showing a due process violation, an applicant must also show prejudice. *Cano-Merida v. INS*, 311 F.3d 960, 965 (9th Cir. 2002). Prejudice can be shown where “the IJ’s conduct potentially affected the outcome of the proceedings.” *Id.* (internal quotations and punctuation omitted). An applicant “need not explain exactly what evidence he would have presented in support of his application, and we may infer prejudice in the absence of any specific allegation as to what evidence [the applicant] would have presented.” *Id.* (internal quotations and citation omitted); *see also Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000).

#### C. Exhaustion Requirement

Exhaustion is generally required. *See Ladha v. INS*, 215 F.3d 889, 903

(9th Cir. 2000). However, an applicant may raise a constitutional issue directly with the court of appeals, unless it is a due process claim which alleges a procedural error correctable by the BIA. *See Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995). Exhaustion is not required where it would be “futile or impossible.” *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003).

#### D. Examples

##### 1. Right to a Neutral Fact-Finder

This court has found a due process violation where the IJ pressured an asylum applicant to withdraw his application and to accept voluntary departure, without giving him an opportunity to present oral testimony at the hearing. *Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002); *see also Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (finding due process violation where “the IJ behaved not as a neutral fact-finder interested in hearing the petitioner’s evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel”); *Reyes-Melendez v. INS*, No. 02-70526, 2003 WL 22053448 (9th Cir. Sept. 4, 2003) (finding due process violation in suspension case where IJ was aggressive, snide, and accused applicant of moral impropriety); *cf. Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003) (rejecting due process claim based on the IJ’s aggressive and harsh questioning).

##### 2. Exclusion of Evidence

The IJ’s exclusion of proffered evidence may result in a due process violation. *See Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (remanding for clarification of applicant’s due process claims based on the exclusion of two documents).

##### 3. New Country of Deportation

The IJ’s last minute switch of the country of deportation violates due process because lack of proper notice. *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

#### 4. Right to Translation

“Due process requires that an applicant be given competent translation services” if he or she does not speak English. *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *see also Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000). “In order to make out a due process violation, . . . the alien must show that a better translation would have made a difference in the outcome of the hearing.” *Kotas v. INS*, 31 F.3d 847, 850 n.2 (9th Cir. 1994) (internal quotation omitted).

#### 5. Right to File Brief

The BIA’s refusal to allow an applicant to file a brief violated his due process rights. *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003).

#### 6. Ineffective Assistance of Counsel

Due process claims based on ineffective assistance of counsel must generally comply with the requirements set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1071-72 (9th Cir. 2003). The applicant must: “(1) provide an affidavit describing in detail the agreement with counsel; (2) inform counsel of the allegations and afford counsel an opportunity to respond; and (3) report whether a complaint of ethical or legal violations has been filed, and if not, why.” *Id.* This court has held that noncompliance will be excused where the “facts are plain on the face of the administrative record.” *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000).

For more information on ineffective assistance of counsel claims, *see* Motions to Reopen or Reconsider Immigration Proceedings.

## **SUSPENSION OF DEPORTATION, SECTION 212(c) RELIEF, and CANCELLATION OF REMOVAL**

### **I. OVERVIEW**

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) merged deportation and exclusion proceedings into a single new process called removal proceedings. *Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003). IIRIRA also repealed suspension of deportation and section 212(c) relief, and established two analogous forms of relief under 8 U.S.C. § 1229b, entitled cancellation of removal. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 n.2 (9th Cir. 2002). One form of cancellation is for applicants who are lawful permanent residents, (8 U.S.C. § 1229b(a)), and the other form is for those who not, (8 U.S.C. § 1229b(b)), *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 n.1 (9th Cir. 2003).

#### **A. Continued Eligibility for Relief Under the Transitional Rules**

Where the former INS commenced deportation proceedings before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Under the transitional rules, an applicant “may apply for the pre-IIRIRA remedy of suspension of deportation if deportation proceedings against her were commenced before April 1, 1997.” *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002) (citing IIRIRA § 309(c)); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc).

Section 212(c) relief also remains available under the transitional rules, subject to the restrictions in section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *See Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 n.1 (9th Cir. 2002). Additionally, certain individuals in removal proceedings remain eligible to apply for a section 212(c) waiver if they were eligible for relief at the time of their convictions. *INS v. St. Cyr*, 533 U.S. 289 (2001).

## B. Commencement of Proceedings

Proceedings are commenced on the date the Order to Show Cause (pre-IIRIRA charging document) or Notice to Appear (IIRIRA charging document), is filed with the immigration court. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597-98, 600 (9th Cir. 2002); *Cortez-Felipe v. INS*, 245 F.3d 1054 (9th Cir. 2001) (holding that proceedings commence on the date of filing, not on the date of service of the OSC).

Merely presenting oneself to the immigration service does not commence proceedings. *See Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105 (9th Cir. 2003) (holding that the filing of an asylum application before the IIRIRA effective date did not lead to a settled expectation of placement in deportation, rather than removal, proceedings); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 600 (9th Cir. 2002) (holding that removal proceedings do not commence upon the initial contact between the applicant and the INS).

## II. JUDICIAL REVIEW

### A. Limitations on Judicial Review of Discretionary Decisions

Under the IIRIRA permanent rules, applicable to removal proceedings initiated on or after April 1, 1997,

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 the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.”

*Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144-45 (9th Cir. 2002) (quoting 8 U.S.C. § 1252(a)(2)(B)).

Section 309(c)(4)(E) of the transitional rules contains a similar limitation on direct judicial review of discretionary decisions. For instance,

the transitional rules provide that “there shall be no appeal of any discretionary decision” under former section 244 of the INA. *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Section 309(c)(4)(E) also eliminated judicial review over discretionary decisions involving section 212(c) relief. *See Palma-Rojas v. INS*, 244 F.3d 1191 (9th Cir. 2001) (per curiam).

#### B. Judicial Review Remains Over Non-Discretionary Determinations

This court has held that the above limitations on judicial review only preclude petition-for-review jurisdiction over decisions that involve the exercise of discretion. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002). Accordingly, the court retains jurisdiction over non-discretionary questions, such as whether the applicant satisfied the continuous physical presence requirement, and whether an adult daughter qualifies as a child. *Id.* at 1144-45 (holding that court retained jurisdiction to review the purely legal question of whether the applicant’s adult daughter qualified as a “child” for purposes of cancellation of removal); *see also Molina-Estrada v. INS*, 293 F.3d 1089 (9th Cir. 2002) (holding that the court retained jurisdiction to review whether the mother was a lawful permanent resident). The court of appeals also retains jurisdiction over certain moral character determinations. *See Kalaw v. INS*, 133 F.3d 1147, 1150, 1151 (9th Cir. 1997) (transitional rules); *Pondoc Hernaez v. INS*, 244 F.3d 752 (9th Cir. 2001) (retaining jurisdiction under transitional rules to review continuous physical presence); *see also Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. June 26, 2003) (holding that the court retained jurisdiction to consider whether the applicant was eligible for suspension under the petty offense exception).

The court of appeals also retains “jurisdiction to review whether the BIA applied the correct discretionary waiver standard in the first instance.” *Murillo-Salmeron v. INS*, 327 F.3d 898 (9th Cir. 2003) (holding that section 309(c)(4)(E) did not divest the court of jurisdiction where the BIA purported to affirm a discretionary decision that the IJ did not make).

#### C. Jurisdictional Bar Limited to Statutory Eligibility Requirements

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

#### D. Jurisdiction Over Constitutional Issues

The court retains petition for review jurisdiction to review constitutional claims, “even when those claims address a discretionary decision.” *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 (9th Cir. 2003) (retaining jurisdiction to consider whether the BIA’s interpretation of the exceptional and extremely unusual hardship standard violates due process); *see also Reyes-Melendez v. INS*, No. 02-70526, 2003 WL 22053448 (9th Cir. Sept. 4, 2003) (retaining jurisdiction to review due process challenges to denial of suspension based on IJ bias); *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) (retaining jurisdiction on petition for review of denial of cancellation, to review applicant’s due process, ineffective assistance of counsel, and equitable tolling claims); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105 (9th Cir. 2003) (holding that the application of the new rules did not violate petitioners’ due process rights); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc) (holding on petition for review from denial of suspension that the BIA’s refusal to allow applicant to supplement the record with additional materials was a denial of due process); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (holding that court retained jurisdiction to review claim that application of IIRIRA’s permanent rules was impermissibly retroactive); *Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000) (retaining jurisdiction and rejecting due process claim that the BIA failed to review all relevant evidence submitted in a case).

Due process allegations must be “colorable,” and “abuse of discretion claims recast as due process violations” do not qualify for direct review. *Sanchez-Cruz v. INS*, 255 F.3d 775 (9th Cir. 2001) (holding that allegations of IJ bias were colorable, but that applicant was required to exhaust her due process allegations before the BIA). “To be colorable . . . the alleged

violation need not be substantial, but the claim must have some possible validity.” *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (internal quotations and citation omitted) (holding that applicant’s allegation that the BIA misapplied case law was not a colorable due process claim).

#### E. Limitations on Judicial Review Based on Criminal Offenses

The IIRIRA permanent and transitional rules eliminate petition-for-review jurisdiction for individuals removable based on certain enumerated crimes. Section 1252(a)(2)(C) of Title 8 provides:

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

Section 309(c)(4)(G) of the IIRIRA transitional rules provides:

[T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

In order to preclude jurisdiction under this section, an applicant must be charged with and found removable based on an enumerated crime. *Alvarez-Santos v. INS*, 332 F.3d 1245 (9th Cir. 2003). Additionally, the court retains jurisdiction to address “three threshold issues: whether [the petitioner] is [1] an alien, [2] *removable*, and [3] removable because of a conviction for a qualifying crime.” *Zavalleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotations omitted). Finally, where direct judicial review is unavailable, a habeas corpus petition may be brought in the district court

under 28 U.S.C. 2241. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003).

For a more detailed discussion of the jurisdictional limitations on appeals by criminal aliens, *see* Criminal Issues in Immigration Law.

#### F. Jurisdiction Over Motions to Reopen

The denial of a motion to reopen is a final administrative decision subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321 (9th Cir. 1997); *Arrozal v. INS*, 159 F.3d 429, 435 n.3 (9th Cir. 1998). The transitional rules of IIRIRA did not eliminate jurisdiction to review the denial of a motion to reopen to apply for suspension, even though the underlying request for relief is discretionary. *See Arrozal*, 159 F.3d at 431-32; *see also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002).

However, where an applicant has been ordered deported on account of certain enumerated crimes, this court lacks petition-for-review jurisdiction over a motion to reopen. *See Sarmadi*, 121 F.3d at 1322 (dismissing petition for review from denial of motion to reopen to apply for suspension because petitioner was ordered deported based on two crimes of moral turpitude).

### III. SUSPENSION OF DEPORTATION, 8 U.S.C. § 1254 (repealed) (INA § 244)

#### A. Eligibility Requirements

Under the pre-IIRIRA rules, an applicant “would be eligible for suspension if (1) the applicant had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of the application for suspension of deportation; (2) the applicant was a person of good moral character; and (3) deportation would result in extreme hardship to the alien or to an immediate family member who was a United States citizen or a lawful permanent resident.” *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc) (citing 8 U.S.C. § 1254(a)(1)).

A ten-year continuous physical presence requirement was required for applicants deportable for serious crimes who could show exceptional and extremely unusual hardship. *See Leon-Hernandez v. INS*, 926 F.2d 902, 905 (9th Cir. 1991) (citing 8 U.S.C. § 1254(a)(2)); *Pondoc Hernaez v. INS*, 244 F.3d 752, 755 (9th Cir. 2001).

## 1. Continuous Physical Presence

### a. Jurisdiction

The court retains jurisdiction over the determination of whether an applicant has satisfied the seven-year continuous physical presence requirement. *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

### b. Standard of Review

“We review for substantial evidence the BIA’s decision that an applicant has failed to establish seven years of continuous physical presence in the United States.” *Vera-Villegas v. INS*, 330 F.3d 1222, 1230 (9th Cir. 2003).

### c. Proof

An applicant may establish the time element by credible direct testimony or written declarations. *Vera-Villegas v. INS*, 330 F.3d 1222 (9th Cir. 2003). Although contemporaneous documentation of presence “may be desirable,” it is not required. *Id.*

### d. Brief, Casual, and Innocent Departures

Brief, casual and innocent departures from the United States do not break a period of continuous physical presence. *Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995) (eight-day trip to Mexico seeking a visa was brief, casual and innocent); *Jubilado v. INS*, 819 F.2d 210, 213 (9th Cir. 1987); *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979); *cf. Hernandez-Luis v. INS*, 869 F.2d 496 (9th Cir. 1989) (holding that departure under grant of voluntary departure was not a brief, casual and innocent departure).

e. Pre-IIRIRA Rule on Physical Presence

Before IIRIRA, an applicant “continued to accrue time towards satisfying the seven-year residency requirement for suspension of deportation during the pendency of the proceedings.” *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002).

f. IIRIRA Stop-Time Rule

Under the IIRIRA “stop-time” rule, “any period of . . . continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear or an order to show cause why he or she should not be deported.” *Arrozal v. INS*, 159 F.3d 429, 434 (9th Cir. 1998) (internal quotation omitted). “The stop-clock provision applies to all deportation and removal proceedings, whether they are governed by the transitional rules or the permanent rules.” *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002).

The stop-time rule applies to suspension of deportation cases heard on or after April 1, 1997. *See Ram v. INS*, 243 F.3d 510, 516-17 (9th Cir. 2001) (holding that the application of the new rule does not offend due process); *Astrero v. INS*, 104 F.3d 264, 266 (9th Cir. 1996) (holding that IIRIRA’s stop-time rule could not be applied before its effective date of April 1, 1997); *Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1211 (9th Cir. 2001) (reversing premature application of the stop-time rule), *as corrected by* 250 F.3d 1271 (9th Cir. 2001); *Otarola v. INS*, 270 F.3d 1272, 1273 (9th Cir. 2001) (same).

g. NACARA Exception to the Stop-Time Rule

The Nicaraguan Adjustment and Central American Relief Act (“NACARA”) exempts certain applicants from El Salvador, Guatemala, and certain specified Eastern Europeans from the stop-time provision. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002); *Ram v. INS*, 243 F.3d 510, 517 and n.9 (9th Cir. 2001). For covered individuals, time accrued after issuance of a charging document may count towards the continuous physical presence requirement.

h. *Barahona-Gomez v. Ashcroft* Exception to the Stop-

## Time Rule

The stop-time rule also does not apply to class members covered by the December 2002 settlement of *Barahona-Gomez v. Ashcroft*, No. C97-0895 CW (N.D. Cal). This class action challenged the Executive Office for Immigration Review's directive to halt the granting of suspension applications during the period between February 13, and April 1, 1997, based on the annual cap on suspension grants.

Eligible *Barahona-Gomez* class members may apply for renewed suspension of deportation under the law as it existed prior to the effective date of IIRIRA. For background on the case, *see Barahona-Gomez v. Ashcroft*, 167 F.3d 1228 (9th Cir. 1999), *supplemented by* 236 F.3d 1115 (9th Cir. 2001). The settlement agreement can be found at: [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir).

### 2. Good Moral Character

#### a. Jurisdiction

A finding of good moral character has both a statutory and a discretionary component. *See Campos-Granillo v. INS*, 12 F.3d 849, 853 (9th Cir. 1993). The court of appeals retains jurisdiction over the BIA's determination that an applicant could not show good moral character if that determination is based on one of the seven "per se" categories of individuals precluded from establishing good moral character set forth in 8 U.S.C. § 1101(f). *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

"[A]side from the applicability of any per se category, IIRIRA's transitional rules prohibit direct judicial review of the question of good moral character." *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

#### b. Standard of Review

"We review for substantial evidence a finding of statutory ineligibility for suspension of deportation based on a lack of good moral character." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2000).

#### c. Time Period Required

The applicant must show that he or she has been of good moral character for the entire statutory period. *Limsico v. INS*, 951 F.2d 210, 213-14 (9th Cir. 1991) (declining to decide whether events occurring before the seven-year period may be considered). Moreover, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc).

d. Statutory Per Se Ineligibility

(1) Aggravated Felonies

An applicant is statutorily ineligible for a finding of good moral character if he or she was convicted of an aggravated felony at any time. *See* 8 U.S.C. § 1101(f)(8); *Castiglia v. INS*, 108 F.3d 1101, 1103 (9th Cir. 1997). It is unclear whether this preclusion to a finding of good moral character applies to convictions for aggravated felonies (except for murder) before November 29, 1990. *Compare* Section 509 of the Immigration Act of 1990 (providing effective date of November 29, 1990) *with* IIRIRA § 321 (eliminating all previous effective dates).

(2) Confinement

A person confined, as a result of a conviction, to prison for an aggregate period of 180 days, cannot show good moral character. *See* 8 U.S.C. § 1101(f)(7); *Rashtabadi v. INS*, 23 F.3d 1562, 1571-72 (9th Cir. 1994).

(3) Alien Smuggling

“An alien is not considered to be of good moral character if during the five-year period he ‘knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law’ in violation of an alien smuggler provision.” *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (holding that applicant who admitted that in 1995 he paid a smuggler to bring his wife and child into the United States

illegally was statutorily ineligible for a good moral character finding); 8 U.S.C. § 1101(f)(3).

#### (4) Drug-Related Crimes

Individuals convicted of controlled substance violations may not establish good moral character. *See Bazuaye v. INS*, 79 F.3d 118 (9th Cir. 1996); 8 U.S.C. § 1101(f)(3). The mandatory bar to good moral character does not apply to a single offense of simple possession of 30 grams or less of marijuana. 8 U.S.C. § 1101(f)(3).

#### (5) Crimes of Moral Turpitude

One crime of moral turpitude or multiple crimes, regardless of whether the crimes involve moral turpitude, preclude a finding of good moral character. *See* 8 U.S.C. § 1101(f)(3); *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000); *Hernandez-Robledo v. INS*, 777 F.2d 536 (9th Cir. 1985) (conviction of one crime involving moral turpitude).

#### (6) False Testimony

An applicant who has given false testimony to obtain an immigration benefit is ineligible for relief which requires a showing of good moral character. *See* 8 U.S.C. § 1101(f)(6); *Abedini v. INS*, 971 F.2d 188, 193 (9th Cir. 1992). “For a witness’s false testimony to preclude a finding of good moral character, the testimony must have been made orally and under oath, and the witness must have had a subjective intent to deceive for the purpose of obtaining immigration benefits.” *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001); *Bernal v. INS*, 154 F.3d 1020 (9th Cir. 1998) (holding that applicant’s false statements made under oath during naturalization examination precluding finding of good moral character).

#### (7) Other Grounds of Ineligibility

An applicant is also statutorily ineligible for a good moral character finding if he or she is a habitual drunkard, 8 U.S.C. § 1101(f)(1); a prostitute or polygamist, 8 U.S.C. § 1101(f)(3); or a professional gambler, 8 U.S.C. § 1101(f)(4) and (5).

### 3. Extreme Hardship Requirement

#### a. Jurisdiction

Determination of hardship “is clearly a discretionary act.” *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997). The court is “no longer empowered to conduct an ‘abuse of discretion’ review of the agency’s purely discretionary determinations as to whether ‘extreme hardship’ exists.” *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc).

#### b. Qualifying Individual

Suspension applicants could meet the extreme hardship requirement by showing hardship to himself or to his or her United States or lawful permanent resident spouse, parent or child. *See* 8 U.S.C. § 1254(a)(1).

#### c. Pre-IIRIRA Cases Addressing Hardship

Under pre-IIRIRA case law, this court held that the BIA abuses its discretion when it fails to consider all relevant factors bearing on extreme hardship, or fails to articulate the reasons for denying relief. *See e.g. Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995) (BIA must consider all factors and their cumulative effect). The relevant factors include separation from citizen children, economic hardship, community ties, medical needs, political conditions and other factors. *See e.g., Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998) (medical problems and political conditions); *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998) (family separation); *Ordonez v. INS*, 137 F.3d 1120 (9th Cir. 1998) (persecution); *Urbina-Osejo v. INS*, 124 F.3d 1314 (9th Cir. 1997) (community assistance and acculturation); *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995) (considering hardship flowing from economic concerns); *Biggs v. INS*, 55 F.3d 1398 (9th Cir. 1995) (psychiatric information must be considered); *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987) (family separation).

#### d. Current Evidence of Hardship

The BIA must decide eligibility for suspension “based, not on the facts

that existed as of the time of the hearing before the IJ, but on the facts as they existed when the BIA issued its decision.” *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc) (holding that the BIA’s refusal to allow applicant to supplement the record with additional materials was a denial of due process); *see also Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1212, *as corrected by*, 250 F.3d 1271 (9th Cir. 2001).

#### 4. Ultimate Discretionary Determination

“Even if all three of these statutory criteria are met, the ultimate grant of suspension is wholly discretionary.” *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997). “Thus, if the Attorney General decides that an alien’s application for suspension of deportation should not be granted as a matter of discretion in addition to any other grounds asserted, the BIA’s denial of the alien’s application would be unreviewable under the transitional rules.” *Id.*; *see also Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc).

#### B. Abused Spouses and Children Provision

Battered spouses, battered children, or the parent of a battered child, may apply for a special form of suspension. Suspension for abused spouses and children requires three years in the United States, good moral character, and extreme hardship. *See* former 8 U.S.C. § 1254(a)(3).

#### C. Persons Disqualified from Suspension

##### 1. Failure to Appear or Depart

An individual is not eligible for suspension for a period of five years if he or she: (1) failed to appear at a deportation or asylum hearing after proper notice; (2) remained in the United States after the expiration of a grant of voluntary departure; or (3) failed to appear for deportation on a scheduled date. *See* 8 U.S.C. § 1252b(e) (repealed 1996).

##### 2. Other Categories of Ineligibility

Persons who entered as crewmen after June 30, 1964, *see Guinto v. INS*, 774 F.2d 991 (9th Cir. 1985), and certain exchange visitors and students, *see* 8 U.S.C. § 1254(f)(2) and (3), are statutorily ineligible for suspension.

Those who assisted in Nazi persecution, *see Schellong v. INS*, 805 F.2d 655 (9th Cir. 1986), or engaged in genocide, are also not eligible for relief, *see* 8 U.S.C. § 1254(a) (excluding applicants described by former 8 U.S.C. § 1251(a)(4)(D)).

#### **IV. SECTION 212(c) RELIEF, 8 U.S.C. § 1182(c) (repealed)**

##### **A. Overview**

Former INA section 212(c) allowed certain long-time permanent residents to obtain a discretionary waiver for certain grounds of excludability and deportability.

Section 212(c) provided that “[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of subsection (a) [classes of excludable aliens].” 8 U.S.C. § 1182(c).

Although the literal language of section 212(c) applies only to exclusion proceedings, the statute applies to deportation proceedings as well. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1122 (9th Cir. 2002); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995).

Effective April 1, 1997, IIRIRA repealed section 212(c), and created a new and more limited remedy called “cancellation of removal for certain permanent residents.” However, certain individuals remain eligible to apply for a section 212(c) waiver if they were eligible for relief at the time of their guilty plea convictions.

##### **B. Eligibility Requirements**

###### **1. Seven Years**

To be eligible for discretionary relief from deportation under former section 212(c), an applicant must have accrued seven years of lawful permanent residence status. *Ortega de Robles v. INS*, 58 F.3d 1355 (9th Cir. 1995) (holding that applicant could include time spent as a lawful temporary resident under the amnesty program). An applicant could continue to accrue legal residency time for the purpose of relief while pursuing an appeal of his deportation order. *See Foroughi v. INS*, 60 F.3d 570 (9th Cir. 1995); *see also Raya-Ledesma v. INS*, 55 F.3d 418 (9th Cir. 1994) (denying equal protection challenge to seven-year requirement); *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994) (holding that a parent's lawful unrelinquished domicile is imputed to his or her minor children).

## 2. Balance of Equities

The applicant must show that the balance of favorable and unfavorable factors weighs in favor of relief. *See Georgiu v. INS*, 90 F.3d 374 (9th Cir. 1996) (reversing BIA where it failed to address positive equities); *Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995); *Alaelua v. INS*, 45 F.3d 1379 (9th Cir. 1995); *Kahn v. INS*, 36 F.3d 1412 (9th Cir. 1994); *Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994); *Rashtabadi v. INS*, 23 F.3d 1562 (9th Cir. 1994); *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir. 1993).

Section 212(c) did not require a showing of good moral character or extreme hardship. *See* 8 U.S.C. § 1182(c).

## C. Comparable Ground of Exclusion

Because INA former section 212(c) explicitly applied to the grounds of excludability, in order to be eligible for a waiver, an applicant in deportation proceedings had to show that that his ground of deportation had an analogous ground for exclusion. *See Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994) (holding that the waiver was not available for deportation based on a firearms offense because there is no comparable ground for exclusion).

#### D. Limits on Section 212(c) Relief

The Immigration Act of 1990 amended Section 212(c) to eliminate relief for aggravated felons who had served a term of imprisonment of at least five years. *Toia v. Fasano*, 334 F.3d 917, 919 (9th Cir. 2003). “Section 212(c) was further revised in 1991 to clarify that the bar applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years.” *Id.* at 919 n.1. Accordingly, before the passage of AEDPA and IIRIRA, an applicant convicted of an aggravated felony could qualify for section 212(c) relief, unless he had served a prison term of at least five years. *See id.*

Relief was also unavailable to persons based on national security, terrorist, or foreign policy grounds, or because the applicant participated in genocide or child abduction. *See* former 8 U.S.C. § 1182(c) (referring to sections 1182(a)(3) and (9)(C)).

#### E. Elimination of Section 212(c) Relief

##### 1. AEDPA

Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) severely restricted section 212(c) relief to bar waivers for applicants convicted of most crimes, including those who had aggravated felonies (regardless of the length of their sentences), or those with convictions for controlled substances offenses, drug addiction or abuse, firearms offenses, two crimes of moral turpitude, or miscellaneous crimes relating to national security. *See Magana-Pizano v. INS*, 200 F.3d 603, 606 and n.2 (9th Cir. 1999); *United States v. Leon-Paz*, No. 02-10506, 2003 WL 21993292 (9th Cir. July 11, 2003).

##### 2. IIRIRA

Section 304(b) of IIRIRA eliminated section 212(c) relief entirely, and replaced it with a new form of relief called cancellation of removal. *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002).

However, the repeal of section 212(c) relief did not apply to proceedings falling under the IIRIRA transitional rules. *See Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 n.1 (9th Cir. 2002). The transitional rules apply where the final agency order was entered on or after October 31, 1996, and the INS initiated deportation proceedings before April 1, 1997. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). These pending transitional rule proceedings, however, are subject to the restrictions in section 440(d) of the AEDPA. *Id.*

Section 321 of IIRIRA also expanded the list of crimes defined as “aggravated felonies.” *See e.g. United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002) (noting that “IIRIRA expanded the definition of ‘aggravated felony’ by [inter alia] reducing the prison sentence required to trigger ‘aggravated felony’ status for burglary from five years to one year.”); *see also INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); 8 U.S.C. § 1101(a)(43) (definition of aggravated felony).

For a more detailed discussion on aggravated felonies, *see* Criminal Issues in Immigration Law.

#### F. Continued Eligibility for Relief

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that a retrospective application of the bar to 212(c) relief would have an impermissibly retroactive effect on certain lawful permanent residents. Accordingly, applicants who were convicted pursuant to plea agreements before AEDPA and IIRIRA, and who were eligible for section 212(c) relief at that time of their guilty pleas, remain eligible to apply for relief. *Id.* at 326.

#### G. Ninth Circuit Cases Addressing Elimination of Section 212(c) Relief

*United States v. Leon-Paz*, No. 02-10506, 2003 WL 21993292 (9th Cir. Jul. 11, 2003) (holding that defendant who pled guilty to burglary in October 1995 was entitled to be considered for section 212(c) relief because at the time of his plea, he did not have notice that section 212(c) relief would not be available in the event his conviction was reclassified as an aggravated felony); *cf. United States v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002)

(holding that the elimination of section 212(c) relief was not impermissibly retroactive where defendant's June 1996 guilty plea for burglary did not make him deportable under the law in effect at the time of the plea, and he had notice that AEDPA had already eliminated relief for aggravated felons).

*Toia v. Fasano*, 334 F.3d 917, 918 (9th Cir. 2003) (holding that the *St. Cyr* retroactivity analysis applied to aggravated felon who pled guilty before the Immigration Act of 1990, believing that he would be eligible for 212(c) relief at the time of his plea); *see also Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147 (9th Cir. 2002) (remanding for application of the *St. Cyr* retroactivity analysis to conviction that pre-dated the Immigration Act of 1990).

*Servin-Espinoza v. Ashcroft*, 309 F.3d 1193 (9th Cir. 2002) (affirming a grant of habeas relief to a lawful permanent resident aggravated felon who was precluded from applying for section 212(c) relief during the time when the BIA allowed excludable aggravated felons to apply for such relief).

*Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002) (holding that because the applicant elected a jury trial, the AEDPA restrictions on section 212(c) relief did not have an impermissibly retroactive effect; and finding no equal protection violation); *see also United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (finding no impermissible retroactive effect where applicant was convicted after a jury trial).

*See also Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) (holding that the bar to discretionary relief had an impermissible retroactive effect); *Alberto-Gonzalez v. INS*, 215 F.3d 906, 909-10 (9th Cir. 2000) (remanding denial of section 212(c) relief in light of *Magana-Pizano*); *see also Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001) (holding that that *Magana-Pizano* announced a new rule which could not be applied on collateral review in order to allow an applicant to seek a section 212(c) waiver).

## **V. CANCELLATION OF REMOVAL, 8 U.S.C. § 1229b**

Individuals placed in removal proceedings on or after April 1, 1997 may apply for a new form of discretionary relief called cancellation of removal. One form of cancellation is for applicants who are lawful

permanent residents, (8 U.S.C. § 1229b(a)), and the other form is for those who not, (8 U.S.C. § 1229b(b)), *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 n.1 (9th Cir. 2003).

A. Cancellation for Lawful Permanent Residents, 8 U.S.C. § 1229b(a) (INA § 240A(a))

Cancellation of removal under 8 U.S.C. § 1229b(a) is similar to former section 212(c) relief, and provides a discretionary waiver of removal for certain lawful permanent residents.

1. Eligibility Requirements

In order for a lawful permanent resident to qualify for cancellation of removal under 8 U.S.C. § 1229b(a), an applicant must show: “(1) that she has been a legal permanent resident for five years; and (2) that she has resided continuously in the United States for a period of seven years after admission.” *Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001) (order). Aggravated felons are ineligible for relief. 8 U.S.C. § 1229b(a)(3).

Cancellation is available for permanent residents who are either “inadmissible or deportable.” *See* 8 U.S.C. § 1229b(a). The statute does not specifically require a showing of extreme hardship or family ties to a United States citizen or lawful permanent resident. *See id.*

2. Exercise of Discretion

The BIA has ruled that the factors relevant to determining whether a favorable exercise of discretion was warranted under former section 212(c) continue to be relevant in the cancellation context. *See Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998).

3. Termination of Continuous Residence

Under 8 U.S.C. § 1229b(d), the period of continuous residence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant committed an offense referred to in section 1182(a)(2) (criminal grounds of inadmissibility) that renders him

inadmissible, or removable under sections 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001) (order).

This court has not yet interpreted the provision terminating continuous residence and physical presence upon “commission” of an enumerated offense which renders an applicant inadmissible or removable. *See Matter of Perez*, 22 I. & N. Dec. 689 (BIA 1999) (holding that continuous residence ends at the time of the criminal misconduct).

a. Military Service

An applicant who has served at least three years of active duty in the armed forces need not fulfill the continuous residence requirement. *See* 8 U.S.C. § 1229b(d)(3).

B. Cancellation for Non-Permanent Residents, 8 U.S.C. § 1229b(b)  
(INA § 240A(b)(1))

1. Eligibility

Cancellation of Removal under 8 U.S.C. § 1229b(b) is similar to former suspension of deportation. To qualify for relief under the more stringent cancellation standards, a deportable or inadmissible applicant must establish that he or she:

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1); *see also* *Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 n.3 (9th Cir. 2003).

## 2. Ten Years of Continuous Physical Presence

Under 8 U.S.C. § 1229b(d)(1), the period of continuous physical presence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant committed an offense referred to in section 1182(a)(2) (criminal grounds of inadmissibility) that renders him inadmissible, or removable under sections 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001) (order).

This court has not yet interpreted the provision terminating continuous residence and physical presence upon “commission” of an enumerated offense which renders an applicant inadmissible or removable. *See Matter of Perez*, 22 I. & N. Dec. 689 (BIA 1999) (holding that continuous residence ends at the time of the criminal misconduct).

### a. Departure from the United States

An applicant will fail to maintain continuous physical presence “if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.” 8 U.S.C. § 1229b(d)(2).

Departure from the United States under a grant of voluntary departure breaks an applicant’s continuous physical presence. *Vasquez-Lopez v. Ashcroft*, 315 F.3d 1201 (9th Cir. 2003) (per curiam), *as amended upon denial of rehearing en banc*, 343 F.3d 961 (9th Cir. 2003).

### b. Military Service

An applicant who has served at least three years of active duty in the armed forces does not need to fulfill the continuous physical presence requirement. *See* 8 U.S.C. § 1229b(d)(3).

### 3. Good Moral Character

An applicant must establish that he or she has been a person of good moral character during the ten-year period preceding the application for cancellation. *See* 8 U.S.C. § 1229b(b)(1)(B). Automatic bars to a finding of good moral character are found in 8 U.S.C. § 1101(f); *see also* discussion of Good Moral Character under Suspension of Deportation, above.

### 4. Criminal Bars

An applicant is ineligible for nonpermanent resident cancellation if he or she has been convicted of an offense under 8 U.S.C. § 1182(a)(2) (criminal grounds of inadmissibility), 8 U.S.C. § 1227(a)(2) (criminal grounds of deportability), or 8 U.S.C. § 1227(a)(3) (failure to register, document fraud, and false claims to citizenship). *See* 8 U.S.C. § 1229b(b)(1)(C).

### 5. Exceptional and Extremely Unusual Hardship

#### a. Jurisdiction

The court lacks jurisdiction to review the heightened “exceptional and extremely unusual hardship” determination. *See Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003) (holding that the “‘exceptional and extremely unusual hardship’ determination is a subjective, discretionary judgment that has been carved out of our appellate jurisdiction”).

The court has not yet decided whether jurisdiction remains to review disputed factual issues underlying the BIA’s hardship determination. *See Romero-Torres*, 327 F.3d at 891 n.5.

#### b. Heightened Hardship Standard Does Not Violate Due Process

The BIA’s interpretation of “exceptional and extremely unusual hardship” does not violate due process. *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 (9th Cir. 2003).

### c. Qualifying Relative

Under cancellation, hardship to the applicant himself will no longer support a grant of relief. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365 (9th Cir. 2003) (en banc). The applicant must show the requisite degree of hardship to a “spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” *See* 8 U.S.C. § 1229b(b)(D).

An adult daughter twenty-one years of age or older does not qualify as a “child” for purposes of cancellation of removal. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144-45 (9th Cir. 2002).

### 6. Exercise of Discretion

“Cancellation of removal, like suspension of deportation before it, is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General.” *See Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003).

### C. Ineligibility for Cancellation

#### 1. Aggravated Felons

A person convicted of any aggravated felony at any time is not eligible for cancellation. *United States v. Corona-Sanchez*, 291 F.3d 1201, 1210, n.8 (9th Cir. 2002) (en banc). The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43); *see also* Criminal Issues in Immigration Law.

#### 2. Security Grounds

Persons inadmissible or deportable under security and terrorism grounds are ineligible for cancellation. *See* 8 U.S.C. § 1229b(c)(4).

#### 3. Previous Grants of Relief

A person previously granted cancellation, suspension, or section 212(c) relief is ineligible for cancellation. *See* 8 U.S.C. § 1229b(c)(6).

#### 4. Failure to Appear or Depart

Cancellation is unavailable for ten years if an applicant was ordered removed for failure to appear at a removal hearing, unless he or she can show exceptional circumstances for failure to appear. *See* 8 U.S.C. § 1229a(b)(7). The ten-year bar also applies if an applicant failed to depart under a grant of voluntary departure. *See* 8 U.S.C. § 1229c(d).

#### 5. Other Categories of Ineligibility

Crewmen who entered after June 30, 1964, certain exchange visitors, and individuals who have persecuted others are ineligible for relief. *See* 8 U.S.C. §§ 1229b(c)(1), (2), (3) and (5).

##### D. Numerical Cap on Grants of Cancellation and Adjustment of Status

IIRIRA limits the number of people who may receive cancellation of removal and adjustment of status to 4,000 per fiscal year. *See* 8 U.S.C. § 1229b(e).

##### E. NACARA Special-Rule Cancellation

The Nicaraguan Adjustment and Central American Relief Act (“NACARA”) amended IIRIRA, and “allows certain individuals to apply for what is known as ‘special rule cancellation,’ which allows designated aliens to qualify for the more generous pre-IIRIRA suspension of deportation remedy, even though not charged by the INS until after IIRIRA’s effective date (April 1, 1997).” *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1162 (9th Cir. 2002).

Special rule cancellation of removal is available for certain applicants from El Salvador, Guatemala, nationals of the former Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany,

Yugoslavia, or any state of the former Yugoslavia. *Ram v. INS*, 243 F.3d 510, 517 and n.9 (9th Cir. 2001).

### 1. NACARA Does Not Violate Equal Protection

This court has found that NACARA special rule cancellation does not violate equal protection. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602-603 (9th Cir. 2002); *Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161 (9th Cir. 2002) (holding that limitation on eligibility for relief based on whether an applicant filed an asylum application by the April 1, 1990 deadline did not violate equal protection or due process).

### 2. No Tolling of NACARA Deadlines

NACARA's internal deadlines are statutory cutoff dates, and are not subject to equitable tolling. *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003).

The numerical cap on the number of adjustments arising from cancellation and suspension in 8 U.S.C. § 1229b(e) does not apply to NACARA special rule cancellation. *See* 8 U.S.C. 1229b(e)(3)(A).

### 3. Judicial review

The Ninth Circuit has not addressed the judicial review provision in section 309(c)(5)(C)(ii) of IIRIRA which provides that “[a] determination by the Attorney General as to whether an alien satisfies the requirements of clause (i) is final and shall not be subject to review by any court.”

### F. Battered Spouse and Child Provision

Battered spouses, battered children, or the parent of a battered child, may apply for a special form of cancellation of removal. Cancellation for abused spouses and children requires three years in the United States, good moral character, and extreme hardship. *See* 8 U.S.C. § 1229b(b)(2).

## **MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS**

For individuals in removal proceedings, the Immigration and Nationality Act now contains provisions governing motions to reopen and reconsider. *See* 8 U.S.C. § 1229a(c)(5) and (6). For deportation cases pending before the April 1, 1997 effective date of IIRIRA, motions to reopen or to reconsider are governed by the administrative regulations. *See* 8 C.F.R. §§ 1003.2 and 1003.23(b) (formerly codified at 8 C.F.R. §§ 3.2 and 3.23).

### **I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND TO RECONSIDER**

#### **A. Motion to Reopen**

A motion to reopen is based on factual grounds, and seeks a fresh determination based on newly discovered facts or a change in the applicant's circumstances since the time of the hearing. *See* 8 C.F.R. § 1003.2(c). A petitioner may also move to reopen to apply for discretionary relief. *See id.*; *Iturribarria v. INS*, 321 F.3d 889, 895-96 (9th Cir. 2003).

#### **B. Motion to Reconsider**

A motion to reconsider is based on legal grounds, and seeks a new determination based on alleged errors of fact or law. *See* 8 C.F.R. § 1003.2(b)(1). The motion to reconsider must be accompanied by a statement of reasons and supported by pertinent authority. *See id.*; 8 U.S.C. § 1229a(c)(5)(C) (removal proceedings); *Iturribarria v. INS*, 321 F.3d 889, 895-96 (9th Cir. 2003).

#### **C. Motion to Remand**

A motion to reopen or reconsider filed while an immigration judge's deportation decision is before the BIA on direct appeal will be treated as a motion to remand the proceedings to the immigration judge. *See Rodriguez v. INS*, 841 F.2d 865, 867 (9th Cir. 1987); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam); 8 C.F.R. § 1003.2(b)(1) and (c)(4). "The formal requirements of the motion to reopen and those of the motion to remand are

for all practical purposes the same.” *Rodriguez*, 841 F.2d at 867; *cf. Guzman*, 318 F.3d at 913 (holding that a motion to remand filed after petitioner’s deportation order had become final, was properly treated as a motion to reopen).

## II. JURISDICTION

The denial of a motion to reopen is a final administrative decision subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321 (9th Cir. 1997); *Arrozal v. INS*, 159 F.3d 429, 435 n.3 (9th Cir. 1998). The transitional rules of IIRIRA did not eliminate jurisdiction to review the denial of a motion to reopen, even if the underlying request for relief is discretionary. *See Arrozal*, 159 F.3d at 431-32; *see also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1168, 1169-70 (9th Cir. 2003).

However, where an applicant has been ordered deported on account of certain enumerated crimes, this court lacks jurisdiction over a motion to reopen. *See Sarmadi*, 121 F.3d at 1322 (dismissing petition for review from denial of motion to reopen to apply for suspension because petitioner was ordered deported based on two crimes of moral turpitude); *Briseno v. INS*, 192 F.3d 1320, 1323 (9th Cir. 1999).

### A. Finality of the Underlying Order

The filing of a motion to reopen does not disturb the finality of the underlying deportation order. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995). However, if the BIA grants a motion to reopen, “there is no longer a final decision to review,” and the petition should be dismissed for lack of jurisdiction. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886 (9th Cir. 2002) (order).

This court may review the denial of a motion to reopen even if a motion to reconsider is pending before the BIA. *Singh v. INS*, 213 F.3d 1050, 1052, n.2 (9th Cir. 2000).

### B. Not a Jurisdictional Prerequisite

The filing of a motion to reopen or reconsider with the BIA is not a jurisdictional prerequisite to filing a petition for review with the court of

appeals. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023-24 (9th Cir. 1992).

### C. No Tolling of the Time Period to File Petition for Review

The 30-day period for filing a petition for review with the court of appeals is not tolled by the filing of a motion to reopen. *See Stone v. INS*, 514 U.S. 386 (1995); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996).

### D. No Automatic Stay of Deportation or Removal

The filing of a motion to reopen or reconsider does not automatically result in a stay of deportation or removal. *See* 8 C.F.R. § 1003.2(f); *Baria v. Reno*, 180 F.3d 1111, 1113 (9th Cir. 1999).

#### 1. Exception

The filing of a motion to reopen an in absentia order of deportation or removal stays deportation. *See* 8 C.F.R. § 1003.2(f).

### E. Consolidation

Judicial review of a motion to reopen or reconsider must be consolidated with the review of the final order of removal. 8 U.S.C. § 1252(b)(6).

### F. Departure from the United States

Departure from the United States ends the right to make motion to reopen or reconsider. 8 C.F.R. § 1003.2(d). However, a motion to reopen may be made on the basis that the departure was not legally executed. *See Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (holding that petitioner was entitled to reopen his deportation proceedings where his state conviction, which was the sole ground of deportation, was vacated); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977).

### III. STANDARD OF REVIEW

#### A. Generally

The court of appeals reviews the BIA's denial of a motion to reopen for abuse of discretion, regardless of underlying relief requested. *INS v. Doherty*, 502 U.S. 314, 323 (1992). “[M]otions to reopen are disfavored in deportation proceedings.” *INS v. Abudu*, 485 U.S. 94, 107 (1988). However, this court will reverse the denial of a motion to reopen if it is “arbitrary, irrational, or contrary to law.” *Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir.), *cert. denied*, 123 S. Ct. 2605 (2003) (internal quotation omitted).

The BIA's determination of purely legal questions is reviewed de novo. *Singh v. INS*, 213 F.3d 1050 (9th Cir. 2000). Factual findings are reviewed for substantial evidence. *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996).

#### B. Full Consideration of All Factors

The BIA must show proper consideration of all factors, both favorable and unfavorable. *See e.g., Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (remanding where the BIA did not consider any of the factors weighing in petitioner's favor); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (remanding motion to reopen to apply for suspension where BIA did not engage in substantive analysis or articulate any reasons for its decision); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998); *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995).

The BIA must also articulate its reasons for denying relief. *See e.g., Romero-Morales v. INS*, 25 F.3d 125, 129 (9th Cir. 1994) (“[T]he IJ (and the BIA) are required to consider the record as a whole [and] issue a reasoned opinion when considering a motion.” (internal quotations omitted)); *Arrozal*, 159 F.3d at 433 (“[T]he BIA must indicate how it weighed [the favorable and unfavorable] factors and indicate with specificity that it heard and considered petitioner's claims.”).

### C. Irrelevant Factors

The BIA may not rely on irrelevant factors. *See e.g., Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (holding that the BIA improperly considered the impact of an unrelated section of the INA and petitioner's wife's pre-naturalization misconduct); *Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986) (holding that the BIA improperly relied on misconduct of petitioner's father).

## IV. REQUIREMENTS FOR A MOTION TO REOPEN

### A. Supporting Documentation

A motion to reopen must be supported by affidavits, the new evidentiary material sought to be introduced, and, if necessary, a completed application for relief. *See* 8 C.F.R. § 1003.2(c)(1); 8 U.S.C. § 1229a(c)(6)(B) (removal proceedings); *INS v. Wang*, 450 U.S. 139 (1981) (per curiam) (upholding BIA's denial of motion to reopen to apply for suspension because "the allegations of hardship were in the main conclusory and unsupported by affidavit."); *Patel v. INS*, 741 F.2d 1134, 1137 (9th Cir. 1984) ("[I]n the context of a motion to reopen, the BIA is not required to consider allegations unsupported by affidavits or other evidentiary material.").

However, the petitioner's failure to submit supporting documentation does not bar reopening where the INS either joins in the motion to reopen, or does not affirmatively oppose it. *See Konstantinova v. INS*, 195 F.3d 528, 530-31 (9th Cir. 1999) (noting that the BIA retains the ability to waive procedural errors); *Guzman v. INS*, 318 F.3d 911, 914 n.3 (9th Cir. 2003) (per curiam); *see also Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 381 (9th Cir.) (en banc) (assuming that where the BIA does not express concerns about form, relevancy or admissibility of the new evidence, "that any purported failure to comply with procedural requirements was not the stated reason for the BIA's" decision), *amended by*, 320 F.3d 858 (2003).

### B. Previously Unavailable Evidence

The moving party must show that the new material evidence could not have been discovered and presented at the former hearing. *See INS v.*

*Doherty*, 502 U.S. 314 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding based on lack of new material evidence); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen to apply for suspension because “new” information was available and capable of discovery prior to his deportation hearing); *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (finding no evidence of new circumstances to support asylum application); *Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984) (reversing deportation order based on reopened proceedings because INS could have obtained the foreign birth certificate before the initial hearing).

### C. Explanation for Failure to Apply for Discretionary Relief

If the motion to reopen is made for the purpose of obtaining discretionary relief, the moving party must establish that he or she was denied the opportunity to apply for such relief, or that such relief was not available at the time of the original hearing. *See INS v. Doherty*, 502 U.S. 314, 327 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding because the applicant did “not reasonably explain[] his failure to pursue his asylum claim at the first hearing”); *INS v. Abudu*, 485 U.S. 94 (1988) (affirming BIA’s denial of motion to reopen to apply for asylum where applicant filed to explain why the asylum application was not submitted earlier).

### D. Prima Facie Eligibility for Relief

The applicant must also show prima facie eligibility for the underlying substantive relief requested. *See INS v. Wang*, 450 U.S. 139, 145 (1981) (per curiam); *Mendez-Gutierrez v. Ashcroft*, No. 02-70546, 2003 WL 21976473 (9th Cir. Aug. 20, 2003); *Dielmann v. INS*, 34 F.3d 851, 853 (9th Cir. 1994); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *Aviles-Torres v. INS*, 790 F.2d 1433, 1435-36 (9th Cir. 1986).

“A *prima facie* case is established when an alien presents affidavits or other evidentiary material, which, if true, would satisfy the requirements for substantive relief.” *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir.

1985) (internal quotations and citation omitted).

However, the BIA has broad discretion to deny reopening even if prima facie eligibility is established. See 8 C.F.R. § 1003.2(a); *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS v. Abudu*, 485 U.S. 94, 105-06 (1988); *INS v. Wang*, 450 U.S. 139 (1981).

#### E. Discretionary Denial

Where ultimate relief is discretionary, such as asylum, the BIA may leap over the threshold concerns, and determine that the moving party would not be entitled to the discretionary grant of relief. See e.g., *INS v. Abudu*, 485 U.S. 94, 105 (1988); *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997); *Vasquez v. INS*, 767 F.2d 598, 600 (9th Cir. 1985). However, “the BIA must consider and weigh the favorable and unfavorable factors in determining whether to deny a motion to reopen proceedings on discretionary grounds.” *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (remanding where the BIA did not consider any of the factors weighing in petitioner’s favor); *Arrozal v. INS*, 159 F.3d 429, 433-34 (9th Cir. 1998).

#### F. Additional Considerations

##### 1. Later-Acquired Equities

It is unclear whether equities acquired after a final order of deportation must be given less weight than those acquired before the applicant was found to be deportable. Compare *Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995) (“The government rightly points out that equities flowing from [petitioner’s] marriage should be given little weight because it took place . . . three months after the BIA’s summary dismissal/final deportation order.”), and *Vasquez v. INS*, 767 F.2d 598, 602 (9th Cir. 1985) (affirming denial of motion to reopen because petitioner’s intra-proceedings marriage did not outweigh his violations of immigration law), with *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986) (concluding that the BIA’s denial of a motion to reopen to adjust status based on a “last-minute marriage” was arbitrary); see also *Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003) (discussing regulatory presumption of fraud for intra-proceedings marriages and requirements of bona fide

marriage exemption).

## 2. Credibility Determinations

The BIA should not make credibility determinations on motions to reopen. *See Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986) (“As motions to reopen are decided without a factual hearing, the Board is unable to make credibility determinations at this stage of the proceedings.”). Facts presented in supporting affidavits must be accepted as true unless inherently unbelievable. *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *see also Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003) (holding that where the BIA cites no evidence to support a finding that petitioner’s version of the facts is incredible, and none is apparent from the court’s review of the record, petitioner’s allegations will be credited).

## V. TIME AND NUMERICAL LIMITATIONS

### A. Generally

Generally, a motion to reopen must be filed within ninety days after a final decision is rendered. 8 C.F.R. § 1003.2(c)(2); 8 U.S.C. § 1229a(c)(6)(C)(i) (removal proceedings). A motion to reconsider must be filed within thirty days after the mailing of the BIA’s final decision. 8 C.F.R. § 1003.2(b)(2); 8 U.S.C. § 1229a(c)(5)(B) (removal proceedings).

A party may make one motion to reopen and one motion to reconsider. 8 C.F.R. § 1003.2(b)(2) and (c)(2); 8 U.S.C. § 1229a(c)(6)(A) and (c)(5)(A) (removal proceedings). The single-motion limitation on motions to reopen does not apply to in absentia orders of deportation. *See Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002) (noting that the limitation applies only to removal cases under IIRIRA’s permanent rules).

The limitation period begins to run when the BIA sends its decision to correct address. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1258-59 (9th Cir. 1996).

### B. Exceptions to the Ninety-Day/One-Motion Rule

## 1. In Absentia Orders

### a. Exceptional Circumstances

If an applicant who is order deported or removed in absentia can show that he or she failed to appear for the hearing due to “exceptional circumstances,” the applicant has 180 days to file a motion to reopen. *See* 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(1).

“The statute defines ‘exceptional circumstances’ as ‘circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.’” *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000) (citing 8 U.S.C. § 1252b(f)(2)); *see also* 8 U.S.C. § 1229a(e)(1). “This court must look to the particularized facts presented in each case in determining whether the petitioner has established exceptional circumstances.” *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir.), *cert. denied*, 123 S. Ct. 2605 (2003) (internal quotations omitted).

#### (1) Evidentiary Requirements

The BIA may not impose new proof requirements without notice. *See Singh v. INS*, 213 F.3d 1050 (9th Cir. 2000) (holding that the BIA violated due process where it required an applicant to produce an affidavit from his employer or doctor, and to immediately contact the immigration court); *cf. Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891 (9th Cir. 2002) (holding that petitioner had notice of the BIA’s evidentiary requirements).

#### (2) Cases Finding Exceptional Circumstances

*Lo v. Ashcroft*, No. 02-70384, 2003 WL 22016887 (9th Cir. 2003) (holding that ineffective assistance of counsel may constitute exceptional circumstances); *Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003) (same); *Fajardo v. INS*, 300 F.3d 1018, 1022 n.8 (9th Cir. 2002) (suggesting to BIA on remand that “it [would be] difficult to imagine” how the paralegal’s failure to inform the petitioner “of her need to appear at her deportation hearing would not constitute an exceptional circumstance”); *Singh v. INS*, 295 F.3d 1037, 1039-40 (9th Cir.), *cert. denied*, 123 S. Ct. 2605

(2003) (holding that petitioner established exceptional circumstances where he arrived late to his hearing based on a misunderstanding, and had “no possible reason to try to delay the hearing” because he was eligible for adjustment of status); *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999) (concluding that where applicant was 20 minutes late, and the IJ was still on bench, an in absentia order was too “harsh and unrealistic”); *see also Romani v. INS*, 146 F.3d 737 (9th Cir. 1998) (holding that where applicants were in the courthouse but did not enter the courtroom due to incorrect advice by lawyer’s assistant, they did not fail to appear for their hearing, and reopening was warranted); *Romero-Morales v. INS*, 25 F.3d 125 (9th Cir. 1994) (remanding for examination of circumstances raised in applicant’s motion for change of venue).

(3) Cases Finding No Exceptional Circumstances

*Valencia-Fragoso v. INS*, 321 F.3d 1204 (9th Cir. 2003) (per curiam) (holding that applicant who was 4 1/2 hours late, based on a misunderstanding of the time of the hearing, did not establish exceptional circumstances, especially where only possible relief was discretionary grant of voluntary departure); *Celis-Castellano v. Ashcroft*, 298 F.3d 888 (9th Cir. 2002) (severe asthma attack not exceptional); *Singh-Bhathal v. INS*, 170 F.3d 943, 944 (9th Cir. 1999) (holding that erroneous advice of immigration consultant to not appear at hearing did not constitute exceptional circumstances); *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) (holding that the mere filing of a motion to reopen did not constitute exceptional circumstances excusing petitioners’ failure to voluntarily depart by the deadline); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding that applicant’s failure to actually and personally receive the notice of hearing, which was mailed to his last known address, where receipt was acknowledged, was not an exceptional circumstance); *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996) (traffic congestion and parking difficulties not exceptional); *see also Hernandez-Vivas v. INS*, 23 F.3d 1557 (9th Cir. 1994) (holding under the previous standard that the mere filing of a motion for a change of venue did not establish reasonable cause for failure to appear).

b. Improper Notice of Hearing

A motion to reopen may be filed at any time if the applicant demonstrates improper notice of the hearing. *See* 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2).

Due process requires notice of an immigration hearing that is reasonably calculated to reach the interested parties. *See Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997). However, the applicant “does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied.” *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding that notice was sufficient where mailed to applicant’s last address, where receipt was acknowledged).

#### (1) Presumption of Proper Notice

The INS will benefit from a presumption of effective delivery if the notice of hearing was properly addressed; had sufficient postage; and was properly deposited in the mails. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008 (9th Cir. 2003). However, “[a] notice which fails to include a proper zip code is not properly addressed.” *Id.* at 1010. “Notice mailed to an address different from the one [the applicant] provided could not have conceivably been reasonably calculated to reach him.” *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. 2003).

The applicant is responsible for informing the immigration agency of his current address. *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *cf. Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998) (holding, under the pre-1992 statutory provision, that applicant who was not informed of the change-of-address requirement established reasonable cause for failure to appear at the hearing); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (same).

Where an applicant seeks to reopen proceedings on the basis of nondelivery or improper delivery of the notice, the IJ and BIA must consider the evidence submitted by the applicant. *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (*per curiam*).

#### (2) Notice by Certified Mail

Notice sent by certified mail is entitled to a stronger presumption of

effective delivery. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003); *see also Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) (per curiam) (concluding that “notice by certified mail sent to an alien’s last known address can be sufficient under the Act, even if no one signed for it”). This court has not addressed whether the presumption of delivery is rebutted where the INS lacks the certified return receipt. *See Busquets-Ivars*, 333 F.3d at 1009 (expressing “no opinion whether the record, lacking the return receipt, deprives the INS of the presumption that notice was effective”).

In the case of notice delivered by certified mail, an applicant may rebut the presumption of effective service if “her mailing address has remained unchanged, that neither she nor a responsible party working or residing at that address refused service, and that there was nondelivery or improper delivery by the Postal Service.” *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (per curiam).

### (3) Notice by Regular Mail

“[D]elivery by regular mail does not raise the same ‘strong presumption’ as certified mail, and less should be required to rebut such a presumption.” *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (holding that under the new statutory provision in 8 U.S.C. § 1229(a)(1), which does not require service by certified mail, the BIA erred by applying the strong presumptions of delivery accorded to certified mail under the former statutory provision). An applicant’s sworn affidavit that neither she nor a responsible party residing at her address received the notice “should ordinarily be sufficient to rebut the presumption of delivery and entitle [the applicant] to an evidentiary hearing.” *Id.* (noting that the applicant initiated the proceedings to obtain a benefit, appeared at an earlier hearing, and had no motive to avoid the hearing); *see also Urbina-Osejo*, 124 F.3d at 1317 (“To overcome the presumption of adequate notice when notice of a deportation hearing was sent by a constitutionally adequate method, Urbina must present[ ] substantial and probative evidence . . . demonstrating that there was improper delivery or that nondelivery was not due to the respondent's failure to provide an address where [s]he could receive mail.”) (internal quotations omitted).

### (4) Notice to Counsel

Notice to counsel is sufficient to establish notice to the applicant. *See Garcia v. INS*, 222 F.3d 1208 (9th Cir. 2000) (per curiam) (rejecting claim of inadequate notice where the INS personally served written notice of the hearing on applicant's counsel; noting that applicant did not raise an ineffective assistance of counsel claim). Where the INS fails to send notice to counsel of record, notice is insufficient. *See Dobrota v. INS*, 311 F.3d 1206 (9th Cir. 2002).

## 2. Asylum and Withholding Claims

A motion to reopen to apply or reapply for asylum or withholding based on changed country conditions that could not have been discovered or presented at the prior hearing, may be filed at any time. 8 C.F.R. § 1003.2(c)(3)(ii); 8 U.S.C. § 1229a(c)(6)(C)(ii) (removal proceedings).

## 3. Jointly-Filed Motions

An exception to the number and time restrictions exists if the motion to reopen is agreed upon by all parties and jointly filed. *See* 8 C.F.R. § 1003.2(c)(3)(iii); *Bolshakov v. INS*, 133 F.3d 1279, 1281-82 (9th Cir. 1998) (rejecting INS contention that the “exception in section 3.2(c)(3)(iii) is an administrative remedy that must be exhausted before an alien can petition the Court of Appeals”).

## 4. INS Motions Based on Fraud

The government may, at any time, bring a motion based on fraud in the original proceeding or a crime that would support termination of asylum. 8 C.F.R. § 1003.2(c)(3)(iv).

## 5. Movant in Custody

A motion to reopen may be filed at any time if the applicant demonstrates that he or she was in state or federal custody. *See* 8 C.F.R. § 1003.2(c)(3) (referring to 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2)).

## 6. Sua Sponte Reopening by the BIA

The BIA may at any time reopen proceedings sua sponte. 8 C.F.R. § 1003.2(a). This court lacks jurisdiction to review a claim that the BIA should have exercised its sua sponte power to reopen deportation proceedings. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002).

## VI. EQUITABLE TOLLING

The ninety-day/one-motion limitations are not jurisdictional, and are amenable to equitable tolling. *See Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003). Equitable tolling is available “when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error.” *Id.* at 897.

### A. Circumstances Beyond the Applicant’s Control

In *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc), this court held that equitable tolling is available “in situations where, despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim,” *id.* at 1193 (internal quotations omitted) (applying equitable tolling where INS officer repeatedly provided erroneous information to the applicant). “The inability to obtain vital information bearing on the existence of a claim need not be caused by the wrongful conduct of a third party. Rather, the party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstances beyond the party’s control.” *Id.*

### B. Fraudulent or Deceptive Conduct

This court recognizes equitable tolling in cases involving ineffective assistance by an attorney or representative, coupled with fraudulent or deceptive conduct. *See e.g., Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003). “Where the ineffective performance was that of an actual attorney and the attorney engaged in fraudulent activity causing an essential action in her client’s case to be undertaken ineffectively, out of time, or not at all, equitable tolling is available.” *Id.*; *see also Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002);

*Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

### C. Due Diligence

The filing deadline may be tolled until the petitioner, exercising due diligence, discovers the fraud, deception, or error. In cases involving ineffective assistance, this court has found that the limitation period may be tolled until the petitioner meets with new counsel to discuss his file, thereby becoming aware of the harm resulting from the misconduct of his prior representatives. See *Iturribarria*, 311 F.3d at 899; *Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002).

## VII. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. Presented Through a Motion to Reopen

A motion based on alleged ineffective assistance of counsel is properly presented through a motion to reopen, rather than a motion to reconsider. See *Iturribarria v. INS*, 321 F.3d 889, 894-97 (9th Cir. 2003). “Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (internal quotation omitted). A due process violation requires a showing of prejudice, which can be made if counsel’s performance “was so inadequate that it may have affected the outcome of the proceedings.” See *Iturribarria*, 321 F.3d at 899-90 (internal quotations omitted).

### B. The *Lozada* Requirements

A motion to reopen based on ineffective assistance of counsel generally must meet the procedural requirements set forth by the BIA in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). The petitioner must “1) submit an affidavit explaining his agreement with former counsel regarding his legal representation, 2) present evidence that prior counsel has been informed of the allegations against her and given an opportunity to respond, and 3) either show that a complaint against prior counsel was filed with the

proper disciplinary authorities or explain why no such complaint was filed.” *Iturribarria*, 321 F.3d at 900; *see also Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002).

### 1. Exceptions

However, the failure to comply with the *Lozada* requirements is not fatal where the alleged ineffective assistance is plain on the face of the administrative record. *See Castillo-Perez v. INS*, 212 F.3d 518, 525-26 (9th Cir. 2000); *see also Lo v. Ashcroft*, No. 02-70384, 2003 WL 22016887 (9th Cir. 2003) (noting court’s flexibility in applying the *Lozada* requirements); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (failure to file bar complaint not fatal); *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (substantial compliance sufficient); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124-25 (9th Cir. 2000) (holding that the BIA may not impose the *Lozada* requirements arbitrarily); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir.), *amended by*, 213 F.3d 1221 (9th Cir. 2000); *Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000).

### C. Cases Discussing Ineffective Assistance

*Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (failure to file brief on appeal to BIA constitutes ineffective assistance, but affirming the denial of habeas because petitioner could not show prejudice); *Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003) (holding that ineffective assistance of counsel constitutes exceptional circumstances warranting reopening); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) (holding that petitioner’s counsel was ineffective, but affirming the denial of the motion to reopen because petitioner could not show prejudice); *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (rejecting IAC claim based on single statement of counsel during proceedings); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (finding that petitioners established ineffective assistance); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000) (untimely appeal presented valid ineffective assistance claim); *Castillo-Perez v. INS*, 212 F.3d 518, 525-26 (9th Cir. 2000) (finding a “clear and obvious case of ineffective assistance of counsel” where counsel “failed, without any reason, to timely file [an] application” for suspension where petitioner was prima

facie eligible for relief); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir.) (holding that the IJ denied applicant her statutory right to counsel when he allowed an attorney whom she had never met and who had no understanding of her case to represent her), *amended by*, 213 F.3d 1221 (9th Cir. 2000); *Lata v. INS*, 204 F.3d 1241 (9th Cir. 2000) (finding that petitioner failed to show prejudice); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (holding that fraudulent legal representation by notary posing as an attorney established a meritorious IAC claim); *Ortiz v. INS*, 179 F.3d 1148 (9th Cir. 1999) (finding that petitioner failed to show prejudice); *Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986) (finding no ineffective assistance by accredited representative); *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986) (holding that attorney's decision to forego contesting deportability was a tactical decision that did not rise to the level of ineffective assistance of counsel); *Roque-Carranza v. INS*, 778 F.2d 1373 (9th Cir. 1985) (holding that the petitioner must raise his ineffective assistance of counsel claims before the BIA in a motion to reopen).

## **VIII. CASES ADDRESSING MOTIONS TO REOPEN OR RECONSIDER**

### **A. Motions to Reopen to Apply for Suspension**

*INS v. Rios-Pineda*, 471 U.S. 444 (1985) (denied); *INS v. Wang*, 450 U.S. 139 (1981) (per curiam) (denied); *Iturribarria v. INS*, 321 F.3d 889, 894-97 (9th Cir. 2003) (denied); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen to apply for suspension because "new" information regarding date of entry was available and capable of discovery prior to deportation hearing); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (reversed and remanded); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998) (reversed and remanded); *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) (petition denied); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (remanded); *Sequiera-Solano v. INS*, 104 F.3d 278 (9th Cir. 1997) (petition denied); *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995) (reversed and remanded); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991) (petition denied); *Gonzalez Batoon v. INS*, 791 F.2d 681 (9th Cir. 1986) (en banc); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Saldana v. INS*, 762 F.2d 824 (9th Cir. 1985), *as amended by*, 785 F.2d 650 (9th Cir. 1986) (reversed and remanded); *Duran v. INS*, 756

F.2d 1338 (9th Cir. 1985) (suspension and asylum; reversed and remanded on suspension claim).

#### B. Motions to Reopen to Apply for Asylum and Withholding

*INS v. Doherty*, 502 U.S. 314 (1992) (holding that the Attorney General did not abuse his discretion by denying the motion to reopen proceedings); *INS v. Abudu*, 485 U.S. 94 (1988) (holding that the BIA did not abuse its discretion by denying the motion to reopen proceedings); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (granting petition for review of BIA's denial of motion to reconsider based on due process violation); *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002) (petition granted); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (affirming denial of motion to reopen); *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (petition denied); *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996) (petition denied); *Romero-Morales v. INS*, 25 F.3d 125 (9th Cir. 1994) (petition granted); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984) (petition denied); *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987) (reversed and remanded); *Ghadessi v. INS*, 797 F.2d 804 (9th Cir. 1986) (petition granted); *Sakhavat v. INS*, 796 F.2d 1201 (9th Cir. 1986) (reversed and remanded); *Aviles-Torres v. INS*, 790 F.2d 1433 (9th Cir. 1986) (reversed and remanded); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986) (petition denied); *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985) (reversed and remanded); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985) (remanding on asylum claim); *Sangabi v. INS*, 763 F.2d 374 (9th Cir. 1985) (petition denied); *Samimi v. INS*, 714 F.2d 992, 994 (9th Cir. 1983) (remanded).

#### C. Motions to Reopen to Apply for Relief Under the Convention Against Torture

*Abassi v. INS*, 305 F.3d 1029 (9th Cir. 2002) (petition granted in part); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001) (vacated and remanded); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (motion to remand denied); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (motion to reopen to apply for Convention relief denied).

#### D. Motions to Reopen to Apply for Adjustment of Status

*Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003) (affirming BIA's denial of motion to remand to apply for adjustment of status based on marriage that occurred during deportation proceedings); *Zazueta-Carrillo v. INS*, 322 F.3d 1166 (9th Cir. 2003) (remanding BIA's denial of motion to reopen to apply for adjustment of status based on petitioner's failure to depart voluntarily within the time given by the BIA); *Castillo Ison v. INS*, 308 F.3d 1036 (9th Cir. 2002) (per curiam) (adjustment of status and immigrant visa; petition granted); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002) (holding that the court lacked jurisdiction to review the BIA's refusal to sua sponte reopen applicant's untimely motion to reopen to adjust status); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (reversing and remanding denial of motion to remand to adjust status); *Eide-Kahayon v. INS*, 86 F.3d 147 (9th Cir. 1996) (per curiam) (petition denied); *Caruncho v. INS*, 68 F.3d 356 (9th Cir. 1995) (petition denied); *Dielmann v. INS*, 34 F.3d 851 (9th Cir. 1994) (petition denied); *Ng v. INS*, 804 F.2d 534 (9th Cir. 1986) (reversed and remanded); *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986) (petition granted); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Ahwazi v. INS*, 751 F.2d 1120 (9th Cir. 1985) (petitions denied).

#### E. Motions to Reopen to Apply for Other Relief

*Taniguchi v. INS*, 303 F.3d 950 (9th Cir. 2002) (holding that petitioner failed to exhaust equitable tolling argument); *Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (Section 241(f) waiver; petition granted); *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (holding that the court lacks jurisdiction to review denial of aggravated felon's motion to reopen to apply for section 212(c) relief); *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996) (motion to reopen to request a humanitarian waiver; petition denied); *Alquisalas v. INS*, 61 F.3d 722 (9th Cir. 1995) (waiver of deportation; remanded); *Foroughi v. INS*, 60 F.3d 570 (9th Cir. 1995) (Section 212(c) relief; petition granted); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (Section 212(c) relief; petition granted); *Torres-Hernandez v. INS*, 812 F.2d 1262 (9th Cir. 1987) (Section 212(c) relief; petition denied); *Platero-Reymundo v. INS*, 807 F.2d 865 (9th Cir. 1987) (voluntary departure; petition denied); *Desting-Estime v. INS*, 804 F.2d 1439 (9th Cir. 1986) (to redesignate country of deportation; petition denied); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986) (reinstatement of voluntary

departure; finding no abuse of discretion); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Avila-Murrieta v. INS*, 762 F.2d 733 (9th Cir. 1985) (Section 212(c) relief; petition denied).

## **CRIMINAL ISSUES IN IMMIGRATION LAW**

### **I. OVERVIEW**

The Immigration and Nationality Act includes serious consequences for non-citizens convicted of various crimes. Conviction of a crime defined as an aggravated felony, for example, triggers deportation or removal proceedings, and precludes eligibility for many forms of discretionary relief. The 1996 amendments to the INA also eliminated direct judicial review of final orders of deportation and removal based on certain enumerated criminal offenses.

### **II. JUDICIAL REVIEW**

#### **A. Petition-For-Review Jurisdiction Under the Permanent Rules**

The IIRIRA permanent rules apply to removal proceedings initiated by the former INS on or after April 1, 1997. The permanent rules limit petition-for-review jurisdiction for individuals removable based on certain enumerated crimes. Section 1252(a)(2)(C) of Title 8 provides:

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

The enumerated criminal offenses include the criminal grounds of inadmissibility, 8 U.S.C. § 1182(a)(2), and the following criminal grounds of deportability: conviction of an aggravated felony at any time after admission, 8 U.S.C. § 1227(a)(2)(A)(iii), controlled substance convictions and drug abuse 8 U.S.C. § 1227(a)(2)(B), certain firearm offenses, 8 U.S.C. § 1227(a)(2)(C), miscellaneous crimes, 8 U.S.C. § 1227(a)(2)(D), and two or more crimes involving moral turpitude, not arising out of a single scheme of

criminal misconduct, 8 U.S.C. § 1227(a)(2)(A)(ii), for which both crimes carry possible sentences of one year or longer, 8 U.S.C. § 1227(a)(2)(A)(i).

The term “criminal offense” does not include drug addiction. *See Pondoc-Hernaez v. INS*, 244 F.3d 752 (9th Cir. 2001) (holding under the transitional rules that drug addiction cannot be considered a “criminal offense” for purposes of removing jurisdiction).

B. Limits on Section 1252(a)(2)(C)

1. Applicant Must be Charged With and Found Removable Based on Enumerated Crime

This court has held that the jurisdiction-stripping provision in section 1252(a)(2)(C) applies only where the agency has determined that the petitioner is removable based on one of the enumerated criminal grounds. *Alvarez-Santos v. INS*, 332 F.3d 1245 (9th Cir. 2003) (holding that the court retained jurisdiction where the agency could have found applicant removable on a covered criminal ground, but did not); *Chowdhury v. INS*, 249 F.3d 970, 975 (9th Cir. 2001) (holding that the court was not divested of jurisdiction where the petitioner was not charged with or found removable on an enumerated criminal ground, and the INS raised the conviction for the first time before the court of appeals); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (“[T]he INS’ mere allegation that a crime was committed is insufficient to bar appellate jurisdiction” under the transitional rules.); *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (rejecting INS argument that commission of an aggravated felony would be sufficient to bar jurisdiction even if the INS did not charge a felony in the order to show cause).

However, where the agency orders the applicant deported on the basis of a criminal ground, but the charging document fails to characterize the crime as an aggravated felony, the jurisdiction-stripping provision still applies. *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (transitional rules).

## 2. Jurisdiction to Determine Jurisdiction

The court retains jurisdiction to determine its own jurisdiction. *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). “In other words, courts retain jurisdiction to address three threshold issues: whether [the petitioner] is [1] an alien, [2] *removable*, and [3] removable because of a conviction for a qualifying crime.” *Zavalleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotations omitted); *see also Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (reviewing equal protection challenge to the definition of conviction); *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001) (retaining jurisdiction to review claim that petitioner was not an alien). Often “the jurisdictional question and the merits collapse into one.” *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). The court “must investigate the alleged underlying conviction as thoroughly as is necessary to ascertain whether the jurisdictional bar applies.” *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 879 (9th Cir. 2003).

If the court determines that the applicant has been convicted of an enumerated crime, the court lacks direct judicial review over the petition for review. *See Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073 (9th Cir. 2001). The elimination of direct review applies to constitutional and other claims. *See e.g., Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003) (no jurisdiction to review due process and equal protection claims on petition for review); *Flores-Miramontes*, 212 F.3d 1133, 1143 (9th Cir. 2000) (no jurisdiction to review due process and access to the courts claims on petition for review); *Alfaro-Reyes v. INS*, 224 F.3d 916 (9th Cir. 2000). “Because constitutional claims raised by criminal aliens can be raised in habeas corpus proceedings, we have declined to construe the statute so as to permit direct review by this Court.” *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 878-79 (9th Cir. 2003).

## 3. Habeas Corpus Jurisdiction Remains

Where direct judicial review is unavailable over final orders of deportation or removal, a petitioner may file a petition for habeas corpus in district court under 28 U.S.C. § 2241. *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that AEDPA and IIRIRA did not repeal habeas corpus jurisdiction).

For a more information on § 2241 habeas petitions, *see* Immigration

## Habeas Proceedings.

### 4. IIRIRA Transitional Rules

For deportation and exclusion cases in the pipeline before the effective date of IIRIRA, certain transitional rules apply. Where the final agency order was entered on or after October 31, 1996, and the former INS initiated deportation proceedings before April 1, 1997, proceedings continue to be governed by 8 U.S.C. § 1105a(a), as modified by the transitional changes in judicial review. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Section 309(c)(4)(G) of the IIRIRA transitional rules provides:

[T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

This jurisdictional provision eliminates petition-for-review jurisdiction where an applicant is inadmissible or deportable by reason of having committed an enumerated criminal offense. *See Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1135 (9th Cir. 2000); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). The court “retain[s] jurisdiction, however, to determine whether [an applicant] has committed a deportable offense described in section 309(c)(4)(G).” *Cardenas-Uriarte*, 227 F.3d at 1135.

### 5. Pre-IIRIRA Changes

For information on the earlier jurisdictional changes made by section 440(a) of the AEDPA in April 1996, *see Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996) (affirming the constitutionality of section section 440(a), and

holding that it applied retroactively to pending cases); *Elramly v. INS*, 131 F.3d 1284, *as amended on denial of rehearing*, (9th Cir. 1997) (per curiam); *Abdel-Razek v. INS*, 114 F.3d 831 (9th Cir. 1997).

### III. DEFINITION OF CONVICTION

IIRIRA amended the INA to define a conviction as “a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” 8 U.S.C. § 1101(a)(48)(A); *Murillo-Espinoza v. INS*, 261 F.3d 771, 773-74 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728, 741-42 (9th Cir. 2000).

#### A. Finality

“A criminal conviction may not be considered by an IJ until it is final.” *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993). A conviction is final for immigration purposes “[o]nce an alien has been convicted by a court of competent jurisdiction and exhausted the direct appeals to which he is entitled.” *Id.* (internal quotations omitted).

#### B. Pre-Trial Diversion

Participation in a pre-trial diversion program, where no guilty plea has been entered, does not constitute a conviction. *See Paredes-Urrestarazu v INS*, 36 F.3d 801 (9th Cir. 1994) (arrest and participation in California pretrial diversion program did not constitute a conviction, but the event could be considered for discretionary purposes); *see also Matter of Grullon*, 20 I. & N. Dec. 12 (BIA 1989) (finding, pre-IIRIRA, no conviction where alien participated in a pretrial intervention program and no guilty plea had been entered).

#### C. Juvenile proceedings

The BIA has held that juvenile delinquency and youthful offender adjudications do not constitute convictions under the INA. *See In Re Devison*, 22 I. & N. Dec. 1362 (BIA 2000) (en banc).

#### D. Post-Conviction Relief

##### 1. Reversed Convictions

A conviction overturned on the merits may not be used as the basis for a deportation order. *See e.g., Lujan-Armendariz v. INS*, 222 F.3d 728, 746-47 & n.30 (9th Cir. 2000) (suggesting that “a reversed conviction is of no force” under the INA); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990).

##### 2. Expunged Convictions

After the incorporation of the definition of conviction in the INA, the Ninth Circuit has held that expungement of a state conviction does not eliminate the immigration consequences of that conviction. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003) (holding that an expunged conviction for lewdness with a child still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002) (expungement of a misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001) (holding that an expunged theft conviction still qualified as an aggravated felony).

##### a. Exception for Minor Drug Offenses

However, in the Ninth Circuit, first convictions for simple drug possession may be expunged. *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). Less serious offenses such as possession of paraphernalia also may be expunged. *Cardenas-Urriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000) (remanding for determination of whether applicant qualified for federal first offender treatment); *see also Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (reversing, on equal protection grounds, BIA’s refusal to recognize foreign expungement of simple possession that would have qualified for federal first offender treatment in the United States); *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994) (holding that the BIA’s

refusal to recognize state expungement for first time marijuana possession violated applicant's right to equal protection); *cf. Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994) (holding that individuals who could not have benefited from federal first offender treatment were not entitled to receive favorable immigration treatment, even if they qualified for rehabilitation under state law).

### 3. Writ of Audita Querela

A state court vacatur of a drug conviction pursuant to a writ of *audita querela* does not eliminate the immigration consequences of that conviction. *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998) (noting that petitioner did not identify a "new defense or legal defect in his conviction," and he "requested that the conviction be set aside solely in order to prevent deportation and the subsequent hardship to himself and his family").

## IV. DEFINITION OF SENTENCE

Under the INA, "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B).

### A. One-Year Sentences

A sentence of "at least one year" means a sentence of 365 days or more. *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001); *Bayudan v. Ashcroft*, 298 F.3d 799 (9th Cir. 2002) (order vacating previous dismissal for lack of jurisdiction because 364-day sentence for manslaughter was not a crime of violence constituting an aggravated felony).

A sentence "for which the term of imprisonment [is] at least one year" means the actual sentence imposed by the court. *Alberto-Gonzalez v. INS*, 215 F.3d 906, 909-10 (9th Cir. 2000); *accord United States v. Pimentel-Flores*, No. 02-10353, 2003 WL 21883944 (9th Cir. Aug. 11, 2003).

### B. Enhancements Not Included

In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), the court held that separate recidivist sentencing enhancements may not be taken into account when determining the maximum possible sentence for an offense. *Id.* at 1209-11. In *Corona-Sanchez*, the defendant received a two-year sentence for his conviction for petty theft with a prior. However, the court held that his conviction was not an aggravated felony under federal sentencing law because the maximum possible sentence for petty theft in California, without the recidivist enhancement, was six months. *Id.*; see also *United States v. Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003) (holding that second Arizona drug conviction did not constitute an aggravated felony for sentencing purposes after eliminating recidivism enhancement).

### C. Wobblers

When evaluating a state offense punishable as either a felony or a misdemeanor, the BIA is bound by the state court's designation of the offense as a misdemeanor. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003); see also *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999) (holding that an undesignated probationary sentence may not be considered a sentence for the maximum period).

### D. Probation Violations

A two-year term of imprisonment imposed after revocation of probation is a "term of imprisonment of at least one year." *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (holding that defendant in unlawful reentry case was convicted of a prior aggravated felony even though he was initially sentenced only to probation), *cert. denied*, 534 U.S. 1151 (2002).

## V. ANALYZING SPECIFIC CRIMES

### A. Standard of Review

This court reviews de novo whether a state or federal conviction is a relevant immigration offense. See *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (reviewing de novo whether federal conviction was a deportable offense).

## B. Categorical Approach

To determine whether specific crime falls within a particular immigration category (i.e., aggravated felony, crime of moral turpitude, or crime of violence) the court must “make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the state statute] is broader than, and so does not categorically fall within, this generic definition.” *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *Chang v. INS*, 307 F.3d 1185 (9th Cir 2002) (“[A]n offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term.”) (internal quotations omitted).

The court looks “only to the fact of conviction and the statutory definition of the prior offense.” *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003) (internal quotations and citation omitted). In other words, the categorical definition is based on the elements of the statute, not the defendant’s conduct. *See Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (“We do not . . . look to the particular facts underlying the conviction.”).

If the statute is overly inclusive, by criminalizing conduct that would not fall within the generic definition of the crime, the conviction will not facially qualify as an aggravated felony or other relevant immigration offense. *See Chang v. INS*, 307 F.3d 1185 (9th Cir 2002).

## C. Modified Categorical Approach

If the statute is “divisible,” i.e., broader than the generic definition of the crime, the court conducts a modified categorical analysis. *See id.* Under this approach, the court will “consider whether documentation or other judicially noticeable facts in the record indicate that [the applicant] was convicted of the elements of the generically defined crime.” *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *Randhawa v. Ashcroft*, 298 F.3d 1148 (9th Cir. 2002) (stating that the court will “conduct a limited examination of documents in the record to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially over-inclusive”).

*See* Record of Conviction, below.

#### D. Record of Conviction

“[C]harging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment may suffice to document the elements of conviction” under the modified categorical approach. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). “Charging papers alone are never sufficient,” but “may be considered in combination with a signed plea agreement.” *Corona-Sanchez*, 291 F.3d at 1211 (internal citation omitted); *see also United States v. Taylor*, 495 U.S. 575, 601 (1990) (noting the “practical difficulties and potential unfairness of a factual approach,” rather than a categorical approach, to a defendant’s prior offenses); *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001) (en banc) (remanding for review of record of conviction).

##### 1. Probation or Presentence Reports

In *Corona-Sanchez*, the court held that the defendant’s presentence report, which recited the facts of the crime as alleged in the charging papers, was not sufficient to establish that the defendant pled guilty to the elements of the generic definition of a crime. *Id.* at 1212 (declining to decide whether information in a presentence report from “an identified, acceptable source” can constitute evidence under the modified categorical approach); *see also Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (declining to decide whether a court may consider statements in a brief under the modified categorical approach). However, in *Abreu-Reyes v. INS*, 292 F.3d 1029 (9th Cir. 2002), the court allowed the presentence report to prove amount of loss in a fraud case where applicant did not contest the factual issues in the report).

In *Chang v. INS*, 307 F.3d 1185 (9th Cir 2002), the court noted the “noticeable tension in our recent caselaw concerning whether the INS may ever rely on presentence reports to develop the factual basis of a convicted offense.” *Id.* (holding that the BIA erred when it relied on the PSR because applicant’s plea agreement specified the amount of the loss).

## E. Applicability of Criminal Sentencing Cases in the Immigration Context

The Ninth Circuit has not explicitly held that circuit rulings in the criminal context necessarily control decisions in the immigration context across the board. However, in *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003), the court held that for purposes of determining whether a crime constituted the aggravated felony of sexual abuse of a minor, a prior Ninth Circuit criminal case was controlling, *see id.* at 1066-67 (citing *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999), *cert. denied*, 531 U.S. 1167 (2001)); *see also United States v. Ibarra-Galindo*, 206 F.3d 1337, 1341 n.2 (9th Cir. 2000) (“[W]e have never even suggested that we would interpret 18 U.S.C. § 924(c)(2) differently in applying the Immigration and Nationality Act than we now interpret it in applying the Sentencing Guidelines.”), *cert. denied*, 531 U.S. 1102 (2001).

The Ninth Circuit has applied criminal cases in a number of immigration cases, including:

*Huerta-Guevara v. Ashcroft*, 321 F.3d 883 (9th Cir. 2003) (applying generic definition of “theft offense” adopted in *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc)); *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003) (same); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (applying generic definition of “theft offense” adopted in *United States v. Corona-Sanchez*, and citing criminal cases for description of the categorical approach); *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002) (citing criminal cases for description of the categorical approach); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (per curiam) (applying construction of “crime of violence” from sentencing case); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001) (applying construction of crime of violence from criminal case); *Castro-Baez v. Reno*, 217 F.3d 1057, 1058-59 (9th Cir. 2000) (applying definition of rape adopted in a criminal case); *Ye v. INS*, 214 F.3d 1128, 1135 n.5 (9th Cir. 2000) (applying the uniform definition of “burglary” in the Career Criminals Amendment Act, and citing criminal cases for description of the categorical approach).

## VI. AGGRAVATED FELONIES

Several dozen offenses are categorized as aggravated felonies under 8 U.S.C. § 1101(a)(43). An applicant is deportable or removable if convicted of an aggravated felony at any time after admission. *See Ocampo-Duran v. Ashcroft*, 254 F.3d 1133 (9th Cir. 2001) (holding that “admission” includes adjustment of status). Aggravated felons are also denied direct judicial review from a final order of removal or deportation, *see Aragon-Ayon v. INS*, 206 F.3d 847, 850 (9th Cir. 2000), and are disqualified from many forms of relief including asylum, voluntary departure, and cancellation of removal, *United States v. Corona-Sanchez*, 291 F.3d 1201, 1210 n.8 (9th Cir. 2002) (en banc). Moreover, convictions for aggravated felonies trigger mandatory detention without bond, *see Demore v. Kim*, 123 S. Ct. 1708 (2003), and a conviction for illegal reentry under 8 U.S.C. § 1326 will carry a significantly higher federal prison term if the defendant was previously convicted of an aggravated felony. *See* 8 U.S.C. § 1326(b)(2).

#### A. Increasingly Broad Definition

The aggravated felony category was created by the Anti-Drug Abuse Act of 1988, and included drug trafficking, arms trafficking, murder, and any conspiracy to commit those acts. *United States v. Andrino-Carillo*, 63 F.3d 922, 925 (9th Cir. 1995).

The Immigration Act of 1990 added more aggravated felonies, including “illicit trafficking” in a controlled substance, money laundering, and crimes of violence for which the term of imprisonment imposed was at least five years. *Id.*

New aggravated felonies were added by the Violent Crime Control and Law Enforcement Act of 1994, the Immigration and Nationality Technical Corrections Act of 1994, and section 440(e) of the Antiterrorism and Effective Death Penalty Act of 1996.

#### 1. IIRIRA Amendments

Section 321 of IIRIRA again expanded the list of crimes defined as “aggravated felonies.” *See e.g. United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002) (noting that “IIRIRA expanded the definition of ‘aggravated felony’ by [inter alia] reducing the prison sentence required to

trigger ‘aggravated felony’ status for burglary from five years to one year.”); *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) (IIRIRA added new offenses and “dramatically broadened the definition’s reach by expanding the terms of many offenses already denominated aggravated felonies.”) (internal quotations omitted); *see also INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); 8 U.S.C. § 1101(a)(43) (definition of aggravated felony).

## 2. Retroactive Application

The expanded definition of aggravated felony applies “retroactively to all defined offenses whenever committed, and to make aliens so convicted eligible for deportation notwithstanding the passage of time between the crime and the removal order.” *Aragon-Ayon v. INS*, 206 F.3d 847, 853 (9th Cir. 2000). The new definition applies to all “actions taken” by the Attorney General on or after September 30, 1996, regardless of the date of conviction. *Id.* at 852 (citing *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997)); *but cf. INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that the elimination of discretionary relief based on the expanded aggravated felony definition had an impermissible retroactive effect on certain aliens).

### B. Theft & Burglary

A theft or burglary offense is an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) if the term of imprisonment is at least one year. *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), the court adopted the following generic definition of theft offense: “a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Id.* at 1205 (holding that a California conviction for petty theft with a prior did not facially constitute an aggravated felony because the statute was over-inclusive, and because the maximum possible sentence was less than one year).

The critical aspect of the generic definition of theft is “the criminal intent to deprive the owner.” *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th

Cir. 2003). Aiding and abetting theft does not constitute theft for purposes of the aggravated felony definition. *Corona-Sanchez*, 291 F.3d at 1207-08 (noting that “[u]nder California law, aiding and abetting liability is quite broad, extending even to promotion and instigation.”).

A burglary offense is “the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

#### 1. Cases Addressing Theft & Burglary Offenses

*Huerta-Guevara v. Ashcroft*, 321 F.3d 883 (9th Cir. 2003) (holding that Arizona conviction for possession of a stolen vehicle does not facially qualify as a theft offense that amounts to an aggravated felony); *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003) (holding that Arizona conviction for theft of a means of transportation is not a theft offense that amounts to an aggravated felony); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (holding that federal conviction for possession of stolen mail is a theft offense amounting to an aggravated felony); *United States v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002) (holding that Arizona conviction for unlawful use of means of transportation is not a theft offense for purposes of sentencing enhancement); *see also Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (holding that conviction for vehicle burglary is not a burglary or a crime of violence as these terms are used in the definition of aggravated felony).

#### C. Murder, Rape or Sexual Abuse of a Minor

The offenses of murder, rape and sexual abuse of a minor constitute aggravated felonies. 8 U.S.C. § 1101(a)(43)(A); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003) (holding that conviction for lewdness with a child under fourteen years of age in violation of Nevada law constitutes sexual abuse of a minor); *United States v. Marin-Navarette*, 244 F.3d 1284 (9th Cir. 2001) (Washington conviction for third-degree attempted child molestation was an aggravated felony for sentencing purposes), *cert. denied*, 534 U.S. 941 (2001); *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999) (holding that a California conviction for lewd conduct with a child under the age of 14 is an aggravated felony for purposes of a sentencing

enhancement); *Castro-Baez v. INS*, 217 F.3d 1057 (9th Cir. 2000) (rape is an aggravated felony).

The Ninth Circuit is currently considering whether a state conviction for misdemeanor statutory rape constitutes sexual abuse of a minor. *See e.g., Valdez Camacho v Ashcroft*, No. 01-71517.

#### D. Fraud, Money Laundering, and Counterfeiting

Under 8 U.S.C. § 1101(a)(43)(M)(i), an offense involving “fraud or deceit in which the loss to the victim or victims exceeds \$10,000” is an aggravated felony. *See Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (conviction for one count of bank fraud was not an aggravated felony where the loss to the victim, as noted in the plea agreement, was under \$10,000); *Abreu-Reyes v. INS*, 292 F.3d 1029 (9th Cir. 2002) (convictions for bribery and subscribing to a false tax return involved fraud or deceit and loss over \$10,000).

In order for a conviction for money laundering to constitute an aggravated felony under 8 U.S.C. 1101(a)(43)(D), the amount of funds laundered must be over \$10,000. *See Chowdhury v. INS*, 249 F.3d 970, 975 (9th Cir. 2001) (conviction for money laundering was not an aggravated felony because amount of funds laundered was less than \$10,000). A federal conviction for possession of counterfeit obligations is an aggravated felony under 8 U.S.C. 1101(a)(43)(R). *Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000).

#### E. Firearms Offenses

*United States v. Mendoza-Reyes*, 331 F.3d 1119 (9th Cir. 2003) (holding that Washington conviction for first degree unlawful possession of a firearm is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii)); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(E) for sentencing purposes), *cert. denied*, 534 U.S. 931 (2001); *Valerio-Ochoa v. INS*, 241 F.3d 1092 (9th Cir. 2001) (California conviction for “willfully discharg[ing] a firearm in a grossly negligent manner” is a deportable firearms offense), *cert. denied*, 534

U.S. 821 (2001); *United States v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000) (Washington conviction for possession of firearm by non-citizen was not an “aggravated felony” for purposes of sentencing enhancement).

#### F. Alien Smuggling

Harboring illegal aliens qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(N) as an offense related to alien smuggling. *See Castro-Espinosa v. Ashcroft*, 257 F.3d 1130 (9th Cir. 2001).

### VII. CONTROLLED SUBSTANCE OFFENSES

The definition of aggravated felony includes “illicit 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.)” 8 U.S.C. § 1101(a)(43)(B).

Section 924(c) of Title 18 defines “drug trafficking crime” to include “any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).”

“[T]he Controlled Substances Act defines ‘felony’ as ‘any Federal or State offense *classified* by applicable Federal or State law as a felony (emphasis added).” *United States v. Robles-Rodriguez*, 281 F.3d 900, 903-04 (9th Cir. 2002) (citing 28 U.S.C. § 802(13)). This court has held for sentencing purposes that a state felony offense could be an aggravated felony, even if it would only be punishable as a misdemeanor under federal law. *See United States v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000) (“[W]e agree with the six other circuits that have addressed this issue that the term ‘felony’ as used within § 924(c)(2) refers to crimes denominated as felonies under *either* federal *or* state law.”), *cert. denied*, 531 U.S. 1102 (2001).

#### A. Simple Possession of Controlled Substance

A drug conviction for simple possession will be an aggravated felony only if a potential sentence of more than a year can be imposed by the convicting jurisdiction. *United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002) (Arizona conviction for drug possession not an aggravated felony because under Arizona Proposition 200, incarceration was not authorized); *cf. United States v. Arellano-Torres*, 303 F.3d 1173 (9th Cir. 2002) (under Nevada Proposition 36, conviction for first possession was an aggravated felony for sentencing purposes).

#### B. Expungement of First Possession Conviction

In the Ninth Circuit, first convictions for simple drug possession may be expunged, and will not count as conviction for immigration purposes. *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000); *see also* Post-Conviction Relief, above.

#### C. Solicitation

A generic solicitation offense is not a law related to a controlled substance, and is also not an aggravated felony. *See United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc) (California conviction for transporting marijuana was not an aggravated felony on its face because the statute punishes solicitation); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (Arizona conviction for solicitation to possess cocaine is not a violation of a law relating to a controlled substance, and is therefore not a deportable offense); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (Arizona conviction for solicitation to possess marijuana for sale is not a violation of a law relating to a controlled substance, and was therefore not a deportable offense).

#### D. Accessory After the Fact

A conviction for being an accessory after the fact to the manufacture of methamphetamine is an aggravated felony. *See Olivera-Garcia v. INS*, 328 F.3d 1083 (9th Cir. 2003) (leaving open the question of whether a conviction solely under the federal accessory after the fact statute would be a violation of law relating to a controlled substance).

## E. Drug-Related Crimes

*Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) (holding that applicant was excludable because he admitted prior use of marijuana in the Philippines, which constituted the essential elements of a violation of a foreign state’s law relating to a controlled substance); *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that Arizona conviction for possession of drug paraphernalia was a conviction relating to a controlled substance); *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (conviction for being under the influence of amphetamines is a deportable offense); *Johnson v. INS*, 971 F.2d 340 (9th Cir. 1992) (holding that conviction for violation of the Travel Act, was a violation of a law relating to a controlled substance, rendering applicant deportable).

## VIII. CRIMES OF VIOLENCE

The definition of aggravated felony includes a “crime of violence” as defined by 18 U.S.C. § 16, for which the term of imprisonment imposed is at least one year. 8 U.S.C. § 1101(a)(43)(F); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). There is an exception for purely political offenses. 8 U.S.C. § 1101(a)(43)(F). “Section 16 of Title 18, in turn, provides that ‘crime of violence’ means: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *Ye*, 214 F.3d at 1133 (quoting 8 U.S.C. § 16).

### A. Felony Driving Under the Influence

Felony DUI is not a crime of violence. *See Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (per curiam); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (holding that a California conviction for driving under influence with injury to another was not “crime of violence” under federal sentencing law).

### B. Battery

*United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002) (holding that Nevada conviction for battery causing substantial bodily harm, which was classified as a gross misdemeanor under state law, was an aggravated felony under federal sentencing law), *cert. denied*, 123 S. Ct. 1921 (2003); *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001) (noting that applicant's convictions for assaulting his wife and children were crimes of violence within the definition of 18 U.S.C. § 16(a)).

### C. Possession of Firearms

In the criminal context, being a felon in possession of firearms is not a crime of violence. *See e.g., United States v. Garcia-Cruz*, 40 F.3d 986 (9th Cir. 1994) (possession of firearm is not a crime of violence for purposes of career offender status); *see also United States v. Sakahian*, 965 F.2d 740 (9th Cir. 1992) (same); *United States v. Canon*, 993 F.2d 1439, 1441 (9th Cir. 1993) (possession of firearm is not a crime of violence for purposes of 18 U.S.C. § 924(c)); *cf. United States v. Hayes*, 7 F.3d 144 (9th Cir. 1993) (possession of unregistered sawed-off shotgun is crime of violence for purposes of career offender status).

However, being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(E), the specific firearms provision of the aggravated felony definition. *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony under the specific firearms provision of the aggravated felony definition), *cert. denied*, 534 U.S. 931 (2001).

### D. Other Cases Interpreting Crimes of Violence

*United States v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002) (Arizona conviction for felony child endangerment was not categorically an aggravated felony for enhancement purposes); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001) (California conviction for involuntary manslaughter constitutes a crime of violence); *see also United States v. Springfield*, 829 F.2d 860, 863 (9th Cir. 1987) (same); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (conviction for entry into a locked vehicle is not a crime of violence); *United States v. Wood*, 52 F.3d 272, 275 (9th Cir. 1995) (Washington conviction for

indecent liberties with minor was a “crime of violence” for purposes of the career offender provision); *United States v. Innis*, 7 F.3d 840, 848-52 (9th Cir. 1993) (holding that being an accessory after the fact to murder for hire was not a crime of violence under federal sentencing law); *United States v. Arrellano-Rios*, 799 F.2d 520, 523 (9th Cir. 1986) (drug trafficking is not a crime of violence under 18 U.S.C. § 924(c)).

## IX. CRIMES OF MORAL TURPITUDE

“The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.” *Jordan v. De George*, 341 U.S. 223, 232 (1951) (holding that crime of conspiracy to defraud United States of taxes was a crime of moral turpitude). Additionally, “certain crimes necessarily involving rather grave acts of baseness or depravity may qualify as crimes of moral turpitude even though they have no element of fraud.” *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir.1995) (internal quotations omitted). For example, “spousal abuse, child abuse, first-degree incest, and having carnal knowledge of a 15-year-old female, all involve moral turpitude.” *Id.*

Where an act is only statutorily prohibited, rather than inherently wrong, the act will generally not involve moral turpitude. *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (noting difference between *malum prohibitum*, an act only statutorily prohibited, and *malum in se*, an act inherently wrong).

### A. Fraud Cases

*Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (holding that convictions for making a false attestation on an employment verification form and using a false Social Security number do not constitute crimes of moral turpitude); *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999) (stating in illegal reentry case that petty theft constitutes a crime of moral turpitude); *Rashtabadi v. INS*, 23 F.3d 1562 (9th Cir. 1994) (grand theft is a crime of moral turpitude); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993) (structuring transaction to avoid currency reporting requirement was not crime of moral turpitude because no intent to defraud).

## B. Base or Depraved Acts

*Zavaleta-Gallegos v. INS*, 261 F.3d 951 (9th Cir. 2001) (conviction for stalking is a crime of moral turpitude); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir.1994) (“Incest . . . involves an act of baseness or depravity contrary to accepted moral standards, and we hold that it too is a ‘crime involving moral turpitude.’”); *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993) (willful infliction of injury to a spouse is a crime of moral turpitude); *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) (willful infliction of injury to a child is a crime of moral turpitude).

## C. Other Cases Discussing Crimes of Moral Turpitude

*Murillo-Salmeron v. INS*, 327 F.3d 898 (9th Cir. 2003) (Simple DUI convictions are not crimes of moral turpitude); *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003) (Arizona conviction for aggravated driving under the influence is not a crime of moral turpitude); *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 n. 4 (9th Cir.1995) (crime of malicious mischief was not crime of moral turpitude); *Perez v. INS*, 116 F.3d 405 (9th Cir. 1997) (discussing 1996 amendments to crime of moral turpitude provisions); *United States v. Chu Kong Yin*, 935 F.2d 990 (9th Cir. 1991) (crimes of gambling and criminal intimidation did not necessarily involve moral turpitude).

## D. Single Scheme of Criminal Misconduct

*See Ye v. INS*, 214 F.3d 1128, 1134 n.5 (9th Cir. 2000) (rejecting argument that the court lacked jurisdiction because the INS did not show that the two counts of vehicle burglary arose out of different criminal schemes); *Leon-Hernandez v. INS*, 926 F.2d 902 (9th Cir. 1991) (not finding single scheme); *Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990) (finding single scheme); *see also Alberto-Gonzalez v. INS*, 215 F.3d 906 (9th Cir. 2000) (jurisdiction under the transitional rules not eliminated because second crime of moral turpitude did not have the requisite sentence).

## E. Petty Offense Exception

A non-citizen with one crime of moral turpitude is not inadmissible if she meets the petty offense exception. A crime of moral turpitude will meet the petty offense exception where “the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months.” *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999) (citing 8 U.S.C. § 1182(a)(2)(A)(ii)(II)).

## **X. DOMESTIC VIOLENCE CRIMES**

Conviction of a state or federal crime of domestic violence is a new ground of deportation added in 1996 by IIRIRA. *See* 8 U.S.C. § 1227(a)(2)(E)(i). The statute covers “any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.” *Id.* The act also covers violators of protective orders. *See* 8 U.S.C. § 1227(a)(2)(E)(ii).

There is no comparable ground of inadmissibility. The Ninth Circuit has not yet reviewed this ground of removal. *Cf. United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003) (interpreting crime of domestic violence in the context of the federal firearms statute).

# IMMIGRATION HABEAS PROCEEDINGS

## I. OVERVIEW

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that the jurisdictional provisions in AEDPA and IIRIRA did not repeal the availability of habeas corpus jurisdiction under 28 U.S.C. § 2241 to challenge the legality of the agency's deportation and removal orders, *see also Calcano-Martinez v. INS*, 533 U.S. 348 (2001). Section 2241 confers jurisdiction upon the federal courts to hear claims that a person "is being held in custody in violation of the Constitution or laws [or treaties] of the United States." *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001) (concluding that alien may challenge post-removal-period detention in habeas proceedings) (internal quotations omitted). Habeas petitioners may also raise questions of law arising in the context of discretionary relief. *See St. Cyr*, 533 U.S. at 307-08 (reviewing impact of 1996 restrictions on the availability of discretionary relief).

## II. REQUIREMENTS

### A. Proper Respondent

This court has held that the proper respondent for an immigration detainee's habeas petition is the Secretary of the Department of Homeland Security, "and at least for the time being, the Attorney General." *Armentero v. INS*, No. 02-55368, 2003 WL 22004997 (9th Cir. Aug. 26, 2003) (holding that the INS is not the proper respondent, and remanding with instructions to allow petitioner to amend his petition to add the proper respondents). The court also noted that its analysis of the appropriate respondents "logically applies" to immigration habeas petitioners who are not in INS detention. *Id.* at \*15 n.2.

### B. Proper Court

"[T]he court of appeals does not have jurisdiction to entertain an original petition for a writ of habeas corpus." *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073 (9th Cir. 2001). "[T]he district court alone has jurisdiction over an original habeas petition." *Id.* at 1075.

## 1. Transfer Statute

This court may treat a petition for review as a habeas petition, and transfer the case to the district court under the federal transfer statute, 28 U.S.C. § 1631. *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073-74 (9th Cir. 2001). “Transfer is appropriate under § 1631 if three conditions are met: (1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action was filed; and (3) the transfer is in the interest of justice. *Id.* “Normally transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is time consuming and justice-defeating.” *Id.* (internal quotations omitted); *see also Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123 (9th Cir. 2001) (transfer from district court to the court of appeals); *cf. Hose v. INS*, 180 F.3d 992 (9th Cir. 1999) (en banc) (holding that transfer would not be appropriate).

### C. “In Custody” Requirement

The “in custody” requirement for habeas jurisdiction is broad enough to cover individuals subject to a final order of deportation or removal. *See e.g., Miranda v. Reno*, 238 F.3d 1156, 1158-59 (9th Cir. 2001) (noting that “jurisdiction has been extended beyond that which the most literal reading of the statute might require, to individuals who, though not subject to immediate physical imprisonment are subject to restraints not shared by the public generally that significantly confine and restrain [their] freedom.” (internal quotations and citations omitted)), *cert. denied*, 534 U.S. 1018 (2001); *see also Williams v. INS*, 795 F.2d 738 (9th Cir. 1986).

### D. Departure from the United States

Generally, “[i]mmigrants who have already been removed, . . . do not satisfy the ‘in custody’ requirement of habeas corpus jurisdiction.” *Miranda*, 238 F.3d at 1159. However, where the habeas petition was filed before the alien’s removal, the courts continue to have jurisdiction, as long as the petitioner “continues to suffer actual collateral consequences of his removal.” *Zegarra-Gomez v. INS*, 314 F.3d 1124 (9th Cir. 2003). Moreover, where the removal was unlawful, this court has granted a habeas petition filed after removal. *See Singh v. Waters*, 87 F.3d 346 (9th Cir. 1996) (granting habeas

corpus petition filed after unlawful removal, and ordering INS to allow petitioner to return to the United States).

#### E. Fee Requirements

The filing fee provisions of the Prison Litigation Reform Act do not apply to INS detainees because an alien held by the INS is not a “prisoner” within the meaning of the PLRA. *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002).

### III EXHAUSTION

#### A. Judicial Remedies

This court has required, “as a prudential matter, that habeas petitioners exhaust available judicial and administrative remedies before seeking relief” under section 2241. *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001); *see also Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003) (holding that petitioner should have raised his claim that he was not convicted of an aggravated felony before the court of appeals on direct petition for review).

#### B. Administrative Remedies

A “petitioner must exhaust administrative remedies before raising . . . constitutional claims in a habeas petition when those claims are reviewable by the BIA on appeal, such as ineffective assistance of counsel claims.” *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (holding that petitioner exhausted his claims by raising them in his notice of appeal to the BIA and in a motion for reconsideration); *see also Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995).

### IV STANDARD OF REVIEW

We review de novo the district court’s decision on a petition for writ of habeas corpus. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002). We review factual findings for substantial evidence. *Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997).

## V SCOPE OF HABEAS REVIEW

### A. Constitutional and Statutory Claims

Where the court of appeals lacks petition-for-review jurisdiction over a removal or deportation order, constitutional and statutory claims may be raised in habeas corpus proceedings in the district court. *See Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003); *Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *cf. Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001) (reviewing criminal alien’s constitutional claim in a petition for review because claim involved a threshold issue of whether he was “convicted” under the INA).

### B. Discretionary Claims

Section 2241 habeas relief is not available to challenge the manner in which the agency exercised its discretion in denying a request for a former section 212(c) waiver of deportation, absent a legal or constitutional claim. *Gutierrez-Chavez v. INS*, 298 F.3d 824 (9th Cir. 2002), *as amended by* 337 F.3d 1023 (9th Cir. 2003) (holding that “habeas is not available to claim that the INS simply came to an unwise, yet lawful, conclusion when it did exercise its discretion” when denying a section 212(c) waiver of deportation). However, “[h]abeas is available to claim that the INS somehow failed to exercise discretion in accordance with federal law or did so in an unconstitutional manner.” *Id.* (suggesting that “failure to exercise discretion or manifest injustice” would be cognizable claims in a 2241 habeas petition). This limitation on the scope of habeas review should not “be interpreted to in any way limit review of an alien’s allegations of a violation of the Constitution or federal statute in a § 2241 petition just because the case involves a discretionary determination.” *Id.*; *see also INS v. St. Cyr*, 533 U.S. 289 (2001) (reviewing question of law regarding the availability of discretionary relief).

This court’s dismissal of a petition for review for lack of jurisdiction does not preclude a habeas petition. *See Chang v. INS*, 307 F.3d 1185, 1188 n.1 (9th Cir. 2002) (“The fact that Chang initially appealed the BIA’s decision to this Court, and then sought habeas relief when we dismissed the appeal, does not present a jurisdictional issue because Chang’s claim is cognizable on

habeas as well as on direct appeal.”).

## **VI SECOND OR SUCCESSIVE PETITIONS**

There is no prohibition to filing a second or successive section 2241 habeas petition. *Lema v. INS*, No. 02-35901, 2003 WL 22038390 n.9 (9th Cir. Sept. 2, 2003); *Barapind v. Reno*, 225 F.3d 1100, 1110-12 (9th Cir. 2000).

## **VII INDEFINITE DETENTION**

*Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that 8 U.S.C. § 1231(a)(6), the IIRIRA provision authorizing post-removal-order detentions, does not authorize indefinite detention of removable aliens); *Ma v. Reno*, 257 F.3d 1095 (9th Cir. 2001) (on remand in light of *Zadvydas*, affirming grant of habeas petition where removal to Cambodia was not likely to occur in the reasonably foreseeable future).

*Xi v. INS*, 298 F.3d 832 (9th Cir. 2002) (holding that *Zadvydas* applies to inadmissible aliens).

*Lema v. INS*, No. 02-35901, 2003 WL 22038390 (9th Cir. Sept. 2, 2003) (holding that continued detention of removable aggravated felon was authorized under 8 U.S.C. § 1231(a)(1)(C) because petitioner refused to cooperate fully and honestly with officials to secure travel documents to Ethiopia); *see also Pelich v. INS*, 329 F.3d 1057 (9th Cir. 2003) (holding that continued detention of petitioner was authorized under 8 U.S.C. § 1231(a)(1)(C) because petitioner was impeding removal efforts).