IMMIGRATION LAW
AN OPEN CASEBOOK

KIT JOHNSON

VERSION 4.0

Immigration Law: An Open Casebook

Author Edition

Version 4.0

Kit Johnson

Hugh Roff Professor of Law
Thomas P. Hester Presidential Professor
University of Oklahoma College of Law

Immigration Law: An Open Casebook
Author Edition, Version 4.0
by Kit Johnson

Place of publication: Norman, Oklahoma
Year of publication: 2026
Publisher: Kit Johnson

This book is set in EB Garamond, with the regular body text rendered at 12-point size. EB Garamond is distributed under an SIL Open Font License and can be downloaded through various sites, including https://github.com/octaviopardo/EBGaramond12/tree/master/fonts.

The cover and cover page typeface is Lato Black. The Lato font family is distributed under an SIL Open Font License and can be downloaded through various sites, including https://www.latofonts.com.

Name: Johnson, Kit, 1975– author
Title: Immigration law : an open casebook
Description: Author Edition, Version 4.0 | Norman, Oklahoma : Kit Johnson 2026. | No index.

10 9 8 7 6 5 4 3 2 1
First printing.

For Joe and Zane, and the many immigrants who led them to their lives in the United States

Notices

Warnings and disclaimers: This book is for law students taking a class on immigration law. **This book is not legal advice. If you need legal help, don't use this book. Instead, hire an attorney. A nationwide list of pro bono legal service providers can be found at https://www.justice.gov/eoir/file/probonofulllist /download.**

This book and the information within it are provided as is, with all faults, and the author disclaims all liability to any person or entity for any loss resulting from mistakes or omissions. Note in particular that no warranty is made that any of the information provided herein is complete or accurate. As George Washington said in his farewell address, later recounted in song in the musical Hamilton: "Though ... I am unconscious of intentional error, I am nevertheless too sensible of my defects not to think it probable that I may have committed many errors."

Note that some portions of these notices and other materials, including editing notes, have been adapted from other sources, including Eric E. Johnson's Torts: Cases and Context.

About the Author

Kit Johnson is the Hugh Roff Professor of Law and Thomas P. Hester Presidential Professor at the University of Oklahoma College of Law. She has taught immigration law since 2008. In addition, she has taught related courses on crimmigration, border enforcement, and applied immigration law.

Professor Johnson's research concerns immigration law. Her works have, broadly speaking, focused on the intersection of immigration law and U.S. business interests as well as issues related to the intersection of criminal law and immigration enforcement. Since 2014, she has served as a co-editor and regular blogger for the ImmProf Blog, https://immprof.com/.

Prior to teaching, Professor Johnson was an attorney with the Los Angeles law firm of Munger, Tolles & Olson LLP, where she practiced general commercial litigation and provided pro bono representation in several adoption and guardianship proceedings in Los Angeles County.

Before entering private practice, Professor Johnson served as a law clerk to the Honorable Pamela A. Rymer of the United States Court of Appeals for the Ninth Circuit and the Honorable Robert C. Broomfield of the United States District Court for the District of Arizona.

Professor Johnson received her J.D. from Berkeley Law. She received her B.A. from Wesleyan University.

Professor Johnson archives teaching materials on her website at kitjohnson.net, including sample immigration and crimmigration essay exams.

Table of Contents

Note to Teachers

Please let me know if you adopt this casebook! Because it's free and open-licensed, I will not know who uses it unless you contact me directly. (And you will make my day!) You can reach me at kit.johnson@ou.edu or kitjohnson.net.

This book is designed for use in an introductory course on United States immigration law. I teach immigration law as a three-credit podium course, covering the chapters of this book in sequence.

I am proud to offer this book to students and adopters for free. Not only is the material free, but you are welcome and encouraged to remix and reuse any portions of the book as you see fit under the terms of the Creative Commons license (see Notices, supra.).

I would welcome the chance to connect with any immigration law teachers, particularly those of you who are thinking about using this book or who are teaching immigration law for the first time. I have a library of teaching materials—from daily class slides to video clips—that I would be happy to share with you.

Editing Notes

This book uses the following editing marks to indicate when material has been added or deleted from the original text:

˜ The superscript tilde denotes matter omitted, which might be of any type.

[] Brackets indicate an insertion. The insertion may be mine or the court's. They are usually mine if they are not in a quote.

This book is formatted without footnotes to make it maximally accessible in an online format. Where footnote material from the original text is included, it is identified with the following editing marks:

↳ The superscript right-pointing descending arrow indicates the beginning of footnote material.

↲ The superscript left-pointing descending arrow indicates the end of footnote material.

Acknowledgments

I take this moment to acknowledge the invaluable assistance of my husband, Eric E. Johnson, who has provided help at every stage of this project. I also thank my wonderful proofreaders and research assistants: Leslee Roybal, Janice Marcin, Parker Lawter, Trisha Bunce, Aryn Kerr, and Savannah Steele.

Preface to Version 4.0

In his second term in office, President Donald Trump has taken significant steps to change U.S. immigration law and policy. This casebook does not attempt to document or discuss every one of those steps as many are the subject of ongoing legal challenges.

Chapter One: Introduction

This chapter provides introductory material that will help situate the rest of your studies regarding immigration law.

We begin with a brief history of U.S. immigration law (section 1.1). While section 1.1 introduces *how* the United States has approached immigration law, section 1.2 considers *why* the United States has passed its immigration laws. Next, you'll find a nuts-and-bolts introduction to the sources of immigration law (section 1.3). After that is an introduction to the federal agencies relevant to immigration law (section 1.4). Finally, this chapter offers an introduction to key immigration terms (section 1.5) that are worth reviewing at the outset of studying immigration law. Indeed, the field of immigration law is filled with specialized legal terms and acronyms. As you read this book, you can make reference to Appendix A.1, which is a comprehensive glossary, and Appendix A.2, which is a list of common acronyms.

1.1 A Brief History of U.S. Immigration Law

As you read the following material, you might make note of the different techniques the United States has utilized to manage immigration: Are they quantitative? Qualitative? Something else entirely?

Lozano v. City of Hazelton
496 F. Supp. 2d 477 (M.D. Pa. 2007) (Appendix)

The history of federal regulation of immigration is one of a transformation from a largely open system to one where federal rules govern nearly every aspect of the immigrant experience, from the conditions under which new residents may enter to the terms under which they may labor.

Prior to the end of the nineteenth century, immigration restriction was minimal: the government "counted the number of immigrants for statistical purposes, and it decreed certain minimum living conditions aboard ship." [B]asic restrictions [were] first instituted by the federal government in 1875, when Congress excluded from entry [women brought to the United States for "immoral purposes," which is to say, prostitution.] In 1882, Congress denied entry to "convicts, lunatics, idiots, and persons likely to become a public charge." [In 1891, Congress determined that "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude" would be excludable.]

Though these federal laws restricted who could enter the United States, they did not place any numerical quotas or absolute restrictions on any class of persons. Reflecting a society dominated by the proposition that racial identity determined one's capacity to participate in society, however, late nineteenth-century immigration law enacted much more robust restrictions on immigration from countries identified by contemporary ideology as populated by "inferior" races. Congress often aimed such legislation at Asians. Examples include: the 1882 Chinese Exclusion Act; the "Gentlemen's Agreement of 1907," which prevented the immigration of Japanese men; and the 1924 Immigration Act's exclusion of "aliens ineligible for citizenship," which included "peoples of all the nations of East and South Asia." Years of agitation led to new restrictions on who could enter the United States in the years during and after the First World War. In 1917, Congress restricted immigration by political radicals and imposed a literacy test on those seeking entry.

The 1921 Immigration Act tightened restrictions on immigration, establishing "the first sharp and absolute numerical restrictions on European immigration" in United States history and implementing "a nationality quota system based on the pre-existing composition of the American population" [namely, three percent of the foreign-born individuals of each nationality in the United States in 1910]. These attempts at restricting immigration culminated in the Immigration Act of 1924, which capped yearly entries into the United States at 150,000, with quotas assigned to each country based on two percent of the foreign-born individuals of each nationality in the United States in 1890. The Act also excluded "aliens ineligible for citizenship" from entry, adding Japanese people to the list of those who were excluded from immigrating altogether. The Act did not, however, restrict immigration from Mexico or other countries in the Western Hemisphere, though it did establish regulations for entry.

Historian Mae Ngai has noted that passage of the 1924 act meant “that numerical restriction created a new class of persons within the national body—illegal aliens—whose inclusion in the nation was at once a social reality and a legal impossibility.”˜ Much of federal immigration law in subsequent decades would be aimed at identifying and controlling these illegal residents, provisions not previously present in American law.˜

Before the changes brought by the immigration regulation of the 1910s and 1920s, [changes consistent with the effort to identify and control,] the process of entering the United States as an immigrant was fairly simple, if invasive: an immigrant need only present herself at the border for inspection. ↳Historian Mae Ngai˜ describes this process as it occurred for Mexicans seeking to enter the United States in a later period: “inspection at the Mexican border involved a degrading procedure of bathing, delousing, medical-line inspection, and interrogation. The baths were new and unique to Mexican immigrants, requiring them to be inspected while naked, have their hair shorn, and have their clothing and baggage fumigated. Line inspection, modeled after the practice formerly used at Ellis Island, required immigrants to walk in single file past a medical officer.”˜↵ Once immigrants cleared this initial hurdle (represented to many by Ellis Island), they were free to enter the country, and did not need to carry any documents or do anything to prove particular status.˜ The passage of quotas and other restrictions on immigration, however, meant that the status of many aliens in the United States had become far from clear.˜ Much of the subsequent history of American immigration law is the history of an attempt to determine the status of aliens living in the United States.˜ Only in 1929 did the United States first provide penalties for unlawful entry, making the first such entry a misdemeanor punishable by up to a year in jail or a $1,000 fine and the second offense a felony, punishable by two years imprisonment or a $2,000 fine.˜

Congress made occasional changes to this immigration system over the next forty years,˜ but the use of quotas and the principal of national exclusion remained central to the federal scheme. The most fundamental change in federal regulation of immigration came with the passage of the Immigration Act of 1965 [also known as the “Hart-Celler Act”]. This act abolished the national-origins quotas established in the 1924 act and allowed an annual admission of 170,000 Immigrants from the Eastern Hemisphere and 120,000 from the Western.˜ The restrictions on immigration for the Western Hemisphere represented a radical change in restrictions on immigration from that part of the world.˜ The law still provided for national quotas, but distributed them equally, not on the basis of previous immigration in particular years.˜ The law also exempted from the quota spouses, minor children and parents of United States citizens.˜

Immigrants would be admitted according to certain preference categories for adult family members, professionals, workers for unfilled positions and refugees.˜ These changes led to an even more active role for the federal government in investigating and determining the status of immigrants, since "strict positive certification was required to ensure that they would not compete with Americans."˜ Still, the 1965 Act represented a major change in the focus of immigration policy from a race-based policy to one that: "clearly institutionalized family reunion as the leading principle governing general immigration."˜

Congress extended its reach over the lives of aliens in the United States with the 1986 Immigration Reform and Control Act ("IRCA" [pronounced "irk-uh"]). The Act established sanctions for employers who hired illegal aliens, providing a civil penalty of $250 to $2,000 for each worker hired and criminal penalties for a "pattern and practice" of illegal hiring, including a fine of up to $3,000 and six month prison sentences.˜ Such employers also had to verify the immigration status of all job applicants.˜ The Act also provided a means for illegal aliens to obtain amnesty by "apply[ing] for legal status within an eighteenth-month period starting six months after the bill became law."˜

During the 1990s Congress implemented procedures to limit the rights of aliens to court review of administrative determinations of their status. The Anti-terrorism and Effective Death Penalty Act ("AEDPA" [pronounced "uh-dep-uh"]) of 1996 "eliminated judicial review of deportation and exclusion orders for noncitizens convicted of 'aggravated felonies.'"˜ The act also removed a long-established waiver of deportability for long-term lawful United States residents.˜ That same year, Congress placed new restrictions on immigration and review of agency removal decisions in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") [(pronounced "eye-ruh-eye-ruh")].˜ That legislation increased resources for enforcement of the immigration laws, made more aliens eligible for deportation or exclusion, limited agency discretion to change immigrants' status and increased the penalties for violating immigration laws.˜ That act also limited review of deportation orders in certain circumstances, particularly those who had been convicted of certain crimes or based their petition on certain "disfavored claims."˜

The history of federal regulation of immigration, then, is one of the creation of an intricate and complex bureaucracy that restricted who could immigrate to the United States and under what terms. Those immigration regulations have also come to define the conditions under which aliens can find employment in the country. The creation of this complex federal bureaucracy not only altered the role of the federal government in relation to immigration; it also transformed the status of immigrants in American society. A foreign-born person in the United States in 1870 had a presumptively legal status; no careful legal inquiry was required to determine whether that person had a right to reside in the country. By 1990, however, determining whether a foreign-born person enjoyed a legal right to remain in the United States demanded a detailed legal examination that involved numerous federal statutes, several adjudicatory bodies, and a number of appeals and exceptions. More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair.

1.2 Theories of Immigration Law

The following excerpt from a law review article presents one way to categorize arguments in favor of various aspects of immigration law.

Kit Johnson, Theories of Immigration Law,
6 ARIZ. ST. L.J. 1211 (2014)

Why is it that any given law singles out certain individuals to be the beneficiaries of American immigration policy—or to deny them admission altogether?˜

Immigration law is fundamentally about membership in a political state.˜ It attempts to identify and circumscribe the present and future populations of our country.˜ For one thing, many more people would like to live in the United States than the country as a whole is comfortable allowing. A 2012 Gallup poll found that some 150 million adults worldwide would like to move to the United States.˜ If every one of those individuals were allowed into the United States, our population would increase by fifty percent.˜ In the absence of a desire for such a radical population shift, who gets to join our membership roster and why?˜

[Put another way, how have U.S. legislators, activists, pundits, lobbyists, and other legal reform influencers justified their choices to grant or deny membership to certain prospective migrants?]˜ It is through canvassing all possible responses to this question that four theories of immigration law emerge: (1) individual rights, (2) domestic interest, (3) national values, and (4) global welfare. In brief, the four theories can be understood as follows:

- The individual rights theory of immigration law focuses on the rights of the prospective migrant and that migrant's right of entry into the United States.
- The domestic interest theory of immigration law examines whether and to what degree allowing migrants into the United States will benefit the country as a whole.

- The national values theory of immigration law considers whether the admission of migrants promotes the fundamental values of the country as a whole.˜
- The global welfare theory of immigration law considers the welfare of humanity as a whole, and thus views the United States as one member of an interconnected global community, such that immigration decisions at the U.S. level affect the political, social, and economic makeup of the global community.˜

—-—

1.3 Sources of Immigration Law

The principal source of authority for U.S. immigration law is the Immigration and Nationality Act of 1952 (INA). The INA is codified within the United States Code at 8 U.S.C. §§ 1101-1537. Since 1952, the INA has been amended numerous times. Significant legislative changes include the Immigration and Nationality Act of 1965 (Hart-Cellar Act), the 1980 Refugee Act, the 1986 Immigration Reform and Control Act (IRCA), the 1990 Immigration Act, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and the Homeland Security Act of 2002 (HSA).

Immigration lawyers and immigration courts typically cite to the INA and its original section numbering. Criminal lawyers and federal courts, including the U.S. Supreme Court, frequently cite to the corresponding U.S. Code provisions. You can find a handy table for converting INA and U.S.C. numbers at Appendix A.5.

In addition to the INA itself, implementing regulations promulgated by immigration agencies are important sources of immigration law. See 8 C.F.R. §§ 1-392 (Department of Homeland Security); 8 C.F.R. §§ 1000-1337 (Executive Office of Immigration Review); 20 C.F.R. §§ 655-656 (Department of Labor); 22 C.F.R. §§ 40-62 (Department of State).

The most significant judicial interpretations of the INA and its implementing regulations come from the Board of Immigration Appeals (BIA), as well as appeals from BIA decisions brought to the U.S. Courts of Appeals and the U.S. Supreme Court.

1.4 Federal Agencies Responsible for Immigration Law

EOUSA, OLE, Immigration Law (2005)

Since the enactment of federal immigration legislation, the administration and enforcement of our immigration laws has resided within various departments.˜

THE DEPARTMENT OF JUSTICE (DOJ)

In 1940, when the enforcement of immigration laws became a priority, immigration functions were transferred to the Department of Justice. The INA of 1952, 8 U.S.C. §§ 1101-1537, delegated broad authority to the Attorney General to administer immigration laws. Most of that authority was re-delegated to the [Immigration and Naturalization Service (INS), an agency that existed within the DOJ from 1940 to 2003]. However, the Attorney General reserved the ultimate authority to decide questions of law by creating the Board of Immigration Appeals (BIA) and delegating to it the authority to hear administrative appeals and to issue binding opinions.˜

The Board of Immigration Appeals (BIA) is composed of˜ [15 Appellate Immigration Judges.] The BIA does not conduct courtroom proceedings—it decides appeals by conducting a "paper review" of cases. The BIA has nationwide jurisdiction to hear appeals from certain decisions rendered by [Immigration Judges (IJs)] and [the Department of Homeland Security (DHS)] in a wide variety of proceedings in which one party is the Government of the United States and the other party is either a noncitizen, a citizen, or a business firm. The BIA's precedent decisions are binding on all immigration officers within DHS and IJs unless modified or overruled by the Attorney General or a federal court. BIA decisions designated for publication are printed in bound volumes entitled Administrative Decisions Under Immigration and Nationality Laws of the United States [__ I. & N. Dec. __ (BIA __)].˜

The Executive Office for Immigration Review (EOIR) [sometimes pronounced "Eeyore"—like Pooh's friend—and other times spelled out "E-O-I-R"] is a quasi-judicial agency within the Department [of Justice]. It was created on January 9, 1983, through an internal Department reorganization which brought together the Board of Immigration Appeals (BIA) with the Immigration Judge (IJ) function previously performed by INS. The reorganization also separated the Immigration Courts from the INS. EOIR is headed by a Director who reports directly to the Deputy Attorney General.˜

The Office of the Chief Immigration Judge (OCIJ) is located at EOIR's headquarters. It provides overall program direction, articulates policies and procedures, and establishes priorities for˜ [more than 500] IJs located in [more than 60] immigration courts throughout the nation. IJs conduct removal proceedings and have the authority to decide various forms of relief. Their decisions are administratively final unless appealed or certified to the BIA.˜

The Office of Immigration Litigation (OIL) [another agency within the DOJ, located in the Civil Division] was established in 1983. It has nationwide jurisdiction over all civil immigration litigation matters and is responsible for the nationwide coordination of civil immigration litigation. OIL has both affirmative and defensive litigation responsibilities. OIL attorneys litigate in both federal district courts and circuit courts of appeals throughout the United States.

[Finally, Assistant United States Attorneys (AUSAs), within the DOJ's Criminal Division, prosecute violations of immigration-related crimes across the country.]

THE DEPARTMENT OF HOMELAND SECURITY (DHS)

The events of September 11, 2001 precipitated the enactment of the [Homeland Security Act of 2002] HSA, which abolished the INS as an agency and transferred its functions to the newly created DHS.˜ The service and citizenship functions [of INS] were transferred to a newly created entity, now known as U.S. Citizenship and Immigration Services (USCIS).˜ The immigration enforcement functions˜ [of INS] were˜ split between˜ U.S. Customs and Border Protection (CBP) and˜ Immigration and Customs Enforcement (ICE).˜

U.S. Citizenship and Immigration Services (USCIS) [often referred to as "CIS" by immigration counsel]˜ is the "immigration service" agency within DHS. It is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities. USCIS adjudicates, among other things, immigrant visa petitions, nonimmigrant benefits, naturalization petitions, and asylum and refugee applications.˜

U.S. Customs and Border Protection (CBP)˜ exercises immigration enforcement authority.˜ CBP immigration authority lies principally in enforcing the immigration laws at sea ports and land ports-of-entry.˜ CBP Officers˜ guard our nations borders, not only to enforce immigration laws, but also trade and customs laws, and drug laws. They also perform other enforcement functions that prior to the HSA were conducted by multiple agencies.

The U.S. Border Patrol [(a subsidiary of CBP)] is the mobile, uniformed law enforcement arm of DHS.˜ The Border Patrol has twenty˜ sectors responsible for detecting, interdicting, and apprehending those who attempt to enter illegally or smuggle people, including terrorists, or contraband, including weapons of mass destruction across U.S. borders between official ports of entry.˜

U.S. Immigration and Customs Enforcement (ICE)˜ is responsible for apprehending, detaining and deporting [noncitizens] who have managed to enter the country illegally.˜ ICE special agents also work closely with the U.S. Attorneys' offices (USAOs) in the investigation and prosecution of immigration-related crimes, such as reentry after deportation, document fraud and [migrant] smuggling.

THE DEPARTMENT OF STATE (DOS)

The United States Department of State˜ [sometimes referred to as the DOS or, more frequently, the State Department,] is responsible for the issuance of passports to United States citizens and travel documents to authorized [noncitizens]. Its overseas consular offices process visa applications by persons seeking to visit, work in or immigrate to the United States. The DOS also may serve as the investigating law enforcement authority for visa and passport fraud.˜

THE DEPARTMENT OF LABOR (DOL)

The United States Department of Labor (DOL) is generally charged with determining whether American workers are available to perform specific employment and if not, whether the employment of foreign workers will adversely affect the wages and working conditions of American workers similarly employed. 20 C.F.R. § 655. This determination, known as the labor certification process, permits adversely affected petitioning employers to file administrative appeals to the Board of Alien Labor Certification Appeals (BALCA) [pronounced "bah-k-luh" as in baklava]. 20 C.F.R. § 656.26. Final decisions from the BALCA are subject to judicial review.

[THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (DHHS)

Within the U.S. Department of Health and Human Services (DHHS) lies the Office of Refugee Resettlement (ORR). The ORR is tasked with helping "new populations maximize their potential in the United States by linking them to critical resources that assist them in becoming integrated members of American society." In addition, ORR is responsible for unaccompanied minors who come to the United States, also known as "unaccompanied alien children" (UACs).]

1.5 Select Immigration Terms

At the end of this book, in Appendix A.1, you will find a comprehensive glossary of immigration law terms. Here are selected terms that are helpful to look at before diving into the following chapters. (For the sources of language used in this section, see Appendix A.1.).

admission. The "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13), 8 U.S.C. § 1101(a)(13).

alien. "The term 'alien' means any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). The term has been criticized as dehumanizing. See, e.g., Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. Miami Inter-Am. L. Rev. 263 (1996-97). Nevertheless, it persists in statute.

asylum. The process by which a nation grants protection to a migrant fleeing from persecution; also, the protection itself.

citizen. The legally recognized subject or national of a nation.

deportation. The formal removal of a previously admitted noncitizen from the United States. INA § 237, 8 U.S.C. § 1227. It also refers to the type of immigration proceedings commenced prior to April 1, 1997, to remove noncitizens who entered the United States without inspection. Note: Regarding relation to the term "removal," see *removal*.

entry without inspection (EWI, pronounced "e-wee"). Prior to 1996, noncitizens who entered without inspection by an immigration officer were considered deportable. Under the amended INA, they are now considered inadmissible. INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A). Noncitizens who enter without inspection may be criminally prosecuted. INA § 275, 8 U.S.C. § 1325.

exclusion. Prior to 1996, exclusion was the formal term for denial of a noncitizen's entry into the United States. This was distinguished from deportation, which applied to all noncitizens present in the United States. Today, exclusion refers to both the process of adjudicating the inadmissibility of noncitizens seeking entry into the United States and the removal of noncitizens who entered the United States without formal admission. INA § 212, 8 U.S.C. § 1182. See *inadmissible*.

green card (alien registration card). A card issued to lawful permanent residents in lieu of a visa. The first such cards were issued in 1946 and were green in color. After

1964 the cards ceased to be green, but they are still referred to as "green cards." See *lawful permanent resident*.

illegal alien. A common but linguistically inapt phrase that is used in an imprecise way to refer to a noncitizen who has entered the United States without authorization, remains in the United States without authorization, or is perceived as having done something contrary to U.S. law. The phrase is rightly condemned on the grounds that persons themselves cannot be "illegal" and on the grounds that a noncitizen's presence in the United States without authorization, while grounds for removal, does not constitute a crime or civil offense. The phrase is not commonly used by immigration lawyers.

immigrant. A noncitizen entering the country to settle there permanently. Under U.S. law, every noncitizen seeking to enter the U.S. is presumed to be an immigrant—intending to settle here permanently—unless they can prove that they are a nonimmigrant. INA § 214(b), 8 U.S.C. § 1184(b). See *nonimmigrant*.

inadmissible. The status of a noncitizen seeking admission at a port of entry who does not meet the criteria in the INA for admission. Since 1996, the statutory grounds for inadmissibility are also applied to the removal of migrants who have entered without inspection. INA § 212, 8 U.S.C. § 1182.

lawful permanent resident (LPR). An immigrant who has been conferred permanent resident status, that is, who has authorization to live and work in the United States indefinitely. Upon meeting the statutory prerequisites for naturalization, an LPR may apply to become a naturalized citizen.

migrant. A person who leaves his/her country of origin to seek residence in another country.

naturalization. The process of conferring nationality of a state on a person after birth. INA § 101(a)(23), 8 U.S.C. § 1101(a)(23).

noncitizen. A person who is not a citizen of the United States. This term is synonymous with the statutory definition of "alien."

nonimmigrant. A noncitizen admitted to the United States for a temporary duration, such as a student, a visitor, or a temporary worker. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).

removal. The expulsion of a noncitizen from the United States. This expulsion may be based on grounds of inadmissibility (INA § 212) or deportability (INA § 237). Note: The usage of the terms "deportation" and "removal" shifted under U.S. law in 1996; subsequently, deportation can be thought of as a subset of removal.

undocumented. A noncitizen described as "undocumented" lacks legal authorization to be present in the United States.

U.S. citizen (USC). An individual is or becomes a U.S. citizen in various ways—generally by birth in the United States, birth to U.S. citizen parents, or naturalization.

visa. A permit issued by a consular representative of a country, allowing the bearer entry into or transit through that country. As will be discussed in Chapters 3 and 4, the United States issues immigrant visas (IV) to lawful permanent residents and nonimmigrant visas (NIV) to temporary visitors.

1.6 Study Tips

TIP 1.1

Construct a timeline of U.S. immigration law based on materials in this chapter. Add key changes that you learn in future chapters. Bonus: Identify significant moments in American history and see where they fit with your immigration timeline. Consider Appendix A.6, which provides the terms of all U.S. presidents along with party control of Congress.

TIP 1.2

Create an organization chart to explain the relationship among federal agencies responsible for immigration law.

Chapter Two: The Plenary Power Doctrine

The plenary power doctrine is a cornerstone of immigration law. It stands for the proposition that Congress enjoys broad authority to create immigration laws and that those laws will not be second-guessed by the federal judiciary.

The Supreme Court first established the plenary power doctrine in Chae Chan Ping v. United States, 130 U.S. 581 (1889), often called "The Chinese Exclusion Case." As you read this decision in section 2.1, note that the phrase "plenary power doctrine" does not actually appear in the decision. Nevertheless, the decision lays out the case for Congress' ability to create immigration laws as well as for judicial deference to Congress' immigration choices.

There is substantial debate about the continuing strength of the plenary power doctrine. The readings in section 2.2 introduce that debate.

2.1 Case: Chae Chan Ping v. United States

Chae Chan Ping v. United States
130 U.S. 581 (1889)

MR. JUSTICE FIELD DELIVERED THE OPINION FOR A UNANIMOUS COURT

This case comes before us on appeal from an order of the circuit court of the United States for the Northern district of California, refusing to release the appellant, on a writ of habeas corpus, from his alleged unlawful detention˜. The appellant is a subject of the emperor of China, and a laborer by occupation. He resided at San Francisco, Cal. following his occupation, from some time in 1875 until June 2, 1887, when he left for China on the steam-ship Gaelic, having in his possession a certificate in terms entitling him to return to the United States˜. On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steam-ship Belgic, which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officers his certificate, and demanded permission to land. The collector of the port refused the permit, solely on the ground that under the act of congress approved October 1, 1888,˜ the certificate had been annulled, and his right to land abrogated, and he had been thereby forbidden again to enter the United States. The captain of the steam-ship, therefore, detained the appellant on board the steamer. Thereupon a petition on his behalf was presented to the circuit court of the United States for the Northern district of California, alleging that he was unlawfully restrained of his liberty, and praying that a writ of habeas corpus might be issued˜. [T]he court˜ held˜ that the appellant was not entitled to enter the United States˜. From this order an appeal was taken to this court.

The appeal involves a consideration of the validity of the act of congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882˜ granting them permission to return. The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of congress.˜

It will serve to present with greater clearness the nature and force of the objections to the act if a brief statement be made of the general character of the treaties between the two countries, and of the legislation of congress to carry them into execution.˜

[In 1868, the United States and China executed the Burlingame-Seward Treaty, which included the following provisions]:˜ 'Art. 5. The United States of America and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents.˜ Art. 6.˜ Chinese subjects visiting or residing in the United [States] shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.˜'

Whatever modifications have since been made to these general provisions have been caused by a well-founded apprehension—from the experience of years—that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there. A few words on this point may not be deemed inappropriate here, they being confined to matters of public notoriety, which have frequently been brought to the attention of congress.˜

The discovery of gold in California in 1848, as is well known, was followed by a large immigration thither from all parts of the world, attracted not only by the hope of gain from the mines, but from the great prices paid for all kinds of labor. The news of the discovery penetrated China, and laborers came from there in great numbers, a few with their own means, but by far the greater number under contract with employers, for whose benefit they worked. These laborers readily secured employment, and, as domestic servants, and in various kinds of outdoor work, proved to be exceedingly useful. For some years little opposition was made to them, except when they sought to work in the mines, but, as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field. The competition steadily increased as the laborers came in crowds˜. They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. The differences of race added greatly to the difficulties of the situation.˜ [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.

On the 6th of May, 1882, an act of congress was approved˜ entitled 'An act to execute certain treaty stipulations relating to Chinese.' It˜ declares that after 90 days from the passage of the act, and for the period of 10 years from its date, the coming of Chinese laborers to the United States is suspended, and that it shall be unlawful for any such laborer to come, or, having come, to remain within the United States. [It] provides that˜ [the Act] shall not apply to Chinese laborers who were in the United States November 17, 1880, or who shall come within 90 days after the passage of the act.˜ [S]uch Chinese laborer shall˜ be entitled to receive˜ a certificate˜ to identify him˜ [that] 'shall entitle the Chinese laborer to whom the same is issued to return to and reenter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter.'

[T]he act of October 1, 1888, the validity of which is the subject of consideration in this case,˜ is entitled 'An act a supplement [the Chinese Exclusion Act of 1882].˜ It is as follows: '˜from and after the passage of this act it shall be unlawful for an[y] Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to or remain [in] the United States.˜ [E]very certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.˜'

It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868˜ but it is not on that account invalid, or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of congress.˜ In either case the last expression of the sovereign will must control.˜

This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that congress possesses the power to pass an act, our province ends with its construction and its application to cases as they are presented for determination.˜

There being nothing in the treaties between China and the United States to impair the validity of the act of congress of October 1, 1888, was it on any other ground beyond the competency of congress to pass it? If so, it must be because it was not within the power of congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. As said by this court˜ 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.'

While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.

The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.˜

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition, and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.˜

Order affirmed.

2.2 Development of the Plenary Power Doctrine

Kit Johnson, Chae Chan Ping at 125:
An Introduction, 68 OKLA. L. REV. 3 (2015)

As for what happened to Chae Chan Ping after his final deportation and return to China, nothing is known. As for what to make of his Supreme Court case, the debate continues. [A symposium volume on the occasion of the 125th anniversary of the case] contains an array of contributions to thinking about the plenary power doctrine and the legacy of Chae Chan Ping on American immigration law.˜

Professor David A. Martin [in his contribution, Why Immigration's Plenary Power Doctrine Endures, 68 Okla. L. Rev. 29 (2015),] argues that the importance of Chae Chan Ping lies in its reasons for deferring to the political branch on immigration issues.˜ He emphasizes the Court's conclusion that the federal government's power to exercise immigration control was necessary for the nation to speak "with one voice on the world stage"˜ in "realms touching upon foreign relations and potential national self-preservation."~ This was, Martin notes, a federalism issue. For, if the federal government did not control immigration, foreign affairs would be in the hands of what were then thirty-eight different states. Thus, the lesson of Chae Chan Ping, Martin argues, is about the nation speaking as one given that immigration laws "might need to be in the mix to respond to, or to help shape, actions that others are taking abroad."~ Martin also points out that this deference does not give the political branches a blank check for immigration law. For one, he notes that courts frequently employ sub-constitutional means—such as statutory interpretation—in ways that "adhere more closely to constitutional values" than lawmakers may have even intended.~ And even more importantly, political bodies are responsive to political pressures. In the end, Martin concludes that Chae Chan Ping is a "call to roll up our sleeves and get to work in the political arena rather than the courts."~

Professor Kevin R. Johnson [in his contribution, Immigration in the Supreme Court 2009-2013: A New Era of Immigration Unexceptionalism, 68 Okla. L. Rev. 57 (2015),] takes a different tack.~ [H]e examines [plenary power's] doctrinal durability in the modern Supreme Court.~ He closely examines each of the Court's most recent immigration decisions—including important denials of certiorari—from the 2009 through the 2013 terms. Johnson concludes that the plenary power doctrine espoused in Chae Chan Ping is "heading toward its ultimate demise."~ He sees the Court moving away from a reliance on "immigration exceptionalism," which is the idea that because of Chae Chan Ping immigration cases are just different.~ Instead, he finds that the Court has handled numerous immigration cases in "ordinary, standard, and unremarkable" ways. For instance, the contemporary Court has often resolved immigration cases through statutory interpretation~ and administrative deference, instead of relying on the constitutional approach of Chae Chan Ping. The result, Johnson notes, has been a trend to bring "immigration law more in line with conventional norms of judicial review."~ Johnson's comprehensive review of the period points to a new era of immigration unexceptionalism.

Castro v. DHS
835 F.3d 422 (3d Cir. 2016)

The Supreme Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Fiallo v. Bell, 430 U.S. 787, 792~ (1977)~. "[T]he Court's general reaffirmations of this principle have been legion." Kleindienst v. Mandel, 408 U.S. 753, 765–766 & n.6~ (1972) (collecting cases).~

The case that first recognized the political branches' plenary authority to exclude aliens, Chae Chan Ping v. United States˜, involved a Chinese lawful permanent resident who, prior to departing the United States for a trip abroad, had obtained a certificate entitling him to reenter the country upon his return.˜ While he was away, however, Congress passed an amendment to the Chinese Exclusion Act that rendered such certificates null and void.˜ Thus, after immigration authorities refused him entrance upon his return, the alien brought a habeas petition to challenge the lawfulness of his exclusion, arguing that the amendment nullifying his reentry certificate was invalid.˜ The Court upheld the validity of the amendment, reasoning that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution," and therefore that "the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one." Id.˜ (concluding that questions regarding the political soundness of the amendment "are not questions for judicial determination").

In subsequent decisions from the same period, the Court upheld and even extended its reasoning in Chae Chan Ping. For instance, in Nishimura Ekiu v. United States, 142 U.S. 651˜ (1892), another exclusion (as opposed to deportation) case, a Japanese immigrant was denied entry to the United States because immigration authorities determined that she was "likely to become a public charge."˜ The Court concluded that the statute authorizing exclusion on such grounds was valid under the sovereign authority of Congress and the Executive to control immigration. Id. at 659˜ (stating that the power over admission and exclusion "belongs to the political department[s] of the government"). In a statement that perfectly encapsulates the meaning of the plenary power doctrine, the Court declared: ["]It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.["]˜

The following year, in Fong Yue Ting v. United States, 149 U.S. 698˜ (1893), the Court extended the plenary power doctrine to deportation cases as well. Fong Yue Ting involved several Chinese immigrants who were ordered deported pursuant to the Chinese Exclusion Act because they lacked certificates of residence and could not show by the testimony of "at least one credible white witness" that they were lawful residents.˜

The aliens sought to challenge their deportation orders, claiming, inter alia, that the Exclusion Act violated the equal protection clause of the Fourteenth Amendment.˜ As it had done in Chae Chan Ping and Nishimura Ekiu, the Court declined to intervene or review the validity of the immigration legislation: [“]The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.[”] Id. at 731˜; see also id. at 707˜ (“The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”).

Thus, the Court’s earliest plenary power decisions established a rule leaving essentially no room for judicial intervention in immigration matters, a rule that applied equally in exclusion as well as deportation cases.

Yet not long after these initial decisions, the Court began to walk back the plenary power doctrine in significant ways. In Yamataya v. Fisher, 189 U.S. 86˜ (1903), a Japanese immigrant was initially allowed to enter the country after presenting herself for inspection at a port of entry.˜ Nevertheless, just a few days later, an immigration officer sought her deportation because he had concluded, after some investigation, that she “was a pauper and a person likely to become a public charge.”˜ About a week later, the Secretary of the Treasury ordered her deported without notice or hearing.˜ Yamataya then filed a habeas petition in federal district court to challenge her deportation, claiming that the failure to provide her notice and a hearing violated due process.˜ The Court acknowledged its plenary power precedents, including Nishimura Ekiu and Fong Yue Ting˜, but clarified that these precedents did not recognize the authority of immigration officials to “disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”˜ According to these “fundamental principles,” the Court held, no immigration official has the power [“]arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.[”]˜

Thus, Yamataya proved to be a “turning point” in the Court’s plenary power jurisprudence.˜ [I]t was at this point that the Court “began to see that the premise [of the plenary power doctrine] needed to be qualified—that a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary."~

Nevertheless, Yamataya did not mark the only "turning point" in the development of the plenary power doctrine. Nearly fifty years after Yamataya, the Court issued two opinions—United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537~ (1950) and Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206~ (1953)—that essentially undid the effects of Yamataya, at least for aliens "on the threshold of initial entry," as well as for those "assimilated to that status for constitutional purposes." Mezei, 345 U.S. at 212, 214~.

In Knauff, the German wife of a United States citizen sought admission to the country pursuant to the War Brides Act.~ She was detained immediately upon her arrival at Ellis Island, and the Attorney General eventually ordered her excluded, without a hearing, because "her admission would be prejudicial to the interests of the United States."~ The Court upheld the Attorney General's decision largely on the basis of pre-Yamataya plenary power principles and precedents: ["][T]he decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.... Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.["]~ Thus, with its holding in Knauff, the Court effectively "reinvigorated the judicial deference prong of the plenary power doctrine."~

Similar to Knauff, Mezei involved an alien detained on Ellis Island who was denied entry for undisclosed national security reasons. Unlike Knauff, however, Mezei had previously lived in the United States for many years before leaving the country for a period of approximately nineteen months, "apparently to visit his dying mother in Rumania [sic]."~ And unlike Knauff, Mezei had no choice but to remain in custody indefinitely on Ellis Island, as no other country would admit him either.~ In these conditions, Mezei brought a habeas petition to challenge his exclusion (and attendant indefinite detention).~ Nevertheless, the Court again upheld the Executive's decision, essentially for the same reasons articulated in Knauff. "It is true," the Court explained, "that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Id. at 212 (citing, inter alia, Yamataya, 189 U.S. at 100-01). In contrast, aliens "on the threshold of initial entry stan[d] on different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"

Thus, Knauff and Mezei essentially restored the political branches' plenary power over aliens at the border seeking initial admission. And since these decisions, the Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking initial admission to the country. See Fiallo, 430 U.S. at 792 ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." (internal quotation marks and citations omitted)); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.").

2.3 Test Your Knowledge

PROBLEM 2.1

H.R. 2415 has passed the U.S. House and Senate and is just waiting for the president's signature. If signed, it will become law. The bill would amend INA § 202(a)(1)(A) to add the following clause to the end of that paragraph: "except that no immigrant visas shall be extended to citizens of Tanzania." The House and Senate have argued that H.R. 2415 is an essential tool in the global war on terror given the recent upsurge in Tanzanian jihadists joining ISIS.

If challenged as beyond Congress's constitutional authority, how might a federal court evaluate the substantive change H.R. 2415 makes to INA § 202(a)(1)(A)?

PROBLEM 2.2

Marco is a native and citizen of Mexico who entered the United States without authorization at age fifteen. He is married to Uma, a U.S. citizen, with whom he has three U.S. citizen children. While residing in the United States, Marco acquired various tattoos: the names of his sons; his initials; a tribal image; images of a woman, theatrical masks, and a joker and clown; the words "Aztec Pride" alongside an Aztec Pyramid and Aztec Sun; a dove with the date of his father's death; the letters "L.A."; and Catholic symbols, including a cross and a rosary.

Marco applied to become a lawful permanent resident in the United States. As the final step in his application process, Marco traveled to Ciudad Juarez, Mexico for an in-person interview with a consular officer at the U.S. Embassy. The officer inquired about Marco's tattoos.

Following the interview, the consular officer refused Marco's visa application. The consular officer stated that Marco was ineligible for an immigrant visa under INA § 212(a)(3)(A) "as an alien for whom there is reason to believe is a member of a known criminal organization."

Marco and Uma thereafter brought a federal suit to challenge this inadmissibility determination, arguing it violated their First Amendment rights. Should the plenary power doctrine bar review of the consular officer's decision?

PROBLEM 2.3

Read the Naturalization Act of 1790, reprinted at section 12.9. Imagine this law was still in place in 1889 and was the subject of legal challenge. How might a court approach this litigation?

Chapter Three: Immigrants

This chapter concerns immigrants, a legal term of art referring to noncitizens who are admitted to the United States on a permanent basis. “Immigrant” is synonymous with “lawful permanent resident” (LPR) and “green card holder.”

There are three main categories of immigrants: those with specific family relationships to United States citizens and lawful permanent residents (see sections 3.4-3.10), those with employment-based ties to the United States (see sections 3.11-3.18), and “diversity” immigrants who participate in an annual lottery of immigrant visas (see section 3.19). In total, 1,320,080 noncitizens obtained lawful permanent resident status in the United States during fiscal year 2025.

Immigrants stand in contrast to nonimmigrants, who are admitted to the United States on a temporary basis. Nonimmigrants will be discussed in Chapter 4.

3.1 The Big Picture

EOUSA, OLE, Immigration Law (2005)

The INA presumes that all noncitizens who seek to enter the United States are entering with the intent to remain here permanently, i.e., as immigrants. INA § 214(b), 8 U.S.C. § 1184(b). Aliens who are not immigrants must prove that they fit within a category of nonimmigrants, i.e., those who seek to enter the United States on a temporary basis. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15). [See Chapter 4.]˜

Generally, to immigrate to the United States or to obtain a “green-card” an applicant must have either a qualifying relative, a job, or luck in the annual visa lottery. INA § 201, 8 U.S.C. § 1151, identifies which relatives and jobs qualify for this special treatment. Immigrants to the United States are divided into two categories: those whose ability to obtain permanent residence status is without numerical limitation, and those whose ability to obtain permanent residence is subject to an annual limitation.

The category of people whose ability to immigrate is not subject to numerical limitation includes "immediate relatives" of United States citizens, namely spouses, widows(ers) and˜ unmarried children [who are less than twenty-one years old]. Also included are the parents of U.S. citizens who are twenty-one or older. INA § 201(b), 8 U.S.C. § 1151(b). [The United States granted LPR status to 551,590 noncitizens as immediate relatives of USCs in fiscal year 2023.]˜

[The categories of people who are subject to numerical limitation include] those who seek permanent residence based on (A) family sponsorship, (B) employment and (C) diversity. The INA sets up an elaborate plan for the allocation of family and employment based visas. INA § 201(c)(d), 8 U.S.C. § 1151(c)(d). The statute also imposes numerical limitations on the visas allotted to nationals of individual foreign states [such that no single country can receive more than 7% of the total number of family- and employment-based immigrant visas: 25, 620. This is called the "per-country cap."]. INA § 202, 8 U.S.C. § 1152.

Family-based visas (separate from immediate relative visas, which are without numerical limitation) are distributed to four preferred groups (with minimum limits in parentheses). The first preferred group (23,400) includes unmarried sons and daughters (at least twenty-one years of age) of United States citizens, and their [unmarried, under twenty-one] children. The second preferred group (114,200) includes the spouses and unmarried sons and daughters [both under and over the age of twenty-one] of legal permanent residents (LPRs). The third preferred group (23,400) includes the married sons and daughters of United States citizens and their spouses and [unmarried, under twenty-one] children. The final preferred group (65,000) includes the brothers and sisters of United States citizens (at least twenty-one years of age) and their spouses and [unmarried, under twenty-one] children. [In fiscal year 2023, 204,240 noncitizens were granted LPR status on the basis of these family relationships.]

A total minimum of 140,000 immigrant visas are made available annually to employment-based immigrants. This category is divided into five preference groups. The number of visas allocated to each of the preferred groups is shown as a percentage of the yearly limit of the visas allocated to the employment-based category. The first preference (28.6%) is for priority workers, persons of extraordinary ability in the sciences, arts, education, business or athletics, outstanding professors and researchers, and certain multinational executives and managers. The second preference (28.6%) is for professionals holding advanced degrees, and persons of exceptional ability in the sciences, arts, and business. The third preference (28.6%) is for professionals holding baccalaureate degrees, skilled workers with at least two years experience and other workers whose skills are in short supply in the United States. The fourth preference (7.1%) is for special immigrants, certain religious workers, ministers of religion, certain international organization employees and their immediate family members and qualified, recommended current and former U.S. Government employees. The fifth preference (7.1%) is for investors, persons who create employment for at least ten unrelated persons by investing capital in a new commercial enterprise in the United States. The minimum capital required is between $[8]00,000 and $1,0[5]0,000, depending on the employment rate in the geographic area. [In fiscal year 2023, 196,760 noncitizens received LPR status on the basis of employment.]

The INA also allocates a maximum of 55,000 diversity immigrant visas. INA § 201(e), 8 U.S.C. § 1151(e). The persons eligible for these visas are selected at random from countries with low rates of immigration to the United States, hence the common name of "lottery visas." The Department of State administers this program and announces the registration information each year. [In fiscal year 2023, 67,350 visas were issued to diversity lottery winners.]

Noncitizens who enter the United States as immigrants or who obtain lawful permanent resident status in the United States are eligible to apply for naturalization when they have met certain eligibility requirements [including, among others, holding LPR status for five years (three for spouses of U.S. citizens)]. See INA §§ 311 et seq., 8 U.S.C. § 1422 [see section 12.7].

3.2 Wait Times

As discussed in section 3.1, some noncitizens are classified as "immediate relatives" and are not subject to the numerical limitations on immigrant visas: these include the spouses, parents, and the unmarried/under-21 children of U.S. citizens. INA § 201(b), 8 U.S.C. § 1151(b). These immigrants may come to the United States as soon as their visa applications are processed and approved. (Chapter 6 provides information about the mechanics of admission.)

For noncitizens who are subject to the numerical limitations on immigrant visas, a visa may not be immediately available. The visa may not be available because of the limited number of visas allotted. Remember from section 3.1 that there are, for example, only 23,400 visas available annually for the married sons and daughters of United States citizens and their spouses and children. Alternatively, the visa may not be immediately available because of the 7% per-country cap on family- and employment-based visas.

When a visa is not immediately available, the filing date of the visa petition—also called a "priority date"—marks the noncitizen's place in the immigrant visa queue. The State Department maintains information about the queues for family-based and employment-based immigrant visas. Each month, the State Department publishes visa bulletins, which provide information to noncitizens about: (1) when visas are actually available for each immigrant visa category by country of birth—the "final action dates" for visas; and (2) when visa applications can be processed by the State Department for each immigrant visa category by country of birth—the "dates for filing" visa applications.

Here is the State Department bulletin listing final action dates for family-based immigrants dated July 2026:

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILLIPINES
F1	01FEB18	01FEB18	01FEB18	08NOV07	01MAY13
F2A	01JAN25	01JAN25	01JAN25	01JAN24	01JAN25
F2B	22NOV17	22NOV17	22NOV17	15FEB09	15MAY13
F3	15APR12	15APR12	15APR12	01JUN01	22FEB06
F4	01JAN09	01JAN09	01NOV06	08APR01	01AUG07

The first column of the above chart refers to the family-based visa categories. F1 refers to the unmarried and over-21 sons and daughters of U.S. citizens. INA 203(a)(1), 8 U.S.C. § 1153(a)(1). F2A refers to the spouses and the unmarried, under-21 children of LPRs. INA 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A). F2B refers to the unmarried, over-21 sons or daughters of LPRs. INA 203(a)(2)(B), 8 U.S.C. § 1153(a)(2)(B). F3 refers to the married sons and daughters of U.S. citizens. INA 203(a)(3), 8 U.S.C. § 1153(a)(3). Finally, F4 refers to the brothers and sisters of U.S. citizens. INA 203(a)(4), 8 U.S.C. § 1153(a)(4). Note that there is no preference category for the parents, married children, or siblings of LPRs.

The remainder of the chart provides information about when visas are available. Dates are listed in an abbreviated format indicating the day of the month, month, and year that is being processed. That is, 01FEB18 refers to February 1, 2018.

The chart indicates that in July 2026, the spouses and children of LPRs eligible for an F2A visa had the shortest wait times; a visa application filed on their behalf would typically be processed within a year and a half. On the other hand, the chart indicates that the State Department was, in July 2026, processing F3 visa applications for the married and over-21-years-of-age Mexican sons and daughters of U.S. citizens filed by their parents more than 25 years earlier in June of 2001. One could read this lag-time to indicate that an F3 application filed on behalf of a Mexican citizen in July 2026 would likely be processed around 2051. Yet that would not be entirely accurate. The 7% per-country cap combined with the numerical visa limits means there is a significant backlog of applicants. The Cato Institute, a Libertarian think tank, has estimated that it would take between 32 and 160 years to receive an F3 visa with 60% to 100% of F3 sponsors dying before their relative receives a green card. See https://perma.cc/48C8-XFYH.

Here is a portion of the State Department bulletin listing final action dates for employment-based immigrants dated July 2026:

Employment based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	01JUN23	15OCT22	C	C
2nd	C	01SEP21	U	C	C
3rd	01AUG24	22DEC21	01JAN14	01AUG24	01AUG23
Other Workers	01MAR22	01APR19	01JAN14	01MAR22	01DEC21
4th	15SEP22	15SEP22	15SEP22	15SEP22	15SEP22
Certain Religious Workers	15SEP22	15SEP22	15SEP22	15SEP22	15SEP22

As with the family-based bulletin, the first column on this employment-based bulletin refers to the visa category. 1st refers to priority workers. INA 203(b)(1), 8 USC § 1153(b)(1). 2nd refers to members of the professions holding advanced degrees or "aliens of exceptional ability." INA 203(b)(2), 8 USC § 1153(b)(2). 3rd refers to skilled workers and professionals. INA 203(b)(3)(A)(i)-(ii), 8 USC § 1153(b)(3)(A)(i)-(ii). Other Workers refers to INA 203(b)(3)(A)(iii), 8 USC § 1153(b)(3)(A)(iii). 4th refers to certain special immigrants. INA 203(b)(4), 8 USC § 1153(b)(4). Certain Religious

Workers refers to a subset of special immigrants. INA § 101(a)(27)(C), 8 U.S.C. § 1101(a)(27)(C).

In addition to dates, this chart includes the letters "U" and "C." A "U" indicates that immigrant visas are temporarily unavailable. A "C" indicates that the category is current, and there is no wait beyond administrative processing for a visa. More employment-based immigrant categories than family-based immigrant categories are current. However, the bulletin indicates that immigrants from India have significant wait times for several visa categories. Frequently, noncitizens in these categories work in the United States as nonimmigrants (see Chapter 4) while their immigrant visa applications are pending.

3.3 Rights and Responsibilities

USCIS, Welcome to the United States: A Guide for New Immigrants (2015)

As a permanent resident, you have the right to:

- Live permanently anywhere in the United States.
- Work in the United States.
- Own property in the United States.
- Attend public school.
- Apply for a driver's license in your state or territory.
- Join certain branches of the U.S. armed forces.
- Receive Social Security, Supplemental Security Income, and Medicare benefits, if you are eligible.
- Apply to become a U.S. citizen once you are eligible.
- Request visas for your spouse and unmarried children to live in the United States.
- Leave and return to the United States under certain conditions.

As a permanent resident, you must:

- Obey all federal, state, and local laws.
- Pay federal, state, and local income taxes.

- Register with the Selective Service (U.S. armed forces), if you are a male between the ages of 18 and 26.˜
- Maintain your immigration status.
- Carry proof of your permanent resident status at all times.
- Change your address online or provide it in writing to USCIS within 10 days of each time you move.

3.4 Family-Based Immigrants: An Introduction

Kit Johnson, Theories of Immigration Law,
6 ARIZ. ST. L.J. 1211 (2014)

The United States has a long-standing tradition of favoring family-based migration. As research by [Dean] Kerry Abrams˜ [notes:] "In the late nineteenth and early twentieth centuries, the ability to relocate one's family was thought of as a male head of household's right. Under coverture, a man had the right to determine the domicile of his wife and children; the right to bring his wife and child with him when he immigrated was analogous. Most immigration was unrestricted, but even when Congress did restrict immigration—such as through the various Chinese exclusion acts—these acts were notably enforced in ways that still allowed a woman to enter if she was married to a man who was eligible for admission. In one case, for example, a court explained, '[A] Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either.'"˜ [Kerry Abrams, What Makes the Family Special?, 80 U. Chi. L. Rev. 7 (2013).]

While the nineteenth-century law of coverture and its concomitant focus on male heads of households is antiquated, its doctrinal descendant, family-based migration, has had a continued vitality through today. The Emergency Quota Act of 1921 was the first immigration law to "specifically privilege certain family members over other immigrants."˜ The privileged status of family members continues today with nearly 81% of those who obtained lawful permanent residence status in 2011 doing so on the basis of family relationships.˜

3.5 Family-Based Immigrants: Spouses

Spouses can receive many categories of immigrant visas. As discussed in section 3.1, spouses of U.S. citizens are classified as "immediate relatives" and can receive family-based immigrant visas. As discussed in section 3.2, spouses of lawful permanent residents can receive F2A immigrant visas. Finally, as will be discussed in more detail in section 3.21, every other noncitizen awarded an immigrant visa (whether family-based, employment-based, or diversity) is entitled to travel to the United States with their spouse; that spouse will be considered a "derivative beneficiary." INA § 203(d), 8 U.S.C. § 1153(d).

What Qualifies as a Marriage? 9 FAM 102.8-1(A)

The term "marriage" is not defined in the INA; however, the meaning of "marriage" can be inferred from INA 101(a)(35), which defines the term "spouse" [in the negative as not including "a spouse, wife, or husband by reason a of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated."] Relationships entered for purposes of evading immigration laws of the United States are not valid for visa adjudication purposes.

—-—

Validity of Marriage 9 FAM 102.8-1(B)

a. Law of Place of Celebration Controls: The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls (except as otherwise noted below). If the marriage was legally performed in the place of celebration and legally recognized, then the marriage is valid for visa adjudication purposes. Any prior marriage, of either party, must be legally terminated before the later marriage.

b. Void for Public Policy: Certain marriages that are legal in the place of celebration but are void under state law as contrary to public policy, are not valid for visa adjudication purposes.

1. Polygamous Marriages: Polygamous marriages are not recognized as a matter of federal public policy.˜ Any prior marriage, of either party, must be legally terminated before the later marriage.
2. Marriage Between Relatives: Certain marriages between relatives may be void because of public policy concerns even if the place of celebration recognizes the marriage.˜

3. Minor Marriage: Certain underage marriages involving an individual under the age of 18 may be void because of public policy concerns even if the place of celebration recognizes the marriage as valid.˜

3.6 Case: Adams v. Howerton

Adams v. Howerton
673 F.2d 1036 (9th Cir. 1982)

CIRCUIT JUDGE JOHN CLIFFORD WALLACE:

Adams, a male American citizen, and Sullivan, a male alien, appeal from the district court's entry of summary judgment for Howerton, Acting District Director of the Immigration and Naturalization Service (INS). The district court held that their homosexual marriage did not qualify Sullivan as Adams's spouse pursuant to section 201(b) of the Immigration and Nationality Act of 1952, as amended (the Act), 8 U.S.C. § 1151(b). We affirm.

I

Following the expiration of Sullivan's visitor's visa, Adams and Sullivan obtained a marriage license from the county clerk in Boulder, Colorado, and were "married" by a minister. Adams then petitioned the INS for classification of Sullivan as an immediate relative of an American citizen, based upon Sullivan's alleged status as Adams's spouse. The petition was denied, and the denial was affirmed on appeal by the Board of Immigration Appeals. Adams and Sullivan then filed an action in district court challenging this final administrative decision on both statutory and constitutional grounds. The parties agreed that there was no genuine issue as to any material fact and that the only issues presented were issues of law. On cross-motions for summary judgment, the district court entered judgment for the INS.˜ This appeal followed.

II

Two questions are presented in this appeal: first, whether a citizen's spouse within the meaning of section 201(b) of the Act must be an individual of the opposite sex; and second, whether the statute, if so interpreted, is constitutional.

Section 201(a) of the Act establishes immigration quotas and a system of preferential admissions based upon the existence of close family relationships. The section excludes immediate relatives of United States citizens from the quota limitations, which have been periodically revised by Congress. 8 U.S.C. § 1151(a).

Section 201(b) defines "immediate relatives" to include the spouses of United States citizens. 8 U.S.C. § 1151(b).˜ Section 201(b) was added to the Act in its present form by the Immigration and Nationality Act Amendments of 1965˜. Neither that section nor any subsequent amendments further define the term "spouse" directly.

Cases interpreting the Act indicate that a two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes. The first is whether the marriage is valid under state law. The second is whether that state-approved marriage qualifies under the Act. Both steps are required.˜ We first consider the validity of the marriage under state law.

In visa petition proceedings addressing this question, the Board of Immigration Appeals has held that the validity of a marriage is governed by the law of the place of celebration.˜ Because a valid marriage is necessary for spouse status under the immigration laws,˜ we look to Colorado law to determine whether the Adams-Sullivan marriage is valid.˜

It is not clear, however, whether Colorado would recognize a homosexual marriage.˜

While we might well make an educated guess as to how the Colorado courts would decide this issue, it is unnecessary for us to do so.˜ Because we do not reach the question of whether Colorado law permits homosexual marriages, we need not examine the constitutionality of the statute. We decide this case solely upon construction of section 201(b), the second step in our two-step analysis.

III

Even if the Adams-Sullivan marriage were valid under Colorado law, the marriage might still be insufficient to confer spouse status for purposes of federal immigration law. So long as Congress acts within constitutional constraints, it may determine the conditions under which immigration visas are issued. Therefore, the intent of Congress governs the conferral of spouse status under section 201(b), and a valid marriage is determinative only if Congress so intends.

It is clear to us that Congress did not intend the mere validity of a marriage under state law to be controlling. Although the 1965 amendments do not define the term "spouse," the Act itself limits the persons who may be deemed spouses. Section 101(a)(35) of the Act specifically provides that the term "spouse" does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated. 8 U.S.C. § 1101(a)(35). Furthermore, valid marriages entered into by parties not intending to live together as husband and wife are not recognized for immigration purposes.˜ Therefore, even though two persons contract a marriage valid under state law and are recognized as spouses by that state, they are not necessarily spouses for purposes of section 201(b).

We thus turn to the question of whether Congress intended that homosexual marriages confer spouse status under section 201(b). Where a statute has been interpreted by the agency charged with its enforcement, we are ordinarily required to accord substantial deference to that construction, and should follow it "unless there are compelling indications that it is wrong."˜ Thus, we must be mindful that the INS, in carrying out its broad responsibilities, has interpreted the term "spouse" to exclude a person entering a homosexual marriage.

While we do accord this construction proper weight, we base our decision primarily on the Act itself.˜ Nothing in the Act, the 1965 amendments or the legislative history suggests that the reference to "spouse" in section 201(b) was intended to include a person of the same sex as the citizen in question. It is "a fundamental canon of statutory construction" that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."˜ The term "marriage" ordinarily contemplates a relationship between a man and a woman.˜ The term "spouse" commonly refers to one of the parties in a marital relationship so defined. Congress has not indicated an intent to enlarge the ordinary meaning of those words. In the absence of such a congressional directive, it would be inappropriate for us to expand the meaning of the term "spouse" for immigration purposes.˜

Our conclusion is supported by a further review of the 1965 amendments to the Act. These amendments˜ clearly express an intent to exclude homosexuals.˜ As our duty is to ascertain and apply the intent of Congress, we strive to interpret language in one section of a statute consistently with the language of other sections and with the purposes of the entire statute considered as a whole.˜ We think it unlikely that Congress intended to give homosexual spouses preferential admission treatment under section 201(b) of the Act when, in the very same amendments adding that section, it mandated their exclusion. Reading these provisions together, we can only conclude that Congress intended that only partners in heterosexual marriages be considered spouses under section 201(b).

IV

We next consider the constitutionality of the section 201(b) so interpreted. Adams and Sullivan contend that the law violates the equal protection clause˜ because it discriminates against them on the bases of sex and homosexuality.˜ We need not and do not reach the question of the nature of the claimed right˜ or whether such a right is implicated in this case.˜ Congress has almost plenary power to admit or exclude aliens,˜ and the decisions of Congress are subject only to limited judicial review.˜

We hold that section 201(b) of the Act is not unconstitutional because it denies spouses of homosexual marriages the preferences accorded to spouses of heterosexual marriages.

AFFIRMED.

3.7 Same-Sex Marriage Today

Same-Sex Marriages, 9 FAM 102.8-1(E)

Same-sex marriage is valid for visa adjudication purposes, if the marriage is recognized in the "place of celebration," whether entered in the United States or a foreign country. The same-sex marriage is valid even if the applicant is applying in a country in which same-sex marriage is illegal.

—-—

3.8 Marriage Fraud

EOUSA, OLE, Immigration Law (2005)

Marriage fraud for immigration purposes is the participation by a noncitizen in a marriage with a United States citizen˜ so that the noncitizen can obtain immigration status.˜

Marriage fraud cases typically involve one of two factual scenarios. The first type involves a United States citizen who is paid some consideration to enter into a marriage with a noncitizen, knowing that the purpose of the marriage is to enable the noncitizen to petition for immigration benefits, with neither the noncitizen nor the citizen having any intention of thereafter residing as a married couple. The second type of marriage fraud involves a noncitizen spouse who misleads a United States citizen with feigned love and matrimonial intent, only to abandon or separate from the citizen after obtaining immigration benefits as a result of the marriage.˜

Predictably, the INA's spousal preference was an easy target for abuse by noncitizens who wished to immigrate to the United States. A noncitizen who did not qualify for immigration, or who was qualified but unwilling to wait until an immigrant visa became available, could participate in a fraudulent marriage in order to circumvent the immigration law and swiftly obtain permanent-resident status. The INS recognized the problem, estimating in 1985 that 30 percent of all marriage-based immigration petitions filed between 1978 and 1984 involved some type of fraud. See S. Rep. No. 99-49I, at 2 (1986) (Immigration and Marriage Fraud Amendments of 1986, Report to the Senate Committee on the Judiciary). [The INS later conceded that this estimate was based on a study of cases where fraud was suspected, without any follow-up as to whether fraud was ultimately found. The INS further conceded that their study was "not a statistically valid study of the suspected or actual incidence of marriage fraud." In addition, the study's author said "it would not be justified" to base legislative reform on his study. See Manwani v. U.S. Dept. of Justice, INS, 736 F. Supp. 1367 (W.D.N.C. 1990).]

Faced with the INS statistics on the growing marriage fraud problem, and recognizing the lack of an effective prosecutorial tool to combat the problem, Congress passed the˜ [Immigration and Marriage Fraud Amendments of 1986 (IMFA)], expressly codifying marriage fraud as a federal crime, and enabling immigration authorities to better identify spurious marriages during the administrative process.˜

THE FEDERAL CRIME OF MARRIAGE FRAUD

In order to prove a charge of marriage fraud under 8 U.S.C. § 1325(c), the government must prove the following elements:

1. The defendant knowingly.
2. Entered into a marriage.
3. For the purpose of evading any provision of the immigration laws of the United States.˜

[CONDITIONAL PERMANENT RESIDENCY FOR CERTAIN NONCITIZEN SPOUSES

The IMFA created new rules for any U.S. citizens seeking an "immediate relative" immigrant visa for their spouse when the two have been married for less than two years. INA § 216, 8 U.S.C. § 1186a. In these circumstances, the noncitizen spouse will receive "conditional" permanent resident status for two years.]

At any time during the conditional two-year period, both the noncitizen and the citizen-spouse are subject to inspection by immigration examiners. Typically, examiners interview the couple together and then each person separately, to test whether the couple is indeed living as husband and wife in a viable marriage. Interviewers may question each person regarding the lay-out of the marital home, the other's habits and preferences, the names of in-laws and any other information a married couple would reasonably be expected to know about each other. In addition, examiners look for documentary proof that the couple is living as husband and wife. Couples typically present copies of household bills and other correspondence, listing both the noncitizen and citizen-spouse as addressees. Copies of joint tax returns often are submitted by the couple, as are copies of the noncitizen's driver's license and other personal identification cards, showing his residence as that of his citizen-spouse.

Within ninety days before the expiration of the conditional two-year period, the noncitizen and spouse must file a Form I-751, Joint Petition to Remove Conditional Basis of Alien's Permanent Residency Status, with [US]CIS. The petition must verify that the marriage is legitimate, that it remains intact, and that it was not entered into for payment. A final interview is conducted prior to the conclusion of the conditional period, and if satisfied, immigration officials approve the petition and lift the noncitizen's conditional status, thus making him a permanent resident of the United States. If the couple fails to file the Form 1-751 before the expiration of the two-year conditional period, the noncitizen's status expires and the noncitizen is subject to deportation.

[OTHER STATUTORY RED FLAGS

In addition to establishing conditional permanent residence for certain noncitizen spouses, the IMFA established new rules for other forms of marriage deemed potentially indicative of fraud, namely: new marriage-based petitions by LPRs who themselves obtained immigration status on the basis of a former marriage, and marriages entered into during removal proceedings.

A lawful permanent resident who obtained their LPR status on the basis of marriage (LPR1) cannot thereafter petition for LPR status for a noncitizen spouse (potential LPR2) unless either: (a) five years has passed since LPR1 obtained permanent residence or (b) LPR1 establishes by "clear and convincing evidence" that their first marriage—the marriage that gave them LPR status—was not fraudulent. INA § 204(a)(2)(A), 8 U.S.C. § 1154(a)(2)(A).

Consider Luna from Mexico, who marries Oscar, a U.S. citizen, and gets LPR status on the basis of that marriage. If the two later divorce, and Luna thereafter marries Mateo, a Mexican citizen, she will have to prove that her original marriage to Oscar was not entered into "for the purpose of evading any provision of the immigration laws"—if she petitions for Mateo to receive LPR status within five years of having obtained LPR status herself.

Marriages entered into during removal proceedings are also subject to heightened scrutiny. Noncitizens in removal proceedings are not entitled to an immediate relative visa unless either: (a) they spend two years, after the date of marriage, outside of the United States or (b) they establish by "clear and convincing evidence" that the marriage was entered into "in good faith." INA §§ 204(g), 245(e), 8 U.S.C. §§ 1154(g), 1255(e). The "good faith" exception was not originally included in the IMFA but was added by statute later.]

—-—

USCIS Adjudicator's Field Manual § 21.3(a)(2)(I)

Some indications that a marriage may have been contracted solely for immigration benefits include:

- Large disparity of age;
- Inability of petitioner and beneficiary to speak each other's language;
- Vast difference in cultural and ethnic background;
- Family and/or friends unaware of the marriage;
- Marriage arranged by a third party;
- Marriage contracted immediately following the beneficiary's apprehension or receipt of notice to depart the United States;
- Discrepancies in statements on questions for which a husband and wife should have common knowledge;
- No cohabitation since marriage;
- Beneficiary is a friend of the family;
- Petitioner has filed previous petitions on behalf of noncitizens, especially prior noncitizen spouses.

—-—

3.9 The Problem of Family Violence

Noncitizens face significant hurdles if the sponsor of their family-based visa is abusive. For example, an abusive spouse might refuse to cooperate with the IMFA process described in section 3.8 to remove conditions on their battered spouse's residency petition, leaving them open to removal. An abusive spouse might exploit this situation by threatening to report their partner to DHS, should they ever try to leave the abuse.

In 1990, Congress created a waiver to the IMFA process of removing conditions on the LPR status of noncitizen spouses. It allows DHS to remove conditions, without a joint petition, if the filing noncitizen can establish that: (1) removal would result in "extreme hardship;" (2) the underlying marriage was "entered into in good faith;" and (3) during the marriage, the noncitizen "was battered by or was the subject of extreme cruelty" by their U.S. citizen or LPR spouse or parent. INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

In 1994, Congress created a broader form of relief that does not require a spouse to initiate, then abandon, the visa petition process as discussed in the paragraph above. Noncitizen spouses can affirmatively self-petition for LPR status if they entered a legal marriage with a U.S. citizen or LPR in good faith but were "battered" or "subject or extreme cruelty" by that U.S. citizen or LPR spouse. INA §§ 204(a)(1)(A)(iii) (U.S. citizens) & 204(a)(1)(B)(ii) (LPRs), 8 U.S.C. §§ 1154(a)(1)(A)(iii) & 1154(a)(1)(B)(ii).

3.10 Family-Based Immigrants: Children

The term "child" is defined by INA § 101(b), 8 U.S.C. 1101(b), and refers to an unmarried person under 21 years of age. Many categories of children can receive immigrant visas. As discussed in section 3.1, children of U.S. citizens are classified as "immediate relatives" and can receive family-based immigrant visas. As discussed in section 3.2, children of lawful permanent residents can receive F2A immigrant visas. Finally, as will be discussed in more detail in section 3.21, every other noncitizen awarded an immigrant visa (whether family-based, employment-based, or diversity) is entitled to travel to the United States with their children; those children will be considered "derivative beneficiaries." INA § 203(d), 8 U.S.C. § 1153(d).

What happens if a sponsor files an application for an immigrant visa when the beneficiary meets this definition of a child but the beneficiary "ages out" before the visa becomes available? That is, what happens if the visa beneficiary is under the age of 21 when the application is filed by their sponsor but is over the age of 21 when the visa becomes available?

Congress passed the Child Status Protection Act (CSPA) to address this scenario. For the children of U.S. citizens, who are classified as immediate relatives, CSPA essentially freezes their age at the time the visa application was filed on their behalf. So as long as an application is filed on behalf of such a child on the day before they turn 21, and so long as they remain unmarried, they will continue to be considered a child.

For those who are not children of U.S. citizens, the CSPA allows them to subtract the time their petition was being reviewed at U.S. Citizenship and Immigration Services

(USCIS) from their age on the day a visa becomes available. If the beneficiary's age after this calculation is less than 21 years, he or she can continue as a "child" in their original visa category. The CSPA only adjusts age; the beneficiary must remain unmarried.

How might the above provision come into play?

Children (and spouses) of incoming LPRs (whether family-based, employment-based, or diversity recipients) may enter the United States if "accompanying or following to join" their parent. INA § 203(d), 8 U.S.C. § 1153(d). Consider Ana, who is the sister of Hector and the mother of Roberto. Hector is a U.S. citizen. Hector has petitioned for Ana to receive an F4 visa. Ana's son Roberto can get an F4 visa at the same time as his mom if he is unmarried and under 21 when Ana's F4 visa becomes available. Roberto can also get an F4 visa at the same time as his mom if he is unmarried and no older than 21 plus the visa processing time. If Roberto is over the age of 21 due to the wait times outlined in section 3.2, the CSPA will not help. He will have "aged out" and cannot follow his mom to the United States under the category of "accompanying or following to join."

Two notes on terminology. First, when the INA refers to the "sons and daughters" of U.S. citizens and LPRs—as it does for F1, F2B, and F3 visas, as discussed in section 3.2—it means progeny over the age of 21 in contradistinction to "children." Second, the term "unaccompanied alien child" (UAC) is a unique statutory term referencing a noncitizen without immigration status, who is under 18, and does not have a parent or guardian in the United States or a parent or guardian in the United States who can "provide care and physical custody." 6 U.S.C. § 279(g).

3.11 Employment-Based Immigrants: Priority Workers (EB-1)

There are three categories of workers who qualify as "priority workers." INA § 203(b)(1), 8 U.S.C. § 1153(b)(1).

The first category includes noncitizens with "extraordinary ability" in "sciences, arts, education, business, or athletics ... demonstrated by sustained national or international acclaim." Proof of extraordinary ability can be shown with evidence of a one-time achievement such as a Pulitzer Prize, an Oscar, or an Olympic medal. Alternatively, an individual can establish their extraordinary ability by showing at least three of the following 10 items:

- Evidence of receipt of a lesser nationally or internationally recognized prize or award for excellence in the field of endeavor;

- Evidence of membership in associations which require outstanding achievements of their members, as judged by recognized experts;
- Published material in professional or major trade publications or major media about the noncitizen's work;
- Evidence of participation on a panel, or individually, as a judge of the work of others in the field;
- Evidence of original scientific, scholarly, artistic, or business-related contributions of major significance;
- Evidence of authorship of scholarly articles in professional journals or other major media;
- Evidence of the display of the noncitizen's work in exhibitions or showcases;
- Evidence that the noncitizen has performed in a leading or critical role for organizations or establishments having a distinguished reputation;
- Evidence of high salary or high remuneration in relation to others in the field; or
- Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disc, or video sales.

An individual of "extraordinary ability" need not have an offer of employment.

The second category includes noncitizens who are "outstanding professors and researchers." This category requires proof of international recognition for outstanding achievements in a particular academic field, a minimum of three years' experience in teaching or research in that academic area, and evidence of a job offer whether in academic or the private sector. This category requires proof of two of the following:

- Evidence of receipt of major prizes or awards for outstanding achievement;
- Evidence of membership in associations that require their members to demonstrate outstanding achievement;
- Evidence of published material in professional publications written by others about the noncitizen's work in the academic field;
- Evidence of participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field;
- Evidence of original scientific or scholarly research contributions in the field; or

- Evidence of authorship of scholarly books or articles (in scholarly journals with international circulation) in the field.

Finally, the EB-1 category includes certain multinational executives and managers.

3.12 Employment-Based Immigrants: Members of the Professions Holding Advanced Degrees, Those of Exceptional Ability (EB-2)

One way for a noncitizen to qualify for an EB-2 visa is to hold an advanced degree: a baccalaureate or foreign equivalent degree plus five years of post-baccalaureate, progressive work experience in the field. The job they are coming to fill must require that advanced degree.

Alternatively, a noncitizen can qualify for an EB-2 visa by showing exceptional (in contrast to the EB-1's "extraordinary") ability in the "sciences, arts, or business." Exceptional ability "means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." This category requires proof of three of the following six types of evidence:

- An official academic record showing that the beneficiary has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- Evidence in the form of letter(s) from current or former employer(s) showing that the beneficiary has at least 10 years of full-time experience in the occupation in which he or she is being sought;
- A license to practice the profession or certification for a particular profession or occupation;
- Evidence that the beneficiary has commanded a salary or other remuneration for services that demonstrates exceptional ability. (To satisfy this criterion, the evidence must show that the beneficiary has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field);
- Evidence of membership in professional associations; or
- Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

Both types of EB-2 workers need to go through the labor certification process, discussed in section 3.14 below.

3.13 Employment-Based Immigrants: Skilled Workers, Professionals, and Other Workers (EB-3)

The third preference group for employment-based visas includes:

- "Skilled workers": Persons whose jobs require a minimum of two years training or experience, not of a temporary or seasonal nature. The skilled worker must meet the educational, training, or experience requirements of the job opportunity. Relevant post-secondary education may be considered as training.
- "Professionals": Persons whose job requires at least a U.S. baccalaureate or foreign equivalent degree and are a member of the professions.
- "Other workers": Persons performing unskilled labor requiring less than two years training, education, or experience, not of a temporary or seasonal nature.

All three types of EB-3 workers need to go through the labor certification process, discussed in section 3.14 below.

3.14 Labor Certification for EB-2 and EB-3 Workers

Before an employer can file a visa application with USCIS on behalf of a prospective EB-2 or EB-3 worker, that employer must first seek labor certification from another federal agency: the Department of Labor's Employment and Training Administration (ETA). This process is currently electronic, conducted through the Program Electronic Review Management (PERM) system.

The purpose of labor certification is twofold. First, it aims to ask whether there are "able, willing, and qualified" U.S. workers available to fill the position that the employer seeks to fill with a noncitizen worker. That is, labor certification asks: Did the employer advertise the position and attempt to recruit U.S. workers to fill it? Did the published job description accurately describe the minimum qualifications for the job? Were there any minimally qualified U.S. workers willing to take the position, even if the proposed EB-2 or EB-3 worker was more qualified? Second, labor certification aims to verify that the employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. To meet this latter requirement, the employer must show that they are paying the "prevailing wage" for the job, a number that can be requested from the National Prevailing Wage Center (NPWC) or determined from another legitimate source of wage information.

The labor certification process, in looking to concerns of recruitment and wages, involves the submission of attestations by the employer on these topics. Applications are generally granted on the basis of employer attestations alone. However, applications are subject to both random and targeted audits to ensure that the process is not being abused by employers.

The DOL has predetermined that there are certain jobs in the United States where there is such a shortage of workers that the labor certification process can be bypassed. The DOL's "Schedule A" identifies these jobs. Beyond Schedule A, certain noncitizens can bypass the labor certification process by obtaining a national interest waiver (NIW).

Schedule A
9 FAM 302.1-5(B)(3)

a. In General: The DOL attempts to minimize the operational impact of its statutory responsibilities with "Schedules" for types of cases in which˜ a definite approval˜ will result, without having to undertake the individual analysis required in the great majority of cases.

b. Schedule A Certifications:

(1) The DOL's Schedule A (see 20 CFR 656.5) sets forth occupational and professional groups in which there is a nationwide shortage of workers willing, able, qualified (or equally qualified in the case of applicants who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available and in which the employment of applicants will not, presumably, affect adversely the wages and working conditions of workers in the United States similarly employed.

(2) An employer for an applicant in an occupation that qualifies for Schedule A may file an application for certification with the appropriate DHS office. Schedule A, as amended by the Immigration Act of 1990, lists two such occupational groups as follows:

(a) Group I - Physical Therapists and Nurses; and

(b) Group II - Applicants of Exceptional Ability in Sciences or Arts.˜

National Interest Waivers of Labor Certification,
9 FAM 502.4-3(E)(b)(1)

Although a labor certification is generally required for the second preference category, USCIS may waive the labor certification requirement if it determines that such waiver is in the national interest. A waiver is in the national interest if the petitioner can establish, based on Matter of In Re: New York State Department of Transportation, 22 I&N Dec. 215 (Comm. 1998) that:

(a) The beneficiary must seek employment in an area that has substantial intrinsic merit;

(b) The waiver request is not based solely on local labor shortage, but rather the proposed benefit to be provided will be national in scope; and

(c) It must be demonstrated that the national interest would be adversely affected if the employer is required to proceed with the labor certification process.

3.15 Case: Matter of Martin Kaplan

Matter of Martin Kaplan
(Board of Alien Labor Certification Appeals 2001) (en banc)

DECISION AND ORDER

These matters arise from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. Permanent alien labor certification is governed by [INA] section 212(a)(5)(A) ˜ and [20 C.F.R. § 656].˜ The Board has considered this matter en banc to consider the method for review of applications involving domestic cooks with job requirements for experience in specific styles or types of cuisine. We hold that cooking specialization requirements for domestic cooks are unduly restrictive˜ and therefore must be justified by business necessity. Moreover, we hold that cooking specialization requirements for domestic cooks normally should be analyzed under the business necessity standard˜ prior to their consideration as a factor under the bona fide job opportunity analysis˜.

STATEMENT OF THE CASE˜

Employer, Martin Kaplan ("Kaplan"), filed an Application for Alien Employment Certification seeking to fill the position of "Cook-Kosher."˜ The duties were listed as follows: "Plans, prepares and cook [sic] meals, according to the principles of Kosher cuisines and recipes, such as: Kosher meats, kreplach, stuffed cabbage, matzo balls. Decorates dishes according to nature of celebration. Purchase foodstuff. Cleans kitchen and cooking utensils. Serves Meals."˜ Kaplan required 2 years of experience in the job offered.˜

The CO issued a Notice of Findings ("NOF")˜ in which she stated her intent to deny the application.˜ The CO first noted that it was unclear whether there was a bona fide job opportunity.˜ The CO next found that Employer's requirement of two years of experience performing Kosher style cooking was unduly restrictive. The CO stated that "[t]he requirement that applicants have experience in a particular type of ethnic/religious food is employer's personal preference and not a normal job requirement."~ The CO noted that the Dictionary of Occupational Titles ("DOT") does not include particularized experience in the preparing of ethnic/religious foods, and thus found that Kaplan's requirement was unduly restrictive. Kaplan was informed that he could rebut the finding by demonstrating a business necessity for the requirement. Kaplan was also specifically requested to provide "[e]vidence to support that an applicant with 2 years of cooking experience could not readily adapt to a Kosher style of cooking" and "[e]vidence to show that an applicant with no prior experience in Kosher cooking is incapable of preparing Kosher food."~

Kaplan filed his rebuttal to the NOF~ stat[ing] that his family has traditionally eaten Kosher food, and that his household and religion require such cooking. Further, Kaplan stated that because of his busy schedule, he could not train someone to cook in a Kosher manner.~

The CO issued her Final Determination denying the application~. The CO found first that Kaplan had failed to document sufficiently that a bona fide position existed.~ The CO further found that Kaplan had not documented business necessity for the restrictive requirement. Specifically, the CO found that Kaplan had not documented that someone with two years of experience in domestic cooking could not cook Kosher style foods without specialized experience.~ Thereafter, Kaplan requested review before the Board.~

DISCUSSION

The case before the Board involves two issues: (1) how to treat an employer's requirement that an applicant for a domestic cooking position specialize in a particular style or type of cooking under the unduly restrictive job requirement/business necessity analysis~; and, (2) how an employer's proffer of a household domestic cook position that includes a specialization requirement is treated under the bona fide offer of employment~.

Unduly Restrictive Job Requirements/Business Necessity~

The analysis of whether a job requirement is unduly restrictive is well-trodden ground. According to the regulations: ["The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones." 20 C.F.R. § 656.17(h)(1). A job is not "unduly restrictive" when the job requirements: (A) are those "normally required for the job in the United States;" (B) are those defined as part of the job in the O*NET including those for subclasses of jobs; and (C) do not contain a language requirement "other than English."] The three elements for determining whether a job requirement is unduly restrictive are to be read conjunctively.˜ Accordingly, "job requirements which do not comply with all three subsections A, B and C, are unduly restrictive unless adequately documented as arising from business necessity."˜

The DOT definition for domestic cooks is: "305.281-010 COOK (domestic ser.). Plans menus and cooks meals, in private home, *according to recipes or tastes of employer*: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for *special diets*.˜"˜ (emphasis added).

We find that the DOT definition of domestic cook supports the notion that cooking specializations are sometimes part of the job, but we also find that the DOT does not necessarily authorize any particular specialization as a job requirement.˜ The definition is far too generalized to provide blanket authorization for individual cooking specialization requirements for domestic cooks. The DOT is merely a guideline and should be considered in context rather than simply applied mechanically.˜ A job duty of cooking to the tastes or recipes of an employer, in context, is hardly an endorsement for chef specialities. The DOT's references to cooking to recipes/tastes/special diets, may or may not involve major or minor job duties in particular cases. These references are not enough to energize these duties with the inherent force of full job requirements.

Recognition that specializations may be part of the job of a domestic cook does not end the analysis because the DOT does not establish whether this particular job requirement is a duty that a cook with two years of experience should be capable of picking up and adjusting to within a reasonable period of on the job functioning (e.g., by consulting cooking reference books), or a major element of the job that itself requires two years of experience (i.e., a type of cooking that requires extensive training and experience).

In addition, we observe that when a DOT definition contains job duties described in broad and subjective terms that can then be narrowly defined by an employer in an application—as in cooking according to the recipes or tastes of the employer—it is all too easy for an employer to impose insubstantial or outright fraudulent specialization requirements that are tailored to the alien's qualifications with the intent of artificially decreasing the pool of qualified U.S. applicants.˜ A CO may properly conclude that a person with two years of cooking experience might be able adapt to many cooking specialties with only a minimal amount of training.˜

Thus, given the weak support the DOT provides for any specific cooking specialization, the distinct possibility that many cooking specialization duties would not require two years of experience in-and-of-themselves for an otherwise qualified and experienced domestic cook to be able to perform within a reasonable period of acquiring the job, and the great potential for fraudulent or exaggerated statement of cooking specializations to tailor the job to the alien's qualifications, we hold that all cooking specializations for domestic cooks are unduly restrictive job requirements within the meaning of the regulations, and must be justified by business necessity.˜ By this holding, we do not mean to suggest that cooking specializations for domestic cooks are somehow improper or even unusual. Rather, we are only holding that a requirement of two years of experience in the specialization is unduly restrictive unless justified by business necessity.

The business necessity test˜ requires that the employer demonstrate: ["the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner." 20 C.F.R. § 656.17(h)(1).]

An application for a Kosher Cook requires a preliminary analysis before applying˜ [this] test. We take official notice˜ that Kosher is a "Hebrew term meaning 'fit,' 'in proper condition,' as a designation for ritually pure things, especially food permitted to be used in accordance with the [Jewish] dietary laws."˜ "There is no such thing as 'kosher-style' food. Kosher is not a style of cooking. Chinese food can be kosher if it is prepared in accordance with Jewish law, and there are many fine kosher Chinese restaurants in Philadelphia and New York. Traditional Ashkenazic Jewish foods like knishes, bagels, blintzes, and matzah ball soup can all be non-kosher if not prepared in accordance with Jewish law. [Kashrut]"˜ If the application is for a person to cook the traditional Ashkenazic Jewish foods and the employer does not follow the laws of Kashrut, the application is no different from one for any other kind of specific cooking specialization and should be treated accordingly. If the application is for a person to cook following the laws of Kashrut it is relevant for the CO to inquire about the way in which the employer practices Kashrut˜ to establish the reasonable relationship to the occupation in the context of the employer's business [household]. If the application is for a person to cook traditional Jewish foods following the laws of Kashrut both components must be established.

The second prong of˜ [the business necessity test] may often focus on whether two years of experience in the specialization for otherwise experienced cooks is required to be able to cook the specialized cuisine. Thus, for example, it is not enough for an employer to establish that there are laws of Kashrut applicable to Kosher cooking-rather, the employer must also establish that it takes two years to learn to cook under the laws of Kashrut.˜ Similarly, it is not enough for an employer to establish that the family prefers a particular cuisine-rather, the employer must also establish that it takes two years to learn to cook that cuisine. In this respect, it must be remembered that an employer may not reject applicants because the alien is more qualified.˜ Thus, an employer seeking to take advantage of alien labor certification when employing a domestic cook cannot demand the best cook—but only a cook who can do the job.

Application of the law to the facts of the case˜

[T]he CO required Employer to establish business necessity˜ for the cooking specializations. [T]he NOF identified three specific points Employer had to address. These can be summarized as a necessity to show that a cook without prior Kosher cooking experience is not capable of preparing Kosher foods; why Employer or a family member could not provide training; and whether the job, as described, existed before the Alien was hired, i.e., whether prior cooks had two years of Kosher cooking experience. Employer, in rebuttal, submitted a statement regarding his Jewish heritage and the religious necessity of keeping Kosher. He additionally stated that due to career demands, neither he nor his wife could train someone. Finally, a letter from a previous cook, who worked for Employer as an independent contractor, was submitted to show that the same job existed previously.

The CO found that the rebuttal did not demonstrate that Kosher cooking experience was necessary. We agree. It may well be true that neither Employer nor his wife can take the time to train a cook according to the laws of Kashrut, but the NOF also required that Employer show that such training was necessary. Employer did not do so. Additionally, the letter from a past cook indicates that she cooked for Employer for a period of three years, but contains no indication at all of her experience prior to her hire by Employer. Employer has failed to show that the prior holder of the position also had to meet the restrictive requirement noted on the certification application. Thus, we find that the CO properly denied certification˜.

Bona Fide Job Opportunity

Since we have determined that˜ the˜ employer [did not] establish˜ business necessity for the domestic cook speciality requirement˜, it is not necessary to rule on whether they˜ provided sufficient documentation to overcome the CO's raising of the issue of whether the domestic cook position was a bona fide job opportunity.˜ [See 20 C.F.R. 656.17(*l*)("the employer ... must be able to demonstrate the existence of a bona fide job opportunity, i.e. the job is available to all U.S. workers."] Nonetheless, we take this opportunity to provide a clarification of the analysis of cooking specialization requirements for domestic cooks˜, and the relationship of that analysis to˜ [the] unduly restrictive job requirement/business necessity analysis.

The problem of whether the job opportunity for a domestic cook is a bona fide offer of employment˜ was discussed by the Board in Carlos Uy III, 1997-INA-304 (Mar. 3, 1999) (en banc). In Uy, the Board adopted a "totality of the circumstances" test for consideration of whether an application was based on a mis-characterization of the position—the problem being the appearance that employers were using the domestic cook position to have the job classified as a skilled position, and therefore avoid a long wait for a visa, when it was likely in many cases that the employer was, in reality, seeking a housekeeper who also has cooking duties. When the CO considers whether a specialization for a domestic cook is evidence relating to the bona fides of the classification of the job as a domestic cook versus some other domestic service position, the focus is on whether the employer is mis-characterizing the job in order to avoid long waits for a visa. In contrast, when a CO questions whether a specialization for a domestic cook is an unduly restrictive job requirement˜, the focus is on whether the employer is seeking to tailor the job requirements to the alien's qualifications and thereby artificially reduce the pool of qualified U.S. applicants. Of course, an employer might simultaneously be attempting to both avoid the visa wait and present unduly restrictive job requirements.˜

We wish to emphasize˜ that a cooking specialization requirement should be first and foremost viewed as an unduly restrictive job requirement/business necessity issue, and that a CO should normally address this issue before consideration of the bona fides of the employment offer issue. Not only does such a sequence honor the integrity of the regulatory scheme˜, but it may also help to crystalize the˜ [bona fide job opportunity] analysis. If an employer is able to establish that a cooking specialization for a domestic cook is justified by business necessity, that fact could become a strong factor in support of the bona fides of a domestic cooking position. If an employer is not able to establish that such a specialization is supported by business necessity, however, it may not be necessary to engage in˜ [bona fide job opportunity] analysis—or—that failure may at least tend to suggest that Employer's job offer is not bona fide.˜

ORDER

The Certifying Officer's denial of labor certification in the˜ above captioned case is hereby AFFIRMED.

3.16 Employment-Based Immigrants: Special Immigrants (EB-4)

The fourth preference of employment-based immigrants is reserved for "special immigrants." The term "special immigrants" is defined at INA 101(a)(27), 8 U.S.C. § 1101(a)(27). It includes such diverse categories as religious workers, translators who worked with the U.S. armed forces in Iraq or Afghanistan, and children who a U.S. court has determined cannot be reunified with one or more parents due to abuse, neglect, or abandonment.

3.17 Employment-Based Immigrants: Investors (EB-5)

CRS, EB-5 Immigrant Investor Program (2023)

Congress created the fifth [employment-based visa] category (EB-5), the immigrant investor visa, in 1990˜ to benefit the U.S. economy through job creation and foreign capital investment. It provides lawful permanent residence (LPR) status to foreign nationals who invest capital in a new commercial enterprise (NCE) that creates jobs. Approximately 10,000 visas annually, 7.1% of all employment-based visas, are allocated to immigrant investors and their family members.

The minimum investment amount for the EB-5 category is $1,050,000, or $800,000 if the investment is in a targeted employment area (TEA)—a rural or high-unemployment area—or in an infrastructure project. The investment must create or preserve full-time employment for at least 10 U.S. citizens, U.S. nationals, LPRs, or other foreign nationals lawfully authorized to be employed in the United States.

The EB-5 visa grants investors, their spouses, and children (known as derivatives [see section 3.21]) conditional LPR status. After approximately two years, they must apply to remove the conditions on their LPR status. If the investor has met the program requirements (i.e., invested the required money and created the required jobs), they will receive full LPR status. If the investor has not met the requirements or does not apply to have the conditional LPR status removed, the investor's and their derivatives' conditional status is terminated, and, generally, they are required to leave the United States or will be placed in removal proceedings.

The EB-5 visa has two pathways, the standalone program and the Regional Center Program. Both may make use of TEAs for a reduced investment amount. In the standalone program, established under the 1990 legislation, foreign nationals invest in an enterprise that uses the capital for direct job creation (jobs held inside the NCE). The standalone program is permanently authorized. In 1992, Congress established the Regional Center Program as a pilot program. Regional centers are "any economic unit, public or private, which [are] involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." The program allows investors to pool their investments in a regional center to fund a project in a specific geographic area and to count a certain proportion of indirect jobs (held outside the NCE) toward the job creation requirement. The Regional Center Program now accounts for most EB-5 investors' participation (94% of individuals admitted to the United States under the EB-5 category from FY2018 through FY2022 invested in regional centers). However, unlike the standalone program, the Regional Center Program is not permanent and it requires regular reauthorization. In 2021, authorization for the program lapsed for nearly nine months.

Lawmakers had long called for various reforms to address concerns about EB-5, including the instability of the Regional Center Program, minimum investment amounts that had been unchanged since 1990, TEA gerrymandering, instances of fraud, and investor protections, among others.

In March 2022, Congress passed the EB-5 Reform and Integrity Act of 2022 (RIA) within an omnibus funding package, enacting several program changes. The legislation codified the Regional Center Program in the INA and reauthorized it through FY2027. It set new investment thresholds; codified processes for TEA designations; established set-asides for visas for investments in rural areas, high-unemployment areas, and infrastructure projects; and implemented new fees and oversight measures.

After low levels of admissions under the EB-5 category during the COVID-19 pandemic in FY2020 (3,966) and FY2021 (2,635), admissions increased to 10,885 in FY2022. Nationals from a relatively small set of countries dominate participation in the EB-5 program. In FY2022, nationals from China, India, and Vietnam comprised more than three-quarters of EB-5 admissions, with China alone representing 56.3% of all admissions.

3.18 The Trump Gold Card

In September 2025, President Trump issued an executive order in which he announced the "Gold Card, a visa program ... [to] facilitate the entry of aliens who have demonstrated their ability and desire to advance the interests of the United States by voluntarily providing a significant financial gift to the Nation." The order promised an "expedited process" for noncitizens who made an "unrestricted gift" of $1 million (for an individual) or $2 million (for a business entity on behalf of an individual). The "gift" would be evidence of the "exceptional business ability" required for an EB-2 visa (see section 3.12) as well as the "national benefit" needed for a national interest waiver of labor certification (see section 3.14).

Immigration attorneys have largely steered clients away from the Gold Card program. For one, simply applying for the program requires a nonrefundable $15,000 filing fee. In addition, the "expedited process" promised has not materialized. More importantly, the legality of the program is being challenged on the basis that it has not been congressionally authorized. As of April 2026, only one Gold Card had been issued.

3.19 Diversity Immigrants

CRS, The Diversity Immigrant Visa Program (2019)

The purpose of the diversity immigrant visa program (DV program, sometimes called "the green card lottery" or "the diversity visa lottery") is˜ to foster legal immigration from countries other than the major sending countries of current immigrants to the United States. Current law weights the allocation of immigrant visas primarily toward individuals with close family in the United States and, to a lesser extent, toward those who meet particular employment needs. The diversity immigrant category was added to the Immigration and Nationality Act (INA) by the Immigration Act of 1990˜ to stimulate "new seed" immigration (i.e., to foster new, more varied, migration from other parts of the world).

The DV program currently makes 50,000 visas available annually to natives of countries from which immigrant admissions were less than 50,000 over the preceding five years combined. The formula for allocating these visas is specified in statute: visas are divided among six global geographic regions, and each region and country is identified as either high-admission or low-admission based on how many immigrant visas were given to foreign nationals from each region and country over the previous five-year period. Higher proportions of diversity visas are allocated to low-admission regions and countries. The INA limits each country to 7% (3,500, currently) of the total and provides that Northern Ireland be treated as a separate foreign state.

Because demand for diversity visas greatly exceeds supply, a lottery system is used to select individuals who may apply for them. Those selected by lottery ("lottery winners"), like all other foreign nationals wishing to come to the United States, must undergo reviews performed by Department of State consular officers abroad and Department of Homeland Security immigration officers upon entry to the United States. These reviews are intended to ensure that the foreign nationals are not ineligible for visas or admission to the United States under the grounds for inadmissibility spelled out in the INA [see Chapter 4]. To be eligible for a diversity visa, the INA requires that a foreign national have at least a high school education or the equivalent, or two years' experience in an occupation that requires at least two years of training or experience. The foreign national or the foreign national's spouse must be a native of one of the countries listed as a foreign state qualified for the diversity visa program.

The distribution of diversity visas by global region of origin has shifted over time, with higher shares coming from Africa and Asia in recent years compared to earlier years when Europe accounted for a higher proportion. Of all those admitted through the program from FY1995 (the first year it was in full effect) through FY2017 (the most recent year for which data are available), individuals from Africa accounted for 40% of diversity immigrants, while Europeans accounted for 31% and Asians for 25%.

Some argue that the DV program should be eliminated and its visas re-allocated for employment-based visas or backlog reduction in various visa categories. Critics of the DV program warn that it is vulnerable to fraud and misuse and is potentially an avenue for terrorists to enter the United States, citing the difficulties of performing background checks in many of the countries whose citizens are eligible for a diversity visa. Critics also argue that admitting immigrants on the basis of their nationality is discriminatory and that the reasons for establishing the DV program are no longer germane.

Supporters of the program argue that it provides "new seed" immigrants for a system weighted disproportionately to family-based immigrants from a handful of countries. Supporters contend that fraud and abuse have declined following measures put in place by the State Department, and that the system relies on background checks for criminal and national security matters that are performed on all prospective immigrants seeking to come to the United States, including those applying for diversity visas. Supporters also contend that the DV program promotes equity of opportunity and serves important foreign policy goals.

—-—

On December 23, 2025, the State Department announced an immediate "pause" on all diversity visas, with no exceptions.

3.20 Other Immigrant Categories

There are other pathways to becoming an LPR. As discussed in Chapter 4, two nonimmigrant visa categories offer a path to LPR status: the T visa for noncitizen victims of severe forms of human trafficking and the U visa for noncitizen crime victims who help law enforcement agencies (see section 4.10). As discussed in Chapter 8, noncitizens who are granted a special kind of relief from removal called cancellation of removal are granted LPR status. Finally, as discussed in Chapter 10, refugees and asylees have a path to LPR status.

3.21 Derivative Beneficiaries

Every immigrant (whether family-based, employment-based, or diversity) is entitled to travel to the United States with their spouse and children. INA § 203(d), 8 U.S.C. § 1153(d). The person who qualifies for the immigrant visa is called the "principal beneficiary." The spouse and children of that immigrant are called "derivative beneficiaries."

Derivative beneficiaries receive the same visa as the principal beneficiary. Recall Ana and Roberto from section 3.10. Ana, as the sibling of a U.S. citizen, qualified for an F4 visa. She was the principal beneficiary. Ana's unmarried and under-21 son, Roberto, was also entitled to an F4 visa as a child "accompanying or following to join" his mother Ana. INA § 203(d), 8 U.S.C. § 1153(d).

In terms of the wait times discussed in section 3.2, primary and derivative beneficiaries share the same priority date based upon the principal beneficiary's visa application. For example, let's continue to think about Ana and Roberto from section 3.10 with the following extra information: Ana and Roberto are from Spain and Hector (Ana's U.S. citizen brother) filed the paperwork for Ana's F4 visa on January 1, 2008. Looking at the visa bulletin in section 3.2, the State Department was ready to process Ana's visa application in July 2025. Roberto's eligibility for a visa would be judged by his age and marital status in July 2025.

Finally, the visas issued to derivative beneficiaries count toward the total number of visas available in any given year. As discussed in section 3.1, the United States makes 65,000 F4 visas available annually. If Ana and Roberto each get an F4 visa, the total number of available F4 visas is reduced by two. If Ana's family were larger—if she were married and had three unmarried and under-21 children—Ana, her spouse, and her three kids would get five of the available F4 visas. That is to say, the United States does not award 65,000 visas to siblings of U.S. citizens a year. It awards a certain number of visas to siblings and to those siblings' spouses and children. This is true for all family-based, employment-based, and diversity visa categories.

3.22 Test Your Knowledge

PROBLEM 3.1

Diego Del Durando is a recently naturalized citizen from the Philippines. Diego is in the process of seeking family-based immigrant visas for his sister, his brother-in-law, and his two nieces (ages one and three). Using the chart in section 3.2, when would you estimate that Diego's sister, brother-in-law, and nieces would be able to come to the United States as LPRs?

PROBLEM 3.2

Tim Tarkinol, a U.S. citizen, got the surprise of his life when his commercial DNA results showed that he was the father of 20-year-old Norwegian citizen Olga Ostøyan, the result of a one-night tryst when he was studying abroad in Norway. Tim and Olga have connected. Olga is interested in moving permanently to the United States. Olga's soon-to-be-wife, Persa Persgard, also a Norwegian citizen, has just been accepted to medical school in New York. And Olga is interested in getting to know Tim, Tim's wife, their kids, as well as Tim's parents, sister, brother-in-law, and nephews, all of whom are U.S. citizens. What are Olga's options in terms of an immigrant visa? Are there any pitfalls or concerns that Olga and Tim should be considering?

PROBLEM 3.3

Gyasi, a Ghanaian citizen, came to the U.S. to study at the University of Delaware. There, Gyasi began dating Annie, a U.S. citizen. Annie was raising two children from a previously relationship and caring for her father, who lived in a nearby nursing home. The couple married shortly after Gyasi graduated with a PhD in political science. Gyasi attempted to get an academic position at a university within commuting distance of Annie's home, but he was unsuccessful. He obtained a tenure-track position in North Carolina. Annie did not want to uproot her children and move away from her ailing father, and Gyasi did not want to stay permanently in North Carolina, so the couple decided that Gyasi would move to North Carolina, while Annie would stay in Delaware, and they visited each other on weekends, holidays, and summers.

Annie filed an I–130 immigrant visa petition on behalf of Gyasi as an "immediate relative." Over the next six years, DHS interviewed the couple three times, asking each spouse a total of 48 questions about their marriage. The couple gave consistent answers to 43 of those questions, which included questions about medications, most recent dates, and decor of the family residence. The five inconsistent responses were these: To the question "Are the rooms carpeted, if so, what color is the carpet?," Gyasi responded "hardwood floor" while Annie responded "2 bedrooms carpet-wall to wall rose color." In response to being asked when the last time the couple went out some place, Gyasi responded "after the last interview, we had an early dinner," and Annie replied "mid-October." When asked who does the cooking, Gyasi said they both did, while Annie responded "me, and sometimes we eat out." In response to a question regarding the number of locks on the front door, both Gyasi and Annie said two in North Carolina, but Gyasi said one in Delaware, while Annie said two in Delaware.

In support of their applications, the couple provided wedding pictures, affidavits from people with personal knowledge of their relationship including the friend who introduced them, joint bank account statements, copies of lease agreements each signed by both spouses for their homes in Delaware and North Carolina, and a copy of Gyasi's life insurance policy listing Annie as the beneficiary. They were upfront about the fact that they lived in separate states and explained the reason for the living arrangement.

After six years of marriage, Annie and Gyasi permanently separated and withdrew their immigration paperwork. Gyasi's employer thereafter filed an immigrant visa petition on his behalf. The application has been flagged for review due to concerns regarding the legitimacy of Gyasi's marriage to Annie.

This file has landed on your desk. Are you ready to render a decision regarding the Annie-Gyasi marriage? If not, what additional information would you like to see?

PROBLEM 3.4

Which of the following couples is subject to the IMFA?

Alice (Azerbaijan) and Andy (Azerbaijan) who were married for thirteen months when they entered the US on the basis of Andy's employment-based visa.

Betha (Benin) & Betty (Benin) who were married for twenty-three months when they entered the US on the basis of Betty's diversity visa.

Chrissy (USA) and Carlos (Cuba) who were married for twenty-two months when Carlos' employment-based visa was issued and married for twenty-five months when he used that visa to enter the US.

Doris (DR) and Danielle (DR) who were married for twenty-two months when their F4 family-based visas were issued and married for twenty-five months when they used those visas to enter the US.

Eugenia (USC) and Ed (Egypt) who were married for twenty-three months, 25 days when Ed entered the US on the basis of his immediate relative visa.

PROBLEM 3.5

Hadúr, a citizen of Hungary, seeks advice regarding obtaining an immigrant visa. Hadúr has a PhD from MIT in computational science and engineering. He has been working for BigTechCo in California for many years, and he would like to leave the position to work for himself. Hadúr has developed an AI model that shows promise in making municipal water management more affordable by identifying burst pipes and failing service connections at a rate 10-times faster than conventional methods. Hadúr has secured a provisional patent as well as venture startup funding for his new business. What are Hadúr's best options. Do you foresee any particular hurdles?

PROBLEM 3.6

Undine, a U.S. citizen, has filed a labor certification application on behalf of Valeria, a citizen of Venezuela, for the position of "Houseworker General/Child Monitor (Live-In)." The duties of the position are listed as follows: "50% of time allocated to housework: Responsible for cleaning 2 story house of 3,000 square feet. Cleans 3 bedrooms, 4 bathrooms, 2 living rooms, 1 dining room, 1 bar area, 1 kitchen area, and garage area including 8 glass windows, 9 glass doors, and 3 big mirrors. Polishes furniture, silverware, and glassware. Waters plants. Changes linens. Irons clothes. Answers phone and door. Feeds 2 dogs. 50% of time allocated to childcare: Full supervision and responsibility on absence of parent of 1 infant girl of 1 (one) years of age. Cooks meals, prepares formulas for her. Bathes, dress her. Supervises and participates in her play activities." Consider *Matter of Martin Kaplan* (section 3.15). Read 20 C.F.R. §§ 656.17(h)(3), 656.17(j). What hurdles do you see for Undine?

PROBLEM 3.7

A wealthy noncitizen has asked about opportunities for foreign investors in the United States. Create a chart to explain the distinctions between the EB-5 visa and the Gold Card. Consult outside sources.

Chapter Four: Nonimmigrants

This chapter concerns nonimmigrants, a legal term of art referring to temporary visitors to the United States. There are many categories of nonimmigrants including those coming to the United States to work (see sections 4.3-4.7), to reunite with family (see section 4.8), to study (see section 4.9), and to travel (see section 4.11). There are even nonimmigrant visas available for noncitizens who have been the victim of crimes in the United States (see section 4.10).

The United States admits significantly more nonimmigrants each year than immigrants. As discussed in Chapter 3, over 1.3 million noncitizens became LPRs in fiscal year 2025. In contrast, the United States granted an estimated 140 million nonimmigrant admissions in fiscal year 2025. What explains this monumental difference? Immigrants, as you'll recall from Chapter 3, are entitled to remain in the United States indefinitely and have the opportunity to become U.S. citizens. The United States is, therefore, motivated to restrict the numbers of new LPRs each year. In contrast, nonimmigrants come to the United States for a limited time (such as a few months or a few years) and for a limited purpose (to work, attend school, or travel around the country). Because nonimmigrants come on a temporary basis to perform limited tasks, the United States is willing to accept far greater numbers of nonimmigrants than immigrants.

4.1 The Big Picture

EOUSA, OLE, Immigration Law (2005)

[A] person who seeks to enter as a nonimmigrant is coming to the United States for a temporary period of time and for a specific purpose. Section 101(a)(15) of the INA, 8

U.S.C. § 1101 provides a lengthy list of categories of nonimmigrant visas. The visas are commonly referred to by the letters and numbers of the applicable subsections under INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).˜ [Thus, an A visa is found at INA § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A).]

A nonimmigrant may apply for an extension of his authorized period of stay in the United States, may change status from one nonimmigrant category to another [see section 4.12], and may in certain limited circumstances adjust status to that of a lawful permanent resident [see sections 4.10 (discussing T and U visas) and 6.9 (discussing adjustment of status)].

4.2 Nonimmigrant Intent

Many nonimmigrant categories specify that the beneficiary must have "residence in a foreign country which he has no intention of abandoning." See, e.g., INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F). What evidence would you think a bona fide nonimmigrant should submit to prove up this required intent?

Nonimmigrants in certain visa categories are entitled to hold "dual intent." That is, some noncitizens are entitled to receive a nonimmigrant visa even though they are simultaneously applying for an immigrant visa. See INA § 214(h), 8 U.S.C. § 1184. Recall the visa bulletin from section 3.2. Some aspiring beneficiaries of employment-based immigrant visas must wait years for their visa to become available. In such cases, the employer-sponsor does not hold a job open while the prospective employee waits abroad. Rather, that employee is typically present in the United States on an employment-based nonimmigrant visa (see section 4.3) while their green-card application is processed. This type of applicant can have "dual intent," meaning (1) the intent to abide by all of the restrictions accompanying their nonimmigrant visa including returning to their country of origin after their nonimmigrant visa expires, and (2) the intent to pursue an immigrant visa that would allow the noncitizen to remain in the United States indefinitely. As the Board of Immigration Appeals has stated: "a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with nonimmigrant status." Matter of Hosseinpour, 15 I. & N. Dec. 191, 192 (BIA 1975).

4.3 Employment-Based Nonimmigrants

Much of the work of an immigration lawyer can involve finding useful visa opportunities for their clients. Here is a sampling of employment-based nonimmigrant categories:

Diplomats. The A visa is for heads of state, ambassadors, public ministers, career diplomats, consular officers, and their families and staff, traveling to the U.S. solely to engage in official duties or activities on behalf of their national government.

Business Visitors. The B-1 visa is for temporary business visitors who are not "performing skilled or unskilled labor." The Bricklayers case, included in section 4.6, explores some of the boundaries of this visa program. Examples of authorized activity include attending a scientific, educational, professional or business conference; settling an estate; and negotiating a contract. The B-1 visa is also available to professional athletes competing in the United States, so long as the athletes are not earning a salary—with competing for prize money being permissible. Examples of unauthorized activity for the holder of a B-1 visa includes engaging in the active management of an enterprise.

Crewmembers. The C-1 visa (sometimes issued as a C-1/D visa) is for crewmen in continuous transit through the United States. It would be appropriate for a crewmember flying into the United States to immediately join a ship in port before it leaves the United States—for example, a noncitizen worker who flies into Miami, Florida to start their job on a Royal Caribbean cruise ship temporarily docked in Miami.

Treaty Traders. The E-1 visa is for noncitizens from treaty countries (countries with which the United States maintains a treaty of commerce and navigation, or with which the United States maintains a qualifying international agreement, or which has been deemed a qualifying country by legislation) coming to the United States solely to engage in substantial international trade (between the U.S. and the treaty country) on behalf of an already-existing enterprise.

Professional Workers. The H-1B visa is for noncitizens engaged in a specialty occupation. A "specialty occupation" is one that requires both "theoretical and practical application of a body of highly specialized knowledge and … a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation." INA § 214(i), 8 U.S.C. § 1184(i). H-1B visas require going through the labor condition application, outlined in section 4.4 below. Only 65,000 H-1B visas are available each year, though an additional 20,000 visa slots are available every year for those with master's or doctoral degrees from U.S. institutions. The program is routinely over-subscribed, and the USCIS must frequently allocate visas using a lottery system. In February 2026, the nature of this lottery changed substantially from "random selection" to "weighted selection." The new process favors allocating H-1B visas to higher-skilled and higher-paid workers. Notably, some employers are "cap-exempt" and can hire H-1B employees outside these limited numbers; among these are institutions of higher education and research hospitals. The H-1B visa allows recipients to have "dual intent" (see section 4.2). There are two additional programs for specialty-occupation workers of note. The H-1B1 visa provides 1,400 visas to specialty workers from Chile and another 5,400 visas for specialty workers from Singapore. Finally, the E-3 visa can be issued to 10,500 Australian workers in specialty occupations.

Foreign Fashion Models. The H-1B3 visa is for foreign fashion models of distinguished merit and ability.

Agricultural Workers. The H-2A visa is for those "coming temporarily to the United States to perform agricultural labor or services … of a temporary or seasonal nature." Examples would include workers harvesting grapes at a winery or helping with calving season on a ranch. This category has no annual quota. H-2A visas require going through the labor certification process, outlined in section 4.5 below.

Temporary Nonagricultural Workers. The H-2B visa applies to "other temporary service or labor." The employer's temporary need for the worker must be either a one-time occurrence, seasonal, peakload, or intermittent. The boundaries of this visa category are discussed in the Bricklayers case, included in section 4.6. Only 66,000 H-2B visas can be issued annually, with 33,000 available during each half of the fiscal year. H-2B visas require going through the labor certification process, outlined in section 4.5 below.

Trainee. The H-3 visa can be used by individuals: (i) to obtain training unavailable in their home country, in any field except graduate medical education, or training that will help the recipient to pursue their career outside the U.S. or (ii) to obtain special education training for children with disabilities.

Journalists. The I visa is for members of the foreign press.

Transnational Employees. The L visa is for noncitizens working in a managerial or executive capacity (L-1A), and others working in positions of specialized knowledge (L-1B), who have been working for at least a year overseas and now seek to work for that same employer in the United States. L visa holders, like H-1B recipients, are entitled to hold "dual intent" (see section 4.2).

Extraordinary Workers. The O-1 visa is available to noncitizens with "extraordinary ability" in "sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim." The benefits to being in the O category include the lack of any numerical limits on the number of O admissions per year and the absence of a need to file a labor-condition application, which will be discussed in greater detail in section 4.4 below.

Athletes and Entertainers. Athletes and entertainers who do not qualify for the "extraordinary" O visa may qualify for the P visa, so long as they can establish that they are internationally recognized as "outstanding" in their field.

Cultural Workers. The Q visa is for employees whose work involves the sharing of the history, culture, and traditions of their home country. It is informally called the "Disney visa" and was enacted in 1990 after lobbying by Disney, motivated to staff its Epcot Center at Walt Disney World.

Religious Workers. The R visa is for religious workers. Visas are available for both ministers—those authorized and trained to conduct religious worship—and religious workers with a non-ministerial vocation or profession.

NAFTA Professionals. The TN visa is for noncitizens from Canada or Mexico working in one of more than 60 professional occupational categories enumerated in the North American Free Trade Agreement. While NAFTA was replaced by the United States-Mexico-Canada Agreement (USMCA) in 2020, TN beneficiaries are still known as NAFTA professionals.

4.4 Labor Condition Application

Employers seeking to sponsor a temporary worker in a specialty occupation under the H-1B, H-1B1, or E-3 visas must file a "labor condition application" (LCA) with the U.S. Department of Labor Employment and Training Administration's (DOLETA) Office of Foreign Labor Certification (OFLC) as a first step in the visa petition process. The LCA requires that employers looking to sponsor workers attest that: (1) the foreign worker's wages will be the greater of either actual wages at the place of employment or prevailing wages in the area for the position; (2) the working conditions of the worker will not adversely affect the working conditions of workers similarly employed; (3) the employer is not experiencing a strike or lock-out; (4) the employer provided notice to employees and unions about the labor certification; and (5) the agency displayed publicly the specific number of the foreign hires, their wages, and working conditions.

Notably, the LCA does not require an employer to first look for "able, willing, qualified" U.S. workers, the standard we first discussed in connection with LPR visas in section 3.14.

With the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Congress added requirements for employers who are "H-1B dependent." Whether a company is deemed H-1B dependent turns on the percentage of H-1B employees in the company's workforce: An H-1B dependent employer has 25 or fewer full-time employees and at least eight H-1B workers, 26-50 full-time employees and at least 13 H-1B workers, or 51 or more full-time employees of whom 15% or more are H-1B workers. If a company is deemed H-1B dependent, then it is prohibited from displacing U.S. workers within a 180-day window. Depending on the situation, the window can be triggered by either the filing of the H-1B petition or the placement of the H-1B worker. Displacement includes both direct displacement (a company firing its own U.S. workers and replacing them with H-1B workers) and secondary displacement (a company using its H-1B workers to displace the U.S. workers of a second employer). H-1B-dependent employers are also under an obligation to take "good faith steps to recruit U.S. workers" for the positions to be filled by H-1B workers.

4.5 Labor Certification

The labor condition application, discussed in section 4.4, does not apply to all employment-based nonimmigrants. Employers seeking to sponsor a temporary worker under an H-2A (agricultural) or H-2B (other temporary workers) visa must seek labor certification. These applications are processed through the Department of Labor's Foreign Labor Application Gateway (FLAG). The certification inquiry aims to establish that: (1) There are not sufficient able, willing, and qualified U.S. workers available to perform the temporary employment for which nonimmigrant foreign workers are being requested; and (2) Employment of H-2A/H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. These standards parallel those required for EB-2 and EB-3 LPRs, discussed in section 3.14. While the DOL is the gatekeeper for both certifications, different online systems are utilized.

4.6 Case: International Union of Bricklayers and Allied Craftsmen v. Meese

International Union of Bricklayers and Allied Craftsmen v. Meese
616 F. Supp. 1387 (N.D. Cal. 1985)

DISTRICT JUDGE CHARLES A. LEGGE

Plaintiff International Union of Bricklayers and Allied Craftsmen ("International Union") represents approximately 100,000 masonry craftsmen working in the construction industry in the United States. Plaintiff Local No. 7, California, International Union of Bricklayers and Allied Craftsmen ("Local 7") is affiliated with plaintiff International Union in Northern California, and represents masonry craftsmen working in Lake County, California.

Defendants Edwin Meese III ("Attorney General"), George P. Schultz ("Secretary of State"), and the Immigration and Naturalization Service ("INS") are charged with the administration and enforcement of the immigration laws in the United States.˜ Defendant-intervenor Homestake Mining Company of California ("Homestake") is a California corporation, and the owner of the McLaughlin Gold Project in Lake County, California.

Plaintiffs commenced this case on behalf of themselves and their members to challenge the federal defendants' practice of issuing visas to foreign laborers under the authority of INS Operations Instruction 214.2(b)(5), an INS internal agency guideline. Pursuant to that practice, visas are issued to foreign laborers coming to the United States temporarily to work. In this case, visas were issued to foreign laborers who came temporarily to work on the project owned by Homestake. Plaintiffs contend that the practice violates the Immigration and Nationality Act˜ and seek declaratory and injunctive relief to remedy the alleged violations.˜

For the reasons set forth below, the court concludes that summary judgment should be entered in favor of plaintiffs.

I. Statutory and Regulatory Overview

The Act generally charges the Attorney General and the Secretary of State with the administration and enforcement of the immigration laws of the United States. See 8 U.S.C. §§ 1103(a), 1104(a). Primary responsibility, however, rests with the Attorney General,˜ and his "determination and ruling ... with respect to all questions of [immigration] law [is] controlling." 8 U.S.C. § 1103(a).˜

The dispute in the present case centers on the Act's provisions regarding nonimmigrant aliens. Section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15), sets forth thirteen classes of aliens entitled to nonimmigrant status. The parties have stipulated, however, that only two of those classes are germane to this case.

A. Temporary Visitors for Business

The first class of nonimmigrant aliens relevant here is the "temporary visitor for business" class. Section 101(a)(15)(B) of the Act defines a "temporary visitor for business" as: "an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business... ." 8 U.S.C. § 1101(a)(15)(B). An alien qualifying for this nonimmigrant status is entitled to receive a "B-1" visa.˜

Pursuant to his authority under the Act, see 8 U.S.C. § 1104(a), the Secretary of State has promulgated a regulation defining the term "business" for purposes of the B-1 "temporary visitor for business" class: "The term 'business', as used in section 101(a)(15)(B) of the Act, refers to legitimate activities of a commercial or professional character. It does not include purely local employment or labor for hire. An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement shall be required to qualify under the provisions of [22 C.F.R.] § 41.55˜.

Among the criteria utilized to determine an alien's eligibility for B-1 "temporary visitor for business" status is INS Operations Instruction 214.2(b)(5), an INS internal agency guideline that is the subject of this dispute. The Operations Instruction provides: "Each of the following may also be classified as a B-1 nonimmigrant if he/she is to receive no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay): (5) An alien coming to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the U.S. or to train U.S. workers to perform such service, provided: the contract of sale specifically requires the seller to perform such services or training, the alien possesses specialized knowledge essential to the seller's contractual obligation to provide services or training, the alien will receive no remuneration from a U.S. source, and the trip is to take place within the first year following the purchase." INS Operations Instruction 214.2(b)(5)˜.

Pursuant to the Operations Instruction, B-1 visas have been issued to the foreign laborers who came to the United States to work on the project owned by Homestake, and to foreign laborers to do other work throughout the United States.˜ The central issue in this case is whether the Operations Instruction violates the Act and the regulations promulgated under the Act.

B. Temporary Workers

The second class of nonimmigrant aliens involved here is the "temporary worker" class. Section 101(a)(15)(H)(ii) of the Act defines a "temporary worker" as: "an alien having a residence in a foreign country which he has no intention of abandoning ... [and] who is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country....” 8 U.S.C. § 1101(a)(15)(H)(ii). An alien qualifying for this nonimmigrant status is entitled to receive an “H-2” visa.

The Attorney General is authorized to make the determination concerning the admissibility of an H-2 “temporary worker” applicant after consulting with other government agencies. In this regard, the Act provides that “[t]he question of importing any alien as a nonimmigrant under section 101(a)(15)(H) ... shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer.” 8 U.S.C. § 1184(c).

Pursuant to his authority under the Act, the Attorney General has promulgated a regulation which requires the petitioning employer for an H-2 “temporary worker” applicant to seek labor certification from the Secretary of Labor prior to approval of the applicant’s petition. That regulation provides in pertinent part: “Every petitioner must attach to every nonimmigrant visa petition to classify an alien under section 101(a)(15)(H)(ii) of the Act ... either: (A) A certification from the Secretary of Labor ... stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect wages and working conditions of workers in the United States similarly employed; or (B) A notice that such certification cannot be made. If there is attached to the petition a notice from the Secretary of Labor ... that certification cannot be made, the petitioner shall be permitted to present countervailing evidence.... All such evidence submitted will be considered in the adjudication of the petition.” 8 C.F.R. § 214.2(h)(3).

II. The Present Case

A. Factual Background

Homestake began construction in early 1984 on its McLaughlin Gold Project in order to open a new gold mine. Due to metallurgical problems in the Lake County region, Homestake concluded that it was necessary to employ technology not used previously in the gold mining industry. Davy McKee Corporation (“Davy McKee”), Homestake’s construction manager, therefore conducted a search to locate the appropriate technology.

On behalf of Homestake, Davy McKee agreed to purchase a newly-designed gold ore processing system from Didier-Werke (“Didier”), a West German manufacturing company. Although the purchase agreement required Didier to supply an integrated processing system, it was not possible to premanufacture the entire system in West Germany. The purchase agreement was therefore made contingent upon Didier’s West German employees completing the work on the system at the project site in Lake County.

In September 1984, Didier submitted B-1 "temporary visitor for business" visa petitions on behalf of ten of its West German employees to United States consular officers in Bonn, West Germany. Relying upon INS Operations Instruction 214.2(b)(5), consular officers approved the petitions and issued B-1 visas to the West Germans. Neither the West Germans nor their employer was required to seek labor certification from the Secretary of Labor, because the certification procedures only govern the issuance of H-2 "temporary worker" visas. In January 1985, the West Germans entered the United States to work on the processing system. The work involves the installation of the interior linings of the system's autoclaves, and requires certain technical bricklaying skills.

B. Procedural Background

On January 29, 1985, plaintiffs filed this lawsuit against the federal defendants.

Plaintiffs allege that the federal defendants' practice of issuing B-1 "temporary visitor for business" visas under the authority of INS Operations Instruction 214.2(b)(5) violates two provisions of the Act. First, plaintiffs allege that the practice violates section 101(a)(15)(B) of the Act, because the issuance of B-1 visas to aliens coming to the United States to perform skilled or unskilled labor is expressly prohibited by section 101(a)(15)(B). Second, plaintiffs allege that the practice violates section 101(a)(15)(H)(ii) of the Act, because aliens have been permitted to bypass the labor certification requirements contained in the regulations under section 101(a)(15)(H)(ii).

Plaintiffs therefore ask this court to declare that INS Operations Instruction 214.2(b)(5) violates the Act; to permanently enjoin the federal defendants from issuing B-1 visas under the authority of the Operations Instruction; and to order the federal defendants to reclassify the visa status of all B-1 "temporary visitor for business" alien nonimmigrants who are currently performing skilled or unskilled labor in the United States.

IV. The Validity of the Operations Instruction Under the Act

Plaintiffs contend that INS Operations Instruction 214.2(b)(5) violates the Act, because the Operations Instruction is inconsistent with specific provisions of the Act, and with the legislative intent underlying those provisions.

In testing the Operations Instruction against the Act, the court's task is to interpret the Act in light of the purposes Congress sought to achieve in enacting it. The starting point must be the language employed by Congress. Absent a clearly expressed legislative intention to the contrary, the statutory language is to be regarded as conclusive.

A. The Language of the Act and the Operations Instruction

The court must begin its analysis by comparing the language of the Act with the language of the Operations Instruction. In particular, the court must focus on the nonimmigrant visa provisions in sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act.˜

A comparison of the language of section 101(a)(15)(B) of the Act with the language of INS Operations Instruction 214.2(b)(5) demonstrates that the Operations Instruction contravenes that section of the Act. Section 101(a)(15)(B) unequivocally excludes from the B-1 "temporary visitor for business" classification an alien who is "coming for the purpose of … performing skilled or unskilled labor." 8 U.S.C. § 1101(a)(15)(B). That exclusion is reinforced by the federal defendants' own regulations. In this regard, the Secretary of State has promulgated a regulation defining "business" for purposes of section 101(a)(15)(B): "The term 'business' … refers to legitimate activities of a commercial or professional character. *It does not include purely local employment or labor for hire*." 22 C.F.R. § 41.25(b)˜(emphasis added).˜

INS Operations Instruction 214.2(b)(5), however, does not contain an exclusion for an alien seeking to enter the United States to perform skilled or unskilled labor. The Operations Instruction provides that an alien may be classified as a "temporary visitor for business" if the alien is "coming to install, service, or repair commercial or industrial equipment or machinery." The effect of this language is to authorize the issuance of a B-1 visa to an alien coming to this country to perform skilled or unskilled labor. In the present case, for example, the West Germans undeniably are performing labor—whether it be deemed skilled or unskilled—in connection with the installation of the gold ore processing system at the McLaughlin Gold Project.

Similarly, a comparison of the language of section 101(a)(15)(H)(ii) of the Act with the language of INS Operations Instruction 214.2(b)(5) shows that the Operations Instruction also contravenes that section of the Act. Section 101(a)(15)(H)(ii) classifies an H-2 "temporary worker" as an alien "coming … to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii). Because the Act requires the Attorney General to consult other agencies of the government concerning "temporary worker" visas,˜ the Attorney General has established H-2 labor certification procedures. Thus, an H-2 visa petition cannot be approved unless the alien's employer obtains either "*[a] certification from the Secretary of Labor* … stating *that qualified persons in the United States are not available and that the employment* of the beneficiary *will not adversely affect wages and working conditions of workers in the United States* similarly employed … [*or*] notice that such certification *cannot* be made." 8 C.F.R. § 214.2(h)(3)˜(emphasis added).

In contrast, INS Operations Instruction 214.2(b)(5) does not require an alien to seek labor certification prior to obtaining a nonimmigrant visa. More importantly, the Operations Instruction authorizes the issuance of a nonimmigrant visa to a person performing skilled or unskilled labor, though qualified Americans may be available to perform the work involved. The Operations Instruction therefore lacks the safeguards contained in section 101(a)(15)(H)(ii) of the Act and the regulation promulgated under that section. Again, the present case illustrates this point, because the parties have stipulated that neither the West Germans nor their employer was required to seek labor certification from the Secretary of Labor prior to the issuance of the visas to the West Germans.

In summary, it is apparent that the language of INS Operations Instruction 214.2(b)(5) is inconsistent with the language of sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act. First, the Operations Instruction ignores the provision in section 101(a)(15)(B) excluding skilled or unskilled labor. Second, the Operations Instruction ignores the provision in section 101(a)(15)(H)(ii) concerning the availability of qualified American workers.

B. The Intent of Congress

Having determined that INS Operations Instruction 214.2(b)(5) is expressly inconsistent with the relevant sections of the Act, the court will also examine the congressional intent underlying those sections. As noted above, however, the scope of the court's inquiry is quite limited. Absent a clearly expressed legislative intention to the contrary, the language of the Act is to be regarded as conclusive.˜

The current substantive versions of sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act were enacted in 1952.˜ Congress, however, demonstrated its concern for the protection of American workers as early as 1885 [when]˜ Congress enacted legislation prohibiting the entry of contract laborers. Contract laborers generally were unskilled aliens who received minimal wages in return for passage to the United States. The importation of those laborers was intended "to oversupply the demand for labor so that the domestic laborers would be forced to work at reduced wages."˜ In the 1885 Act, Congress therefore sought to "protect American labor from an influx of cheaper foreign competition."˜

In the Immigration Act of 1924,˜ Congress enacted a "temporary visitor for business" nonimmigrant provision in section 3(2) that was very similar to section 101(a)(15)(B) of the current Act.˜

In taking these actions, Congress evidenced a continuing concern for the protection of American workers from unnecessary foreign competition.˜

The legislative history also demonstrates that sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act were intended to restrict the influx of aliens seeking to perform skilled or unskilled labor in the United States. Thus, to the extent that INS Operations Instruction 214.2(b)(5) permits aliens to circumvent the restrictions enacted by Congress in those sections, the Operations Instruction is inconsistent with both the language and the legislative intent of the Act.

C. Defendants' Arguments

Defendants contend that INS Operations Instruction 214.2(b)(5) should be upheld because it embodies a reasonable administrative interpretation of the Act.

Defendants' argument centers on the purposes Congress sought to achieve in sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act. Defendants contend that those sections evidence Congress' intent to foster multiple purposes. Although defendants acknowledge that one such purpose was the protection of American labor, they argue that another was the promotion of international commerce. Further, defendants assert that the language in sections 101(a)(15)(B) and 101(a)(15)(H)(ii) reveals a tension between American labor interests and international commerce interests; that the Operations Instruction seeks to minimize the tension; and that the Operations Instruction is therefore consistent with the multiple purposes in the Act.

Defendants rely primarily upon the decision of the Board of Immigration Appeals in Matter of Hira, 11 I. & N. Dec. 824 (BIA 1966). In Hira, an alien employed by a Hong Kong custom-made clothing manufacturer had entered the United States under the authority of a B-1 "temporary visitor for business" visa. While in this country, the alien took orders on behalf of his employer from prospective customers, and took the measurements of those customers. Prior to the expiration of the alien's visa, the INS commenced deportation proceedings against him. The INS concluded that the alien's activities involved the performance of skilled labor, and ordered that the alien be deported for failure to maintain his B-1 "temporary visitor for business" status. On appeal, the Board of Immigration Appeals focused its analysis on the term "business" within section 101(a)(15)(B) of the Act. Adopting the Supreme Court's definition from an earlier version of the Act, the Board held that "business," for purposes of section 101(a)(15)(B) of the Act, "contemplate[s] only 'intercourse of a commercial character.'"˜ In support of that definition, the Board alluded to prior administrative cases in which aliens were found eligible for "temporary visitor for business" status because "there was involved international trade or commerce and the employment was a necessary incident thereto."˜ The Board also elaborated upon the underlying requirements for eligibility as a "temporary visitor for business" nonimmigrant: "The significant considerations to be stressed are that there is a clear intent on the part of the alien to continue the foreign residence and not to abandon the existing domicile; the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country; the business activity itself need not be temporary, and indeed may long continue; the various entries into the United States made in the course thereof must be individually or separately of a plainly temporary nature in keeping with the existence of the two preceding considerations."˜

Applying those principles the Board in Hira concluded that the alien's business was intercourse of a commercial character, even though he took prospective customers' measurements in connection with the business. Thus, the Board held that the alien was entitled to B-1 "temporary visitor for business" status. The Attorney General subsequently affirmed the Board's decision, and certified it as controlling. See 8 U.S.C. § 1103(a).

Defendants argue that Hira controls the result in this case, since the principles underlying INS Operations Instruction 214.2(b)(5) and Hira are nearly identical. Defendants focus on the portion of Hira that permits the issuance of B-1 "temporary visitor for business" visas to an alien coming to the United States to engage in "intercourse of a commercial character," or coming to work as a "necessary incident" to international trade or commerce.˜ Defendants argue that here the West Germans came to this country only as a necessary incident to the purchase and sale of the gold-ore processing system, rather than as individuals hired expressly as laborers. Further, defendants contend that it must be presumed that Congress has acquiesced in the policies underlying the Operations Instruction, because Congress has been aware of those policies for many years but has failed to take action.

Defendants' arguments are answered primarily by the language of the Act. It is important to reemphasize that in matters of statutory interpretation, a court must interpret the statute in light of the purposes Congress sought to achieve in enacting it.˜ And absent a clearly expressed legislative intention to the contrary, the statutory language is regarded as conclusive.˜ Under those principles, the language of section 101(a)(15)(B) of the Act which excludes an alien "coming for the purpose of ... performing skilled or unskilled labor," 8 U.S.C. § 1101(a)(15)(B), precludes defendants' purported distinction between business and labor in this case; so does the expressed congressional intent of protecting American labor.

Similarly, there is no indication that Congress has acquiesced in the policies underlying INS Operations Instruction 214.2(b)(5). The current substantive versions of sections 101(a)(15)(B) and 101(a)(15)(H)(ii) were enacted in 1952. The Operations Instruction was not promulgated until 1972. And there is no suggestion from legislative history that Congress considered either the specific holding of the Board of Immigration Appeals in Hira in 1966, or Hira's impact on other types of foreign labor performed in the United States.

The interpretation of a federal statute by the officials responsible for its administration is entitled to deference.˜ A court, however, must reject an administrative interpretation "that [is] inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement."˜

The court concludes from both the language and legislative intent of the Act that the federal defendants' interpretation embodied in the Operations Instruction contravenes the Act. The court therefore decides that INS Operations Instruction 214.2(b)(5) violates sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Act.˜

4.7 Legislative Exercise

Read the following bill. Consider how the bill changes current law from a technical standpoint. (This requires consultation with your statutory supplement.) Does the bill insert new provisions? Move provisions? Consider how the bill changes current law from a substantive standpoint. Does it create new rights? Alter existing rights? Now consider the law from a policy standpoint. Is it a good idea? Why or why not? Be prepared to make arguments on both sides.

A BILL

To amend the Immigration and Nationality Act to establish a separate nonimmigrant classification for fashion models.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ESTABLISHMENT OF NEW FASHION MODEL NONIMMIGRANT CLASSIFICATION.

(a) In General-

(1) NEW CLASSIFICATION- Section 101(a)(15)(P) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(P)) is amended

(A) in clause (iii), by striking 'or' at the end;

(B) in clause (iv), by striking 'clause (i), (ii), or (iii)' and inserting 'clause (i), (ii), (iii), or (iv)';

(C) by redesignating clause (iv) as clause (v); and

(D) by inserting after clause (iii) the following:

(iv) is a fashion model who is of distinguished merit and ability and who is seeking to enter the United States temporarily to perform fashion modeling services that involve events or productions which have a distinguished reputation or that are performed for an organization or establishment that has a distinguished reputation for, or a record of, utilizing prominent modeling talent; or.

(2) AUTHORIZED PERIOD OF STAY- Section 214(a)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1184(a)(2)(B)) is amended in the second sentence—

(A) by inserting 'or fashion models' after 'athletes'; and

(B) by inserting 'or fashion model' after 'athlete'.

(3) NUMERICAL LIMITATION- Section 214(c)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(4)) is amended by adding at the end the following:

(I)(i) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year under section 101(a)(15)(P)(iv) may not exceed 1,000.

(ii) The numerical limitation established by clause (i) shall only apply to principal aliens and not to the spouses or children of such aliens.

(iii) An alien who has already been counted toward the limitation established by clause (i) shall not be counted again during the same period of stay or authorized extension under subsection (a)(2)(B), irrespective of whether there is a change in petitioner under subparagraph (C).

(4) CONSULTATION-

(A) IN GENERAL- Section 214(c)(4)(D) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(4)(D)) is amended by striking 'clause (i) or (iii)' and inserting 'clause (i), (iii), or (iv)'.

(B) ADVISORY OPINION- Section 214(c)(6)(A)(iii) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(6)(A)(iii)) is amended—

(i) by striking 'section 101(a)(15)(P)(i) or 101(a)(15)(P)(iii),' and inserting 'clause (i), (iii), or (iv) of section 101(a)(15)(P),'; and

(ii) by striking 'of athletics or entertainment'.

(C) EXPEDITED PROCEDURES- Section 214(c)(6)(E)(i) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(6)(E)(i)) is amended by striking 'artists or entertainers' and inserting 'artists, entertainers, or fashion models'.

(b) Elimination of H-1B Classification for Fashion Models- Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)) is amended—

(1) by striking 'or as a fashion model'; and

(2) by striking 'or, in the case of a fashion model, is of distinguished merit and ability'.

(c) Effective Date and Implementation-

(1) IN GENERAL- The amendments made by this section shall take effect on the date of the enactment of this Act.

(2) REGULATIONS, GUIDELINES, AND PRECEDENTS- The regulations, guidelines and precedents in effect on the date of the enactment of this Act for the adjudication of petitions for fashion models under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)), shall be applied to petitions for fashion models under section 101(a)(15)(P)(iv) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(P)(iv)), as added by this Act, except to the extent modified by the Secretary of Homeland Security through final regulations (not through interim regulations) promulgated in accordance with subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the 'Administrative Procedure Act').

(3) CONSTRUCTION- Nothing in this section shall be construed as preventing an alien who is a fashion model from obtaining nonimmigrant status under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(O)(i)) if such alien is otherwise qualified for such status.

(4) TREATMENT OF PENDING PETITIONS- Petitions filed on behalf of fashion models under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)) that are pending on the date of the

enactment of this Act shall be treated as if they had been filed under section 101(a)(15)(P)(iv) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(P)(iv)), as added by this Act.

4.8 Family-Based Nonimmigrants

There are two important family-based nonimmigrant categories:

Fiancée/Fiancé. The K visa is for the betrothed of a U.S. citizen who will marry within 90 days of coming to the United States.

Spouses and Children of LPRs. The V visa was created to give certain spouses and children of LPRs a means to come to the United States during the processing of their immigrant visa applications. At present, spouses and children of LPRs who are eligible to receive immigrant visas under the F2A category must wait around three-and-a-half years for the issuance of their visas (see section 3.2). Congress created the V visa to help alleviate family separation due to those delays.

4.9 Students

There are three important categories for nonimmigrants pursing educational opportunities in the United States:

Degree-seeking students. The F visa is available to degree-seeking international students who are enrolled in an academic program. The F visa applies whether the student is pursuing undergraduate or graduate education in the United States. F-visa students can engage in on-campus work and, in the case of economic hardship, off-campus work. They are also eligible for curricular practical training (CPT) during their program of study, which is employment that is an integral part of an established curriculum and that directly relates to the student's major area of study, as well as optional practical training (OPT) during or following their program of study, which is temporary employment that directly relates to the student's program of study. F-visa students can remain in the United States for the duration of their studies.

Vocational students. The M visa is available to students who are pursuing vocational and technical studies in the United States. M-visa students have limited work opportunities in the United States. They can engage in practical training (PT) one month for every four months of their program. M visas are typically issued for just one year.

Exchange visitors. The J visa is available to exchange students who are studying in the United States on a temporary basis, such as for a single semester or academic year, and are not degree-seeking. The J visa, however, is much broader than the F or M categories. It also includes opportunities for visa holders to teach, study, conduct research, demonstrate special skills or receive on-the-job training for periods ranging from a few weeks to several years. It is a visa utilized by such diverse occupations as au pairs, camp counselors, doctors, and professors.

Kit Johnson, The Wonderful World of Disney Visas,
63 FLA. L. REV. 915 (2011)

The J visa has been in existence since 1961. It is a product of the Mutual Educational and Cultural Exchange Act of 1961, also called the Fulbright-Hays Act after Senator J. William Fulbright, who was then chairman of the Senate Foreign Relations Committee.˜ Its history, however, dates back to 1939. In August of that year, Congress enacted a law˜ relating to educational cooperation with Latin America that provided, among other things, for international student exchanges monitored by the Department of State.˜ The "[p]rimary emphasis" of the law was on "the increase of mutual understanding through personal relationships between leaders of thought and opinion in all fields."˜

The 1948 United States Information and Educational Exchange Act,˜ better known as the Smith-Mundt Act,˜ expanded the 1939 Act beyond the Western Hemisphere. Section 201 of the Smith-Mundt Act authorized the Secretary of State to "provide for interchanges on a reciprocal basis between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill."˜ Visitors under this program were considered "nonimmigrant visitors for business,"˜ and later just unspecified "nonimmigrants,"˜ present in the United States for a finite period before returning to their country of origin.

The legislative reports that discussed the purpose and need for the Smith-Mundt Act echoed the 1939 call for "mutual understanding between the people of the United States and of other countries."˜ Congress argued that such "mutual understanding" was necessary to "correct misunderstandings about the United States abroad."˜ ["T]he importance of maintaining such a program cannot be gainsaid. The American people, our ideals, and our form of government are being misrepresented and distorted abroad by the propaganda of other nations. The prestige of the United States and of democracy itself are suffering as a result of this unequal battle of ideas. We must be able to tell abroad the truth about the United States. We cannot afford to let others tell that story for us.["]˜

One thing that was not spelled out in the Smith-Mundt Act was how to deal with exchange visitors who wanted to stay in the United States after the conclusion of their exchange programs. President Dwight Eisenhower strongly urged the passage of a new law to require "that exchange personnel return home and remain there for a minimum period before being eligible to reenter the United States for permanent residence."˜ He argued that this would be the only effective means for achieving the program's basic objectives: (1) promoting international understanding and (2) allowing the countries of origin to benefit from their citizens' United States training.˜

Congress obliged. In 1956, the Smith-Mundt Act was amended to require exchange participants to reside and be physically present overseas for at least two years following their departure from the United States.˜

The Fulbright-Hays Act of 1961 followed.˜ Its purpose was to "consolidate, expand, and simplify both the scope and the administration of [U.S.] international educational and cultural exchange program[s],"˜ which included, among others, the Smith-Mundt Act.˜

The Act authorized "educational exchanges" open to "students, trainees, teachers, instructors, and professors"˜ as well as "other exchanges ... promoting studies, research, instruction, and other educational activities of citizens and nationals of foreign countries in American schools, colleges, and universities located in the United States."˜ It also authorized separate "cultural exchanges" for limited categories of specialized activities such as creative performing artists and athletes.˜

The Act fixed the problem of how to define these exchange visitors for purposes of immigration law by creating a new visa category—the J visa—solely to serve the purposes of the Fulbright-Hays Act.˜ This new J visa applied, and continues to apply, to: ["]an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee ... who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency,˜ for the purpose of ... studying, observing, ... consulting, demonstrating special skills, or receiving training ....["]˜

Notably, the Act also codified the requirement that J visa recipients typically must reside overseas for two years following the conclusion of their J visa program before returning to the United States.˜

Congress' statement of purpose for the new law largely echoed language justifying the past twenty-two years of legislation: ["]The purpose of this chapter is to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.[“]˜

The House Report regarding the Fulbright-Hays Act was more pointedly directed at the Cold War fears prevalent at the time of the Act’s passage:˜ [“]Present-day governments give a high priority to educational and cultural exchanges. While political and economic affairs are the province of a relatively few individuals, educational and cultural programs are by their very nature a people-to-people activity. A lecturer catches young minds. A student gains experiences that shape his mature years. Cultural exchanges as in music or art can reach thousands at a time. In the current struggle for the minds of men, no other instrument of foreign policy has such great potential.[“]˜

Congress saw in the Act the potential for drawing members of the international community into a pro-American, and thus anti-communist, stance by means of education and cultural exchange.˜

4.10 Prosecution-Related Nonimmigrant Categories

The United States has three different nonimmigrant categories that relate to criminal prosecution:

Informants. Informants who have “critical reliable information” about a criminal or terrorist organization, and who work with law enforcement to prosecute such organizations, may be eligible for an S visa.

Trafficking. Victims of “severe” labor or sex trafficking, who are present in the United States because of that trafficking, who cooperate (or are unable to cooperate) with law enforcement, and who would suffer “extreme hardship involving unusual and severe harm upon removal” may be eligible for a T visa. Trafficking involves (i) the recruitment, harboring, transporting, provision or obtaining of a person, (ii) through force, fraud, or coercion, (iii) for the purpose of a commercial sex act or subjection to involuntary servitude, peonage, debt bondage, or slavery. Only 5,000 T visas are available annually, but this cap has never been met. A T visa holder can adjust to LPR status after three years of physical presence in the United States, assuming other requirements are met. INA § 245(*l*), 8 U.S.C. § 1255(*l*).

Crime Victims. A person who has "suffered substantial physical or mental abuse" because of certain specified crimes and who "has been helpful, is being helpful, or is likely to be helpful" to law enforcement may be eligible for a U visa. Specified crimes include: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, and unlawful criminal restraint. Only 10,000 U visas are available each year, and there is a significant backlog for this visa category. A U visa holder can adjust to LPR status after three years of physical presence in the United States, assuming other requirements are met. INA § 245(m), 8 U.S.C. § 1255(m).

4.11 Tourists

The B-2 visa is available to noncitizens traveling to the United States "temporarily for … pleasure." The term "pleasure" has been understood quite broadly. It includes travel for purposes of medical treatment, seeing friends and family, as well as travel for purposes of engaging in a "short course of study" that is "recreational or avocational." It's also available to uncompensated amateur competitors in musical, sports, and similar contests. Before the United States recognized same-sex marriages, the B-2 visa offered a means for same-sex noncitizens to join their partners in the United States for a limited time.

Many noncitizens who are eligible for a B-1 visa (see sections 4.3, 4.6) as a business visitor will receive a B-1/B-2 visa to authorize both their work and leisure in the United States. In 2025, the State Department began requiring nationals from certain countries to post a bond of between $5,000 and $15,000 in order to receive a B-1, B-2, or B-1/B-2 visa. As of June 2026, 50 countries—more than 25% of the recognized nations of the world—are subject to this bond requirement. See https://perma.cc/9CSK-24CH.

4.12 Change of Nonimmigrant Classification

Many, though not all, nonimmigrants can change from one nonimmigrant status to another without leaving the United States. INA § 248, 8 U.S.C. § 1258. Imagine a university student who came to the United States on an F visa who, following graduation, has been hired by a company that sought and obtained an H-1B visa for them. If that noncitizen meets the criteria set out in INA § 248, 8 U.S.C. § 1258, they could switch their visa classification from F to H-1B without leaving the country (compare section 6.1). Notably, that same individual might ultimately change from an

H-1B visa to an employment-based immigrant visa (recall sections 3.11-3.17), also without leaving the United States, if they qualify for a process called "adjustment of status," discussed in section 6.9.

4.13 Test Your Knowledge

PROBLEM 4.1

Georg, a German citizen, has a good job in the states. He was brought to the U.S. on a B-1/B-2 visa by the German manufacturing company Seimation Systems in order to build new a manufacturing plant that will eventually produce power-plant turbines for worldwide distribution. Georg works as an electrical technician in Germany and was brought to the U.S. by Seimation to install wiring in the new U.S. plant. He works with four other electricians and is nominally the supervisor for the group, though he's doing as much on-the-ground wiring as his cohort.

Is everything on the up-and-up with Georg? Explain.

PROBLEM 4.2

Félicien, a French citizen, works for Disneyland Paris. He is a sales manager within the Disney Business Solutions division. As such, he works with corporate clients to plan business events at Disneyland Paris. He manages everything from budgets to logistics.

Félicien is interested in moving to the United States to get additional sales manager experience at Walt Disney World in Orlando, Florida. What are nonimmigrant visa options that Félicien and Walt Disney World should consider? Are there any benefits to pursuing one visa over another?

PROBLEM 4.3

Patrícia is a Portuguese citizen. She does not work a traditional full-time job; she earns passive income from her family's widespread real estate holdings. Patrícia is fascinated by the traditional craft of loom weaving. She has a full weaving set-up at home and has crafted scarves and pillows for family and friends. She has also sold her wares at various artisan fairs in Portugal where folks praise her eye for color and texture. Patrícia wants to travel to the United States to participate in an intensive 6-day weaving camp in Gallup, New Mexico, to learn traditional Navajo weaving techniques. What are nonimmigrant visa options that Patrícia should consider? Are there any benefits to pursuing one visa over another?

PROBLEM 4.4

Edward, a U.K. citizen, is better known by his screenname AceRuneborn. Edward is the worldwide number one ranked player for Hearthstone, a free-to-play online digital collectible card game that builds on the Warcraft universe. He wants to come to New York City, NY for a Hearthstone tournament. You're his immigration attorney. What visa options would be most logical to consider?

PROBLEM 4.5

Janice, a Jamaican citizen, came to the United States on a nonimmigrant visa to work for a Florida housecleaning company. On arrival to the United States, Janice was kept in substandard company housing for which she was charged rent. She worked long hours, but as rent was automatically subtracted from wages, Janice received paychecks in the amount of $0.00. Janice complained to her employer and was threatened with deportation. Ultimately, Janice organized her coworkers to go on strike against their employer. Janice was then fired. Janice has come to you to discuss her situation. What visa brought Janice to the United States? Is there any visa that might be available to her now?

Chapter Five: Inadmissibility

Not every noncitizen is welcome in the United States. INA § 212, 8 U.S.C. § 1182, delineates classes of noncitizens who are ineligible for visas or admission to the United States. These inadmissibility grounds apply to two district groups of noncitizens: (1) would-be immigrants and nonimmigrants living outside the United States who seek to enter the country through the legal process of admission that will be discussed in Chapter 6, and (2) migrants who are present in this country after entering without authorization and who are being expelled from the United States through the legal process of removal that will be discussed in Chapter 9.

The remainder of this chapter explores the varied classes of individuals marked for exclusion under INA § 212 including: those who have failed to adhere to U.S. immigration laws (sections 5.2-5.3), suspected terrorists and terrorism abettors (sections 5.4-5.6), criminals (section 5.7-5.13), the poor (section 5.14), those posing a public health risk (section 5.15), and more (section 5.16). Finally, this chapter explores waivers to these inadmissibility grounds (section 5.17, Appendix A.3).

5.1 Inadmissibility Basics

Congress has created an extensive list of noncitizens who should not be granted admittance into the United States because of their prior conduct or because of certain personal characteristics. These are found at INA § 212, 8 U.S.C. § 1182, and include:

INA § 212(a)(1): Health and medical-related grounds;

INA § 212(a)(2): Criminal and related grounds;

INA § 212(a)(3): Security and related grounds;

INA § 212(a)(4): Public charge;

INA § 212(a)(6): Illegal entrants, immigration violators, misrepresentation; and

INA § 212(a)(9): Previously removed, unlawfully present, unlawfully present after previous immigration violations.

Remember that these grounds for exclusion apply to two distinct groups of noncitizens: those living outside the United States who wish to enter and those inside the United States who entered without authorization. A migrant seeking lawful entry into the United States by, for example, obtaining a B-2 tourist visa, will be assessed during the admission process outlined in Chapter 6 to make sure that they are not ineligible for that visa due to INA § 212. In addition, a migrant who enters the United States without authorization, circumventing the admission process, if placed into removal proceedings by the government following the process outlined in Chapter 9, will also be assessed under INA § 212.

Finally, a note on vocabulary: immigration practitioners interchangeably use the terms "inadmissibility," "inadmissible," "exclusion," and "excludability." Some will use the term "inadmissibility" solely in relation to noncitizens outside the United States seeking lawful entry and the term "exclusion" in relation to noncitizens present in the United States without authorization. Others do not adhere to those distinctions. The statute heading for INA § 212 is "Excludable aliens." This term is then defined as applying to "aliens who are inadmissible under the following paragraphs." Just know that the terms refer to the same criteria, which are laid out in INA § 212.

5.2 Unlawful Entry, Unlawful Presence, and Post-Exclusion Bars

Noncitizens who enter the United States without authorization are subject to removal under INA § 212(a)(6). Beyond removal, noncitizens who have been "unlawfully present" in the United States also face lengthy bars to any lawful return to this country. This hurdle applies both to noncitizens who never had permission to be present in the United States and entered without authorization as well as those noncitizens who may have had initial permission to enter the United States but then overstayed their visa period. A noncitizen in either category who has been unlawfully present in the United States for more than 180 days, but less than a year, cannot return to the United States for at least three years. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I). Noncitizens who remain in the United States without authorization for more than a year cannot return for at least ten years. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II). Noncitizens who return to the United States, without authorization, after being removed following more than a year of unlawful presence, face a lifetime ban from the country. INA § 212(a)(9)(C)(i)(I), 8 U.S.C. § 1182(a)(9)(C)(i)(I). A note about unlawful presence: it only accrues when the noncitizen is over the age of 18. INA § 212(a)(9)(B)(iii)(I), 8 U.S.C. § 1182(a)(9)(B)(iii)(I). Finally, these prohibitions are waivable by the government under certain limited circumstances. INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v); see also Appendix A.3.

Other bars to returning to the United States exist for those who flaunt the U.S. immigration laws. Noncitizens who "without reasonable cause" fail to attend their removal proceedings may not return to the United States for at least five years. INA § 212(a)(6)(B), 8 U.S.C. § 1182(a)(6)(B). Noncitizens who engage in fraud or willful misrepresentation of material facts during the immigration process face a lifetime ban from the country. INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

5.3 Case: Matter of Arrabally

The following case rests on statutory interpretation of INA 212(a)(9)(B)(i)(II), 8 U.S.C. § 11821(a)(i)(B)(i)(II), regarding unlawful presence. However, full understanding of the case requires a brief introduction to two concepts described in more detail in future chapters: advance parole (section 6.6) and adjustment of status (section 6.9).

A noncitizen who is present without authorization in the United States and who needs to leave the country can petition the government for "advance parole" so that they can re-enter the United States upon their return. The word "advance" refers to the timing—the noncitizen is seeking government permission to reenter the United States before they leave the country. "Parole" stands in contrast to the formal admission process outlined in Chapter 6. A noncitizen without a valid nonimmigrant or immigrant visa can physically enter the United States when granted parole; they have not been formally admitted.

Adjustment of status is a process by which a noncitizen can obtain an immigrant visa without having to depart the United States and appear at an American consulate in a foreign country. Adjustment of status is only available to noncitizens "admitted or paroled" who are immediately eligible for an immigrant visa (see section 3.2) and are admissible.

Matter of Manohar Rao Arrabally and Sarala Yerrabelly
25 I. & N. Dec. 771 (BIA 2012)

[A]n Immigration Judge found the respondents inadmissible as charged under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act˜ as intending immigrants not in possession of valid immigrant visas or other entry documents. He further found them ineligible for adjustment of status˜ based on their inadmissibility under section 212(a)(9)(B)(i)(II), and he ordered them removed from the United States.

This case presents the question whether the respondents, who left the United States temporarily under a grant of advance parole, thereby effected a "departure," which resulted in their inadmissibility under section 212(a)(9)(B)(i)(II). We hold that they did not. Consequently, the respondents' appeal will be sustained in part and the record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The respondents, a husband and wife, are natives and citizens of India. The male respondent and his wife were admitted to the United States temporarily as nonimmigrants on December 15, 1999, and October 29, 2000, respectively. The male respondent's visa expired on June 14, 2000, but he remained in the United States without lawful immigration status for more than 5 years thereafter, and his wife also remained in this country for several years after her visa expired on April 28, 2001.

On May 11, 2004, the male respondent became the beneficiary of an approved employment-based immigrant visa petition, Form I-140 (Immigrant Petition for Alien Worker), with a priority date of April 27, 2001. On June 2, 2004, he and his wife applied for adjustment of status˜ before the United States Citizenship and Immigration Services ("USCIS"), a component of the Department of Homeland Security ("DHS").˜

The respondents' applications for˜ adjustment were prima facie approvable when filed, but they were held in abeyance for several years to await the availability of visa numbers in the male respondent's oversubscribed preference category. During this interval, the respondents found it necessary to return to India to attend to their aging parents, but they were appropriately concerned that the USCIS would deem their adjustment applications abandoned if they left the United States.

To prevent their applications from being deemed abandoned, the respondents applied for "advance parole" from the USCIS pursuant to section 212(d)(5)(A) of the Act. *See* 8 C.F.R. §§ 212.5(f) (providing for the advance authorization of parole); 245.2(a)(4)(ii)(A)˜ (providing that "the departure of an [adjustment] applicant … shall be deemed an abandonment of the application constituting grounds for termination of any pending application for adjustment of status, unless the applicant was previously granted advance parole by the Service for such absences, and was inspected upon returning to the United States"). The respondents' requests for advance parole were granted, and they traveled to India and back on several occasions between 2004 and 2006, returning each time in accordance with the terms of their advance parole. On September 10, 2006, the respondents returned from India for the last time and were paroled into the United States.

In separate notices issued on October 15, 2007, the USCIS informed the respondents that their applications for adjustment of status were denied. Specifically, the notices informed the respondents that they were no longer "admissible" to the United States, as required for adjustment of status, because they had departed this country (under grants of advance parole) after having been "unlawfully present" here for 1 year or more and were seeking admission less than 10 years after having departed, a set of circumstances that rendered them inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The male respondent promptly sought reopening of his adjustment application before the USCIS, noting the humanitarian considerations that had prompted his request for advance parole and contending that he and his wife should not be punished for having departed the United States when the DHS knew about, and expressly approved of, those departures by granting them advance parole. On July 21, 2008, a USCIS Field Office Director issued a decision acknowledging the force of some of the male respondent's arguments but ultimately concluding that his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act necessitated the denial of his application.˜

On November 21, 2008 the DHS commenced these removal proceedings by filing notices to appear in Immigration Court, charging the respondents with inadmissibility under section 212(a)(7)(A)(i)(I) of the Act. By serving these notices to appear on the respondents, the DHS terminated their parole, thereby restoring them to the status they allegedly held at the time of their last parole into the United States, that is, as intending immigrants who are not in possession of valid admission documents.˜ On February 12, 2009, the respondents conceded removability through counsel and sought to renew their adjustment applications before the Immigration Judge. At the conclusion of an evidentiary hearing conducted on August 20, 2009, the Immigration Judge found the respondents inadmissible under section 212(a)(9)(B)(i)(II) of the Act and ineligible for˜ adjustment, and he ordered them removed to India.

II. ANALYSIS

The respondents' first argument on appeal is that their departures from the United States under a grant of advance parole were not the sort of "departures" that render aliens inadmissible under section 212(a)(9)(B)(i)(II) of the Act. For the following reasons, we agree.

As previously noted, the USCIS and the Immigration Judge found the respondents inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, which provides as follows: "Any alien (other than an alien lawfully admitted for permanent residence) who ... (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's *departure* or removal from the United States, is inadmissible." (Emphasis added.)

The terms "depart" and "departure" are employed in numerous different contexts throughout the Act, but they are not statutorily defined. This is understandable. It would be a daunting task for any statutory draftsman to supply a single comprehensive definition for terms of such broad and variable application. Nevertheless, according to one dictionary, "depart" means simply "to go away: leave," while "departure" denotes "the act or an instance of departing."~ As used in section 212(a)(9)(B)(i)(II) of the Act, a "departure" could thus be interpreted to encompass *any* instance in which a person has "gone away" from or "left" the territory of the United States. Indeed, we have stated that the term "departure" should be given such a broad construction in the section 212(a)(9)(B)(i)(II) context.~

In [Matter of Lemus, 24 I. & N. Dec. 272 (BIA 2007)], the respondent maintained that section 212(a)(9)(B)(i)(II) should be construed so that the term "departure" would cover only a formal "voluntary departure" under section 240B of the Act~ that is, a departure made after the commencement of removal proceedings and in lieu of an order of removal.~ We disagreed, concluding that this interpretation of "departure" was too narrow.~ Indeed, in refuting the argument presented, we opined that the term should be interpreted broadly, "to encompass any 'departure' from the United States, regardless of whether it is a voluntary departure in lieu of removal or under threat of removal, or it is a departure that is made wholly outside the context of a removal proceeding."~

We continue to espouse the view that an alien like the respondent in Lemus~—who accrued more than 1 year of unlawful presence in the United States and then departed of his own volition without having obtained advance permission to return—fell within the class of individuals that Congress intended to cover when it enacted section 212(a)(9)(B)(i)(II).~ However, our unqualified declaration in Lemus~ that inadmissibility under section 212(a)(9)(B)(i)(II) could be triggered by literally "any departure" from the United States has had implications that bear additional consideration. Specifically, as this case illustrates, immigration adjudicators have interpreted our "any departure" statement to cover departures made pursuant to a grant of advance parole.˜

Purely as a matter of semantics, there is nothing to preclude the term "departure" from being interpreted to encompass departures made by advance parolees. Indeed, viewed in isolation and taken in its broadest possible sense, "departure" would also presumably include departures by people who stray across the border by accident, are induced to cross the border by deception or threat, or are kidnaped outright and spirited across the border against their will. It is well established, however, that we do *not* interpret statutory terms in isolation.

Instead, when interpreting the Act, we should be guided to a degree by common sense, taking into account Congress' intention to enact "a symmetrical and coherent regulatory scheme" in which all parts are fit into a harmonious whole.˜ The words of section 212(a)(9)(B)(i)(II) of the Act should thus "be read in their context and with a view to their place in the overall statutory scheme," since it is only by reading the language in context that its meaning can become evident.˜ When section 212(a)(9)(B)(i)(II) is understood in context, it becomes clear to us that Congress did not intend it to cover aliens—like the respondents—who have left and returned to the United States pursuant to a grant of advance parole.˜ To the extent that Lemus˜ suggested otherwise, we hereby clarify it accordingly.

As we have noted elsewhere, section 212(a)(9)(B)(i)(II) was enacted pursuant to section 301(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996˜. The legislative history of section 212(a)(9)(B)(i)(II) is rather sparse. Nevertheless, the manifest purpose of the provision (and of the related provisions surrounding it) is to "compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter."˜

Section 212(a)(9)(B)(i)(II) thus places most aliens who are unlawfully present in the United States for a significant period of time on fair notice that if they leave this country—whether through removal, extradition, formal "voluntary departure," or other means—they will be unwelcome to return for at least 10 years thereafter. But the same cannot be said for the respondents, who left the United States and returned with Government authorization pursuant to a grant of advance parole.

Typically, an alien who presents himself for inspection at a United States port of entry is permitted to enter only if he possesses a valid visa or other document authorizing his "admission."˜ Sometimes, however, an alien who lacks a valid visa or other entry document may need to come into the United States temporarily "for urgent humanitarian reasons or [for] significant public benefit," in which case, with certain exceptions not pertinent here, the DHS may, in its discretion, "parole" the alien into this country for a limited time, subject to conditions. Section 212(d)(5)(A) of the Act.˜ Although a grant of parole does not "admit" an alien into the United States, see section 101(a)(13)(B) of the Act,˜ it does typically allow him to leave the inspection facility free from official custody and to be physically present inside the United States until the purpose of his parole is completed.˜ Once the DHS determines that the purpose of an alien's parole has been satisfied, parole is terminated and the alien reverts to the status of any other applicant for admission by operation of law. Section 212(d)(5)(A) of the Act˜.

As its name implies, "advance parole" is simply parole that has been requested and authorized in advance based on an expectation that the alien will be presenting himself for inspection without a valid visa in the future. 8 C.F.R. § 212.5(f). Advance parole can be requested from abroad or at a port of entry, but typically it is sought by an alien who is already inside the United States and who wants to leave temporarily but fears that he will either be excluded as an inadmissible alien upon return or be deemed to have abandoned a pending application for an immigration benefit.˜

The DHS takes the position that a grant of advance parole does not technically authorize such an alien to *depart* from the United States.˜ But as a practical matter, the DHS is well aware that aliens who are inside the United States only request advance parole in order to facilitate foreign travel. By granting advance parole, the DHS thus understands that, as a discretionary humanitarian measure, it is telling the alien that he can leave the United States with assurance that his pending applications for immigration benefits will not be deemed abandoned during his absence and "that he will be *paroled* back into the United States upon return, under prescribed conditions, if he cannot establish that he is admissible at that time."˜ To obtain this assurance, the alien submits an Application for Travel Document (Form I-131), which requires him to explain how he qualifies for advance parole—such as through the pendency of an adjustment application together with a need to travel abroad for emergent personal or bona fide business reasons—and to identify the circumstances that warrant its issuance. Advance parole is thus treated as a distinct benefit for which the alien must demonstrate his eligibility and worthiness.

In short, an undocumented alien's departure under a grant of advance parole is qualitatively different from other departures, because it presupposes both that he will be permitted to return to the United States thereafter and that he will, upon return, continue to pursue the adjustment of status application he filed before departing. Nothing in the foregoing discussion is intended to suggest that a grant of parole into the United States following a trip abroad is ever guaranteed. Rather, we acknowledge that at the time of the returning alien's application for admission, the DHS possesses discretionary authority under section 212(d)(5) of the Act to determine whether parole is appropriate. We do not believe that Congress intended an alien to become inadmissible under section 212(a)(9)(B)(i)(II) and, by extension, ineligible for adjustment of status solely by virtue of a trip abroad that (1) was *approved* in advance by the United States Government on the basis of an application demonstrating the alien's qualification for and worthiness of the benefit sought, (2) presupposed the alien's *authorized return* thereafter, and (3) was requested solely for the purpose of *preserving* the alien's eligibility for adjustment of status. Applying section 212(a)(9)(B)(i)(II) to such an alien vindicates none of the purposes for which the statute was enacted, largely defeats the regulatory purpose of preserving advance parolees' eligibility for adjustment of status, and has the paradoxical effect of transforming advance parole from a humanitarian benefit into a means for barring relief. The language of section 212(a)(9)(B)(i)(II) does not require such a result. Accordingly, we hold that an alien who has left and returned to the United States under a grant of advance parole has not made a "departure … from the United States" within the meaning of section 212(a)(9)(B)(i)(II) of the Act.

We emphasize that we hold only that an alien cannot become inadmissible *under section 212(a)(9)(B)(i)(II)* solely by virtue of a trip abroad undertaken pursuant to a grant of advance parole. Our decision does not preclude a trip under a grant of advance parole from being considered a "departure" for other purposes, nor does it call into question the applicability of any other inadmissibility ground. On the contrary, it is well settled that an alien who leaves the United States and returns under a grant of advance parole is subject to the grounds of inadmissibility once parole is terminated, even if he had been "deportable" rather than "inadmissible" before the trip's commencement.

This can sometimes lead to harsh consequences, particularly for aliens with criminal convictions, when the relevant grounds of inadmissibility are more expansive than the corresponding deportability grounds. But ordinarily the relevant inadmissibility grounds were already applicable to the alien before he traveled abroad (as potential bars to adjustment of status, for instance), and thus the alien's trip outside the United States only affects the *manner* in which the fact of inadmissibility arises, by also making it an available basis for a removability charge. Section 212(a)(9)(B) is fundamentally different, however, because its focus on "departure" means that it alone *creates* a condition of inadmissibility that may not have existed before the alien left the

United States. The respondents were not even arguably covered by section 212(a)(9)(B) until they left under grants of advance parole.

In light of the foregoing, we conclude that the respondents are *not* inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. Consequently, they are not ineligible for˜ adjustment˜.˜

III. CONCLUSION

In conclusion, the respondents are˜ not inadmissible under section 212(a)(9)(B)(i)(II) or ineligible for˜ adjustment on that basis. The respondents' appeal will therefore be sustained in part, and the record will be remanded to the Immigration Judge for further proceedings.˜

DISSENTING OPINION:˜

I respectfully dissent. The majority labors unpersuasively to find that a departure under a grant of advance parole is not a "departure" for purposes of inadmissibility under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act˜ such that the respondents are not ineligible for adjustment of status˜. As noted in the majority opinion, however, such a construction is at odds with the straightforward meaning of "departure." Moreover, no claim is made that giving the term "departure" an expansive meaning˜ leads to absurd results. Rather, it merely leads to an outcome that the majority apparently deem undesirable.

Moreover, the majority's position is not merely at odds with the normal and natural meaning of the term "departure"; it is contrary to the consistent understanding of the Department of Homeland Security ("DHS") and its predecessors at the former Immigration and Naturalization Service ("INS"), which, from shortly after the April 1, 1997, effective date of section 212(a)(9)(B) to the present time, have interpreted a departure under a grant of advance parole as a "departure" for purposes of section 212(a)(9)(B)(i)(II).˜ While such internal interpretive policies are not binding on the Board, courts, including the Supreme Court, have found that similar agency policies are entitled to "great deference," "[p]articularly ... when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are as yet untried and new.'"˜

Not only does the majority not accord these agency understandings "great deference," it gives them no weight. Furthermore, the relevant enforcement agency (INS and DHS) reached this conclusion because˜ "[b]y granting advance parole or a refugee travel document, USCIS does not authorize the alien's departure from the United

States; it merely provides a means for the alien to return to the United States, regardless of admissibility." In short, a grant of advance parole is *not a Government-authorized departure* such as might support a finding that Congress could not have intended to subject an alien who thereby departs to the provisions of section 212(a)(9)(B).

In light of the above, and notwithstanding the majority's view, Congress could reasonably determine that aliens who leave the United States under a grant of advance parole do so at their own risk in terms of eligibility for relief upon their return as applicants for admission and must weigh the benefit of leaving pursuant to such a grant against the possible adverse consequences. Furthermore, as the majority acknowledges, grants of advance parole come with an explicit warning˜ that the alien may, upon return, be inadmissible under section 212(a)(9)(B) and ineligible for adjustment of status.˜ While the majority may disagree with requiring such an election, aliens may be put to such a choice, and whether or not to do so is precisely the sort of consideration that is for the Congress, not adjudicators like the Board.˜

5.4 Terrorism Related Inadmissibility Grounds

Terrorism related inadmissibility grounds, referred to colloquially as "TRIG" (rhymes with "twig") are outlined at INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B). An exploration of this statutory provision reveals a broad definition of terrorist activity. TRIG exclusion rests on both engaging in terrorist activity as well as support for or membership in a terrorist organization. The following cases provide more insight about TRIG.

5.5 Case: In Re S-K-

In Re S-K-

23 I. & N. Dec. 936 (BIA 2006)

[A]n Immigration Judge found the respondent removable as charged and denied her applications for asylum, withholding of removal, and protection under the Convention Against Torture˜. The respondent appealed that decision˜. The respondent's appeal will be sustained in part and dismissed in part.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent, a native and citizen of Burma, is a Christian and an ethnic Chin. According to the respondent, she faces persecution and/or torture if returned to Burma because the Government, currently a military dictatorship ruled by the majority Burman ethnic group, regularly commits human rights abuses against ethnic and religious minorities and, in fact, arrested and detained both the respondent's brother and fiancé, the latter ultimately being killed by the military.

In 2001, the respondent became acquainted with an undercover agent for the Chin National Front ("CNF") who was a friend of her deceased fiancé. She became sympathetic to the CNF's goal of securing freedom for ethnic Chin people and donated money to the organization for approximately 11 months. In addition, she attempted to donate some other goods, such as a camera and binoculars, to the CNF, but they were confiscated after she had given them to the undercover agent. The agent informed the respondent that she should flee Burma because the Burmese military, known to torture anyone affiliated with the CNF, had seen a letter written by the respondent to the CNF; the military knew that the respondent was the person who had attempted to provide the material goods. The respondent was actually residing in Singapore at the time, but since her temporary work visa was about to expire and she could not return to Burma, she fled to the United States in order to request asylum.

Although the Immigration Judge found that the respondent had established a well-founded fear of persecution in order to qualify for asylum, he denied her application for relief because, by providing money and other support to the CNF, an organization which uses land mines and engages in armed conflict with the Burmese Government, the respondent provided material support to an organization or group of individuals who she knew, or had reason to know, uses firearms and explosives to endanger the safety of others or to cause substantial property damage. Therefore, she was statutorily barred from asylum and from withholding of removal under either section 241(b)(3) of the Immigration and Nationality Act˜ or the Convention Against Torture.˜

[W]e view˜ the major questions arising in the case: (1) what standards or definition should be used to assess whether the term "material support" should be defined narrowly or more broadly; whether it should take into consideration the mens rea of the provider, as proposed by the respondent; and whether it includes the type of support provided by the respondent to the CNF;˜ and (2) to what extent, in light of our precedent, we should factor in an organization's purpose and goals in order to assess whether an organization, like the CNF, is engaged in terrorist activity.˜ We will address these issues in reverse order.

II. ANALYSIS

A. Terrorist Organization

During oral argument and on appeal, the respondent argued that the Burmese Government is not legitimate because the military junta rules the country under martial law and crushes any attempts at democratic reform. According to the respondent, the

United States does not recognize the Burmese Government's legislative acts, and therefore the CNF's actions are not unlawful under Burmese law. Rather, she asserts, the organization's actions are similar to those of forces fighting the Taliban in Afghanistan or forces rebelling against Saddam Hussein in Iraq, which are supported by the United States. Its goals are democracy and it uses force only in self-defense. Moreover, the CNF is allied with the National League of Democracy, which the United States has recognized as a legitimate representative of the Burmese people and is recognized by the United Nations. Therefore, the respondent contends that the Immigration Judge erred in concluding that the CNF is a terrorist organization. *See* section 212(a)(3)(B)(iii) of the Act (requiring that terrorist activity must be unlawful under the laws of the place where it is committed or under the laws of the United States).˜

During oral argument, the respondent pointed to testimony from the Assistant Secretary of State describing the Burmese military as a "group of thugs," as well as to the fact that the United States Government has passed the Burmese Freedom and Democracy Act of 2003,˜ acknowledging that the National League of Democracy is the legitimate representative of the Burmese people.˜

[T]the respondent acknowledged, upon questioning, that the United States does maintain a diplomatic relationship with the Burmese Government and maintains an embassy there. Therefore, in some sense or degree, the United States recognizes as legitimate the Burmese Government, which appears to consider the activities of the CNF unlawful.

Although the respondent urges us to determine that the Burmese Government is illegitimate and argues that we have such authority, we are unable to agree with the respondent's argument. While there may have been cases in which we determined that certain acts by foreign governments were unlawful in terms of harming individuals who sought asylum here, we have not gone so far as to determine that a foreign sovereignty would not be recognized by the United States Government. Such a determination is beyond our delegated authority and is a matter left to elected and other high-level officials in this country.

Furthermore, the respondent cites to past case law interpreting asylum applicants' claims and granting relief where aliens have attempted to overthrow governments that do not allow citizens to change the political structure and therefore exercise illegitimate power when prosecuting such individuals. In other words, she asserts that the motivation of the group seeking to effect change in a country must be analyzed in order to determine whether the harm produced is persecution or, as claimed in this case, terrorist activity.˜ During oral argument, counsel for the respondent acknowledged that by utilizing such factors to determine whether an organization falls within section 212(a)(3) of the Act, he was advocating that we apply a "totality of the circumstances" test.

We are unable to find any support for the respondent's assertion that such a test should be utilized. Our past case law is not inconsistent with some of the respondent's arguments. However, that case law does not address the bar to relief in section 212(a)(3)(B)(i)(I) of the Act. In this case, we are dealing with specific statutory language, which we read as applying to the respondent.˜

As noted by the DHS during oral argument, the fact that Congress included exceptions elsewhere in the Act for serious nonpolitical offenses and aliens who have persecuted others, even where persecuted themselves, and that it has not done so in section 212(a)(3)(B), indicates that the omission of an exception for justifiable force was intentional. In fact, having reviewed the statutory sections, we find that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as "freedom fighters," and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic. Rather, Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals.˜

In sum, we find no error in the Immigration Judge's conclusion that the CNF is a terrorist organization within the definition of the Act. Contrary to the respondent's assertions on appeal and during oral argument, there is no exception in the Act to the bar to relief in cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime. As noted by the Immigration Judge, there was sufficient evidence in the record to conclude that the CNF uses firearms and/or explosives to engage in combat with the Burmese military, and the respondent has not provided evidence that would rebut this conclusion or lead us to interpret the Act differently. Moreover, the record shows that the respondent knew or should have known of the CNF's use of arms.˜ Thus, assuming the respondent provided material support to the CNF, her sole remedy to extricate herself from the statutory bar appears to lie in the waiver afforded by Congress for this purpose, for which the DHS stated at oral argument she is eligible to apply.˜ However, the Immigration Judges and the Board have no role in the adjudication of such a waiver.

B. Materiality of Support Provided

The respondent also argues that the type and amount of support which she provided to the CNF was not material. She asserts that the Immigration Judge failed to take into consideration whether the funds and goods she provided were relevant to the planning or implementation of a terrorist act~. Since no evidence was submitted to support a conclusion that the respondent's contributions were relevant to a specific terrorist goal, the respondent asserts that finding that her contributions were material goes against congressional intent to tie materiality to terrorist activity.~

Section 212(a)(3)(B)(iv)(VI) of the Act states that "material support" includes "a safe house, transportation, communication, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training."~

We are unaware of any legislative history which indicates a limitation on the definition of the term "material support."~ Rather, the statute is clearly drafted in this respect to require only that the provider afford material support to a terrorist organization, with the sole exception being a showing by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was of that character. Section 212(a)(3)(B)(iv)(VI)(dd) of the Act. We thus reject the respondent's assertion that there must be a link between the provision of material support to a terrorist organization and the intended use by that recipient organization of the assistance to further a terrorist activity. Especially where assistance as fungible as money is concerned, such a link would not be in keeping with the purpose of the material support provision, as it would enable a terrorist organization to solicit funds for an ostensibly benign purpose, and then transfer other equivalent funds in its possession to promote its terrorist activities.

We turn then to the respondent's claim that the statute's requirement of material support means that trivial or unsubstantial amounts of assistance, such as she allegedly provided, are not within the statutory bar.~ In *Singh- Kaur v. Ashcroft*, [385 F.3d 293 (3d Cir. 2004)], the Third Circuit found that the provision of very modest amounts of food and shelter to individuals who the alien reasonably should have known had committed or planned to commit terrorist activity did constitute material support.~ The court also found that the listed examples in section 212(a)(3)(B)(iv)(VI) of the Act were not exhaustive but were "intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories."~

As the DHS contends, it is certainly plausible, in light of the decision in *Singh-Kaur v. Ashcroft*, *supra*, and recent amendments to the Act, ↳The definition of "material support” was amended recently in 2001 in order to add the term “transfer of funds or other material financial benefit.” that the list in section 212(a)(3)(B) was intended to have an expanded reach and cover virtually all forms of assistance, even small monetary contributions. Congress has not expressly indicated its intent to provide an exception for contributions which are de minimis. Thus the DHS asserts that the term “material support” is effectively a term of art and that all the listed types of assistance are covered, irrespective of any showing that they are independently “material.”

On the other hand, the respondent’s contrary argument that “material” should be given independent content is by no means frivolous. However, we find it unnecessary to resolve this issue now, inasmuch as we agree with the DHS that based on the amount of money the respondent provided, her donations of S$1100 (Singapore dollars) constituted material support. We take administrative notice that this corresponded at the time to approximately US$685. Specifically, the respondent testified that she contributed approximately S$100 per month over an 11-month period, representing approximately one-eighth of her monthly income. This was sufficiently substantial by itself to have some effect on the ability of the CNF to accomplish its goals, whether in the form of purchasing weaponry or providing routine supplies to its forces, for example. We therefore agree with the Immigration Judge that the respondent provided material support to the CNF.

III. CONCLUSION

Based on the foregoing, we agree with the Immigration Judge’s decision that the respondent is statutorily ineligible for asylum and withholding of removal for having provided material support to a terrorist organization. The respondent’s appeal will therefore be dismissed in part regarding her applications for that relief. However, during oral argument, the DHS conceded that the respondent is eligible for deferral of removal under the Convention Against Torture. We agree and will therefore sustain the respondent’s appeal and vacate the Immigration Judge’s decision in that regard. The record will be remanded for the appropriate background checks to be updated.

CONCURRING OPINION:

I join the majority’s decision. I agree with the majority that the Immigration Judge properly denied the respondent’s applications for asylum and withholding of removal, as this result is compelled by the specific language of the statute. I write separately because I have considerable doubts that this result is what Congress had in mind when it enacted the “material support” bar to asylum.

We are finding that a Christian member of the ethnic Chin minority in Burma, who clearly has a well-founded fear of being persecuted by one of the more repressive governments in the world, one that the United States Government views as illegitimate, is ineligible to avail herself of asylum in the United States despite posing no threat to the security of this country. It may be, as the majority states, that Congress intended the material support bar to apply very broadly. However, when the bar is applied to cases such as this, it is difficult to conclude that this is what Congress intended.

Unfortunately, there is virtually no legislative history that accompanies the material support bar. We therefore have nothing to examine to determine congressional intent, beyond the statutory language itself. And that language mandates that we bar this respondent from asylum.

The respondent clearly faces persecution in her home country. The Immigration Judge found her credible. He also found that the respondent has a well-founded fear of persecution due to her imputed political opinion. The Immigration Judge denied asylum, however, after finding that the respondent was barred from establishing eligibility because she is inadmissible under section 212(a)(3)(B)(i)(I) for having "engaged in a terrorist activity." Under the Act, to "engage in terrorist activity" includes committing an act the actor knows, or reasonably should know, affords "material support" to, among others, a designated terrorist organization or to "a group of two or more individuals, whether organized or not," which engages in any of a number of activities, including the use of an "explosive, firearm, or other weapon or dangerous device … with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." The organization that the respondent provided support to, the Chin National Front ("CNF"), has an armed wing that is resisting the Government of Burma. The CNF is allied with the National League of Democracy, which is recognized by the United States as a legitimate representative of the Burmese people.

In enacting the material support bar, Congress was rightly concerned with preventing terrorists and their supporters from exploiting this country's asylum laws. It is unclear, however, how barring this respondent from asylum furthers those goals. The respondent provided funds and some equipment to a member of the CNF, an organization that has *not* been designated by the Department of State as a terrorist organization under section 212(a)(3)(B)(vi) of the Act. The available information in the record indicates that the CNF engages in violence primarily as a means of self-defense against the Burmese Government, a known human rights abuser that has engaged in systematic persecution of Burmese ethnic minorities, including the Chin Christians. By reference to common definitions of the term "terrorism" and "terrorist," it is doubtful that the CNF would be considered a terrorist organization.˜ Indeed, the Resource Information Center of the Department of Homeland Security ("DHS") reported in February 2004 that there is no information that the CNF has been involved in terrorist activities or in abuses against civilians on any large or systematic scale.˜

The CNF, however, is a group that has resorted to violence in self-defense, including the use of explosives. The Immigration Judge was thus correct to find that the assistance that the respondent provided to the CNF constituted material support to any individual who the respondent knew, or should have known, "has committed or plans to commit a terrorist activity."˜ The fact that this language goes beyond common notions of "terrorism" is immaterial in the context of this case.

Yet, the statutory language is breathtaking in its scope. Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization. This includes organizations that the United States Government has not thought of as terrorist organizations because their activities coincide with our foreign policy objectives.˜

It also includes groups and organizations that are not normally thought of as "terrorists" per se. Read literally, the definition includes, for example, a group of individuals discharging a weapon in an abandoned house, thus causing "substantial damage to property." Section 212(a)(3)(B)(iii)(V) of the Act. This may constitute inappropriate or even criminal behavior, but it is not what we normally think of as "terrorist" activity.˜

The broad reach of the material support bar becomes even starker when viewed in light of the nature of the Burmese regime, and how it is regarded by the United States Government. In 2003, Congress passed the Burmese Freedom and Democracy Act of 2003˜ which, among other things, imposes sanctions on the Burmese Government as a result of its deplorable human rights record. The Secretary of State has designated Burma as one of a handful of "countries of particular concern" in light of this record, including its treatment of ethnic and religious minorities.˜ In particular, the Burmese Government has engaged in arrests of Christian clergy, destruction of churches, prohibition of religious services and proselytizing by Christians, and forced conversions of Christians.˜ These efforts are part of a larger effort to "Burmanize" the Chin ethnic minority.˜

In sum, what we have in this case is an individual who provided a relatively small amount of support to an organization that opposes one of the most repressive governments in the world, a government that is not recognized by the United States as legitimate and that has engaged in a brutal campaign against ethnic minorities. It is clear that the respondent poses no danger whatsoever to the national security of the United States. Indeed, by supporting the CNF in its resistance to the Burmese junta, it is arguable that the respondent actually acted in a manner consistent with United States foreign policy. And yet we cannot ignore the clear language that Congress chose in the material support provisions; the statute that we are required to apply mandates that we find the respondent ineligible for asylum for having provided material support to a terrorist organization.

Accordingly, I concur in the majority's result. I note, however, that the law provides for a limited waiver of the material support bar to be exercised by the DHS in appropriate cases. Section 212(d)(3) of the Act. I suggest that the DHS may wish to consider this respondent as someone to whom the grant of such a waiver is appropriate.

5.6 Case: Matter of A-C-M-

Matter of A-C-M-
27 I. & N. Dec. 303 (BIA 2018)

˜I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of El Salvador who claims that she entered the United States without inspection in 1991.˜ The DHS initiated removal proceedings against her, charging that she is removable as an alien without a valid entry document under section 212(a)(7)(A)(i)(I) of the Act˜. [Respondent sought asylum.]˜

In her August 8, 2016, decision, the Immigration Judge found that the respondent is ineligible for asylum and withholding of removal based on the material support bar in section 212(a)(3)(B)(iv)(VI) of the Act. The Immigration Judge stated that, but for the material support bar, she would have granted the respondent's asylum application on humanitarian grounds˜, noting the horrific harm she experienced from the guerrillas in El Salvador because, in addition to being kidnapped and required to perform cooking and cleaning for the guerrillas under threat of death, the respondent was forced to witness her husband, a sergeant in the Salvadoran Army, dig his own grave before being killed. However, the Immigration Judge granted the respondent's request for deferral of removal pursuant to the Convention Against Torture.

II. ISSUE

The principal issue on appeal is whether the respondent is subject to the "material support" bar in section 212(a)(3)(B)(iv)(VI) of the Act. Specifically, we must decide if the statutory definition of "material support" has any limitation based on the extent and type of support rendered.

III. ANALYSIS

A. Statutory Provisions

Section 208(b)(2)(A)(v) of the Act bars the Attorney General from granting asylum to an alien who is inadmissible˜. The Attorney General is also barred from granting withholding of removal to an alien when "there are reasonable grounds to believe that the alien is a danger to the security of the United States." Section 241(b)(3)(B)(iv) of the Act˜. For purposes of that provision, an alien who is described in section 237(a)(4)(B) of the Act—that is, inter alia, any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as that term is defined in section 212(a)(3)(B)(iv)— "shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States." Section 241(b)(3)(B) of the Act.

As relevant to the respondent, section 212(a)(3)(B)(iv)(VI) of the Act provides that a person engages in terrorist activity when she "commit[s] an act that [she] knows, or reasonably should know, affords material support" to a terrorist organization, as that term is defined in section 212(a)(3)(B)(vi). Section 212(a)(3)(B)(iv)(VI)(dd) of the Act requires "only that the [alien] afford material support to a terrorist organization, with the sole exception being a showing by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was of that character."˜ If the evidence indicates that the terrorism bar applies to an alien, he or she has the burden of proving by a preponderance of the evidence that the bar is not applicable.˜

B. Material Support Bar

The respondent argues on appeal that the Immigration Judge erred by finding that she is subject to the material support bar, claiming that any assistance she provided to the guerrillas in El Salvador was de minimis and therefore not "material." She further asserts that even if the material support bar is applicable to her, she is entitled to a duress exception. However, in Matter of M-H-Z-, 26 I&N Dec. 757 (BIA 2016), we ruled that the "material support bar" in section 212(a)(3)(B)(iv)(VI) of the Act does not include an implied exception for an alien whose material support to a terrorist organization was provided under duress. The United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, has deferred to our interpretation. See Hernandez v. Sessions, 884 F.3d 107, 109 (2d Cir. 2018). Consequently, we will not address that issue further.

We must therefore decide whether the phrase "material support" contains a quantitative requirement. The respondent and the dissent contend that an insignificant degree of support provided by an alien to a terrorist organization does not constitute "material" support. We hold that no such quantitative limitation exists in the bar.˜

We first observe that, while not dispositive, the fact that the Board and the Federal courts have uniformly rejected a duress exception to the material support bar counsels against adopting the interpretation that the respondent and the dissent support.˜

We agree˜ that the word "material" in the phrase "material support" must be "ascribed some meaning."˜ However, we conclude that the meaning does not relate to a quantitative requirement. We reiterate that there is no legislative history to support taking a quantitative approach and separating out what amount of support is necessary to make it "material." If an alien affords material support to a terrorist organization, he or she is subject to the bar, regardless of how limited that support is in amount.

This interpretation does not render the word "material" superfluous. Without that qualification, the bar could have been construed to apply to a person who merely expressed general "support" for a terrorist organization, which would have raised substantial freedom of expression concerns.˜

In sum, "material support" is a term of art that "relates to the type of aid provided," that is, aid of a material and normally tangible nature,˜ and it is not quantitative.˜ ↳[T]he term "material" relates to the type of aid provided *rather than whether it is substantial or considerable*.↲

˜[W]e conclude that an alien provides "material support" to a terrorist organization, regardless of whether it was intended to aid the organization, if the act has a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree.

Our view that the phrase "material support" has no quantitative component is also borne out by the fact that Congress, through section 212(d)(3)(B)(i) of the Act, has conferred upon the Secretary of Homeland Security the authority to grant a waiver regarding the application of the material support bar in order to address excusable violations including, among other things, support provided under duress or to only a de minimis degree.˜ As relevant here, the DHS has construed the waiver to apply specifically in situations where an alien has afforded only "insignificant material support" to an undesignated terrorist organization, a member of such an organization, or an individual the applicant knew, or reasonably should have known, had committed or planned to commit a terrorist activity.˜

In Matter of S-K-,˜we noted that the inclusion of the waiver was a means of balancing the "harsh provisions" of the material support bar. By creating the waiver, Congress effectively addressed the over-inclusive nature of the bar by allowing the Secretary to consider each situation in a more holistic manner.˜

Obviously, if providing merely an "insignificant" amount of support did not constitute "material support," the DHS would not have found a need for a waiver addressing this type of circumstance. The fact that the waiver covers such situations is clear evidence that the DHS regards the bar as extending to the provision of even "insignificant" support, contrary to the contention of the respondent and the dissent.˜ Thus, regardless of how sympathetic the circumstances of an alien's case may be, we find no support for concluding that Congress intended to provide a quantitative exclusion from the term "material support."˜

We therefore conclude that, on the facts before us, the respondent afforded material support when she aided guerillas in continuing their mission of armed and violent opposition to the Salvadoran Government in 1990.˜ While the respondent's assistance may have been relatively minimal, if she had not provided the cooking and cleaning services she was forced to perform, another person would have needed to do so.˜

DISSENTING OPINION:˜

I respectfully dissent from the majority's conclusion that the respondent is subject to the bar to asylum and withholding of removal for applicants who have provided "material support" to a terrorist organization˜.

The primary question presented by this case is whether the respondent's activities are of the kind and magnitude that would meet the threshold requirement of "material." I would conclude that they are not.

To prevent Congress' use of the word "material" from being superfluous, that word must have an independent meaning. Had Congress intended the word "material" to add little or nothing to the threshold requirements, it presumably would have simply prohibited "support." Far from having done so, Congress went into detail about the kinds of activities that the general term "material support" entails. Specifically, section 212(a)(3)(B)(iv)(VI) of the Act states that "material support" includes "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training."

Admittedly, this is not an exclusive list. Nevertheless, the listed specific examples imply that certain kinds and levels of support are required in order to constitute "material" support.˜ It is a well-settled canon of statutory construction that general statutory terms like “material support” “should be understood to refer to items belonging to *the same class* that is defined by the more specific terms in the list.”˜

I cannot conclude that the menial and incidental tasks that the respondent performed— as a slave—for Salvadoran guerrillas, including cooking, cleaning, and washing clothes, are of “the same class” as the enumerated forms of assistance set forth in the statute. The enumerated examples all involve items that either can directly be used to plan or carry out terrorist activities or, in the case of funds, have the liquidity and fungibility to readily be diverted to such use. Cooking and cleaning services for individuals who happen to belong to a terrorist organization cannot validly be placed in the same category as items that can be used to plan and carry out the organization’s goals. If Congress had intended to include such incidental services in the definition of “material support,” there would have been no need—and, indeed, it would have been counterproductive—to list multiple specific examples that relate directly to terrorist activity.

Similarly, I cannot conclude that the incidental assistance the respondent afforded to the guerillas provides “material” support in the logical sense of having at least some importance to promoting, sustaining, or maintaining the organization’s goals.˜ The majority’s apparent interpretation of “material,” as referencing anything and everything that “another person would have needed to do” if the respondent had not done it, is without effective limits and would lead to absurd results.˜

For example, under the majority’s strained interpretation, providing a glass of water to a thirsty individual who happened to belong to a terrorist organization would constitute material support of that organization, because the individual otherwise would have needed to obtain water from another source. Providing medical care to a flu-stricken member of a terrorist organization would also qualify as material support, since the individual otherwise would have needed to seek help from another doctor. Myriad other everyday activities that involve the crossing of paths with individuals who happen to be members of terrorist organizations would also be covered, such as selling such a member groceries on the same terms as are applied to the public generally, or cooking breakfast or doing laundry for one’s spouse who is a member. All of these examples, like the majority’s application of the bar to the minimal and menial activities in which the respondent has engaged, essentially read the word “material” out of the statute and render it superfluous, an outcome with which I cannot agree.˜

In view of our relatively recent holding in Matter of M-H-Z-, 26 I&N Dec. 757 (BIA 2016), that the material support bar contains no exception for duress, “it is especially important to give meaning to the statutory limit of ‘material.’”˜ Unlike the majority, which apparently would apply the bar without any meaningful limit, I would not decline to carry out our responsibility to strike the foregoing critical balance.

5.7 Inadmissibility Based on Criminal Conduct, Generally

Criminal conduct is a basis for inadmissibility. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2). There are strong similarities between the criminal grounds for exclusion and the criminal grounds for deportation, the latter of which will be discussed in Chapter 7. While this chapter provides an overview of crime-based inadmissibility under INA § 212, the majority of discussion regarding crime-based removal will be found in Chapter 7 (see sections 7.5-7.10).

5.8 Convictions

In general, noncitizens who have been convicted of certain crimes are inadmissible. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i). The term "convicted" is defined by statute. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). A "formal judgment of guilt" qualifies as a conviction. So does the noncitizen's admission of "sufficient facts to warrant a finding of guilt" coupled with "some form of punishment, penalty, or restraint on the alien's liberty" by a judge.

Criminal convictions that are the result of a jury trial clearly qualify as a "formal judgment of guilt." So are guilty pleas; the guilty plea is merely a predicate to an agreed-upon conviction. In addition, the statute provides that "a plea of ... nolo contendere" (no contest) is also a conviction so long as the noncitizen is subject to "some form of punishment, penalty, or restraint on ... liberty."

You may be aware of programs where a defendant can avoid a criminal conviction by completing drug rehabilitation or anger management. Such programs often require the defendant to enter a guilty plea; that plea is later withdrawn and dismissed upon the defendant's successful completion of required programming. These programs are of little help to noncitizens because the original plea, coupled with required rehabilitation, is still a conviction for purposes of immigration law.

Post-conviction modification, and even wholesale expungement, of a criminal sentence, if done for rehabilitation purposes or to avoid immigration consequences, will not move the conviction outside the ambit of INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). However, if the conviction is overturned due to a defect in the underlying criminal proceedings, that will take the conviction outside the reach of INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

There is one important exception to the expansive definition of "conviction" for immigration purposes: juvenile convictions. In general, a guilty verdict, ruling, or judgment in a juvenile court does not constitute a conviction for immigration purposes. See Matter of Devison-Charles, 22 I & N Dec. 1362 (BIA 2000).

5.9 Pardons

There are no provisions in INA § 212 regarding the effect of pardons on the immigration consequences of criminal convictions for noncitizens facing exclusion. In contrast, INA § 237 includes language regarding the immigration consequences of pardons for noncitizens facing deportation. See section 7.5.

From 1956 to 1990, former INA § 241(b) explicitly made pardons of controlled substance convictions ineffectual for immigration purposes. While that provision was eliminated in the restructured INA of 1990, the absence of any language in INA § 212 regarding pardons has led courts to conclude that controlled substance offenses continue to be non-pardonable for purposes of INA § 212. See, e.g., Aguilera-Montero v. Mukasey, 548 F.3d 1248 (9th Cir. 2008). The State Department also considers pardons of controlled substance offenses to be ineffectual in eliminating INA § 212 consequences. 9 FAM 302.4-2(B)(3)(b)(5)(b). However, State Department regulations provide that pardons of crimes involving moral turpitude, discussed in section 5.11, do eliminate attendant INA § 212 consequences. 22 C.F.R. § 40.21(a)(5).

5.10 Admissions of Criminal Conduct

Convictions are not the only basis for excluding noncitizens because of criminal conduct. A noncitizen "who admits committing acts" that constitute the essential elements of a crime involving moral turpitude (see section 5.11 below) or a controlled substance offence (see section 5.12 below) may also be excluded. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

5.11 Crimes Involving Moral Turpitude

Noncitizens convicted of or admitting to having committed a crime involving moral turpitude—referred to as a "CIMT" and pronounced as spelled "C-I-M-T"—are excludable. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). As one court has put it, CIMTs involve "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Marciano v.

INS, 450 F.2d 1022 (8th Cir. 1971). The most common CIMTs include fraud, larceny, or intent to harm persons or things. 9 FAM 302.3-2(B)(2)(b).

There is a juvenile exception to the INA § 212 CIMT exclusion ground. A noncitizen is not excludable if their CIMT was committed when they were under the age of 18 and the crime was committed (and the noncitizen finished any time served) more than 5 years before seeking a visa. INA § 212(a)(2)(A)(ii)(I), 8 U.S.C. § 1182(a)(2)(A)(ii)(I).

In addition, there is a *de minimis* exception to the INA § 212 CIMT exclusion ground. A noncitizen is not excludable if: (i) the maximum possible penalty for their CIMT does not exceed imprisonment for one year; *and* (ii) the noncitizen was not sentenced to serve more than six months. INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

5.12 Controlled Substance Offenses

Any violation of law regarding controlled substances is grounds for exclusion. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). This includes violations of state, federal, or foreign laws regarding controlled substances.

There is a special exclusion ground for "controlled substance traffickers." INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C). The Supreme Court has held that "ordinarily 'trafficking' means some sort of commercial dealing." Lopez v. Gonzales, 549 U.S. 47, 53 (2006).

5.13 Multiple Criminal Convictions

Noncitizens convicted of "2 or more offenses (other than purely political offenses)" for which they were sentenced to imprisonment of "5 years or more" are also excludable. INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B).

5.14 Economic Grounds

Exclusion also applies to noncitizens deemed "likely at any time to become a public charge." INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A). "Public charge" means that the noncitizen is "likely to become primarily dependent on the U.S. Government for subsistence" by either: (a) receiving public cash assistance for income maintenance, or (b) being institutionalized for long-term care at U.S. government expense. 9 FAM 302.8-2(B)(1)(a)(1). By statute, "public charge" is evaluated "at a minimum" by considering the noncitizen's age, health, family status, assets, resources, and financial status, as well their education and skills. INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B). It is a "totality of the circumstances" test. 9 FAM 302.8-2(B)(1)(a)(2).

A noncitizen who might be deemed a "public charge" can nevertheless be admitted if a "sponsor"—the U.S.-based citizen or LPR petitioning for the noncitizen's admission as an immigrant—submits an "affidavit of support." INA § 213A, 8 U.S.C. § 1183a. The affidavit of support is a contract between the sponsor and the U.S. government pursuant to which the sponsor agrees to provide financial support for the visa beneficiary in the amount of 125% of the federal poverty line until the sponsored beneficiary becomes a U.S. citizen, has paid into Social Security for 40 quarters (10 years), leaves the U.S. permanently, or dies. INA § 213A, 8 U.S.C. § 1183a.

In 2026, the State Department took a new approach to public charge determinations. It paused all immigrant visa applications from 75 countries deemed a "high risk of U.S. public benefits reliance." See https://perma.cc/J3K4-HU8D. A federal judge issued a temporary restraining order enjoining the policy, but only as to the litigating plaintiffs. See Sangster v. Rubio, 2026 WL 222316 (D. Nev. 2026).

5.15 Public Health and Morals

Noncitizens determined to have "a communicable disease of public health significance" are excludable under INA § 212(a)(1)(A)(i), 8 U.S.C. § 1182(a)(1)(A)(i). In addition, noncitizens determined to have a "physical or mental disorder" either associated with behaviors or an actual history of behavior that poses "a threat to the property, safety, or welfare of the aliens or others" are also excludable. INA § 212(a)(1)(A)(iii), 8 U.S.C. § 1182(a)(1)(A)(iii). A final provision of note is the exclusion of noncitizens determined to be "a drug abuser or addict." INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv).

5.16 Other Exclusion Grounds

There are myriad other grounds for exclusion of noncitizens.

Foreign Policy. A noncitizen whose admission would "have potentially serious adverse foreign policy consequences" is excludable under INA § 212(a)(3)(C)(i), 8 U.S.C. § 1182(a)(3)(C)(i). President Trump has flagged antisemitism as a foreign policy issue. See https://perma.cc/W6L7-KCBU.

Communists. Membership in the Communist or other totalitarian party is a basis for excluding immigrants, but not nonimmigrants. INA § 212(a)(3)(D)(i), 8 U.S.C. § 1182(a)(3)(D)(i). There are exceptions for membership that was involuntary, before the age of 16, a function of law, or solely to obtain "employment, food rations, or other essentials of living." INA § 212(a)(3)(D)(ii), 8 U.S.C. § 1182(a)(3)(D)(ii). There's another exception for membership that ended two years before seeking an immigrant visa where the noncitizen is not a threat to U.S. security. INA § 212(a)(3)(D)(iii), 8 U.S.C. § 1182(a)(3)(D)(iii). Finally, there is a discretionary exception available for the close family members of U.S. citizens and lawful permanent residence so long as their admission is "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest," if the noncitizen is not a threat to U.S. security. INA § 212(a)(3)(D)(iv), 8 U.S.C. § 1182(a)(3)(D)(iv).

Nazis. Those who "order, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" as a Nazi between March 23, 1933, and May 8, 1945, are inadmissible under INA § 212(a)(3)(E)(i), 8 U.S.C. § 1182(a)(3)(E)(i).

Genocide. Participating in genocide is a basis for exclusion under INA § 212(a)(3)(E)(ii), 8 U.S.C. § 1182(a)(3)(E)(ii).

Torture, Extra-judicial killing, recruiting/using child soldiers. Like the exclusions of Nazis and those who have participated in genocide, noncitizens who have committed torture, extra-judicial killings, or who have recruited or used child soldiers are also inadmissible. INA § 212(a)(3)(E)(iii) & (a)(3)(G), 8 U.S.C. § 1182(a)(3)(E)(iii) & (a)(3)(G).

Polygamists. Coming to the United States to practice polygamy is grounds for excluding immigrants, but not nonimmigrants. INA § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A).

Unlawful voters. Voting in a U.S. federal or state election is grounds for exclusion. INA § 212(a)(10)(D), 8 U.S.C. § 1182(a)(10)(D).

Former citizens if tax evaders. If a U.S. citizen renounced their citizenship in order to avoid taxes, they become inadmissible under INA § 212(a)(10)(E), 8 U.S.C. § 1182(a)(10)(E).

5.17 Waivers

There are special waivers available to noncitizens subject to INA § 212 exclusion on the basis of criminal conduct. Nonimmigrants who seek waivers look to INA § 212(d)(3)(A). Immigrants who seek waivers look to INA § 212(h). Appendix A.3 replicates a USCIS chart regarding waiver grounds.

5.18 Test Your Knowledge

PROBLEM 5.1

Cruz is a citizen of Cuba. Five years ago, he was paroled into the United States (see section 6.6). His parole expired after a year, and Cruz remained in the United States without authorization. Cruz worked as a truck driver and, one year ago, he crossed the U.S. border into Canada to make a delivery. He reentered the United States on a new grant of parole. Thereafter, Cruz sought adjustment of status (see section 6.9) on the basis of his marriage to a U.S. citizen (see section 3.5). The sole question before you is whether Cruz is inadmissible on the basis of INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). How should Matter of Arrabally factor into your conclusion?

PROBLEM 5.2

Mimma Mahmood is an undocumented migrant from Myanmar. She is a member of the Muslim Rohingya minority, a group that has been systematically persecuted by the Myanmar military in what the United Nations has called a "textbook example of ethnic cleansing."

For the past year, Mimma has served as the administrator for the Facebook page of the Arakan Rohingya Salvation Army (ARSA), an armed Rohingya defense organization that the Myanmar government considers a terrorist organization. ARSA has attacked military outposts in an effort to steal guns, which ARSA then uses to thwart government-backed military attacks on Rohingya in Myanmar.

Is Mimma potentially removable under INA § 212(a)(3)(B)?

PROBLEM 5.3

Zara entered the United States without authorization. She received a felony conviction of fraud and was thereafter put into removal proceedings. On what base(s) is Zara removable?

Zara's attorney seeks post-conviction relief in criminal court, attaching evidence of Zara's family ties in the U.S. and her work history. The motion states that her prior attorney failed to advise her that her fraud conviction would be a removable offense. The judge grants the motion for post-conviction relief, signing an order finding a Sixth Amendment violation. Will the immigration judge recognize the vacatur for immigration purposes? How would this change Zara's removability?

PROBLEM 5.4

Celextza corporation filed all necessary paperwork for Tama, from Tonga, to receive an employment-based immigrant visa. When Tama appeared at the U.S. Consulate in Tonga for her consular interview (see section 6.1), the consular official asked for Tama's weight (200 pounds) and height (5'4"), noting that her body mass index was 34.3 and in the obesity range. The official also asked Tama if she had diabetes, which Tama confirmed that she did. The official found Tama inadmissible based on these two facts. What ground or grounds do you think led to the finding of inadmissibility?

PROBLEM 5.5

Salma, from Syria, seeks a visa to study in the United States. Salma is a news junkie interested in world events, including the Gaza War. She follows Reuters, the Associated Press, and Al Jazeera, as well as several independent newsfeeds from Palestinians living in the Gaza Strip. Last year, Salma added a watermelon emoji to her social media handles. This emoji is a symbol of Palestine support as it displays the colors of the Palestine flag: red, green, white, and black. If Salma is found inadmissible based on these facts, what is the likely basis for her inadmissibility?

PROBLEM 5.6

Ishwar, from India, is a tech worker and would-be beneficiary of an H-1B visa. Ishwar has experience working as a "fact checker" and "content moderator" for a U.S.-based social media company. If Ishwar is found inadmissible based on these facts, what is the likely basis for his inadmissibility?

Chapter Six: Admission

In prior chapters, we covered *who* is lawfully coming to the United States: immigrants (Chapter 3) and nonimmigrants (Chapter 4). This chapter covers *how* noncitizens lawfully come to the United States. It explores the process by which noncitizens get a visa (section 6.2), if a visa is needed (section 6.3), and how they enter the United States (section 6.4), noting the presidential power over admission (section 6.5) and the "parole" alternative to admission (section 6.6). In addition, this chapter introduces "expedited removal," an administrative process that applies at the border to exclude noncitizens without proper documents and those engaged in misrepresentation (section 6.7), as well as "withdrawal," the opportunity to leave a port of entry without seeking admission (section 6.8). Finally, this chapter discusses an alternative to admission—adjustment of status—which allows noncitizens present in the United States to become LPRs without leaving the country (section 6.9).

Before we delve into the admission process, it is a good time to remember that admission is a key dividing point in immigration law. As we already touched upon in Chapter 5, removal (the process of which will be discussed in Chapter 9) is the mechanism that the United States uses to expel noncitizens from this country whether those noncitizens have been lawfully admitted or not. But admission determines the criteria used to remove a noncitizen: those not lawfully admitted are subject to INA § 212 (Chapter 5); those lawfully admitted are subject to the different removal grounds outlined in INA § 237 (Chapter 7).

6.1 Admission Procedure: The Big Picture

Admission to the United States is a multi-step process involving multiple federal agencies.

DEPARTMENT OF LABOR

For some noncitizens looking to come to the United States on a work-based visa, the admission process starts when an employer files necessary paperwork with the Department of Labor. See sections 3.14 (labor certification for EB-2 and EB-3 immigrants), 4.4 (labor condition application for H-1B, H-1B1, or E-3 nonimmigrants), and 4.5 (labor certification for H-2A and H-2B nonimmigrants).

USCIS

The next step for all immigrants and many nonimmigrants is to file a visa petition with USCIS. This will be the first step for all family-based immigrants and those nonimmigrant categories that require a visa petition but do not require DOL input.

A note on vocabulary: The person who files the paperwork with USCIS is the petitioner; the ultimate recipient of the visa is the beneficiary. As discussed in Chapters 3 and 4, the petitioner might be the noncitizen beneficiary's family member or a prospective employer.

Every visa petition requires a filing fee, unless the filer qualifies for a fee waiver. As of May 2026, there is a $675 fee for family-based immigrant visas and a $715 fee for employment-based immigrant visas. Nonimmigrant visa fees vary. A nonprofit employer must pay a fee of $460 for an H-2B visa petition while many other nonimmigrant petitions require a fee of $1,015. The One Big Beautiful Bill Act of 2025 added an additional $250 visa integrity fee for most nonimmigrants. And, in September 2025, President Trump announced a $100,000 fee for H-1B petitions on behalf of beneficiaries outside of the United States who do not currently hold a nonimmigrant visa. Fees provide most of USCIS' funding (96%). Unlike other agencies, USCIS does not rely primarily on congressional appropriations.

Whenever a petition requires an exercise of discretion, 2026 USCIS policy indicates that endorsing, promoting, supported, or otherwise espousing the views of "an anti-American or terrorist organization or group, including those who support or promote antisemitic terrorism, antisemitic terrorist organizations, and antisemitic ideologies" will be an "overwhelmingly negative factor." See https://perma.cc/ST4G-K54U.

Finally, the DHS Secretary "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any" immigrant petition otherwise granted by

USCIS. INA § 205; 8 U.S.C. § 1155. The decision to revoke a visa is a discretionary one that is not eligible for judicial review. See Bouarfa v. Mayorkas, 604 U.S. 6 (2024) (citing INA § 242(a)(2)(B)(ii); 8 U.S.C. § 1252(a)(2)(B)(ii)).

DEPARTMENT OF STATE

Immigrant visa petitions, if approved by the USCIS, are sent to the National Visa Center (NVC) in Portsmouth, New Hampshire. The NVC is run by the Department of State, and it is the agency's processing center in the United States. The petition remains with the NVC until the beneficiary's priority date is likely to become current. Recall section 3.2 regarding immigrant visa wait times. Immediate relatives, who are not subject to those wait times, will have their petitions processed by the NVC rapidly. Other family- and employment-based beneficiaries may have to wait years for their priority date to become current.

When ready, immigrant petitions will be sent from the NVC to the appropriate U.S. embassy or consulate abroad. This is typically, but not always, the embassy or consulate servicing the beneficiary's country of origin. At this point, the noncitizen completes a visa application and pays another fee to the Department of State: $325 for a family-based application and $345 for an employment-based application. Immigrant applicants must also complete a medical examination. INA § 221(d), 8 U.S.C. § 1201(d). The application, results from the medical exam, photographs, supporting documentation, and any other necessary material is considered by the consular official when interviewing the would-be immigrant, their spouse, and any qualified unmarried children immigrating with them. If successful, the noncitizen and their derivative beneficiaries will each receive a physical visa authorizing their entry into the United States.

Many noncitizens are entitled to just start with a nonimmigrant visa application at a consular office. Tourists, for example, apply at the consulate without the need to interact with the DOL or USCIS in advance. As explained, however, many work-based nonimmigrants are screened through the DOL and USCIS before their paperwork is sent to the appropriate consulate. INA § 214(b) governs consular consideration of the nonimmigrant visa application: the noncitizen is "presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa ... that he is entitled to a nonimmigrant status." The Department of State charges a fee between $185 and $315 for nonimmigrant visa application processing.

Immigrants and nonimmigrants alike are screened for INA § 212 exclusion grounds by consular officials. INA § 221(g)(1), 8 U.S.C. § 1201(g)(1) ("No visa ... shall be issued to an alien if ... it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa … under section 212.”). This includes “social media screening” for, among other things, anti-American and antisemitic attitudes. In 2026, consular officials began asking nonimmigrant visa applicants if they have experienced or fear harm or mistreatment in their country of nationality or permanent residence, and to deny visas to any who respond affirmatively.

DEPARTMENT OF HOMELAND SECURITY

Receipt of a visa does not guarantee a noncitizen entry into the United States. INA § 221(h), 8 U.S.C. § 1201(h). There is one final hurdle for both immigrants and nonimmigrants: actual entry into the United States at an official port of entry after inspection by an officer from the Department of Homeland Security. More specifically, inspection will be done by an agency within DHS: the Office of Field Operations (OFO) division of the U.S. Customs and Border Patrol. OFO officers verify identity, examine the validity of travel documents, evaluate the noncitizen’s compliance with rules regarding their individual visa, and consider the applicability of INA § 212 inadmissibility grounds.

In considering the admission of nonimmigrants, OFO officers are bound by INA § 214(b), which dictates that every nonimmigrant is “presumed to be an immigrant until he establishes to the satisfaction of the … immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status.”

Finally, note that visas expire. Immigrants must use their visa within six months of issuance from the State Department. INA § 221(c)(1), 8 U.S.C. § 1201(c)(1). The expiration dates of nonimmigrant visas vary. INA § 221(c)(2), 8 U.S.C. § 1201(c)(2).

6.2 Getting a Visa

EOUSA, OLE, Immigration Law (2005)

WHO NEEDS A VISA

Most foreigners who want to travel to the United States either as visitors, or who seek to enter as intending immigrants must apply for a visa at an American embassy or consulate abroad. See INA § 211(a), 8 U.S.C. § 1181 (immigrants), INA § 212(a)(7)(B)(i)(II), 8 U.S.C. § 1182(a)(7)(B)(i)(II) (nonimmigrants). However, under the Visa Waiver Program (VWP) authorized by INA § 217, 8 U.S.C. § 1187, citizens of certain participating countries can travel to the United States for tourism or business for ninety days or less without a visa.˜ The visa allows a foreign citizen to travel to a port of entry in the United States, such as a[n] international airport, a seaport or a land border crossing.

IMMIGRANT VISA PETITIONS

A noncitizen who seeks to obtain permanent residence in the United States (Green Card), must either obtain an immigrant visa at a U.S. consular post abroad or in certain limited circumstances, the noncitizen may obtain adjustment of status if residing in the U.S.˜ To obtain an immigrant visa a noncitizen must have a qualifying relative, an offer of employment or luck in the diversity visa lottery. Additionally, the noncitizen must not be subject to any grounds of inadmissibility.

To obtain a family-based visa, the qualifying relative who is a U.S. citizen or a lawful permanent resident (LPR), files a visa petition, known as an "I-130" form with the USCIS. The petitioning party is referred to as the "Petitioner," while the noncitizen is referred to as the "beneficiary."˜ The allocation of immigrant visas, with the exception of immigrant visas for "immediate relatives," is subject to numerical limitations. Consequently, an immigrant visa may not always be immediately available. Therefore, even though USCIS will approve the I-130 visa petition, applicants must wait in line to actually obtain their visas. Moreover, the approval of the I-130 does not guarantee that the immigrant visa will be issued or that the adjustment of status will be granted. The USCIS forwards the approved I-130 to the Department of State's Visa Processing Center, which will contact the intending immigrant with further information.

The date of the filing of the I-130 with the USCIS is known as the "priority date" for purpose for visa issuance. To determine whether an immigrant visa is immediately available for a family based preference, one must consult the Department of State Visa Bulletin, now published only online at http://www.travel.state.gov. For example, the Visa Bulletin for March 2005 indicates that first preference family-based visas are available to applicants who had a priority date earlier than February 22, 2001. This suggests that an applicant who applied for such visa in March 2005 would have to wait for four years.

Once a family-based visa becomes immediately available, the applicant who is abroad is notified that he or she must submit additional documents and attend a visa interview. If the U.S consular official approves the immigrant visa, the applicant is issued a travel document to present himself for inspection and admission at a U.S. port of entry. On the other hand, an applicant who is in the United States may, if qualified, apply for adjustment of status (Form I-485) under INA § 245, 8 U.S.C. § 1255. Once USCIS grants the adjustment application, the applicant will be issued form I-551 (Green Card), as evidence of lawful permanent residence.

Obtaining an immigrant visa based on an offer of employment may require an additional step. For most employment-based preferences, the petitioning party, in this case an employer, must demonstrate to the DOL that it could not find a qualified U.S. worker for that particular position. The employer does so by filing an Application for Alien Employment Certification (ETA-750). If DOL grants the application, the petitioner must file a Petition for Immigrant Worker (I-140) with USCIS or with the U.S. Embassy or consular post with jurisdiction over the noncitizen's residence.˜ Following the submission of the I-140, the beneficiary will be interviewed either by a consular official abroad, or by USCIS if the beneficiary is in the United States. If the applicant qualifies, USCIS will grant lawful permanent residence status˜. If abroad, the beneficiary must appear for inspection and admission at a United States port of entry.

NONIMMIGRANT VISA PETITIONS

A noncitizen who seeks to enter the United States as a nonimmigrant must obtain a nonimmigrant visa (NIV) abroad by submitting Form DS-156 to the American embassy or consular post. Most nonimmigrants who travel to the United States do so as visitors for pleasure. However, there are broad categories of noncitizens who must first get approval from USCIS prior to submitting an application for a nonimmigrant visa. For example, an employer who seeks a temporary worker must file with USCIS˜ a Petition For a Nonimmigrant Worker (I-129)˜ on behalf of the employee beneficiary. USCIS is responsible for determining the conditions of the worker's entry, including duration of status. INA § 214, 8 U.S.C. § 1184. Consultation with the DOL and the Departments of Agriculture regarding the conditions of employment must occur when the noncitizen is seeking admission as a temporary worker or trainee (H-visa), as an intracompany transferee (L-visa), as an individual with extraordinary ability in the sciences, arts, education, business or athletics (O-visa) or as a member of an internationally recognized entertainment group (P-visa). INA § 214(b), 8 U.S.C. § 1184(b). Once USCIS approves a nonimmigrant visa petition, the noncitizen may apply for a visa from a consular officer overseas or for a change of nonimmigrant status if the noncitizen already is in the United States. INA § 248, 8 U.S.C. § 1258.˜

CONSULAR NONREVIEWABILITY

Decisions of consular officials are not judicially reviewable under the well-established doctrine of "consular nonreviewability."

Role of Consular Officers, 9 FAM 102.2-1

When reviewing a visa application and interviewing a visa applicant you must consider the applicant's qualifications for the visa under the law as it applies to the specific visa type. Each case should be decided on its own merit. If applicable to the visa type, you should consider the presumption of immigrant intent. Review all cases for the possibility of fraud, and ensure the applicant has no ineligibilities. If there are ineligibilities, consider whether a waiver would be applicable. You are responsible for conducting as complete a clearance as is necessary to establish the eligibility of an applicant to receive a visa.

Adjudication Decisions Based On Law, Regulations,
9 FAM 301.1-2

(1) Legal Basis for Issuance, Refusal:˜ [Y]ou may may issue a visa to an immigrant or nonimmigrant who has made proper application˜. However˜ no visa or other documentation may be issued to an alien if:

(a) It appears to you, from statements in the application, or in the papers submitted therewith, that such applicant is ineligible to receive a visa or such other documentation under INA 212, or any other provision of law;

(b) The application fails to comply with the provisions of the INA, or the regulations issued thereunder; or

(c) You know or have reason to believe that such applicant is ineligible to receive a visa or such other documentation under INA 212, or any other provision of law.

(2) Issuing a Visa: Eligibility for a visa is based on three legal and regulatory criteria—if all three of the criteria below are met, an applicant is likely eligible for a visa:

(a) Classification: The applicant demonstrates that they fall within a visa classification as established in INA 101(a)(15) for nonimmigrants and INA 201 or INA 203 for immigrants.˜;

(b) Documentary and Processing Requirements: The applicant provides a complete visa application and completes all required steps in the application process.˜;

(c) Ineligibilities: The applicant successfully demonstrates that they are not subject to any legal provision which would make them ineligible for a visa and therefore inadmissible into the United States.˜

CRS, The Power of Congress and the Executive to Exclude Aliens: Constitutional Principles (2019)

The doctrine of consular nonreviewability precludes judicial review of challenges brought by nonresident aliens located abroad against visa denials˜. Under the doctrine, the millions of nonresident aliens denied visas each year at U.S. consulates abroad cannot themselves challenge their visa denials in federal court on statutory or constitutional grounds.˜ The general unavailability of judicial review of visa denials under the doctrine means that U.S. consular officers (the officials who adjudicate visas abroad)˜ have considerable power to make final decisions about visa applications.˜

No statute speaks expressly to the issue of whether visa decisions should be subject to judicial review.˜ Even so, lower federal courts recognize the doctrine with apparent uniformity˜. As authority for the doctrine, courts often cite [United States ex rel. Knauff v. Shauhnessy, 338 U.S. 537 (1950) and other]˜ Supreme Court precedents for the proposition that Congress's plenary immigration power includes the power to have statutes governing the admission of aliens "enforced exclusively through executive officers, without judicial intervention"˜ and that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."˜

There is one narrow exception to the doctrine of consular nonreviewability: A U.S. citizen can challenge a visa denial that allegedly burdens their own constitutional rights. In such a case, the court looks to see if there is a "facially legitimate and bona fide reason" for the visa denial, which would bring an end to the U.S. citizen's challenge. The Supreme Court "has disclaimed the authority to 'look behind the exercise of that discretion,' much less to balance the reason given against the asserted constitutional right." Department of State v. Muñoz, 602 U.S. 899 (2024).

The Muñoz case involved a U.S. citizen wife who challenged the denial of her Salvadoran husband's visa. She argued that, in denying her husband's visa, the State Department "abridged her fundamental right to live with her spouse in her country of citizenship—and that it did so without affording her the fair procedure guaranteed by the Fifth Amendment." The Court held that "a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country."

6.3 Visa Waiver Program

CRS, Visa Waiver Program (2024)

The Visa Waiver Program (VWP), established in 1986 as a trial program and made permanent in 2000 (P.L. 106-396), allows nationals from 42 countries to enter the United States for periods of up to 90 days as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa.˜

[I]n FY2019, there were more than 22.9 million admissions to the United States under this program, constituting nearly a third (31%) of all temporary visitor admissions.˜

To qualify for the VWP, a country must offer reciprocal travel privileges to U.S. citizens; have had a nonimmigrant visa refusal rate of less than 3% for the previous year; issue their nationals machine-readable passports that incorporate biometric identifiers; issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry; report the loss and theft of passports; share specified information regarding nationals of the country who represent a threat to U.S. security; and not compromise the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if they fail to meet any of these conditions or otherwise threaten the United States' security or immigration interests.

All foreign nationals˜ entering under the VWP must present passports that contain electronic data chips (e-passports). Under Department of Homeland Security (DHS) regulations, travelers who seek to enter the United States through the VWP are subject to the biometric requirements of the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. In addition, aliens seeking to travel to the United States under the VWP must get an approval from the Electronic System for Travel Authorization (ESTA), a web-based system that checks the alien's information against relevant law enforcement and security databases, before they can board a plane to the United States.˜

[In 2015, Congress] changed eligibility for the VWP by prohibiting people who were present in certain countries since March 1, 2011, with limited exceptions, from traveling under the VWP.˜ Currently, the prohibition affects those who were present in any of the following countries: Democratic People's Republic of Korea, Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.

The statutory exceptions to this restriction apply to foreign nationals who were in one of the specified countries in order to perform military service in the armed forces of a VWP country, or to perform official duties as an employee of the VWP country. In addition, DHS can grant waivers on a case-by-case basis.˜

[A]nyone who is a dual national of a VWP country and the Democratic People's Republic of Korea, Iran, Iraq, Sudan, or Syria is ineligible to travel under the VWP.˜

—-—

6.4 Admission to the United States

EOUSA, OLE, Immigration Law (2005)

A noncitizen must apply for admission at a U.S. port of entry within the validity period of his or her visa or entry document. A CBP Officer will verify the noncitizen is the person issued the visa or entry document and is admissible to the United States. INA §§ 212(b), 235, 8 U.S.C. §§ 1182(b), 1225˜.

—-—

CRS, Expedited Removal of Aliens: Legal Framework (2019)

INSPECTION

An alien arriving in the United States or an alien present in the United States who has not been admitted is considered an "applicant for admission" who is subject to inspection by an immigration officer.˜ At a designated port of entry, the initial phase of the inspection process is referred to as "primary inspection."˜ During this stage, "the immigration officer literally has only a few seconds to examine documents, run basic lookout queries, and ask pertinent questions to determine admissibility and issue relevant entry documents."˜ If the immigration officer finds discrepancies in the alien's documents or statements, "or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection," the alien will be referred to "secondary inspection" for "a more thorough inquiry."˜ During secondary inspection, the immigration officer˜ [will] question[] the alien to assess whether the alien is inadmissible.˜ In order to make that determination, the immigration officer may obtain statements under oath about the purpose and intention of the applicant incoming to the United States.˜

—-—

6.5 Presidential Power Over Admission

Congress has given the president broad power to affect admission. If the president determines that the entry of noncitizens (whether immigrants or nonimmigrants) "would be detrimental to the interest of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." INA § 212(f), 8 U.S.C. § 1182(f). In 2017, President Donald J. Trump issued an Executive Order pursuant to this statutory power to restrict the entry of noncitizens from several Muslim-majority nations. The Supreme Court held that the president's actions were a "lawful exercise" of the "broad discretion" authorized by statute. Trump v. Hawaii, 585 U.S. 667 (2018). In 2025, President Trump invoked INA § 212(f) to wholly or partially ban the admission of nationals from 42 countries, citing "national security and public safety threats." See https://perma.cc/K7F2-CZZC. USCIS thereafter placed a hold on all pending applications regarding noncitizens from the named countries and announced a comprehensive re-review of approved benefit requests regarding noncitizens from the named countries dated on or after January 20, 2021—the first day of the Biden administration. See https://perma.cc/B8A6-AGRB.

6.6 Parole

Not every noncitizen who is allowed physical entry into the United States is formally "admitted" into the United States pursuant to the rules and regulations described thus far. Some noncitizens are allowed to enter the United States under a status called "parole." Parole is the mechanism by which the government may permit entry into the United States to a noncitizen who is ineligible to receive a visa and ineligible to be admitted to the United States under INA § 212. For example, the government might grant entry to a drug addict for purposes of seeking treatment at a U.S. rehabilitation center or an asylum-seeker for purposes of pursuing asylum (see Chapter 10). Parole is also the mechanism by which the government might grant a noncitizen, presently in the United States without authorization, permission to reenter the country after leaving.

DHS, Definition of Terms

Parolee - A parolee is an alien, appearing to be inadmissible to the inspecting officer, allowed into the United States for urgent humanitarian reasons or when that alien's entry is determined to be for significant public benefit. Parole does not constitute a formal admission to the United States and confers temporary status only, requiring parolees to leave when the conditions supporting their parole cease to exist. Types of parolees include:

1. Deferred inspection: authorized at the port upon alien's arrival; may be conferred by an immigration inspector when aliens appear at a port of entry with documentation, but after preliminary examination, some question remains about their admissibility which can best be answered at their point of destination.

2. Advance parole: authorized at an DHS District office in advance of alien's arrival; may be issued to aliens residing in the United States in other than lawful permanent resident status who have an unexpected need to travel and return, and whose conditions of stay do not otherwise allow for readmission to the United States if they depart.

3. Port-of-entry parole: authorized at the port upon alien's arrival; applies to a wide variety of situations and is used at the discretion of the supervisory immigration inspector, usually to allow short periods of entry. Examples include allowing aliens who could not be issued the necessary documentation within the required time period, or who were otherwise inadmissible, to attend a funeral and permitting the entry of emergency workers, such as fire fighters, to assist with an emergency.

4. Humanitarian parole: authorized at DHS headquarters for "urgent humanitarian reasons" specified in the law. It is used in cases of medical emergency and comparable situations.

5. Public interest parole: authorized at DHS headquarters for "significant public benefit" specified in the law. It is generally used for aliens who enter to take part in legal proceedings.

6. Overseas parole: authorized at an DHS District or suboffice while the alien is still overseas; designed to constitute long-term admission to the United States. In recent years, most of the aliens the DHS has processed through overseas parole have arrived under special legislation or international migration agreements.

—-—

In addition to the above-mentioned forms of parole, "parole in place" is available for certain family members of active-duty military personnel and veterans of the U.S. armed services. The following 2013 memo outlines the requirements and purposes of parole in place.

USCIS Policy Memorandum 602-0091 (2013)

Military preparedness can potentially be adversely affected if active members of the U.S. Armed Forces and individuals serving in the Selected Reserve of the Ready Reserve, who can be quickly called into active duty, worry about the immigration status of their spouses, parents and children.

Similarly, our veterans, who have served and sacrificed for our nation, can face stress and anxiety because of the immigration status of their family members in the United States. We as a nation have made a commitment to our veterans, to support and care for them. It is a commitment that begins at enlistment, and continues as they become veterans.˜

INA § 212(d)(5)(A) gives the Secretary the discretion, on a case-by-case basis, to "parole" for "urgent humanitarian reasons or significant public benefit" an alien applying for admission to the United States. Although it is most frequently used to permit an alien who is outside the United States to come into U.S. territory, parole may also be granted to aliens who are already physically present in the U.S. without inspection or admission. This latter use of parole is sometimes called "parole in place."˜

The fact that the individual is a spouse, child or parent of an Active Duty member of the U.S. Armed Forces, an individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve, however, ordinarily weighs heavily in favor of parole in place. Absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion for such an individual. If USCIS decides to grant parole in that situation, the parole should be authorized in one-year increments, with extensions of parole as appropriate.

—-—

As mentioned in the 2013 memo above, INA § 212(d)(5), 8 U.S.C. § 1182(d)(5), authorizes parole. The following provisions of the State Department's Foreign Affairs Manual (FAM) provides more information about the authority for and limits of parole.

Parole Authorization, 9 FAM 202.3-2(A)

b. Parole is an extraordinary measure, sparingly used to permit a noncitizen, who may be inadmissible or otherwise ineligible for admission, into the United States for a temporary period due to an urgent humanitarian reason or for significant public benefit.˜

c. Parole under INA 212(d)(5)(A) is not an admission to the United States.˜

f. Parole is not a method for circumventing normal visa issuing procedures, including noncurrent priority dates˜. Parole is not a method to bypass established refugee processing˜. It is a last resort for those with an urgent need to travel to the United States or for cases with significant public benefit.

g. ˜ Parole is a discretionary authority of the DHS Secretary.

—-—

Parole Does Not Confer Immigration Benefits, 9 FAM 202.3-2(B)

a. Parole does not, by itself, confer any immigration benefits.˜ Parole authorization usually permits the individual to travel to the United States only one time and does not allow an individual to travel abroad and then return to the United States after the initial parole, without prior approval from DHS.

b. Those authorized parole based on a Department request for protection of that individual may apply for asylum or other protections in the United States, and, if approved, may eventually adjust status to LPR, if qualified.

c. Parolees may apply for employment authorization.˜

d. Parolees usually must depart the United States before the end of the authorized parole period.˜

—-—

6.7 Expedited Removal

As discussed in section 6.2, an applicant for admission at the border may be rejected, despite having been issued a visa by a U.S. consular official. An inspecting officer may conclude, for example, that an individual holding a tourist visa does not intend to visit the United States for pleasure but instead plans to work without authorization.

For some noncitizens, being rejected at the border can have even greater consequences than mere denial of entry. Noncitizens believed to be engaging in misrepresentation are subject to expedited removal under INA § 235, which will render them inadmissible under INA § 212(a)(9)(A)(i) for five years after their date of removal.

As explained in the reading below, expedited removal applies not only to cases of misrepresentation but also whenever a noncitizen arrives in the United States, whether at a port of entry or between ports of entry, without authorization.

For many years, the government employed expedited removal only as to noncitizens present in the country for less than 14 days and found within 100 miles of the U.S. border. During both Trump presidencies, however, his administrations expanded expedited removal to its full statutory potential—those present in the country for less than two years and found anywhere in the United States.

CRS, Expedited Removal of Aliens: Legal Framework (2019)

Congress˜ has broad authority over the admission of aliens *seeking to enter* the United States.˜ The Supreme Court has repeatedly held that the government may exclude an alien seeking to enter this country without affording him the traditional due process protections that otherwise govern formal removal proceedings; instead, an alien seeking initial entry is entitled only to those procedural protections that Congress expressly authorized.˜

Consistent with this broad authority, Section 235(b)(1) of the INA provides for the expedited removal of arriving aliens who do not have valid entry documents or have attempted to gain their admission by fraud or misrepresentation.˜ Under this streamlined removal procedure, which Congress established through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, such aliens may be summarily removed without a hearing or further review.˜

In limited circumstances, however, an alien subject to expedited removal may be entitled to certain procedural protections before he or she may be removed from the United States. For example, an alien who expresses a fear of persecution may obtain administrative review of his or her claim and, if the review determines that the alien's fear is credible, the alien will be placed in "formal" removal proceedings where he or she can pursue asylum and related protections.˜ Additionally, an alien may seek administrative review of a claim that he or she is a U.S. citizen, lawful permanent resident (LPR), admitted refugee, or asylee.˜ Unaccompanied alien children also are not subject to expedited removal.˜

In addition to providing for expedited removal of certain arriving aliens, INA Section 235(b)(1) also confers the Secretary of the Department of Homeland Security (DHS) with the ability to expand the use of expedited removal to aliens present in the United States without being admitted or paroled˜ if they have been in the country less than two years and do not have valid entry documents or have attempted to gain their admission by fraud or misrepresentation.˜

[E]xpedited removal is a major component of immigration enforcement, and in recent years it has been one of the most regularly employed means by which immigration authorities remove persons from the United States.˜

As an alternative to expedited removal, DHS may permit an alien to voluntarily withdraw his or her application for admission if the alien intends, and is able, to depart the United States immediately.

—-—

CRS, Expedited Removal of Aliens: An Introduction (2022)

INA § 242(a)(2) generally bars judicial review of an expedited removal order. Judicial review, however, is still available in limited circumstances.˜

Under INA § 242(e)(2), an alien may challenge an expedited removal order in habeas corpus proceedings, contesting the legality of his or her detention. The habeas court's jurisdiction, however, is limited to whether (1) the petitioner in the habeas action is an alien; (2) the petitioner was ordered removed under INA § 235(b)(1)'s expedited removal provisions; and (3) the petitioner can prove by a preponderance of the evidence that he or she is an LPR, refugee, or asylee. Most courts have construed INA § 242(e)(2) as barring review of the legality of the underlying expedited removal proceedings. In Dep't of Homeland Security v. Thuraissigiam, the Supreme Court upheld these judicial review limitations against a constitutional challenge.˜

—-—

6.8 Withdrawal

CRS, Alien Removals and Returns: Overview and Trends (2015)

WITHDRAW OF APPLICATION (INA § 235(A)(4))

At the discretion of the government, an applicant for admission to the United States may be permitted to withdraw his or her application and depart immediately from the United States without being subject to the five-year bar on reentry.˜ An alien may be permitted to withdraw the application if it is determined that it is in the best interest of justice that a removal (or expedited removal) order not be issued, and that the alien has both the intent and means to depart immediately from the United States.˜ The alien's decision to withdraw the application must be made voluntarily. In general, an alien who has withdrawn an application for admission must be detained, either by DHS or the owner of the vessel (e.g., airline) on which he or she arrived, until departure.˜

—-—

6.9 Adjustment of Status

As discussed in section 6.2, most noncitizens travel to a consulate overseas in order to receive their visa. This includes noncitizens who are already present in the United States; they, too, typically leave the country and travel abroad to get their visa. However, certain noncitizens present in the United States can obtain an immigrant visa without leaving the country through a process called adjustment of status, as explained below. This is a particularly important option for would-be immigrants who, due to periods of unlawful presence in the United States, would be barred from returning to the country after leaving (see section 5.2). Note: noncitizens cannot use adjustment of status to obtain a nonimmigrant visa; though, some nonimmigrant visa holders can change their nonimmigrant classification without leaving the country, as discussed in section 4.12.

Consider Saanvi, a Canadian citizen, who is lawfully present in the United States on a nonimmigrant work visa (see section 4.3). She meets and marries a U.S. citizen and thereby becomes eligible for a family-based immigrant visa (see section 3.5). Saanvi's spouse will file an immigrant visa petition on Saanvi's behalf. Saanvi can visit the U.S. consulate in Montreal, Quebec, for "consular processing" as outlined in section 6.2. But Saavni has an alternative option available: She can remain in the United States and, without traveling to an overseas consulate, "adjust status" and obtain her visa stateside. Saavni might well choose consular processing, despite the availability of adjustment of status, because it can be a faster process.

If we tweak a few facts, the allure of adjustment of status becomes clear. What if Saanvi is a citizen of Australia who currently lives in Boston, Massachusetts? Consular processing for Saanvi would require a journey of more than 10,000 miles, multiple flights with more than 22 hours of travel each way, and it would cost several thousand dollars. What if Saanvi came to the U.S. as an international student and overstayed her visa? If she overstayed by more than 180 days, and returned to Australia for consular processing, she would have to live abroad for a minimum of three years before reuniting with her husband in the United States (see section 5.2). Adjustment of status, on the other hand, would allow Saanvi to obtain her family-based immigrant visa without expense or exile.

CRS, Deferred Action, Advance Parole, and Adjustment of Status (2015)

ADJUSTMENT OF STATUS PURSUANT TO INA § 245(A)

INA § 245(a) generally permits the Secretary of Homeland Security, "in his discretion and under such regulations as he may prescribe," to adjust the status of any alien "who was inspected and admitted or paroled into the United States" to that of an LPR provided the alien is "admissible ... for permanent residence," among other things.˜

The requirements that an alien (1) has been "inspected and admitted or paroled" and (2) is admissible as an LPR generally serve to limit unlawfully present aliens' eligibility to adjust their status while within the United States, even if the alien has a family member or an employer who is able and willing to sponsor the alien for an immigrant visa.

Aliens who are unlawfully present as the result of having entered the United States without authorization generally cannot satisfy the requirement that an alien have been "inspected and admitted or paroled" in order to qualify for adjustment of status. Under the INA, admission specifically refers to the "lawful entry of an alien ... after inspection and authorization by an immigration officer," while *parole* refers to an entry—which does not constitute an admission—that is also authorized by immigration officials.˜

Aliens who are unlawfully present, either as the result of an unauthorized entry or because they overstayed a visa or otherwise violated the conditions of their temporary presence in the United States, are also often inadmissible pursuant to INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i). INA § 212(a)(9)(B)(i) generally bars aliens who have been unlawfully present in the United States for a period of more than 180 days and less than 1 year from admission within 3 years of their "departure or removal." Those who are unlawfully present for one year or more are generally barred from admission for 10 years.

ADVANCE PAROLE PURSUANT TO INA § 212(D)(5)(A)

A grant of advance parole pursuant to INA § 212(d)(5)(A) could, however, help an alien to qualify for adjustment of status by enabling the alien to (1) leave the United States and return to it in such a way that the alien is seen to have been "inspected and admitted or paroled" and (2) avoid the 3- and 10-year bars on admission that would generally be triggered by the "departure" of aliens who have been unlawfully present in the United States for over 180 days (and thus potentially be "admissible ... for permanent residence").˜

LIMITATIONS ON ADJUSTMENT UNDER INA § 245(A)

Not all aliens granted advance parole will qualify for adjustment of status˜. This is, in part, because other grounds of inadmissibility—beyond the 3- and 10-year bars—could still apply. These include criminal and security grounds.

Aliens who are not “immediate relatives” (e.g., spouses, minor children) of U.S. citizens are generally also ineligible for adjustment because INA § 245(a) requires that an immigrant visa be “immediately available” to the alien at the time when s/he applies for adjustment. However, aliens who are not immediate relatives of U.S. citizens are generally subject to statutory caps on the number of immigrant visas issued per year that can delay the issuance of visas (i.e., make them not “immediately available”).

In addition, INA § 245(b) expressly bars certain aliens from adjustment of status, including aliens (other than “immediate relatives”) who were employed while lacking employment authorization; have otherwise violated the terms of a nonimmigrant visa; or are not in legal status when they apply for adjustment.

Waivers of the 3- and 10-Year Bars Also Possible

It should also be noted that adjustment as the result of a grant of advance parole is not the only means by which aliens granted deferred action (among others) could acquire LPR status. INA § 212(a)(9)(B)(v) expressly permits the Secretary of Homeland Security to waive the 3- and 10-year bars for aliens who are the spouses, sons, or daughters of U.S. citizens or LPRs, if the Secretary determines that refusing admission to the alien would result in “extreme hardship” to the alien’s citizen or LPR spouse or parent. (Aliens are granted such waivers in conjunction with leaving the country to obtain an immigrant visa.)

Such waivers differ from a grant of advance parole, however, in that a waiver requires a finding of “extreme hardship” to a qualifying relative, while a grant of advance parole does not.

In May 2026, a USCIS policy memorandum upended many of these longstanding adjustment-of-status practices. USCIS characterized adjustment of status as “a matter of discretion and administrative grace” as well as “extraordinary relief.” The memo stated that since noncitizens paroled into the United States or admitted into the United States as nonimmigrants should have left the country at the end of their parole or nonimmigrant status, they should ordinarily pursue any immigrant visa through consular processing outside of the United States. Failure to comply with parole or nonimmigrant conditions, including by failing to depart the United States, “are highly relevant” factors to any exercise of discretion regarding adjustment of status. See https://perma.cc/K4VW-NZSD.

6.10 Test Your Knowledge

PROBLEM 6.1

Reconsider Problem 2.2. Are there issues other than plenary power that the court might address?

PROBLEM 6.2

Reconsider Problem 5.5. At what stage in the admission process would Salma's request for a visa likely be flagged?

PROBLEM 6.3

Peter is a Canadian citizen with an F-visa studying at the University of North Dakota (see section 4.9). On Monday morning, he drove to the Pembina Port of Entry on his way back to Grand Forks, ND from Winnipeg, Manitoba. Peter was randomly selected for secondary inspection. During secondary inspection, a CBP officer found the following in Peter's car: a Buffalo Wild Wings shirt, a Buffalo Wild Wings nametag/pin (with Peter's name on it), and various pay stubs from Buffalo Wild Wings in Grand Forks, ND, made out to Peter. What is likely to happen next?

PROBLEM 6.4

Fifteen years ago, Sia, a citizen of Sierra Leone, entered the United States without authorization. Sia has led a largely exemplary life in the United States, with just one slip up. Ten years ago, Sia pled guilty to simple possession of 1.4 grams of marijuana. She served no time in jail. Five years ago, Sia married U.S. Army Specialist Adam Armstrong. The couple has one child, Cristina Celeste.

Sia suffers from lupus, a long-term autoimmune disease in which the body's immune system becomes hyperactive and attacks normal, healthy tissue. She relies on medicines and treatments available in the United States that are not available in Sierra Leone. Indeed, Sierra Leone currently bears the dubious distinction of being the nation recognized by the World Health Organization as providing the worst healthcare in the world to its citizens.

Is Sia currently eligible for adjustment of status? Are there any steps that Sia could take to make her eligible for adjustment of status? Consider INA § 212(h)(1)(A), 8 U.S.C. § 1182(h)(1)(A).

PROBLEM 6.5

On January 20, 2025, President Donald Trump issued Executive Order No. 14163, "Realigning the United States Refugee Admissions Program," wherein he determined that "entry into the United States of refugees … would be detrimental to the interests of the United States" and directed that "entry into the United States of refugees … be suspended" pending further findings. Refugees who had been approved for resettlement in the United States but who had not yet arrived in the United States filed suit to enjoin implementation of the executive order. Should the order be enjoined?

Chapter Seven: Deportability

Not every immigrant or nonimmigrant who has been admitted to the United States is welcome to stay. INA § 237, 8 U.S.C. § 1227, delineates classes of immigrants and nonimmigrants who are deportable from the United States.

This chapter begins by exploring the important distinction between entry and admission (section 7.2-7.3). Next, this chapter explores the varied classes of individuals marked for deportation including those who failed to adhere to U.S. immigration laws (section 7.4) and those who have criminal convictions (sections 7.5-7.10). This chapter also addresses recent moves by the second Trump administration to deport members of a Venezuelan crime syndicate called Tren de Aragua (section 7.11) and international students who participated in pro-Palestinian protests (section 7.12).

7.1 Deportation Basics

Noncitizens who have been lawfully admitted to the United States and thereafter become removable fall under the provisions of INA § 237, 8 U.S.C. § 1227. Such noncitizens are deportable and their removal is often called deportation.

There are many grounds for deportation laid out at INA § 237, 8 U.S.C. § 1227, and they include:

INA § 237(a)(1): Inadmissible at time of entry or of adjustment of status or violates status;

INA § 237(a)(2): Criminal offenses;

INA § 237(a)(3): Failure to register and falsification of documents;

INA § 237(a)(4): Security and related grounds; and

INA § 237(a)(5): Public charge.

7.2 Entry Versus Admission

It is critical to understand the distinction between removal under INA § 237 (“deportation”) and removal under INA § 212 (“exclusion”), the latter of which was discussed in Chapter 5. Removal under INA § 237 applies to those noncitizens who followed the process outlined in Chapter 6 and were admitted to the United States, whether as immigrants or nonimmigrants. Removal under INA § 212 applies to those noncitizens who entered the United States surreptitiously and without authorization.

As discussed in the readings that follow, this distinction did not always exist. Prior to 1996, the critical point of distinction was physical entry into the United States, not the admission process. However, since April 1, 1997, the effective date of IIRIRA, however, admission has been the dividing line between removal under INA § 237 and INA § 212.

EOUSA, OLE, Immigration Law (2005)

Before the enactment of IIRIRA, the term “entry” was originally defined in § 101(a)(13) of the INA, 8 U.S.C. § 1101(a)(13), as “any coming of an alien into the United States from a foreign port or place or from an outlying possession.”˜ Before IIRIRA, to effect an “entry” a noncitizen must have: (1) crossed into the territorial limits of the United States; (2) been inspected and admitted by immigration officials or actually or intentionally evaded inspection by border officials; and (3) been free from official restraint.˜ Thus, a noncitizen waiting in the immigration inspection area at a port of entry or airport would not have effected an “entry” under immigration law. Similarly, a noncitizen granted “advanced parole” or “parole” also did not effect entry. Ironically, if a noncitizen managed to bypass the immigration inspectors and physically reach the interior of the country, the noncitizen was considered to have made an “entry.” The legal fiction created by the entry doctrine fostered the development of a two-tier immigration system under which noncitizens who had not yet made an “entry” were placed into exclusion proceedings, while noncitizens who could establish entry were placed into deportation proceedings.

A major limitation to the entry doctrine was created by the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449 (1963), called the Fleuti doctrine. Under Fleuti, lawful permanent residents returning to the United States were not considered to have made a new entry or reentry if their departure was “brief, casual and innocent.” Consequently, they were entitled to be placed into deportation proceedings rather than exclusion even when they were in the act of returning to the United States from abroad. If the trip outside the United States was made for an illegal purpose, however, the trip was not considered "brief, casual and innocent," and the returning resident would be placed into exclusion proceedings. See Landon v. Plasencia, 459 U.S. 21 (1977).

In 1996, IIRIRA § 301(a) replaced the term "entry" with the terms "admission" and "admitted." "Admitted" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). The term "arriving alien" is defined in the regulations as a noncitizen "who seeks admission to or transit through the United States ... or an alien who is interdicted in international or United States waters." 8 C.P.R. § 1001.1(q). Despite IIRIRA's amendments, entry continues to be an important factor in immigration proceedings, because a ground of removal still exists for noncitizens who were "inadmissible" at the time they entered. INA § 237(a)(l)(A), 8 U.S.C. § 1227(a)(1)(A). Thus, although the term "entry" no longer exists, understanding the theory behind it continues to be important to fully comprehend the immigration laws.

—-—

7.3 Case: Rosenberg v. Fleuti

Rosenberg v. Fleuti
374 U.S. 449 (1963)

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT.

Respondent Fleuti is a Swiss national who was originally admitted to this country for permanent residence on October 9, 1952, and has been here continuously since except for a visit of "about a couple hours" duration to Ensenada, Mexico, in August 1956. The Immigration and Naturalization Service, of which petitioner Rosenberg is the Los Angeles District Director, sought in April 1959 to deport respondent on the ground that he had been excludable at the time of his 1956 return as an alien "afflicted with psychopathic personality," § 212(a)(4), by reason of the fact that he was a homosexual. Deportation was ordered on this ground and Fleuti's appeal to the Board of Immigration Appeals was dismissed, whereupon he brought the present action for declaratory judgment and review of the administrative action. It was stipulated that among the issues to be litigated was the question whether § 212(a)(4) is "unconstitutional as being vague and ambiguous." The trial court rejected respondent's contentions in this regard and in general, and granted the Government's motion for summary judgment. On appeal, however, the United States Court of Appeals for the Ninth Circuit set aside the deportation order and enjoined its enforcement, holding that as applied to Fleuti § 212(a)(4) was unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term "psychopathic personality."˜

The Government petitioned this Court for certiorari, which we granted in order to consider the constitutionality of § 212(a)(4) as applied to respondent˜. Upon consideration of the case, however, and in accordance with the long-established principle that "we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable,"˜ we have concluded that there is a threshold issue of statutory interpretation in the case, the existence of which obviates decision here as to whether § 212(a)(4) is constitutional as applied to respondent.

That issue is whether Fleuti's return to the United States from his afternoon trip to Ensenada, Mexico, in August 1956 constituted an "entry" within the meaning of § 101(a)(13) of the Immigration and Nationality Act of 1952˜, such that Fleuti was excludable for a condition existing at that time even though he had been permanently and continuously resident in this country for nearly four years prior thereto. Section 101(a)(13), which has never been directly construed by this Court in relation to the kind of brief absence from the country that characterizes the present case,˜ reads as follows: "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

The question we must consider, more specifically, is whether Fleuti's short visit to Mexico can possibly be regarded as a "departure to a foreign port or place ... (that) was not intended," within the meaning of the exception to the term "entry" created by the statute. Whether the 1956 return was within that exception is crucial, because Fleuti concededly was not excludable as a "psychopathic personality" at the time of his 1952 entry. The 1952 Act became effective on December 24, 1952, and Fleuti entered the country for permanent residence on October 9, 1952, a fact which is of significance because § 241(a)(1) of the Act only commands the deportation of aliens "excludable by the law existing at the time of such entry ...." Hence, since respondent's homosexuality did not make him excludable by any law existing at the time of his 1952 entry, it is critical to determine whether his return from a few hours in Mexico in 1956 was an "entry" in the statutory sense. If it was not, the question whether § 212(a)(4) could constitutionally be applied to him need not be resolved.↩

The definition of "entry" as applied for various purposes in our immigration laws was evolved judicially, only becoming encased in statutory form with the inclusion of § 101(a)(13) in the 1952 Act. In the early cases there was developed a judicial definition of "entry" which had harsh consequences for aliens. This viewpoint was expressed most restrictively in United States ex rel. Volpe v. Smith, 289 U.S. 422 (1933),˜ in which the Court˜ upheld deportation of an alien who, after 24 years of residence in this country following a lawful entry, was held to be excludable on his return from "a brief visit to Cuba"˜. The Court stated that "the word 'entry' ... includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."˜ Although cases in the lower courts applying the strict re-entry doctrine to aliens who had left the country for brief visits to Canada or Mexico or elsewhere were numerous,˜ many courts applied the doctrine in such instances with express reluctance and explicit recognition of its harsh consequences,˜ and there were a few instances in which district judges refused to hold that aliens who had been absent from the country only briefly had made "entries" upon their return.˜

Reaction to the severe effects produced by adherence to the strict definition of "entry" resulted in a substantial inroad being made upon that definition in 1947 by a decision of the Second Circuit and a decision of this Court. The Second Circuit, in an opinion by Judge Learned Hand, refused to allow a deportation which depended on the alien's being regarded as having re-entered this country after having taken an overnight sleeper from Buffalo to Detroit on a route lying through Canada. Di Pasquale v. Karnuth, 158 F.2d 878. Judge Hand recognized that the alien "acquiesced in whatever route the railroad might choose to pull the car,"˜ but held that it would be too harsh to impute the carrier's intent to the alien, there being no showing that the alien knew he would be entering Canada. "Were it otherwise," Judge Hand went on, "the alien would be subjected without means of protecting himself to the forfeiture of privileges which may be, and often are, of the most grave importance to him."˜ If there were a duty upon aliens to inquire about a carrier's route, it "would in practice become a trap, whose closing upon them would have no rational relation to anything they could foresee as significant. We cannot believe that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous." Concluding, Judge Hand said that if the alien's return were held to be an "entry" under the circumstances, his "vested interest in his residence" would: "be forfeited because of perfectly lawful conduct which he could not possibly have supposed would result in anything of the sort. Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards."˜

Later the same year this Court, because of a conflict between Di Pasquale and Del Guercio v. Delgadillo, 159 F.2d 130 (C.A.9th Cir. 1947), granted certiorari in the latter case and reversed a deportation order affecting an alien who, upon rescue after his intercoastal merchant ship was torpedoed in the Caribbean during World War II, had been taken to Cuba to recuperate for a week before returning to this country.˜ The Court pointed out that it was "the exigencies of war, not his voluntary act,"˜ which put the alien on foreign soil, adding that "(w)e might as well hold that if he had been kidnapped and taken to Cuba, he made a statutory 'entry' on his voluntary return. Respect for law does not thrive on captious interpretations."˜ Since "(t)he stakes are indeed high and momentous for the alien who has acquired his residence here,"˜ the Court held that "(w)e will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."˜

The increased protection of returning resident aliens which was brought about by the Delgadillo decision, both in its result and in its express approval of Di Pasquale, was reflected in at least two subsequent lower-court decisions prior to the enactment of § 101(a)(13). In Yukio Chai v. Bonham, 165 F.2d 207 (C.A.9th Cir. 1947), the court held that no "entry" had occurred after a ship carrying a resident alien back from seasonal cannery work in Alaska made an unscheduled stop in Vancouver, B.C., and in Carmichael v. Delaney, 170 F.2d 239 (C.A.9th Cir. 1948), the court held that a resident alien returning from wartime service with the United States Maritime Service during which he had stopped at many foreign ports made no "entry" because all of the movements of the ship to which he had been assigned were pursuant to Navy orders.˜

It was in light of all of these developments in the case law that § 101(a)(13) was included in the immigration laws with the 1952 revision. As the House and Senate Committee Reports˜ make clear, the major congressional concern in codifying the definition of "entry" was with "the status of an alien who has previously entered the United States and resided therein ...." This concern was in the direction of ameliorating the harsh results visited upon resident aliens by the rule of United States ex rel. Volpe v.

Smith, as is indicated by the recognition that "the courts have departed from the rigidity of (the earlier) rule," and the statement that "(t)he bill (gives) due recognition to the judicial precedents." It must be recognized, of course, that the only liberalizing decisions to which the Reports referred specifically were Di Pasquale and Delgadillo, and that there is no indication one way or the other in the legislative history of what Congress thought about the problem of resident aliens who leave the country for insignificantly short periods of time. Nevertheless, it requires but brief consideration of the policies underlying § 101(a)(13), and of certain other aspects of the rights of returning resident aliens, to conclude that Congress, in approving the judicial undermining of Volpe,˜ and the relief brought about by the Di Pasquale and Delgadillo decisions, could not have meant to limit the meaning of the exceptions it created in § 101(a)(13) to the facts of those two cases.

The most basic guide to congressional intent as to the reach of the exceptions is the eloquent language of Di Pasquale and Delgadillo themselves, beginning with the recognition that the "interests at stake" for the resident alien are "momentous,"˜ and that "(t)he stakes are indeed high and momentous for the alien who has acquired his residence here,"˜. This general premise of the two decisions impelled the more general conclusion that "it is ... important that the continued enjoyment of (our) hospitality once granted, shall not be subject to meaningless and irrational hazards."˜ Coupling these essential principles of the two decisions explicitly approved by Congress in enacting § 101(a)(13) with the more general observation, appearing in Delgadillo as well as elsewhere,˜ that "(d)eportation can be the equivalent of banishment or exile," it is difficult to conceive that Congress meant its approval of the liberalization wrought by Di Pasquale and Delgadillo to be interpreted mechanistically to apply only to cases presenting factual situations identical to what was involved in those two decisions.

The idea that the exceptions to § 101(a)(13) should be read nonrestrictively is given additional credence by the way in which the immigration laws define what constitutes "continuous residence" for an alien wishing to be naturalized. Section 316 of the 1952 Act,˜ which liberalized previous law in some respects, provides that an alien who wishes to seek naturalization does not begin to endanger the five years of "continuous residence" in this country which must precede his application until he remains outside the country for six months, and does not damage his position by cumulative temporary absences unless they total over half of the five years preceding the filing of his petition for naturalization. This enlightened concept of what constitutes a meaningful interruption of the continuous residence which must support a petition for naturalization, reflecting as it does a congressional judgment that an alien's status is not necessarily to be endangered by his absence from the country, strengthens the foundation underlying a belief that the exceptions to § 101(a)(13) should be read to protect resident aliens who are only briefly absent from the country.˜

Given that the congressional protection of returning resident aliens in § 101(a)(13) is not to be woodenly construed, we turn specifically to construction of the exceptions contained in that section as they relate to resident aliens who leave the country briefly. What we face here is another harsh consequence of the strict "entry" doctrine which, while not governed directly by Delgadillo, nevertheless calls into play the same considerations,˜ which led to the results specifically approved in the Congressional Committee Reports. It would be as "fortuitous and capricious," and as "irrational to square with the statutory scheme,"˜ to hold that an alien may necessarily be deported because he falls into one of the classes enumerated in § 212(a) when he returns from "a couple hours" visit to Mexico as it would have been to uphold the order of deportation in Delgadillo. Certainly when an alien like Fleuti who has entered the country lawfully and has acquired a residence here steps across a border and, in effect, steps right back, subjecting him to exclusion for a condition, for which he could not have been deported had he remained in the country seems to be placing him at the mercy of the "sport of chance" and the "meaningless and irrational hazards" to which Judge Hand alluded.˜ In making such a casual trip the alien would seldom be aware that he was possibly walking into a trap, for the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequence of subsequent excludability. There are, of course, valid policy reasons for saying that an alien wishing to retain his classification as a permanent resident of this country imperils his status by interrupting his residence too frequently or for an overly long period of time, but we discern no rational policy supporting application of a re-entry limitation in all cases in which a resident alien crosses an international border for a short visit.˜ Certainly if that trip is innocent, casual, and brief, it is consistent with all the discernible signs of congressional purpose to hold that the "departure ... was not intended" within the meaning and ameliorative intent of the exception of § 101(a)(13). Congress unquestionably has the power to exclude all classes of undesirable aliens from this country, and the courts are charged with enforcing such exclusion when Congress has directed it, but we do not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in "about a couple hours." Such a holding would be inconsistent with the general purpose of Congress in enacting § 101(a)(13) to ameliorate the severe effects of the strict "entry" doctrine.

We conclude, then, that it effectuates congressional purpose to construe the intent exception to § 101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence. One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country. Although the operation of these and other possibly relevant factors remains to be developed "by the gradual process of judicial inclusion and exclusion,"˜ we declare today simply that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been "intended" as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an "entry" into the country on his return. The more civilized application of our immigration laws given recognition by Congress in § 101(a)(13) and other provisions of the 1952 Act protects the resident alien from unsuspected risks and unintended consequences of such a wholly innocent action. Respondent here, so far as appears from the record, is among those to be protected. However, because attention was not previously focused upon the application of § 101(a)(13) to the case, the record contains no detailed description or characterization of his trip to Mexico in 1956, except for his testimony that he was gone "about a couple hours," and that he was "just visiting; taking a trip." That being the case, we deem it appropriate to remand the case for further consideration of the application of § 101(a)(13) to this case in light of our discussion herein. If it is determined that respondent did not "intend" to depart in the sense contemplated by § 101(a)(13), the deportation order will not stand and adjudication of the constitutional issue reached by the court below will be obviated.˜

MR. JUSTICE CLARK, WITH WHOM MR. JUSTICE HARLAN, MR. JUSTICE STEWART AND MR. JUSTICE WHITE JOIN, DISSENTING.

I dissent from the Court's judgment and opinion because "statutory construction" means to me that the Court can construe statutes but not that it can construct them. The latter function is reserved to the Congress, which clearly said what it meant and undoubtedly meant what it said when it defined "entry" for immigration purposes˜.

That this definition of "entry" includes the respondent's entry after his brief trip to Mexico in 1956 is a conclusion which seems to me inescapable. The conclusion is compelled by the plain meaning of the statute, its legislative history, and the consistent interpretation by the federal courts. Indeed, the respondent himself did not even question that his return to the United States was an "entry" within the meaning of § 101(a)(13). Nonetheless, the Court has rewritten the Act sua sponte, creating a definition of "entry" which was suggested by many organizations during the hearings prior to its enactment but which was rejected by the Congress. I believe the authorities discussed in the Court's opinion demonstrate that "entry" as defined in § 101(a)(13) cannot mean what the Court says it means˜.

The federal courts in numerous cases were called upon to apply this definition of "entry" and did so consistently, specifically recognizing that the brevity of one's stay outside the country was immaterial to the question of whether his return was an "entry".˜

The House and Senate reports quoted by the Court show that the Congress recognized the courts' difficulty with the rule that any coming of an alien into the United States was an "entry," even when the departure from the country was unintentional or involuntary. The reports discuss the broad rule of the Volpe case and the specific limitations of the Di Pasquale and Delgadillo cases, citing those cases by name˜.

Thus there is nothing in the legislative history or in the statute itself which would exempt the respondent's return from Mexico from the definition of "entry". Rather, the statute in retaining the definition expressed in Volpe seems clearly to cover respondent's entry, which occurred after he knowingly left the United States in order to travel to a city in Mexico. That the trip may have been "innocent, casual, and brief" does not alter the fact that, in the words of the Court in Delgadillo, the respondent "plainly expected or planned to enter a foreign port or place."˜

It is true that this application of the law to a resident alien may be harsh, but harshness is a far cry from the irrationality condemned in Delgadillo˜. There and in Di Pasquale contrary results would have meant that a resident alien, who was not deportable unless he left the country and reentered, could be deported as a result of circumstances either beyond his control or beyond his knowledge. Here, of course, there is no claim that respondent did not know he was leaving the country to enter Mexico and, since one is presumed to know the law, he knew that his brief trip and reentry would render him deportable. The Congress clearly has chosen so to apply the long-established definition, and this Court cannot alter that legislative determination in the guise of statutory construction. Had the Congress not wished the definition of "entry" to include a return after a brief but voluntary and intentional trip, it could have done so. The Court's discussion of § 316 of the Act shows that the Congress knows well how to temper rigidity when it wishes.˜

All this to the contrary notwithstanding, the Court today decides that one does not really intend to leave the country unless he plans a long trip, or his journey is for an illegal purpose, or he needs travel documents in order to make the trip. This is clearly contrary to the definition in the Act and to any definition of "intent" that I was taught.

What the Court should do is proceed to the only question which either party sought to resolve: whether the deportation order deprived respondent of due process of law in that the term "afflicted with psychopathic personality," as it appears in § 212(a)(4) of the Act, is unconstitutionally vague. Since it fails to do so, I must dissent.

7.4 Immigration Law Violators

INA § 237 outlines multiple grounds for removal based on violations of immigration law. Among them are the following:

Inadmissibility. Noncitizens who were inadmissible "at the time of entry or adjustment of status … by the law existing at such time" are removable under INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A).

Nonimmigrant status violators. Noncitizens admitted as nonimmigrants who violate the terms of their nonimmigrant visas are removable under INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i).

Termination of conditional permanent residence. Some LPRs are admitted to the United States on a conditional basis. See section 3.8 (conditional permanent residence for spouses married less than two years) and section 3.17 (conditional permanent residence for immigrant investors). If conditional residence is terminated, as opposed to lifted and converted to nonconditional residence, the noncitizen is subject to removal under INA § 237(a)(1)(D)(1), 8 U.S.C. § 1227(a)(1)(D)(1).

Smuggling. Knowingly encouraging, inducing, assisting, abetting, or aiding another noncitizen to enter the United States in violation of law is a deportable offense. INA § 237(a)(1)(E)(i), 8 U.S.C. § 1227(a)(1)(E)(i). There is a time limitation on this removal ground: "prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry." Discretionary waivers are available for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest … in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law." INA § 237(a)(1)(E)(iii), 8 U.S.C. § 1227(a)(1)(E)(iii).

Marriage fraud. If the noncitizen obtained LPR status on the basis of a marriage that was fraudulent, they are removable under INA § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G).

Failure to register. All noncitizens have an obligation to notify the government regarding any change of address within ten days of moving. INA § 265(a), 8 U.S.C. § 1305(a). Failure to provide the government with notice of a change of address is grounds for deportation. INA § 237(a)(3)(A), 8 U.S.C. § 1227(a)(3)(A).

Falsely claiming citizenship. Noncitizens who hold themselves out as U.S. citizens are removable under INA § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D).

7.5 Crime-Based Deportation: Convictions and Post-Conviction Relief

Noncitizens convicted of certain crimes are deportable under INA § 237(a)(2).

The definition of "conviction" is the same for INA § 237 and INA § 212. It is defined at INA § 101(a)(48). Review section 5.8, which provides an explanation of this term.

Note that pardons are treated differently for purposes of INA § 212 and INA § 237 because INA § 237 explicitly permits pardons to eliminate the § 237 consequences of certain crimes whereas INA § 212 contains no comparable language (see section 5.9). Noncitizens who have been "granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states" will not be deemed to have a conviction for purposes of INA §§ 237(a)(2)(A)(i) (crimes of moral turpitude), (ii) (multiple criminal convictions), (iii) (aggravated felony), and (iv) (high speed flight). See INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi).

Another difference between INA § 212 and INA § 237 concerns admissions of criminal conduct. As discussed in section 5.10, noncitizens can be deemed inadmissible on the basis of not only convictions, but also admission of criminal conduct. There is no comparable provision under INA § 237. A conviction is required for the removal of a previously admitted noncitizen.

What can a noncitizen with a criminal conviction do to avoid deportation under INA § 237(a)(2)? As the following case explains, if their conviction rests on a guilty plea, it may be possible to withdraw that guilty plea and thereby eliminate the conviction that is the basis for their removal. A common justification for post-conviction relief ("PCR"), including vacating convictions and sentences, is ineffective assistance of counsel ("IAC") during the criminal proceeding.

7.6 Case: Padilla v. Kentucky

Padilla v. Kentucky
559 U.S. 356 (2010)

Justice Stevens delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.˜

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "did not have to worry about immigration status since he had been in the country so long."˜ Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction.˜ In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari,˜ to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal,˜ is now virtually inevitable for a vast number of noncitizens convicted of crimes.˜

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part˜—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

II

Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel."˜ [Strickland v. Washington, 466 U.S. 668, 686 (1984).] The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court.˜ In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel."˜ The Kentucky high court is far from alone in this view.˜

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under Strickland˜. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe "penalty," Fong Yue Ting v. United States, 149 U.S. 698, 740˜ (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature,˜ deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century˜. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context.˜ Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.˜

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a Strickland claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla's claim.

III

Under Strickland, we first determine whether counsel's representation "fell below an objective standard of reasonableness."˜ Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."˜ The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."˜ We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like … are guides to determining what is reasonable …."˜ Although they are "only guides,"˜ not "inexorable commands,"˜ these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.˜ "[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients …." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae 12–14 (footnotes omitted) (citing, inter alia, National Legal Aid and Defender Assn., Performance Guidelines for Criminal Prosecution, §§ 6.2–6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan./ Feb.2007); N. Tooby, Criminal Defense of Immigrants § 1.3 (3d ed.2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (West 2009)).

We too have previously recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."˜ Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation˜, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial."˜ We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief.˜

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See [INA § 237(a)(2)(B)(i)] ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.˜ But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of Strickland. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy Strickland's second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that Strickland applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case ...," though counsel is required to provide accurate advice if she chooses to discuss˜ these matters.˜

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement."˜ When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.˜ Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the Strickland analysis."˜

We have given serious consideration to the concerns that the Solicitor General, respondent, and amici have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern˜ but nevertheless applied Strickland to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.˜

A flood did not follow in that decision's wake. Surmounting Strickland's high bar is never an easy task.˜ Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.˜ There is no reason to doubt that lower courts—now quite experienced with applying Strickland—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea.˜ We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.˜

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied Strickland to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.˜ But they account for only approximately 30% of the habeas petitions filed.˜ The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea.

Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.˜ The severity of deportation—"the equivalent of banishment or exile,"˜—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.

V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel."˜ To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below.˜

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.˜

JUSTICE ALITO, WITH WHOM THE CHIEF JUSTICE JOINS, CONCURRING IN THE JUDGMENT.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of Strickland˜ if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, "[i]mmigration law can be complex"; "it is a legal specialty of its own"; and "[s]ome members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it."˜ The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is "succinct and straightforward"—but not, perhaps, in other situations.˜ This vague, halfway test will lead to much confusion and needless litigation.

I

Under Strickland, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards.˜ Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction.˜ While the line between "direct" and "collateral" consequences is not always clear,˜ the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.˜ A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "seriou[s],"˜ but this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations.˜ However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts.˜ Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands.˜ And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law,˜ it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be.˜

The Court's new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*."˜ As has been widely acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task.˜

Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained."˜

Determining whether a particular crime is one involving moral turpitude is no easier.˜

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law.˜ To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien,˜ or whether a particular state disposition will result in a "conviction" for purposes of federal immigration law.˜

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences.˜ This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation?˜

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral.˜ Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences.˜

Fourth, the Court's decision marks a major upheaval in Sixth Amendment law. This Court decided Strickland in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel.˜

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment˜.

II

While mastery of immigration law is not required by Strickland, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases.˜ As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not "within the range of competence demanded of attorneys *in criminal cases*."˜ By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.'"˜

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question.˜ When˜ a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable˜, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights.˜

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law.˜

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS, DISSENTING.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer "for his defence" against a "criminal prosecutio[n]"—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of Justice ALITO's concurrence, I dissent from the Court's conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney's assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.˜

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel.˜ We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense,˜ and that the right to "the assistance of counsel" includes the right to *effective* assistance˜. Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment's textual limitation to criminal prosecutions.˜ We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense˜.

There is no basis in text or in principle to extend the constitutionally required advice˜.

Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point.˜

But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences,˜—what would come to be known as the "Padilla warning"—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act˜.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given.˜ Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.˜

7.7 Crime-Based Deportation: Key Crimes

There are multiple crime-based deportation grounds. Three of the most important are aggravated felonies, crimes involving moral turpitude, and controlled substance offenses.

AGGRAVATED FELONIES

A noncitizen convicted of an "aggravated felony at any time after admission is deportable." INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). The term "aggravated felony" is defined at INA § 101(a)(43) and includes 21 separate subparts. Some of the aggravated felony provisions look to the potential length of a noncitizen's sentence under their statute of conviction. See INA § 101(a)(43)(J), (Q), (T). Other aggravated felony provisions look to the noncitizen's actual sentence. See INA § 101(a)(43)(F), (G), (P), (R), (S). Sentencing—potential or actual—is irrelevant to the majority of aggravated felony provisions. See INA § 101(a)(43)(A)-(E), (H)-(I), (K)-(O), (U). Substantively, aggravated felonies run the gamut from murder, INA § 101(a)(43)(A), to perjury, INA § 101(a)(43)(S). And they include attempt or conspiracy to commit a delineated offense. INA § 101(a)(43)(U). As long as a conviction falls within INA § 101(a)(43), it is an aggravated felony, even if the crime would not be generally considered "aggravated" and even if the underlying state law conviction is for a misdemeanor.

CRIMES INVOLVING MORAL TURPITUDE

A noncitizen who commits a crime involving moral turpitude (CIMT) within five years of admission and is convicted of a crime for which a sentence of "one year or longer may be imposed" is deportable under INA § 237(a)(2)(A)(i). There's a lot to unpack in that sentence. First, we are talking about CIMTs, a concept already covered in section 5.11. Second, note the timing: it's important *when* the criminal act is committed: within five years of admission. This is very different from the just-discussed basis for crime-based removal—aggravated felony—which has no similar time cut-off. Third, note that it does not matter what the actual sentence received is; what matters is what the potential sentence for the crime is.

CONTROLLED SUBSTANCE OFFENSES

There are multiple ways in which a controlled substance offense can lead to deportation. One such offense, "illicit trafficking in a controlled substance" is an aggravated felony. INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). As discussed in section 5.12, the Supreme Court has held that "ordinarily 'trafficking' means some sort of commercial dealing." Lopez v. Gonzales, 549 U.S. 47, 53 (2006). Beyond trafficking, the commission of any violation of a controlled substance law after admission is a basis for removal, though there is an exception for "a single offense involving possession for one's own use of 30 grams or less of marijuana." INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). Presently being or having been at any time after admission "a drug abuser or addict" is another basis for deportation. INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii).

7.8 The Categorical Approach to Crime-Based Deportation

Courts follow what is called the "categorical approach" to determine whether a noncitizen is removable based on certain criminal convictions—including, specifically, analysis of whether a noncitizen is removable because of an aggravated felony, a crime involving moral turpitude, or a controlled substance offense. The categorical approach is a methodology for determining whether a noncitizen's prior criminal conviction falls within the INA's provisions regarding removal.

The "categorical approach" requires looking at the nature of the underlying criminal conviction and comparing the elements of the criminal statute to the INA's removal provision. Notably, the facts underlying the conviction are irrelevant to this analysis—only the statutory elements of the crime matter.

THE STRICT CATEGORICAL APPROACH

Determining whether there is a categorical match between the statute of conviction and the removability ground requires:

1. identifying and defining the elements of the federal removal offense;
2. identifying and defining the elements of the statute of conviction; and
3. comparing the elements of the generic offense with the elements of the statute of conviction.

There are two approaches to that first step—identifying and defining the elements of the federal removal offense. When the removal offense uses a general term—such as "murder," which is considered an aggravated felony under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A)—the categorical approach requires identifying the "generic" definition of that term. That is, what is the generic definition of the federal offense of murder? The answer to that question may be found in case law from federal courts or the Board of Immigration Appeals. It might require analysis of other legal sources such as dictionaries and treatises. As it happens, the BIA has identified the elements of the generic offense of murder as: (1) killing, (2) with malice aforethought, (3) of a human being. Matter of M-W-, 25 I.&N. Dec. 748 (BIA 2012).

There is no need to come up with a "generic" definition when the federal removal offense at issue refers to specified federal law. For example, Congress has determined that a crime of violence as defined by 18 U.S.C. § 16 is also an aggravated felony. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). Thus, when a noncitizen is facing removal under INA § 101(a)(43)(F), there is no need to uncover the "generic" definition of a "crime of violence," rather, categorical analysis begins by seeing how courts have understood 18 U.S.C. § 16.

The second step of the categorical approach—identifying and defining the elements of the statute of conviction—starts with the statute of conviction. In most cases, the statute of conviction will be a state law. The categorical approach requires identifying the minimum conduct that could result in a conviction under that statute. This requires looking at case law and jury instructions regarding the statute as it existed at the time of conviction. Consider a noncitizen convicted under California Penal Code § 187(a). The statutory elements of that crime are: (1) killing, (2) with malice aforethought, (3) of a human being or fetus. The minimum conduct that could result in a conviction under Cal. Penal Code § 187(a) is the premeditated killing of a fetus.

The third step is to compare the elements of the generic offense with the elements of the statute of conviction. The goal is to identify whether every violation of the state statute of conviction necessarily falls within the generic definition of the removability offense. If we take the examples above—the generic federal definition of murder and Cal. Penal Code § 187(a)—we can see that there is a way to violate the state law without meeting the federal generic definition of murder: by killing a fetus. This indicates that there is not a categorical match between the generic offense and the state statute of conviction. This is good news for the noncitizen. When there is not a categorical match, the state statute is considered "overbroad," and the noncitizen is not removable. In contrast, when every conviction under the state statute would fall within the generic definition of the removability offense, then there is a categorical match, and the noncitizen would be removable.

Generic federal offense of "murder"	Cal. Penal Code § 187(a)
(1) killing	(1) killing
(2) with malice aforethought	(2) with malice aforethought
(3) of a human being	(3) of a human being <u>or fetus</u> [overbroad]

7.9 Case: Moncrieffe v. Holder

Moncrieffe v. Holder
569 U.S. 184 (2013)

JUSTICE SOTOMAYOR DELIVERED THE OPINION OF THE COURT.

The Immigration and Nationality Act (INA)˜ provides that a noncitizen who has been convicted of an "aggravated felony" may be deported from this country. The INA also prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case. Among the crimes that are classified as aggravated felonies, and thus lead to these harsh consequences, are illicit drug trafficking offenses. We must decide whether this category includes a state criminal statute that extends to the social sharing of a small amount of marijuana. We hold it does not.

I

A

The INA defines "aggravated felony" to include a host of offenses.˜ Among them is "illicit trafficking in a controlled substance." [INA § 101(a)(43)(B).] This general term is not defined, but the INA states that it "includ[es] a drug trafficking crime (as defined in section 924(c) of title 18)."˜ In turn, 18 U.S.C. § 924(c)(2) defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act," or two other statutes not relevant here. The chain of definitions ends with § 3559(a)(5), which provides that a "felony" is an offense for which the "maximum term of imprisonment authorized" is "more than one year." The upshot is that a noncitizen's conviction of an offense that the Controlled Substances Act (CSA) makes punishable by more than one year's imprisonment will be counted as an "aggravated felony" for immigration purposes. A conviction under either state or federal law may qualify, but a "state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."˜

B

Petitioner Adrian Moncrieffe is a Jamaican citizen who came to the United States legally in 1984, when he was three. During a 2007 traffic stop, police found 1.3 grams of marijuana in his car. This is the equivalent of about two or three marijuana cigarettes. Moncrieffe pleaded guilty to possession of marijuana with intent to distribute, a violation of Ga.Code Ann. § 16–13–30(j)(1) (2007). Under a Georgia statute providing more lenient treatment to first-time offenders, § 42–8–60(a) (1997), the trial court withheld entering a judgment of conviction or imposing any term of imprisonment, and instead required that Moncrieffe complete five years of probation, after which his charge will be expunged altogether. ⤷The parties agree that this resolution of Moncrieffe's Georgia case is nevertheless a "conviction" as the INA defines that term[.]⤶

Alleging that this Georgia conviction constituted an aggravated felony, the Federal Government sought to deport Moncrieffe. The Government reasoned that possession of marijuana with intent to distribute is an offense under the CSA, 21 U.S.C. § 841(a), punishable by up to five years' imprisonment, § 841(b)(1)(D), and thus an aggravated felony. An Immigration Judge agreed and ordered Moncrieffe removed.˜ The Board of Immigration Appeals (BIA) affirmed that conclusion on appeal.˜

The Court of Appeals denied Moncrieffe's petition for review.~

We granted certiorari,~ to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both § 841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that "proscribes conduct punishable as a felony under" the CSA.~ We now reverse.

II

A

When the Government alleges that a state conviction qualifies as an "aggravated felony" under the INA, we generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA.~ Under this approach we look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony.~ By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved … facts equating to [the] generic [federal offense]."~

Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense.~ [O]ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply "legal imagination" to the state offense; there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime."~

This categorical approach has a long pedigree in our Nation's immigration law.~ The reason is that the INA asks what offense the noncitizen was "convicted" of,~ not what acts he committed. "[C]onviction" is "the relevant statutory hook."~

B

The aggravated felony at issue here, "illicit trafficking in a controlled substance," is a "generic crim[e]."~ So the categorical approach applies.~ As we have explained,~ this aggravated felony encompasses all state offenses that "proscrib[e] conduct punishable as a felony under [the CSA]."~ In other words, to satisfy the categorical approach, a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct.

Moncrieffe was convicted under a Georgia statute that makes it a crime to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." Ga.Code Ann. § 16–13–30(j)(1). We know from his plea agreement that Moncrieffe was convicted of the last of these offenses.˜ We therefore must determine whether possession of marijuana with intent to distribute is "necessarily" conduct punishable as a felony under the CSA.

We begin with the relevant conduct criminalized by the CSA. There is no question that it is a federal crime to "possess with intent to ... distribute ... a controlled substance," 21 U.S.C. § 841(a)(1), one of which is marijuana, § 812(c).˜ So far, the state and federal provisions correspond. But this is not enough, because the generically defined federal crime is "any felony punishable under the Controlled Substances Act," 18 U.S.C. § 924(c)(2), not just any "offense under the CSA." Thus we must look to what punishment the CSA imposes for this offense.

Section 841 is divided into two subsections that are relevant here: (a), titled "Unlawful acts," which includes the offense just described, and (b), titled "Penalties." Subsection (b) tells us how "any person who violates subsection (a)" shall be punished, depending on the circumstances of his crime (e.g., the type and quantity of controlled substance involved, whether it is a repeat offense).˜ Subsection (b)(1)(D) provides that if a person commits a violation of subsection (a) involving "less than 50 kilograms of marihuana," then "such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years," *i.e.,* as a felon. But one of the exceptions is important here. Paragraph (4) provides, "Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, 21 U.S.C. § 844, which for our purposes means as a misdemeanant.˜ These dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, and one not. The only way to know whether a marijuana distribution offense is "punishable as a felony" under the CSA,˜ is to know whether the conditions described in paragraph (4) are present or absent.

A conviction under the same Georgia statute for "sell[ing]" marijuana, for example, would seem to establish remuneration. The presence of remuneration would mean that paragraph (4) is not implicated, and thus that the conviction is necessarily for conduct punishable as a felony under the CSA (under paragraph (1)(D)). In contrast, the fact of a conviction for possession with intent to distribute marijuana, standing alone, does not reveal whether either remuneration or more than a small amount of marijuana was involved. It is possible neither was; we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, see, e.g., Taylor v. State, 260 Ga.App. 890˜ (2003) (6.6 grams), and that "distribution" does not require remuneration, see, e.g., Hadden v. State, 181 Ga.App. 628, 628–629˜ (1987). So Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

III

A

The Government advances a different approach that leads to a different result. In its view, § 841(b)(4)'s misdemeanor provision is irrelevant to the categorical analysis because paragraph (4) is merely a "mitigating exception," to the CSA offense, not one of the "elements" of the offense.˜ And because possession with intent to distribute marijuana is "presumptive[ly]" a felony under the CSA, the Government asserts, any state offense with the same elements is presumptively an aggravated felony.˜ These two contentions are related, and we reject both of them.˜

Here, the facts giving rise to the CSA offense establish a crime that may be either a felony or a misdemeanor, depending upon the presence or absence of certain factors that are not themselves elements of the crime. And so to qualify as an aggravated felony, a conviction for the predicate offense must necessarily establish those factors as well.

The Government˜ [argues]˜ that any marijuana distribution conviction is "presumptively" a felony. But that is simply incorrect, and the Government's argument collapses as a result. Marijuana distribution is neither a felony nor a misdemeanor until we know whether the conditions in paragraph (4) attach: Section 841(b)(1)(D) makes the crime punishable by five years' imprisonment "*except* as provided" in paragraph (4), and § 841(b)(4) makes it punishable as a misdemeanor "*[n]otwithstanding* paragraph (1)(D)" when only "a small amount of marihuana for no remuneration" is involved. (Emphasis added.) The CSA's text makes neither provision the default. Rather, each is drafted to be exclusive of the other.

Like the BIA and the Fifth Circuit, the Government believes the felony provision to be the default because, in practice, that is how federal criminal prosecutions for marijuana distribution operate.˜

We cannot discount § 841's text, however, which creates no default punishment, in favor of the procedural overlay or burdens of proof that would apply in a hypothetical federal criminal prosecution. In Carachuri–Rosendo, we rejected the Fifth Circuit's "hypothetical approach," which examined whether conduct "could have been punished as a felony" "had [it] been prosecuted in federal court."~ The outcome in a hypothetical prosecution is not the relevant inquiry. Rather, our "more focused, categorical inquiry" is whether the record of conviction of the predicate offense necessarily establishes conduct that the CSA, on its own terms, makes punishable as a felony.~

Here we consider a "generic" federal offense in the abstract, not an actual federal offense being prosecuted before a jury. Our concern is only which facts the CSA relies upon to distinguish between felonies and misdemeanors~.

Finally, there is a more fundamental flaw in the Government's approach: It would render even an undisputed misdemeanor an aggravated felony. This is "just what the English language tells us not to expect," and that leaves us "very wary of the Government's position."~ Consider a conviction under a New York statute that provides, "A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, *without consideration,* [marihuana] of an aggregate weight of *two grams or less* ; or one cigarette containing marihuana." N.Y. Penal Law Ann. § 221.35 (West 2008) (emphasis added). This statute criminalizes only the distribution of a small amount of marijuana for no remuneration, and so all convictions under the statute would fit within the CSA misdemeanor provision, § 841(b)(4). But the Government would categorically deem a conviction under this statute to be an aggravated felony, because the statute contains the corresponding "elements" of (1) distributing (2) marijuana, and the Government believes all marijuana distribution offenses are punishable as felonies.

The same anomaly would result in the case of a noncitizen convicted of a misdemeanor in federal court under § 841(a) and (b)(4) directly. Even in that case, under the Government's logic, we would need to treat the federal misdemeanor conviction as an aggravated felony, because the conviction establishes elements of an offense that is presumptively a felony. This cannot be. "We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors," only to have courts presume felony treatment and ignore the very factors that distinguish felonies from misdemeanors.~

B

Recognizing that its approach leads to consequences Congress could not have intended, the Government hedges its argument by proposing a remedy: Noncitizens should be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration, just as a federal criminal defendant could do at sentencing.˜

This solution is entirely inconsistent with both the INA's text and the categorical approach. As noted, the relevant INA provisions ask what the noncitizen was "convicted of," not what he did, and the inquiry in immigration proceedings is limited accordingly.˜ The Government cites no statutory authority for such case-specific factfinding in immigration court, and none is apparent in the INA. Indeed, the Government's main categorical argument would seem to preclude this inquiry: If the Government were correct that "the fact of a marijuana-distribution conviction *alone* constitutes a CSA felony,"˜ then all marijuana distribution convictions would categorically be convictions of the drug trafficking aggravated felony, mandatory deportation would follow under the statute, and there would be no room for the Government's follow-on factfinding procedure. The Government cannot have it both ways.

Moreover, the procedure the Government envisions would require precisely the sort of *post hoc* investigation into the facts of predicate offenses that we have long deemed undesirable. The categorical approach serves "practical" purposes: It promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact.˜ Yet the Government's approach would have our Nation's overburdened immigration courts entertain and weigh testimony from, for example, the friend of a noncitizen who may have shared a marijuana cigarette with him at a party, or the local police officer who recalls to the contrary that cash traded hands. And, as a result, two noncitizens, each "convicted of" the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge. The categorical approach was designed to avoid this "potential unfairness."˜

Furthermore, the minitrials the Government proposes would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention,˜ where they have little ability to collect evidence.˜ A noncitizen in removal proceedings is not at all similarly situated to a defendant in a federal criminal prosecution. The Government's suggestion that the CSA's procedures could readily be replicated in immigration proceedings is therefore misplaced.˜

In short, to avoid the absurd consequences that would flow from the Government's narrow understanding of the categorical approach, the Government proposes a solution that largely undermines the categorical approach.˜

C

The Government fears the consequences of our decision, but its concerns are exaggerated. The Government observes that, like Georgia, about half the States criminalize marijuana distribution through statutes that do not require remuneration or any minimum quantity of marijuana.˜ As a result, the Government contends, noncitizens convicted of marijuana distribution offenses in those States will avoid "aggravated felony" determinations, purely because their convictions do not resolve whether their offenses involved federal felony conduct or misdemeanor conduct, even though many (if not most) prosecutions involve either remuneration or larger amounts of marijuana (or both).

Escaping aggravated felony treatment does not mean escaping deportation, though. It means only avoiding mandatory removal.˜ Any marijuana distribution offense, even a misdemeanor, will still render a noncitizen deportable as a controlled substances offender. [INA 237(a)(2)(B)(i).] At that point, having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria.˜ But those forms of relief are discretionary. The Attorney General may, in his discretion, deny relief if he finds that the noncitizen is actually a member of one "of the world's most dangerous drug cartels,"˜ (opinion of ALITO, J.), just as he may deny relief if he concludes the negative equities outweigh the positive equities of the noncitizen's case for other reasons. As a result, "to the extent that our rejection of the Government's broad understanding of the scope of 'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one."˜

In any event, serious drug traffickers may be adjudicated aggravated felons regardless, because they will likely be convicted under greater "trafficking" offenses that necessarily establish that more than a small amount of marijuana was involved. See, e.g., Ga.Code Ann. § 16–13–31(c)(1) (Supp.2012) (separate provision for trafficking in more than 10 pounds of marijuana). Of course, some offenders' conduct will fall between § 841(b)(4) conduct and the more serious conduct required to trigger a "trafficking" statute.˜ Those offenders may avoid aggravated felony status by operation of the categorical approach. But the Government's objection to that underinclusive result is little more than an attack on the categorical approach itself.˜ We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions.˜ And we err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor.˜

Finally, the Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like § 1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U.S.C. § 921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But Duenas–Alvarez requires that there be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." 549 U.S., at 193˜. To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.˜

* * *

This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as "illicit trafficking in a controlled substance," and thus an "aggravated felony." Once again we hold that the Government's approach defies "the 'commonsense conception'" of these terms.˜ Sharing a small amount of marijuana for no remuneration, let alone possession with intent to do so, "does not fit easily into the 'everyday understanding'" of "trafficking," which "ordinarily ... means some sort of commercial dealing."˜ Nor is it sensible that a state statute that criminalizes conduct that the CSA treats as a misdemeanor should be designated an "aggravated felony." We hold that it may not be. If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA. The contrary judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.˜

JUSTICE THOMAS, DISSENTING.

A plain reading of 18 U.S.C. § 924(c)(2) identifies two requirements that must be satisfied for a state offense to qualify as a "felony punishable under the Controlled Substances Act [(CSA)]." "First, the offense must be a felony; second, the offense must be capable of punishment under the [CSA]."˜ Moncrieffe's offense of possession of marijuana with intent to distribute satisfies both elements. No one disputes that Georgia punishes Moncrieffe's offense as a felony. See Ga.Code Ann. § 16–13–30(j)(2) (Supp.2012). ("Except as otherwise provided in subsection (c) of Code Section 16–13–31 or in Code Section 16–13–2, any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years").˜ And, the offense is "punishable under the [CSA]," 18 U.S.C. § 924(c)(2), because it involved "possess[ion] with intent to manufacture, distribute, or dispense, a controlled substance," 21 U.S.C. § 841(a)(1). Accordingly, Moncrieffe's offense is a "drug trafficking crime," 18 U.S.C. § 924(c)(2), which constitutes an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(B).˜

[T]he majority's ill-advised approach once again leads to an anomalous result. It is undisputed that, for federal sentencing purposes, Moncrieffe's offense would constitute a federal felony unless he could prove that he distributed only a small amount of marijuana for no remuneration.˜ But, the Court holds that, for purposes of the INA, Moncrieffe's offense would necessarily correspond to a federal misdemeanor, regardless of whether he could in fact prove that he distributed only a small amount of marijuana for no remuneration.˜ The Court's decision, thus, has the effect of treating a substantial number of state felonies as federal misdemeanors, even when they would result in federal felony convictions.

The majority notes that "[t]his is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as … an 'aggravated felony.'"˜ The Court has brought this upon itself.˜ If the Court continues to disregard the plain meaning of § 924(c)(2), I expect that these types of cases will endlessly—and needlessly—recur.˜

JUSTICE ALITO, DISSENTING.

The Court's decision in this case is not supported by the language of the Immigration and Nationality Act (INA) or by this Court's precedents, and it leads to results that Congress clearly did not intend.

Under the INA, aliens˜ who are convicted of certain offenses may be removed from this country, 8 U.S.C. § 1227(a)(2)˜, but in many instances, the Attorney General (acting through the Board of Immigration Appeals (BIA)) has the discretion to cancel removal˜. Aliens convicted of especially serious crimes, however, are ineligible for cancellation of removal.˜ Among the serious crimes that carry this consequence is "illicit trafficking in a controlled substance."˜

Under the Court's holding today, however, drug traffickers in about half the States are granted a dispensation. In those States, even if an alien is convicted of possessing tons of marijuana with the intent to distribute, the alien is eligible to remain in this country. Large-scale marijuana distribution is a major source of income for some of the world's most dangerous drug cartels˜, but the Court now holds that an alien convicted of participating in such activity may petition to remain in this country.

The Court's decision also means that the consequences of a conviction for illegal possession with intent to distribute will vary radically depending on the State in which the case is prosecuted. Consider, for example, an alien who is arrested near the Georgia–Florida border in possession of a large supply of marijuana. Under the Court's holding, if the alien is prosecuted and convicted in Georgia for possession with intent to distribute, he is eligible for cancellation of removal. But if instead he is caught on the Florida side of the line and is convicted in a Florida court—where possession with intent to distribute a small amount of marijuana for no remuneration is covered by a separate statutory provision˜—the alien is likely to be ineligible. Can this be what Congress intended?

I

Certainly the text of the INA does not support such a result.˜

Where an alien has a prior federal conviction, it is a straightforward matter to determine whether the conviction was for a "felony punishable under the [CSA]." But 8 U.S.C. § 1101(a)(43) introduces a complication. That provision states that the statutory definition of "aggravated felony" "applies to an offense described in this paragraph *whether in violation of Federal or State law*." (Emphasis added.) As noted, the statutory definition of "aggravated felony" includes a "felony punishable under the [CSA]," and therefore § 1101(a)(43)(B) makes it necessary to determine what is meant by a state "offense" that is a "felony punishable under the [CSA]."

What § 1101(a)(43) obviously contemplates is that the BIA or a court will identify conduct associated with the state offense and then determine whether that conduct would have supported a qualifying conviction under the federal CSA.˜ Identifying and evaluating this relevant conduct is the question that confounds the Court's analysis. Before turning to that question, however, some preliminary principles should be established.

In Lopez v. Gonzales, 549 U.S. 47, 50˜ (2006), we held that felony status is controlled by federal, not state, law. As a result, once the relevant conduct is identified, it must be determined whether proof of that conduct would support a felony conviction under the CSA. The federal definition of a felony is a crime punishable by imprisonment for more than one year. 18 U.S.C. § 3559(a)(1)-(5). Consequently, if the proof of the relevant conduct would support a conviction under the CSA for which the maximum term of imprisonment is more than one year, the state conviction qualifies as a conviction for an "aggravated felony."

II~

The Court's opinion in this case conveys the impression that its analysis is based on the categorical approach, but that is simply not so. On the contrary, a pure categorical approach leads very quickly to the conclusion that petitioner's Georgia conviction was a conviction for an "aggravated felony."

The elements of the Georgia offense were as follows: knowledge, possession of marijuana, and the intent to distribute it.~ Proof of those elements would be sufficient to support a conviction under 21 U.S.C. § 841(a), and the maximum punishment for that offense is imprisonment for up to five years, § 841(b)(1)(D)~, more than enough to qualify for felony treatment. Thus, under a pure categorical approach, petitioner's Georgia conviction would qualify as a conviction for an "aggravated felony" and would render him ineligible for cancellation of removal.

The Court departs from this analysis~ [by] proceed[ing] as if the CSA created a two-tiered possession-with-intent-to-distribute offense: a base offense that is punishable as a misdemeanor and a second-tier offense (possession with intent to distribute more than a "small amount" of marijuana or possession with intent to distribute for remuneration) that is punishable as a felony.

If the CSA actually created such a two-tiered offense, the pure categorical approach would lead to the conclusion that petitioner's Georgia conviction was not for an "aggravated felony." The elements of the Georgia offense would not suffice to prove the second-tier offense, which would require proof that petitioner possessed more than a "small amount" of marijuana or that he intended to obtain remuneration for its distribution. Instead, proof of the elements of the Georgia crime would merely establish a violation of the base offense, which would be a misdemeanor.

The CSA, however, does not contain any such two-tiered provision. And § 841(b)(4) does not alter the elements of the § 841(a) offense. As the Court notes, every Court of Appeals to consider the question has held that § 841(a) is the default offense and that § 841(b)(4) is only a mitigating sentencing guideline,~ and the Court does not disagree~.

In sum, contrary to the impression that the Court's opinion seeks to convey, the Court's analysis does not follow the pure categorical approach.

III

Nor is the Court's analysis supported by prior case law.~

IV

Unsupported by either the categorical approach or our prior cases, the decision of the Court rests instead on the Court's belief—which I share—that the application of the pure categorical approach in this case would lead to results that Congress surely did not intend.

Suppose that an alien who is found to possess two marijuana cigarettes is convicted in a state court for possession with intent to distribute based on evidence that he intended to give one of the cigarettes to a friend. Under the pure categorical approach, this alien would be regarded as having committed an "aggravated felony." But this classification is plainly out of step with the CSA's assessment of the severity of the alien's crime because under the CSA the alien could obtain treatment as a misdemeanant by taking advantage of 21 U.S.C. § 841(b)(4).

For this reason, I agree with the Court that such an alien should not be treated as having committed an "aggravated felony." In order to avoid this result, however, it is necessary to depart from the categorical approach, and that is what the Court has done. But the particular way in which the Court has departed has little to recommend it.

To begin, the Court's approach is analytically confused.˜

In addition, the Court's approach leads to the strange and disruptive results noted at the beginning of this opinion.˜

For these reasons, departures from the categorical approach are warranted, and this Court has already sanctioned such departures in several circumstances.˜ Consistent with the flexibility that the Court has already recognized, I would hold that the categorical approach is not controlling where the state conviction at issue was based on a state statute that encompasses both a substantial number of cases that qualify under the federal standard and a substantial number that do not. In such situations, it is appropriate to look beyond the elements of the state offense and to rely as well on facts that were admitted in state court or that, taking a realistic view, were clearly proved. Such a look beyond the elements is particularly appropriate in a case like this, which involves a civil proceeding before an expert agency that regularly undertakes factual inquiries far more daunting than any that would be involved here.˜

Petitioner, for whatever reason, availed himself only of the opportunity to show that his conviction had involved a small amount of marijuana and did not present evidence—or even contend—that his offense had not involved remuneration.˜ As a result, I think we have no alternative but to affirm the decision of the Court of Appeals, which in turn affirmed the BIA.

7.10 Crime-Based Deportation: Judicial Recommendation Against Deportation (JRAD)

Prior to 1990, attorneys could ask a sentencing judge, at the time of sentencing or within 30 days thereafter, to recommend against the deportation of a noncitizen criminal defendant. INA § 241(b)(2)(repealed). This procedure was known as a "judicial recommendation against deportation" or JRAD (pronounced "jay-rad"). Since its repeal in 1990, there have been multiple (as yet unsuccessful) calls to reinstate the JRAD.

Here is the text of former INA § 241(b)(2): "The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply … if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this chapter." That last bit meant narcotics convictions were ineligible for JRAD relief.

7.11 The Alien Enemies Act

On March 15, 2025, President Trump issued an executive order invoking the Alien Enemies Act (AEA), 50 U.S.C. § 21, to deport "all Venezuelan citizens 14 years of age or older" who "are not actually naturalized or lawful permanent residents of the United States" and who "are members of" the Venezuelan entity Tren de Aragua (TdA). See https://perma.cc/FT8W-3MVM.

The AEA became law in 1798. It provides that "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies." 50 U.S.C. § 21. Prior to 2025, the AEA had been invoked during the War of 1812, World War I, and World War II. Notably, it was used to justify the United States' internment of some 120,000 people of Japanese descent during World War II.

Litigation over the 2025 executive order commenced quickly. Plaintiffs argue that the AEA cannot not justify removal given that the United States is not currently experiencing a "declared war … invasion or predatory incursion" as the statute requires, notwithstanding the executive order's language that the TdA has been "conducting irregular warfare … against the United States." Plaintiffs also argue that Tren de Aragua is a transnational criminal organization or gang that does not qualify as a "foreign nation or government" under the AEA, despite the executive order's characterization of the TdA as "Nicolas Maduro regime-sponsored." In addition, plaintiffs raise concerns about the process of categorizing noncitizens as members of Tren de Aragua, as well as whether and how such designations could be challenged in accordance with due process.

The day the executive order was released, the U.S. District Court for the District of Columbia issued two temporary restraining orders (TROs) prohibiting the removal of plaintiff-noncitizens under the AEA as well as similarly situated noncitizens. Notably, the TROs did not prevent the Trump administration from removing 245 Venezuelans pursuant to the AEA and relocating those individuals to a notorious prison in El Salvador known as Centro de Confinamiento del Terrorismo (CECOT). Within a month, the government's appeal of the TROs landed before the U.S. Supreme Court. The Court vacated the TROs, determining that challenges to the AEA must be brought by way of individual writs of habeas corpus—the procedure by which individuals can challenge the legality of their detention. The Court further noted that noncitizens subject to removal under the AEA must receive "notice … that they are subject to removal under the Act … afforded within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the [district of confinement] … before such removal occurs." Trump v. J.G.G., 604 U.S. __ (2025) (per curiam).

AEA challenges continue.

7.12 Foreign Policy

A noncitizen is removable under INA § 237(a)(4)(C), 8 U.S.C. § 1227(a)(4)(C), when the U.S. Secretary of State has "reasonable grounds to believe" that the presence of a noncitizen "would have potentially serious adverse foreign policy consequences." There is a statutory exception to this provision providing that removal should not rest on the noncitizen's "past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's [presence] would compromise a compelling United States foreign policy interest." INA § 237(a)(4)(C)(ii), 8 U.S.C. § 1227(a)(4)(C)(ii) (incorporating by reference the quoted language at INA § 212(a)(3)(C)(iii), 8 U.S.C. § 1182(a)(3)(C)(iii)).

Beginning in March 2025, the Trump administration invoked this provision to detain and place into removal proceedings university students known to have engaged in pro-Palestinian demonstrations, most notably Mahmoud Khalil, a graduate student at Columbia University and lawful permanent resident. Secretary of State Marco Rubio penned a memo in which he noted that the basis for his decision was Khalil's participation in "antisemitic protests and disruptive activities" and that Khalil's continued presence in the country would "undermine U.S. policy to combat anti-Semitism around the world and in the United States, in addition to efforts to protect Jewish students from harassment and violence in the United States." Khalil brought federal litigation to challenge this invocation of INA § 237(a)(4)(C) as violating his constitutional free-speech rights. However, the Third Circuit determined that Khalil's suit was premature; he needed to raise his constitutional challenge in immigration proceedings, with federal court review only after IJ and BIA decisions. Khalil v. President, United States, 164 F.4th 259 (3d Cir. 2026).

7.13 Other Removal Grounds

Terrorists. Noncitizens who engage in terrorist activities or who have been associated with a terrorist organization are deportable under INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B).

Nazis. Those who "order, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" as a Nazi between March 23, 1993 and May 8, 1945, are deportable under INA § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D).

Genocide. Participating in geocide is a basis for exclusion under INA § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D).

Public Charge. A noncitizen who "within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable" pursuant to INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

Unlawful voters. Voting in a U.S. federal or state election is grounds for deportation. INA § 237(a)(6), 8 U.S.C. § 1227(a)(6).

7.14 Test Your Knowledge

PROBLEM 7.1

Reconsider Problem 5.1. Does Rosenberg v. Fleuti change your response?

PROBLEM 7.2

In 2025, Panra, a citizen of Pakistan, applied for an F-visa to study in the United States. During the visa application process, Panra was asked to identify all of her social media handles and to make her social media public for review. Panra disclosed all social media handles associated with her given name. She was given a visa and came to the United States to begin her studies in Fall 2026. At her university, Panra joined the on-campus Students for Justice in Palestine movement. She also wrote a pro-Palestinian op-ed that was published in the student paper. An ICE investigation into Panra uncovered the fact that she was behind the x.com handle @CrescentAndOlive, a high-profile pro-Palestinian account that began posting in 2023. On what ground(s) is Panra removable?

PROBLEM 7.3

Dafid is a lawful permanent resident from the Dominican Republic. On a flight from Denver to New York City, he struck up a conversation with his seatmate about the best weed shops in the Denver area. Dafid was adamant that Puff & Petal was the best in the city with its award-winning house grown premium flower. Dafid's seatmate, as it turns out, was an ICE agent. Will the in-flight conversation trigger Dafid's removal?

PROBLEM 7.4

Isayu, a citizen of India, entered the United States surreptitiously and applied for asylum using a false name. Prior to a decision on that application, Isayu married a U.S. citizen. He applied for and received permanent-resident status based on that marriage, using the same false name as on his asylum application. Later, Isayu became a naturalized U.S. citizen and obtained a U.S. passport—in the false name. Returning from a trip abroad, a CBP officer asked Isayu if he had ever used any other names. Isayu replied that he had not. That encounter led to charges of using a fraudulently obtained passport and making a false statement to federal agents.

Isayu pled guilty to the fraudulent-passport charge, and the government agreed to dismiss the false-statement charge. He was sentenced to 12 months of probation.

Three years later, the government began proceedings to denaturalize Isayu based on his fraudulent asylum, LPR, and citizenship applications.

Isayu petitioned for a writ of coram nobis, a mechanism to challenge the validity of a conviction or sentence when a habeas petition isn't available. Isayu based his motion on ineffective assistance of counsel, noting his criminal defense attorney did not advise him of the possibility that his conviction might lead to denaturalization.

What should come of Isayu's motion?

PROBLEM 7.5

Rostislav, a citizen of Russia, came to the United States on an employment-based immigrant visa 10 years ago. Following a jury trial this year, Rostislav was convicted of forgery under California Penal Code § 470(d), in connection with "check washing." Rostislav took checks meant for his employer, used chemicals to remove the name written at the "pay to the order of" line, and added, instead, payment to a similarly named LLC owned by his cousin and accomplice. Section 470(d) reads: "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check[.]" Is Rostislav removable? On what ground(s)?

PROBLEM 7.6

A burglary offense for which a noncitizen is imprisoned for at least one year is an aggravated felony under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

The generic definition of burglary is "unlawful entry or remaining in a building or structure with intent to commit a crime." In Taylor v. United States, 495 U.S. 575 (1990), the Supreme Court held that a "building or structure" did not include a vehicle. Then, in United States v. Stitt, 586 U.S. __ (2018), the Supreme Court included entry into a vehicle that is "adapted or is customarily used for lodging."

Naomi Nikston, an LPR, has a conviction for burglary under Georgia Code § 26-1601. The statute reads: "A person commits burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another, or any building, vehicle, railroad car, aircraft, watercraft, or other such structure designed for use as the dwelling of another."

At the time of Naomi's conviction, Georgia's intermediate appellate court had held that the state's definition of burglary included entry into "any vehicle," regardless of whether it was designed for use as a dwelling.

Is there a categorical match such that Naomi should be removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii)?

PROBLEM 7.7

A theft offense for which a noncitizen is imprisoned for at least one year is an aggravated felony under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

The generic definition of theft is "the taking of, or exercise of control over, property without consent whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." Matter of Garcia-Madruga, 24 I.&N. Dec. 436, 440-41 (BIA 2008).

Greg Goppould, an international student with an F visa, has a conviction for theft under Georgia Code § 16-8-2, which reads: "A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated."

Is there a categorical match such that Greg should be removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii)?

PROBLEM 7.8

A firearms offense under 18 U.S.C. § 924(b) is an aggravated felony under INA § 101(a)(43)(E)(ii), 8 U.S.C. § 1101(a)(43)(E)(ii). 18 U.S.C. § 924(b) reads: "Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both."

Patrycja Paczynski, an LPR, pled guilty to 29 Ohio Revised Code § 1280(A): Having a firearm while committing a felony. The statute provides: "Any person who, while committing or attempting to commit a felony, possesses a pistol, shotgun or rifle or any other offensive weapon in such commission or attempt, whether the pistol, shotgun or rifle is loaded or not, or who possesses a blank or imitation pistol, altered air or toy pistol, shotgun or rifle capable of raising in the mind of one threatened with such device a fear that it is a real pistol, shotgun or rifle, or who possesses an air gun or carbon dioxide or other gas-filled weapon, electronic dart gun, conductive energy weapon, knife, dagger, dirk, switchblade knife, blackjack, ax, loaded cane, billy, hand chain or metal knuckles, in addition to the penalty provided by statute for the felony committed or attempted, upon conviction shall be guilty of a felony for possessing such weapon or device, which shall be a separate offense from the felony committed or attempted and shall be punishable by imprisonment in the custody of the Department of Corrections for a period of not less than two (2) years nor for more than ten (10) years for the first offense, and for a period of not less than ten (10) years nor more than thirty (30) years for any second or subsequent offense."

Is there a categorical match such that Patrycja should be removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii)?

PROBLEM 7.9

After the assassination of conservative influencer Charlie Kirk, Songezo, a South African citizen present in the United States on a nonimmigrant business visa, took to social media. Songezo wrote that Kirk's followers were "hurt that the racist rally ended in attempted martyrdom" and alleged that Kirk "was used to astroturf a movement of white nationalist trailer trash." Songezo's visa was revoked in response to this post. What was the likely basis?

Chapter Eight: Relief from Removal

Just because a noncitizen is subject to removal under either INA § 212 (Chapter 5) or INA § 237 (Chapter 7) does not mean that they must be removed. Noncitizens can petition for relief from removal.

Some forms of relief from removal allow a lawful permanent resident to keep their LPR status or provide the means for an undocumented migrant to obtain LPR status. These include cancellation of removal (sections 8.1-8.7), registry (section 8.8), legalization/amnesty (section 8.9), adjustment of status (section 8.10), and private bills (section 8.11).

Other forms of relief from removal do not offer a permanent solution for staying in the United States but offer limited protection from removal. These include exercises of prosecutorial discretion (section 8.12) and Deferred Action for Childhood Arrivals (DACA) (section 8.13).

Finally, another form of relief from removal—voluntary departure (section 8.14)—does not enable the recipient to stay in the United States but does give them some freedom to wrap up their affairs before departing the country.

8.1 Cancellation of Removal

Cancellation of removal was created by Congress in 1996 with the passage of IIRIRA § 304(a). You may recall from Chapters 5 and 7 that IIRIRA created a unified removal process with different grounds for removal based on whether a noncitizen present in the United States had been admitted (Chapter 7) or not (Chapter 5), a change from the previous focus on entry into the United States (see section 7.2). In addition to that change, IIRIRA replaced prior forms of relief from removal—"waiver of excludability" and "suspension of deportation"—with "cancellation of removal".

There are two forms of cancellation of removal. One applies to certain LPRs. The other applies more broadly to LPRs, nonimmigrants, and undocumented migrants.

CANCELLATION OF REMOVAL PART A

The first form of cancellation of removal is found at INA § 240A(a), 8 U.S.C. § 1229b(a). This relief is alternatively called "cancellation," "COR," "COR Part A," and "42A." That last moniker derives from the name of the government form that a noncitizen must submit when seeking this relief: EOIR 42A.

42A relief is available exclusively to lawful permanent residents who meet the following criteria:

1. The noncitizen must have been lawfully admitted for permanent residence for not less than five years;
2. The noncitizen must have resided in the United States continuously for seven years after having been admitted in any status; and
3. The noncitizen must not have been convicted of any aggravated felony.

For most LPRs, the key issue with regards to the first element is what should be the end date of their LPR status. The answer is found at 8 C.F.R. § 1.2: "[LPR] status terminates upon entry of a final administrative order of exclusion, deportation, or removal." INA § 101(a)(47)(B) provides further assistance in parsing this language, stating that an "order of deportation ... shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." This means that an LPR may not initially be eligible for cancellation of removal at the start of their removal proceedings, due to insufficient time in LPR status, but may become eligible for this form of relief during the course of their removal proceedings or subsequent appeal.

Other LPRs will be prohibited from seeking 42A relief because they were never "lawfully admitted for permanent residence" despite holding LPR status. An immigrant who acquired permanent resident status through fraud or misrepresentation has never been "lawfully admitted for permanent residence" and so is ineligible for 42A relief. See In re Koloamatangi, 23 I. & N. Dec. 548, 549–50 (BIA 2003).

The ins and outs of the second element of 42A relief—continuous residence—are discussed in section 8.2. Finally, review section 7.7 for discussion of aggravated felonies.

CANCELLATION OF REMOVAL PART B

The second form of cancellation of removal is found at INA § 240A(b), 8 U.S.C. § 1229b(b). This relief is alternatively called "cancellation," "COR," "COR Part B," and "42B." As before, that last descriptor derives from the name of the government form that a noncitizen must submit when seeking this relief: EOIR 42B.

42B relief is available to noncitizens who meet the following criteria:

1. The noncitizen must have been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of application;

2. The noncitizen must have been a person of good moral character during the ten-year period. See INA § 101(f), 8 U.S.C. § 1101(f);

3. The noncitizen must not have been convicted of an offense under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (governing inadmissibility due to "criminal and related grounds"); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (governing deportability due to "criminal offenses"); or INA § 237(a)(3), 8 U.S.C. § 1227(a)(3), (governing deportability due to "failure to register or falsification of documents"); and

4. The noncitizen must establish that removal would result in "exceptional and extremely unusual hardship" to the noncitizen's spouse, parent, or child, who is a citizen of the United States or an LPR.

The first element of 42B relief—physical presence—is somewhat straightforward if the noncitizen has lived in and never left the United States for significantly more than 10 years. Noncitizens who have left the country need to consult INA § 240A(d)(2), 8 U.S.C. § 1229b(d)(2), which states that "continuous physical presence" has not been maintained if the noncitizen departed the United States for: (i) any period in excess of 90 days; or (ii) any periods in the aggregate exceeding 180 days. Section 8.2 addresses when presence in the United States is determined to end.

The second element of 42B relief—good moral character—is a statutorily defined term found at INA § 101(f), 8 U.S.C. § 1101(f). Good moral character is defined in the negative. The statute lists circumstances that would lead a court to conclude a noncitizen does not have good moral character, such as if the noncitizen has been convicted of an aggravated felony. INA § 101(f)(8), 8 U.S.C. § 1101(f)(8). Finally, even if a noncitizen does not fall within the statutorily enumerated reasons for lacking good moral character, that "shall not preclude a finding that for other reasons such person is or was not of good moral character." INA § 101(f), 8 U.S.C. § 1101(f).

To understand the third element of 42B relief—criminal convictions—review sections 5.7-5.13 (INA § 212) and sections 7.5-7.10 (INA § 237).

The final element of 42B relief—“exceptional and extremely unusual hardship”—is discussed in sections 8.3 and 8.4.

8.2 Cancellation of Removal: Continuous Residence and Continuous Physical Presence

Some of the rules regarding continuous residence, for 42A relief, and continuous physical presence, for 42B relief, are the same. Under INA § 240A(d)(1), the end of either period is marked by the earliest of (i) when the noncitizen is served a notice to appear (NTA), the charging document that begins removal proceedings, or (ii) when the noncitizen has committed a criminal offense that has rendered them excludable or deportable.

SERVICE OF THE NTA

In order for residence/presence to end based on the service of an NTA, that NTA must be valid. In Pereira v. Sessions, 585 U.S. 198 (2018), an 8-1 decision, the Supreme Court held that when a noncitizen receives a document called a notice to appear, and where that document does not have a time or place listed for the removal proceedings, then it is not a valid notice to appear, and thus it does not “stop time” for purposes of establishing the noncitizen’s continuous physical presence in the United States. Such a document, the court wrote, is only a “putative” NTA.

Following Pereira, the BIA held that the government could meet its notice obligations by serving on a noncitizen a notice to appear containing the grounds for their removability and a subsequent notice of hearing with the time and date of their hearing. Matter of Bermudez-Cota, 27 I. & N. Dec. 441 (B.I.A. 2018). However, three years later, in Niz-Chavez v. Garland, 593 U.S. 155 (2021), the Supreme Court rejected the BIA’s approach, clarifying that noncitizens are statutorily entitled to a single document—the notice to appear—outlining both their grounds for removal and the time and date of their hearing. Only receipt of an NTA containing all the statutorily required information is sufficient to stop time for purposes of establishing continuous presence.

Here is the first paragraph of the Court’s opinion in Niz-Chavez, authored by Justice Gorsuch: “Anyone who has applied for a passport, filed for Social Security benefits, or sought a license understands the government’s affinity for forms. Make a mistake or skip a page? Go back and try again, sometimes with a penalty for the trouble.

But it turns out the federal government finds some of its forms frustrating too. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, requires the government to serve 'a notice to appear' on individuals it wishes to remove from this country. At first blush, a notice to appear might seem to be just that—a single document containing all the information an individual needs to know about his removal hearing. But, the government says, supplying so much information in a single form is too taxing. It needs more flexibility, allowing its officials to provide information in separate mailings (as many as they wish) over time (as long as they find convenient). The question for us is whether the law Congress adopted tolerates the government's preferred practice."

The final paragraph of the majority's opinion is equally compelling: "In this case, the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."

CRIMINAL CONDUCT

In Barton v. Barr, 590 U.S. 222 (2020), the Supreme Court considered how and when criminal conduct should "stop time" for purposes of establishing a noncitizen's continuous physical presence in the United States. Andre Barton, a Jamaican LPR, was found removable due to state firearms and drug offenses. He sought cancellation of removal. The immigration judge found Barton ineligible for cancellation of removal not because of the crimes that led to his removability but because Barton committed another offense in violation of INA § 212(a)(2) during his initial seven years of residence in the United States: state aggravated assault, a crime involving moral turpitude. The B.I.A. and Eleventh Circuit affirmed. The Supreme Court agreed, determining that although Barton was not convicted of state aggravated assault until after his initial seven years in the United States, INA § 240A(d)(1) explicitly focuses on the commission of not the conviction for a criminal offense. The Court further noted it was irrelevant that Barton was not found removable on the basis of the offense that made him ineligible for cancellation of removal. Finally, the Court determined that INA § 240A(d)(1) required analysis of Barton's ineligibility for cancellation of removal under INA § 212, despite the fact that Barton was removable under INA § 237.

8.3 Cancellation of Removal: Exceptional and Extremely Unusual Hardship

The last element of 42B relief is “exceptional and extremely unusual hardship” to the noncitizen’s spouse, parent, or child, who is a citizen of the United States or an LPR.

When cancellation of removal came into being through IIRIRA in 1996, it eliminated a prior form of relief from removal—suspension of deportation—that, unlike cancellation, allowed for consideration of (1) “extreme hardship” as opposed to “exceptional and extremely unusual hardship” and (2) hardship experienced by the noncitizen themselves, not just their USC/LPR spouse, parent or child. The breadth of the previous form of relief is evidenced in In re O-J-O, 21 I &N. Dec. 381 (BIA 1996), where the BIA held that a noncitizen established that his removal would cause “extreme hardship” given the fact that he had been living in the U.S. for ten years since the age of 13, attended U.S. schools, spoke fluent English, and “fully assimilated into American culture and society.”

IIRIRA clearly intended to restrict the availability of relief from removal when it jettisoned suspension of deportation in favor of cancellation of removal. The following case explains just how tough the new criteria of “exceptional and extremely unusual hardship” is.

8.4 Case: In Re Recinas

In Re Recinas
23 I. & N. Dec. 467 (BIA) (2002)

The respondents have appealed from the decision of an Immigration Judge dated December 18, 2000, denying their application for cancellation of removal pursuant to section 240A(b) of the Immigration and Nationality Act˜ (2000). The appeal will be sustained.

I. FACTUAL BACKGROUND

The adult respondent is a 39-year-old native and citizen of Mexico. She is the mother of four United States citizen children, aged 12, 11, 8, and 5, and the two minor respondents, aged 15 and 16, both of whom are natives and citizens of Mexico. Her parents are lawful permanent residents and her five siblings are United States citizens. She is divorced and has no immediate family in Mexico.

The three respondents entered the United States in 1988 on nonimmigrant visas and stayed longer than authorized. Except for a brief absence in 1992, they have remained in this country since their initial entry.

II. ISSUE

The sole issue on appeal is whether the Immigration Judge erred in finding that the respondent failed to demonstrate that her removal would result in exceptional and extremely unusual hardship to her four United States citizen children and/or her lawful permanent resident parents. As the Immigration Judge noted, the minor respondents do not have a qualifying relative for purposes of cancellation of removal. See section 240A(b)(1)(D) of the Act.

III. ANALYSIS

Congress created the relief of cancellation of removal under section 240A(b)(1) of the Act as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Cancellation of removal is available to an alien who has been physically present in the United States for at least 10 years, has been a person of good moral character, has not been convicted of a specified criminal offense, and has established that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a United States citizen or lawful permanent resident. This case requires us to interpret the "exceptional and extremely unusual hardship" standard.

A. Exceptional and Extremely Unusual Hardship Standard

In Matter of Monreal, 23 I&N Dec. 56 (BIA 2001), we first considered the "exceptional and extremely unusual" hardship standard in a precedent decision in the case of a 34-year-old Mexican national who was the father of three United States citizen children. We held that to establish exceptional and extremely unusual hardship under section 240A(b) of the Act, an alien must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person's departure. We specifically stated, however, that the alien need not show that such hardship would be "unconscionable." We also noted that, in deciding a cancellation of removal claim, consideration should be given to the age, health, and circumstances of the qualifying family members, including how a lower standard of living or adverse country conditions in the country of return might affect those relatives.

After reviewing the case, we dismissed the respondent's appeal, finding that he had not satisfied the new hardship standard. We noted that the respondent had been working for 10 years at his uncle's business, but had a brother living in Mexico who also worked for the same business. Our decision emphasized that the respondent was in good health and would be able to work and support his United States citizen children in Mexico. We further found that, upon his return to Mexico, the respondent would be reunited with family members, including his wife (the mother of their three children), who had already returned to Mexico with one of the children.˜ Finally, we noted that the respondent's children were in good health and that the eldest, who was 12 years old, could speak, read, and write Spanish.˜

We revisited the issue in Matter of Andazola, 23 I&N Dec. 319 (BIA 2002), finding that the exceptional and extremely unusual hardship standard was not met in the case of a single Mexican woman. The respondent had two United States citizen children, who were 11 and 6 years old. Their father (who apparently had authorization to remain in the United States) contributed financially to the family, was a presence in the lives of the children, and could continue to help support the family upon their return to Mexico. All of the respondent's siblings were living in the United States, but were without documentation. The respondent had not shown that her United States citizen children would be deprived of all schooling, or of an opportunity to obtain any education. In denying relief, we considered it "significant" that the respondent had accumulated assets, including $7,000 in savings and a retirement fund, and owned a home and two vehicles.˜ We noted that these assets could help ease the family's transition to Mexico. Accordingly, we found that the case presented a common fact pattern that was insufficient to satisfy the exceptional and extremely unusual hardship standard.˜

While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, Matter of Andazola and Matter of Monreal are the starting points for any analysis of exceptional and extremely unusual hardship. Cancellation of removal cases coming before the Immigration Judges and the Board must therefore be examined under the standards set forth in those cases.

B. Hardship Factors

In the present case, the adult respondent is a single mother of six children, four of whom are United States citizens. The respondent and her children have no close relatives remaining in Mexico. Her entire family lives in the United States, including her lawful permanent resident parents and five United States citizen siblings. As in Matter of Andazola, the respondent's mother serves as her children's caretaker and watches the children while the respondent manages her own motor vehicle inspection business.

The respondent is divorced from the father of her United States citizen children. Although the respondent's former husband at one point was paying $146.50 per month in child support, there is no indication that he remains actively involved in their lives.

He is currently out of status and was in immigration proceedings in Denver as of the date of the respondent's last hearing.

The respondent has been operating her own business performing vehicle inspections for 2 years. The business has two employees. She reported having $4,600 in assets, which is apparently the value of an automobile she owns. The respondent testified that after 2 months in business her proceeds were $10,000 a month, but she was also repaying her mother and brother money that she and her former husband had borrowed from them. After meeting expenses, her net profits were $400-500 per month.

The respondent's four United States citizen children have all spent their entire lives in this country and have never traveled to Mexico. She and her family live 5 minutes away from her mother, with whom they have a close relationship. According to the respondent, her children, particularly two of her United States citizen children, experience difficulty speaking Spanish and do not read or write in that language.

Finally, the respondent has no alternative means of immigrating to the United States in the foreseeable future. There is a significant backlog of visa availability to Mexican nationals with preference classification. Therefore, the respondent has little hope of immigrating through her United States citizen siblings, or even her parents, should they naturalize.

C. Assessment of Hardship

While this case presents a close question, we find it distinguishable from both Matter of Monreal, supra, and Matter of Andazola, supra. As we noted in those decisions, the exceptional and extremely unusual hardship standard for cancellation of removal applicants constitutes a high threshold that is in keeping with Congress' intent to substantially narrow the class of aliens who would qualify for relief.˜ Nevertheless, the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief. We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met. Keeping in mind that this hardship standard must be assessed solely with regard to the qualifying relatives in this case, we find the following factors to be significant.

The respondent has raised her family in the United States since 1988, and her four United States citizen children know no other way of life. The respondent's children do not speak Spanish well, and they are unable to read or write in that language.

Unlike the children in Monreal and Andazola, the respondent's four United States citizen children are entirely dependent on their single mother for support. The respondent is divorced from the children's father, and there is no indication that he remains involved in their lives in any manner. This increases the hardship the children would face upon return to Mexico, as they would be completely dependent on their mother's ability, not only to find adequate employment and housing, but also to provide for their emotional needs.

The respondent has been able to leave her children in the care of her lawful permanent resident mother while she attended courses to obtain a vehicle inspector's certificate and established a business. This assistance from her mother has enabled her to support her children within a stable environment. The respondent's ability to provide for the needs of her family will be severely hampered by the fact that she does not have any family in Mexico who can help care for her six children. As a single mother, the respondent will no doubt experience difficulties in finding work, especially employment that will allow her to continue to provide a safe and supportive home for her children.

From the perspective of the United States citizen children, it is clear that significant hardship will result from the loss of the economic stake that their mother has gained in this country, coupled with the difficulty she will have in establishing any comparable economic stability in Mexico. We emphasize that the respondent is a single parent who is solely responsible for the care of six children and who has no family to return to in Mexico. These are critical factors that distinguish her case from many other cancellation of removal claims.

In addition to the hardship of the United States citizen children, factors that relate only to the respondent may also be considered to the extent that they affect the potential level of hardship to her qualifying relatives.˜ In Andazola we found that similar factors were not sufficient to meet the high standard of exceptional and extremely unusual hardship. However, in this case, there are additional factors that we find raise the level of hardship, by a close margin, to that required to establish eligibility for relief.

The respondent's lawful permanent resident parents also are qualifying relatives. While we have not considered their hardship in assessing the respondent's claim, her parents form part of the strong system of family support that the respondent and the minor qualifying relatives would lose if they are removed from the United States.

Although the minor respondents lack a qualifying relative for purposes of cancellation of removal, their existence also cannot be ignored. In a family such as this, headed by a single parent, the hardship of their parent inherently translates into hardship on the rest of the family, in this case to all six children. In considering the hardship that the United States citizen children would face in Mexico, we must also consider the totality of the burden on the entire family that would result when a single mother must support a family of this size.˜ Unlike the situation in Monreal and Andazola, all of the respondent's family, including her siblings, reside lawfully in the United States. We find this significant because they are unlikely to be subject to immigration enforcement and will probably remain in the United States indefinitely. The respondent's family members are very close and have been instrumental in helping her raise her children and obtain the necessary funds to establish her business. The loss of this support would further increase the hardship that she, and therefore her United States citizen children, would suffer if they are compelled to return to Mexico, where no support structure exists.

Finally, we note that the respondent's prospects for lawful immigration through her United States citizen siblings or lawful permanent resident parents are unrealistic due to the backlog of visa availability for Mexican nationals with preference classification. There are no other apparent methods of adjustment available to any of the respondents. These are factors we have previously found to be significant when considering an identical hardship standard for suspension of deportation.˜

The hardship factors present in this case are more different in degree than in kind from those present in Monreal and Andazola. For this reason, we see no need to depart from the analysis set forth in those cases. Part of that analysis requires the assessment of hardship factors in their totality, often termed a "cumulative" analysis. Here, the heavy financial and familial burden on the adult respondent, the lack of support from the children's father, the United States citizen children's unfamiliarity with the Spanish language, the lawful residence in this country of all of the respondent's immediate family, and the concomitant lack of family in Mexico combine to render the hardship in this case well beyond that which is normally experienced in most cases of removal. The level of hardship presented here is higher than that established in either Monreal or Andazola and, in our view, is sufficient to be considered exceptional and extremely unusual.

We emphasize, in conclusion, that this decision cannot be read in isolation from Monreal and Andazola. Those cases remain our seminal interpretations of the meaning of "exceptional and extremely unusual hardship" in section 240A(b)(1)(D) of the Act. The cumulative factors present in this case are indeed unusual and will not typically be found in most other cases, where respondents have smaller families and relatives who reside in both the United States and their country of origin.

IV. CONCLUSION

Given the unusual facts presented in this case, we find that the adult respondent has shown that her United States citizen children will suffer exceptional and extremely unusual hardship if she is removed from the United States. Accordingly, her appeal will be sustained and she will be granted cancellation of removal.

As the adult respondent has been granted relief and appears to have no impediment to adjusting her status, the minor respondents are likely to soon have a qualifying relative for purposes of establishing eligibility for cancellation of removal. Given this fact, we find it appropriate to remand their records to the Immigration Judge for their cases to be held in abeyance pending a disposition regarding the adult respondent's status.˜

—-—

An immigration judge's application of the "exceptional and extremely unusual hardship" standard to a set of given facts is a reviewable question of law under INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), despite the fact that the decision of whether or not to grant cancellation of removal relief is discretionary (see section 8.6) and denials of discretionary relief are not judicially reviewable under INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (see section 9.9). Wilkinson v. Garland, 601 U.S. 209 (2024).

8.5 Cancellation of Removal: Burden of Proof

A noncitizen applying for any form of relief from removal, including cancellation of removal, bears the burden of proof to establish that they (i) are eligible for relief and (ii) merit a favorable exercise of discretion. INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A).

8.6 Cancellation of Removal: Discretion

In order to obtain cancellation of removal, whether under INA § 240A(a) or (b), a noncitizen must establish the statutory predicates outlined in sections 8.1-8.5. However, the ultimate decision as to whether to grant or deny cancellation of removal rests in the discretion of the immigration judge. As the statute notes, "[t]he Attorney General *may* cancel removal." INA § 240A(a), (b) (emphasis added). And the IJ stands in the stead of the AG to make that determination.

"In exercising discretion, the IJ must consider the record as a whole, and balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented [on] his (or her) behalf to determine whether the granting of ... relief appears in the best interest of this country." Ridore v. Holder, 696 F.3d 907, 920 (9th Cir. 2012).

"Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character." Matter of C-V-T-, 22 I. & N. Dec. 7, 11 (BIA 1998).

"Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of exclusion or deportation (now removal) that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country." Matter of C-V-T-, 22 I. & N. Dec. 7, 11 (BIA 1998).

8.7 Cancellation of Removal: Numerical Limitations

By statute, the Attorney General may not grant cancellation of removal relief to more than 4,000 noncitizens in any fiscal year. INA § 240A(e)(1), 8 U.S.C. § 1229b(e)(1). This limitation is referred to as a "cap."

The Office of the Chief Immigration Judge (OCIJ) alerts immigration judges when the cancellation of removal cap has been reached. At that point, immigration judges must "reserve" decisions in which they would otherwise grant cancellation of removal until the next fiscal year.

8.8 Registry

EOUSA, OLE, Immigration Law (2005)

An Immigration Judge may grant lawful admission for permanent residence for noncitizens who establish entry into the United States prior to January 1, 1972; continuous residence since entry; good moral character; and eligibility for citizenship. INA § 249, 8 U.S.C. § 1259. The continual residence requirement is not as stringent as the continuous physical presence requirement applicable to suspension.

—-—

CRS, Immigration: Registry as Means of Obtaining Lawful Permanent Residence (2001)

Registry is a provision of immigration law that enables certain unauthorized aliens in the United States to acquire lawful permanent resident status. It grants the Attorney General the discretionary authority to create a record of lawful admission for permanent residence for an alien who lacks such a record, has continuously resided in the United States since before January 1, 1972, and meets other specified requirements. The registry provision originated in a 1929 law. That law set the required entry date from which continuous residence had to be shown (known as the registry date) at June 3, 1921. The registry provision has been amended several times since 1929, most commonly to update the registry date. The first update came in 1940, when the registry date was changed to July 1, 1924. The registry provision underwent significant change in 1958. That year, the registry date was changed to June 28, 1940, and the registry requirements were revised. As a result of the 1958 changes, the registry mechanism became available to aliens who had entered the country illegally or who had overstayed, or violated the terms of, a temporary period of entry. The registry date was subsequently changed to June 30, 1948, and then to January 1, 1972, where it stands today. Since 1985, approximately 60,000 people have adjusted to lawful permanent residence under the registry provision.˜

There is debate about the merits of advancing the registry date. Supporters maintain that long-time immigrants with strong ties to the country should be allowed to become lawful permanent residents. Opponents argue that aliens in the country illegally should not be rewarded with legal status and that advancing the registry date could encourage future illegal immigration.

8.9 Legalization/Amnesty

CRS, Alien Legalization and Adjustment of Status: A Primer (2010)

The issue of whether aliens residing in the United States without legal authorization may be permitted to become LPRs has been debated periodically, and at various times Congress has enacted legalization programs.˜

When Congress passed the Immigration Reform and Control Act (IRCA) of 1986, it included provisions that enabled several million aliens illegally residing in the United States to become LPRs. Generally, legislation such as IRCA is referred to as an "amnesty" or a legalization program because it provides LPR status to aliens who are otherwise residing illegally in the United States.˜ Although legalization is considered distinct from adjustment of status, most legalization provisions are codified under the adjustment or change of status chapter of INA.

There were two temporary legalization programs created by IRCA.˜ The "pre-1982" program provided legal status for otherwise eligible aliens who had resided continuously in the United States in an unlawful status since before January 1, 1982. They were required to apply during a 12-month period beginning May 5, 1987. The "special agricultural worker" (SAW) program provided legal status for otherwise eligible aliens who had worked at least 90 days in seasonal agriculture in the United States during the year ending May 1, 1986. They were required to apply during an 18-month period beginning June 1, 1987, and ending November 30, 1988. Approximately 2.7 million aliens qualified for legal status under the pre-1982 and SAW programs. Of this total, 1.6 million or 59% qualified under the pre-1982 program, and 1.1 million or 41% qualified under the SAW program.˜

CRS, NACARA: Hardship Relief and Long-Term Illegal Aliens (1998)

[One important legislative example of legalization or amnesty is the Nicaraguan Adjustment and Central American Relief Act (NACARA). The CRS described the legislation as follows:] [NACARA] establishes special procedures through which hundreds of thousands of aliens in the U.S., primarily Central Americans, may seek legal permanent resident status.˜

NACARA directs the Attorney General to adjust to permanent resident status˜ an alien in one of the classes listed below, if the alien meets two conditions. First, the alien must apply for adjustment before April 1, 2000. Second, the alien must not be legally inadmissible to the U.S. on grounds other than being a prospective public charge, failing to have proper documents, failing to meet certain labor-related requirements, or entering the U.S. surreptitiously (e.g., aliens who are inadmissible on health grounds or as criminal aliens or security threats are ineligible for adjustment absent a waiver). The classes of aliens covered include:

- Nicaraguans and Cubans who have been in the U.S. continuously for a period beginning before December 1, 1995, and ending the date of application.˜; and
- Nicaraguans and Cubans who are the spouses or unmarried children of aliens in the foregoing class.˜

[NACARA also included "hardship relief" for certain Salvadoran and Guatemalan nationals as well as nationals of various Eastern European nations.]

—-—

8.10 Adjustment of Status

Adjustment of status has already been covered in section 6.9. Review that section at this time. Perhaps counterintuitively, adjustment of status can be sought not only through an affirmative application, as discussed in section 6.9, but can also be raised defensively in the course of a removal proceeding.

EOUSA, OLE, Immigration Law (2005)

In certain circumstances, noncitizens in deportation proceedings may apply for adjustment of status to permanent resident status under INA § 245, 8 U.S.C. § 1255. The prerequisites are: (1) the noncitizen must have a basis of eligibility for permanent resident status; (2) a visa must be immediately available (an approved visa petition); and (3) the applicant must be statutorily eligible to seek adjustment of status and not be excludable. In essence, the noncitizen is given the opportunity to receive legal status while in the United States rather than the usual overseas visa process for immigrants.

—-—

When adjustment of status is sought as relief from removal, it rests on the immigration judge's exercise of discretion. It is "a matter of grace" that requires the noncitizen to "persuade the immigration judge that he merits a favorable exercise of discretion." Patel v. Garland, 596 U.S. 328 (2022). By statute, federal courts do not have jurisdiction to review "any judgment regarding the granting of" adjustment of status relief. INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). The Supreme Court has interpreted this statute to preclude review of facts found as part of adjustment of status proceedings. Patel v. Garland, 596 U.S. 328 (2022).

8.11 Private Bills

ICE Policy Number 5004.3, Stays of Removal and Private Immigration Bills (January 31, 2025)

Private immigration bills introduced by members of Congress generally operate as a last resort for an alien, or a group of aliens, who have exhausted ordinary administrative and judicial immigration remedies. Most private immigration bills are introduced with the intent to protect an alien-beneficiary˜ from removal or confer lawful permanent resident (LPR) status on alien-beneficiaries, by circumventing the normal immigration law framework, including inadmissibility grounds and legal requirements that ordinarily apply to those seeking LPR status.

[Previously,]˜ if a private immigration bill was introduced and the Chair of a Committee or Subcommittee requested an investigative report,˜ ICE provided a stay of removal˜ for the bill's alien-beneficiaries until March 15th of the following session of Congress. This˜ resulted in removable aliens being granted multiple stays of removal not based on the merits of their case, but because they ha[d] access to a member of Congress. Some alien-beneficiaries ha[d] been benefitting from the private immigration bill process for several years. Furthermore, between 2007 and 2024, members of Congress introduced 520 private immigration bills (318 in the House of Representatives and 202 in the Senate). Of those, only 11 (two percent) were passed and six (one percent) were enacted. In other words, approximately 99 percent of private immigration bills that were introduced by members of Congress were never passed or enacted. Following introduction, only 29 bills (five and a half percent) were ever taken up for consideration by the House or Senate. Yet˜ Congressional action on the private immigration bill was not required for an alien-beneficiary to forestall removal.

While the intent˜ was to allow Congress time to consider pending private immigration bills and take appropriate action, in practice, the policy became a mechanism by which alien-beneficiaries obtained "de facto" relief from removal in the form of a continuous, indefinite stay of removal. It is not in ICE's best interest to allow the private immigration bill process, including the mere introduction of a private immigration bill and the request for an investigative report, to be used as a mechanism to prevent or delay the removal of otherwise removable aliens. The low probability of a private immigration bill being enacted into law, combined with the agency's past practice of issuing stays of removal to alien-beneficiaries every time an investigative report on a beneficiary was requested by the Chair of Committee or Subcommittee of jurisdiction, could prevent ICE from removing aliens in a manner consistent with the agency's authorities and enforcement mission.˜

Effective immediately, it is ICE policy that:

- ICE will consider and, on a case-by-case basis and at ICE's discretion, issue a stay of removal for an alien-beneficiary associated with a private immigration bill only if the Chair of the full Committee or Subcommittee of jurisdiction expressly makes a written request to ICE to stay the alien-beneficiary's removal, independent of any request for an investigative report. A request for an investigative report will no longer trigger an automatic stay of removal.

- ICE will not grant an alien-beneficiary more than one stay of removal through the private immigration bill process. As such, ICE will not honor subsequent requests for a stay of removal from the Chair of the Committee or Subcommittee of jurisdiction for an alien-beneficiary who has already received a stay through the private immigration bill process.
- The duration of a stay of removal will be limited to six months. However, the ICE Director, at his or her discretion, can provide a one-time 90-day extension beyond the initial six-month stay if specifically requested in writing by the Chair of the Committee or Subcommittee of jurisdiction and, if necessary, to accommodate extenuating circumstances.
- ICE will take appropriate action, including revocation of the stay and removal of the alien-beneficiary, in cases where ICE discovers derogatory information about an alien-beneficiary after issuing a stay of removal. In such instances, ICE will notify the appropriate Committee or Subcommittee of the action it takes.˜

8.12 Prosecutorial Discretion

CRS, Prosecutorial Discretion in Immigration Enforcement: Legal Issues (2013)

The term prosecutorial discretion is commonly used to describe the wide latitude that prosecutors have in determining when, whom, how, and even whether to prosecute apparent violations of the law. The Immigration and Naturalization Service (INS) and, later, the Department of Homeland Security (DHS) and its components have historically described themselves as exercising prosecutorial discretion in immigration enforcement.˜

In Reno v. American-Arab Anti-Discrimination Committee, [525 U.S. 471 (1999),] a majority of the Supreme Court found that the various prudential concerns that prompt deference to the executive branch's determinations as to whether to prosecute criminal offenses are "greatly magnified in the deportation context,"˜ which entails civil (rather than criminal) proceedings.˜ While the reasons cited by the Court for greater deference to exercises of prosecutorial discretion in the immigration context than in other contexts reflect the facts of the case, which arose when certain removable aliens challenged the government's decision *not* to exercise prosecutorial discretion in their favor,˜ the Court's language is broad and arguably can be construed to encompass decisions to favorably exercise such discretion. More recently, in its decision in Arizona v. United States, [567 U.S. 387 (2012),] a majority of the Court arguably similarly affirmed the authority of the executive branch not to seek the removal of certain aliens, noting that "[a] principal feature of the removal system is the broad discretion entrusted to immigration officials," and that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."˜ According to the majority, such exercises of prosecutorial discretion may reflect "immediate human concerns" and the "equities of … individual case[s]," such as whether the alien has children born in the United States or ties to the community, as well as "policy choices that bear on … international relations."˜

Going beyond such general affirmations of the executive branch's prosecutorial discretion in the immigration context, other cases have specifically noted that certain decisions are within the prosecutorial discretion of INS and, later, the immigration components of DHS. These decisions include

- whether to parole an alien into the United States;˜
- whether to commence removal proceedings and what charges to lodge against the respondent;˜
- whether to pursue formal removal proceedings;˜
- whether to cancel a Notice to Appear or other charging document before jurisdiction vests with an immigration judge;˜
- whether to grant deferred action or extended voluntary departure;˜
- whether to appeal an immigration judge's decision or order, and whether to file a motion to reopen;˜
- whether to invoke an automatic stay during the pendency of an appeal;˜ and
- whether to impose a fine for particular offenses.˜

As used here, *deferred action* is "generally an act of prosecutorial discretion to suspend [taking action] against a particular individual or group of individuals for a specific timeframe; it cannot resolve an individual's underlying immigration status."˜ It is generally granted on a case-by-case basis, although the executive branch has sometimes provided that individuals who share certain characteristics (e.g., advanced or young age) are to be given particular consideration for deferred action.˜ In contrast, *extended voluntary departure*—sometimes also referred to as *deferred departure* or *deferred enforced departure*—generally involves "blanket relief" from removal to particular countries [(see section 10.45)].˜

Many of the actions that judicial and administrative tribunals have noted are within the prosecutorial discretion of immigration officers have also been mentioned in INS and, later, DHS, guidance regarding the exercise of prosecutorial discretion. Memoranda or other documents providing such guidance have been issued intermittently since at least 1976, and have suggested that officers may generally exercise discretion in

- deciding whether to issue or cancel a notice of detainer;
- deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- focusing administrative resources on particular violations or conduct;
- deciding whom to stop, question, or arrest for a violation;
- deciding whether to detain aliens who are not subject to "mandatory detention" pending removal, or whether to release them on bond, supervision, personal recognizance, or other conditions;
- seeking expedited removal or removal by means other than formal proceedings in immigration court;
- settling or dismissing a proceeding;
- granting deferred action or parole;
- staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings, or joining in a motion to grant relief or a benefit.˜

Often, this executive branch guidance has highlighted resource constraints,˜ as well as humanitarian considerations,˜ that may warrant a favorable exercise of prosecutorial discretion, although such guidance has generally also indicated that determinations as to whether to exercise discretion in particular cases are to be based on the "totality of the circumstances"˜ and whether a "substantial federal interest" is present.˜ The guidance may also suggest when in the process such discretion is to be exercised (generally as early in the process as possible, so as to avoid wasting government resources),˜ as well as which officers may exercise particular forms of discretion.˜ While personnel are generally instructed that they should "always consider prosecutorial discretion on a case-by-case basis,”˜ classes of individuals warranting consideration for favorable—or unfavorable—exercises of discretion have sometimes been identified (e.g., minors and elderly individuals, known gang members).˜

8.13 Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, Janet Napolitano, Secretary of Homeland Security, released a memo entitled Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. This memo was the basis for granting a two-year period of deferred action, a form of prosecutorial discretion, as well as work authorization to certain individuals who came to the United States as children. This was known as DACA, Deferred Action for Childhood Arrivals.

The Napolitano memo was rescinded and replaced by formal regulations that came into effect on October 31, 2022. See 8 CFR §§ 236.21-236.25. A noncitizen is eligible for this current form of DACA if they:

- came to the United States before the age of sixteen;
- continuously resided in the United States from June 15, 2007, to the time of filing their request, with exceptions for “brief, casual, and innocent” absences from the country (recall section 8.3);
- were physically present in the United States on June 15, 2012, and on the date of their regulation-based DACA request;
- lack lawful immigration status;
- are currently enrolled in school, have graduated from high school or obtained a certificate of completion from high school, have a G.E.D., or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- have not been convicted of a felony offense, a significant misdemeanor offense, three or more misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- were born on or after June 16, 1981.

DACA—both in its memo and regulation form—has been the subject of ongoing litigation. Most recently, the U.S. Court of Appeals for the Fifth Circuit determined that the federal regulations regarding DACA “substantively violate˜ the INA” because Congress’ “rigorous” and “comprehensive” statutory scheme for immigration and lawful presence does not include DACA. Texas v. United States, 126 F.4th 392 (5th Cir. 2025). The court approved enjoining DACA, but only in Texas and possibly only as to work authorization and not as to deportation protections; it also stayed the effective date of implementing relief pending further appeals.

USCIS has since issued a policy memorandum regarding deferred action generally. In it, USCIS characterizes deferred action as a "temporary" and "extraordinary use of prosecutorial discretion [that] should not be used to circumvent Congressional authority by granting large populations of aliens, without proper case-by-case scrutiny." Thus, prosecutorial discretion "must always be exercised only in compelling cases after a determination if discretion is warranted in the totality of the circumstances." The memo rejects any "reliance interest" a beneficiary of deferred action might have in the relief that led to building a life in the United States: "USCIS has determined that any reliance interests that may have been a result of previous USCIS policies concerning deferred action are outweighed by the U.S. government's strong interest in ensuring the integrity of the legal immigration system, national security, and public safety." https://perma.cc/9EJA-EMDY. This memo does not end DACA, nor does it rescind active grants of DACA relief. It does, however, signal antipathy toward future renewal requests.

There is one more important piece to the DACA puzzle: Matter of Santiago-Santiago, 29 I. & N. Dec. 5889 (BIA 2026). The case involved 8 C.F.R. § 1003.18(d)(1)(ii)(C), which provides that immigration judges have the discretionary authority to terminate removal proceedings when "[t]he noncitizen is a beneficiary of ... deferred action." An immigration judge, following 8 C.F.R. § 1003.18(d)(1)(ii)(C), terminated removal proceedings based on unlawful presence (see section 5.2) where the noncitizen had DACA relief. The BIA held that the immigration judge erred, writing that DACA relief "is not the sole, dispositive consideration for whether discretionary termination is warranted" and chastising the immigration judge for failing to address the government's arguments against termination.

8.14 Voluntary Departure

EOUSA, OLE, Immigration Law (2005)

The privilege of voluntary departure in lieu of deportation may be granted in the exercise of discretion to one who meets the statutory requirements. To be eligible for voluntary departure, the noncitizen must show a readiness, willingness, and financial ability to leave the United States at his own expense; good moral character for the previous five years; and that a favorable exercise of discretion is warranted. See INA

§§ 244(e), 240B(b), 8 U.S.C. §§ 1254a, 1229c (specific requirements). The advantage of voluntary departure to the noncitizen is that it is not a bar to return to the United States if the noncitizen is otherwise eligible to return as an immigrant or nonimmigrant. A noncitizen who receives voluntary departure, but fails to depart as ordered, becomes ineligible for certain other forms of discretionary relief.

Note. A noncitizen convicted of an aggravated felony after November 29, 1990, or murder at any time, cannot show good moral character.

8.15 Citizenship

U.S. citizens are not subject to removal. As described in Chapter 12, citizenship can be a complicated question. An individual might believe that they are not a U.S. citizen when, in fact, they are. If it becomes clear that the individual being removed is a U.S. citizen, that is an absolute defense to the removal process.

8.16 Test Your Knowledge

PROBLEM 8.1

Piolo came to the United States from the Philippines nine years ago to pursue a PhD in meteorology at the University of Oklahoma. He came on a F visa as a "degree seeking" student. While at OU, Piolo met and fell in love with an American citizen, Amy. They married eight years ago and welcomed daughter Daisy seven years ago. Daisy suffers from severe asthma. When she has a flare-up, it's up to Piolo to pick her up from school, take her to doctor's appointments, and care for her when she needs to stay home to recover. That's because Amy is the breadwinner of the family. Piolo never ended up completing his PhD program and his visa lapsed. He's been working off-and-on as a day laborer in and around Norman for the past 4 years.

Last year, Piolo was arrested in Norman, Oklahoma for possession of marijuana. Police pulled Piolo over on suspicion of driving while intoxicated. Piolo passed the breathalyzer test but a K-9 alerted to the presence of drugs and police found a baggie in Piolo's pocket with 6 grams of marijuana. Piolo was charged with possession, though he ultimately pled no contest to misdemeanor possession of paraphernalia and served no time in jail.

This past week, Piolo was picked up by ICE and put in removal proceedings. What are his options?

Problem 8.2

Tiare, a Tuvalu citizen, has been living in the United States for 10 years. She entered on an F-1 student visa. During her lengthy studies, Tiare met and fell in love with Ursula, a U.S. citizen. They married. Tiare became an LPR, a status she's held for 1 year. Ursula suffers from cystic fibrosis and relies on U.S. medical care (unavailable elsewhere) to stay alive. Tiare, a licensed nurse, cares for her when she is ill.

Tiare received an NTA indicating that she is removable under INA § 237(a)(1)(A)—inadmissible at adjustment of status—because she did not disclose her longstanding membership in the Communist party (see section 5.16). At her master calendar hearing, Tiare conceded removability but petitioned for relief from removal. Does Tiare qualify for any form of relief from removal?

Problem 8.3

Pilar, a citizen of Peru, came to the United States in 1965 on an H-4 nonimmigrant visa as the dependent child of her father, an H-1B visa holder. When her father's position ended and he returned to Peru, Pilar opted to stay in the United States. This year, Pilar was picked up by ICE. She wasn't the target of their operation, but ICE nevertheless took custody of Pilar and began removal proceedings when they determined that she had long overstayed her visa and did not have current permission to live in the country. Is Pilar eligible for any form of relief from removal?

Problem 8.4

Alex was born in Moore, Oklahoma to two undocumented migrants from Mexico. The family returned to Mexico when Alex was just two months old. When Alex was 19, he and his father entered the United States surreptitiously, looking for work. After two years of living and working in the United States, Alex was picked up by ICE in a workplace raid. If put into removal proceedings, is Alex eligible for any form of relief from removal?

Problem 8.5

Miguel was surreptitiously brought into the United States by his parents when he was only four months old. He grew up in South Texas and lived the life of a normal American boy. When he was 17, Miguel asked his parents about getting a job. They told him not to work but instead to focus on his studies. Miguel was undeterred and inquired about a part-time job at a local pizza place where a friend from school had a job. When Miguel showed the owner his birth certificate, the owner informed him that it was a fake and advised Miguel not to show it to anyone else. Miguel returned home and confronted his parents. They confirmed that Miguel wasn't a U.S. citizen as he'd grown up believing, but a Mexican citizen. Later that year, Miguel got into an altercation with another boy at school. The school resource officer, from the local police department, took both boys to jail. After determining that Miguel was not lawfully present in the United States, the police officer notified ICE who came and took possession of Miguel. Miguel, who had just turned 18, was offered voluntary departure. Miguel signed the paperwork and was returned to Mexico within 24 hours of the school altercation. His parents want to know if Miguel can take advantage of any form of relief from removal or otherwise qualify for immigration to the United States. In addition to his undocumented parents, Miguel has a U.S. citizen brother who is 12 years old.

Chapter Nine: Removal Procedure

This chapter covers the process of removal, namely the mechanics of how noncitizens are expelled from the United States. See INA §§ 239, 240, 8 U.S.C. §§ 1229, 1229a. Recall that there are two distinct grounds for removal: INA § 212 applies to noncitizens who entered the United States without authorization (Chapter 5) and INA § 237 applies to noncitizens who have been lawfully admitted (Chapter 7). See INA § 240(e)(2), 8 U.S.C. § 1229a(e)(2) (defining "removable" to mean either "inadmissible" or "deportable"). The same removal process, however, applies to both groups. INA § 240, 8 U.S.C. § 1229.

Formal removal proceedings take place before an immigration judge (sections 9.1-9.8), are appealable to the BIA (section 9.9), and a decision from the BIA can be appealed to the federal circuit where the removal proceeding took place (section 9.10). The Attorney General also has the power to weigh in on a case (section 9.11). There are, however, three alternative forms of removal that do not take place before an immigration judge and have limited opportunities for appeal: expedited removal, administrative removal, and reinstatement of removal (section 9.12). The noncitizen can choose a country to be removed to, or the government might make its own selection (section 9.13). Finally, noncitizens who have never encountered immigration enforcement can "self-deport" from the United States (section 9.14).

Keep in mind that removal is a civil process. As the U.S. Supreme Court has said, removal, "while it may be burdensome and severe for the alien, is not a punishment." Mahler v. Eby, 264 U.S. 32, 39 (1924). As such, protections that a noncitizen would have in a criminal trial—for example, a right to counsel—are not available during removal proceedings.

9.1 Removal Basics

CRS, Formal Removal Proceedings:
An Introduction (2021)

The Fifth Amendment's Due Process Clause confers substantive and procedural protections to all persons within the United States, including non-U.S. nationals (aliens) who the federal government seeks to remove from the country. Once an alien has "passed through our gates, even illegally," the Supreme Court has declared, the alien "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Shaughnessy v. Mezei, 345 U.S. 206 (1953).

Against this backdrop, the Immigration and Nationality Act (INA) and implementing regulations provide a framework for the Department of Homeland Security (DHS) to seek the removal of aliens from the United States. Aliens targeted for removal in the interior of the United States are typically placed in proceedings under INA § 240.˜

Formal removal proceedings are conducted before an immigration judge (IJ) within the Executive Office for Immigration Review (EOIR).˜

The process for initiating and conducting formal removal proceedings is primarily governed by INA §§ 239 and 240, implementing regulations found in 8 C.F.R. chapter V, and EOIR's Immigration Court Practice Manual.˜

COMMENCEMENT OF FORMAL REMOVAL PROCEEDINGS

Formal removal proceedings begin with DHS filing a Notice to Appear (NTA) in immigration court. The NTA sets forth the allegations and charges against an alien believed to be subject to removal. The NTA must be served on the alien in person or, if personal service is not practicable, mailed to the alien or the alien's counsel of record.˜ [See INA § 239, 8 U.S.C. § 1229.]

MASTER CALENDAR HEARINGS

An alien will first appear before an IJ at a Master Calendar hearing. There the IJ is required to explain the alien's rights, the charges against the alien, and the nature of the proceedings. If the alien is unrepresented, the IJ must provide a list of free or low-cost legal service providers and give the alien an opportunity to find counsel (unless the alien waives counsel and elects to proceed pro se). An interpreter might also be used to facilitate communication in the hearing and other proceedings.

At the first or a subsequent Master Calendar hearing, the alien is required to plead to the allegations and charges in the NTA, either admitting or denying them. The alien may also submit an application for any relief from removal. In the alternative, the alien may request the opportunity to voluntarily depart the United States at his or her own expense in lieu of removal proceedings (unless statutorily barred) [see section 8.14]. If an alien files an application for relief, the IJ must schedule a "merits" hearing. An IJ may also schedule a merits hearing to address any contested issues about the alien's removability.˜

[During the second Trump administration, some cities have held "mega master hearings," processing 100-250 noncitizens a day in contrast to the prior rate of 40-50 a day.]

CONSEQUENCES OF FAILURE TO APPEAR

If an alien receives proper notice but fails to attend a hearing, an IJ is required to order the alien removed *in absentia* if DHS establishes that the alien is removable as charged in the NTA. But the order of removal may be rescinded if the alien (1) files a motion to reopen within 180 days of the order and shows that the failure to appear was because of "exceptional circumstances" (e.g., serious illness); or (2) files a motion to reopen at any time and shows that the alien did not receive notice of the hearing, or that the alien was in custody and could not appear.˜ [A noncitizen arrested after receiving an in absentia order of removal will be fined $5,000. 8 U.S.C. § 1814. That fee may soon rise to $18,000. https://perma.cc/UPF4-4PBK.]

[Government counsel's failure to appear is not generally grounds for terminating removal. See Matter of Arana Castillo, 29 I. & N. Dec. 593 (BIA 2026) (holding IJ should have taken plea from noncitizen at Master Calendar hearing even though government counsel was not present); Matter of Bolivar-Bolivar, 29 I. & N. Dec. 548 (BIA 2026) (holding IJ should have considered in absentia removal where noncitizen and government counsel did not appear but record included evidence of alienage).]

MERITS HEARING AND IJ'S DECISION

In the merits hearing an alien may present testimony and evidence in support of an application for relief. The IJ may direct the parties to present opening or closing statements. The alien's counsel (or the IJ if the alien is unrepresented) may conduct direct examination of the alien, and DHS counsel conducts cross-examination. The IJ may question the alien and any witnesses.

The IJ then issues an oral or written decision granting or denying the alien's application for relief. The decision must also include a finding as to the alien's removability. If the IJ denies the application, the IJ must issue an order of removal (but the alien may request an opportunity to voluntarily depart at his or her own expense in lieu of removal, unless ineligible). If the IJ grants the alien's application for relief, or otherwise concludes the alien is not removable as charged, the alien will not be subject to removal.

APPEAL TO THE BIA

Both the alien and DHS may appeal an IJ's decision to the BIA. The Notice of Appeal must be filed within 30 days of the IJ's decision. Absent an appeal, the IJ's decision becomes administratively final.

Generally, following the Notice of Appeal, the BIA will order the parties to submit briefs in support of and against the appeal. The BIA may summarily dismiss an appeal, such as when the appealing party fails to specify the reasons for the appeal or submits an untimely appeal. Absent summary dismissal, a single BIA member normally will issue a decision on the merits. The BIA member may affirm the IJ's decision without opinion if the appeal raises no substantial legal or factual issues, or raises issues controlled by legal precedent. Otherwise, the BIA member issues an opinion. But the BIA member may designate the case for a three-member panel decision in some circumstances (e.g., to resolve inconsistent IJ rulings or to create precedent).

JUDICIAL REVIEW OF ORDERS OF REMOVAL

If the BIA affirms an IJ's order of removal, that order becomes administratively final. An alien may seek judicial review of a final order of removal by petitioning for review in the judicial circuit in which the immigration court proceedings were completed. The petition must be filed within 30 days of the BIA's decision. But there are limitations to judicial review. For instance, no court may review a final order against an alien found removable based on certain enumerated crimes. Additionally, no court has jurisdiction to review certain discretionary denials of relief. But courts retain jurisdiction to review constitutional claims or questions of law raised in a petition for review.

MOTIONS TO REOPEN AND RECONSIDER

An alien with a final order of removal may move to reopen proceedings before the BIA. Typically, a motion to reopen seeks relief based on new, previously unavailable evidence. The motion must come with an application for relief and supporting documents. Generally, an alien may file only one motion to reopen, filed within 90 days of the BIA's decision. But exceptions exist, including when the motion is made to apply for asylum based on changed conditions in the alien's country of nationality, or when DHS agrees to join the motion. Some courts have held that the time and/or numerical limitations may be waived ("equitably tolled") in some situations, such as if the alien was defrauded or received ineffective assistance of counsel, if the alien exercised due diligence in filing the motion.˜

An alien subject to a final order of removal may also move to reconsider with the BIA. The motion must be filed within 30 days of the BIA's decision and specify the alleged errors in that decision. The alien generally may file one motion to reconsider. But some courts have held that the time and numerical limitations on motions to reconsider may be equitably tolled (e.g., because of ineffective assistance of counsel).˜ If the BIA denies a motion to reopen or reconsider, the alien generally may seek judicial review of that decision.

The BIA also may reopen or reconsider a case in which it has rendered a decision on its own motion ("sua sponte"). The decision to reopen or reconsider sua sponte is discretionary and generally not subject to judicial review.

An alien who has not appealed to the BIA may move to reopen or reconsider an order of removal before the IJ (subject to time and numerical limitations). But if the alien already appealed and the BIA issued a decision, the alien must file the motion with the BIA. And if the alien files the motion while an appeal to the BIA is pending, the BIA may treat it as a motion to remand the case to the IJ for further proceedings, and consolidate it with the appeal for decision.

ATTORNEY GENERAL (AG) CERTIFICATION

The AG has ultimate authority over administrating agencies' interpretation and application of federal immigration laws, including in formal removal cases. DOJ regulations require the BIA to certify cases for AG review when (1) the AG directs the BIA to refer a specific case to him for review; (2) either the Chair or a majority of the BIA believes the case should be referred; or (3) the Secretary of DHS or certain authorized DHS officials refer the case to the AG. The AG thus has considerable authority to review BIA decisions and issue superseding rulings.

EOUSA, OLE, Immigration Law (2005)

REMOVAL PROCEEDINGS˜

Removal proceedings commence with the issuance of a Notice To Appear. See INA § 239, 8 U.S.C. § 1229. If a noncitizen is an applicant for admission, he has the burden of establishing that he is "clearly and beyond a doubt entitled to be admitted." See INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A). A noncitizen seeking admission into the United States will be charged as "inadmissible" under INA § 212, 8 U.S.C. § 1182, and bears the burden of establishing that he is not inadmissible as charged. See INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A).

If the noncitizen is not an applicant for admission, he must demonstrate by "clear and convincing evidence" that he is lawfully present "pursuant to a prior admission." See INA § 240(c)(2)(B), 8 U.S.C. § 1229a(c)(2)(B). If the noncitizen can establish his lawful presence pursuant to a prior admission, he will be charged as "deportable" under INA § 237, 8 U.S.C. § 1227, and the burden is on the INS to establish the noncitizen's removability by "clear and convincing evidence." See INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3), 8 C.F.R. § 1240.8.

Regardless of whether they are considered inadmissible or deportable, noncitizens in removal proceedings have the burden to prove that they are eligible for any relief they request. Similarly, noncitizens in removal proceedings may appeal the Immigration Judge's decision to the BIA. See 8 C.F.R. § 1003.1. Review of Board decisions by the circuit courts is permitted only in certain delineated circumstances. See INA § 242, 8 U.S.C. § 1252.

RIGHTS OF THE NONCITIZEN IN JUDICIAL REMOVAL PROCEEDINGS

An Immigration Judge presides over the hearings, and a noncitizen is accorded:

- The right to an attorney or representative at no expense to the government (INA § 292, 8 U.S.C. § 1362; 8 C.F.R. §§ 1003.16(b), 1240.3 (removal), 1240.32(a) (exclusion), 1240.42 (deportation)).
- The opportunity reasonably to examine and object to evidence against him, including cross-examining any witnesses (8 C.F.R. §§ 1240.10(a)(4) (removal), 1240.32(a) (exclusion), 1240.48(a) (deportation)).
- The opportunity to present evidence on his own behalf (8 C.F.R. §§ 1240.10(a)(4) (removal), 1240.32(a) (exclusion), 1240.48(a) (deportation)).
- A list of free legal service providers in the area (8 C.F.R. §§ 1240.10(a)(2) (removal), l240.32(a) (exclusion), l240.48(a) (deportation)).
- The right to appeal to the Board of Immigration Appeals (BIA) in certain cases (8 C.F.R. §§ 1003.38, 1240.15 (removal), 1240.37 (exclusion), 1240.53 (deportation)).

9.2 Right to Counsel

Immigration Court Practice Manual (2023)

Under the regulations, parties appearing before the immigration court may represent themselves˜ or be represented by practitioners. See 8 C.F.R. §§ 1001.1(ff), 1292.1. Practitioners include: attorneys˜, accredited representatives˜, and certain categories of persons who are expressly recognized by the immigration court˜.

A respondent may be represented by a practitioner of their choosing, at no cost to the government. As in most civil or administrative proceedings, the government does not provide legal counsel. ˜

A fully accredited representative is a practitioner who is not an attorney and is approved by the Assistant Director for Policy or the Assistant Director's designee to make appearances before the Board, the immigration courts, and the Department of Homeland Security (DHS). A partially accredited representative is authorized to appear solely before DHS. An accredited representative must, among other requirements, have the character and fitness to represent respondents and be employed by, or be a volunteer for, a non-profit religious, charitable, social service, or similar organization that has been recognized by the Assistant Director for Policy or the Assistant Director's designee to represent respondents. 8 C.F.R. §§ 1292.1(a)(4), 1292.11(a), 1292.12(a)-(e). Accreditation of an individual is valid for a period of up to three years, and recognition of an organization is valid for a period of up to six years. 8 C.F.R. §§ 1292.11(f), 1292.12(d). Both may be renewed. 8 C.F.R. § 1292.16.˜

Law students and law graduates (law school graduates who are not yet admitted to practice law) are practitioners who may appear before the immigration court if certain conditions are met and the appearance is approved by the immigration judge.˜

If a party is a child, then a parent or legal guardian may appear before the immigration court and represent the child, provided the parent or legal guardian clearly informs the immigration court of their relationship. If a party is an adult, a family member may represent the party only when the family member has been authorized by the immigration court to do so as a reputable individual.˜

Reputable individuals are practitioners who may appear before the immigration court if certain conditions are met and the appearance is approved by the immigration judge.˜ To qualify as a reputable individual and be permitted to appear, an individual must meet all of the following criteria:

- be a person of good moral character

- appear on an individual basis, at the request of the respondent
- receive no direct or indirect remuneration for their assistance of the respondent
- file a declaration that they are not being remunerated for their assistance of the respondent
- have a preexisting relationship with the respondent (e.g., relative, neighbor, clergy), except in those situations where representation would otherwise not be available
- be officially recognized by the immigration court˜

An Immigration Judge cannot appoint a legal practitioner or a guardian ad litem for unaccompanied juveniles. However, the Executive Office for Immigration Review encourages the use of pro bono legal resources for unaccompanied juveniles.˜

—-—

All representatives must file a Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28) or Notice of Entry of Limited Appearance for Document Assistance Before the Immigration Court (Form EOIR-61).

9.3 Case: Aguilera-Enriquez v. INS

Aguilera-Enriquez v. INS
516 F.2d 565 (6th Cir. 1975)

CELEBREZZE, CIRCUIT JUDGE.

Petitioner, Jesus Aguilera-Enriquez, seeks reversal of a deportation order on the ground that he was constitutionally entitled to but was not afforded the assistance of counsel during his deportation hearing.˜

A thirty-nine-year-old native and citizen of Mexico, Petitioner has resided in the United States since December 18, 1967, when he was admitted for permanent residence. He is a married farm worker, living with his wife and three daughters in Saginaw, Michigan.

In December 1971, Petitioner traveled to Mexico for a vacation. An officer of the Saginaw, Michigan Police Department notified federal customs officers at the Mexican border that he had reason to believe that Petitioner would be returning with a quantity of heroin. When Petitioner crossed the border on his return, he was subjected to a search which produced no heroin but did reveal two grams of cocaine.

On April 12, 1972, Petitioner pleaded guilty in the United States District Court for the Western District of Texas, on one count of knowingly possessing a quantity of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 844(a) (1970). Petitioner received a suspended one-year sentence, was placed on probation for five years, and was fined $3,000, to be paid in fifty-dollar monthly installments over the five-year probationary period. Neither Petitioner's appointed counsel nor the District Court informed him that a narcotics conviction would almost certainly lead to his deportation.

On December 7, 1972, the Immigration and Naturalization Service issued an Order to Show Cause [precursor to the Notice to Appear] and Notice of Hearing, charging that because of his narcotics conviction, Petitioner should be deported under section 241(a)(11) of the Immigration and Nationality Act˜.

On February 6, 1973 Petitioner appeared before the Immigration Judge and requested appointed counsel. The Immigration Judge refused this request. After a hearing Petitioner was ordered deported and was not afforded the option of voluntary departure.

Shortly after the Immigration Judge's ruling, Petitioner engaged as counsel a Michigan legal assistance attorney, who in turn secured the services of a Texas attorney.

On February 14, 1973, Petitioner filed an appeal to the Board of Immigration Appeals, stating that the validity of the Texas conviction was being challenged.

On May 23, 1973, Petitioner's Texas counsel filed a motion to withdraw his guilty plea under Rule 32(d), F.R.Crim.P. The motion asserted that the District Court had not followed Rule 11 in accepting the plea because it had not properly determined that there was a factual basis for the plea and that the plea was made with a full understanding of the probable consequences.

On February 1, 1974, after full briefing and oral argument by counsel for Petitioner and the Government, the Board of Immigration Appeals dismissed Petitioner's appeal. A petition for review was timely filed in this Court.

The issue Petitioner raises here is whether an indigent alien has the right to appointed counsel in a deportation proceeding. He attacks the constitutional validity of 8 U.S.C. § 1252(b)(2) (1970), which gives an alien facing deportation proceedings "the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."˜ The Immigration Judge held that this section prevented appointment of counsel at Government expense. Since he could not afford to hire a lawyer, he did not have one before the Immigration Judge.

The courts have been vigilant to ensure that aliens receive the protections Congress has given them before they may be banished from our shores. As this Circuit noted in United States ex rel. Brancato v. Lehmann, 239 F.2d 663, 666 (6th Cir. 1956), "Although it is not penal in character, ... deportation is a drastic measure, at times the equivalent of banishment or exile, for which reason deportation statutes should be given the narrowest of the several possible meanings." The Supreme Court has held that once an alien has been admitted to lawful residence, "not even Congress may expel him without allowing him a fair opportunity to be heard." Kwong Hai Chew v. Colding, 344 U.S. 590 (1953). Thus, if procedures mandated by Congress do not provide an alien with procedural due process, they must yield, and the constitutional guarantee of due process must provide adequate protection during the deportation process.

The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide "fundamental fairness the touchstone of due process." Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). The Supreme Court's holdings in Gagnon, Morrissey v. Brewer, 408 U.S. 471 (1972), and In re Gault, 387 U.S. 1 (1967), have undermined the position that counsel must be provided to indigents only in criminal proceedings. Decisions such as Tupacyupanqui-Marin v. Immigration and Naturalization Service, 447 F.2d 603 (7th Cir. 1971), and Murgia-Melendrez v. Immigration and Naturalization Service, 407 F.2d 207 (9th Cir. 1969), which contain dictum appearing to set forth a per se rule against providing counsel to indigent aliens facing deportation, rested largely on the outmoded distinction between criminal cases (where the Sixth Amendment guarantees indigents appointed counsel) and civil proceedings (where the Fifth Amendment applies). Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, "fundamental fairness" would be violated.

In Petitioner's case the absence of counsel at his hearing before the Immigration Judge did not deprive his deportation proceeding of fundamental fairness.

Petitioner was held to be deportable under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. s 1251(a)(11), which states in relevant part: "(a) Any alien in the United States ... shall, upon the order of the Attorney General, be deported who (11) ... at any time has been convicted of a violation of ... any law or regulation relating to the illicit possession of or traffic in narcotic drugs ...."

Before the Immigration Judge, Petitioner raised no defense to the charge that he had been convicted in April 1972 of a violation of 21 U.S.C. § 844(a). Thus, he was clearly within the purview of section 241(a)(11) of the Act, and no defense for which a lawyer would have helped the argument was presented to the Immigration Judge for consideration. After the decision of the Immigration Judge, Petitioner moved to withdraw his guilty plea in the Texas District Court under Rule 32(d), F.R.Crim.P. He then urged before the Board of Immigration Appeals that this motion took him outside the reach of section 241(a)(11), because the likelihood of success on that motion meant that he had not been "convicted" of a narcotics offense. He was effectively represented by counsel before the Board, and his argument was considered upon briefing and oral argument. The lack of counsel before the Immigration Judge did not prevent full administrative consideration of his argument. Counsel could have obtained no different administrative result. "Fundamental fairness," therefore, was not abridged during the administrative proceedings, and the order of deportation is not subject to constitutional attack for a lack of due process.˜

The petition for review is denied.

DeMASCIO, District Judge (dissenting).

A deportation proceeding so jeopardizes a resident alien's basic and fundamental right to personal liberty that I cannot agree due process is guaranteed by a "fundamental fairness" analysis on a case-by-case basis.˜ I think a resident alien has an unqualified right to the appointment of counsel.˜ When the government, with plenary power to exclude, agrees to allow an alien lawful residence, it is unconscionable for the government to unilaterally terminate that agreement without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which may follow an In re Gault finding of delinquency. A resident alien's right to due process should not be tempered by a classification of the deportation proceeding as "civil", "criminal", or "administrative." No matter the classification, deportation is punishment, pure and simple.˜

The court today has fashioned a test to resolve whether a resident alien's due-process right requires appointment of counsel. That test is whether "... in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness the touchstone of due process.'"˜ The majority concludes that lack of counsel before the immigration judge did not prevent full consideration of petitioner's sole argument and no different result would have been obtained had counsel been appointed. Accordingly, the court holds the hearing was fundamentally fair. These conclusions are reached by second guessing the record a record made without petitioner's meaningful participation.

In my view, the absence of counsel at respondent's hearing before the immigration judge inherently denied him fundamental fairness. Moreover, I do not believe that we should make the initial determination that counsel is unnecessary; or that lack of counsel did not prevent full administrative consideration of petitioner's argument; or that counsel could not have obtained a different administrative result. We should not speculate at this stage what contentions appointed counsel could have raised before the immigration judge. For example, a lawyer may well have contended that § 1251(a)(11) is an unconstitutional deprivation of the equal protection of the laws by arguing that alienage was the sole basis for the infliction of punishment, additional to that imposed by criminal law; that since the government elected to rely upon the criminal law sanctions, it may not now additionally exile petitioner without demonstrating a compelling governmental interest.

I do not intend to imply such a contention has validity. I cite this only to emphasize the danger of attempting to speculate at this stage whether counsel could have obtained a different result and to show that it is possible that the immigration judge did not fully consider all of petitioner's arguments.

Because the consequences of a deportation proceeding parallels punishment for crime, only a per se rule requiring appointment of counsel will assure a resident alien due process of law. In this case, the respondent, a resident alien for seven years, committed a criminal offense. Our laws require that he be punished and he was. Now, he must face additional punishment in the form of banishment. He will be deprived of the life, liberty, and pursuit of happiness he enjoyed by governmental consent. Of course, what I have said applies only to a resident alien. I readily agree that an alien who enters illegally is entitled to less due process, if any at all. It is interesting to note that the Immigration Act seems to treat all aliens alike. It may be proper that he be compelled to face the consequences of such a proceeding. But, when he does, he should have a lawyer at his side and one at government expense, if necessary. When the government consents to grant an alien residency, it cannot constitutionally expel unless and until it affords that alien due process. Our country's constitutional dedication to freedom is thwarted by a watered-down version of due process on a case-by-case basis.

I would reverse and remand for the appointment of counsel before the immigration judge.

9.4 Case: Matter of Lozada

Matter of Lozada
19 I. & N. Dec. 637 (BIA 1988)

On March 13, 1985, an immigration judge found the respondent deportable as charged on the basis of his concessions at the hearing under section 241(a)(4) of the Immigration and Nationality Act˜, as an alien who was convicted of a crime involving moral turpitude committed within 5 years of entry and was sentenced to confinement for 1 year or more, denied his applications for relief under section 212(c) of the Act˜, and for voluntary departure under section 244(e) of the Act˜, and ordered him deported to the Dominican Republic. That same day, the respondent filed a Notice of Appeal˜ indicating that he would be filing a separate written brief or statement in support of his appeal. No such brief or statement was forthcoming. On July 8, 1986, over a year after the immigration judge had entered his decision in the case, the Board summarily dismissed the appeal, noting that the respondent had in no meaningful manner identified the claimed error in the immigration judge's comprehensive decision of March 13, 1985.

On January 20, 1987, the respondent, through present counsel,˜ filed a motion to reopen the proceedings, alleging (1) that prior counsel's failure to submit a written brief or statement explaining the basis for appeal constituted ineffective assistance of counsel and (2) that the immigration judge erred as a matter of law and discretion in deciding the case. The respondent also filed a petition for review of the Board's decision with the United States Court of Appeals for the First Circuit. The court has stayed action on the petition for review pending the Board's resolution of the motion to reopen. The motion will be denied.

Any right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process.˜ Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.˜ One must show, moreover, that he was prejudiced by his representative's performance.˜

The Government maintains that the fact that prior counsel did not submit a brief does not in itself amount to deprivation of due process. We agree.

Failure to specify reasons for an appeal is grounds for summary dismissal under 8 C.F.R. § 3.1(d)(1–a)(i) (1988).˜ It would be anomalous to hold that the same action or, more accurately, inaction that gives rise to a summary dismissal of an appeal could, without more, serve as the basis of a motion to reopen. To allow such anomaly would permit an alien to circumvent at will the appeals process, with its regulatory time constraints, by the simple expedient of failing to properly pursue his appeal rights, then claiming ineffective assistance of counsel. Litigants are generally bound by the conduct of their attorneys, absent egregious circumstances.˜ No such egregious circumstances have been established in this case.

A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. In the case before us, that affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this regard. Furthermore, before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

The high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board. Where essential information is lacking, it is impossible to evaluate the substance of such claim. In the instant case, for example, the respondent has not alleged, let alone established, that former counsel ever agreed to prepare a brief on appeal or was engaged to undertake the task. Then, too, the potential for abuse is apparent where no mechanism exists for allowing former counsel, whose integrity or competence is being impugned, to present his version of events if he so chooses, thereby discouraging baseless allegations. The requirement that disciplinary authorities be notified of breaches of professional conduct not only serves to deter meritless claims of ineffective representation but also highlights the standards which should be expected of attorneys who represent persons in immigration proceedings, the outcome of which may, and often does, have enormous significance for the person.

The respondent's motion is wholly insufficient in light of the foregoing guidelines. We note, moreover, that no prejudice was shown to have resulted from prior counsel's failure to or decision not to file a brief in support of the appeal. The respondent received a full and fair hearing at which he was given every opportunity to present his case. We do not find, and the respondent does not allege, any inadequacy in the quality of prior counsel's representation at the hearing. The immigration judge considered and properly evaluated all the evidence presented, and his conclusions that the respondent did not merit a grant of section 212(c) relief as a matter of discretion and that he was ineligible for voluntary departure as a matter of law are supported by the record.˜

ORDER: The motion is denied.

9.5 Immigration Court Characteristics

Immigration Court Practice Manual (2023)

IMMIGRATION JUDGES

Immigration judges are responsible for conducting immigration court proceedings and act independently in deciding matters before them. Immigration judges are tasked with resolving cases in a manner that is timely, impartial, and consistent with the Immigration and Nationality Act, federal regulations, and precedent decisions of the Board of Immigration Appeals and federal appellate courts.˜

[Immigration Judges are employees of the Executive Office for Immigration Review (EOIR), which] is a component of the Department of Justice and operates under the authority and supervision of the Attorney General.˜

Immigration judges generally have the authority to:

- Make determinations of removability, deportability, and excludability
- Adjudicate applications for relief from removal or deportation, including, but not limited to, asylum, withholding of removal ("restriction on removal"), protection under the Convention Against Torture, cancellation of removal, adjustment of status, registry, and certain waivers
- Review credible fear and reasonable fear determinations made by the Department of Homeland Security (DHS)˜
- Conduct custody hearings and bond redetermination proceedings
- Make determinations in rescission of adjustment of status and departure control cases
- Take any other action consistent with applicable law and regulation as may be appropriate, including such actions as ruling on motions, issuing subpoenas, and ordering pre-hearing conferences and statements
- Conduct disciplinary proceedings pertaining to practitioners˜

- Administer the oath of citizenship in administrative naturalization ceremonies conducted by DHS˜

[T]he Immigration Judge should be referred to as "the Immigration Judge" and addressed as "Your Honor" or "Judge __"˜.

GOVERNMENT COUNSEL

[The ICE Office of Principal Legal Advisor (OPLA), a part of DHS, represents the United States Government in administrative proceedings (Immigration Court and the Board of Immigration Appeals). The Office of Immigration Litigation (OIL), within Department of Justice's Civil Division, represents the United States government in appellate litigation in the federal courts.]

[In court,] the attorney for the Department of Homeland Security should be referred to as "the Assistant Chief Counsel," "the DHS attorney," or "the government attorney"˜.

THE RESPONDENT

[T]he noncitizen should be referred to as "the respondent"˜.

FILINGS

Documents are filed either with the immigration judge during a hearing or with the immigration court outside of a hearing.˜ [H]owever, [e]lectronic filing through ECAS [the web-based "EOIR Courts & Appeals System"] is mandatory for attorneys and accredited representatives appearing as practitioners of record, as well as for DHS, in every case eligible for electronic filing. The immigration judge retains authority to accept paper filings at their sole discretion.˜

If all parties are using ECAS in a specific case, the parties do not need to separately serve any electronically filed documents on the opposing party. Rather, the ECAS system will automatically send service notifications to both parties that a new document has been filed. The parties must continue to include a certificate of service with their electronic filing, but simply note in the certificate that service was completed through ECAS.˜

If one or more parties is not using ECAS in a specific case, or a specific document is not filed through ECAS, then the parties must complete service separately outside of the ECAS system. If separate service is required, a party must:

- provide, or "serve," an identical copy on the opposing party (or, if the party is represented, the party's practitioner of record), and

- except for filings served during a hearing or jointly filed motions agreed upon by all parties, declare in writing that a copy has been served.

The written declaration is called a "Proof of Service," also referred to as a "Certificate of Service."˜

All documents filed with the immigration court must be in the English language or accompanied by a certified English translation. See 8 C.F.R. §§ 1003.33, 1003.23(b)(1)(i).˜

FORM OF PROCEEDINGS

An Immigration Judge may conduct removal hearings:

- in person
- by video conference
- by telephone conference, except that evidentiary hearings on the merits may only be held by telephone if the respondent consents after being notified of the right to proceed in person or by video conference˜

CONDUCT OF HEARING

While the Immigration Judge decides how each hearing is conducted, parties should be prepared to:

- make an opening statement
- raise any objections to the other party's evidence
- present witnesses and evidence on all issues
- cross-examine opposing witnesses and object to testimony
- make a closing statement˜

All witnesses, including the respondent if they testify, are placed under oath by the immigration judge before testifying.˜

[EVIDENCE

The Federal Rules of Evidence do not apply in removal proceedings. Immigration proceedings generally favor admissibility of evidence so long as: (i) the evidence is probative of relevant matters, and (ii) its use is fundamentally fair so as not to deprive the respondent of due process of law under the Fifth Amendment to the U.S. Constitution.

Accordingly, hearsay is admissible in removal proceedings so long as its admission is probative and not fundamentally unfair.

Law

"[T]he controlling circuit law in Immigration Court proceedings for choice of law purposes is the law governing the geographic location of the Immigration Court where venue lies, namely where jurisdiction vests and proceedings commence upon the filing of a charging document, and will only change if an Immigration Judge subsequently grants a change of venue to another Immigration Court." Matter of Garcia, 28 I&N Dec. 693, 703 (BIA 2023). "[T]he controlling circuit law is not affected by a change in the administrative control court and will only change upon the granting of a motion to change venue." Matter of M-N-I-, 28 I&N Dec. 803 (BIA 2024).]

Interpretation

Interpreters are provided at government expense to individuals whose command of the English language is inadequate to fully understand and participate in removal proceedings. In general, the immigration court endeavors to accommodate the language needs of all respondents and witnesses. The immigration court will arrange for an interpreter both during the individual calendar hearing and, if necessary, the master calendar hearing. See 8 C.F.R. § 1003.22, Chapter 4.15(o) (Other requests).

The immigration court uses staff interpreters employed by the immigration court, contract interpreters, and telephonic interpretation services. Staff interpreters take an oath to interpret and translate accurately at the time they are employed by the Department of Justice. Contract interpreters take an oath to interpret and translate accurately in court. See 8 C.F.R. § 1003.22.˜

Record of Proceedings

Immigration judges previously recorded immigration court hearings on cassette tapes and now record immigration court hearings digitally. The court will provide a copy of the hearing recording in digital format at the request of a party.˜

Decisions

After the parties have presented their cases, the immigration judge renders a decision. The immigration judge may render an oral decision at the hearing's conclusion, or they may render an oral or written decision on a later date.˜ If the decision is rendered orally, the parties are given a signed summary order from the court.˜

SPECIAL ISSUES REGARDING MINOR RESPONDENTS

Immigration Courts do their best to schedule cases involving unaccompanied juveniles on a separate docket or at a fixed time in the week or month, separate and apart from adult cases.˜

An Immigration Judge cannot appoint a legal representative or a guardian ad litem for unaccompanied juveniles. However, the Executive Office for Immigration Review encourages the use of pro bono legal resources for unaccompanied juveniles.˜

Juveniles are encouraged, under the supervision of court personnel, to explore an empty courtroom, sit in all locations, and practice answering simple questions before the hearing. The Department of Health and Human Services, Office of Refugee Resettlement, provides orientation for most juveniles in their native languages, explaining immigration court proceedings.˜

Immigration judges make reasonable modifications for juveniles. These may include allowing juveniles to bring pillows, or toys, permitting juveniles to sit with an adult companion, and permitting juveniles to testify outside the witness stand next to a trusted adult or friend.˜

9.6 Executive Control of IJs and the BIA

Immigration judges—at both the trial and BIA level—do not have lifetime appointments. They are Department of Justice employees who can be fired.

President Trump began his second term by removing and replacing the EOIR leadership responsible for management and operation of immigration courts—including the agency's acting director, chief immigration judge, and general counsel. His administration then proceeded to gut the immigration bench.

An estimated 115 immigration judges left the EOIR during FY2025 with another 88 leaving in the first quarter of FY2026. See https://perma.cc/L4S4-T29V. Some retired. Many more were fired. Affected judges argued they were targeted for being perceived as pro-immigrant—whether because they were appointed by President Biden, had prior careers in immigration law, or had asylum grant rates viewed as incompatible with the second Trump administration's plans. Immigration judges who remained received an admonition from the head of EOIR to avoid "bias is in favor of an alien and against the Department of Homeland Security," warning that such bias might result in "corrective or disciplinary action." See https://perma.cc/GU9S-YVRZ.

While the immigration bench shrank from a high of 735 (end of FY2024) to 557 (end of Q1 FY2026), the second Trump administration announced plans to staff immigration courts with temporary immigration judges (TIJs) pulled from the corps of Judge Advocates General (JAGs)—military lawyers. In addition, the administration took steps to hire new, permanent immigration judges, posting a hiring announcement that read: “Help write the next chapter of America. Apply today to become a deportation judge[.]” See https://perma.cc/Z9B6-AYPF.

The second Trump administration also reshaped the BIA by reducing the court from 28 members to 15. Nine of the 13 judges let go had been appointed by President Biden.

Similar restructuring took place during the George W. Bush Administration. President Bush’s Attorney General, John Ashcroft, reduced the number of positions on the BIA from 23 to 11. Those removed from the BIA were “liberal” in terms of the percentage of their decisions that favored noncitizens. See Stephen H. Legomsky, Deportation and the War on Independence, 91 Cornell L. Rev. 369 (2006).

9.7 Administrative Closure

Not all removal proceedings end with an order of removal or a grant of relief from removal. The immigration judge might decide to pause the proceedings and issue an order of administrative closure.

CRS, An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others (2018)

When Immigration and Customs Enforcement˜ decides to discontinue temporarily a removal proceeding against a particular alien˜—because ICE deems the case low-priority, because the alien has obtained or is seeking a form of discretionary relief such as DACA, or for some other reason—ICE may ask the presiding immigration judge to place the proceeding in a status called “administrative closure.” ↳Matter of Avetisyan, 25 I. & N. Dec. 688, 692 (BIA 2012) (“Administrative closure˜ is used to temporarily remove a case from an Immigration Judge’s active calendar or from the Board’s docket. In general, administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time.”).↵ An immigration judge may also place removal proceedings in administrative closure upon the alien’s motion and over the government’s objection, although this course of events may be less common.˜ The effect of administrative closure is to suspend but not terminate the removal proceeding.˜ As such, administrative closure offers little formal protection from removal: the alien cannot be removed while the proceedings are suspended, but ICE can move to re-activate the proceedings at any time and will likely succeed in doing so if the alien is not in the midst of pursuing independent protections from removal outside of immigration court.˜ Furthermore, administrative closure does not itself confer any additional rights or protections, such as work authorization or lawful presence.˜ However, administrative closure is often granted in conjunction with other discretionary reprieves that do provide additional protections.˜ For example, an alien whose removal case is placed in administrative closure may also have enrolled in DACA, which confers eligibility for work authorization and vitiates unlawful presence.˜

—-—

Administrative closure has been the subject of debate during the Biden and Trump presidencies. During the first Trump administration, Attorney General Jeff Sessions held, in Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018), that neither immigration judges nor the BIA have "the general authority to suspend indefinitely immigration proceedings by administrative closure." Administrative closure, the opinion continued, "may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action." During the Biden administration, Attorney General Merrick Garland overturned the Castro-Tum decision with Matter of Cruz-Valdez, 28 I&N Dec. 326 (A.G. 2021), concluding that the 2018 decision "departed from long-standing practice."

In 2024, federal regulations were amended to address administrative closure. See 8 C.F.R. § 1003.1(*l*) (BIA) and 8 C.F.R. 1003.18 (c) (immigration judges). The regulations acknowledge administrative closure as a discretionary power of IJs. They also provide a list of factors relevant to any decision to administratively close a case, including: the parties' arguments regarding closure, the noncitizen's likelihood of succeeding on any petition or application filed with DHS, the anticipated duration of administrative closure, the ultimate anticipated outcome of the case, and the noncitizen's detention status. No one factor is dispositive, and IJs and the BIA should consider the "totality of the circumstances." The BIA has interpreted that language as follows: "Because Immigration Judges and the Board have a duty to promptly and fairly bring removal proceedings to a close, whether there are persuasive reasons for a case to proceed and be resolved on the merits is the primary consideration in determining whether administrative closure is appropriate under the totality of the circumstances." Matter of B-N-K-, 29 I&N Dec. 96 (BIA 2025). Administrative closure that lasts more than 6 months is "presumptively unreasonable." Matter of Ibarra-Vega, 29 I. & N. Dec. 476 (BIA 2026) (mandating the re-calendaring of a case administratively closed for 13 years based on a pending U-visa application (see section 4.10) where no visa is likely to become available in the "reasonably near future" due to Congressional limits on such visas).

9.8 Adjusted Proceedings for Certain Crime-Based Removals

INA § 238(a)(1) allows for removal proceedings for noncitizens convicted of certain crimes to be conducted at federal, state, and local correctional facilities. The removal process is the same: it must be conducted in conformance with INA § 240. The removal proceeding will take place before an immigration judge who will consider both removability and any claim to relief from removal. The difference is that the hearing will be conducted at the correctional facility—either by having the IJ appear and conduct hearings at the facility or by having the prisoner appear in immigration court by video conference. Such hearings are part of the EOIR's "Institutional Hearing Program" (IHP).

The crime-based removals eligible for the IHP are INA § 237(a)(2)(A)(iii) (aggravated felony), (B) (controlled substances), (C) (certain firearm offenses), (D) (miscellaneous crimes), as well as offenses covered by INA § 238(a)(2)(A)(ii) (multiple criminal convictions) where the predicate offenses, "without regard to the date of their commission," are otherwise covered by section 237(a)(2)(A)(i) (crimes of moral turpitude).

The stated goals of this provision are to assure "expeditious removal following the end of the noncitizen's incarceration" and to eliminate "the need for additional detention at any [DHS] processing center" following incarceration. INA § 238(a)(1).

9.9 Board of Immigration Appeals

BIA Practice Manual (2025)

FUNCTION OF THE BOARD˜

The Board of Immigration Appeals is the highest administrative body for interpreting and applying immigration laws. The Board is responsible for applying the immigration and nationality laws uniformly throughout the United States. Accordingly, the Board has been given nationwide jurisdiction to review the orders of Immigration Judges and certain decisions made by the Department of Homeland Security (DHS), and to provide guidance to the Immigration Judges, DHS, and others, through published decisions. The Board is tasked with resolving the questions before it in a manner that is timely, impartial, and consistent with the Immigration and Nationality Act and regulations, and to provide clear and uniform guidance to

Immigrations Judges, DHS, and the general public on the proper interpretation and administration of the Immigration and Nationality Act and its implementing regulations. 8 C.F.R. § 1003.1(d)(1).˜

COMPOSITION OF THE BOARD˜

The Board consists of [15] Board Members, also known as Appellate Immigration Judges, including a Chief Appellate Immigration Judge and up to two Deputy Chief Appellate Immigration Judges. Under the direction of the Chief Appellate Immigration Judge, the Board uses a case management system to screen all cases and manage its caseload. 8 C.F.R. § 1003.1(e). Under this system, the Board adjudicates cases in one of three ways:

Individual—The majority of cases at the Board are adjudicated by a single Board Member. In general, a single Board Member decides the case unless the case falls into one of six categories that require a decision by a panel of three Board Members. These categories are:

- the need to settle inconsistencies among the rulings of different immigration judges
- the need to establish a precedent construing the meaning of laws, regulations, or procedures
- the need to review a decision by an Immigration Judge or DHS that is not in conformity with the law or with applicable precedents
- the need to resolve a case or controversy of major national import
- the need to review a clearly erroneous factual determination by an Immigration Judge
- the need to reverse the decision of an Immigration Judge or DHS in a final order, other than nondiscretionary dispositions
- the need to resolve a complex, novel, unusual, or recurring issue of law or fact.

Panel—Cases not suitable for consideration by a single Board Member are adjudicated by a panel consisting of three Board Members. The panel of three Board Members renders decisions by majority vote. Cases are assigned to specific panels pursuant to the Chief Appellate Immigration Judge's administrative plan. The Chief Appellate Immigration Judge may change the composition of the sitting panels and may reassign Board Members from time to time.

En Banc—The Board may, by majority vote or by direction of the Chief Appellate Immigration Judge, assign a case or group of cases for full en banc consideration. 8 C.F.R. § 1003.1(a)(5). By regulation, en banc proceedings are not favored.˜

SCOPE OF REVIEW

Questions of fact—By regulation, the Board applies a clearly erroneous standard to an Immigration Judge's findings of fact, including credibility findings. See 8 C.F.R. § 1003.1(d)(3)(i).

Questions of law—The Board applies a de novo standard of review to questions of law, discretion, judgment, and other issues. See 8 C.F.R. § 1003.1(d)(3)(ii).˜

SUMMARY AFFIRMANCE

Under certain circumstances, the Board may affirm, without opinion, the decision of an Immigration Judge or DHS officer. The Board may affirm a decision if all of these conditions are met:

- the Immigration Judge or DHS decision reached the correct result
- any errors in the decision were harmless or nonmaterial
- either (a) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of a precedent to a novel factual situation, or (b) the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion

See 8 C.F.R § 1003.1(e)(4). By regulation, a summary affirmance order reads: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. 3.1(e)(4)." 8 C.F.R. § 1003.1(e)(4)(ii).

A summary affirmance order will not contain further explanation or reasoning. Such an order approves the result reached by the Immigration Judge or DHS. Summary affirmance does not mean that the Board approves of all the reasoning of that decision, but it does reflect that any errors in the decision were considered harmless or not material to the outcome of the case. See 8 C.F.R. § 1003.1(e)(4).˜

SUMMARY DISMISSAL˜

Under certain circumstances, the Board is authorized to dismiss an appeal without reaching its merits. See 8 C.F.R. § 1003.1(d)(2)(i).

Failure to Specify Grounds for Appeal—When a party takes an appeal, the Notice of Appeal (Form EOIR-26) must identify the reasons for the appeal. A party should be specific and detailed in stating the grounds of the appeal, specifically identifying the finding of fact, the conclusions of law, or both, that are being challenged. 8 C.F.R. § 1003.3(b). An appeal, or any portion of an appeal, may be summarily dismissed if the Notice of Appeal (Form EOIR-26), and any brief or attachment, fails to adequately inform the Board of the specific reasons for the appeal. 8 C.F.R. § 1003.1(d)(2)(i)(A).

Failure to File a Brief—An appeal may be summarily dismissed if the Notice of Appeal (Form EOIR-26) indicates that a brief or statement will be filed in support of the appeal, but no brief, statement, or explanation for not filing a brief is filed within the briefing deadline. 8 C.F.R. § 1003.1(d)(2)(i)(E).

Other Grounds for Summary Dismissal—An appeal can also be summarily dismissed for the following reasons:

- the appeal is based on a finding of fact or conclusion of law that has already been conceded by the appealing party
- the appeal is from an order granting the relief requested
- the appeal is filed for an improper purpose
- the appeal does not fall within the Board's jurisdiction
- the appeal is untimely
- the appeal is barred by an affirmative waiver of the right of appeal
- the appeal fails to meet essential statutory or regulatory requirements
- the appeal is expressly prohibited by statute or regulation

See 8 C.F.R. § 1003.1(d)(2)(i).

PUBLICATION

Published decisions—Published decisions are binding on the parties to the decision. Published decisions also constitute precedent that binds the Board, the Immigration Courts, and DHS. The vast majority of the Board's decisions are unpublished, but the Board periodically selects cases to be published. See 8 C.F.R. § 1003.1(g).

Decisions selected for publication meet one or more of several criteria, including but not limited to: the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law;

resolution of a conflict of authority; and discussion of an issue of significant public interest.˜

Precedent decisions are collected and published in bound volumes of Administrative Decisions Under Immigration and Nationality Laws of the United States ("I&N Decisions").˜

[Between January 21, 2025 (the first day of the second Trump administration) and June 15, 2026, the BIA issued 116 precedential decisions. Professor Jason Cade studied the first 100 decisions and found them remarkable in terms of the pace of decision-making, the designation of cases as precedential, the percentage of pro se cases, and their content. See Jason Cade, Welcome to the Trump Administration's Board of Immigration Appeals. The Immigrant Always Loses., 136 Yale Law Journal Forum (2026). In this time period, the BIA issued precedential decisions at more than three times the rate of prior boards. This is particularly notable given the reduction of the board from 28 to 15 members (see section 9.6). More than 42% of the decisions were designated precedential by the U.S. Attorney General and not the BIA itself. Almost 20% involved unrepresented noncitizens. And, perhaps least surprising, only 2 of the 100 decisions studied resolved in favor of the noncitizen. In sum, Professor Cade wrote: "No matter what an immigrant suffered, no matter what Congress intended, no matter what the hearing-level judge found, the answer is removal."]

Unpublished decisions—Unpublished decisions are binding on the parties to the decision but are *not* considered precedent for unrelated cases.˜

[More than 99% of the 30,000 BIA decisions issued annually are unpublished and nonprecedential. See Faiza W. Sayed, The Immigration Shadow Docket, 117 Northwestern U. L. Rev. 893 (2023).]

STAYS˜

A stay prevents DHS from executing an order of removal, deportation, or exclusion. Stays are automatic in some instances and discretionary in others.˜

Automatic Stays—There are certain circumstances when an Immigration Judge's order of removal is automatically stayed pending further action on an appeal or motion. When a stay is automatic, the Immigration Courts and the Board do not issue a written order on the stay.˜

After an Immigration Judge issues a final decision on the merits of a case (not including bond or custody, credible fear, claimed status review, or reasonable fear determinations), the order is automatically stayed for the 30-day period for filing an appeal with the Board. However, the order is not stayed if the losing party waived the right to appeal. 8 C.F.R. § 1003.6(a).˜

If a party appeals an Immigration Judge's decision on the merits of the case (not including bond and custody determinations) to the Board during the appeal period, the order of removal is automatically stayed during the Board's adjudication of the appeal. 8 C.F.R. § 1003.6(a). The stay remains in effect until the Board renders a final decision in the case.˜

Discretionary Stays—˜In most cases, the Board entertains stays only when there is an appeal from an Immigration Judge's denial of a motion to reopen removal proceedings or a motion to reopen or reconsider a prior Board decision pending before the Board.˜

—-—

In February 2026, an interim final rule was released that would have made significant changes to the process of BIA decision-making. Most notably, the default resolution of BIA appeals would be summary dismissal. See https://perma.cc/W6PQ-BT3X. Nonprofits sued and this provision was vacated prior to taking effect. Amica Center for Immigrant Rights v. EOIR, __ F.Supp.3d __ (D.D.C. 2026).

9.10 Judicial Review

EOUSA, OLE, Immigration Law (2005)

All judicial review of exclusion, deportation, and removal orders must take place in the court of appeals for the judicial circuit in which a noncitizen's administrative proceedings were completed. All noncitizens are required to file their review petitions within thirty days of an administrative final order, and the filing of a review petition no longer automatically stays the execution of a final order in the case of any noncitizen.˜ The IIRIRA permanent provisions˜ preclude judicial review of discretionary judgments regarding these forms of relief, and further specifically preclude review [of] "any other decision or action of the Attorney General ... the authority for which is specified ... to be in the discretion of the Attorney General ... other than the granting of [asylum] under section 208(a)." INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B).˜

IIRIRA further limited the jurisdiction of courts by providing in INA § 242(g), 8 U.S.C. § 1252(g), that no court shall review the Attorney General's decision "to commence proceedings, adjudicate cases, or execute [a final order of exclusion, deportation or removal]" except as provided in INA § 106(a) and INA § 242, 8 U.S.C. § 1252. The Supreme Court has concluded that, rather than being a general bar to jurisdiction, INA § 242(g), 8 U.S.C. § 1252(g), serves to limit review in district court in three discrete areas by providing that "'no deferred action' decisions and similar discretionary determinations" are reviewable, if at all, only in the court of appeals.˜ The Court expressly cited as an example a case where a noncitizen seeks a stay of deportation in district court.˜

[In addition,] Congress took significant steps˜ to remove access to the courts for criminal noncitizens in the AEDPA and IIRIRA. Under both statutes, judicial review of deportation, exclusion, and removal orders generally is unavailable for noncitizens convicted of serious crimes. Crimes precluding judicial review include aggravated felonies, two or more crimes involving moral turpitude, drug offenses, firearms offenses, and certain miscellaneous offenses such as treason and sabotage. See AEDPA § 440(a), IIRIRA §§ 306(a), 309(c)(4)(G).

The foregoing bars to judicial review do not completely eliminate all judicial review. The courts of appeals have almost universally agreed that the courts retain "jurisdiction to determine jurisdiction"-that is, the courts retain the authority to ascertain whether the conditions precluding jurisdiction actually exist (i.e, that the petitioner is a noncitizen who is actually removable for a criminal ground).˜

Following enactment of the AEDPA and IIRIRA jurisdictional limitations for criminal noncitizens, many noncitizens filed habeas corpus petitions in district courts alleging that AEDPA and IIRIRA have not limited the availability or scope of habeas corpus under 28 U.S.C. § 2241 for criminal noncitizen offenders seeking to challenge their removal, deportation, and exclusion orders.˜

On May 11, 2005, the President signed into law the REAL ID Act of 2005. Section 106(a)(1)(A)(iii) added a new subsection (a)(2)(0) to INA § 242, 8 U.S.C. § 1252, that codified the government's position that district courts should not have jurisdiction over habeas cases brought by noncitizens challenging their removal orders. INA § 242(a)(2)(D) [now] states: "(D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS-Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." REAL ID Act § 106(a)(1)(A)(iii). Thus, it is now clear that the courts of appeals have exclusive jurisdiction to consider constitutional claims and questions of law raised in petitions for review.

—-—

9.11 Attorney General Decisions

Immigration Court Practice Manual (2025)

Decisions of Immigration Judges are reviewable by the Board of Immigration Appeals. The Board's decisions may be referred to the Attorney General for review. Referral may occur at the Attorney General's request, or at the request of the Department of Homeland Security or the Board. The Attorney General may vacate any decision of the Board and issue her own decision in its place. See 8 C.F.R. § 1003.1(d)(1)(i), (h). Decisions of the Attorney General may be published as precedent decisions. The Attorney General's precedent decisions appear with the Board's precedent decisions in Administrative Decisions Under Immigration and Nationality Law of the United States ("I&N Decisions").

—-—

During the first Trump administration, the Attorney General self-referred 17 cases. To put that number in perspective, four cases were self-referred during the Obama administration (over two terms) and ten were self-referred during the George W. Bush administration (also two terms). During the first year of the second Trump administration, the AG self-referred three cases.

9.12 Other Forms of Removal

Chapter 9 has, up until now, focused on "formal" removal as outlined in INA § 240, 8 U.S.C. § 1229a—also called "standard removal" or "Section 240 proceedings." That is, it has focused on removal where a noncitizen appears in court before an immigration judge for a hearing on the merits of removal. There are, however, other forms of removal that do not involve a hearing before an immigration judge.

EXPEDITED REMOVAL

Section 6.7 explained the process of expedited removal provided for at INA § 235. This process applies at the border to noncitizens seeking entry into the United States. If the noncitizen is found either to be engaged in misrepresentation or does not have proper entry documents (and assuming they are not seeking asylum), then they can be summarily removed through the expedited removal process without seeing an immigration judge.

In January 2025, the use of expedited removal expanded. DHS attorneys, following direction from the Acting Secretary of DHS, began requesting that immigration judges dismiss formal immigration proceedings (see section 9.1) to move applicable cases into expedited removal proceedings. See https://perma.cc/UTT6-QS5Q. This change affected cases where the noncitizen respondent had been paroled into the United States (see section 6.6) in order to pursue asylum (see Chapter 10).

ADMINISTRATIVE REMOVAL

INA § 238(b), 8 U.S.C. § 1228(b), provides that a noncitizen who has been convicted of an aggravated felony and who is not a lawful permanent resident, that is, a nonimmigrant, may be subject to an administrative removal order. This means that a nonimmigrant convicted of an aggravated felony can be removed pursuant to streamlined removal procedures that authorize DHS to remove such noncitizens without a hearing before an IJ.

Although the noncitizen subject to administrative removal is not entitled to a hearing before an immigration judge, the noncitizen is entitled to "reasonable" notice of the charges and an opportunity to inspect the evidence and rebut the charges; counsel, at no expense to the government; a determination that the foreign national is in fact the person named in the notice; and a record of the proceedings. INA § 238(b)(4).

REINSTATEMENT OF REMOVAL

INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), authorizes DHS to reinstate the previously executed removal order of a noncitizen who unlawfully reentered the United States. See 8 C.F.R. § 241.8. This means that a previously removed noncitizen will be removed for the second time without a new hearing before an IJ.

A reinstatement order is not subject to review by an immigration judge. Noncitizens subject to reinstatement are ineligible for all forms of relief from removal except for withholding of removal (see section 10.38) and claims based on the Convention Against Torture (see section 10.39).

9.13 Country of Removal

The country a noncitizen will be removed to is covered by INA § 241(b), 8 U.S.C. § 1231(b). A noncitizen may designate a country for removal, but they cannot choose

Canada or Mexico unless they are a citizen of that nation. INA § 241(b)(2)(A)-(B), 8 U.S.C. § 1231(b)(2)(A)-(B).

The government can ignore the noncitizen's designated country if the noncitizen fails to designate a country promptly, the designated country does not promptly agree to take the noncitizen or outright refuses to take the noncitizen, or if it is determined that removal to the designated country would be "prejudicial to the United States." INA § 241(b)(2)(C), 8 U.S.C. § 1231(b)(2)(C). If the government ignores the noncitizen's choice, they can remove a noncitizen to a nation where they are "a subject, national, or citizen" unless that nation does not promptly agree to take the noncitizen or outright refuses to take the noncitizen. INA § 241(b)(2)(D), 8 U.S.C. § 1231(b)(2)(D).

If those two options—the noncitizen's choice or their country of belonging—fail, the government has further alternatives. The noncitizen can be removed to the country from which they were admitted to the United States, the foreign port from which they left for the United States, a country in which they previously resided, or their country of birth. INA § 241(b)(2)(E), 8 U.S.C. § 1231(b)(2)(E). "If impracticable, inadvisable, or impossible to remove the alien to" any of those countries, then the government can remove the noncitizen to "another country whose government will accept the alien into that country." Id.

No matter what, the noncitizen cannot be removed to a country where their "life or freedom would be threatened" (see section 10.38).

The second Trump administration embraced "third-country" removals, reaching agreements with countries to accept deportees who lack any ties to those nations. Litigation ensued. The U.S. District Court for the District of Massachusetts issued a preliminary injunction requiring the government to provide written notice to noncitizens and their counsel prior to removing a noncitizen to any country not "explicitly provided for on the alien's order of removal" so that the noncitizen could have a "meaningful opportunity" to raise the issue of whether that their life would be threatened by removal to that third country given that noncitizens ordered removed can seek relief from removal under the Convention Against Torture (see section 10.38). The government sought to stay the preliminary injunction pending appeal, which the U.S. Court of Appeals for the First Circuit denied. The U.S. Supreme Court, however, in a one-paragraph, per curiam decision, granted the government's motion to stay the preliminary injunction pending disposition of the substantive appeal to the First Circuit. DHS v. D.V.D., 606 U.S. __ (2025). The First Circuit thereafter remanded to the trial court, which issued a declaratory judgment that noncitizens "have the right to meaningful notice before removal to any third country" as well as a "right to a meaningful opportunity to raise a country-specific claim against removal before removal to any third country." The court further declared the government's third country removal policies unlawful. Considering the Supreme Court's prior decision in the case, the trial court stayed judgment pending a decision from the First Circuit. D.V.D. v. DHS, __ F. Supp. 3d. ___ (2026). Third country removals continue.

9.14 Self-Deportation

An undocumented migrant can always choose to leave the country on their own initiative before any encounter with U.S. immigration officials or beginning of removal proceedings. This has been called "self-deportation."

The second Trump administration has encouraged undocumented migrants to self-deport using a mobile phone application called CBP Home, which allows noncitizens to indicate their intent to depart. DHS promises that, after "vetting," those who indicate their intent to deport will be "temporarily deprioritized by ICE for detention or enforcement action before their scheduled departure" and will "receive cost-free travel, a $1,000 exit bonus, and forgiveness of any failure to depart fines." https://perma.cc/K4BT-UXSD.

"Failure to depart" fines can be substantial. The second Trump administration announced daily fines of $998 for noncitizens remaining in the United States after a final order of removal as well as retroactive daily fines going back five years, resulting in total fine amounts over $1.8 million.

9.15 Test Your Knowledge

PROBLEM 9.1

Claudia did not appear at her scheduled master calendar hearing. She left her home two hours before the hearing for a journey to the courthouse that would normally take one hour. In the end, her trip took four hours due to two, separate, major car accidents on the highway. The IJ ordered Claudia removed. What type of removal is likely in play? Is there anything Claudia can do, given these facts?

PROBLEM 9.2

Luz came to the United States in 1989 on a temporary visa. She overstayed and has lived here continuously since then. In that time, Luz had two interactions with the criminal justice system—a 1991 charge of shoplifting that was dismissed and a 2009 charge of assault and battery that was likewise dismissed. In addition, Luz gave birth to two U.S. citizen children and obtained an approved family-based petition for an immigrant visa.

DHS sought to remove Luz on the basis of her visa overstay. Luz petitioned for adjustment of status relief, which was denied on the basis of her "serious criminal acts" for which she had not expressed remorse. On advice of counsel, Luz filed a notice of appeal stating that a brief would be forthcoming. But counsel did not file a brief. When counsel realized the error, a month after the deadline had passed, he petitioned the BIA to accept a late-filed brief in which counsel argued that the IJ's ruling was unfair because Luz was never asked whether she had remorse for the past incidents or what lessons she had learned from them. The BIA did not accept the late-filed brief and dismissed Luz's appeal.

Does Luz have any options at this point? If so, what are they? Is there anything that Luz must do before seeking further relief?

Review question: On what ground(s), if any, is Luz subject to removal?

PROBLEM 9.3

Ximena came to the United States by herself when she was only 12 years old. She was stopped and detained by Border Patrol who encountered Ximena as she tried to surreptitiously enter the country. She has since been placed in removal proceedings where she is not represented by counsel. Does Ximena have a right to counsel?

PROBLEM 9.4

Channthy from Cambodia came to the United States on an F-visa to study biology. During his first semester of school, Channthy sold marijuana at cost—meaning, he did not profit from these sales—to his dormmates. The smell caught the attention of Channthy's resident advisor who, upon determining that Channthy was at the heart of the dorm's uptick in drug use, involved campus police who, in turn, involved the city police. Channthy was arrested and charged with drug possession. If DHS learns of the charges against Channthy and begins removal proceedings, what would be the ground(s) for removal? What would Channthy's removal process look like?

Chapter Ten: Refugees and Asylees

The United States provides protection to individuals seeking refuge from specific types of persecution through two different, but related, programs. The *refugee* program applies to noncitizens living overseas. The *asylum* program applies to noncitizens currently living in the United States or who seek protection when they arrive at our nation's border. Both programs rely on the same INA definition of refugee, found at INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), which provides: "The term 'refugee' means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

This chapter begins with a brief history of U.S. law regarding refugees and asylees (section 10.1). Next, it provides background on refugee admissions including the process by which refugees are identified and screened for admission (section 10.2-10.3) and the numbers of refugees admitted yearly into the United States (section 10.4). The remainder of the chapter focuses on asylum, walking through the asylum process (sections 10.5-10.7), the elements of asylum (sections 10.8-10.33), and bars to asylum (sections 10.34-10.42). Finally, we cover alternative forms of humanitarian relief including withholding of removal (section 10.43), the Convention Against Torture (section 10.44), temporary protected status (section 10.45), and deferred enforced departure (section 10.46).

10.1 The History of U.S. Refugee Law

The United States did not always welcome refugees. The tragic story of the M.S. St. Louis illuminates the United States' attitude towards Jewish refugees during World War II.

70th Anniversary of the Tragedy of the M.S. St. Louis, 155 Cong. Rec. S5646-01 (2009)

The story starts on May 13, 1939, when the M.S. St. Louis sailed from Hamburg, Germany, to Havana, Cuba with 937 passengers, mostly Jewish refugees, searching for freedom and safety. State-supported antisemitism including violent pogroms, expulsion from public schools and services, and arrest and imprisonment solely because of Jewish heritage forced those passengers to leave their homes.

When the M.S. St. Louis arrived in Havana, the Cuban Government allowed only 28 passengers to disembark. Corruption and political maneuvering within the Cuban Government invalidated the transit visas of the other passengers. Before returning to Europe, the ship sailed toward Miami hoping for a solution. The ship sailed so close to Florida that the passengers could see the lights of Miami. One survivor remembers his father commenting that "Florida's golden shores, so near, might as well be 4,000 miles away for all the good it did them."

The U.S. Immigration and Nationality Act of 1924 strictly limited the number of immigrants admitted to the United States each year and in 1939 the waiting list for German-Austrian immigration was several years long. While the press and citizens were largely sympathetic to the passengers' plight, no extraordinary measures were taken to permit the refugees to enter the United States. The passengers were told that they must "await their turns on the waiting list and qualify for and obtain immigration visas."

On June 6, 1939, the M.S. St. Louis sailed back to Europe with nearly all of its original passengers. The passengers obtained refuge in Great Britain, the Netherlands, Belgium, and France. World War II started 3 months later and those countries, with the exception of Great Britain, fell to Nazi occupation. Two hundred and fifty-four of those passengers died during the Holocaust and many others suffered under Nazi persecution and in concentration camps.

DHS, Refugees and Asylees: 2019

[It took a long time for the United States to codify refugee protections into law.] The Displaced Persons Act of 1948 was passed to address the migration crisis in Europe resulting from World War II, wherein millions of people had been forcibly displaced from their home countries and could not return. By 1952, the United States had admitted over 400,000 displaced people under the Act. [However, the Immigration and Nationality Act (INA) of 1952, as originally enacted, did not contain any language on asylum.] The United States extended its commitments to refugee resettlement through legislation including the Refugee Relief Act of 1953 and the Fair Share Refugee Act of 1960. The United States also used the Attorney General's parole authority to bring large groups of persons into the country for humanitarian reasons, including over 38,000 Hungarian nationals beginning in 1956 and over a million Indochinese beginning in 1975.

Obligations of the United States under the 1967 United Nations Protocol relating to the Status of Refugees (to which the United States acceded in 1968) generally prohibit the United States from returning a refugee to a country where their life or freedom would be threatened on account of a protected ground. The Refugee Act of 1980 amended the INA to bring U.S. law into greater accord with U.S. obligations under the Protocol, which specifies a geographically and politically neutral refugee definition. The Act also established formal refugee and asylum programs.

10.2 The Refugee Process

CRS, U.S. Refugee Admissions Program (2023)

The Immigration and Nationality Act (INA), as amended by the Refugee Act of 1980, authorizes the United States to admit refugees.˜ A main purpose of the 1980 act was to end the ad hoc approach to refugee admissions that had characterized U.S. refugee policy since World War II and establish a uniform procedure.

The INA defines a *refugee* as a person who is outside his or her country of nationality and is unable or unwilling to return 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.˜

The Bureau of Population, Refugees, and Migration (PRM) of the Department of State (DOS) coordinates and manages the U.S. Refugee Admissions Program (USRAP), and U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) interviews applicants and makes final determinations about eligibility for admission. Refugees are processed and admitted to the United States from abroad.˜

After one year in refugee status in the United States, refugees are required to apply to adjust to lawful permanent resident (LPR) status.˜

Processing Priorities

The INA authorizes the admission of refugees who are determined to be "of special humanitarian concern to the United States."˜ This requirement is implemented through a system of processing priorities. In order to be considered for admission to the United States as a refugee, an individual must fall within an established processing priority (access category).˜

At the start of each fiscal year, DOS, in coordination with other agencies, determines the refugee processing priorities for that year. [USRAP currently has four processing priorities. See https://perma.cc/NJD9-DZPJ. They are:

- Priority 1: Cases that are identified and referred to the program by the United Nations High Commissioner for Refugees (UNHCR), a United States Embassy, or a designated non-governmental organization (NGO).
- Priority 2: Groups of special humanitarian concern identified by the U.S. refugee program.
- Priority 3: Family reunification cases (spouses, unmarried children under 21, and parents of persons lawfully admitted to the United States as refugees or asylees or permanent residents (green card holders) or U.S. citizens who previously had refugee or asylum status). For information on the current nationalities eligible for Priority 3 processing, see the U.S. Department of State page.
- Priority 4: Cases who have been referred by private sponsors in the United States through the Welcome Corps program, and who receive post-arrival support and services from those sponsors. For more information on the Welcome Corps, see the U.S. Department of State page Welcome Corps - Sponsoring Refugees, Strengthening Communities.]

Refugee Adjudications

The Secretary of DHS has discretionary authority to admit refugees to the United States. To be eligible for admission to the United States as a refugee, an individual must meet the INA definition of a refugee, not be firmly resettled in another country, be determined to be of special humanitarian concern to the United States, and be admissible to the United States.˜ The adjudication of refugee cases is handled by USCIS officers in the Refugee Corps.

ADMISSIBILITY OF REFUGEES

To be admitted to the United States, a prospective refugee must be admissible under immigration law. The INA sets forth various grounds of inadmissibility, which include health-related grounds, security-related grounds, public charge (i.e., indigence), and lack of proper documentation.˜ Some inadmissibility grounds (public charge, lack of proper documentation) are not applicable to refugees. Others can be waived for humanitarian purposes, to ensure family unity, or when it is otherwise in the public interest.˜

SECURITY SCREENING

To be admissible under the INA security-related grounds of inadmissibility discussed above, a prospective refugee must clear all required security checks. According to a June 2020 USCIS fact sheet on refugee security screening: "USCIS has the sole discretion to approve an application for refugee status and only does so after it has obtained and cleared the results of all required security checks for the principal applicant, as well as any derivative family members included on their case. Just as DOS commonly denies visas, USCIS also routinely denies refugee cases, including for reasons of national security.˜

The fact sheet summarizes the security screening process as follows: "USRAP screening includes both biometric and biographic checks, which occur at multiple stages throughout the process, including immediately after the preliminary RSC interview, before a refugee's departure to the United States, and on arrival in the U.S. at a port of entry."˜

LAUTENBERG AMENDMENT GROUPS

Originally enacted as part of the FY1990 Foreign Operations Appropriations Act and subsequently amended, the Lautenberg amendment on refugees directed the executive branch to˜ designate, for purposes of U.S. refugee admission, categories˜ for

- "nationals and residents of an independent state of the former Soviet Union or of Estonia, Latvia, or Lithuania and who are Jews or Evangelical Christians," and
- "nationals of an independent state of the former Soviet Union or of Estonia, Latvia, or Lithuania and who are current members of, and demonstrate public, active, and continuous participation (or attempted participation) in the religious activities of, the Ukrainian Catholic Church or the Ukrainian Orthodox Church."˜

The Lautenberg language went beyond identifying categories, however, and also provided that category members would have a lower burden of proof to qualify for refugee status. Such persons had to establish that they were members of a protected category with a credible, but not necessarily individual, fear of persecution. By contrast, other prospective refugees have to establish a well-founded fear of persecution on an individual basis.

The Lautenberg Amendment has been regularly extended in appropriations acts[.]˜

The FY2004 Consolidated Appropriations Act˜ amended the Lautenberg language to add a new provision known as the Specter amendment.˜ This amendment provided for the designation of categories of Iranian nationals, specifically religious minorities, who would also be subject to the lower evidentiary standard. It has been extended as part of the regular Lautenberg amendment extensions.

—-—

10.3 Re-vetting Refugees

Refugees "shall," after one year in refugee status, "return ... to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant." INA § 209(a); 8 U.S.C. § 1159(a). That is, they must apply for LPR status.

In 2026, DHS announced that refugees who do not timely file for LPR status will be subject to arrest and detention. See bit.ly/4wWMO2E. Furthermore, the "examination" prescribed by the INA is not limited to determining if the refugee qualifies for LPR status; it presents an opportunity to reexamine if refugee status was appropriately granted in the first place. This directive works in tandem with an earlier call for "a comprehensive re-review of approved benefit requests" to noncitizens from certain countries who entered after January 20, 2021—the first day of the Biden administration. See https://perma.cc/5M4X-95XV. "Operation PARRIS" is the name of the government initiative to reexamine refugee cases. PARRIS stands for Post-Admission Refugee Reverification and Integrity Strengthening.

The stated goals for re-vetting refugees include eligibility and fraud detention, national security, public safety, and compliance with laws and policies. Critics of re-vetting emphasize that refugees undergo extensive vetting prior to their admission to the United States (see section 10.2). They also argue that re-vetting traumatizes refugees and upends the promise of safety.

10.4 Refugee Numbers

CRS, Global Refugee Resettlement: Background and Selected Issues (2025)

As of June 2025 (latest data available), the United Nations estimated that 122.1 million people were forcibly displaced worldwide due to armed conflict, widespread violence, or human rights violations. Those displaced include refugees, asylum seekers, and Internally Displaced Persons (IDPs). Displaced populations may be separated from their homes for long periods, particularly in instances of large-scale, protracted crises or ongoing armed conflicts where political solutions have proven elusive. According to the United Nations, on average, a person is displaced as a refugee for 20 years. Some refugees are able to return to their country of origin and others integrate with local populations in the country to which they fled; however, for millions of refugees without these options, less than one percent may be eligible for refugee resettlement in another country.˜

Since 2019, an average of 25 countries, including the United States, have taken part in UNHCR's global refugee resettlement program annually. The United States has been a main recipient of UNHCR referrals. [In 2022, UNHCR submitted 116,481 individuals for resettlement, with 80,553 referrals to the United States. In 2024, UNHCR submitted 203,777 individuals for resettlement, with 159,790 referrals to the United States.]

—-—

CRS, U.S. Refugee Admissions Program (2023)

Under the INA, the annual number of refugee admissions and their allocation are set by the President after consultation with Congress.˜ Each year, the President submits a Proposed Refugee Admissions report to Congress containing the Administration's proposed worldwide refugee ceiling and allocations for the upcoming fiscal year.˜ Following congressional consultations on the proposal, the President issues a presidential determination setting the refugee numbers for that year.˜

—-—

The following chart derives from several different federal sources.

Proposed and Actual Refugee Admissions by Regions of Chargeability, FY2020-2026							
Region	FY2020	FY2021	FY2022	FY2023	FY2024	FY2025	FY2026
Africa	-	22,000	40,000	40,000	30-50,000	30-50,000	7,500
East Asia	-	6,000	15,000	15,000	10-20,000	10-20,000	
Europe and Central Asia	-	4,000	10,000	15,000	2-3,000	2-3,000	
Latin America/ Caribbean	-	5,000	15,000	15,000	35-50,000	35-50,000	
Near East/South Asia	-	13,000	35,000	35,000	30-45,000	20-45,000	
Unallocated	-	12,500	10,000	5,000	0	0	
Total ceilings	18,000	62,500	125,000	125,000	125,000	125,000*	7,500
Actual admissions	11,840	11,450	25,520	60,050	100,034	38,102	

On his first day in office, January 20, 2025, President Trump issued an executive order suspending the U.S. Refugee Admissions Program (USRAP) "until such time as the further entry into the United States of refugees aligns with the interests of the United States." See https://perma.cc/E8KY-QNEF. The executive order left open the possibility that the Department of State and Department of Homeland security "may jointly determine to admit aliens to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such aliens as refugees is in the national interest and does not pose a threat to the security or welfare of the United States."

The suspension of the USRAP has not been officially lifted. However, in September 2025, President Trump set a refugee ceiling for FY2026 of 7,500, the lowest ceiling ever placed on refugee admissions. He directed that refugee admissions "shall be primarily allocated among Afrikaners from South Africa ... and other victims of illegal or unjust discrimination in their respective homelands." Between October 2025 and April 2026, the United States admitted 4,499 refugees. Three were from Afghanistan. The other 4,496 were Afrikaners.

10.5 The Asylum Process

CRS, Immigration: U.S. Asylum Policy (2019)

WHAT IS ASYLUM?˜

The Immigration and Nationality Act (INA) of 1952, as amended, provides for the granting of asylum to an alien˜ who applies for such relief in accordance with applicable requirements and is determined to be a refugee.˜ The INA defines a refugee, in general, as a person who is outside his or her country of nationality and is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution based on one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.˜

The INA distinguishes between applicants for refugee status and applicants for asylum by their physical location. Refugee applicants are outside the United States, while applicants for asylum are physically present in the United States or at a land border or port of entry.˜ After one year as a refugee or asylee (a person granted asylum), an individual can apply to become a U.S. lawful permanent resident (LPR).˜

ASYLUM APPLICATION PROCESS

Applications for asylum are either defensive or affirmative. A different set of procedures applies to each type of application.

AFFIRMATIVE ASYLUM

An asylum application is affirmative if an alien who is physically present in the United States (and not in removal proceedings) submits an application for asylum to DHS's USCIS. An alien may file an affirmative asylum application regardless of his or her immigration status, subject to applicable restrictions.˜ [As of July 2025, there is a $100 asylum application fee as well as an additional yearly fee of $100 for pending asylum applications.]

The INA prohibits the granting of asylum until the identity of the asylum applicant has been checked against appropriate records and databases to determine if he or she is inadmissible or deportable, or ineligible for asylum.˜ As part of the affirmative asylum process, applicants are scheduled for fingerprinting appointments. The fingerprints are used to confirm the applicant's identity and perform background and security checks.

Asylum applicants are interviewed by USCIS asylum officers. In scheduling asylum interviews, the USCIS Asylum Division is currently giving priority to applications that have been pending for 21 days or less. According to USCIS, “Giving priority to recent filings allows USCIS to promptly place such individuals into removal proceedings, which reduces the incentive to file for asylum solely to obtain employment authorization.”˜ Under DHS regulations, the asylum interview is to be conducted in “a nonadversarial manner.” The applicant may bring counsel or a representative to the interview, present witnesses, and submit other evidence. After the interview, the applicant or the applicant’s representative can make a statement.˜

An asylum officer’s decision on an application is reviewed by a supervisory asylum officer, who may refer the case for further review.˜ If an asylum officer ultimately determines that an applicant is eligible for asylum, the applicant receives a letter and form documenting the grant of asylum.˜

If the asylum officer determines that an applicant is not eligible for asylum and the applicant has immigrant status, nonimmigrant status, or temporary protected status (TPS),˜ the asylum officer denies the application.˜ If the asylum officer determines that an applicant is not eligible for asylum and the applicant appears to be inadmissible or deportable under the INA, however, DHS regulations direct the officer to refer the case to an immigration judge for adjudication in removal proceedings.˜ In those proceedings, the immigration judge evaluates the asylum claim independently as a *defensive* application for asylum.

DEFENSIVE ASYLUM

An asylum application is defensive when the applicant is in standard removal proceedings in immigration court˜ and requests asylum as a defense against removal.˜

There are different ways that an alien can be placed in standard removal proceedings. An alien who is living in the United States can be charged by DHS with violating immigration law. In such a case, DHS initiates removal proceedings when it serves the alien with a Notice to Appear before an immigration judge.

Another way to be placed in standard removal proceedings relates to the statutory expedited removal [see section 6.7] and credible fear screening provisions˜.

CRS, Credible Fear and Defensive Asylum Processes: Frequently Asked Questions (2024)

Although a person in expedited removal proceedings typically has no right to a hearing or review of the expedited removal order, there is an exception for individuals who express an intent to apply for asylum, a fear of persecution or torture, or a fear of returning to their home country.˜ In these cases, the immigration officer must refer the individual for an interview with an asylum officer˜ to make a credible fear determination.˜

WHAT IS A CREDIBLE FEAR DETERMINATION?

A credible fear determination results from a screening process that evaluates whether a person placed in expedited removal proceedings might qualify for asylum˜. Federal statute defines a "credible fear of persecution" as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."˜

WHAT IS THE PROCESS FOR A CREDIBLE FEAR INTERVIEW?

USCIS asylum officers conduct credible fear interviews.˜ Currently, all credible fear interviews are conducted virtually.˜

The asylum officer is required to explain to the applicant the credible fear interview process, the right to consultation before the interview, the right to request a review of the asylum officer's determination, and the consequences of failing to show a credible fear of persecution˜. The asylum officer must also create a summary of the material facts as stated by the applicant and, at the end of the interview, review the summary with the applicant and provide him or her with an opportunity to correct any errors in it.˜

If an asylum officer finds that an alien has a credible fear of persecution or torture, that individual is typically placed in formal removal proceedings [where an immigration judge will adjudicate the individual's defensive claim to asylum.] ˜

When an asylum officer finds that an alien does not have a credible fear of persecution˜ the alien may request that an immigration judge review that determination.˜ The immigration judge's review "shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the asylum officer's decision.˜ If the alien declines further review, the asylum officer must order the alien removed from the United States without further hearing or review.˜

If the immigration judge concurs with the asylum officer's negative credible fear finding, the applicant is to be removed from the United States and the immigration judge's decision may not be appealed.˜

Conversely, if the immigration judge determines that the alien has a credible fear of persecution˜, the immigration judge must vacate the asylum officer's negative credible fear determination and the alien may be placed in formal removal proceedings.˜ During those proceedings, the alien may pursue asylum˜.

WHAT PERCENTAGE OF PEOPLE PASS THEIR CREDIBLE FEAR INTERVIEWS? ˜

Table 1 shows the percentage of nationwide screenings for the past 10 years with positive findings, meaning that the person established credible fear and could pursue a claim for asylum or other relief in immigration court.˜

Table 1. Percentage of Nationwide Credible Fear Screenings with Positive Outcomes, FY2014-FY2023

Fiscal Year	Percentage of Positive Outcomes
2014	73%
2015	72%
2016	80%
2017	77%
2018	77%
2019	74%
2020	38%
2021	68%
2022	58%
2023	60%

WHAT PERCENTAGE OF INDIVIDUALS WHO PASS A CREDIBLE FEAR SCREENING ARE GRANTED ASYLUM?

EOIR reports the following decision outcomes for completed asylum cases: asylum grants, asylum denials, "other" outcomes (including cases that were abandoned, not adjudicated, or withdrawn), and cases that were administratively closed [(see section 9.6)].˜ Administratively closed cases are temporarily removed from the docket (e.g., while the respondent pursues an application for relief outside immigration court).˜

In recent years, there has been an increase in "other" outcomes. These may reflect, in part, increases in the number of cases dismissed by DHS as a matter of prosecutorial discretion˜ and/or by the immigration judge in instances where DHS failed to file the NTA with the immigration court.˜

Table 3. Asylum Outcomes for Cases Originating with a Credible Fear Claim, FY2014-FY2024(Q3)

FY	Grants	Grant Rate	Denials	Denial Rate	Other	Other Rate	Admin. Closure	Admin Closure Rate	Total Outcomes
2014	1,687	28%	2,621	44%	1,239	21%	400	7%	5,947
2015	1,949	24%	2,726	34%	1,304	16%	2,050	26%	8,029
2016	2,463	21%	3,683	32%	1,700	15%	3,679	32%	11,525
2017	3,969	25%	7,142	46%	2,572	16%	1,916	12%	15,599
2018	5,585	27%	9,885	48%	4,701	23%	339	2%	20,510
2019	8,497	26%	17,436	54%	6,136	19%	17	0%	32,086
2020	5,584	25%	12,473	56%	3,998	18%	141	1%	22,196
2021	2,458	23%	3,734	35%	3,721	35%	619	6%	10,532
2022	6,521	19%	5,268	15%	19,204	55%	3,676	11%	34,669
2023	7,966	18%	6,557	15%	26,433	60%	3,332	8%	44,288
2024 (Q3)	4,468	14%	3,137	10%	21,486	69%	1,832	6%	30,923
Total	**51,147**	**22%**	**74,662**	**32%**	**92,494**	**39%**	**18,001**	**8%**	**236,304**

10.6 Metering

The asylum system does not always function as designed. In 2016, CBP began "metering" asylum claims at the U.S.-Mexico border. This entailed turning back asylum applicants when it was determined that a port of entry did not have the capacity to hear such claims. This was accomplished by CBP officials standing on the U.S. side of the border and preventing noncitizens entering the United States. Rebuffed applicants were not tracked or given any means to bring an asylum claim.

The Ninth Circuit held that CBP's metering amounted to the agency's "wholesale refusal" to carry out its mandatory obligation to inspect asylum seekers and, so, unlawful "withholding of agency action." Al Otro Lado v. EOIR, 138 F.4th 1102 (9th Cir. 2025). The U.S. Supreme Court reversed. Mullin v. Al Otro Lado, 609 U.S. __ (2026).

The Supreme Court held that until a noncitizen "arrives in" the United States, by crossing the border into our country, that noncitizen "is not entitled to inspection, is not an applicant for admission, and cannot apply for asylum[.]" The Court noted that

"Metering does not permanently bar any alien from arriving in the United States and then applying for asylum. It merely delays the date when some may enter."

10.7 Pretermission

The pathways to reaching an immigration judge outlined in section 10.5 do not guarantee that an asylum applicant will receive a full evidentiary hearing. An immigration judge may, on motion of the government, "pretermit" the case, which means the judge may deny the application without an evidentiary hearing. The Acting Director of the EOIR has encouraged pretermission of asylum cases to help IJs efficiently manage their dockets. See https://perma.cc/S5GS-SYKH.

An immigration judge may pretermit a case if the government seeks to remove the applicant to a third country, though not the country from which the noncitizen seeks protection, pursuant to a bilateral Asylum Cooperative Agreement (ACA). See Matter of C-I-G-M- & L-V-S-G-, 129 I. & N. Dec. 291 (BIA 2025). This ground will be discussed further in section 10.36.

An immigration judge may also pretermit a case if the Application for Asylum and for Withholding of Removal (Form I-589) is incomplete. See Matter of C-A-R-R-, 29 I. & N. Dec. 13 (BIA 2025). An I-589 can be deemed incomplete if it lacks a complete response to every question on the form, is unsigned, or is unaccompanied by materials specified in regulations.

Finally, an immigration judge may pretermit a case if there are "no factual issues in dispute" or "if the factual allegations underlying a claim for asylum, ... viewed in the light most favorable to the respondent, do not establish prima facie eligibility for relief or protection." Matter of H-A-A-V-, 29 I. & N. Dec. 233 (BIA 2025).

Keep pretermission in mind as you read the following sections about the various elements of an asylum claim. What evidence would you submit with a client's application to ensure a hearing on the merits?

10.8 Asylum Elements: Persecution

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of **persecution** or a well-founded fear of **persecution** on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2023)

The term "persecution" is not defined by the Immigration and Nationality Act. "Our caselaw characterizes persecution as an extreme concept, marked by the infliction of suffering or harm … in a way regarded as offensive."˜ Minor disadvantages or trivial inconveniences do not rise to the level of persecution.˜

A subjective intent to harm or punish an applicant is not required for a finding of persecution.˜

"The hallmarks of persecutory conduct include, but are not limited to, the violation of bodily integrity and bodily autonomy."˜ Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution.˜ "[S]ome forms of physical violence are so extreme that even attempts to commit them constitute persecution.˜"

"Petitioners often point to threats made against them in support of their claims of past persecution."˜ "[d]eath threats alone can constitute persecution[.]"˜ The court will "generally look at all of the surrounding circumstances to determine whether … threats are actually credible and rise to the level of persecution."˜ Threats of serious harm, particularly when combined with confrontation or other mistreatment, may constitute persecution.˜

Physical harm is not required for a finding of persecution.˜ "Persecution may be emotional or psychological, as well as physical."

"Substantial economic deprivation that constitutes a threat to life or freedom may constitute persecution."˜ However, "mere economic disadvantage alone does not rise to the level of persecution."˜

Persecution generally "does not include mere discrimination, as offensive as it may be."˜ However, discrimination, in combination with other harms, may be sufficient to establish persecution.˜

In Urias-Orellana v. Bondi, 607 U.S. __ (2026), the U.S. Supreme Court unanimously held that judicial review of an immigration judge's decision concerning persecution—both the underlying factual findings and the application of the INA to those findings—should be reviewed under the "substantial evidence" standard. That is, a determination as to whether a given set of undisputed facts rises to the level of persecution will generally be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."

10.9 Asylum Elements: Prosecution as Persecution

Ninth Circuit Immigration Outline (2023)

Ordinary prosecution for criminal activity is generally not persecution.˜ "[W]here there is evidence of legitimate prosecutorial purpose, foreign authorities enjoy much latitude in vigorously enforcing their laws."˜

"Understanding that persecution may appear in the guise of prosecution, [the court has] carved out exceptions to the general rule that applicants avoiding prosecution for violations of criminal law are ineligible for asylum. Chief among these exceptions to the general rule are disproportionately severe punishment and pretextual prosecution."˜

[I]f the prosecution is motivated by a protected ground, and the punishment is sufficiently serious or disproportionate, the sanctions imposed could amount to persecution.˜ Additionally, "even if the government authorities' motivation for detaining and mistreating [an applicant] was partially for reasons of security, persecution in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation, even if the persecution served intelligence gathering purposes."˜

"Criminal prosecution for illegal departure is generally not considered to be persecution."˜ 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.˜

10.10 Asylum Elements: Well-Founded Fear

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a **well-founded fear of persecution** on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

[PAST PERSECUTION CREATES A REBUTTABLE PRESUMPTION]

"If past persecution is established, a rebuttable presumption of a well-founded fear arises, 8 C.F.R. § 1208.13(b)(1), and the burden shifts to the government˜".

Pursuant to 8 C.F.R. § 1208.13(b)(1)(i) & (ii), the government may rebut the presumption of a well-founded fear by showing "by a preponderance of the evidence" that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear."˜ [For example, the government can establish that country conditions have changed so as to remove a well-founded fear of persecution or that the applicant could avoid future persecution by relocating to another part of the applicant's country (see section 10.12).]

The IJ or BIA may grant asylum to a victim of past persecution, even where the government has rebutted the applicant's fear of future persecution, "if the asylum seeker establishes (1) 'compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,' 8 C.F.R. § 1208.13(b)(1)(iii)(A), or (2) 'a reasonable possibility that he or she may suffer other serious harm upon removal to that country,' 8 C.F.R. § 1208.13(b)(1)(iii)(B)."˜

[WELL-FOUNDED FEAR OF PERSECUTION]

Even in the absence of past persecution, an applicant may be eligible for asylum based on a well-founded fear of future persecution. See 8 C.F.R. § 1208.13(b). "Absent evidence of past persecution, [an applicant] must establish a well-founded fear of future persecution by showing both a subjective fear of future persecution, as well as an objectively 'reasonable possibility' of persecution upon return to the country in question."˜ A well-founded fear must be subjectively genuine and objectively reasonable.˜ An applicant can demonstrate a well-founded fear of persecution if: (A) she has a fear of persecution in her country; (B) there is a reasonable possibility of suffering such persecution; and (C) she is unable or unwilling to return to that country because of such fear. See 8 C.F.R. § 1208.13(b)(2)(i). A "'well-founded fear' … can only be given concrete meaning through a process of case-by-case adjudication."˜

The subjective prong of the well-founded fear test is satisfied by an applicant's credible testimony that he or she genuinely fears harm.˜ A fear of persecution need not be the applicant's only reason for leaving his country of origin.˜

The objective prong of the well-founded fear analysis can be satisfied in two different ways: "One way to satisfy the objective component is to prove persecution in the past, giving rise to a rebuttable presumption that a well-founded fear of future persecution exists. The second way is to show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. The objective requirement can be met by either through the production of specific documentary evidence or by credible and persuasive testimony."˜ "A well-founded fear does not require certainty of persecution or even a probability of persecution."˜ "[E]ven a ten percent chance of persecution may establish a well-founded fear."˜

An applicant may demonstrate a well-founded fear by showing that he has been targeted for persecution.˜ Acts of violence against an applicant's family members and friends may establish a well-founded fear of persecution.˜ The violence must "create a pattern of persecution closely tied to the petitioner."˜

An applicant need not show that she will be singled out individually for persecution if: "(A) The applicant establishes that there is a pattern or practice in his or her country … of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable."˜

10.11 Asylum Elements: Source of Persecution

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is **unable or unwilling to avail himself or herself of the protection of, that country** because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2023)

In order to qualify for asylum, the source of the persecution must be the government or persons or groups that the government is unwilling or unable to control.˜ "[P]olice officers are the prototypical state actor for asylum purposes."˜

Affirmative state action is not necessary to establish a well-founded fear of persecution if the government is unable or unwilling to control the agents of persecution.˜ In cases of non-governmental persecution, "we consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors."~

"A government's inability or unwillingness to control violence by private parties can be established in other ways—for example, by demonstrating that a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection."~ "Willingness to control persecutors notwithstanding, authorities may nevertheless be 'powerless to stop' them because of a 'lack of … resources or because of the character or pervasiveness of the persecution.' … Conversely, authorities may simply be unwilling to control persecutors, where, for instance, they themselves harbor animus towards a protected group. … In other words, the question on this step is whether the government both 'could and would provide protection.'"~

"There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it."~

10.12 Asylum Elements: The Relocation Question

Ninth Circuit Immigration Outline (2023)

"The asylum regulation makes asylum unavailable if '[t]he applicant could avoid future persecution by relocating to another part of the applicant's country of nationality … and under all the circumstances, it would be reasonable to expect the applicant to do so.'"~

"When an asylum applicant has established that he suffered past persecution, the burden is on the government to show by a preponderance of the evidence that the applicant either no longer has a well-founded fear of persecution in the country of his nationality, or that he can reasonably relocate internally to an area of safety."~

"Relocation is generally not unreasonable solely because the country at large is subject to generalized violence."~ "Relocation analysis consists of two steps: (1) 'whether an applicant could relocate safely,' and (2) 'whether it would be reasonable to require the applicant to do so.' … For an applicant to be able to safely relocate internally, 'there must be an area of the country where he or she has no well-founded fear of persecution.'"~ "The reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and family ties.”˜ This non-exhaustive list of factors “may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.” 8 C.F.R. § 1208.13(b)(3).˜

Relocating to another part of the country does not mean living in hiding.˜

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.˜ “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.” 8 C.F.R. § 1208.13(b)(3)(ii).˜

10.13 Burden of Proof

Ninth Circuit Immigration Outline (2020)

An applicant bears the burden of establishing that he or she is eligible for asylum. 8 C.F.R. § 208.13(a)˜.

“The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”˜ [See 8 U.S.C. § 1158(b)(1)(B)(ii).]

“[T]he trier of fact [may] require an applicant to provide evidence to corroborate otherwise credible testimony, unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”˜ “If the IJ determines that corroborative evidence is necessary, ‘the IJ must give the applicant notice of the corroboration that is required and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available.’”˜

10.14 The Question of Fraud

Immigration lawyers play a critical role in preparing asylum applicants to present their claims with appropriate evidentiary support. These lawyers operate in a system where President Trump has publicly and formally denounced their work. In a March

2025 presidential memo titled "Preventing Abuses of the Legal System and the Federal Court," President Trump wrote: "The immigration system … is … replete with … unscrupulous behavior by attorneys and law firms. [T]he immigration bar, and powerful Big Law pro bono practices, frequently coach clients to conceal their past or lie about their circumstances when asserting their asylum claims, all in an attempt to circumvent immigration policies enacted to protect our national security and deceive the immigration authorities and courts into granting them undeserved relief. Gathering the necessary information to refute these fraudulent claims imposes an enormous burden on the Federal Government. And this fraud in turn undermines the integrity of our immigration laws and the legal profession more broadly—to say nothing of the undeniable, tragic consequences of the resulting mass illegal immigration, whether in terms of heinous crimes against innocent victims … or the enormous drain on taxpayer resources intended for Americans." See https://perma.cc/APM4-ZGG8.

Evidence suggests that asylum fraud is not "rampant." In a 2014 report on asylum fraud, the U.S. Government Accountability Office noted that between 2010 and 2014, USCIS terminated asylum status for 374 individuals. See https://perma.cc/44TN-NQLR. During that same period, USCIS granted 71,589 asylum claims. See https://perma.cc/M8KW-NFEB. Moreover, an asylum denial is not evidence of asylum fraud. There are myriad reasons why a noncitizen with a legitimate asylum claim may be unable to gain that status (see sections 10.29-10.37).

As you read the cases in this chapter, put yourself in the shoes of the noncitizen's lawyer. How would you prepare your client to present their asylum claim? What evidence would you seek to bolster your client's case?

10.15 Case: Matter of Acosta

Matter of Acosta
19 I. & N. Dec. 211 (BIA 1985)

[T]he immigration judge found the respondent deportable˜ for entering the United States without inspection, denied the respondent's application˜ for a grant of asylum˜, but granted the respondent the privilege of departing voluntarily in lieu of deportation. The respondent has appealed from that portion of the immigration judge's decision denying the application˜ for asylum˜. The appeal will be dismissed.

The respondent is a 36-year-old male native and citizen of El Salvador. In a deportation hearing held before an immigration judge˜, the respondent conceded his deportability for entering the United States without inspection and accordingly was found deportable as charged. The respondent sought relief from deportation by applying for a discretionary grant of asylum pursuant to section 208 of the Act˜. In an oral decision, the immigration judge denied the respondent's applications for˜ relief finding that he had failed to meet his burden of proof˜. It is this finding that the respondent has challenged on appeal.˜

In order to be eligible for a grant of asylum, an alien must show he or she is a "refugee" as defined by section 101(a)(42)(A) of the Act˜. That definition includes the requirement that an alien must have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."˜

THE EVIDENTIARY BURDENS OF PROOF AND PERSUASION˜

Case law and the regulations have always made clear that it is the alien who bears the burden of proving that he would be subject to, or fears, persecution.˜ However, to date our decisions have not articulated the burden of persuasion an alien must meet in order to convince the trier-of-fact of the truth of the allegations that form the basis of the claim for asylum˜.

It is the general rule in both administrative and immigration law that the party charged with the burden of proof must establish the truth of his allegations by a preponderance of the evidence.˜ We see no reason to depart from this burden of persuasion when aliens seek asylum˜. Thus, in such cases we consider it to be incumbent upon an alien to establish the facts supporting his claim by a preponderance of the evidence.˜ In determining whether a preponderance of the evidence supports an alien's allegations, it is necessary to assess the credibility and the probative force of the evidence put forward by the alien.˜

In order to prove the facts underlying his application˜ for asylum˜, the respondent testified, and attested in an affidavit attached to his asylum application, to the following facts. In 1976 he, along with several other taxi drivers, founded COTAXI, a cooperative organization of taxi drivers of about 150 members. COTAXI was designed to enable its members to contribute the money they earned toward the purchase of their taxis. It was one of five taxi cooperatives in the city of San Salvador and one of many taxi cooperatives throughout the country of El Salvador. Between 1978 and 1981, the respondent held three management positions with COTAXI, the duties of which he described in detail, and his last position with the cooperative was that of general manager. He held that position from 1979 through February or March of 1981. During the time he was the general manager of COTAXI, the respondent continued on the weekends to work as a taxi driver.

Starting around 1978, COTAXI and its drivers began receiving phone calls and notes requesting them to participate in work stoppages. The requests were anonymous but the respondent and the other members of COTAXI believed them to be from anti-government guerrillas who had targeted small businesses in the transportation industry for work stoppages, in hopes of damaging El Salvador's economy. COTAXI's board of directors refused to comply with the requests because its members wished to keep working, and as a result COTAXI received threats of retaliation. Over the course of several years, COTAXI was threatened about 15 times. The other taxi cooperatives in the city also received similar threats.

Beginning in about 1979, taxis were seized and burned, or used as barricades, and COTAXI drivers were assaulted or killed. Ultimately, five members of COTAXI were killed in their taxis by unknown persons. Three of the COTAXI drivers who were killed were friends of the respondent and, like him, had been founders and officers of COTAXI. Each was killed after receiving an anonymous note threatening his life. One of these drivers, who died from injuries he sustained when he crashed his cab in order to avoid being shot by his passengers, told his friends before he died that three men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him.

During January and February 1981, the respondent received three anonymous notes threatening his life. The first note, which was slipped through the window of his taxi and was addressed to the manager of COTAXI, stated: "Your turn has come, because you are a traitor." The second note, which was also put on the respondent's car, was directed to "the driver of Taxi No. 95," which was the car owned by the respondent, and warned: "You are on the black list." The third note was placed on the respondent's car in front of his home, was addressed to the manager of COTAXI, and stated: "We are going to execute you as a traitor." In February 1981, the respondent was beaten in his cab by three men who then warned him not to call the police and took his taxi. The respondent is of the opinion that the men who threatened his life and assaulted him were guerrillas who were seeking to disrupt transportation services in the city of San Salvador. He also has the impression, however, that COTAXI was not favored by some government officials because they viewed the cooperative as being too socialistic.

After being assaulted and receiving the three threatening notes, the respondent left El Salvador because he feared for his life. He declared at the hearing that he would not work as a taxi driver if he returned to El Salvador because he understands that there is little work for taxi drivers now. He explained that the people are too poor to call taxis. Additionally, he stated that the terrorists are no longer active.

As evidence of the truth of his version of the facts, the respondent submitted a letter from the present manager of COTAXI, stating that the respondent was a member of that organization for 3 years. The respondent also submitted several articles reporting that leftist guerrillas had threatened to kill American advisors and personnel in El Salvador, had launched an offensive in three of the provinces in the country, and had engaged in a campaign designed to sabotage the transportation industry and the country's economy˜.

The respondent described in specific detail the circumstances surrounding the deaths of his three friends shortly after they received threatening notes, the threats he received, and the facts surrounding his assault. His testimony as to these matters was logically consistent with his testimony about the threats made to COTAXI and its members for failing to participate in guerrilla-sponsored work stoppages. Moreover, the respondent submitted objective evidence to establish his membership in COTAXI and to corroborate his testimony that the guerrillas sought to disrupt the public transportation system of El Salvador. Thus, absent an adverse credibility finding by the immigration judge, we find the respondent's testimony, which was corroborated by other objective evidence in the record, to be worthy of belief. It remains to be determined, however, whether the respondent's facts are sufficient to meet the statutory standard˜ of eligibility for asylum˜.

THE STATUTORY STANDARD FOR ASYLUM

A grant of asylum is a matter of discretion. See section 208 of the Act˜. However, an alien is eligible for a favorable exercise of discretion only if he qualifies as a "refugee" under section 101(a)(42)(A) of the Act. Therefore, that section establishes the statutory standard of eligibility for asylum.˜

This section creates four separate elements that must be satisfied before an alien qualifies as a refugee: (1) the alien must have a "fear" of "persecution"; (2) the fear must be "well-founded"; (3) the persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion"; and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.˜

(1) The alien must have a "fear" of "persecution."˜

Congress did not identify what one must show in order to establish a "fear of persecution."˜

"Fear" is a subjective condition, an emotion characterized by the anticipation or awareness of danger.~ The Office of the United Nations High Commissioner for Refugees (UNHCR) has suggested in the Handbook that the definition of a refugee found in the Protocol requires fear to be a person's primary motivation for seeking refugee status.~ While we do not consider the UNHCR's position in the Handbook to be controlling,~ the Handbook nevertheless is a useful tool to the extent that it provides us with one internationally recognized interpretation of the Protocol.~

[W]e conclude that an alien seeking to qualify under section 101(a)(42)(A) of the Act must demonstrate that his primary motivation for requesting refuge in the United States is "fear," i.e., a genuine apprehension or awareness of danger in another country. No other motivation, such as dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States, satisfies the definition of a refugee created in the Act.~

"[P]ersecution" as used in section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. The word does not embrace harm arising out of civil strife or anarchy. In fact, Congress specifically rejected a definition of a refugee that would have included "displaced persons," i.e., those who flee harm generated by military or civil disturbances.~ This construction is consistent with the international interpretation of "refugee" under the Protocol, for that term does not include persons who are displaced by civil or military strife in their countries of origin.~

In the case before us, we find that the respondent has adequately established that his primary motivation for seeking asylum is fear of persecution. We must now consider whether it has been demonstrated that this fear is well founded and whether the other elements necessary to establish eligibility for asylum have been satisfied.

(2) The fear of persecution must be "well-founded."~

[W]e continue to construe "a well-founded fear of persecution" to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country.

As has always been the case, our construction of the well-founded-fear standard reflects two fundamental concepts. The first is that in order to be "well-founded," an alien's fear of persecution cannot be purely subjective or conjectural—it must have a solid basis in objective facts or events.~ This concept, after all, is consistent with the generally understood meaning of the term "well-founded," which refers to something that has a firm foundation in fact or is based on excellent reasoning, information, judgment, or grounds.˜

The second fundamental concept that is, and always has been, reflected in our construction of “a well-founded fear of persecution” is that in order to warrant the protection afforded by a grant of refuge, an alien must show it is likely he will become the victim of persecution.˜ Since language by its nature is inexact, we have used such words as “likelihood,” or “realistic likelihood,” or even “probability” of persecution to express this concept.˜ By use of such words we do not mean that “a well-founded fear of persecution” requires an alien to establish to a particular degree of certainty, such as a “probability” as opposed to a “possibility,” that he will become a victim of persecution. Rather, as a practical matter, what we mean can best be described as follows: the evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien. The first of these factors is inherent in the showing that the conduct the alien fears amounts to “persecution” under the Act, i.e., the infliction of suffering or harm in order to punish an alien because he differs in a way a persecutor deems offensive and seeks to overcome. The second, third, and fourth factors are all indispensable in showing that there is a real chance an alien will become a victim of persecution, for if the persecutor is not aware or could not easily become aware that an alien possesses the characteristic that is the basis for persecution, or if the persecutor lacks the capability to carry out persecution, or if the persecutor has no inclination to punish the particular alien, then it cannot reasonably be found that the alien is likely to become the persecutor’s victim. The issue of whether an alien’s facts demonstrate these four factors is one that ordinarily must be decided on a case-by-case basis, for the question of what kinds of facts show a likelihood of persecution ultimately depends upon each alien’s own particular situation.˜

No matter how the courts have described the well-founded-fear standard, they have required an alien to come forward with more than his purely subjective fears of persecution; he has been required to show that his fears have a sound basis in personal experience or in other external facts or events.˜ In addition, each of the courts has assessed an alien’s facts to determine whether he is likely to become a victim of persecution and, in so doing, has looked for facts demonstrating some combination of the four factors we have used to describe a likelihood of persecution.˜

In the case before us, the respondent claims he fears persecution at the hands of two groups: the government and the guerrillas. Therefore, under our construction of the well-founded-fear standard, the respondent must show that his fear of persecution by these groups is more than a matter of personal conjecture or speculation; he must show by objective events that his fear has a sound basis in fact and that persecution by the government or by the guerrillas is likely to occur if he is returned to El Salvador. This means that he must demonstrate that (1) he possesses characteristics the government or the guerrillas seek to overcome by means of punishment of some sort; (2) the government or the guerrillas are aware or could easily become aware that he possesses these characteristics; (3) the government or the guerrillas have the capability of punishing him; and (4) the government and the guerrillas have the inclination to punish him.

The respondent's fear of persecution by the government has no basis whatsoever in either his personal experiences or in other external events. To the contrary, by the respondent's own admission, this fear is based solely on his impression that some officials in the government may have viewed COTAXI as being too socialistic. This purely subjective impression is not sufficient to show a well-founded fear of persecution by the government.

In addition, whatever the facts may have been prior to the respondent's departure from El Salvador, those facts have changed significantly since 1981. Most importantly, the respondent admitted that he does not intend to work as a taxi driver upon his return to El Salvador. The respondent's facts do not show that the persecution of taxi drivers continued even after they stopped working as drivers. Furthermore, the respondent testified that the guerrillas' strength has diminished significantly in El Salvador since 1981. For these reasons, the respondent has not shown that at the present time he possesses characteristics the guerrillas seek to overcome or that the guerrillas have the inclination to punish him. Thus, the facts do not demonstrate that there is a likelihood the respondent would be persecuted by the guerrillas should he be returned to El Salvador, and accordingly his fear of persecution upon deportation has not been shown to be "well-founded."˜

(4) The alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.

Traditionally, a refugee has been an individual in whose case the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relation of an oppressor to a victim.˜ Thus, inherent in refugee status is the concept that an individual requires international protection because his country of origin or of habitual residence is no longer safe for him.˜ We consider this concept to be expressed, in part, by the requirement in the Act and the Protocol that a refugee must be unable or unwilling to return to a particular "country." See section 101(a)(42)(A) of the Act. We construe this requirement to mean that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country—he must show that the threat of persecution exists for him country-wide.

In the respondent's case, the facts show that taxi drivers in the city of San Salvador were threatened with persecution by the leftist guerrillas. However, the facts do not show that this threat existed in other cities in El Salvador. It may be the respondent could have avoided persecution by moving to another city in that country.˜ In any event, the respondent's facts did not demonstrate that the guerrillas' persecution of taxi drivers occurred throughout the country of El Salvador. Accordingly, the respondent did not meet this element of the standard for asylum.

In summary, the respondent's facts fail to show that˜ his present fear of persecution by the government and the guerrillas is "well-founded"˜ and˜ he is unable to return to the country of El Salvador, as opposed to a particular place in that country, because of persecution. Thus, he has not met˜ the statutory definition of a refugee created by section 101(a)(42)(A) of the Act. Accordingly, the respondent has not shown he is eligible for a grant of asylum.˜

10.16 Asylum Elements: Nexus or "Because of"

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country **because of** persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion˜."

The "because of" language in INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) is known as the "nexus" requirement. The asylum applicant must establish the "nexus" between persecution and one of the five statutorily protected grounds.

Ninth Circuit Immigration Outline (2023)

[An asylum] applicant [must] establish that "race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). "[A] motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist. Likewise, a motive is a ‘central reason’ if that motive, standing alone, would have led the persecutor to harm the applicant. … [P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant. Nevertheless, to demonstrate that a protected ground was ‘at least one central reason’ for persecution, an applicant must prove that such ground was a cause of the persecutors’ acts.”˜

The persecutor’s motivation may be established by direct or circumstantial evidence.˜ Direct proof of motivation may consist of evidence concerning statements made by the persecutor to the victim, or by victim to persecutor.˜ 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.˜ Circumstantial evidence of motive may also include˜ the timing of the persecution and signs or emblems left at the site of persecution.˜ Statements made by the persecutor may constitute circumstantial evidence of motive.˜

10.17 Asylum Elements: Race

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: “The term “refugee” means˜ any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of **race**, religion, nationality, membership in a particular social group, or political opinion˜.”

Ninth Circuit Immigration Outline (2023)

Claims of race and nationality persecution often overlap.˜ Recent cases use the more precise term “ethnicity,” “which falls somewhere between and within the protected grounds of race and nationality.”˜ Individuals forced to flee ethnic cleansing by hostile military forces are refugees who fear persecution on account of ethnicity.

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019)

[The 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol provide international law regarding refugee status. The UNHCR, which serves as "guardian" of these legal documents, explains "race" with regard to refugee status as follows:] Race˜ has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population.

10.18 Asylum Elements: Religion

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, **religion**, nationality, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2023)

Persecution on the basis of religion may assume various forms, including: "prohibition of membership of a religious community, or worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.˜ UNHCR Handbook˜, para. 72

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

Moreover, "[a]n individual (or group) may be persecuted on the basis of religion, even if the individual or other members of the group adamantly deny that their belief, identity and/or way of life constitute a 'religion.'"˜

An applicant cannot be required to practice his religious beliefs in private in order to escape persecution.˜

—-—

10.19 Asylum Elements: Nationality

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, **nationality**, membership in a particular social group, or political opinion˜."

Ninth Circuit Immigration Outline (2023)

Claims of race and nationality persecution often overlap.˜ Some cases use the more precise term "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality."˜

—-—

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019)

The term "nationality"˜ is not to be understood only as "citizenship". It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.

10.20 Asylum Elements: Political Opinion

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or **political opinion**~."

Ninth Circuit Immigration Outline (2023)

"[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."~ In other words, that an applicant holds a political opinion "is not, by itself, enough to establish that any future persecution would be 'on account' of this opinion. He must establish that the political opinion would motivate his potential persecutors."~

"[P]olitical opinion encompasses more than electoral politics or formal political ideology or action."~ An applicant may manifest his or her political opinion by membership or participation in an organization with political purposes or goals.~ An applicant may manifest a political opinion by his refusal to join or support an organization, or departing from the same.~ A conscious choice not to side with any political faction can be a manifestation of a political opinion,~ [though an] applicant's neutrality must be the result of an affirmative decision to remain neutral, rather than mere apathy.~

[Political opinion also includes an opinion imputed—that is, attributed—to the applicant by their persecutor.] "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.'"~ Under the imputed political opinion doctrine, the applicant's own opinions are irrelevant.~ "[O]ur analysis focuses on how the persecutor perceived the applicant's actions and allegiances, and what motivated their abuse."~ "[D]irect and indirect evidence, taken together, [can compel the conclusion] that the petitioner was subjected to abuse because of 'imputed political opinion.'"~ 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.~ An applicant's status as a government employee alone may establish imputed political opinion.~

[Finally, INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), specifies that "[f]or 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."]

10.21 Case: INS v. Elias-Zacarias

INS v. Elias-Zacarias
502 U.S. 478 (1992)

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

The principal question presented by this case is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes "persecution on account of ... political opinion" under § 101(a)(42) of the Immigration and Nationality Act˜.

I

Respondent Elias–Zacarias, a native of Guatemala, was apprehended in July 1987 for entering the United States without inspection. In deportation proceedings brought by petitioner Immigration and Naturalization Service (INS), Elias–Zacarias conceded his deportability but requested asylum˜.

The Immigration Judge summarized Elias–Zacarias' testimony as follows: "[A]round the end of January in 1987 [when Elias–Zacarias was 18], two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home. Only he and his parents were there.... [T]he guerrillas asked his parents and himself to join with them, but they all refused. The guerrillas asked them why and told them that they would be back, and that they should think it over about joining them. [Elias–Zacarias] did not want to join the guerrillas because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas. [H]e left Guatemala at the end of March [1987] ... because he was afraid that the guerrillas would return."˜

The Immigration Judge understood from this testimony that Elias–Zacarias' request for asylum˜ was "based on this one attempted recruitment by the guerrillas."˜ She concluded that Elias–Zacarias had failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, and was not eligible for asylum.˜

The Board of Immigration Appeals (BIA) summarily dismissed Elias–Zacarias' appeal on procedural grounds. Elias–Zacarias then moved the BIA to reopen his deportation hearing so that he could submit new evidence that, following his departure from Guatemala, the guerrillas had twice returned to his family's home in continued efforts to recruit him. The BIA denied reopening on the ground that even with this new evidence Elias–Zacarias had failed to make a prima facie showing of eligibility for asylum and had failed to show that the results of his deportation hearing would be changed.

The Court of Appeals for the Ninth Circuit, treating the BIA's denial of the motion to reopen as an affirmance on the merits of the Immigration Judge's ruling, reversed.˜ The court ruled that acts of conscription by a nongovernmental group constitute persecution on account of political opinion, and determined that Elias–Zacarias had a "well-founded fear" of such conscription.˜ We granted certiorari.˜

II

The Court of Appeals found reversal warranted. In its view, a guerrilla organization's attempt to conscript a person into its military forces necessarily constitutes "persecution on account of ... political opinion," because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political."˜ The first half of this seems to us untrue, and the second half irrelevant.

Even a person who supports a guerrilla movement might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few. The record in the present case not only failed to show a political motive on Elias–Zacarias' part; it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias–Zacarias' refusal was politically based.

As for the Court of Appeals' conclusion that the guerrillas' "motive in carrying out the kidnapping is political": It apparently meant by this that the guerrillas seek to fill their ranks in order to carry on their war against the government and pursue their political goals.˜ But that does not render the forced recruitment "persecution on account of ... political opinion." In construing statutes, "we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."˜ The ordinary meaning of the phrase "persecution on account of ... political opinion" in § 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized "political" motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias–Zacarias fears persecution on account of political opinion, as § 101(a)(42) requires.

Elias–Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so, since we do not agree with the dissent that only a "narrow, grudging construction of the concept of 'political opinion,'"˜ would distinguish it from such quite different concepts as indifference, indecisiveness, and risk averseness. But we need not decide whether the evidence compels the conclusion that Elias–Zacarias held a political opinion. Even if it does, Elias–Zacarias still has to establish that the record also compels the conclusion that he has a "well-founded fear" that the guerrillas will persecute him because of that political opinion, rather than because of his refusal to fight with them. He has not done so with the degree of clarity necessary to permit reversal of a BIA finding to the contrary; indeed, he has not done so at all.˜

Elias–Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide some evidence of it, direct or circumstantial.˜ That he has not done.

The BIA's determination should therefore have been upheld in all respects, and we reverse the Court of Appeals' judgment to the contrary.

It is so ordered.

JUSTICE STEVENS, WITH WHOM JUSTICE BLACKMUN AND JUSTICE O'CONNOR JOIN, DISSENTING.˜

It is undisputed that respondent has a well-founded fear that he will be harmed, if not killed, if he returns to Guatemala. It is also undisputed that the cause of that harm, if it should occur, is the guerrilla organization's displeasure with his refusal to join them in their armed insurrection against the government. The question of law that the case presents is whether respondent's well-founded fear is a "fear of persecution on account of … political opinion" within the meaning of § 101(a)(42) of the Immigration and Nationality Act.˜

Today the Court holds that respondent's fear of persecution is not "on account of … political opinion" for two reasons. First, he failed to prove that his refusal to join the guerrillas was politically motivated; indeed, he testified that he was at least in part motivated by a fear that government forces would retaliate against him or his family if he joined the guerrillas.˜ Second, he failed to prove that his persecutors' motives were political. In particular, the Court holds that the persecutors' implicit threat to retaliate against respondent "because of his refusal to fight with them,"˜ is not persecution on account of political opinion. I disagree with both parts of the Court's reasoning.

I

A political opinion can be expressed negatively as well as affirmatively. A refusal to support a cause—by staying home on election day, by refusing to take an oath of allegiance, or by refusing to step forward at an induction center—can express a political opinion as effectively as an affirmative statement or affirmative conduct. Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect.

As the Court of Appeals explained in Bolanos-Hernandez v. INS, 767 F.2d 1277 (CA9 1985): "Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction. Just as a nation's decision to remain neutral is a political one˜, so is an individual's. When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one. A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980—to provide protection to all victims of persecution regardless of ideology. Moreover, construing 'political opinion' in so short-sighted and grudging a manner could result in limiting the benefits under the ameliorative provisions of our immigration laws to those who join one political extreme or another; moderates who choose to sit out a battle would not qualify."˜

The narrow, grudging construction of the concept of "political opinion" that the Court adopts today is inconsistent with the basic approach to this statute that the Court endorsed in [prior case law].˜

In my opinion, the record in this case is more than adequate to support the conclusion that this respondent's refusal was a form of expressive conduct that constituted the statement of a "political opinion" within the meaning of § 208(a).˜

II

It follows as night follows day that the guerrillas' implied threat to "take" him or to "kill" him if he did not change his position constituted threatened persecution "on account of" that political opinion. As the Court of Appeals explained in Bolanos–Hernandez: "It does not matter to the persecutors what the individual's motivation is. The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion."˜

It is important to emphasize that the statute does not require that an applicant for asylum prove exactly why his persecutors would act against him; it only requires him to show that he has a "well-founded fear of persecution on account of ... political opinion."˜ Because respondent expressed a political opinion by refusing to join the guerrillas, and they responded by threatening to "take" or to "kill" him if he did not change his mind, his fear that the guerrillas will persecute him on account of his political opinion is well founded.˜

Accordingly, I would affirm the judgment of the Court of Appeals.

10.22 Asylum Elements: Membership in a Particular Social Group

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), provides: "The term "refugee" means˜ any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, **membership in a particular social group**, or political opinion˜."

Ninth Circuit Immigration Outline (2023)

The "phrase 'particular social group' [(PSG)] is ambiguous."˜ The Board has interpreted the phrase "particular social group" to refer to a group that is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."˜ Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).˜

"The common immutable characteristic has been defined [by the BIA] as one 'that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.'"˜

"The particularity element requires characteristics that 'provide a clear benchmark for determining who falls within the group,' wherein the relevant society must have a 'commonly accepted definition[ ]' of the group."˜

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

"To make the social-distinction determination, the agency must perform an 'evidence-based' inquiry into 'whether the relevant society recognizes [the petitioner's] proposed social group.'~ 'Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as 'distinct' or 'other' in a particular society.'~ Because the inquiry is based on country-specific evidence, the inquiry is necessarily conducted case-by-case, country-by-country, and, in some cases, region-by-region."~

"Social distinction requires 'those with a common immutable characteristic [to be] set apart, or distinct, from other persons within the society in some significant way.'~ Specifically, social distinction requires 'evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.'~ '[T]he social group must exist independently of the fact of persecution' because 'the persecutors' perception is not itself enough to make a group socially distinct.'"~

Clan membership may constitute membership in a particular social group.~ Sexual orientation and sexual identity can be the basis for establishing a particular social group.~ An applicant's status based on her former occupations, associations, or shared experiences, may be the basis for social group claim.~

—-—

10.23 Case: Matter of Acosta, Revisited

Matter of Acosta
19 I. & N. Dec. 211 (BIA 1985)

(3) The persecution feared must be 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'

The respondent has argued that the persecution he fears at the hands of the guerrillas is on account of his membership in a particular social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador and is also on account of his political opinion.

The requirement of persecution on account of 'membership in a particular social group' comes directly from the Protocol and the U.N. Convention.˜ Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol.˜

We find the well-established doctrine of ejusdem generis, meaning literally, 'of the same kind,' to be most helpful in construing the phrase 'membership in a particular social group.' That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.˜ The other grounds of persecution in the Act and the Protocol listed in association with 'membership in a particular social group' are persecution on account of 'race,' 'religion,' 'nationality,' and 'political opinion.' Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.˜ Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Applying the doctrine of ejusdem generis, we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

In the respondent's case, the facts demonstrate that the guerrillas sought to harm the members of COTAXI, along with members of other taxi cooperatives in the city of

San Salvador, because they refused to participate in work stoppages in that city. The characteristics defining the group of which the respondent was a member and subjecting that group to punishment were being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.˜ Therefore, because the respondent's membership in the group of taxi drivers was something he had the power to change, so that he was able by his own actions to avoid the persecution of the guerrillas, he has not shown that the conduct he feared was 'persecution on account of membership in a particular social group' within our construction of the Act.˜

10.24 Case: Matter of Toboso-Alfonso

Matter of Toboso-Alfonso
20 I. & N. Dec. 819 (BIA 1990)˜

The applicant is a 40-year-old native and citizen of Cuba who was paroled into the United States in June of 1980, as part of the Mariel boat lift. In 1985 his parole was terminated. He was placed in exclusion proceedings and appeared before an immigration judge in Houston, Texas. The applicant conceded his excludability and applied for asylum˜.

The immigration judge ultimately concluded that the applicant was statutorily eligible for asylum˜ as a member of a particular social group who fears persecution by the Cuban Government.˜

The Service contends that the applicant did not meet his burden of proof, that the evidence presented was inadequate to prove the existence of a particular social group˜.˜

In the instant case, the applicant asserts that he is a homosexual who has been persecuted in Cuba and would be persecuted again on account of that status should he return to his homeland. He submits that homosexuals form a particular social group in Cuba and suffer persecution by the government as a result of that status.

The applicant testified that there is a municipal office within the Cuban Government which registers and maintains files on all homosexuals. He stated that his file was opened in 1967, and every 2 or 3 months for 13 years he received a notice to appear for a hearing. The notice, the applicant explained, was a sheet of paper, "it says Fidel Armando Toboso, homosexual and the date I have to appear." Each hearing consisted of a physical examination followed by questions concerning the applicant's sex life and sexual partners. While he indicated the "examination" was "primarily a health examination," he stated that on many occasions he would be detained in the police station for 3 or 4 days without being charged, and for no apparent reason. He testified that it was a criminal offense in Cuba simply to be a homosexual. The government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual. He further testified that on one occasion when he had missed work, he was sent to a forced labor camp for 60 days as punishment because he was a homosexual (i.e., had he not been a homosexual he would not have been so punished).

The applicant stated that at the time of the Mariel boat lift, the Union of Communist Youth received permission to hold a demonstration against homosexuals at the factory where he worked. Several of the members got on top of a table and screamed that all homosexuals should leave-should go to the United States. He testified that on that same day there was a sheet of paper tacked to the door of his home which stated that he should report to "the public order." The applicant presented himself at the police station in the town of "Guines" where he was informed by the chief of police that he could spend 4 years in the penitentiary for being a homosexual, or leave Cuba for the United States. He was given a week to decide and decided to leave rather than be jailed.

The applicant further testified that the day he left his town, the neighbors threw eggs and tomatoes at him. He claims that the situation was so grave that the authorities were forced to reschedule his departure time from the afternoon to 2:00 a.m., in order to quell the protesting residents.

In addition to the applicant's testimony, he supplemented the record with the following information: several articles describing "Improper Conduct," a film which centers on the testimony of 28 Cuban refugees and recounts the human rights violations, including incarceration in forced labor camps known as "Military Units to Aid Production," suffered by Cubans whom the Government considers to be dissidents or "antisocial," particularly male homosexuals; a newspaper article entitled, "Gay Cubans Survive Torture and Imprisonment," in which Cuban homosexuals in the United States, most of whom were part of the Mariel boat lift, describe their treatment by the Cuban Government, including repeated detentions, incarcerations, and physical beatings; and, Amnesty International's Report for 1985 which describes the political situation in Cuba.

The immigration judge found the "applicant's testimony to be credible and worthy of belief, and, if anything, perceive[d] that he was restrained in his testimony as to the difficulty of his life during the years that he lived in Cuba." The immigration judge further concluded that the applicant had been persecuted in Cuba and that he has a well-founded fear of continued persecution in that country. He found that this persecution resulted from the applicant's membership in a particular social group, namely homosexuals.˜

The Immigration and Naturalization Service˜ argues that "socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act" and that such a conclusion "would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well." The applicant's testimony and evidence, however, do not reflect that it was specific activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual. Further, the immigration judge's initial finding that a particular social group existed in Cuba was not "tantamount to awarding discretionary relief" to that group. Individuals in a particular social group are not eligible for relief based on that fact alone, among other showings they must establish facts demonstrating that members of the group are persecuted, have a well-founded fear of persecution, or that their life or freedom would be threatened because of that status.

We principally note regarding this issue, however, that the Service has not challenged the immigration judge's finding that homosexuality is an "immutable" characteristic. Nor is there any evidence or argument that, once registered by the Cuban government as a homosexual, that that characterization is subject to change. This being the case, we do not find the Service's challenge to the immigration judge's finding that this applicant was a member of a particular social group in Cuba adequately supported by the arguments set forth on appeal.˜

10.25 Case: Matter of M-E-V-G-

Matter of M-E-V-G-
26 I. & N. Dec. 227 (BIA 2014)

This case is before us on remand from the United States Court of Appeals for the Third Circuit for further consideration of the respondent's application˜ for asylum˜. [W]e˜ clarify our interpretation of the phrase "particular social group."˜ We adhere to our prior interpretations of the phrase but emphasize that literal or "ocular" visibility is not required, and we rename the "social visibility" element as "social distinction."˜

I. FACTUAL AND PROCEDURAL HISTORY~

[T]he respondent claims that he suffered past persecution and has a well-founded fear of future persecution in his native Honduras because members of the Mara Salvatrucha gang beat him, kidnaped and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang. In addition, the respondent testified that the gang members would shoot at him and throw rocks and spears at him about two to three times per week. The respondent asserts that he was persecuted "on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."~

II. ISSUE

The question before us is whether the respondent qualifies as a "refugee" as a result of his past mistreatment, and his fear of future persecution, at the hands of gangs in Honduras. Specifically, we address whether the respondent has established an asylum claim based on his membership in a particular social group.

III. PARTICULAR SOCIAL GROUP

A. Origins~

The phrase "membership in a particular social group," which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define.~

Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board.~ The Board's reasonable construction of an ambiguous term in the Act, such as "membership in a particular social group," is entitled to deference.~

We first interpreted the phrase "membership in a particular social group" in Matter of Acosta. We found the doctrine of "ejusdem generis" helpful in defining the phrase, which we held should be interpreted on the same order as the other grounds of persecution in the Act.~ The phrase "persecution on account of membership in a particular social group" was interpreted to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."~ The common characteristic that defines the group must be one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."~

B. Evolution of the Board's Analysis of Social Group Claims˜

Now, close to three decades after Acosta, claims based on social group membership are numerous and varied. The generality permitted by the Acosta standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes.˜ [W]e cautioned that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."˜

To provide clarification and address the evolving nature of the claims presented by asylum applicants, we refined the particular social group interpretation first discussed in Matter of Acosta to provide the additional analysis required once an applicant demonstrated membership based on a common immutable characteristic.

In a series of cases, we applied the concepts of "social visibility" and "particularity" as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements.˜ Although we expanded the particular social group analysis beyond the Acosta test, the common immutable characteristic requirement set forth there has been, and continues to be, an essential component of the analysis.˜

We˜ determined that a "particular social group" cannot be defined exclusively by the claimed persecution, that it must be "recognizable" as a discrete group by others in the society, and that it must have well-defined boundaries.˜

[W]e held that—in addition to the common immutable characteristic requirement set forth in Acosta—the previously introduced concepts of "particularity" and "social visibility" were distinct requirements for the "membership in a particular social group" ground of persecution.˜ [W]e stated that we were seeking to provide "greater specificity to the definition of a social group" outlined in Acosta by requiring an applicant to establish "particularity" and "social visibility," consistent with our prior decisions.˜

IV. ANALYSIS

We take this opportunity to clarify our interpretation of the phrase "membership in a particular social group."˜ In this regard, we clarify that the "social visibility" test was never intended to, and does not require, literal or "ocular" visibility.

A. Protection Within the Refugee Context

The interpretation of the phrase "membership in a particular social group" does not occur in a contextual vacuum.˜

The Act and the Protocol do not extend protection to all individuals who are victims of persecution. They identify "refugees" as only those who face persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." Section 101(a)(42) of the Act˜.

The limited nature of the protection offered by refugee law is highlighted by the fact that it does not cover those fleeing from natural or economic disaster, civil strife, or war.˜ Similarly, asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions.˜

Societies use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion. The distinctions may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible. Some distinctions are based on beliefs and characteristics that are largely internal, such as religious or political beliefs. Individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual. The members of these factions generally understand their own affiliation with the grouping, and other people in the particular society understand that such a distinct group exists.

Therefore these enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or "ocular" visibility. Considering the refugee context in which they arise, we find that the enumerated grounds all describe persecution aimed at an immutable characteristic that separates various factions within a particular society.

B. Particular Social Group˜

The primary source of disagreement with, or confusion about, our prior interpretation of the term "particular social group" relates to the social visibility requirement.˜ Contrary to our intent, the term "social visibility" has led some to believe that literal, that is, "ocular" or "on-sight," visibility is required to make a particular social group cognizable under the Act.˜ Because of that misconception, we now rename the "social visibility" requirement as "social distinction."˜ This new name more accurately describes the function of the requirement.

Thus, we clarify that an applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is

(1) composed of members who share a common immutable characteristic,

(2) defined with particularity, and

(3) socially distinct within the society in question.

1. Overview of Criteria˜

Our interpretation of the phrase “membership in a particular social group” incorporates the common immutable characteristic standard set forth in Matter of Acosta˜ because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members’ identities or consciences. Our interpretation also encompasses the underlying rationale of both the “particularity” and “social distinction” tests.

The “particularity” requirement relates to the group’s boundaries or, as earlier court decisions described it, the need to put “outer limits” on the definition of a “particular social group.”˜ The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the “social distinction” requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society. Although members of a particular social group will generally understand their own affiliation with the group, such self-awareness is not a requirement for the group’s existence. See, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1089 (“[F]or example, an infant may not be aware of race, sex, or religion.”). Nevertheless, as a practical matter, this point is of little import because the applicants in removal proceedings are generally professing their membership in these groups in the process of seeking asylum.

Literal or “ocular” visibility is not, and never has been, a prerequisite for a viable particular social group.˜ An immutable characteristic may be visible to the naked eye, and it is possible that a particular social group could be set apart within a given society based on such visible characteristics. However, our use of the term "social visibility" was not intended to limit relief solely to those with outwardly observable characteristics. Such a literal interpretation would be inconsistent with the principles of refugee protection underlying the Act and the Protocol.

In fact, we have recognized particular social groups that are clearly not ocularly visible. See, e.g., Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996) (determining that young tribal women who are opposed to female genital mutilation ("FGM") constitute a particular social group); Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) (holding that homosexuals in Cuba were shown to be a particular social group); Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988) (holding that former national police members could be a particular social group in certain circumstances). Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question. See Matter of E-A-G-, 24 I&N Dec. at 594 (describing social visibility as "the extent to which members of a society perceive those with the characteristic in question as members of a social group").

2. "Particularity"

While we addressed the immutability requirement in Acosta, the term "particularity" is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined. However, there is a critical difference between a political opinion or religious belief, which may in theory be entirely personal and idiosyncratic, and membership in a particular social group, which requires that others in the society share the characteristics that define the group.

A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. Matter of A-M-E- & J-G-U-, 24 I&N Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. Id. (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective. The particularity requirement clarifies the point, at least implicit in earlier case law, that not every "immutable characteristic" is sufficiently precise to define a particular social group. See, e.g., Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005) (finding the characteristics of poverty, homelessness, and youth to be "too vague and all encompassing" to set perimeters for a protected group within the scope of the Act).

3. "Social Distinction"

Our definition of "social visibility" has emphasized the importance of "perception" or "recognition" in the concept of "particular social group." See Matter of H-, 21 I&N Dec. 337, 342 (BIA 1996) (stating that in Somali society, clan membership is a "highly recognizable" characteristic that is "inextricably linked to family ties"). The term was never meant to be read literally. The renamed requirement "social distinction" clarifies that social visibility does not mean "ocular" visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious or political belief must be "ocularly" visible to others in society. See, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1087-89. Social distinction refers to social recognition, taking as its basis the plain language of the Act—in this case, the word "social." To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society.˜ Society can consider persons to comprise a group without being able to identify the group's members on sight.

The examples in Matter of Kasinga, Matter of Toboso-Alfonso, and Matter of Fuentes, illustrate this point. It may not be easy or possible to identify who is opposed to FGM, who is homosexual, or who is a former member of the national police. These immutable characteristics are certainly not ocularly visible. Nonetheless, a society could still perceive young women who oppose the practice of FGM, homosexuals, or former members of the national police to comprise a particular social group for a host of reasons, such as sociopolitical or cultural conditions in the country. For this reason, the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive the group of its protected status as a particular social group.˜

The "social distinction" and "particularity" requirements each emphasize a different aspect of a particular social group. They overlap because the overall definition is applied in the fact-specific context of an applicant's claim for relief. While "particularity" chiefly addresses the "outer limits" of a group's boundaries and is definitional in nature,˜ this question necessarily occurs in the context of the society in which the claim for asylum arises, see Matter of S-E-G-, 24 I&N Dec. at 584 (inquiring whether the group can be described in sufficiently distinct terms that it "would be recognized, in the society in question, as a discrete class of persons"). Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently "particular." Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the "social distinction" test.

For example, in an underdeveloped, oligarchical society, "landowners" may be a sufficiently discrete class to meet the criterion of particularity, and the society may view landowners as a discrete group, sufficient to meet the social distinction test. However, such a group would likely be far too amorphous to meet the particularity requirement in Canada, and Canadian society may not view landowners as sufficiently distinct from the rest of society to satisfy the social distinction test. In analyzing whether either of these hypothetical claims would establish a particular social group under the Act, an Immigration Judge should make findings whether "landowners" share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers "landowners" as a significantly distinct group within the society. Thus, the concepts may overlap in application, but each serves a separate purpose.

4. Society's Perception˜

Interpreting "membership in a particular social group" consistently with the other statutory grounds within the context of refugee protection, we clarify that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.˜

[D]efining a particular social group from the perspective of the persecutor is in conflict with our prior holding that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm."˜ The perception of the applicant's persecutors may be relevant, because it can be indicative of whether society views the group as distinct. However, the persecutors' perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group.˜

C. Evidentiary Burdens˜

In all asylum and withholding of removal cases, including those involving the other grounds of persecution, an applicant is required to establish the existence of the underlying basis for the alleged persecution.˜

[T]he applicant has the burden to establish a claim based on membership in a particular social group and will be required to present evidence that the proposed group exists in the society in question. The evidence available in any given case will certainly vary. However, a successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart within the society in some significant way.

Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as "distinct" or "other" in a particular society. Thus, when the requirements for "membership in a particular social group" are consistent with the other grounds of persecution, the overall burdens are equivalent to those placed on applicants asserting claims based on the other grounds.˜

V. APPLICATION TO THE RESPONDENT˜

The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum.˜ Congress may choose to provide relief to those suffering from difficult situations not covered by asylum and withholding of removal.˜

Nevertheless, we emphasize that our holding˜ should not be read as a blanket rejection of all factual scenarios involving gangs.˜ Social group determinations are made on a case-by-case basis.˜ For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground.˜

VI. CONCLUSION

We interpret the "particular social group" ground of persecution in a manner consistent with the other enumerated grounds of persecution in the Act and clarify that our interpretation of the phrase "membership in a particular social group" requires an applicant for asylum or withholding of removal to establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. Not every "immutable characteristic" is sufficiently precise to define a particular social group. The additional requirements of "particularity" and "social distinction" are necessary to ensure that the proposed social group is perceived as a distinct and discrete group by society. We further clarify that a particular social group does not require literal or "ocular" visibility.˜

The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion˜.

In M-E-V-G-, one of the "socially distinct" groups mentioned is "a former member of the national police." In Matter of O-A-R-G-, 29 I. & N. Dec. 30 (BIA 2025), the BIA considered the proffered PSG of "former police officers of Colombia." The BIA wrote: "Where a particular social group is defined by 'former' status, Immigration Judges must ensure the persecutor's conduct was based on a desire to overcome or animus toward the respondent's membership in a group defined specifically by that former status, not retribution for conduct the respondent engaged in while a current member of the group."

10.26 The Problem of Gender

Ninth Circuit Immigration Outline (2023)

"Gender" is not listed as a protected ground in the refugee definition. However, [courts]˜ have begun to address the circumstances under which gender is relevant to a statutorily protected ground, including gender as a particular social group and gender-related harm.˜

Gender-based characteristics may define particular social groups.˜

Gender-specific harm may take many forms, including sexual violence, domestic or family violence, female genital mutilation or cutting, persecution of gays and lesbians, coerced family planning, and repressive social norms.˜

10.27 Case: Fatin v. INS

Fatin v. INS
12 F.3d 1233 (3d Cir. 1993)

ALITO, CIRCUIT JUDGE:

Parastoo Fatin has petitioned for review of an order of the Board of Immigration Appeals (the "Board" or "BIA") requiring her to depart or be deported from the United

States. Arguing that she has a well-founded fear of persecution and that she is likely to be persecuted if she returns to her native country of Iran, the petitioner contends that the Board erred in holding that she is not entitled to asylum˜. Based on the administrative record before us, however, we are constrained to deny the petition for review.

I.

The petitioner is a native and citizen of Iran. On December 31, 1978, approximately two weeks before the Shah left Iran, the petitioner entered the United States as a nonimmigrant student. She was then 18 years old. She attended high school in Philadelphia through May 1979, and the following September she enrolled in Spring Garden College, also in Philadelphia.˜

The INS˜ commenced a deportation proceeding against her in February 1986. In its order to show cause and notice of hearing, the INS alleged that she had stopped attending college and was therefore deportable˜ since she was not in compliance with the conditions of her admission as a nonimmigrant. At a hearing in May of that year, she conceded deportability, but she [applied] for asylum˜.˜

At a˜ hearing in May 1987, [w]hen her attorney asked her why she feared going back to Iran, she responded: "Because of the government that is ruling the country. It is a strange government to me. It has different rules and regulation[s] th[a]n I have been used to."˜ She stated that "anybody who [had] been a Moslem" was required "to practice that religion" or "be punished in public or be jailed," and she added that she had been "raised in a way that you don't have to practice if you don't want to."˜ She subsequently stated that she would be required "to do things that [she] never had to do," such as wear a veil.˜ When asked by her attorney whether she would wear a veil, she replied:

A. I would have to, sir.

Q. And if you didn't?

A. I would be jailed or punished in public. Public mean by whipped or thrown stones and I would be going back to barbaric years.˜

Later, when the immigration judge asked her whether she would wear a veil or submit to arrest and punishment, she stated: "If I go back, I would try personally to avoid it as much as I could do.... I will start trying to avoid it as much as I could."˜

The petitioner also testified that she considered herself a "feminist" and explained: "As a feminist I mean that I believe in equal rights for women. I believe a woman as a human being can do and should be able to do what they want to do. And over there in

… Iran at the time being a woman is a second class citizen, doesn't have any right to herself…."˜

After the hearing, the immigration judge denied the petitioner's application˜ for asylum˜.˜ [T]he immigration judge stated that, although she would be subject to the same discriminatory treatment as all other women in Iran, there was "no indication that there is a likelihood that the Iranian government would be particularly interested in this individual and that they would persecute her."˜ Similarly,˜ the judge stated: "Respondent has offered no objective indic[i]a which would lead the Court to believe that there is a possibility that she would be persecuted upon return to Iran.˜ It would appear that her fear of return to Iran while indeed understandable is based upon uncertainty and the unknown. In addition, it would appear that the respondent's fear upon return to Iran is her apparent dislike for the system and her belief that she as a woman would be subject to the severe restrictions presently imparted on Iranian[s] in that country. Respondent therefore contends that her beliefs as a "feminist" would be compromised. While the Court is very much sympathetic to the respondent's desire not to return to Iran, nonetheless, in applying the law to include case law, the Court is compelled to find that the respondent has failed to sustain her burden of proof necessary to be accorded asylum in the United States."˜

Petitioner then appealed to the Board of Immigration Appeals. In her brief, she argued that she feared persecution "on account of her membership of a particular social group˜."˜ Her brief identified her "particular social group" as "the social group of the upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals."˜ Her brief also stated that she had a "deep[ly] rooted belief in feminism" and in "equal rights for women, and the right to free choice of any expression and development of abilities, in the fields of education, work, home and family, and all other arenas of development."˜ In addition, her brief observed that she would be forced upon return to Iran "to practice the Moslem religion."˜ Her brief stated that "she would try to avoid practicing a religion as much as she could."˜ Her brief added that she had "the personal desire to avoid as much practice as she could," but that she feared that "through religious ignorance and inexperience she would be unable to play the role of a religious Shi'ite woman."˜ Her brief contained one passage concerning the requirement that women in Iran wear a veil in public: "In April 1983, the government adopted a law imposing one year's imprisonment on any women caught in public without the traditional Islamic veil, the Chador. However, from reports, it is clear that in many instances the revolutionary guards … take the law into their own hands and abuse the transgressing women…."˜

Her brief did not discuss the question whether she would comply with the law regarding the wearing of a chador. Nor did her brief explain what effect submitting to that requirement would have upon her.˜

The Board of Immigration Appeals dismissed the petitioner's appeal. The Board noted that she had argued that she was entitled to relief "as a member of the social group composed of upper-class Iranian women" and as a person who "was educated in the western tradition."˜ Rejecting this argument, the Board stated that there was no evidence that she would be "singled out" for persecution.˜ Instead, the Board observed that she would be "subject to the same restrictions and requirements" as the rest of the population.˜

II.˜

The petitioner in this case contends that she is˜ eligible for asylum based on her "membership in a particular social group"˜.˜

Both courts˜ and commentators˜ have struggled to define "particular social group." Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a "particular social group." Thus, the statutory language standing alone is not very instructive.

Nor is there any clear evidence of legislative intent. The phrase "particular social group" was first placed in the INA when Congress enacted the Refugee Act of 1980.˜ While the legislative history of this act does not reveal what, if any, specific meaning the members of Congress attached to the phrase "particular social group," the legislative history does make clear that Congress intended "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968."˜ It is therefore appropriate to consider what the phrase "particular social group" was understood to mean under the Protocol.˜

When the Conference of Plenipotentiaries was considering the Convention in 1951, the phrase "membership of a particular social group" was added to this definition as an "afterthought."˜ The Swedish representative proposed this language, explaining only that it was needed because "experience had shown that certain refugees had been persecuted because they belonged to particular social groups," and the proposal was adopted.˜ Thus, neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase "particular social group."

Our role in the process of interpreting this phrase, however, is quite limited. As the Supreme Court has explained, the Board of Immigration Appeals' interpretation of a provision of the Refugee Act is entitled to deference˜.

Here, the Board has˜ reasoned that a particular social group refers to "a group of persons all of whom share a common, immutable characteristic."˜

We have no doubt that this is a permissible construction of the relevant statutes, and we are consequently bound to accept it.˜

With this understanding of the phrase "particular social group" in mind, we turn to the elements that an alien must establish in order to qualify for withholding of deportation or asylum based on membership in such a group. We believe that there are three such elements. The alien must (1) identify a group that constitutes a "particular social group" within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.

In the excerpt from Acosta quoted above, the Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted. She has not, however, satisfied the third element; that is, she has not shown that she would suffer or that she has a well-founded fear of suffering "persecution" based solely on her gender.˜

The petitioner's primary argument, in any event, is not that she faces persecution simply because she is a woman. Rather, she maintains that she faces persecution because she is a member of "a very visible and specific subgroup: Iranian women who refuse to conform to the government's gender-specific laws and social norms."˜ This definition merits close consideration. It does not include all Iranian women who hold feminist views. Nor does it include all Iranian women who find the Iranian government's "gender-specific laws and repressive social norms" objectionable or offensive. Instead, it is limited to those Iranian women who find those laws so abhorrent that they "refuse to conform"-even though, according to the petitioner's brief, "the routine penalty" for noncompliance is "74 lashes, a year's imprisonment, and in many cases brutal rapes and death."˜

Limited in this way, the "particular social group" identified by the petitioner may well satisfy the BIA's definition of that concept, for if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as "so fundamental to [her] identity or conscience that [they] ought not be required to be changed. “˜ The petitioner’s difficulty, however, is that the administrative record does not establish that she is a member of this tightly defined group, for there is no evidence in that record showing that her opposition to the Iranian laws at issue is of the depth and importance required.

The Iranian restriction discussed most prominently in the petitioner’s testimony was the requirement that women wear the chador or traditional veil, but the most that the petitioner’s testimony showed was that she would find that requirement objectionable and would seek to avoid compliance if possible. When asked whether she would prefer to comply with that law or suffer the consequences of noncompliance, she stated only that she “would try to avoid” wearing a chador as much as she could. Similarly, her brief to the BIA stated only that she would seek to avoid Islamic practices “as much as she could.” She never testified that she would refuse to comply with the law regarding the chador or any of the other gender-specific laws or social norms. Nor did she testify that wearing the chador or complying with any of the other restrictions was so deeply abhorrent to her that it would be tantamount to persecution. Instead, the most that emerges from her testimony is that she would find these requirements objectionable and would not observe them if she could avoid doing so. This testimony does not bring her within the particular social group that she has defined-Iranian women who refuse to conform with those requirements even if the consequences may be severe.

The “particular social group” that her testimony places her within is, instead, the presumably larger group consisting of Iranian women who find their country’s gender-specific laws offensive and do not wish to comply with them. But if the petitioner’s “particular social group” is defined in this way, she cannot prevail because the administrative record does not satisfy the third element described above, i.e., it does not show that the consequences that would befall her as a member of that group would constitute “persecution.” According to the petitioner, she would have two options if she returned to Iran: comply with the Iranian laws or suffer severe consequences. Thus, while we agree with the petitioner that the indicated consequences of noncompliance would constitute persecution, we must still inquire whether her other option-compliance-would also constitute persecution.

In considering whether the petitioner established that this option would constitute persecution, we will assume for the sake of argument that the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs. An example of such conduct might be requiring a person to renounce his or her religious beliefs or to desecrate an object of religious importance. Such conduct might be regarded as a form of "torture" and thus as falling within the Board's description of persecution in Acosta.˜ Such a requirement could constitute "torture" or persecution, however, only if directed against a person who actually possessed the religious beliefs or attached religious importance to the object in question. Requiring an adherent of an entirely different religion or a non-believer to engage in the same conduct would not constitute persecution.˜

Here, while we assume for the sake of argument that requiring some women to wear chadors may be so abhorrent to them that it would be tantamount to persecution, this requirement clearly does not constitute persecution for all women. Presumably, there are devout Shiíte women in Iran who find this requirement entirely appropriate. Presumably, there are other women in Iran who find it either inconvenient, irritating, mildly objectionable, or highly offensive, but for whom it falls short of constituting persecution. As we have previously noted, the petitioner's testimony in this case simply does not show that for her the requirement of wearing the chador or complying with Iran's other gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution. Accordingly, we cannot hold that she is entitled to withholding of deportation or asylum based on her membership in a "particular social group."

10.28 Case: Matter of A-B-

The following case, Matter of A-B-, concerns the availability of asylum protection for those fleeing domestic violence. The history of the case—both before and after its publication—reveals intense political debate about whether intimate violence should be the basis for asylum relief.

In 2014, not long after Matter of M-E-V-G- (see section 10.21), the BIA granted asylum to a woman who had been the victim of domestic violence; her PSG was "married women in Guatemala who are unable to leave their relationship." Matter of A-R-C-G-, 26 I. & N. Dec. 388 (BIA 2014). In 2018, Attorney General Jeff Sessions, serving under President Donald Trump, vacated the A-R-C-G- decision. Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018). In 2021, Attorney General Merrick Garland, serving under President Joe Biden, vacated A-B- and reinstated A-R-C-G-. Matter of A-B-, 28 I. & N. Dec. 307 (A.G. 2021). In 2025, Attorney General Pam Bondi, serving under President Donald Trump, reinstated Matter of A-B-. Matter of S-S-F-M-, 29 I. & N. Dec. 207 (A.G. 2025).

Matter of A-B-
27 I. & N. Dec. 316 (AG 2018)˜

The prototypical refugee flees her home country because the government has persecuted her—either directly through its own actions or indirectly by being unwilling or unable to prevent the misconduct of non-government actors—based upon a statutorily protected ground. Where the persecutor is not part of the government, the immigration judge must consider both the reason for the harm inflicted on the asylum applicant and the government's role in sponsoring or enabling such actions. An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune. It applies when persecution arises on account of membership in a protected group and the victim may not find protection except by taking refuge in another country.˜

In Matter of R-A-, 22 I&N Dec. 906, 917-23 (BIA 1999) (en banc), the Board considered whether a victim of domestic violence could establish refugee status as a member of a particular social group consisting of similarly situated women. The Board held that the mere existence of shared circumstances would not turn those possessing such characteristics into a particular social group.˜ Rather, the members of a particular social group must not merely share an immutable characteristic, but must also be recognized as a distinct group in the alien's society,˜ and the persecution must be motivated by membership in that social group˜. Attorney General Reno vacated that decision for reconsideration in light of a proposed regulation, see 22 I&N Dec. 906, 906 (A.G. 2001), but no final rule ever issued, and the case was eventually resolved in 2009 without further consideration by the Board.˜

[In 2014], the Board decided A-R-C-G-, which recognized "married women in Guatemala who are unable to leave their relationship" as a particular social group--without performing the rigorous analysis required by the Board's precedents.˜ Instead, the Board accepted the concessions by the Department of Homeland Security ("DHS") that the respondent suffered harm rising to the level of past persecution, that she was a member of a qualifying particular social group, and that her membership in that group was a central reason for her persecution.˜

I do not believe A-R-C-G- correctly applied the Board's precedents, and I now overrule it. The opinion has caused confusion because it recognized an expansive new category of particular social groups based on private violence. Since that decision, the Board, immigration judges, and asylum officers have relied upon it as an affirmative statement of law, even though the decision assumed its conclusion and did not perform the necessary legal and factual analysis. When confronted with asylum cases based on purported membership in a particular social group, the Board, immigration judges, and asylum officers must analyze the requirements as set forth in this opinion, which restates and where appropriate, elaborates upon, the requirements set forth in M-E-V-G~.

Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.~ While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.

I.

The respondent, a native and citizen of El Salvador, entered the United States illegally and was apprehended by U.S. Customs and Border Protection agents in July 2014. After being placed in removal proceedings, the respondent filed an application for asylum~.

The respondent claimed that she was eligible for asylum because she was persecuted on account of her membership in the purported particular social group of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common" with their partners.~ The respondent asserted that her ex-husband, with whom she shares three children, repeatedly abused her physically, emotionally, and sexually during and after their marriage.~

In December 2015, the immigration judge denied~ relief and ordered the respondent removed to El Salvador.~ The respondent appealed.~ In December 2016, the Board reversed and remanded with an order to grant the respondent asylum.~ The Board~ concluded that the respondent's particular social group was substantially similar to "married women in Guatemala who are unable to leave their relationship," which the Board had recognized in Matter of A-R-C-G-, 26 I&N Dec. at 390.~ Moreover, the Board held that the immigration judge clearly erred in finding that the respondent could leave her ex-husband, and that the respondent established that her ex-husband persecuted her because of her status as a Salvadoran woman unable to leave her domestic relationship.~ Finally, the Board determined that the El Salvadoran government was unwilling or unable to protect the respondent.~

III.

I turn now to the question of whether, and under what circumstances, being a victim of private criminal activity constitutes persecution on account of membership in a particular social group.˜

B.˜

In 1999, the Board, sitting en banc, considered for the first time "whether the repeated spouse abuse inflicted on the respondent makes her eligible for asylum as an alien who has been persecuted on account of her membership in a particular social group." R-A-, 22 I&N Dec. at 907. In a thorough, well-reasoned opinion, the Board first looked to the plain language of the INA to determine whether Congress intended the Act to provide asylum to battered spouses who are leaving marriages to aliens having no ties to the United States.˜ Finding no definitive answer in the language of the statute, the Board "look[ed] to the way in which the other grounds in the statute's 'on account of' clause operate."˜ Following that "significant guidance," the Board concluded that R-A- was not eligible for asylum˜.˜ [H]er claimed social group—"Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination"—did not qualify as a "particular social group" under the INA.

The Board first observed that the purported social group appeared "to have been defined principally, if not exclusively, for purposes of this asylum case, and without regard to the question of whether anyone in Guatemala perceives this group to exist in any form whatsoever."˜ The Board found "little or no relation [of the purported social group] to the way in which Guatemalans might identify subdivisions within their own society or otherwise might perceive individuals either to possess or to lack an important characteristic or trait."˜ The Board reasoned that for a social group to be viable for asylum purposes, there must be some showing of how the immutable characteristic shared by the group is understood in the alien's home country so that the Board can "understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm."˜

The Board held that a "particular social group" should be recognized and understood to be a societal faction or a recognized segment of the population in the alien's society.˜ The Board found that R-A- had "shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group."˜ Without such a showing, the Board concluded that "if the alleged persecutor is not even aware of the group's existence, it becomes harder to understand how the persecutor may have been motivated by the victim's 'membership' in the group to inflict the harm on the victim."˜

In addition to holding that R-A-'s proposed group did not qualify as a "particular social group," the Board also held that she had not shown the persecution was "on account of" her membership in the group.˜ Even if the Board were to accept the respondent's proposed social group, she "has not established that her husband has targeted and harmed [R-A-] because he perceived her to be a member of this particular social group."˜ R-A-'s husband targeted her "because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm."˜

On January 19, 2001, Attorney General Reno summarily vacated R-A- and directed the Board to stay consideration of the case pending final publication of a proposed rule offering guidance on the definitions of "persecution" and "membership in a particular social group" and what it means to be "on account of" a protected characteristic. R-A-, 22 I&N Dec. at 906˜. No final rule ever issued, however. In September 2008, Attorney General Mukasey lifted the stay and directed the Board to reconsider the case in light of intervening Board and judicial decisions.˜ In December 2009, before the Board issued an opinion, R-A- and DHS jointly stipulated that she was eligible for asylum, resolving the case.˜

In the years since R-A-, the Board has refined its interpretation of "particular social group" on a case-by-case basis.˜

C.

Although the Board has articulated a consistent understanding of the term "particular social group," not all of its opinions have properly applied that framework. Shortly after M-E-V-G-˜, the Board decided A-R-C-G-, 26 I&N Dec. 388, which held that "married women in Guatemala who are unable to leave their relationship" could constitute a particular social group˜. Importantly, the Board based its decision on DHS's concessions that: (1) A-R-C-G- suffered harm rising to the level of past persecution; (2) A-R-C-G-'s persecution was on account of her membership in a particular social group; and (3) A-R-C-G-'s particular social group was cognizable under the INA.˜ In fact, the only legal question not conceded by DHS was whether, under applicable Eighth Circuit law, the Guatemalan government was unwilling or unable to control her husband.˜ The Board declined to answer that question, electing instead to remand for further proceedings.

Because of DHS's multiple concessions, the Board performed only a cursory analysis of the three factors required to establish a particular social group. The Board concluded that A-R-C-G-'s purported particular social group was "composed of members who share the common immutable characteristic of gender," and that "marital status can be an immutable characteristic where the individual is unable to leave the relationship."˜ With respect to particularity, the Board observed that the terms defining the group—"married," "women," and "unable to leave the relationship"--had commonly accepted definitions within Guatemalan society.˜ And finally, with respect to social distinction, the Board cited evidence that Guatemala has a "culture of machismo and family violence," and that although Guatemala's criminal laws that prohibit domestic violence, "enforcement can be problematic because the National Civilian Police often failed to respond to requests for assistance related to domestic violence."˜

Subsequent Board decisions, including the decision certified here, have read A-R-C-G- as categorically extending the definition of a "particular social group" to encompass most Central American domestic violence victims. Like A-R-C-G-, these ensuing decisions have not performed the detailed analysis required. For instance, the Board's decision in this case offered only the conclusory statement that the respondent's proposed group was "substantially similar to that which we addressed in Matter of A-R-C-G-," and that the "totality of the evidence, including the 2014 El Salvador Human Rights Report, establishes that the group is sufficiently particular and socially distinct in El Salvadoran Society."˜ The Board's entire analysis of the respondent's proposed particular social group consisted of only two sentences.˜ Other Board opinions have similarly treated A-R-C-G- as establishing a broad new category of cognizable particular social groups.˜

IV.

A-R-C-G- was wrongly decided and should not have been issued as a precedential decision.˜

1.

In A-R-C-G-, DHS conceded that A-R-C-G- was a member of a "cognizable" social group that was both particular and socially distinct.˜ The Board thus avoided considering whether A-R-C-G- could establish the existence of a cognizable particular social group without defining the group by the fact of persecution.˜

In accepting DHS's concession that this proposed particular social group was defined with particularity, the Board limited its analysis to concluding that the terms used to describe the group—"married," "women," and "unable to leave the relationship"—have commonly accepted definitions within Guatemalan society.˜ But that misses the point. To say that each term has a commonly understood definition, standing alone, does not establish that these terms have the requisite particularity in identifying a distinct social group as such, or that people who meet all of those criteria constitute a discrete social group. A particular social group must not be "amorphous, overbroad, diffuse, or subjective," and "not every 'immutable characteristic' is sufficiently precise to define a particular social group."~ The Board's scant analysis did not engage with these requirements or show that A-R-C-G-'s proposed group was "defined by characteristics that provide a clear benchmark for determining who falls within the group."~

Social groups defined by their vulnerability to private criminal activity likely lack the particularity required under M-E-V-G-, given that broad swaths of society may be susceptible to victimization. For example, groups comprising persons who are "resistant to gang violence" and susceptible to violence from gang members on that basis "are too diffuse to be recognized as a particular social group."~ Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group.

Particular social group definitions that seek to avoid particularity issues by defining a narrow class—such as "Guatemalan women who are unable to leave their domestic relationships where they have children in common"—will often lack sufficient social distinction to be cognizable as a distinct social group, rather than a description of individuals sharing certain traits or experiences.~ A particular social group must avoid, consistent with the evidence, being too broad to have definable boundaries and too narrow to have larger significance in society.

DHS similarly admitted that A-R-C-G-'s proposed particular social group was socially distinct by conceding that it was cognizable.~ In support of that concession, the Board cited evidence that Guatemala has a "culture of machismo and family violence" and that, although Guatemala has laws in place to prosecute domestic violence crimes, "enforcement can be problematic because the National Civilian Police often failed to respond to requests for assistance related to domestic violence."~ The Board provided no explanation for why it believed that that evidence established that Guatemalan society perceives, considers, or recognizes "married women in Guatemala who are unable to leave their relationship" to be a distinct social group. But the key thread running through the particular social group framework is that social groups must be classes recognizable by society at large.~ Membership in a particular tribe or clan within a society is an instructive example: those distinctions often constitute a "particular social group" because that is a "highly recognizable, immutable characteristic" that makes members recognized in society as a group.~ By contrast, there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances.

2.

In A-R-C-G-, DHS also conceded that the respondent established that she had suffered past persecution. It can be especially difficult, however, for victims of private violence to prove persecution because "[p]ersecution is something a government does," either directly or indirectly by being unwilling or unable to prevent private misconduct. Persecution under the asylum statute "does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."

Board precedents have defined "persecution" as having three specific elements. First, "persecution" involves an intent to target a belief or characteristic. Yet private criminals are motivated more often by greed or vendettas than by an intent to "overcome [the protected] characteristic of the victim." For example, in R-A-, R-A-'s husband targeted her "because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm."

Second, the level of harm must be "severe." Private violence may well satisfy this standard, and I do not question that A-R-C-G-'s claims of repugnant abuse by her ex-husband were sufficiently severe.

Third, the harm or suffering must be "inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." The Board declined to address this prong of the analysis, instead remanding to the immigration judge for further proceedings to determine whether the Guatemalan government was unwilling or unable to control A-R-C-G-'s ex-husband.

An applicant seeking to establish persecution based on violent conduct of a private actor "must show more than 'difficulty ... controlling' private behavior." The applicant must show that the government condoned the private actions "or at least demonstrated a complete helplessness to protect the victims." The fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States. There may be many reasons why a particular crime is not successfully investigated and prosecuted. Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it.

3.

Finally, DHS conceded the nexus requirement by agreeing that persecution suffered by A-R-C-G- “was, for at least one central reason, on account of her membership in a cognizable particular social group.”˜ This conclusion simply does not follow from the facts of that case or similar cases. Establishing the required nexus between past persecution and membership in a particular social group is a critical step for victims of private crime who seek asylum.˜ Yet the Board did not evaluate the conclusion that A-R-C-G- was persecuted “on account of” her status as a married woman in Guatemala who was unable to leave her relationship.

When private actors inflict violence based on a personal relationship with a victim, then the victim’s membership in a larger group may well not be “one central reason” for the abuse.˜ A criminal gang may target people because they have money or property within the area where the gang operates, or simply because the gang inflicts violence on those who are nearby.˜ That does not make the gang’s victims persons who have been targeted “on account of” their membership in any social group.

Similarly, in domestic violence cases, like A-R-C-G-, the Board cited no evidence that her ex-husband attacked her because he was aware of, and hostile to, “married women in Guatemala who are unable to leave their relationship.” Rather, he attacked her because of his preexisting personal relationship with the victim.˜ When “the alleged persecutor is not even aware of the group’s existence, it becomes harder to understand how the persecutor may have been motivated by the victim’s ‘membership’ in the group to inflict the harm on the victim.”˜

V.

Having overruled A-R-C-G-, I must vacate the Board’s December 2016 decision in this case as well. The Board’s cursory analysis of the respondent’s social group consisted of a general citation to A-R-C-G- and country condition reports. Neither immigration judges nor the Board may avoid the rigorous analysis required in determining asylum claims, especially where victims of private violence claim persecution based on membership in a particular social group.˜

Having subjected the Board’s decision to plenary review, I also address several additional errors and outline other general requirements relevant to all asylum applications to provide guidance to the Board and immigration judge on remand.˜

C.

The Board˜ erred when it overruled the immigration judge’s finding that the respondent failed to demonstrate that the government of El Salvador was unable or unwilling to protect her from her ex-husband. This inquiry too involved factual findings to which the Board did not give proper deference. No country provides its citizens with complete security from private criminal activity, and perfect protection is not required. In this case, the respondent not only reached out to police, but received various restraining orders and had him arrested on at least one occasion.˜

For many reasons, domestic violence is a particularly difficult crime to prevent and prosecute, even in the United States, which dedicates significant resources to combating domestic violence.˜ The persistence of domestic violence in El Salvador, however, does not establish that El Salvador was unable or unwilling to protect A-B- from her husband, any more than the persistence of domestic violence in the United States means that our government is unwilling or unable to protect victims of domestic violence. In short, the Board erred in finding, contrary to the record and the immigration judge's findings, that El Salvador was unable or unwilling to protect A-B- and that she thus had no choice but to flee the country.

D.

The Board, immigration judges, and all asylum officers should consider the following points when evaluating an application for asylum. First, an applicant seeking asylum˜ based on membership in a particular social group must clearly indicate, on the record and before the immigration judge, the exact delineation of any proposed particular social group.˜ The immigration judge has a responsibility to "ensure that the specific social group being analyzed is included in his or her decision," as it critical to the Board's "appellate review that the proposed social group is clear and that the record is fully developed."˜ The Board must also remember that it cannot sustain an asylum applicant's appeal based on a newly articulated social group not presented before or analyzed by the immigration judge.˜

Furthermore, the Board, immigration judges, and all asylum officers must consider, consistent with the regulations, whether internal relocation in the alien's home country presents a reasonable alternative before granting asylum. Asylum applicants who have "not established past persecution ... bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or government-sponsored." 8 C.F.R. § 1208.13(b)(3)(i). An immigration judge, "in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution" if it is "found by a preponderance of the evidence" that "the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality, ... and under all the circumstances, it would be reasonable to expect the applicant to do so." Id. § 1208.13(b)(1)(i). Beyond the standards that victims of private violence must meet in proving refugee status in the first instance, they face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible). When the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government.

Finally, there are alternative proper and legal channels for seeking admission to the United States other than entering the country illegally and applying for asylum in a removal proceeding. The asylum statute "is but one provision in a larger web of immigration laws designed to address individuals in many different circumstances," and "[t]o expand that statute beyond its obviously intended focus is to distort the entire immigration framework." Aliens seeking a better life in America are welcome to take advantage of existing channels to obtain legal status before entering the country. In this case, A-B- entered the country illegally, and when initially apprehended by Border Patrol agents, she stated that her reason for entering the country was "to find work and reside" in the United States. Aliens seeking an improved quality of life should seek legal work authorization and residency status, instead of illegally entering the United States and claiming asylum. Asylum is a discretionary form of relief from removal, and an applicant bears the burden of proving not only statutory eligibility for asylum but that she also merits asylum as a matter of discretion. I remind all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA. Relevant discretionary factors include, inter alia, the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and her living conditions, safety, and potential for long-term residency there.

VI.

In reaching these conclusions, I do not minimize the vile abuse that the respondent reported she suffered at the hands of her ex-husband or the harrowing experiences of many other victims of domestic violence around the world. I understand that many victims of domestic violence may seek to flee from their home countries to extricate themselves from a dire situation or to give themselves the opportunity for a better life. But the "asylum statute is not a general hardship statute." Nothing in the text of the INA supports the suggestion that Congress intended "membership in a particular social group" to be "some omnibus catch-all" for solving every "heart-rending situation."

I therefore overrule Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014) and all other opinions inconsistent with the analysis in this opinion, vacate the Board's decision, and remand to the immigration judge for further proceedings consistent with this opinion.

10.29 Case: Matter of K-E-S-G-

The following case represents the BIA's most recent thinking on asylum and gender. As you read, consider how you might reconcile this decision with Matter of A-B- (section 10.28) and Fatin v. INS (section 10.27).

Matter of K-E-S-G-
29 I. & N. Dec. 145 (BIA 2025)˜

We review de novo whether the respondent's proposed particular social groups of "Salvadoran women" and "Salvadoran women viewed as property" are cognizable.˜

A. Particular Social Groups Based on Sex

We acknowledge that sex is an immutable characteristic.˜ However, "not every 'immutable characteristic' is sufficiently precise to define a particular social group." Matter of M-E-V-G-, 26 I&N Dec. at 239. A proposed particular social group based solely on sex or sex and nationality must also satisfy the particularity and social distinction requirements for a cognizable group. See Matter of M-E-V-G-, 26 I&N Dec. at 237.˜

1. Circuit Court Case Law

We begin our analysis by acknowledging that some circuit courts, most notably the Ninth Circuit, have questioned the premise that a particular social group defined solely by sex is too broad to be cognizable under the INA.˜ See Perdomo v. Holder, 611 F.3d 662, 667-69 (9th Cir. 2010)˜. In Perdomo˜, the Ninth Circuit rejected the Board's conclusion that the alien's proposed particular social group of "all women in Guatemala" was not cognizable because it was overly broad, internally diverse, and constituted a "mere demographic division ... rather than a particular social group."˜ It noted that simply because a proposed group is large and perhaps comprises a "sweeping demographic division" within the alien's home country does not render it per se not cognizable.˜

The Ninth Circuit also disagreed that the characteristics of breadth and internal diversity rendered the proposed group not cognizable.˜ It held˜ that the focus should be on whether the proposed particular social group is defined by "innate characteristics" and noted that it had found two other groups—"homosexuals" and "Gypsies"—to be cognizable despite each group being broad and internally diverse.˜ The Ninth Circuit further stated that when it did reject proposed particular social groups as too broad, it was because there was "no unifying relationship or characteristic to narrow th[e] diverse and disconnected group."˜

The Ninth Circuit's decision in Perdomo was˜ [decided before Matter of M-E-V-G-]. Since Perdomo, the Ninth Circuit has upheld Board decisions concluding that the applicants did not establish their proposed social groups were sufficiently particular due, in part, to the large size of the group involved.˜

Other circuits have questioned the reasoning in Perdomo following the updated definition of a particular social group.˜ Chavez-Chilel v. Att'y Gen. U.S., 20 F.4th 138 (3d Cir. 2021) [("Substantial evidence supports the BIA's and IJ's finding that 'Guatemalan women' is not a cognizable PSG" due to lack of particularity as there was "no record evidence that all Guatemalan women share a unifying characteristic that results in them being targeted for any form of persecution based solely on their [sex].")].˜

Several other circuits have acknowledged that an individual's sex, standing alone or in conjunction with nationality, is insufficient to constitute a cognizable social group.˜

[T]he Fifth Circuit rejected the applicant's proposed social group because, when stripped of the illicit element of persecution, it consisted only of "Honduran women" and the Fifth Circuit found this group insufficiently particular. Jaco v. Garland, 24 F.4th 395, 407 (5th Cir. 2021). The Eleventh Circuit, in evaluating the proposed group of "women in Mexico who are unable to leave their domestic relationship," similarly noted that the immutable characteristic of being women "alone is insufficient to make them cognizable as a particular social group under the INA." Amezcua-Preciado v. U.S. Att'y Gen., 943 F.3d 1337, 1344 (11th Cir. 2019).˜

2. Sex Alone Not a Protected Ground

Consistent with the Federal circuit court decisions cited above, we hold that a particular social group defined by the alien's sex or sex and nationality, standing alone, is overbroad and insufficiently particular to be cognizable under the INA.˜ Groups defined solely by the characteristics of sex and nationality contain no narrowing features such as a specific age range or a specific position in the country's society or its economy. These proposed groups are too broad and diffuse, encompassing a diverse cross section of society of widely varying ages, socioeconomic statuses, marital statuses, family backgrounds, and lifestyles.˜

If we held that groups defined solely by sex were cognizable, we would essentially create another protected ground under the INA—that of sex—to add to the grounds of race, religion, nationality, membership in a particular social group, or political opinion. Had Congress or the drafters of the United Nations Convention Relating to the Status of Refugees, ˜ or the United Nations Protocol Relating to the Status of Refugees,˜ intended sex in and of itself to be a protected ground, they could have specifically listed it as a separate ground.˜

It is not the role of the Board to add a specific protected ground that was not included by Congress and the drafters of the Convention and the Protocol.˜

3. Application to the Respondent

The Immigration Judge properly found that the respondent did not establish that her proposed particular social group of "Salvadoran women" satisfied the particularity requirement for a cognizable group.˜ While this group shares the characteristic of women from El Salvador, it otherwise encompasses a large, diffuse, and disconnected portion of El Salvador's population with few unifying characteristics.˜ The group encompasses women from various age groups, socioeconomic statuses, levels of education, religions, and widely diverse cultural backgrounds.˜ Thus, the proposed group is too broad and diffuse to satisfy the particularity requirement.

We are not persuaded by the respondent's arguments that evidence that women in El Salvador face disproportionate levels of violence and that legislation has been enacted in that country to protect women establishes her group as discrete.˜

That certain characteristics may make individuals more vulnerable to violence does not establish that individuals sharing that characteristic necessarily constitute a cognizable particular social group.˜

Because we agree with the Immigration Judge that the respondent's proposed group of "Salvadoran women" does not satisfy the particularity requirement, we need not address whether the proposed group satisfies the social distinction requirement.˜

B. Particular Social Group of Women Viewed as Property

With regard to the respondent's second proposed group of "Salvadoran women viewed as property," the group lacks the requisite particularity for a cognizable particular social group. The group is not defined by clear benchmarks for determining who falls within the group.˜ The respondent has not presented evidence that "viewed as property" has a commonly accepted definition in El Salvador.˜ It is not clear which women are viewed as property or who views them as property. Thus, the group is too "amorphous, overbroad, diffuse, or subjective" to qualify as a particular social group under the INA.˜

The respondent also has not shown that Salvadoran society at large considers women in El Salvador viewed as property to comprise a distinct segment of society, such that the group would satisfy the social distinction requirement.˜ The respondent's citation to general evidence concerning violence against women and widespread sexism is insufficient to establish "that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group."˜

The respondent has not established that she is a member of a cognizable particular social group, and she does not claim eligibility for asylum or withholding of removal based upon any other statutorily protected ground. She is therefore ineligible for asylum˜.

10.30 Case: Matter of L-E-A-

The following case, Matter of L-E-A-, addresses how and whether kinship ties can form the basis of a particular social group. As with Matter of A-B- (see section 10.28), the issue of family-based PSG claims has been the subject of political debate. In 2017, the BIA held that "family may be a particular social group." Matter of L-E-A-, 27 I. & N. Dec. 40 (BIA 2017). Attorney General William Barr, serving during the first Trump presidency, referred the case to himself and reversed. Matter of L-E-A-, 27 I. & N. Dec. 581 (AG 2019). Attorney General Merrick Garland, serving during the Biden administration, vacated Barr's decision. Matter of L-E-A-, 28 I. & N. Dec. 304 (AG 2021). Attorney General Pam Bondi, serving during the second Trump administration, reversed course once again, reinstating Barr's 2019 decision. Matter of R-E-R-M- & J-D-R-M-, 29 I. & N. Dec. 202 (AG 2025).

Matter of L-E-A-
27 I. & N. Dec. 581 (AG 2019)˜

In 1998, the respondent, a Mexican citizen, illegally entered the United States. After a criminal conviction for driving under the influence,˜ DHS˜ initiated removal proceedings. The respondent accepted voluntary departure and returned to Mexico in May 2011. But he did not stay there long. By August 2011, the respondent had again illegally returned to the United States. DHS apprehended him and commenced removal proceedings. The respondent conceded removability, but this time sought asylum based upon a claim of persecution allegedly suffered during his brief return to Mexico.

According to the respondent, upon returning to Mexico, he had gone to live with his parents in Mexico City. His father operated a neighborhood general store there, but he had run afoul of La Familia Michoacana, a Mexican drug cartel. Because his father refused to sell the cartel's drugs out of his store, the drug dealers evidently decided to retaliate against the respondent upon his return. About a week after returning to Mexico City, the respondent was walking a few blocks from his home when he heard gunshots coming out of a black sport-utility vehicle. He dropped down to the ground and was unharmed. Although the respondent did not initially believe that he was the target of the shooting, he later concluded that he was, based upon the cartel's subsequent actions.

About a week later, four armed cartel members, driving the same black sport-utility vehicle, approached the respondent and asked him to agree to sell the cartel's drugs at his father's store. When the respondent declined, the cartel members threatened him and advised him to reconsider. Shortly thereafter, four masked men, in the same sport-utility vehicle, attempted to kidnap the respondent, but he managed to escape. After that incident, the respondent left Mexico City for Tijuana, where two months later, he illegally crossed back into the United States and was thereafter apprehended.

In his removal proceeding, the respondent claimed persecution in Mexico based on his membership in the particular social group comprising his father's immediate family. The immigration judge denied relief on the ground that the respondent had not shown he was the victim of anything more than criminal activity.

On appeal, the Board found that the respondent's relationship with his father established membership in a particular social group, namely "his father's immediate family."~ In reaching that conclusion, the Board relied upon DHS's concession "that the immediate family unit of the respondent's father qualifies as a cognizable social group."~ I conclude that the Board erred~.

The Board has recognized that "kinship ties" may be one of the kinds of common, immutable characteristics that might form the basis for a "particular social group" under the INA.~ But the Board has never held that every type of family grouping would be cognizable as a particular social group.~ Here, the respondent argues that the immediate family of his father constitutes a particular social group because a local drug cartel had a dispute with his father, and the cartel chose to take that dispute out upon his family members. But the respondent did not show that anyone, other than perhaps the cartel, viewed the respondent's family to be distinct in Mexican society. If cartels or other criminals created a cognizable family social group every time they victimized someone, then the social-distinction requirement would be effectively eliminated.~

[A]s almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group. There is no evidence that Congress intended the term "particular social group" to cast so wide a net.~ If Congress intended for refugee status to turn on one's suffering of persecution "on account of" family membership, Congress would have included family identity as one of the expressly enumerated covered grounds for persecution.˜

[B]y the terms of the statutory definition of "refugee," as well as according to long-standing principles set forth in BIA precedent, to qualify as a "particular social group," an applicant must demonstrate that his family group meets each of the immutability, particularity, and social distinction requirements. While many family relationships will be immutable, some family-based group definitions may be too vague or amorphous to meet the particularity requirement—i.e., where an applicant cannot show discernible boundaries to the group.˜ Further, many family-based social groups will have trouble qualifying as "socially distinct," a requirement that contemplates that the applicant's proposed group be "set apart, or distinct, from other persons within the society in some significant way." M-E-V-G-, 26 I&N Dec. at 238 ("In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it."). "To have the 'social distinction' necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group."˜

Asylum applicants generally seek to establish family-based groups as "particular social groups" by raising one of two principal arguments. First, many applicants assert a specific family unit as their "particular social group."˜ But to qualify under the statute and Board precedent, when an applicant proposes a group composed of a specific family unit, he must show that his proposed group has some greater meaning in society. It is not enough that the family be set apart in the eye of the persecutor, because it is the perception of the relevant society—rather than the perception of the alien's actual or potential persecutors—that matters.˜

In analyzing these claims, adjudicators must be careful to focus on the particular social group as it is defined by the applicant and ask whether that group is distinct in the society in question. If an applicant claims persecution based on membership in his father's immediate family, then the adjudicator must ask whether that specific family is "set apart, or distinct, from other persons within the society in some significant way." M-E-V-G-, 26 I&N Dec. at 238. It is not sufficient to observe that the applicant's society (or societies in general) place great significance on the concept of the family. If this were the case, virtually everyone in that society would be a member of a cognizable particular social group. The fact that "nuclear families" or some other widely recognized family unit generally carry societal importance says nothing about whether a specific nuclear family would be "recognizable by society at large." A-B-, 27 I&N Dec. at 336˜. The average family—even if it would otherwise satisfy the immutability and particularity requirements—is unlikely to be so recognized.

Second, other applicants define the relevant "particular social group" as a collection of familial relatives of persons who have certain shared characteristics.˜ This is a common approach in asylum cases concerning gang violence.˜ Often, this category of family classifications fails the social distinction requirement because there is little evidence to indicate that families sharing these characteristics are seen in society as cohesive and identifiable groups.˜ Furthermore, when proposing these kinds of groups, applicants risk impermissibly defining their purported social group in terms of the persecution it has suffered or that it fears.˜

This opinion does not bar all family-based social groups from qualifying for asylum. To the contrary, in some societies, an applicant may present specific kinship groups or clans that, based on the evidence in the applicant's case, are particular and socially distinct.˜ But unless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be "distinct" in the way required by the INA for purposes of asylum. Moreover, adjudicators should be skeptical of social groups that appear to be "defined principally, if not exclusively, for the purposes of [litigation] . . . without regard to the question of whether anyone in [a given country] perceives [those] group[s] to exist in any form whatsoever."˜

Here, the Board's particular social group analysis merely cited past Board and federal court precedents recognizing family-based groups and then agreed with the parties' stipulations. The Board summarily concluded that "the facts of this case present a valid particular social group," without explaining how the facts supported this finding or satisfied the particularity and social visibility requirements.˜ This cursory treatment could not, and did not, satisfy the Board's duty to ensure that the respondent satisfied the statutory requirements to qualify for asylum. The Board's conclusion that the respondent's proposed group presents a valid "particular social group" under the INA must be reversed.˜

As Attorney General Sessions previously explained, "[a]n alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet, the asylum statute does not provide redress for all misfortune." A-B-, 27 I&N Dec. at 318. The term "particular social group" may not receive such an elastic and unbound meaning that it includes all immediate-family units, regardless of whether the applicant's proposed family is particular and socially distinct in his society.˜

—-—

The BIA considered another family-based asylum claim in Matter of S-E-M-Z, 29 I. & N. Dec. 680 (BIA 2026). The Board wrote: "In determining that the applicant established a valid family-based particular social group, the Immigration Judge found that people within Honduran neighborhoods know each other and are highly familiar with the details of families within those neighborhoods. While this finding is grounded in the record and is not clearly erroneous, the Immigration Judge erred by focusing on a specific neighborhood to determine the concept of social distinction, instead of the relevant society at large.˜ We recognize that neighbors within a limited geographic and residential area may be known to each other; however, such recognition does not establish that, for asylum and withholding of removal claims and in the case of a specific family, such family unit is recognized as separate and distinct by society at large.˜ [T]reating a neighborhood or other limited geographic location as the relevant society for the social distinction inquiry is inconsistent with the INA's focus on countrywide persecution.˜ Accordingly, we conclude that social distinction must generally be measured on a countrywide basis, rather than from the perspective of a neighborhood or other limited geographic location within a country."

10.31 Refugee Sur Place

Sometimes an individual does not qualify as a refugee when they leave their country of origin, but they nonetheless meet the definition at a later point in time. Imagine an individual who has been a vocal supporter of the political party in charge when they left their country but, after arriving in the U.S., a violent coup takes place that would subject the individual to persecution if they returned to their country. Or imagine an international student who comes to the United States from a socially repressive nation who, after living in the U.S., comes to the realization that they are gay, becomes involved in a same-sex relationship, and would be subject to persecution in their home country because of that relationship. Migrants who do not qualify as refugees when entering the U.S., but who meet the refugee definition later due to events occurring after their arrival in this country, are known as "sur place" refugees.

10.32 Discretion

Ninth Circuit Immigration Outline (2023)

"Asylum is a two-step process, requiring the applicant first to establish his *eligibility* for asylum by demonstrating that he meets the statutory definition of a 'refugee,' and second to show that he is *entitled* to asylum as a matter of discretion."˜

Once an "applicant establishes statutory eligibility for asylum, the Attorney General must, by a proper exercise of [] discretion, determine whether to grant that relief."˜

The Attorney General's ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion.˜ An IJ abuses his discretion when he conflates his discretionary determination of whether an applicant is entitled to asylum with his non-discretionary determination concerning eligibility for asylum.˜

In exercising its discretion, the BIA must consider both favorable and unfavorable factors, including the severity of the past persecution suffered.˜ "There is no definitive list of factors that the BIA must consider or may not consider. Each asylum application is different, and factors that are probative in one context may not be in others. However, all relevant favorable and adverse factors must be considered and weighed."˜ "[T]he likelihood of future persecution is a particularly important factor to consider."˜

Uncontested evidence that an applicant committed immigration fraud is sufficient to support the discretionary denial of asylum.˜ In contrast, an applicant's entry into the United States using false documentation is worth little if any weight in balancing positive and negative factors.˜

If asylum is denied in the exercise of discretion, the applicant remains eligible for withholding [of removal, discussed in section 10.43].˜

10.33 Derivative Asylees

Ninth Circuit Immigration Outline (2023)

"A spouse or child ... of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien."˜ [INA § 208(b)(3);] 8 U.S.C. § 1158(b)(3).

10.34 Asylum Bars: One Year Deadline

Ninth Circuit Immigration Outline (2023)

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.˜ 8 U.S.C. § 1158(a)(2)(B). "The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later." 8 C.F.R. § 1208.4(a)(2)(ii). The first day of the one-year period for filing an asylum application is the day after the noncitizen arrived in the United States.˜

Pursuant to 8 U.S.C. § 1158(a)(3), [federal courts lack]˜ jurisdiction to review the agency's determination that an asylum application is not timely.˜ However, § 106 of REAL ID Act restored jurisdiction over constitutional claims and questions of law˜ [which can include whether the IJ applied the proper legal standard and how the IJ applied law to undisputed facts.]

"[T]he Government may still consider a late application if the applicant establishes (1) changed circumstances that materially affect the applicant's eligibility for asylum or (2) extraordinary circumstances directly related to the delay in filing an application."˜ "[T]he applicant need only provide evidence '[t]o the satisfaction of ... the immigration judge ... that he or she qualifies for an exception to the 1-year deadline[.]'"˜ If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. See 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4) & (5).˜

To determine whether the reasons for petitioner's delay in filing an asylum application is reasonable, the court considers the reasons given to justify the delay, as well as the length of the delay in filing.˜

It is not uncommon to file a barebones asylum application within the one-year deadline and to provide a more fulsome claim for relief thereafter. However, government counsel frequently contends that the later material should be deemed a new application barred by the one-year deadline. See Matter of M-A-F-, 26 I. & N. Dec. 651 (BIA 2015) ("A later filed application that presents a previously unraised basis for relief…[or] is predicated on a new or substantially different factual basis ... will ... be considered a new application.").

10.35 Asylum Bars: Previous Denial

Ninth Circuit Immigration Outline (2023)

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), [federal courts lack]˜ jurisdiction to review the IJ's determination under this section.˜ Notwithstanding 8 U.S.C. § 1158(a)(2)(C), an application for asylum may be considered if the alien demonstrates "either the existence of changed circumstances which materially affect the applicant's eligibility for asylum…." 8 U.S.C. § 1158(a)(2)(D).˜

—-—

10.36 Asylum Bars: Safe Third Country

Ninth Circuit Immigration Outline (2023)

An applicant has no right to apply for asylum if she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality …) in which the alien's life or freedom would not be threatened on account of" the statutory grounds. [INA § 208(a)(2)(A);] 8 U.S.C. § 1158(a)(2)(A). Pursuant to 8 U.S.C. § 1158(a)(3), [federal courts lack]˜ jurisdiction to review the IJ's determination under this section.˜

The United States and Canada entered into a bilateral agreement, effective December 29, 2004, which recognizes that both countries "offer generous systems of refugee protection" and provides, subject to exceptions, that noncitizens arriving in the United States from Canada at a land border port-of-entry shall be returned to Canada to seek protection under Canadian immigration law.˜ The Agreement indicates that a noncitizen may apply for asylum˜ in one or the other, but not both, countries. See also 8 C.F.R. § 208.30(e)(6) (implementing regulation); 69 FR 69480 (Nov. 29, 2004) (rules implementing United States-Canada agreement).˜

—-—

For many years, Canada was the only "safe third country." Then the first Trump administration entered into safe third country agreements (STCAs) with Guatemala, El Salvador, and Honduras. These STCAs deemed the Central American countries "safe" and specified that asylum seekers who passed through an STCA country on their way to the United States could be returned to that country in order to seek protection there.

The latest iteration of "safe third country" agreements are the Asylum Cooperative Agreements (ACAs) of the second Trump administration. As of March 2026, the U.S. has entered ACAs with Belize, Cabo Verde, Ecuador, Guatemala, Honduras, Liberia, Paraguay, and Uganda. These agreements differ from the earlier STCAs in that they are not limited by a noncitizen's transit through their territory. In fact, there is no requirement that a noncitizen have any connection whatsoever to an ACA country. As briefly addressed in section 10.7, the government may pretermit asylum cases in order to effectuate removal to an ACA country. A noncitizen can oppose ACA pretermission only if they fall outside the terms of the ACA or demonstrate that, more likely than not, they would be persecuted on account of a protected ground by the third country. See Matter of C-I-G-M- & L-V-S-G-, 129 I. & N. Dec. 291 (BIA 2025).

10.37 Asylum Bars: Firm Resettlement

Ninth Circuit Immigration Outline (2023)

[A]n applicant may not be granted asylum if he or she "was firmly resettled in another country prior to arriving in the United States." See 8 U.S.C. § 1158(b)(2)(A)(vi)~. A finding of firm resettlement is a factual determination reviewed for substantial evidence.~

"Determining whether the firm resettlement rule applies involves a two-step process: First, the government presents 'evidence of an offer of some type of permanent resettlement,' and then, second, 'the burden shifts to the applicant to show that the nature of his [or her] stay and ties was too tenuous, or the conditions of his [or her] residence too restricted, for him [or her] to be firmly resettled.'"~

An applicant who received an offer of permanent resettlement will not be firmly resettled if he can establish: (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country. 8 C.F.R. § 1208.15.

The government bears the initial burden of showing by direct or indirect evidence an offer of permanent resident status, citizenship, or some other type of permanent resettlement.~ [T]he focus of the firm resettlement inquiry remains on *an offer* of permanent resettlement.~ The fact that a country offers a process for applying for some type of refugee or asylum status is not the same as offering the status itself.~ However, an applicant may have an offer if he or she is entitled to permanent resettlement and all that remains in the process is for the applicant to complete some ministerial act.˜ Thus, the firm resettlement bar may apply if the applicant chooses to walk away instead of completing the process and accepting the third country's offer of permanent resettlement.˜ The fact that an applicant no longer has travel authorization does not preclude a finding of permanent resettlement when the applicant has permitted his documentation to lapse.˜

Once the government presents evidence of an offer of some type of permanent resettlement, the burden shifts to the applicant to show that the nature of his stay and ties was too tenuous, or the conditions of his residence too restricted, for him to be firmly resettled.˜

10.38 Asylum Bars: Persecution of Others

In defining the scope of refugee protections, Congress specifically excluded those who have themselves engaged in persecution: "The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

Whether the persecutor bar should apply to individuals who acted under duress has been the subject of debate. In 2018, the Board of Immigration Appeals recognized a "narrow" duress exception to the persecutor bar. Matter of Negusie, 27 I. & N. Dec. 347, 353 (BIA 2018). Attorney General William Barr, serving under President Donald Trump, referred the BIA's decision to himself and reversed, finding no duress or coercion exception existed. Matter of Negusie, 28 I. & N. Dec. 120 (A.G. 2020). Attorney General Merrick Garland, serving under President Joe Biden, referred AG Barr's decision to himself and stayed it, Matter of Negusie, 28 I. & N. Dec. 299 (A.G. 2021), but Garland never rendered a decision in the case. Attorney General Pam Bondi, serving during the second administration of President Donald Trump, vacated AG Garland's stay and reinstated AG Barr's decision. Matter of Negusie, 29 I. & N. Dec. (A.G. 2025).

There has also been debate about the burden of proof when it comes to the persecutor bar. The BIA, in its Negusie decision, concluded that "the initial burden is on the DHS to show evidence that indicates the alien assisted or otherwise participated in persecution." Negusie, 27 I. & N. Dec. at 366. Attorney General Barr disagreed, concluding that "if evidence in the record indicates the persecutor bar may apply, the noncitizen bears the burden of proving by a preponderance of the evidence that it does not." Negusie, 28 I. & N. Dec. at 154. The latter position presently controls.

10.39 Asylum Bars: Particularly Serious Crime

Ninth Circuit Immigration Outline (2020)

[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).] A person convicted of a particularly serious crime is considered per se to be a danger to the community.˜

[Courts have] jurisdiction to review the BIA's determination that an applicant has been convicted of a "particularly serious crime˜" [but review] is "limited to ensuring that the agency relied on the 'appropriate factors' and 'proper evidence,'" and˜ may not "reweigh the evidence and reach our own determination about the crime's seriousness."

All aggravated felonies are categorically particularly serious crimes for the purposes of asylum.˜ Further,˜ the Attorney General is permitted "by regulation, to [categorically] make particular crimes particularly serious even though they are not aggravated felonies."˜

For offenses that are not per se particularly serious crimes,˜ the seriousness of a crime is judged by looking at such factors "as the nature of conviction, the circumstances underlying the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community."˜ Additionally, crimes against persons are more likely to be considered particularly serious.˜

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

10.40 Asylum Bars: Serious Non-political Crime

Ninth Circuit Immigration Outline (2023)

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)˜. The court interprets "serious reasons to believe as being tantamount to probable cause."˜

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

—˜—

The BIA has held that there is no duress exception to the serious non-political crime bar. Matter of D-G-B-L, 29 I. & N. Dec. 392 (BIA 2026).

10.41 Asylum Bars: Security

Ninth Circuit Immigration Outline (2023)

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

—˜—

10.42 Asylum Bars: TRIG

The terrorism related inadmissibility grounds (TRIG) discussed in sections 5.4-5.6 are grounds for denying asylum.

Ninth Circuit Immigration Outline (2023)

An applicant is ineligible for asylum if he is inadmissible or removable for reasons relating to terrorist activity, unless in the case of an applicant inadmissible as a representative of a terrorist organization or group that espouses or endorses terrorist activity, the Attorney General determines in his discretion that there are not reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(v).˜

The commission of "an act that the actor knows, or reasonably should know, affords material support, … to a terrorist organization or a member of a terrorist organization, unless the alien did not know (and should not reasonably have known) that the organization was a terrorist organization" qualifies as engaging in terrorist activity.˜ "[T]he INA's material support bar contains no implied exception for de minimis aid in the form of funds."˜

—-—

10.43 Withholding of Removal

A noncitizen who does not qualify for asylum may qualify for a different form of relief called withholding of removal. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). As explained in the following readings, withholding is subject to a higher burden of proof than asylum. Yet two of the asylum bars discussed above—the one-year filing deadline and firm resettlement—do not apply to withholding cases. Finally, withholding is a less-desirable form of relief as it applies only to the applicant and does not provide for relief for family members such as spouses and children.

EOUSA, OLE, Immigration Law (2005)

Withholding of removal is a distinct mechanism through which a noncitizen can have his or her deportation to a particular country "withheld" because his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). The burden is higher than in an asylum case: the noncitizen must establish a clear probability of persecution. "Clear probability" is defined as "more likely than not" that the noncitizen will be persecuted.˜ If the noncitizen satisfies this burden, removal to the designated country is prohibited. Withholding, unlike asylum, provides no means to become a permanent resident.˜

—-—

Ninth Circuit Immigration Outline (2023)

Withholding [of removal] codifies the international norm of "nonrefoulement" or non-return to a country where an applicant would face persecution.˜

BURDEN OF PROOF

"The 'clear probability' standard for withholding is a more stringent burden of proof than the standard for asylum, which does not require that the applicant demonstrate that harm would be more likely than not to occur."˜ Because "[t]he 'more likely than not' standard for withholding of removal is 'more stringent' than the 'reasonable possibility' standard for asylum, … an applicant who is unable to show a 'reasonable possibility' of future persecution 'necessarily fails to satisfy the more stringent standard for withholding of removal.'"˜ The standard has "no subjective component, but instead requires the noncitizen to establish by objective evidence that it is more likely than not that [the noncitizen] will be subject to persecution upon deportation."˜

Although an asylum "applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant," 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added), the standard for withholding of removal is not as demanding˜. [The withholding statute requires that race, religion, nationality, membership in a particular social group, or political opinion be *a* reason for persecution of the applicant.] "[T]he requirement that an applicant demonstrate that a protected characteristic would be 'a reason' for future persecution is a 'weaker motive' than the 'one central reason' required for asylum…. A person may have 'a reason' to do something that is not his 'central' reason or even 'one central reason.' Thus, although the overall standard of proof is more difficult to meet in withholding cases, the motive for persecution is easier to show."˜

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 [] protected grounds …."˜

[That said, some of the asylum bars apply in withholding cases as well. Applicants are not entitled to withholding relief if they:]˜ assisted in Nazi persecution or engaged in genocide˜; "ordered, incited, assisted, or otherwise participated in the persecution of an individual" on account of the protected grounds; [have been convicted of particularly serious crimes such as (1) an aggravated felony resulting in an aggregate sentence of imprisonment of at least five years—a more narrow understanding of this term than is used in asylum cases, or (2) a crime designed as particularly serious by the Attorney General]; "committed a serious nonpolitical crime outside the United States before" arrival;˜ [are]˜ a danger to the security of the United States; [or they are subject to the terrorism related inadmissibility grounds].

NATURE OF RELIEF

Under asylum, an applicant granted relief may apply for permanent residence after one year.˜ Under withholding of removal, the successful applicant is only given a right not to be removed to the country of persecution.˜ Withholding does not confer protection from removal to any other country.˜

10.44 Convention Against Torture

A noncitizen who does not qualify for asylum or withholding may nonetheless qualify for protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, known as "CAT" relief.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.˜

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Ninth Circuit Immigration Outline (2023)

"CAT prohibits removal of a noncitizen to a country where the noncitizen likely would be tortured."˜ The United States signed the Convention Against Torture on

April 18, 1988, and Congress passed the Foreign Affairs Reform and Restructuring Act ("FARRA") in 1988 to implement Article 3 of CAT.˜ The implementing regulations for the Convention Against Torture are found in 8 C.F.R. § 1208.16 to 1208.18.˜

There are two forms of protection under the Convention Against Torture: (1) withholding of removal under 8 C.F.R. § 1208.16(c) for noncitizens who are not barred from eligibility under FARRA for having been convicted of a "particularly serious crime" or of an aggravated felony for which the term of imprisonment is at least five years, and (2) deferral of removal under 8 C.F.R. § 1208.17(a) for noncitizens entitled to protection but subject to mandatory denial of withholding.˜

Definition of Torture

"The Torture Convention defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as … punishing him … for an act he … has committed … when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity."˜ "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."˜

"The United States included a reservation when it ratified the Convention, narrowing the definition of torture with respect to 'mental pain or suffering.' The reservation states that 'mental pain or suffering refers to the prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality."˜

"'Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'"˜ However, "[w]hether used as a means of punishing desertion or some other form of military or civilian misconduct or whether inflicted on account of a person's political opinion, torture is *never* a lawful means of punishment."˜ Lawful sanctions encompass "'judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty,' but only so long as those sanctions do not 'defeat the object and purpose of [CAT] to prohibit torture.'"˜ "A government cannot exempt tortuous acts from CAT's prohibition merely by authorizing them as permissible forms of punishment in its domestic law."˜

"The threat of imminent death, whether directed at the applicant or someone the applicant knows, may constitute torture."˜ Additionally, "[r]ape and sexual assault may constitute torture, and 'certainly rise[] to the level of torture for CAT purposes' when inflicted due to the victim's sexual orientation."˜

BURDEN OF PROOF

In order to be eligible for withholding of removal under the Convention Against Torture, the applicant has the burden of establishing that if removed to the proposed country of removal "he is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, but defeats the object and purpose of CAT."˜ This standard requires that an applicant demonstrate "only a chance greater than fifty percent that he will be tortured" if removed.˜

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."˜ The "failure to establish eligibility for asylum does not necessarily doom an application for relief under the United Nations Convention Against Torture." Instead, "the standards for the two bases of relief are distinct and should not be conflated."˜

[S]ection "1208.16(c)(2) provides that an applicant for deferral of removal must demonstrate that it is more likely than not that he or she will be tortured if removed. In deciding whether the applicant has satisfied his or her burden, the IJ must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal."˜ "[S]ection 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative.˜ Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof."˜

"[T]he CAT regulations cast a wide evidentiary net, providing that 'all evidence relevant to the possibility of future torture shall be considered, including, but not limited to ... evidence of gross, flagrant or mass violations of human rights within the country of removal ....'" "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."˜

"In evaluating a CAT claim, 'the IJ must consider all relevant evidence; no one factor is determinative.'˜ Relevant evidence includes:

i. Evidence of past torture inflicted upon the applicant;
ii. Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
iii. Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
iv. Other relevant information regarding conditions in the country of removal.˜

Differences Between CAT Protection and Asylum and Withholding

"[T]he Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured 'on account of' a protected ground; it is narrower, however, because the petitioner must show that it is 'more likely than not' that he or she will be tortured, and not simply persecuted upon removal to a given country."˜ "Unlike asylum and withholding, there are no mandatory bars to an applicant seeking deferral of removal under CAT."˜

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."˜

"Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."˜ "Acquiescence" by government officials does not require actual knowledge or willful acceptance, rather awareness and willful blindness by governmental officials is sufficient.˜ Nor does the standard require that public officials sanction the alleged conduct.˜ "It is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it."˜ "[T]he acquiescence standard is met where the record demonstrates that public officials at any level—even if not at the federal level—would acquiesce in torture the petitioner is likely to suffer."˜

"[A]n applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in [her] torture."˜ It is enough for her to show that she was subject to torture at the hands of local officials.

"[A] general ineffectiveness on the government's part to investigate and prevent crime will not suffice to show acquiescence."˜ Furthermore, "inability to bring the criminals to justice is not evidence of acquiescence, as defined by the applicable regulations."˜

An applicant also need not demonstrate that she would face torture while under public officials' prospective custody or physical control.˜

MANDATORY RELIEF

"If an alien meets his burden of proof regarding future torture, withholding of removal [under CAT] is mandatory under the implementing regulations…."˜ However, there is one qualification to the mandatory nature of withholding under the CAT. "If the alien has committed a 'particularly serious crime' or an aggravated felony for which the term of imprisonment is at least five years, only deferral of removal, not withholding of removal, is authorized."˜

Although an applicant will be denied withholding of removal under CAT if the Attorney General has reasonable grounds to believe that the applicant is a danger to the security of the United States, see 8 U.S.C. § 1231(b)(3)(B)(iv) and 8 C.F.R. § 1208.16(d)(2), he may still be eligible for deferral of removal under CAT, see 8 C.F.R. § 1208.17(a).˜

NATURE OF RELIEF

Unlike asylum, CAT relief does not confer status, only protection from return to the country where the applicant would be tortured. See 8 C.F.R. § 1208.16(f).˜

10.45 Temporary Protected Status

CRS, TPS and DED (2025)

Congress established TPS through Title III of the Immigration Act of 1990.˜ The statute gives the Secretary of the Department of Homeland Security (DHS),˜ in consultation with other government agencies (most notably the Department of State), the authority to designate a country for TPS under one or more of the following conditions:

1. ongoing armed conflict in a foreign state that poses a serious threat to personal safety;

2. a foreign state request for TPS because it temporarily cannot handle the return of its nationals due to an environmental disaster; or
3. extraordinary and temporary conditions in a foreign state that prevent its nationals from safely returning, unless the Secretary finds that allowing its nationals to temporarily stay in the United States is against the U.S. national interest.

[INA § 244(b)(1), 8 U.S.C. § 1254a(b)(1).]˜

The Secretary of DHS may designate a country for TPS for periods of 6 to 18 months.˜ TPS statute directs the Secretary to periodically review conditions in designated countries and determine whether the conditions for designation continue to be met. If the Secretary determines they do not, he or she "shall terminate the designation by publishing notice in the Federal Register."˜ Such termination may not take effect earlier than 60 days after publication or expiration of the most recent previous extension, whichever is later.˜ If the Secretary determines that conditions continue to be met (or does not make a determination), a designation is extended for 6 months, or at the Secretary's discretion, 12 to 18 months.˜ Each designation specifies the date by which individuals must have continuously resided in the United States in order to qualify.˜ If the Secretary extends a designation, he or she may also move forward the required arrival date to allow foreign nationals who arrived in the United States later to qualify, an action referred to as redesignation.˜

To be eligible for TPS, a national˜ of a designated country must (1) have been continuously physically present in the United States since the designation began; (2) have continuously resided in the United States since the date indicated by the DHS Secretary;˜ (3) be admissible as an immigrant, with certain exceptions; and (4) register during the specified registration period. Aliens convicted of a felony or two or more misdemeanors committed in the United States are ineligible for TPS.˜ In addition, TPS applicants are subject to the same criminal and security ineligibilities that apply to asylum applicants.˜ The TPS statute specifies that certain grounds of inadmissibility do not apply to TPS applicants (those related to labor certification and documentation requirements) and that other grounds of inadmissibility cannot be waived, including those relating to criminal convictions, drug offenses, terrorist activity, and the persecution of others. To obtain TPS, applicants must pay specified fees˜ and submit an application to DHS's U.S. Citizenship and Immigration Services (USCIS) before the deadline set forth in the Federal Register notice announcing the TPS designation. The application must include supporting documentation as evidence of eligibility (e.g., a passport issued by the designated country and records showing continuous physical presence in the United States since the date established in the TPS designation).˜ Foreign nationals outside the United States are not eligible to apply for TPS.

Individuals granted TPS are eligible for employment authorization, cannot be detained on the basis of their immigration status, and are not subject to removal while they retain TPS.˜ They may be deemed ineligible for public assistance by a state, and they may travel abroad with the prior consent of the DHS Secretary.˜ TPS does not provide a path to lawful permanent residence or citizenship, but a TPS recipient is not barred from acquiring nonimmigrant or immigrant status if he or she meets the requirements.˜ DHS has indicated that information it collects when an individual registers for TPS may be used to enforce immigration law or in any criminal proceeding.˜ In addition, withdrawal of an alien's TPS may subject the alien to exclusion or deportation proceedings.˜

—-—

TPS protections last, at most, 18 months at a time. But they can be renewed. And for many years, TPS for certain countries was renewed at every opportunity. TPS for Honduras and Nicaragua lasted from 1999 to 2025. TPS for El Salvador lasted from 2001 to 2026. Thus, some TPS recipients lived and worked in the United States for over 25 years albeit with no pathway to more permanent status—not even through adjustment of status. In Sanchez v. Mayorkas, 593 U.S. 409 (2021), the Supreme Court held that TPS does not count as a lawful admission that would allow a TPS holder to benefit from adjustment of status within the United States. See section 6.9.

The second Trump administration has taken a different approach to TPS—terminating every program that has come up for renewal, 13 between January 2025 and June 2026. Advocates challenged the decisions on multiple grounds including that the terminations were arbitrary and capricious under the Administrative Procedure Act (APA). In Mullin v. Doe, 609 U.S. __ (2026), the Supreme Court held that INA § 244(b)(5)(A), 8 U.S.C. § 1254a(b)(5)(A), bars judicial review of non-constitutional claims concerning TPS.

10.46 Deferred Enforced Departure

CRS, TPS and DED (2025)

[Deferred Enforced Departure (DED) is another form of blanket relief from removal.] ⤷The term blanket relief ... refers to relief from removal that is administered to a group of individuals based on their ties to a foreign country; this stands in contrast to asylum, which is a form of relief administered on a case-by-case basis to individuals based on their personal circumstances. DED is not to be confused with deferred action [see sections 8.12-8.13], which the Department of Homeland Security defines as "a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion."

DED is a temporary, discretionary, administrative stay of removal that has been granted to foreign nationals from designated areas. Unlike TPS, a DED designation emanates from the President's constitutional powers to conduct foreign relations and has no statutory basis. DED was first used in 1990 and [c]ertain Lebanese, Liberians, and residents of Hong Kong living in the United States currently maintain relief under DED; a DED grant for certain Palestinians expired on August 13, 2025.

Unlike TPS, the Secretary of State does not need to be consulted when DED is granted. In contrast to recipients of TPS, individuals who benefit from DED do not register for the status with USCIS unless they are applying for work authorization. Instead, DED is triggered when a protected individual is identified for removal.

DED—and its precursor, [Extended Voluntary Departure (EVD)]—have been used to provide relief from removal at the President's discretion, usually in response to war, civil unrest, or natural disasters.

10.47 Test Your Knowledge

PROBLEM 10.1

Alena Aineska is a citizen of Bereznik. Eighteen months ago, she was involuntarily committed to a mental institution after she was found, in a civil proceeding, to be a homosexual. While institutionalized, she was given electroshock treatment and drug protocols aimed at curing her of her mental illness. She was granted a brief home visit to see her dying mother fourteen months ago. Alena's older sister took the opportunity to secret Alena out of the country. Alena then spent one month in a neighboring country, Estrovia, with an ex-girlfriend, Mika Miocic. Alena spent the entire month indoors, curled up on Mika's couch, not speaking. Concerned about her well-being, Mika took steps to move Alena to the U.S. home of Alena's cousins and close friends.

Mika went to a travel agent and purchased a ticket – in Mika's own name – from Estrovia to Seattle. She then gave her passport and the ticket to Alena, drove Alena (still silent and mostly non-responsive) to the airport, and ushered Alena onto the plane. When Alena landed in the United States one year ago, she allowed herself to be carried with the traveling crowds through immigration control. She did not need to present a visa because Estrovia is a visa-waiver country. Alena's cousins were waiting on the other side and took her immediately into their care.

Last month, Alena and her cousins were involved in a car accident. The responding officers asked everyone on the scene for identification. When Alena could not produce any evidence of lawful immigration status, the responding officer contacted ICE and she was taken into custody.

It has now been a little over a year since Alena's initial entry into the United States. Her cousins are asking for advice on how to help Alena. They are concerned about her return to Bereznik. If returned, Alena will receive advanced mental health treatment, which would include a frontal lobotomy. In Bereznik today, as was common in the United States several decades ago, lobotomies are typically accomplished by inserting rods through the eye socket, using a mallet to drive through the thin layer of bone and into the brain along the plane of the bridge of the nose, and then pivoting the rods to dissect the connection between the prefrontal cortex (the portion of the brain responsible for planning complex cognitive behaviors, personality expression, decision making and moderating correct social behavior) and the thalamus (the portion of the brain relaying sensation, spatial sense and motor signals to the cerebral cortex, along with the regulation of consciousness, sleep and alertness).

What are possible avenues, as well as any hurdles, to relief for Alena?

PROBLEM 10.2

Santiago Sánchez is from Chalatenango, El Salvador, an area in the northern part of the country with about 30,000 inhabitants. He grew up in this area and was raised by his paternal grandfather, Martin Mariel. Because of the size of Chalatenango, many people knew Sánchez lived with his grandfather and continued to live with him after marrying Rosa Renata and even after the arrival of their daughters: Flor Fernanda and Gina Gabriela.

Sánchez knew his grandfather was employed by the National Civil Police of El Salvador, but he didn't know that his grandfather had testified against several gang members until he, Sánchez, started receiving threatening phone calls from the gang Mara Salvatrucha (MS or MS-13). The callers would threaten Sánchez and his grandfather, saying they knew about Mariel's testimony against their friends. The calls arrived two to three times a month.

At one point, when out running errands, Sánchez was surrounded by members of MS-13 who told him that they knew he had a family member that worked for the police. The gang members punched Sánchez several times in the face, breaking his nose. When

Sánchez told his grandfather of the encounter, his grandfather made a formal complaint with the local police. However, the phone calls to the house did not stop.

Last month, Rosa Renata was kidnapped while shopping. She was assaulted and murdered, her body dumped on the front steps of the home Sánchez shared with his grandfather.

Fearing for the lives of his daughters, Sánchez fled with them to the United States. Sánchez has since spoken to his grandfather and learned that the threatening telephone calls continue.

How might an attorney use this information to support an asylum claim by Sánchez?

PROBLEM 10.3

Li Lau came to the United States on an F-visa to pursue a Master of Divinity degree at the New York City Theological Seminary. Lau, an Evangelical Christian, hoped to return to China to aid his father's ministry in the Grace Evangelical Free Church, a small 50-member church in Beijing, China.

One Saturday, when Lau called home, Lau learned that father had been sent to a government-run labor camp on the charge of "organizing and using a cult to undermine law enforcement." Lau's mother did not know when his father might return. She also told Lau that officers from the Beijing Municipal Public Security Bureau (the city police) had boarded up the small building that housed the Grace Evangelical Free Church. Every member of the church had been brought to the PSB headquarters for questioning, and all had been "strongly encouraged" to join the Three-Self Patriotic Movement ("TSPM"), the only state-sanctioned Protestant church in China. The children's director and associate pastor of Grace Evangelical Free Church were both under house arrest, and both had been fired from their positions at the state-run Beijing No. 80 High School. Lau's mother warned him not to return to China.

How might an attorney use this information to support an asylum claim by Lau?

Chapter Eleven: Federal Immigration Crimes

Immigration crimes dominate federal criminal prosecutions. Here are just a few statistics from the Federal Justice Statistics, regarding FY 2023, available at https://perma.cc/H8FE-8C5T:

- Immigration offenses were the most common basis for arrest, accounting for 26% of federal arrests.
- The five federal judicial districts along the U.S.-Mexico border (California Southern, Arizona, New Mexico, Texas Southern, and Texas Western) accounted for 41% of all federal arrests.
- 70% of immigration suspects were prosecuted.
- Thirteen percent of matters concluded by U.S. attorneys in FY 2023 were disposed of by U.S. magistrates. 28.5% of the offenses disposed of by U.S. magistrates were misdemeanor immigration cases.
- Nearly all defendants (98%) charged with immigration offenses were convicted.

The two most prosecuted federal crimes are improper entry by an alien, 8 U.S.C. § 1325, and reentry of a removed alien, 8 U.S.C. § 1326.

11.1 Improper Entry and Unlawful Reentry

Unauthorized entry and post-deportation reentry have been called the "low-hanging fruit of the federal legal system." The description is apt, as both are crimes with few elements and minimal evidentiary burdens.

CRS, Immigration-Related Criminal Offenses (2023)

IMPROPER ENTRY

8 U.S.C. § 1325 makes it a criminal offense to enter or attempt to enter the United States without authorization. A violation may result in a fine [of $5,130] and imprisonment for up to six months for a first offense and up to two years for a subsequent violation. An alien may commit improper entry in three ways:

1. entering or attempting to enter the United States at any time or place other than a designated port of entry;
2. eluding examination or inspection by immigration officers; or
3. attempting to enter or obtaining entry by a willfully false or misleading representation or the willful concealment of a material fact.

ILLEGAL REENTRY

8 U.S.C. § 1326 makes it a felony for an alien previously denied admission or removed from the United States, or who departed the country while an order of removal was outstanding, to enter, attempt to enter, or be found in the United States without prior authorization. Absent certain factors, a conviction carries a punishment of a fine and a term of imprisonment for up to two years. Aliens may face enhanced penalties if they were previously removed or excluded on certain grounds, or had committed specified crimes. See 8 U.S.C. § 1326(b). In some cases, the maximum penalty may be up to 20 years' imprisonment.

Some reviewing courts have held that the alien must have entered "free from official restraint." See United States v. Gaspar-Miguel, 947 F.3d 632, 633-34 (10th Cir. 2020) (detailing history of the concept of "freedom from official restraint"); United States v. Pacheco-Medina, 212 F.3d 1162 (9th Cir. 2000) (reversing conviction for illegal reentry where the defendant was immediately apprehended when stepping on U.S. soil and therefore was never free from official restraint); United States v. Morales-Palacios, 369 F.3d 442 (5th Cir. 2004); see also United States v. Lombera-Valdovinos, 429 F.3d 927 (9th Cir. 2005) (overturning conviction for attempted illegal reentry because the alien crossed with the specific intent to be imprisoned). Some circuits have neither explicitly endorsed nor rejected the doctrine. See, e.g., United States v. Rojas, 770 F.3d 366, 368 (5th Cir. 2014) (deciding case without reaching the question of whether the circuit should recognize the official restraint doctrine).

Kit Johnson, A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes, 92 DENV. U. L. REV. 863 (2015)

[The crime of improper entry is] known as "a 1325" in reference to its statutory basis in 8 U.S.C. § 1325. Conviction requires proof that the defendant (1) is not a U.S. citizen, (2) was found in or trying to enter the United States, and (3) did not have permission to be in the country.~ [This crime is also referred to as "unlawful entry," "unauthorized entry" and EWI (pronounced "e-wee"), short for "entry without inspection."]

[The crime of reentry after deportation is]~ called "a 1326" because of its basis in 8 U.S.C. § 1326.~ [A 1326 conviction requires the same proof as § 1325 with the addition of] proof that the defendant (4) had previously been removed or deported from the United States.~

The evidence required to prove these elements is not hard to come by.~ To prove citizenship, a prosecutor might have the defendant's own admission, a birth certificate, or fingerprint data.~ To prove presence, a prosecutor can simply point to the defendant in the courtroom— though, in practice, prosecutors generally use the arresting officer's testimony.~ For lack of permission, the prosecutor might present a Certificate of Non-Existence from the USCIS indicating a lack of any paperwork regarding formal admission.~ As for prior removal, the prosecutor need only introduce certified copies of the prior order of removal and warrant of removal.~ To do all this, a prosecutor would need, at most, two witnesses—a records custodian and the arresting officer.~

It should come as no surprise that prosecution of § 1325 and § 1326 cases are "lightning quick."~ And the process moves even faster with routine plea agreements.~ Many defendants who might be tried for felony reentry are offered the following deal: Don't fight prosecution, and receive instead a misdemeanor conviction for unauthorized entry.~ Such pleas can take prosecutions from a two-day endeavor~ to a process lasting just seconds.~ That's not hyperbole. Section 1325 pleas are handled en masse in many courts along the southern border~ where the initial appearance, arraignment, plea and sentencing all take place in one hearing.~ Magistrate Judge Bernardo P. Velasco of the U.S. District Court for the District of Arizona can routinely process seventy pleas to § 1325 charges in thirty minutes, averaging out to just under twenty-six seconds per defendant.~

The quickness of prosecution contrasts strongly with the length of incarceration. The maximum sentence for a § 1325 conviction is six months for a first offense,~ and a second unauthorized entry conviction can result in a two-year prison term.~ The maximum sentence for a § 1326 conviction is two years.~ But there's a hitch: If the defendant was removed on the basis of a conviction for three or more misdemeanors involving drugs, crimes against the person, or certain felonies, the maximum sentence jumps to ten years.˜ And if the defendant was removed on the basis of a conviction for an aggravated felony,˜ the maximum sentence is twenty years.˜

11.2 Defenses to Improper Entry and Unlawful Reentry: Citizenship

Both 8 U.S.C. § 1325 and 8 U.S.C. § 1326 apply only to "any alien" who violates the proscribed conduct. Thus, U.S. citizenship is an absolute defense to a criminal prosecution under either of these statutes. See Chapter 12 for more details regarding the acquisition of U.S. citizenship.

11.3 Defenses to Improper Entry and Unlawful Reentry: Statutes of Limitation

Neither 8 U.S.C. § 1325 nor 8 U.S.C. § 1326 reference a specific statute of limitations. Pursuant to 18 U.S.C. § 3282(a), both are subject to a five-year statute of limitations. The limitations period runs from the moment when the crime is said to be complete.

For 8 U.S.C. § 1325 cases, the statute of limitations runs from the date of the noncitizen's unlawful entry into the United States. That is when a 1325 crime is complete.

For 8 U.S.C. § 1326 cases, in contrast, the statute of limitations runs from different dates, depending on which provision of 1326 the noncitizen is charged with violating. The offenses of "entry" and "attempted entry" under 8 U.S.C. § 1326 are complete when the deported noncitizen enters or attempts to enter through a recognized port of entry. In contrast, the offense of being "found in" the United States after surreptitious entry is considered a "continuing violation" that is not complete until the noncitizen is "discovered" by immigration authorities. Accordingly, this latter category of 1326 prosecutions are difficult to challenge on statute of limitations grounds.

11.4 Defenses to Unlawful Reentry: Challenging Initial Deportation

Prosecution under 8 U.S.C. § 1326 requires proof of an earlier "order of exclusion, deportation, or removal." 8 U.S.C. § 1326(a)(1). One defense to a 1326 prosecution is to challenge the validity of the initial order of deportation. However, in 1996, Congress limited the availability of this defense by requiring administrative exhaustion. 8 U.S.C. § 1326(d).

11.5 Failure to Register

The INA states that "[i]t shall be the duty of every [noncitizen] … in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted … and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted…." INA § 262(a); 8 U.S.C. § 1302(a). On the first day of his second term of office, President Trump issued an executive order directing DHS to publicize this obligation and ensure that failure to register be treated as a criminal enforcement priority. See https://perma.cc/33BU-YMSK. USCIS thereafter publicized the registration requirement as well as consequences for failure to complete it, noting that "Failure to comply may result in criminal … penalties, up to and including misdemeanor prosecution, the imposition of fines, and incarceration." See https://perma.cc/2Q8Y-WKDU. The basis for criminal penalties is INA § 266(a), 8 U.S.C. § 1306(a), which reads: "Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted … shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both."

Notably, USCIS considers many noncitizens to have already completed the registration requirement, including, among others: lawful permanent residents (see Chapter 3), parolees (see section 6.6), nonimmigrants (see Chapter 4), and noncitizens in removal proceedings (see Chapter 9). The main target of the second Trump administration's registration push is undocumented migrants. Registration by this cohort will, naturally, aid the administration in identifying and removing such noncitizens.

11.6 Unlawful Employment

Kit Johnson, Lawful Work While Undocumented: Business Entity Solutions, 64 ARIZ. L. REV. 89 (2022)

There is a commonly held misconception that it is a crime to be present in the United States without authorization. This is, however, not true.˜ Despite ubiquitous use of the phrase "illegal alien" to describe a noncitizen present in the United States without authorization, presence is not a criminally-punishable offense.˜

There is a natural corollary that is also a misconception—that noncitizens present in the United States "illegally" must be engaged in unlawful conduct if they work without authorization.˜ To the contrary, it is not a crime to work in the United States without authorization.˜ The potential for criminal liability is on the other side of the transaction, with the employer. It is "unlawful for a person or other entity … to hire … for employment in the United States an alien knowing the alien is an unauthorized alien … with respect to such employment."˜ [8 U.S.C. § 1324a(a)(2).] In addition, should an employer find out that an employee "is (or has become) an unauthorized alien with respect to such employment," it is unlawful to continue their employment.˜ [8 U.S.C. § 1324a(a)(4).]

Notably, an employer cannot avoid these prohibitions with obvious work-arounds such as a contracting or subcontracting relationship.˜ If a "person or other entity" manages to "obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien … with respect to performing such labor," that person or entity will be "consider[ed] to have hired the alien for employment" in violation of law.˜ [8 U.S.C. § 1324a(a)(4).] Wal-Mart famously fell afoul of this provision, ultimately paying $11 million to settle accusations that the company benefitted from janitorial service contractors who employed undocumented laborers to undertake overnight cleaning in stores across several states.˜

Knowledge is an important part of these IRCA provisions˜ "Knowing" is defined by regulation.˜ It includes actual knowledge.˜ It also includes constructive knowledge: "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."˜

Employers face federal civil and criminal penalties for violating these rules. On the civil side, employers as individuals or entities can be ordered to pay fines that escalate for repeat offenders.˜ Fines start at $583 and are capped at $23,331 per undocumented worker.˜ On the criminal side, individuals or entities engaged in a "pattern or practice" of employing undocumented workers face mandatory fines—$3,000 per undocumented worker—six months of imprisonment, or both.˜ If an employer knowingly hires 10 or more undocumented workers during any 12 month period, the potential jailtime increases to five years.˜ [That said, the odds of catching the government's enforcement eye are long. Fewer than 0.02% of U.S. employers are civilly fined for unlawful employment. Criminal convictions are rare. Prison-time is rarer still.]

Federal penalties for unauthorized work are fairly new—at least in the long history of immigration law. The prohibitions came into being as part of the Immigration Reform and Control Act of 1986 ("IRCA," commonly pronounced "irk-uh").˜

Congress had started considering the possibility of employer sanctions in 1952, but those efforts went nowhere until 1986.˜ For 210 years of the United States' existence prior to passage of IRCA, such employment was generally lawful.˜

What, then, accounts for the radical reshaping of U.S. law in 1986? For one, IRCA was greatly influenced by the work of the Select Commission on Immigration and Refugee Policy ("SCIRP").˜ SCRIP was created in 1978 to study then-existing immigration law and its effects on the United States as well as to recommend changes to governing law.˜ After reviewing testimony and expert research, the commission released a final report on March 1, 1981.˜ In that report, the commission noted that "Many undocumented/illegal migrants were induced to come to the United States by offers of work from U.S. employers who recruited and hired them under protection of present U.S. law."˜ The commission saw employment opportunities in the United States as a significant factor inducing migrants to come to the United States without permission.˜ In addition to exploring why migrants came to the United States without authorization, the SCRIP report also addressed perceived consequences of such migration, including "job displacement" and "wage depression" affecting working Americans.˜ The commission concluded that "some form of employer sanctions is necessary if illegal migration is to be curtailed."˜ Specifically, the commission recommended "legislation be passed making it illegal for employers to hire undocumented workers."˜

IRCA, influenced by SCRIP, created employment sanctions in an effort to eliminate the availability of U.S. jobs identified as the "pull factor" drawing undocumented migrants to the United States.˜ This, legislators hoped, would also help protect U.S.-born workers.˜ Another important factor in the creation of employment sanctions was the fact that IRCA included an amnesty provision, granting legal status to many individuals then living in the United States without authorization.˜ Employer sanctions were, in the words of Professor Wishnie, "part of a grand bargain and the principal quid pro quo" for amnesty.˜

The employment sanctions put into place by IRCA dramatically shifted the legal landscape regarding the hiring of unauthorized workers. Yet the law does not reach every category of employment in the United States.

"Employment" under IRCA is "any service or labor performed by an employee for an employer within the United States."˜ Within this language, an "employee," is "an individual who provides services or labor for an employer for wages or other remuneration."˜ And an "employer" is an individual or entity "who engages the services or labor of an employee to be performed in the United States for wages or other remuneration."˜

By statute, the term "employee" does not include those engaged in casual domestic employment˜ nor independent contractors.˜

11.7 Test Your Knowledge

PROBLEM 11.1

Reconsider Problem 9.2. Can Luz be charged with a federal immigration crime?

PROBLEM 11.2

Reconsider Problem 5.3. Can Zara be charged with a federal immigration crime?

PROBLEM 11.3

Reconsider Problem 5.1. What are the federal criminal implications of Cruz's work as a truck driver? What information, if any, would you need from Cruz to reach an informed conclusion about his work?

Chapter Twelve: Citizenship and Naturalization

This chapter explores the concepts of citizenship and naturalization. It begins with an explanation of the rights and benefits of U.S. citizenship (section 12.1). Next, it addresses the various ways in which individuals can acquire U.S. citizenship: by being born in the United States (sections 12.2-12.4), by being born to U.S. citizen parents (section 12.5), and through the process of naturalization (sections 12.6-12.8). It addresses the issue of dual citizenship (section 12.9) and the idea of purchasing citizenship (section 12.10). Finally, this chapter discusses expatriation, which is the knowing relinquishment of citizenship (section 12.11), as well as denaturalization, which is the revocation of naturalization (section 12.12).

12.1 Rights and Benefits of U.S. Citizenship

CRS, U.S. Naturalization Policy (2024)

[O]nly U.S. citizens may

- vote in federal, state, and local elections;
- receive U.S. citizenship for their minor children born abroad;
- travel with a U.S. passport and receive diplomatic protection from the U.S. government while abroad;
- meet the U.S. citizenship requirement for federal and many state and local civil service employment and certain law enforcement jobs;
- receive the full range of federal public benefits and certain state benefits;
- participate on a jury; and

- run for elective office where citizenship is required.˜

U.S. citizens may also sponsor a broader range of family members living abroad for legal permanent residence (i.e., married minor and adult children, and siblings) than LPRs. [See section 3.1.] U.S. citizens may sponsor certain *immediate relatives* for legal permanent residence—spouses, minor unmarried children, and parents—regardless of numerical limits established in the INA. [See section 3.1.] As such, their sponsored immediate relatives may immigrate to the United States without having to wait for a numerically limited preference visa to become available. In contrast, LPRs must sponsor relatives for LPR status within numerically limited family preference categories that often require waiting years for a visa.˜

12.2 Introductory Concepts

United States citizenship is determined by: (1) birth in the United States, also known as *jus soli*; (2) birth to U.S. citizen parents, also known as *jus sanguinis*; and (3) naturalization, the process that allows individuals, after following a series of prescribed steps, to take on a new citizenship different from the one they were born into.

8 FAM 301.1-1

a. U.S. citizenship may be acquired either at birth or through naturalization subsequent to birth. U.S. laws governing the acquisition of citizenship at birth embody two legal principles:

1. Jus soli (the law of the soil)—a rule of common law under which the place of a person's birth determines citizenship. In addition to common law, this principle is embodied in the 14th Amendment to the U.S. Constitution and the various U.S. citizenship and nationality statutes; and
2. Jus sanguinis (the law of the bloodline)—a concept of Roman or civil law under which a person's citizenship is determined by the citizenship of one or both parents. This rule, frequently called "citizenship by descent" or "derivative citizenship", is not embodied in the U.S. Constitution, but such citizenship is granted through statute. As U.S. laws have changed, the requirements for conferring and retaining derivative citizenship have also changed. [For more, see section 12.5]

b. National vs. citizen: While most people and countries use the terms "citizenship" and "nationality" interchangeably, U.S. law differentiates between the two. Under current law all U.S. citizens are also U.S. nationals, but not all U.S. nationals are U.S.

citizens. The term "national of the United States", as defined by statute (INA 101 (a)(22) (8 U.S.C. 1101(a)(22)) includes all citizens of the United States, and other persons who owe allegiance to the United States but who have not been granted the privilege of citizenship:

1. Nationals of the United States who are not citizens owe allegiance to the United States and are entitled to the consular protection of the United States when abroad, and to U.S. documentation, such as U.S. passports with appropriate endorsements. They are not entitled to voting representation in Congress and, under most state laws, are not entitled to vote in Federal, State, or local elections except in their place of birth. (See 7 FAM 012 and 7 FAM 1300 Appendix B Endorsement 09.);

2. Historically, Congress, through statutes, granted U.S. non-citizen nationality to persons born or inhabiting territory acquired by the United States through conquest or treaty. At one time or other natives and certain other residents of Puerto Rico, the U.S. Virgin Islands, the Philippines, Guam, and the Panama Canal Zone were U.S. non-citizen nationals. (See 7 FAM 1120 and 7 FAM 1100 Appendix P.);

3. Under current law, only persons born in American Samoa and Swains Island are U.S. non-citizen nationals (INA 101(a)(29) (8 U.S.C. 1101(a)(29) and INA 308(1) (8 U.S.C. 1408)). (See 7 FAM 1125.); and

4. See 7 FAM 1126 regarding the citizenship/nationality status of persons born on the Commonwealth of the Northern Mariana Islands (CNMI).

c. Naturalization—Acquisition of U.S. Citizenship Subsequent to Birth: Naturalization is "the conferring of nationality of a State upon a person after birth, by any means whatsoever" (INA 101(a)(23) (8 U.S.C. 1101(a)(23)) or conferring of citizenship upon a person (see INA 310, 8 U.S.C. 1421 and INA 311, 8 U.S.C. 1422). Naturalization can be granted automatically or pursuant to an application. (See 7 FAM 1140.) [For more, see section 17.5.]

d. "Subject to the Jurisdiction of the United States": All children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth.

8 FAM 301.1-7

b. The Act of June 2, 1924 was the first comprehensive law relating to the citizenship of Native Americans. It provided: That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

c. Section 201(b) INA, effective January 13, 1941, declared that persons born in the United States to members of an Indian, Eskimo, Aleutian, or other aboriginal tribe were nationals and citizens of the United States at birth.

d. INA 301(b) (8 U.S.C. 1401(b)) (formerly INA 301(a)(2)), in effect from December 24, 1952, restates this provision.

12.3 Case: United States v. Wong Kim Ark

United States v. Wong Kim Ark
169 U.S. 649 (1898)

MR. JUSTICE GRAY DELIVERED THE OPINION OF THE COURT.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873, in the city of San Francisco, in the state of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the emperor of China. They were at the time of his birth domiciled residents of the United States, having previously established and are still enjoying a permanent domicile and residence therein at San Francisco. They continued to reside and remain in the United States until 1890, when they departed for China; and, during all the time of their residence in the United States, they were engaged in business, and were never employed in any diplomatic or official capacity under the emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom. In 1890 (when he must have been about 17 years of age) he departed for China, on a temporary visit, and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about 21 years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit, and with the intention of returning to the United States; and he did return thereto, by sea, in August, 1895, and applied to the collector of customs for permission to land, and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of congress known as the "Chinese Exclusion Acts," prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

I.˜

The constitution of the United States, as originally adopted, uses the words "citizen of the United States" and "natural-born citizen of the United States." By the original constitution, every representative in congress is required to have been "seven years a citizen of the United States," and every senator to have been "nine years a citizen of the United States"; and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president." Article 2, § 1. The fourteenth article of amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," also declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the fifteenth article of amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude."

The constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” Amend. art. 14. In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.˜ The language of the constitution, as has been well said, could not be understood without reference to the common law.˜

II.

The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called “ligealty,” “obedience,” “faith,” or “power”—of the king. The principle embraced all persons born within the king’s allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, “Protectio trahit subjectionem, et subjectio protectionem,”—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king’s dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.˜

[B]y the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

III.

The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established.˜

That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted until more than 50 years after the adoption of the constitution, when the matter was elaborately argued in the court of chancery of New York, and decided upon full consideration˜ in favor of their citizenship.

The same doctrine was repeatedly affirmed in the executive departments, as, for instance, by Mr. Marcy, secretary of state, in 1854˜; by Attorney General Black in 1859˜; and by Attorney General Bates in 1862˜.

IV.

It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile"; and children born in a foreign country, of a French father who had not established his domicile there, nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality."˜ The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, jus soli, the rule of descent or blood, jus sanguinis, as the leading principle; but an eminent commentator has observed that the framers of that code "appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe,—"De la vieille règle francaise, ou plutôt même de la vieille règle européenne,"—according to which nationality had always been, in former times, determined by the place of birth."˜

The later modifications of the rule in Europe rest upon the constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the constitution of the United States.˜

There is, therefore, little ground for the theory that at the time of the adoption of the fourteenth amendment of the constitution of the United States there was any settled and definite rule of international law generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport, and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion.˜

So far as we are informed, there is no authority, legislative, executive, or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective) conferring citizenship on foreign-born children of citizens have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion.˜

V.

In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The civil rights act, passed at the first session of the Thirty-Ninth congress, began by enacting that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding."˜

The same congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress, framed the fourteenth amendment of the constitution, and on June 16, 1866, by joint resolution, proposed it to the legislatures of the several states; and on July 28, 1868, the secretary of state issued a proclamation showing it to have been ratified by the legislatures of the requisite number of states.˜

The first section of the fourteenth amendment of the constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes˜, and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.˜

The real object of the fourteenth amendment of the constitution, in qualifying the words "all persons born in the United States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.˜

The principles upon which each of those exceptions rests were long ago distinctly stated by this court.˜

By the civil rights act of 1866, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed," were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, "not subject to any foreign power," were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children or foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the civil rights act, "not subject to any foreign power," gave way, in the fourteenth amendment of the constitution, to the affirmative words, "subject to the jurisdiction of the United States."

This sentence of the fourteenth amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed,—"born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof"; in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by congress, in the exercise of the power conferred by the constitution to establish a uniform rule of naturalization.

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined, and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in well-considered opinions of the executive departments of the government, since the adoption of the fourteenth amendment of the constitution.˜

The foregoing considerations and authorities irresistibly lead us to these conclusions: The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke in Calvin's Case, 7 Coke, 6a, "strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject"; and his child, as said by Mr. Binney in his essay before quoted, "If born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when secretary of state, in his report to the president on Thrasher's case in 1851, and since repeated by this court: "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,—it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations."˜

To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

VI.

Whatever considerations, in the absence of a controlling provision of the constitution, might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the fourteenth amendment, which declares and ordains that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Chinese persons, born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States.˜

The fact˜ that acts of congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII.

Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."~ Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry, inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about 17 years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.

12.4 Challenges to Jus Soli

CRS, Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate (2015)

[S]ome argue that the Fourteenth Amendment does not require U.S. citizenship to be automatically granted to persons born in the United States to aliens, especially those aliens who are present unlawfully or who are domiciled elsewhere.~↳Note that different reinterpretations are aimed at different concerns. Some would exclude from automatic U.S. citizenship those born to non-domiciled temporary visitors (whether legally present or not), but not unlawfully present aliens.~ Others would exclude those born to unlawfully present aliens, but not necessarily to those lawfully present, even temporarily as nonimmigrants.~ Still others propose that the Citizenship Clause does not require granting automatic U.S. citizenship to anyone but those with one or even both parents who are citizens or lawfully present and domiciled immigrants. [See Peter H. Shuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity (Yale University Press, 1985).] The core of this argument is that the phrase "subject to the jurisdiction thereof" was intended to codify a limitation on the birthright citizenship principle that, in the words of two of its early proponents, "demanded a more or less complete, direct power by government over the individual, and a reciprocal relationship between them at the time of birth, in which the government consented to the individual's presence and status and offered him complete protection." The "jurisdiction" referred to by the Citizenship Clause, in this view, is a more "complete" jurisdiction that entails undivided allegiance. This opposing view has been called the "consensual" approach, as its proponents would "make political membership a product of mutual consent by the polity and the individual." In short, as one amicus brief argued unsuccessfully before the Supreme Court in 2004, "[i]t is not the physical location of birth that defines citizenship, but the express or implied consent to jurisdiction of the sovereign." It is generally acknowledged that opposition to the conventional interpretation is the minority viewpoint.

On the first day of his second term in office, President Donald Trump issued an executive order aligned with this minority viewpoint of birthright citizenship. See https://perma.cc/DV7L-26HE.

Protecting the Meaning and Value of American Citizenship (2025)

Section 1. Purpose. The privilege of United States citizenship is a priceless and profound gift. The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." That provision rightly repudiated the Supreme Court of the United States's shameful decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), which misinterpreted the Constitution as permanently excluding people of African descent from eligibility for United States citizenship solely based on their race.

But the Fourteenth Amendment has never been interpreted to extend citizenship universally to everyone born within the United States. The Fourteenth Amendment has always excluded from birthright citizenship persons who were born in the United States but not "subject to the jurisdiction thereof." Consistent with this understanding, the Congress has further specified through legislation that "a person born in the United States, and subject to the jurisdiction thereof" is a national and citizen of the United States at birth, 8 U.S.C. 1401, generally mirroring the Fourteenth Amendment's text.

Among the categories of individuals born in the United States and not subject to the jurisdiction thereof, the privilege of United States citizenship does not automatically extend to persons born in the United States: (1) when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth.

Sec. 2. Policy. (a) It is the policy of the United States that no department or agency of the United States government shall issue documents recognizing United States citizenship, or accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship, to persons: (1) when that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth.

—-—

In 2026, the Supreme Court considered the constitutionality of President Trump's executive order in the following case of Trump v. Barbara.

12.5 Case: Trump v. Barbara

Trump v. Barbara
609 U.S. __ (2026)

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

At issue in this case is whether the Constitution guarantees citizenship to children born of parents unlawfully or temporarily present in the United States.

I

The Fourteenth Amendment provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

On January 20, 2025, President Trump issued Executive Order No. 14160, titled Protecting the Meaning and Value of American Citizenship. The Order provides that children born of persons unlawfully or temporarily present in the United States are not "subject to the jurisdiction" of the United States—and thus do not qualify for citizenship under the Fourteenth Amendment or the Immigration and Nationality Act (INA), which uses the same language.˜

Several parents filed suit, some on their own behalf, others on behalf of (and in the name of) their children. They argued that the Executive Order violates the Fourteenth Amendment and the INA. The District Court agreed.˜ It provisionally certified a nationwide class of children who would be denied citizenship by the Order and preliminarily enjoined the Order's enforcement.˜ We granted certiorari before judgment.˜

II

To understand the Citizenship Clause of the Fourteenth Amendment, it is first necessary to understand the context in which it arose—and the opinion of this Court, Dred Scott v. Sandford, 19 How. 393, 15 L.Ed. 691 (1857), that it rejected.

A

The story of citizenship in the United States begins with the English common law. Before the Revolution, the American colonists—like all in the British Empire—were considered subjects of the sovereign.˜ That arose not from royal fiat, but from what the common law conceived as the relationship between the sovereign and the people. The King, Blackstone explained, owes those "born within the dominions" a duty of "protection."˜ And "in return for that protection," those "born within the dominions" owe the King a "duty" of "allegiance."˜

Because the sovereign's power (and thus his duty) was limited in various respects, so too was the scope of this rule. He could not demand allegiance from—for he could not protect—those born in lands that he did not control.˜ The same held true even in discrete areas within his kingdom that were temporarily outside his control.˜ And the same held true for ambassadors (and their families), who were considered—by a fiction of extraterritoriality—to remain on foreign soil and thus "under the ligeance" of their home country.˜

In all other respects, however, the sovereign's power—and his claim to the people's allegiance—was complete. A foreign mother could enter the British Isles, give birth, and leave with her child the very next day, and that child would remain a British subject. Why? Because the child owed an implied allegiance to the sovereign who protected him at his birth—no matter how "momentary and uncertain" his presence in the King's realms.˜ The same rule applied to children born in the realm of parents subject to expulsion. For example, children of "gypsies" (today, called Romani or Roma people) born in the realm were natural-born subjects, notwithstanding that British law at the time "directed" the Roma people "to avoid the realm" under "pain of imprisonment" or even death.˜ For those children, and all others born in Britain, the rule was the same: With protection came allegiance, and with allegiance came the status of a natural-born subject.

This view crossed the Atlantic with the colonists—and was adopted with little fanfare after the Revolution, as "subject[s]" of the sovereign became "citizens" of the States.˜ This common law of citizenship—known as jus soli, or right of the soil—prevailed in "each and all of the states" after American independence, and continued to emphasize reciprocal "allegiance" and "protection."˜ By "the doctrine of natural allegiance," all "who [we]re born within the jurisdiction of a State" were citizens.˜

When the newly independent Americans confronted a novel situation, unknown to England—that of the quasi-sovereign Indian tribes—they turned to the principles of the common law. Did the tribes truly govern their people? Or were their people wholly subsumed within the United States?˜ Chancellor Kent answered with the common law.˜ [T]he "United States ha[s] never dealt with those people, within our national limits, as if they were extinguished sovereignties."˜ They were instead "dependent nations" that maintained "dominion[s]" of their own.˜ Indians born under those dominions, he concluded, were not "citizens or subjects of the United States," but members of "alien and sovereign tribes."˜

In a Nation of immigrants˜ jus soli's broad scope took on particular importance.˜ The young Republic attracted tens of thousands of émigrés from the Old World—Scotch-Irish, French, German, Welsh, and many more, some of whom hoped to stay only a short time, others of whom hoped never to leave.˜ No matter their intentions, however, they could be assured that their children would be American citizens by birth alone. As Justice Story said, "[n]othing is better settled."˜ The very first American legal treatise agreed.˜ As did the antebellum era's foremost case on the topic˜.

B

The common law "made no distinction on account of race or color."˜ But the slave States did. As the Civil War approached, more and more Southern States sought to deny citizenship to black Americans—and openly rejected the common law to reach that result.˜ It was "not the place of a man's birth" that made him a citizen, these States said, "but the rights and privileges he may be entitled to enjoy."˜ On that view, "[t]he prejudice … of caste" was "unconquerable."~ Not even emancipation could "confer citizenship," these States held, because free African Americans still suffered from "social and civil degradation" based on "the taint of blood."~ With the common law abandoned, almost 500,000 free black Americans in the South were left little more than "strangers."~

In the odious decision of Dred Scott v. Sandford, this Court imposed the Southern States' beliefs onto the Nation.~ Chief Justice Taney, writing for the Court, concluded that "the words 'people of the United States' and 'citizen[s]'" had an unexpressed (and atextual) racial component—one that excluded all those descended from slaves.~ Even if Massachusetts or Connecticut chose to grant citizenship to the freedmen, they still could not participate in national affairs.~ They were "born in the country," Chief Justice Taney acknowledged, and thus "did owe allegiance to the Government"—the precise criteria for citizenship at common law.~ But they were "not included, and were not intended to be included, under the word 'citizens' in the Constitution."~ For them, blood, not soil, was made the rule.

Dred Scott was met with shock. Ever since "the Declaration of Independence," Justice Curtis wrote, "the received general doctrine has been, in conformity with the common law"—that all "free persons born within" a State are "citizens of the United States."~ Justice McLean said much the same. "Being born under our Constitution and laws," he explained, "make[s] him a citizen."~ Northern newspapers condemned Dred Scott as "a wicked and false judgment," "an atrocious doctrine," "a deliberate iniquity," and a "willful perversion."~ The decision was, in Lincoln's famous words, an "astonisher in legal history."~

Abolitionists swore to undo what the Court had done. "By birth," Frederick Douglass insisted, "we are American citizens."~ "The Constitution knows all the human inhabitants of this country as 'the people,'" he explained, no matter their "color, class, or clime."~ "[A]ll I ask of the American people is, that they live up to the Constitution, adopt its principles, imbibe its spirit, and enforce its provisions."~ "When this is done," Douglass predicted, "the glorious birthright of our common humanity" will once again "become the inheritance of all the inhabitants of this highly favored country."~

C

The Court had overruled the common law, but the people—eventually—would overrule the Court. It took more than a decade—and the addition of names such as Antietam, Gettysburg, and Chancellorsville to our national canon—but Douglass's vision of "our common humanity" would be fulfilled.

The Reconstruction Congress did not start from scratch. In the midst of the Civil War, President Lincoln's Attorney General, Edward Bates, had issued a landmark opinion that sought to displace Dred Scott in favor of the common law. Citing the key authorities (among them Calvin's Case and Kent's Commentaries), Bates rejected the premise that "citizenship is ever hereditary."˜ "[E]very person born in the country," he wrote, "is, at the moment of birth, prima facie a citizen ... without any reference to race or color, or any other accidental circumstances."˜ He acknowledged that there were some limits—hence "prima facie," not "conclusive."˜ But those exceptions were "few," simply "the small and admitted class of the natural-born composed of the children of foreign ministers and the like."˜ To Bates, it was soil—not blood—that "furnishes the rule, both of duty and of right."˜

A year after General Lee's surrender at Appomattox, Congress sought to turn Bates's opinion into law. The result was the Civil Rights Act of 1866. The Act declared that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby ... citizens of the United States."˜ To the Reconstruction Congress, the Act was simply assumed to invoke the common law rule˜. Indeed, the bill's sponsor, Senator Lyman Trumbull, enthusiastically agreed with the bill's critics that it would make citizens of "the children of Chinese and Gypsies born in this country."˜ "[E]ven the infant child of a foreigner born in this land is a citizen" under this bill, Trumbull declared.˜

The specter of Dred Scott, however, loomed over Congress's efforts. Opponents of the Act contended that Congress could not grant such expansive citizenship (and set aside this Court's precedent) by statute alone.˜ To quiet those concerns—and to permanently enshrine the common law in the Constitution—Congress turned to the Fourteenth Amendment.

III

A

What the Civil Rights Act began, the Fourteenth Amendment would finish. Like the Act, the Fourteenth Amendment was intended to repudiate Dred Scott. This time, however, the goal was even grander—to put the "great question of citizenship" "beyond the legislative power" altogether, to settle the issue once and for all.˜

The Fourteenth Amendment achieved its aim. The Citizenship Clause mirrored the common law's criteria for citizenship. The Clause starts, like the common law, with territory—a child must be "born ... in the United States," not elsewhere (even to American parents). And the Clause ends, again like the common law, with sovereign power—a child must be "subject to the jurisdiction" of the United States, unlike (say) the families of foreign ministers. A child born on American soil and subject to American law was made an American citizen.

Even the language of the Clause is that of the common law. Lynch held that American citizenship extended to "all persons born within the jurisdiction of the United States."˜ So did the first legal treatise on the rights of free black Americans.˜ And so did the famed antebellum lawyer Horace Binney.˜ Little wonder, then, that the Citizenship Clause's principal author would explain that its language was "simply declaratory of ... the law of the land already."˜

That law was clear. Any child who was born "under the protection of" the United States—that is, any child for whom no extraterritorial fiction applied—was made a citizen, for he owed a natural "allegiance" (and thus "obedience") to the Nation.˜

B

Even putting the common law to one side, the Citizenship Clause's key phrase—"subject to the jurisdiction"—requires the same result. The word "jurisdiction" was hardly unknown to the drafters and ratifiers of the Fourteenth Amendment. Congress chose to use an established legal term and the Clause must be interpreted in that light.

In 1868, as today, "jurisdiction" (in the context of a sovereign) refers to the "[p]ower of governing or legislating."˜ To be "subject to" the jurisdiction of the United States, then, is to "liv[e] under" its "dominion,"˜ a meaning reinforced by the Clause's territorial focus on those born "in" the United States. The Citizenship Clause uses jurisdiction in its ordinary sense—referring to the power of the United States to govern those within its territory.

The scope of that power was well settled in 1868, largely by "the celebrated case" of Schooner Exchange v. McFaddon˜. Expounding on "general principles," Chief Justice Marshall explained that "jurisdiction" referred to "the full and complete power of a nation within its own territories."˜ That "absolute" power was "susceptible of no limitation not imposed" by the nation itself.˜ All sovereigns, however, were understood to have impliedly waived their jurisdiction in "certain peculiar circumstances"—in essence, where exercising jurisdiction would "degrade the dignity" of "foreign sovereigns."˜ As in the context of jus soli, those peculiar circumstances arose most frequently in the case of "foreign ministers."˜ "[E]very sovereign would hazard his own dignity," after all, if his officials abroad were made to "owe temporary and local allegiance to a foreign prince."˜

The limits of that exception were carefully defined. Still within the United States' power were the "private individuals" of a foreign nation who had "spread themselves through [our territory] as business or caprice may direct."˜ "[I]t would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction," Chief Justice Marshall explained, "if such individuals or merchants ... were not amenable to the jurisdiction of the country."˜ "Nor can the foreign sovereign have any motive for wishing such exemption," he continued, with respect to its sojourning subjects who were "not employed by" the sovereign or "engaged in national pursuits."˜ Just like jus soli, a sovereign's jurisdiction made no exception for those only temporarily present within the sovereign's territory. Instead, nearly everyone within the territorial boundaries of the United States was "amenable to" the Nation's jurisdiction.˜

The ordinary legal meaning of the text of the Clause thus neatly captures the common law rule, with its broad reach and narrow exceptions. The same groups included (and excluded) by jus soli were included (and excluded) by the conventional understanding of jurisdiction. Excluded by both were the children of foreign ministers and members of 19th-century Indian tribes over whom the United States had ceded a part of its territorial jurisdiction to preserve its relationship with a foreign sovereign (or quasi-sovereign).

No such intersovereign concerns apply to children born of parents unlawfully or temporarily present in the United States; no foreign sovereign would "have any motive for wishing" them outside this Nation's authority.˜ Those children are thus subject to the jurisdiction of the United States. They satisfy both elements of the Citizenship Clause: they are "born ... in the United States" and "subject to the jurisdiction thereof." Under the Constitution, they are citizens at birth.

IV

Our precedent—the seminal case of United States v. Wong Kim Ark, 169 U.S. 649˜ (1898)—confirms this rule.

A

For nearly two decades after the Fourteenth Amendment's ratification, the Executive Branch viewed the Citizenship Clause as "simply an affirmance of the common law of England and of this country."˜ Under that view, "the status of citizenship" was "fixed by the place of nativity, irrespective of parentage"—with the limited exception of "the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality."˜

In 1872, for instance, Attorney General George Williams was called upon to determine the citizenship of a child born of Austrian parents only "temporarily residing" in New York City.˜ Citing the Citizenship Clause (and Bates's 1862 opinion), Williams explained that "a person born in this country, though of alien parents who have never been naturalized, is, under our law, deemed a citizen of the United States by reason of the place of his birth."˜ Thus the child "is a native of this country," Williams concluded, "and as such was originally clothed with American nationality."˜ Secretary of State Hamilton Fish agreed.˜ Like the Executive Branch, they saw the Clause as merely "declaratory of the rule of the common law."˜

As the era of Reconstruction faded, however, so too did the promise of birthright citizenship. Uncertainty came with the first Chinese Exclusion Act of 1882˜ and the election of President Cleveland, the first Democrat to hold the office since the Civil War.˜ It was around this time that the State Department began to deny citizenship to those with "dual or doubtful allegiance,"˜; and it was around this time that several scholars proposed a new theory of the Clause, one based on "international law"˜.

This new theory focused on the parents' status, not the child's. It was only if a child's parents were "domiciled in the United States," they argued, that the child was "internationally subject to the jurisdiction of the United States," as the Citizenship Clause (they said) required.˜ These writers acknowledged that the common law took a different view,˜ and acknowledged "that the language of the [F]ourteenth [A]mendment … is very broad,"˜ But they insisted that jus soli had been "universally" rejected by other nations and had not been made part of the Constitution.˜

B

In Wong Kim Ark, this Court rejected that view, concluding that no "rule of international law" had qualified "the ancient rule of citizenship by birth within the dominion."˜

At issue was the citizenship of Wong Kim Ark, born in San Francisco to Chinese parents.˜ In Wong's telling, the case was not close. "[T]here can be no just doubt," he argued, "that the Amendment was intended to be based upon the doctrine derived from the common law, that the character of a natural born citizen is incidental to birth only."˜ The Government disagreed. It admitted that "the opinions of the Attorneys-General, the decisions of the Federal and State courts, and, up to 1885, the rulings of the State Department all concurred in the view that birth in the United States conferred citizenship," based on "the common law doctrine of allegiance" and "the authority of the decision of Chancellor Sandford in Lynch v. Clarke."˜ But the Executive no longer endorsed that view. "[T]he common-law doctrine of England," it argued, had in fact never been "the doctrine of the United States," and was not made the law by virtue of the Citizenship Clause.˜

In an opinion by Justice Gray, the Court rejected the Government's position. Justice Gray explained that the Fourteenth Amendment was merely "declaratory" of the "fundamental rule of citizenship by birth" that prevailed at common law.˜ That "same rule," he wrote, "was in force in all the English Colonies"—"and continued to prevail under the Constitution."˜ And its contours were clear. It excluded those recognized as exempt "from the jurisdiction of this country"—the "children of ambassadors" and other representatives of foreign sovereigns, as well as those born in the "alien nations" of Indian tribes.˜

All others were citizens at birth, whether born to permanent residents or temporary visitors.˜ Indeed, Justice Gray noted, no one had even "contested" this conclusion for "more than fifty years after the adoption of the Constitution"—until the matter was "elaborately argued" before the New York Court of Chancery in Lynch v. Clarke.˜ And there the question was "decided upon full consideration by Vice Chancellor Sandford in favor of their citizenship."˜ "The same doctrine was repeatedly affirmed in the executive departments," Justice Gray wrote, not to mention by Kent and Binney—each of whom affirmed that "[t]he child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen."˜ In adopting the common law, Justice Gray explained, the Citizenship Clause adopted this same rule.˜

Justice Gray then turned to Schooner Exchange to confirm what the common law made clear. "The words … 'subject to the jurisdiction thereof,'" he wrote, "must be presumed to have been understood and intended by the Congress … in the same sense in which the like words had been used by Chief Justice Marshall in the well known case of The Exchange."˜ On that understanding, aliens who traveled to the United States for "business or pleasure" received no "exemption from the jurisdiction of the country."˜ To the contrary, they were subject to that jurisdiction for as long as they remained here—and any children born to them were American citizens under the Fourteenth Amendment.˜

What the Court held in Wong Kim Ark was simple: the Citizenship Clause incorporated the common law and granted citizenship to nearly all children born in the United States. Not surprisingly, then, in the 128 years since, we have repeatedly understood the rule of Wong Kim Ark to guarantee citizenship to all children born in the United States and subject to its power.˜ We see no reason to depart from that view today.

V

The Government and the principal dissent share many of our premises. They agree that the Citizenship Clause was intended to incorporate the "background principles" of the common law.˜ They agree that, under the common law, "citizenship turns on allegiance."˜ And they agree that "Dred Scott departed from that traditional, allegiance-based view of citizenship"—a departure that Congress "repudiated" in the Clause.˜

Where the Government and the principal dissent err is with their definition of "allegiance." They concede that Calvin's Case and Blackstone state the rule that prevailed before the Declaration of Independence—that a natural "allegiance" arises for all children who are "born here … under the protection of the sovereign."˜ Yet according to the Government and the principal dissent, "the United States' conception of allegiance"—at some unspecified point in time—broke "from Great Britain's."˜ Natural allegiance, they contend, was no longer sufficient for citizenship; some greater quantum of allegiance was required.

How much? The Government offers a smorgasbord of formulations: "primary allegiance," "sufficient allegiance," "full allegiance," "requisite allegiance."˜ What all these formulations supposedly share is that they turn on domicile—the place of one's permanent home. At some point before the ratification of the Fourteenth Amendment, the argument goes, it became "deeply rooted" in this country that "[d]omicile is the key concept that creates allegiance."˜

The trouble is that there is scant evidence for this dramatically revisionist view. Certainly no one said that such a change had occurred. Indeed, even as the antebellum Americans hotly debated whether the Declaration of Independence had abrogated one aspect of the British common law—that natural allegiance was indefeasible, no matter a person's desire to expatriate—all agreed that such allegiance was owed in the first place.

The only evidence the Government and the principal dissent can muster to show that some alternative ("primary") conception of allegiance displaced the common law is a "funeral oration" for President Lincoln.˜ Ahistorical modifiers aside, the Government and the dissent identify no source that defined allegiance at birth as being based on domicile in the period from 1776 to 1868.˜ Sources from that period instead defined "allegiance by birth" just as the British did—as "the tie or duty" owed by one who is "born within the dominions and under the protection of a particular sovereign."˜

Of course, some wished to change the rule. But even those who wished to limit jus soli did not deny that children born of temporary visitors owed natural allegiance to the United States. They instead thought that domicile might serve as a "reasonable qualification" to the common law rule (namely, that citizenship derives solely from the "[n]atural allegiance" owed "to the government of the territory of a man's birth").˜

The principal dissent (but not the Government) at times seems to directly equate domicile and national citizenship.˜ That is wrong. "It is, in fact, a general axiom of international law, that there may be domicil where there is no nationality, and nationality where there is no domicil."˜ After all, one who establishes a domicile in a new country does not automatically become a citizen thereof. (He has to be naturalized.) Nor does he automatically lose his prior citizenship. (He has to expatriate.) Thus, the principal dissent ultimately acknowledges that domicile alone was insufficient to make someone "formally" a "citizen."˜

Of course, domicile was relevant to naturalization and expatriation. But that by no means suggests it was a prerequisite to national citizenship at birth. The principal dissent's reliance on cases concerning changes to a person's state citizenship is thus misplaced.˜ And the Government's remaining support for the idea that a domicile "qualification" to birthright citizenship was "widely accepted" in the United States before the Civil War˜, consists of a single state-court case about citizenship in the Republic of Texas, a proposed (but never adopted) model code for the State of New York, and another treatise that discussed the subject only in terms of "the principles of natural reason," which it expressly distinguished from "[t]he common law."˜

The congressional debates over the Civil Rights Act of 1866 and the Fourteenth Amendment confirm our view. The principal dissent (and the Government) lean heavily on a handful of ambiguous floor statements referencing "temporary sojourners" and "foreigners."˜ Far more frequent and explicit, however, were statements embracing the common law.˜ And the debates make clear that no member of Congress seriously grappled with a domicile-based carveout to the "fixed, certain, and intelligible rule[ ]" of the common law.˜

For a Congress intent on putting the question of citizenship "once and forever [to] rest,"˜a domicile-based qualification would have introduced significant uncertainty. Unlike the easy-to-apply common law, it would be "difficult, if not impossible, to lay down any general rule" of domicile-based citizenship, as domicile "often depend[s] upon the circumstances of each case, the combinations of which are infinite."˜

If Congress intended to hinge citizenship on each individual's domicile—a question that "is sometimes a matter of great difficulty to decide,"˜—it is reasonable to expect there would have been at least some discussion of the topic. Yet the word "domicile" appears just twice in the discussion of the relevant provision of the Civil Rights Act.˜ And it appears in only one speech from the Citizenship Clause debates—as part of an explanation of why State citizenship is distinct from national citizenship under the Constitution.˜

Perhaps recognizing the absence of ratification-era support for a domicile-based rule of national citizenship, the Government and principal dissent both emphasize sources from after the ratification of the Fourteenth Amendment. They turn to the same international law treatises that underpinned the Government's attempts to limit birthright citizenship in the 1880s.˜ This fundamentally revisionist scholarship—and the post-1884 Executive Branch actions that relied upon it—do not put in doubt the understanding of the Citizenship Clause at the time of (and after) its ratification. As Senator Trumbull explained in 1871, the Citizenship Clause recognized that "[e]very person born within the jurisdiction" of the Nation was "a citizen of the United States," as had been true under "the common law of this country as well as of England."˜

In any case, postenactment history cannot override the text. If Congress intended to limit American citizenship to the children of those domiciled in the United States, nothing in the succinct language of the Citizenship Clause conveyed that design. Words appearing frequently in the Executive Order—"mother," "father," "lawful," "temporary"—are absent from the Clause. For a simple reason: they did not matter. And while the Clause does ensure state citizenship attaches for U. S. citizens in "the State wherein they reside,"˜ the explicit invocation of residence for state citizenship only highlights its absence from the criteria for U. S. citizenship.˜

When the principal dissent does grapple with the operative legal text—"subject to the jurisdiction" of the United States—it has little to say. It argues only that a person is "subject to the jurisdiction of the government of his domicile."˜ But that is not the question. The question is whether a person is "subject to the jurisdiction" of the government of the country in which he is physically present, even if he is only there temporarily. He is (unless he falls under one of the familiar exceptions, such as for ambassadors). For the reasons given by Chief Justice Marshall in Schooner Exchange, the United States exercises "full and complete power"—its "absolute and complete jurisdiction"—over temporary visitors.˜

To avoid these problems, the principal dissent spends much of its time on the text of the Civil Rights Act.˜ The Civil Rights Act made citizens of "all persons born in the United States and not subject to any foreign power."˜ The principal dissent contends that a person is "not subject to any foreign power" if (and only if) he is "domiciled in" the United States, for it is then (and only then) that "his home nation" is forbidden from regulating his conduct.˜ Justice ALITO contends that a person is "not subject to any foreign power" if (and only if) no other country would "automatically" make him a "national[ ]," whether he is domiciled here or not.˜

Neither theory works. As to the principal dissent, it is simply not true that domicile in a new nation severs one's ties to the old one.˜ If the test truly is whether a person is "amenable to the laws" of two governments at once,˜ then it is a test that every child born to a foreign parent fails—a result that even the principal dissent cannot stomach.

Justice ALITO seems to recognize this bind, so he would create an ad hoc exception for those whose parents have "done everything within their power … to become Americans."˜ He does not explain how that exception can be squared with his view of the text, which (to repeat) is that anyone "automatically" made a "national[ ]" of his "parents' native country" was not entitled to citizenship under the Civil Rights Act.˜ In our estimation, the Act raises more questions than answers—and was replaced by the Fourteenth Amendment, which "better" expresses the views of the Reconstruction Congress anyway.˜ This Court said as much in Wong Kim Ark.˜

For the dissents and the Government, Wong Kim Ark is essentially irrelevant. They attempt to narrow that precedent by noting that the Court's opinion repeatedly referred to the domicile of Wong's parents. That is true. But "the reasoning underlying" the holding of Wong Kim Ark cannot be squared with a domicile requirement of the sort the Government envisions.˜ As we have already explained, the Court exhaustively canvassed the text and history of the Citizenship Clause. It traced an unbroken line from the English common law, into the founding and antebellum eras, and through the debates, to the Clause's ratification. Yet at no point did the Court identify any evidence in the historical record that the ratifiers of the Fourteenth Amendment thought themselves to be imposing a domicile limitation.

In the end, it is the dissent in Wong Kim Ark that makes the strongest case for a domicile-based theory of American citizenship. There, Chief Justice Fuller resisted the application of the English common law rule because it "recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents."˜ He admitted that, in England, "the question of domicil[e] is entirely distinct from that of allegiance" because "[t]he one relates to the civil, and the other to the political, status."˜ But he believed that "a different view as to the effect of permanent abode on nationality ha[d] been expressed in this country."˜ Under this different view, the Fourteenth Amendment "prevent[ed] the acquisition of citizenship by" "the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power."˜ The Government and today's dissenters agree. But this view commanded only a dissent in 1898, and neither time nor circumstance has changed the fact that it is not the law.

* * *

Again and again, the dissents cast the common law as "feudal," "medieval"—a remnant of "the darkness of the middle ages."˜

That was not the view of the Reconstruction Congress. Where the dissents see feudalism, the Framers of the Fourteenth Amendment saw emancipation. By the time of the Glorious Revolution in 1688, in fact, the tie created by birth was less a "duty" than a "right"—the foundation of the "ancient liberties" of "free-born subjects."˜ That is why Blackstone described the "privileges" owed to the "natural-born."˜ That is why the colonists demanded the "rights of Englishmen" more than 250 years ago.˜ And that is why abolitionists lauded the "ancient and universal" rule of citizenship by birth alone as "an ordinance of Heaven."˜

Citizenship, then and now, was the right to have rights—to freely participate in our political community. The Framers of the Fourteenth Amendment extended that promise to "every free-born person in this land."˜ We keep that promise today.˜

JUSTICE KAVANAUGH, CONCURRING IN THE JUDGMENT AND DISSENTING IN PART.

Executive Order No. 14160 establishes new exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country.˜ The Court today holds that the Order violates the Fourteenth Amendment to the Constitution. I respectfully disagree with the Court's constitutional holding. In my view, the Executive Order does not violate the Fourteenth Amendment. But the Order does contravene a federal statute, 8 U.S.C. § 1401(a). Congress could—consistent with the Fourteenth Amendment—amend § 1401(a) or otherwise enact new legislation establishing exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country. But Congress has not yet done so.˜

JUSTICE THOMAS, WITH WHOM JUSTICE GORSUCH JOINS, DISSENTING.˜

With due respect, the Court's account is not historically accurate.˜

The Court today takes the extraordinary step of holding facially unconstitutional the President's Order excluding from citizenship the children of foreign temporary visitors and illegal aliens. In doing so, the Court adds to the sad history of the Fourteenth Amendment, which was designed and understood to secure equal rights for the freed blacks but has instead been repurposed for political projects that the Reconstruction Congress did not support.˜

The evidence from the decades following ratification confirms that the Citizenship Clause was understood to exclude the children of temporary visitors. There was frequently expressed, enduring, and widespread agreement, from the Reconstruction Congress through the end of the 19th century (and even into the 20th), that the Citizenship Clause did not guarantee citizenship to persons not domiciled here. The Executive Branch, Congress, courts, States, lawyers, scholars, and commentators generally shared this understanding.˜

This Court's decision in Wong Kim Ark concerned only persons already domiciled in the United States.˜ The Court found it so important that Wong and his parents were domiciled in the United States at the time of his birth that it gratuitously insisted upon that fact throughout its opinion.˜ Wong Kim Ark left in place the same rule that existed before: A child of a domiciliary was a citizen, but a child of a temporary visitor was not.˜

The Citizenship Clause was enacted for people who were born in this country and called it home. It was enacted for freed slaves such as Dred Scott, who had "a domicil" here and therefore were entitled to sue as citizens.˜ It was enacted for men such as Frederick Douglass, who demanded citizenship "not as aliens nor as exiles," but as "Americans."˜ Its authors and supporters promised, over and over again, that it would exclude the children of "persons temporarily resident" here, whom "we would have no right to make citizens."˜

JUSTICE ALITO, DISSENTING.

This is one of the most important decisions in the history of the Court, and in my judgment, the Court has made a serious mistake. As interpreted by the Court today, the Fourteenth Amendment confers citizenship on virtually everyone who happens to be born in this country, including the children of "birth tourists," women who come here solely for the purpose of giving birth to a child and then promptly return home. Careful analysis of the text of the Fourteenth Amendment and the process that led to its adoption shows that it does not degrade the concept of United States citizenship in this way. Instead, the Fourteenth Amendment confers citizenship on only those children who, at birth, owe allegiance solely to this country.˜

[A] person who is born in the United States is made a citizen by the Fourteenth Amendment only if that person was also "subject to the jurisdiction" of the United States. And that phrase means subject to the jurisdiction of the United States alone and not "subject to any foreign power."

A great many persons who are born here to illegal immigrant parents fail this test because at birth they are automatically made nationals of their parents' native country and, as a result, incur duties to that country. This means that they are "subject to a foreign power" and are thus not "subject to the jurisdiction" of the United States within the meaning of the Fourteenth Amendment.

This is illustrated by the laws of countries on the list of those from which the greatest number of illegal immigrants come.˜ Mexico is at the top of that list, and under Mexico's constitution, the child of a Mexican parent can become a Mexican national at birth and acquires certain duties to the government.˜ Guatemala is second on the list, and its constitution also confers Guatemalan nationality on a person born abroad to a Guatemalan parent.˜ El Salvador is also among the top five, and its constitution provides that "[c]hildren of a Salvadoran father or mother, born in a foreign country," are Salvadorans by birth.˜ Many other countries among the top 10 have similar laws.˜

The Court's interpretation is not only contrary to the original meaning of the Fourteenth Amendment, it produces grotesque results. While foreigners who wish to immigrate lawfully must sometimes wait for many years, a child born here to a birth tourist is automatically a citizen.˜

The Court's interpretation saddles this country with an ancient British rule that even the United Kingdom has abandoned,˜ as have other countries whose legal systems share the same pedigree.˜

12.6 Citizenship by Descent

U.S. citizenship can also be conferred at birth to a child born outside of the United States depending on the parents' citizenship. Determining whether citizenship has been conferred at birth requires investigating: (1) when the child was born, (2) the citizenship status of the child's parents at the time of the birth, and (3) the requirements of the law in place at the time of the child's birth.

EOUSA, OLE, Immigration Law (2005)

The most frequently encountered derivative citizenship scenario occurs when a noncitizen claims citizenship through either a United States-citizen father or mother. If a person is born outside the United States to parents, of whom only one is a citizen, the citizen parent must have been physically present or resided in the United States for a certain period before the birth of that child. Further, a certain portion of that presence or residence must have been while the parent was a teenager or adult. Depending upon when the child was born, the ability to derive citizenship may be governed by the Nationality Act of 1940, 54 Stat. 1137, the Immigration and Nationality Act of 1952, 66 Stat. 163, or the current statute. Because a person derives citizenship at birth the law in effect at the time of birth controls derivative citizenship. See Minasyan v. Gonzales, 401 F.3d 1069, 1075 (9th Cir. 2005).

The primary statute that addresses derivative citizenship is INA § 301, 8 U.S.C. § 1401.˜

<table>
<tr><td colspan="3">LEGITIMATE CHILDREN
(Includes Children Legitimated After Birth)</td></tr>
<tr><td>DOB</td><td>PARENTS</td><td>USC PARENT RESIDENCY</td></tr>
<tr><td>Between 1/13/41 and 12/24/52</td><td>One citizen and one noncitizen parent</td><td>Citizen resided in the U.S. or outlying possessions ten years, at least five of which were after age sixteen.
Retention requirements exist for children born between 5/24/34 and 10/11/52. To retain US citizenship, the child must have:
A. Five years' residence in the US or possessions between thirteen and twenty-one; OR
B. Two years' continuous physical presence in the US between fourteen and twenty-eight; OR
C. No specific period of residence if noncitizen parent naturalized before child reached eighteen and child began to reside permanently in US prior to eighteen.</td></tr>
<tr><td>Between 1/13/41 and 12/24/52</td><td>Both parents citizens</td><td>One parent resided in the U.S. or its possessions.</td></tr>
<tr><td>Between 12/24/52 and 11/14/86</td><td>One citizen and one noncitizen parent</td><td>Citizen parent physically present in the U.S. or possessions ten years prior to the birth of the child, at least five of which were after the age of fourteen.</td></tr>
<tr><td>Born between 12/24/52 and 11/14/86</td><td>Both parents citizens</td><td>One resided in the U.S. or its outlying possessions.</td></tr>
</table>

<table>
<tr><td colspan="3">ILLEGITIMATE CHILD</td></tr>
<tr><td>DOB</td><td>PARENTS</td><td>USC PARENT RESIDENCY</td></tr>
<tr><td>Prior to 12/24/52</td><td>Mother a citizen, not legitimated by citizen father</td><td>Mother a citizen with prior U.S. residence</td></tr>
<tr><td>Prior to 12/24/52</td><td>Mother a citizen, legitimated by father</td><td>(By noncitizen father): No effect
(By citizen father): Treat as though legitimate from birth-see prior chart</td></tr>
<tr><td>[Born between 12/24/52 and 6/12/2017]</td><td>Mother a citizen, not legitimated by father</td><td>Mother must have one year continuous physical presence in the U.S. prior to birth</td></tr>
</table>

On or after 12/24/52	Mother a citizen, legitimated by father	(By noncitizen father) No effect (By citizen father) Treat as though legitimate from birth-see prior chart
[On or after 6/12/2017]	[Mother a citizen, not legitimated by father]	[The child's U.S. citizen mother was physically present in the United States or one of its outlying possessions for at least 5 years prior to the child's birth (at least 2 years of which were after age 14).]

USCIS Policy Manual, Vol. 12, Pt. H, Chapter 3.C.1 (2025)

GENERAL REQUIREMENTS FOR FATHERS OF CHILDREN BORN OUT OF WEDLOCK

The general requirements for acquisition of citizenship at birth˜ for a child born in wedlock also apply to a child born out of wedlock˜ outside of the United States (or one of its outlying possessions) who claims citizenship through a U.S. citizen father. Specifically, the provisions apply in cases where:

- A blood relationship between the child and the father is established by clear and convincing evidence;
- The child's father was a U.S. citizen at the time of the child's birth;
- The child's father (unless deceased) has agreed in writing to provide financial support for the child until the child reaches 18 years of age; and
- One of the following criteria is met before the child reaches 18 years of age:
    - The child is legitimated under the law of his or her residence or domicile;
    - The father acknowledges in writing and under oath the paternity of the child; or
    - The paternity of the child is established by adjudication of a competent court.

In addition, the residence or physical presence requirements contained in the relevant paragraph of INA 301 continue to apply to children born out of wedlock, who are claiming citizenship through their fathers.

WRITTEN AGREEMENT TO PROVIDE FINANCIAL SUPPORT

In order for a child born out of wedlock outside of the United States (or one of its outlying possessions) to acquire U.S. citizenship through his or her father, Congress included a requirement that the father agree in writing to provide financial support for the child until the child reaches the age of 18.˜ Congress included the language to prevent children from becoming public charges.˜ USCIS interprets the phrase in the statute "has agreed in writing to provide financial support"˜ to mean that there must be documentary evidence that supports a finding that the father accepted the legal obligation to support the child until the age of 18.

The written agreement of financial support may be dated at any time before the child's 18th birthday. If the child is under the age of 18 at the time of filing an Application for Certificate of Citizenship, the father may provide the written agreement of financial support either concurrently with the filing of the application or prior to the adjudication of the application. USCIS may request the written agreement of financial support at the time of issuance of a Request for Evidence or at the time of an interview (unless the interview is waived).

Alternatively, if the applicant is already over the age of 18, he or she may meet the requirement if one or more documents support a finding that the father accepted his legal obligation to support the child. In such cases, the evidence must have existed (and have been finalized) prior to the child's 18th birthday and must have met any applicable foreign law or U.S. law governing the child's or father's residence to establish acceptance of financial responsibility.˜

In all cases, the applicant has the burden of proving the father has met any applicable requirements under the law to make an agreement to provide financial support. A written agreement of financial support is not required if the father died before the child's 18th birthday.˜

WRITTEN AGREEMENT REQUIREMENTS

In order for a document to qualify as a written agreement of financial support under INA 309(a)(3), the document:

- Must be in writing and acknowledged by the father;˜
- Must indicate the father's agreement to provide financial support for the child;˜ and
- Must be dated before the child's 18th birthday.

In addition, USCIS considers whether the agreement was voluntary.

OTHER ACCEPTABLE DOCUMENTATION

A written agreement of financial support may come in different forms and documents. USCIS may consider other similar documentation in which the father accepts financial responsibility of the child until the age of 18. Some examples of documents USCIS may consider include:

- A previously submitted Affidavit of Support (Form I-134) or Affidavit of Support Under Section 213A of the INA (Form I-864);
- Military Defense Enrollment Eligibility Reporting System (DEERS) enrollment;
- Written voluntary acknowledgement of a child in a jurisdiction where there is a legal requirement that the father provide financial support;˜
- Documentation establishing paternity by a court or administrative agency with jurisdiction over the child's personal status, if accompanied by evidence from the record of proceeding establishing the father initiated the paternity proceeding and the jurisdiction legally requires the father to provide financial support; or
- A petition by the father seeking child custody or visitation with the court of jurisdiction with an agreement to provide financial support and the jurisdiction legally requires the father to provide financial support.

—-—

CRS, U.S. Naturalization Policy (2024)

Table 1. Requirements for U.S. Citizenship Acquisition for Children Born Outside the United States			
Circumstances	**Timing of Citizenship Acquisition**	**Requirements**	**Relevant Section of INA**
Children born to two U.S. citizen parents	At birth	Child acquires automatic citizenship at birth if at least one of the parents resided in the United States or one of its outlying possessions˜ prior to the child's birth.	INA § 301(c)

Children born to one U.S. citizen parent and one U.S. national parent˜	At birth	Child acquires automatic citizenship at birth if the U.S. citizen parent was physically present in the United States or one of its outlying possessions for a continuous period of at least one year prior to the child's birth	INA § 301(d)
Children born to one U.S. citizen parent and one noncitizen parent˜	At birth	Child acquires automatic citizenship at birth if the U.S. citizen parent was physically present in the United States or one of its outlying possessions for five years prior to the child's birth and at least two years after the parent's 14th birthday.	INA § 301(g)
Children lawfully admitted for permanent residence and residing in the United States˜	After birth; before age 18	Child acquires automatic citizenship if the following conditions are met: (1) at least one parent, including an adoptive parent, is a U.S. citizen by birth or naturalization; (2) the child is under 18 years of age; (3) the child is an LPR; and (4) the child is residing in the United States in the legal and physical custody of the citizen parent.˜	INA § 320(a)
Children residing outside the United States	After birth; before age 18	Child may become a citizen if the following conditions are met: (1) at least one parent, including an adoptive parent, is a U.S. citizen by birth or naturalization; (2) the U.S. citizen parent has resided for at least five years in the United States, of which at least two years were after the parent's 14th birthday; (3) the child is under 18 years of age; (4) the child is residing outside of the United States in the legal and physical custody of the citizen parent; and (5) the child has been lawfully admitted temporarily to the	INA § 322(a)

		United States and remains in lawful status.	

12.7 Naturalization

CRS, U.S. Naturalization Policy (2024)

To qualify for U.S. citizenship, LPRs must meet certain requirements.˜ They must

- be at least 18 years of age;
- reside continuously in the United States for five years (three years for spouses of U.S. citizens);
- be of good moral character;
- demonstrate the ability to read, write, speak, and understand English;
- pass an examination on U.S. government and history; and
- be willing and able to take the naturalization Oath of Allegiance.

USCIS is responsible for reviewing all naturalization applications to ensure applicants meet U.S. citizenship eligibility requirements.˜ This assessment includes security and criminal background checks, a review of the applicant's entire immigration history, an in-person interview, and English language and civics exams. [As of August 2025, USCIS has resumed "neighborhood investigations," a criteria previously waived. Such investigations may require applicants to provide "testimonial letters from neighbors, employers, co-workers, and business associates" regarding eligibility requirements.]

Applicants bear the burden of proof to demonstrate that they entered the United States lawfully.˜ Upon approval, they must take an oath of allegiance to the United States and renounce allegiance to any foreign state.˜ Persons whose naturalization applications have been denied may request a hearing before an immigration officer.˜

CONTINUOUS RESIDENCE

To be naturalized, an applicant generally must have *resided continuously* for at least five years within the United States after being lawfully admitted for permanent residence and prior to the date he or she filed a naturalization application. For periods totaling at least half of that time, the individual must have been *physically present* in the United

States. The individual also must have lived for at least three months within the State or district in which he or she filed the application.˜

The period of continuous residence required for naturalization is broken by an absence of over a year unless the LPR is employed abroad by the U.S. government, an international organization, an American research institute, or an American company engaged in foreign trade. An absence of between six months and one year presumptively breaks continuous residence unless the applicant can establish that he or she did not abandon U.S. residence during that period.˜

Certain classes of LPRs either are exempt from the residency requirement or are subject to shorter residency periods.˜ Unmarried children under age 18 living with a citizen parent are exempt from any residency requirement.˜ The residency requirement for spouses of American citizens is three years instead of five years, and the physical presence requirement is one and a half years.˜ Residency requirements also are modified for other special classes.˜

GOOD MORAL CHARACTER

To be eligible for naturalization, applicants must demonstrate that they have been persons of good moral character during the applicable statutory period (five years in most cases) preceding the filing of their naturalization application.˜ [INA § 101(f), 8 U.S.C. § 1101(f) defines "good moral character" in the negative, listing circumstances that would lead a court to conclude a noncitizen does not have good moral character.]

ENGLISH LANGUAGE PROFICIENCY AND CIVICS KNOWLEDGE

During applicants' eligibility interviews for naturalization, they must pass English language and civics tests. The law requires that persons wishing to be naturalized demonstrate an understanding of English, specifically an ability to read, write, and speak words in ordinary usage in the English language.˜ The language requirement is waived for those who are at least 50 years old and have lived in the United States as an LPR at least 20 years, or who are at least 55 years old and have lived in the United States as an LPR for at least 15 years.˜ Individuals for whom the language requirement is waived may take the civics test in their native language.˜

The civics test fulfills a statutory requirement for naturalized citizens to demonstrate an understanding of the history, principles, and form of government of the United States.˜ The exam is an oral test administered by a USCIS officer during the eligibility interview. USCIS has discretion over the test questions and periodically makes updates to the test. Applicants have two opportunities to pass the test. They may retake a failed portion of the test between 60 and 90 days from the date of the initial interview.˜

The pass rate for the English and civics components of the naturalization test was 95.7% in FY2022.˜

Special consideration on the civics requirement is given to individuals who are over 65 years and have lived in the United States for at least 20 years.˜ These individuals may take a modified, shorter version of the test. Both the language and civics requirements are waived for those unable to comply because of physical or developmental disabilities or mental impairment.˜

Military Naturalizations

The INA contains provisions facilitating the naturalization of foreign-born military personnel of most branches of the U.S. Armed Forces and recently discharged members.˜ Requirements and qualifications˜ are similar to general naturalization requirements, but military personnel are exempt from residence and physical presence requirements.˜ Military naturalization applicants are exempt from naturalization filing fees.˜

The INA distinguishes between naturalization during peacetime and wartime service.˜ For current or past *peacetime* military service,˜ naturalization applicants are not required to meet the naturalization residency requirements if they apply while still serving or within six months of discharge.˜ The applicant must have served honorably˜ in the U.S. Armed Forces for at least one year and must be LPRs.

For current or past *wartime* military service during periods of designated military hostilities,˜ naturalization applicants are also not required to meet the naturalization residency requirements, but there are no conditions regarding the timing of the applicability of this exemption.˜ During a period of military hostilities, members of the Armed Forces who serve honorably for any period of time may qualify for naturalization. Those who have separated from military service must have been discharged under honorable conditions.˜ Applicants are not required to be LPRs, as long as they were physically present in the United States˜ at the time of their enlistment or reenlistment.˜

As of July 2002, noncitizens serving honorably in the U.S. Armed Forces on or after September 11, 2001, may apply to naturalize˜ under requirements for service during hostilities.˜

Oath of Allegiance

An individual seeking to become a naturalized citizen must take the Naturalization Oath of Allegiance to the United States of America before citizenship can be granted: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by law; that I will perform noncombatant service in the Armed Forces of the United States when required by law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God."˜

In addition, naturalization applicants must renounce any hereditary titles or orders of nobility in a foreign state.˜ The oath of allegiance may be modified for conscientious objectors to military service or for individuals preferring to affirm (instead of swear to) the substance of the oath.˜

Applicants for naturalization may choose to have the oath administered in either an administrative ceremony conducted by USCIS or an immigration judge˜. They must appear in person in a public ceremony,˜ which must be held as frequently as necessary to ensure timely naturalization.˜

12.8 Naturalization of Children

Naturalization of a parent will automatically confer citizenship on their minor child, so long as that child: is living in the United States as an LPR, is under the age of 18, and is residing in the "legal and physical" custody of their naturalizing parent. INA § 320(a), 8 U.S.C. § 1431(a).

12.9 The Naturalization Act of 1790

The very first rules regarding U.S. naturalization were set out in the Naturalization Act of 1790: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the States wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; and the clerk of such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such person so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: *Provided also*, That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed."

12.10 Dual Citizenship

CRS, Basic Questions on U.S. Citizenship and Naturalization (1992)

The United States does not categorically forbid its citizens from holding dual nationality nor does it expressly require dual nationals to make an election of citizenship as such at any point.˜

Part of the process for becoming a United States citizen is the taking of an oath "absolutely and entirely" renouncing any allegiance or fidelity to any other country. United States naturalization, in combination with the oath of absolute allegiance, may result in loss of foreign nationality under the pertinent foreign laws.

12.11 Citizenship for Sale

Kit Johnson, A Citizenship Market, 2018 U. ILL. L. REV. 969

[C]itizenship is for sale around the globe, although it is commonly phrased in terms of "investment" in the receiving country.˜ That investment may take the form of financing private-sector assets or a direct payment to the government.˜ Terms of investment vary widely from method to timing, as well as in the quantity of cash required.

The small Caribbean country of Dominica, for example, offers citizenship after an investment of $100,000 USD plus fees.˜ This can be a good deal since Dominica is a member of the Commonwealth of Nations, a group of fifty-three states that includes the United Kingdom, Canada, Australia, and other countries formerly connected through the British Empire.˜ Citizens of the Commonwealth of Nations share special privileges, such as travel, throughout the Commonwealth.˜ Potential citizens of Dominica wait between four and fourteen months for a passport,˜ which they can obtain without ever stepping foot on the island nation.˜

The Mediterranean island nation of Malta also offers citizenship in exchange for cash, requiring an investment of at least €650,000 ($689,000 USD) in the country.˜ Maltese citizenship has great value not so much because of the beautiful beaches along the archipelago that makes up the country, but because the nation is a member of the European Union˜ and part of the Schengen Visa zone.˜ As a result, Maltese citizenship opens the door to unrestricted travel throughout much of Europe.˜

Other countries offering citizenship in return for an investment include Antigua and Barbuda, Comoros, Cyprus, Grenada, Macedonia, St. Kitts and Nevis, and St. Lucia.˜

The monies flowing into these nations as a result of passport sales have been significant; the prime minister of Antigua and Barbuda credits passport sales with turning his country's economy around.˜ In St. Kitts and Nevis, passport sales accounted for 40% of the country's revenue in 2014.˜ But participating countries have also experienced problems with corruption, reflected in missing passport revenues.˜

Some countries do not offer straight cash-for-passport options, but they do offer a fast-track path to citizenship for investors. For example, since 1990, the United States has granted EB-5 immigrant visas [discussed in section 3.17].˜ Programs similar to the EB-5 visa exist in other countries as well.˜ Although the required investment amounts vary, the United Kingdom, Canada, Australia, and New Zealand all have investor visas that share the same basic character as the EB-5.˜

These examples—from Dominica to New Zealand—are all instances of countries that are, in essence, offering citizenship for sale.˜ There are differences in whether that sale is immediate or delayed, how long the process of obtaining citizenship can take, and the level of financial investment required. But in every case, the economic reality undeniably is that citizenship is being sold.˜

12.12 Expatriation

CRS, Basic Questions on U.S. Citizenship and Naturalization (1992)

A United States citizen may lose˜ [their] citizenship through expatriation. Expatriating acts are set forth in the INA. These acts include: (1) voluntary naturalization in a foreign country after the age of 18; (2) making a formal declaration of allegiance to a foreign country after the age of 18; (3) serving in the armed forces of a foreign country that is engaged in hostilities against the United States; (4) serving in the armed forces of a foreign country as a commissioned or non-commissioned officer; (5) holding an office under the government of a foreign country if foreign nationality is acquired or if a declaration of allegiance is required; (6) formal renunciation of citizenship before a U.S. diplomatic or consular officer abroad; (7) formal written renunciation of citizenship during a state of war if the Attorney General approves the renunciation as not contrary to the national defense; and (8) conviction of treason, seditious conspiracy, or advocating violent overthrow of the government.˜ [INA § 349(a), 8 U.S.C. § 1481(a)]. The Supreme Court has held that performing an expatriating act alone is an insufficient basis for revoking citizenship. Rather, according to the Court, the Constitution requires that an expatriation act be undertaken with an intent to relinquish U.S. citizenship. Vance v. Terrazas, 444 U.S. 252 (1980). This restriction also has been enacted in statute. INA § 349(a), 8 U.S.C. § 1481(a).

12.13 Denaturalization

CRS, U.S. Naturalization Policy (2024)

A naturalized citizen may be *denaturalized* (i.e., have his or her citizenship revoked) on the basis that the citizenship was procured illegally, by concealment of material fact, or by willful misrepresentation.˜ Various acts occurring after naturalization are considered evidence of misrepresentation or suppression at the time of naturalization. For example, if a naturalized citizen joins certain political or terrorist organizations within five years of becoming a citizen, and membership in that group would have precluded eligibility for naturalization under the INA, then the joining of the organization is held to be prima facie evidence raising a rebuttable presumption˜ that naturalization was obtained by concealing or misrepresenting how attached to the United States the citizen was when naturalized.˜ Naturalized citizens may have their citizenship revoked because of less than honorable discharge from the U.S. armed services.˜

Citizenship revocation must be initiated by a U.S. district attorney and must occur in the district where the naturalized citizen resides.˜ If a naturalized citizen is convicted of knowingly procuring naturalization in violation of law, the court in which that conviction is obtained has jurisdiction to revoke that person's citizenship.˜ In both cases, the court in which the revocation occurs must cancel the certificate of naturalization and notify the Attorney General of that action. The holder of the certificate of naturalization must return it to the Attorney General.˜

The effect of denaturalization is to divest a person of their status as a U.S. citizen and to return them to their former immigration status as a noncitizen. Once final, the denaturalization is effective as of the original date of the certificate of naturalization.˜

Derivative citizens may also lose their citizenship under these circumstances. If a principal immigrant's citizenship is revoked based on "procurement by concealment of a material fact or by willful misrepresentation," derivative citizens (i.e., their naturalized family members) also lose their citizenship regardless of where they are living.˜ If citizenship is revoked because of membership in a subversive organization˜ or less than honorable discharge from the Armed Forces,˜ derivative citizens lose their citizenship only if they are living abroad.˜

—-—

In a June 2025 memo, the U.S. Assistant Attorney General issued a memorandum describing the policy objectives of the Trump administration and directing the DOJ's Civil Division to prioritize and enforce those objectives. https://perma.cc/T8C2-GA33. Among the directives: "The Civil Division shall prioritize and maximally pursue denaturalization proceedings in all cases permitted by law and supported by the evidence … To promote the pursuit of all viable denaturalization cases available under 8 U.S.C. § 1451 and maintain the integrity of the naturalization system while simultaneously ensuring an appropriate allocation of resources[.]"

12.14 Test Your Knowledge

PROBLEM 12.1

Laci Lemire turned 18 in September. She is from Haiti. She and her parents came to the United States without authorization when Laci was only six months old. Laci has no idea that she is undocumented. Her parents recently paid to obtain a false U.S. passport for Laci to help her get into college and secure future jobs. But they know this "passport" will never stand up to official scrutiny, which is why they have never allowed Laci to travel out of the country, even to visit her grandparents in Haiti. Instead, her maternal and paternal grandfathers have traveled to New York to visit Laci in person every year on her birthday. Laci's grandfathers were good friends, having been born and raised in the same Brooklyn, NY neighborhood and moved together to Haiti after falling in love with Brooklyn-born cousins who preferred the sea life of Les Cayes to the hustle and bustle of the Big Apple.

Laci has been served with an NTA identifying her for removal under INA § 212(a)(6). You represent Laci. How would you assess her case?

PROBLEM 12.2

Reconsider Problem 3.1. When, if ever, would Diego's sister, brother-in-law, and nieces be eligible for U.S. citizenship?

PROBLEM 12.3

Reconsider Problem 3.2. When, if ever, would Olga Ostøyan be eligible for U.S. citizenship? What about Persa Persgard?

PROBLEM 12.4

Reconsider Problem 7.4. Is there a valid basis for denaturalizing Isayu?

Appendices

A.1 Glossary of Key Immigration Terms

Note: *Many of the following definitions use text from or adapted from the publication* Immigration Law *published in 2005 by the Executive Office for United States Attorneys, Office of Legal Education, and from the Department of Homeland Security's "Definition of Terms" webpage. Other material is original to this casebook.*

accredited representative. A representative is "accredited" when DOJ/EOIR authorizes a specially qualified non-lawyer, who works or volunteers with a recognized organization, to represent individuals in immigration legal matters.

acquired citizenship. Citizenship conferred at birth on children born abroad to U.S. citizen parent(s).

adjustment of status. A procedure allowing certain noncitizens in the United States to apply for lawful permanent resident status without having to depart the United States and appear at an American consulate in a foreign country. INA § 245(a), 8 U.S.C. § 1255.

administrative removal. A summary procedure allowing for the removal of a noncitizens, other than lawful permanent residents, convicted of an aggravated felony pursuant to an administrative decision by ICE. INA § 238(b), 8 U.S.C. § 1228(b).

admission. The "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13), 8 U.S.C. § 1101(a)(13).

A-File. Alien file. Contains the noncitizen's biographical information, family history, passports, records of each apprehension by or encounter with INS/DHS, prior applications for immigration benefits, prior proceedings, conviction records, photographs, and fingerprints.

aggravated felony. Refers to a select group of crimes for which special immigration consequences follow. The INA bars noncitizens convicted of aggravated felonies from obtaining certain forms of discretionary relief such as asylum, cancellation of removal, and voluntary departure. Such noncitizens also are precluded from obtaining judicial review to the greatest extent permitted under the Constitution. INA § 242, 8 U.S.C. § 1252. The definition of "aggravated felony" was first added to the INA by section 7342 of the Anti-Drug Abuse Act of 1988, and it is found at section 101(a)(43) of the INA, 8 U.S.C. § 1101(a)(43). Four subsequent amendments to the INA enlarged the class of aggravated felonies for immigration purposes.

Air and Marine Operations (AMO). A division of CBP. The agency focuses on border security through the use of aircraft and boats.

alien. "The term 'alien' means any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). The term has been criticized as dehumanizing. See, e.g., Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. Miami Inter-Am. L. Rev. 263 (1996-97). Nevertheless, it persists in statute.

alternatives to detention (ATD). Alternatives to the physical detention of migrants during their removal proceedings include parole/release on own recognizance, bond, check-ins at ICE offices, home visits and check-ins, telephonic monitoring, and ankle monitors.

American Immigration Lawyers Association (AILA). The national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996). An amendment to the INA that, among other things, mandated detention of noncitizens convicted of a wide range of crimes.

A-Number. Alien Registration Number. Alien Number. A#. The number associated with the noncitizen's A-File. The number begins with the letter "A" and is followed by seven, eight, or nine digits.

asylee. A noncitizen within the United States who has been granted the protection of the United States asylum laws because of persecution or a well-founded fear of persecution in their home country.

asylum. The process by which a nation grants protection to a migrant fleeing from persecution; also, the protection itself.

beneficiary. A noncitizen who receives an immigration benefit from the government after a request has been made by a U.S. citizen, lawful permanent resident, or employer, any of whom is known as the petitioner. A "principal beneficiary" is a noncitizen who is named on an immigrant or nonimmigrant petition or application. A "derivative beneficiary" is an immediate family member of the principal beneficiary who may be eligible to receive the same immigration status as the principal beneficiary based on their family relationship.

biometrics. Processes used to identify people based on their physical traits, including fingerprints, photograph, and signature.

Board of Alien Labor Certification Appeals (BALCA). The appellate body that hears administrative appeals brought by employers whose applications to certify noncitizens to work in the United States have been denied.

Board of Immigration Appeals (Board or BIA). The appellate body that hears administrative appeals from decisions of immigration judges.

cancellation of removal. A form of relief created by IIRIRA, potentially available for permanent residents and nonpermanent residents. INA § 240A(b), 8 U.S.C. § 1229b.

child. The term "child" for immigration purposes is comprehensively defined by INA § 101(b), 8 U.S.C. 1101(b), and refers to an unmarried person under 21 years of age.

citizen. The legally recognized subject or national of a nation.

conditional permanent resident. Any noncitizen granted permanent resident status on a conditional basis (for example, a spouse of a U.S. citizen or an immigrant investor) who must petition to remove the conditions of their status before the second anniversary of the approval date of their conditional status.

conviction. The term "conviction" for immigration purposes is comprehensively defined by INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), and it includes both a formal judgment of guilt as well as an admission of guilt combined with punishment.

crime involving moral turpitude (CIMT). A ground of deportability or inadmissibility under the INA. INA §§ 237(a)(2)(A), 212(a)(2)(A), 8 U.S.C. §§ 1227(a)(2)(A), 1182(a)(2)(A).

deferred action. A discretionary determination to defer a removal action against an individual as an act of prosecutorial discretion. An individual who has received deferred action is authorized by DHS to be present in the United States and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. An individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate "an economic necessity for employment." DHS can terminate or renew deferred action at any time, at the agency's discretion.

Department of Homeland Security (DHS). The federal agency principally responsible for immigration law. DHS was created in 2002 as part of a package of reforms in the wake of the September 11, 2001 attacks.

deportable. A noncitizen lawfully admitted to the United States subject to any of the 27 grounds for deportation specified in the INA. INA § 237, 8 U.S.C. § 1227.

deportation. The formal removal of a previously admitted noncitizen from the United States. INA § 237, 8 U.S.C. § 1227. It also refers to the type of immigration proceedings commenced prior to April 1, 1997, to remove noncitizens who entered the United States without inspection. Note: Regarding relation to the term "removal," see *removal*.

derivative citizenship. Citizenship conferred on foreign-born children when a parent achieves U.S. citizenship by naturalization or when the child is adopted by a U.S. citizen.

detainer. A written notice that DHS issues to a federal, state, or local law enforcement agency requesting that the agency hold a noncitizen in their custody pending pick-up by ICE for removal proceedings.

detention. The physical holding of a migrant by the government during the pendency of their civil immigration proceedings. INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); INA § 235(b)(2), 8 U.S.C. § 1225(b)(2); INA § 236(a), 8 U.S.C. § 1226(a); INA § 236(c), 8 U.S.C. § 1226(c).

employer sanctions. The employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA) prohibit employers from hiring noncitizens who are unauthorized to work in the United States and impose a duty on the employers to verify the employment eligibility of their workers. INA § 274A, 8 U.S.C. § 1324a.

employment authorization document (EAD). Proof of authorization to work in the United States for a specific time period.

Enforcement and Removal Operations (ERO). A division of ICE. The agency focuses on the enforcement of immigration laws through the arrest and removal of immigration law violators.

entry without inspection (EWI, pronounced "e-wee"). Prior to 1996, noncitizens who entered without inspection by an immigration officer were considered deportable. Under the amended INA, they are now considered inadmissible. INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A). Noncitizens who enter without inspection may be criminally prosecuted. INA § 275, 8 U.S.C. § 1325. See *exclusion, inadmissibility, removal*.

exclusion. Prior to the 1996, exclusion was the formal term for denial of a noncitizen's entry into the United States. This was distinguished from deportation, which then applied to all noncitizens present in the United States. Today, exclusion refers to both the process of adjudicating the inadmissibility of noncitizens seeking entry into the United States and the removal of noncitizens who entered the United States without formal admission. INA § 212, 8 U.S.C. § 1182. See *inadmissible*.

Executive Office for Immigration Review (EOIR). The Agency within the Department of Justice that oversees the activities of the Office of the Chief Immigration Judge (OCIJ), the Office of the Chief Administrative Hearing Officer (OCAHO) and the Board of Immigration Appeals (BIA).

expedited removal. IIRIRA authorized the DHS to quickly remove certain inadmissible noncitizens from the United States. The authority covers noncitizens who are inadmissible because they have no entry documents or because they have used counterfeit, altered, or otherwise fraudulent or improper documents. The authority covers noncitizens who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled by an immigration officer at a port-of-entry. The DHS has the authority to order the removal, and the noncitizen is not referred to an immigration judge except under certain circumstances after a noncitizen makes a claim to lawful status in the United States or demonstrates a credible fear of persecution if returned to his or her home country. INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A).

fiscal year. For the federal government, the 12-month period beginning October 1 and ending September 30.

Foreign Affairs Manual (FAM). A single, comprehensive, and authoritative source for the Department of State's organization structures, policies, and operating procedures including ones applicable to the Foreign Service and, in some cases, other federal agencies.

good moral character. Establishing good moral character is a prerequisite to many immigration benefits. The term is defined in the negative, with INA § 101(f), 8 U.S.C. § 1101(f), listing reasons why an individual should not be considered to be person of good moral character based on specifically delineated conduct.

green card (alien registration card). A card issued to lawful permanent residents in lieu of a visa. The first such cards were issued in 1946 and were green in color. After 1964 the cards ceased to be green but they are still referred to as "green cards." See *lawful permanent resident*.

Homeland Security Investigations (HSI). A division of ICE. It is the principal investigative arm of DHS, and it is focused on criminal organizations that "threaten or seek to exploit the customs and immigration laws of the United States."

illegal alien. A common but linguistically inapt phrase that is used in an imprecise way to refer to a noncitizen who has entered the United States without authorization, remains in the United States without authorization, or is perceived as having done something contrary to U.S. law. The phrase is rightly condemned on the grounds that persons themselves cannot be "illegal" and on the grounds that a noncitizen's presence in the United States without authorization, while grounds for removal, does not constitute a crime or civil offense. The phrase is not commonly used by immigration lawyers.

illegal immigrant. See *illegal alien*.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, commonly pronounced "eye-ruh, eye-ruh"), Pub. L. No. 104-208, 110 Stat. 1570. A major amendment to the INA that, among other things, mandated individuals who accrued unlawful presence in the United States to remain abroad for a significant period of time before reentry.

immediate relative. Certain immigrants who, because of their close relationship to U.S. citizens, are exempt from the numerical limitations imposed on immigration to the

United States. Immediate relatives are: spouses, children, and parents of U.S. citizens. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

immigrant. A noncitizen entering the country to settle there permanently. Under U.S. law, every noncitizen seeking to enter the U.S. is presumed to be an immigrant—intending to settle here permanently—unless they can prove that they are a nonimmigrant. INA § 214(b), 8 U.S.C. § 1184(b). See *nonimmigrant*.

Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 5005 (1990). Effective as of November 29, 1990. An amendment to the INA that, among other items, established the diversity visa program.

Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537 (1986). An amendment to the INA that imposed strict conditions on any noncitizen seeking to become a lawful permanent resident through marriage to a U.S. citizen or permanent resident. Such conditions include conditional residency for a two-year period.

Immigration and Nationality Act of 1952 (INA), as amended, Pub. L. No. 82-414, 66 Stat. 163 (1952), 8 U.S.C. §§ 1101-1537. The INA, as amended, is the principal source of statutory law on immigration in the United States.

Immigration and Naturalization Service (INS). A former division of the Department of Justice (from 1940 to 2003) and the Department of Labor (from 1933 to 1940), the INS ceased to exist on March 1, 2003. Its work was transferred to the newly created Department of Homeland Security (DHS).

immigration judge (IJ). An administrative hearing officer designated by the Attorney General to conduct removal proceedings. 8 C.F.R. § 1003.10.

Immigration Reform and Control Act of 1986 (IRCA, commonly pronounced "irk-uh"), Pub. L. No. 99-603, 100 Stat. 3359 (1986). An amendment to the INA that, among other things, provided for the regularization of certain noncitizens who had been in the U.S. without authorization for many years and for certain special agricultural noncitizen workers.

inadmissible. The status of a noncitizen seeking admission at a port of entry who does not meet the criteria in the INA for admission. Since 1996, the statutory grounds for inadmissibility are also applied to the removal of migrants who have entered without inspection. INA § 212, 8 U.S.C. § 1182.

institutional hearing program (IHP). Refers to removal hearings held inside correctional institutions while the noncitizen is serving a criminal sentence.

judicial recommendation against deportation (JRAD). A form of relief from deportation eliminated by the Immigration Act of 1990. It authorized sentencing judges in criminal trials to weigh in on the advisability of deporting the defendant.

jus sanguinis. Nationality determined by "blood," i.e., by the nationality of the parents. A legal concept used to support acquired and derived citizenship. See *acquired citizenship*, *derived citizenship*.

jus soli. Nationality determined by place of birth.

labor certification. The certification process administered by the Department of Labor to ensure that foreign workers do not take away jobs from American workers and do not depress wages.

lawful permanent resident (LPR). An immigrant who has been conferred permanent resident status, that is, who has authorization to live and work in the United States indefinitely. Upon meeting the statutory prerequisites for naturalization, an LPR may apply to become a naturalized citizen.

Legal Immigration Family Equity Act (LIFE), Pub. L. No. 106-553, 114 Stat. 2762 (2002). Temporarily reinstated INA § 245(i), 8 U.S.C. § 1255(i) and created the "V" nonimmigrant visa category for spouses and children of LPRs waiting for immigrant visas.

migrant. A person who leaves his/her country of origin to seek residence in another country.

naturalization. The process of conferring nationality of a state on a person after birth. INA § 101(a)(23), 8 U.S.C. § 1101(a)(23).

Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, 111 Stat. 2193 (1997). An amendment to the INA that pertains to certain Central American and other noncitizens who were long-term unauthorized residents in the United States when hardship relief rules were made more stringent by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Provisions: 1) allowed approximately 150,000 Nicaraguans and 5,000 Cubans adjustment to permanent resident status without having to make any hardship showing; 2) allowed approximately 200,000 Salvadorans and 50,000 Guatemalans as well as certain noncitizens from the former Soviet Union to seek hardship relief under more lenient hardship rules than existed prior to IIRIRA amendments.

noncitizen. A person who is not a citizen of the United States. This term is synonymous with the statutory definition of "alien."

nonimmigrant. A noncitizen admitted to the United States for a temporary duration, such as a student, a visitor, or a temporary worker. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).

notice to appear (NTA). The NTA (Form I-862). The charging document used, since April 1, 1997, by DHS to place a noncitizen in removal proceedings. See *order to show cause*.

Office of the Chief Counsel (OCC). A division within USCIS. OCC attorneys provide legal advice, opinions, determinations, regulations, and any other assistance to the USCIS director as an embedded legal program of the DHS Office of the General Counsel.

Office of Field Operations (OFO). A division of CBP. It is the government agency that enforces immigration laws at ports of entry.

Office of Immigration Litigation (OIL). A division with the Department of Justice. OIL has nationwide jurisdiction over all civil immigration litigation matters and is responsible for the nationwide coordination of civil immigration litigation.

Office of the Principal Legal Advisor (OPLA). A division within ICE. OPLA attorneys represent the government in immigration removal proceedings. OPLA attorneys also counsel ICE personnel regarding their enforcement actions and work with the DOJ in ICE-built criminal prosecutions.

Office of Refugee Resettlement (ORR). A division of the U.S. Department of Health and Human Services that provides benefits and services to refugees, asylees, special immigrants, victims of trafficking, and unaccompanied minors.

order to show cause (OSC). The charging document (Form I-221) used prior to April 1, 1997 to initiate deportation proceedings against a particular noncitizen. This phrase is used more generally in court procedure outside the immigration context.

out of status. A noncitizen who violates their terms of their visa is considered out of status.

overstay. An "overstay" occurs when a nonimmigrant remains in the United States longer than permitted.

parolee. A noncitizen who appears to be inadmissible to DHS, but is allowed to come into the United States, provided the noncitizen is not a security or flight risk. 8 C.F.R. § 212.5.

per-country limit. The maximum number of family-sponsored and employment-based preference visas that can be issued to citizens of any country in a fiscal year. The limits are calculated each fiscal year depending on the total number of family-sponsored and employment-based visas available. No more than 7 percent of the visas may be issued to natives of any one independent country in a fiscal year; no more than 2 percent may be issued to any one dependency of any independent country. The per-country limit does not indicate, however, that a country is entitled to the maximum number of visas each year, just that it cannot receive more than that number. Because of the combined workings of the preference system and per-country limits, most countries do not reach per-country limits on visa issuance.

petitioner. A person who is filing an immigration form with the government in order to obtain immigration status for another person, called the beneficiary.

port of entry (POE). A location in the United States which is designated as a point of entry for noncitizens and United States citizens. The ports of entry are listed at 8 C.F.R. § 100.4.

preinspection. Immigration inspection conducted of passengers at foreign airports to determine their admissibility before their departure for the United States. This practice has been codified at INA § 235A, 8 U.S.C. § 1225a.

priority date. The date on the I-797, notice of action, marking receipt of an immigration application or petition. The priority date marks the noncitizen's place in the immigrant visa queue.

prosecutorial discretion. In the context of immigration enforcement by DHS and DOJ, the capacity and authority of the government to do any of the following: refrain from placing a potentially deportable person in deportation proceedings; suspend or even terminate a deportation proceeding; postpone a deportation; release someone from detention; or de-prioritize the enforcement of immigration laws against someone. Prosecutorial discretion is guided by policy preferences that frequently shift.

registry. Noncitizens who have continuously resided in the United States since January 1, 1972, are of good moral character, and are not inadmissible, are eligible to adjust to lawful permanent resident status under the "registry" provision. INA § 249, 8 U.S.C. § 1259.

refugee. A person, outside of the United States, who is also outside the country of his or her nationality who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

reinstatement of removal. The removal of a previously removed noncitizen who returned to the United States without permission on the basis of the initial order of removal. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5).

removal. The expulsion of a noncitizen from the United States. This expulsion may be based on grounds of inadmissibility (INA § 212) or deportability (INA § 237). Note: The usage of the terms "deportation" and "removal" shifted under U.S. law in 1996; subsequently, deportation can be thought of as a subset of removal.

respondent. An individual who is in immigration court "responding" to charges of removability laid out in the notice to appear.

Service Centers. The five offices of the U.S. Citizenship and Immigration Service established to handle the filing, data entry, and adjudication of certain applications for immigration services and benefits.

Student and Exchange Visitor Information System (SEVIS). SEVIS documents information pertaining to international foreign students and exchange visitors.

special immigrant. A general reference to eleven categories of immigrants listed at INA § 101(a)(27), 8 U.S.C. § 1101(a)(27).

special immigrant juvenile (SIJ). An immigrant "who has been declared dependent on a juvenile court located in the United States ... and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

temporary protected status (TPS). A status provided by the secretary of Homeland Security to nationals of certain countries temporarily unable to handle the return of their nationals due to armed conflict or natural disaster. TPS beneficiaries receive authorization to remain and work in the United States for the duration of the TPS period. INA § 244, 8 U.S.C. § 1254a.

unaccompanied alien child (UAC). A migrant under the age of 18 who seeks entry into or enters the United States without a parent or guardian.

undocumented. A noncitizen described as "undocumented" lacks legal authorization to be present in the United States.

U.S. Border Patrol (USBP). A division within CBP. USBP agents focus on border security between ports of entry.

U.S. citizen (USC). An individual is or becomes a U.S. citizen in various ways—generally by birth in the United States, birth to U.S. citizen parents, or naturalization.

U.S. Citizenship and Immigration Services (USCIS). A division within DHS. USCIS is the government agency that oversees lawful immigration to the United States.

U.S. Customs and Border Protection (CBP). A division within DHS that is focused on border security, including immigration enforcement.

U.S. Immigration and Customs Enforcement (ICE). A division within DHS that is focused on immigration enforcement in the interior of the United States.

unlawful presence. The time that a noncitizen is present in the United States after entering the country without inspection or after the expiration of their allotted visa stay.

Violence Against Women Act of 1994 (VAWA). Pub. L. No. 103-322, 108 Stat. 1901 (1994). VAWA amended the INA to create pathways to lawful immigration status for noncitizens battered by their U.S. citizen or LPR spouses or parents.

visa. A permit issued by a consular representative of a country, allowing the bearer entry into or transit through that country. As will be discussed in Chapters 3 and 4, the United States issues immigrant visas (IV) to lawful permanent residents and nonimmigrant visas (NIV) to temporary visitors.

voluntary departure. The privilege of voluntarily departing the United States in lieu of being formally removed.

voluntary return. The informal process through which an authorized immigration official or border patrol agent returns a noncitizen to Mexico or Canada with the noncitizen's consent and without a hearing.

waiver. A discretionary pardon for a specific immigration violation. See INA § 212(h).

withdrawal. An arriving noncitizen's voluntary retraction of an application for admission to the United States in lieu of a removal hearing before an immigration judge or an expedited removal.

withholding. Withholding of removal is a form of relief from deportation akin to, but less desirable than, asylum. See INA § 241(b)(3).

A.2 Table of Abbreviations

AAO	Administrative Appeals Office of the USCIS
ACA	Asylum Cooperative Agreement
ACWIA	American Competitiveness and Workforce Improvement Act of 1998
AEA	Alien Enemies Act
AEDPA	Antiterrorism and Effective Death Penalty Act of 1996
AG	Attorney General of the United States
AILA	American Immigration Lawyers Association
AOS	Adjustment of status
ATD	Alternatives to detention
AUSA	Assistant United States Attorney
BALCA	Board of Alien Labor Certification Appeals
BIA	Board of Immigration Appeals
BOP	Bureau of Prisons Burden of proof
CAT	Convention against torture
CBP	U.S. Customs and Border Protection
CFR	Code of Federal Regulations
CIMT	Crime involving moral turpitude
CIS	United States Citizenship and Immigration Services
COR	Cancellation of removal
CRS	Congressional Research Service
CSPA	Child Status Protection Act
DACA	Deferred Action for Childhood Arrivals
DED	Deferred Enforced Departure
DHHS	Department of Health and Human Services
DHS	Department of Homeland Security
DOJ	Department of Justice
DOL	Department of Labor
DOS	Department of State
DOT	Dictionary of Occupational Titles
EAD	Employment Authorization Document

EOIR	Executive Office for Immigration Review
EOUSA	Executive Office for United States Attorneys
ESTA	Electronic System for Travel Authorization
EWI	Entry Without Inspection
FAM	Foreign Affairs Manual
FGM	Female genital mutilation
FY	Fiscal year
GMC	Good moral character
HSA	Homeland Security Act of 2002
IAC	Ineffective assistance of counsel
ICE	U.S. Immigration and Customs Enforcement
IHP	Institutional Hearing Program
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
IJ	Immigration judge
IMFA	Immigration Marriage Fraud Amendments of 1986
IMMACT	Immigration Act of 1990
INA	Immigration and Nationality Act of 1952
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act of 1986
IV	Immigrant visa
JAG	Judge Advocate General
JRAD	Judicial Recommendation Against Deportation
LC	Labor certification
LCA	Labor condition application
LIFE	Legal Immigration Family Equity Act
LPR	Lawful permanent resident
MTR	Motion to reopen
NACARA	Nicaraguan Adjustment and Central American Relief Act of 1997
NAFTA	North American Free Trade Agreement
NIV	Nonimmigrant visa
NIW	National interest waiver
NOID	Notice of Intent to Deny

NSEERS	National Security Entry Exit Registration System
NTA	Notice to appear
NVC	National visa center
OCAHO	Office of the Chief Administrative Hearing Officer
OCC	Office of the Chief Counsel
OCIJ	Office of the Chief Immigration Judge
OIL	Office of Immigration Litigation
OLE	Office of Legal Education (DOJ)
OPLA	Office of the Principal Legal Advisor
ORR	Office of Refugee Resettlement
OSC	Order to show cause
OTM	Other than Mexican
PCR	Post conviction relief
PERM	Program Electronic Review Management System
POE	Port of entry
RFE	Request for evidence
SEVIS	Student and Exchange Visitor Information System
SIJ	Special Immigrant Juvenile
STCA	Safe Third Country Agreement
TIJ	Temporary Immigration Judge
TPS	Temporary Protected Status
UAC	Unaccompanied alien child
UNHCR	United Nations High Commissioner for Refugees
UPL	Unauthorized practice of law
USBP	United States Border Patrol
USC	United States Citizen United States Code
USCIS	United States Citizenship and Immigration Services
US-VISIT	United States Visitor and Immigrant Status Indicator Technology
VAWA	Violence Against Women Act of 1994
VD	Voluntary Departure
VR	Voluntary Return

A.3 USCIS Chart on Waivers and Relief from Inadmissibility

GROUNDS	**EXCEPTIONS**	**WAIVERS**
212(a)(1)(A)(i): Communicable Disease		NIV: 212(d)(3)(A) IV: 212(g)(1) (applicable to spouse, unmarried son or daughter, or parent of USC/LPR) danger to public health is minimal; spread of infection is minimal; no cost incurred by gov't agency w/o consent Legalization: 245A(d)(2)(B)(i)
212(a)(l)(A)(ii): Vaccinations	212(a)(l)(C) adopted child; 10 yrs old & parent's affidavit	NIV: N/A IV: 212(g)(2) Legalization: 245A(d)(2)(B)(i)
212(a)(1)(A)(iii): physical or mental disorder & behavior poses threat		NIV: 212(d)(3)(A) IV: 212(g)(3) Legalization: 245A(d)(2)(B)(i)
212(a)(l)(A)(iv): Drug abuser or addict		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(2)(A)(i)(I): CIMT (conviction or admission)	• 212(a)(2)(A)(ii)(I): only 1 crime + committed < 18 yrs old + >5 yrs before application for visa/admission • 212(a)(2)(A)(ii)(n): only 1 crime + maximum penalty possible 1yr + alien's sentence is 6 months or less • Full pardon by President or Governor, 237(a)(2)(A)(vi) • Purely political offense	NIV: 212(d)(3)(A) IV: 212(h) (if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval) • 212(h)(l)(A): Offense >15 yrs ago + rehabilitated + not contrary to national welfare; • 212(h)(l)(B): Alien is spouse/parent/son/ daughter of USC/LPR + extreme hardship to USC/LPR; • 212(h) barred if (1) LPR convicted of ag felony or lacks 7 yrs cont. residence before initiation of removal; or (2) murder or crime involving torture Legalization: NO WAIVER
212(a)(2)(A)(i)(II): Controlled Substance		NIV: 212(d)(3)(A) IV: 212(h) for single offense of simple possession 30 grams MJ (See 212(h)(l)(A) or 212(h)(l)(B) above); if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval Legalization: 245A(d)(2)(B)(i)(II); no waiver except single possession of 30 grams of MJ

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(2)(B): Multiple convictions + >5 years sentence total		NIV: 212(d)(3)(A) IV: 212(h) (if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval) • 212(h)(l)(A): Offense >15 yrs ago + rehabilitated + not contrary to national welfare; • 212(h)(l)(B): Alien is spouse/parent/son/ daughter of USC/LPR + extreme hardship to USC/LPR; • 212(h) barred if (1) LPR convicted of ag felony or lacks 7 yrs cont. residence before initiation of removal; or (2) murder or crime involving torture. Legalization: NO WAIVER
212(a)(2)(C): Drug Traffickers (reason to believe)		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: NO WAIVER
212(a)(2)(D): (i) Engaging in prostitution within past 10 yrs; (ii) Procuring prostitutes within past 10 yrs; (iii) Coming to engage in Commercialized vice.		NIV: 212(d)(3)(A) IV: 212(h) (if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval) • For (i) & (ii) 212(h)(l)(A): Admission is not contrary to national welfare, safety or security and alien has been rehabilitated; • For (iii) 212(h)(1)(A) Offense >15 yrs ago rehabilitated + not contrary to national welfare; • For (i), (ii), (iii), 212(h)(l)(B): Alien is spouse/parent/son/ daughter of USC/LPR + extreme hardship to USC/LPR.
212(a)(2)(E) Alien asserts immunity from prosecution		NIV: 212(d)(3)(A) IV: 212(h) if violent or dangerous crime then exceptional or extremely unusual hardship and have supervisor or higher concurrence for approval • 212(h)(l)(A): Offense >15 yrs ago + rehabilitated + not contrary to national welfare; • 212(h)(l)(B): Alien is spouse/parent/son/ daughter of USC/LPR + extreme hardship to USC/LPR. Legalization: NO WAIVER

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(2)(G) Foreign gov't officials who violated religious freedom		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(2)(H) Human traffickers & sp/son/dau who knew & benefitted $$	212(a)(2)(H)(iii) Received benefits only while a minor child	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(2)(I) Money Laundering		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(3)(A)(i)(I) Espionage, sabotage		NIV or IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(A)(i)(II) Illegal export of technology or sensitive information		NIV: 212(d)(3)(A) IV: NO WAIVER
212(a)(3)(A)(ii) Other unlawful activity		NIV or IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(A)(iii) Actively engage in overthrow of US		NIV or IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(B)(i)(I) Engaged in terrorist activity, defined at 212(a)(3)(B)(iv) to include providing material support	212(a)(3)(B)(iv)(VI)(dd) Providing material support to an undesignated org. if clear & convincing evidence didn't reasonably know it was terrorist org.	NIV:212(d)(3)(A) IV or NIV: 212(d)(3)(B) Sec of DHS or Sec of State may grant waiver in sole unreviewable discretion for material support Legalization: NO WAIVER
212(a)(3)(B)(i)(II) Reasonable belief likely to engage in terrorist activity		NIV: 212(d)(3)(A} IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(B)(i)(m) Incited terrorism		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(B)(i)(IV) Representative of a terrorist org. or an org. that endorse terrorist activity. 212(a)(3)(B)(vi) defines terrorist org as (I) §219 designation, (II) Sec of State designation, or (iii) 2 or more individuals engaged in terrorist activity.		NIV: 212(d)(3)(A) NIV/IV: 212(d)(3)(B) Sec of DHS or Sec of State may grant in sole unreviewable discretion for representatives of organizations that endorse terrorist activity.
212(a)(3)(B)(i)(V) Member of terrorist org.	Member of undesignated org. + clear & convincing evidence	NIV: 212(d)(3)(A) IV: NO WAIVER

GROUNDS	EXCEPTIONS	WAIVERS
described in subcl. (I), (II), or cl. (vi)	didn't reasonable know it was terrorist org.	Legalization: NO WAIVER
212(a)(3)(B)(i)(VI) Member of terrorist org. described in (vi)(III)		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(B)(i)(VII) Endorses or espouses terrorist activity (defined at §212(a)(3)(8)(iii))		NIV: 212(d)(3)(A) IV: 212(d)(3)(B) Sec of DHS/ Sec of State may grant in sole unreviewable discretion
212(a)(3)(B)(i)(VIII) Received military type training from terrorist org.		NIV: 212(d)(3)(A)
212(a)(3)(B)(i)(IX) Spouse or child of an alien inadmissible under 212(a)(3)(B) if activity occurred within last 5 years	212(a)(3)(B)(ii): Spouse or child did not reasonably know of activity or spouse or child renounced the activity	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(C) Entry has potentially serious adverse foreign policy consequences	212(a)(3)(C)(ii) foreign officials 212(a)(3)(C)(iii) Beliefs, statements or associations would be lawful in US	NIV: NO WAIVER IV: NO WAIVER Legalization: NO WAIVER
212(a)(3)(D) Communist Party Membership	212(a)(3)(D)(ii) Involuntary membership 212(a)(3)(D)(iii) Past membership terminated	NIV: 212(d)(3)(A) IV: 212(a)(3)(D)(iv) close family member Legalization: NO WAIVER
212(a)(3)(E) Nazi persecution or genocide		NIV or IV: NO WAIVER Legalization: NO WAIVER
212(a)(4) Public Charge	NACARA 202(d)(l)(D) Special Rules for Legalization Applicants 245A(d)(2)(B)(ii)(4) and 245A(d)(2)(B)(iii)	NIV: 212(d)(3)(A) IV: 213 (bond), 213A (affidavit of support), 221(g) (bond)
212(a)(5)(A) Lack of Labor Certification & seeking employment; immigrants seeking admission or adjustment under 203(b)(2), (3)	• Labor Certification • Proof applicant will not work • 8 CFR 212.8(a), (b) lists various exemptions e.g. US Military, fiancé, etc. • 207(c)(3) refugees • 209 (c) asylees adjusting status • Family based immigrants • NACAR • Legalization applicants	NIV: 212(d)(3)(A) IV: 212(k) (alien in possession of an immigrant visa if inadmissibility was not known before departure)
212(A)(5)(B) unqualified physician		NIV: 212(d)(3)(A) IV: NO WAIVER
212(a)(5)(C) uncertified health care worker		NIV: 212(d)(3)(A) IV: NO WAIVER

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(6)(A) Alien present w/o admission or parole	• (6)(A)(ii) battered woman & child • NACARA 202(d)(1)(D) • Legalization applicants	NIV: 212(d)(3)(A)
212(a)(6)(B) Failure to attend removal proceedings	• Reasonable cause for failure to attend • Proceedings initiated prior to 4/1/1997	NIV: 212(d)(3)(A) IV: NO WAIVER but it is no longer an inadmissibility if 5 years has passed
212(a)(6)(C)(i) Misrepresentation or fraud seeking to procure a visa admission, or other benefit under the INA	• Timely retraction • Immaterial misrepresentation • 22 CFR 40.63(a)	NIV: 212(d)(3)(A) IV: 212(i) discretion + alien is the spouse/son/daughter of USC/LPR + extreme hardship to USC/LPR Legalization: 245A(d)(2)(B)(i)
212(a)(6)(C)(ii) False claim to USC	• False claims before 9/30/96 (but could fall under (6)(c)(i) • 212(a)(6)(C)(ii)(II) Reasonable mistaken belief by alien who was LPR by age 16+ child of USC parents	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(6)(D) Stowaways (present)	Applies only to current entry as stowaway	NIV & IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(6)(E) Alien Smugglers	212(a)(6)(E)(ii)	NIV: 212(d)(3)(A) IV: 212(d)(11) Intending LPR/LPR who aided own spouse, parent, son or daughter (not 4th preference) Legalization: 245A(d)(2)(B)(i)
212(a)(6)(F) 274C civil penalty		NIV: 212(d)(3)(A) IV: 212(d)(11) LPR + committed to aid own spouse or child Legalization: 245A(d)(2)(B)(i)
212(a)(6)(G) Student visa Abusers	Remain outside US 5 years after violation	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(7)(A) Immigrant document requirement	• 211(b) returning LPRS • 211(c) refugees • NACARA 202(d)(1)(D) • 289, American Indians born in Canada • Legalization Applicant: 245A(d)(2)(A)	NIV: 212(d)(3)(A) IV: 212(k)
212(a)(7)(B) Non-immigrant document requirement (c/o valid passport, visa, border crossing card)	• NATO Military personnel • 212(d)(4)(B) • 212(d)(7), Alien entering from Guam, PR, VI • US military under official orders • 289, American Indians born in Canada	NIV: 212(d)(3), (4) 217 VWP IV: N/A

GROUNDS	EXCEPTIONS	WAIVERS
	• Legalization Applicant: 245A(d)(2)(A)	
212(a)(8)(A) Permanently ineligible for citizenship- relieved of military service in the US on the ground of alienage. Of Matter of Kanga, 22 I&N Dec. 1206 (BIA 2000)		NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(8)(B) Left US or remained abroad to avoid or evade military training or service during war or national emergency	Nonimmigrant at time of departure & seeking reentry as a nonimmigrant	NIV: 212(d)(3)(A) IV: NO WAIVER. Vietnam era draft evaders may benefit from Presidential pardon; 42 Fed. Reg. 59,562 (Nov. 15, 1977) Legalization: 245A(d)(2)(B)(i)
212(a)(9)(A) Previously removed (5 , 10-, 20- year bars & permanent bars)	212(a)(9)(A)(iii) AG's consent to reapplying for admission by filing I-212	NIV: 212(d)(3)(A) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(9)(B) Aliens Unlawfully Present (3- & 10- year bars)	• 212(a)(9)(B)(iii) exception to accrual of ULP for minors, asylee applicant + no unlawful employment, Family Unity, Battered Women & Children • 212(a)(9)(B)(iv) Tolled period for good cause • Lawfully present (1) E/S or C/S pending (3/3/2000 Person Memo); (2) NACARA §202(d)(1)(D); (3) HRIFA; (4) 249 registry applicant; (5) VD period; (6) refugee; (7) asylee; (8) granted withholding; (9) granted cancellation; (10) DED; (11) TPS; (12) §202(b) Cuban-Haitian; (13) §245 applicant • Immediate relatives §201(b) • Special Immigrants	NIV: 212(d)(3) IV: 212(a)(9)(B)(v) Alien is spouse/son/daughter of USC/LPR + extreme hardship to USC/LPR Legalization: 245A(d)(2)(B)(i)
212(a)(9)(C) Aliens Unlawfully Present after Previous Immigration Violations	212(a)(9)(C)(ii)10 years since last departure + AG's consent to reapplying for admission by filing I-212	NIV: 212(d)(3) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(10)(A) Practicing polygamists		NIV: n/a IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)

GROUNDS	EXCEPTIONS	WAIVERS
212(a)(10)(B) Guardian to accompany helpful alien		IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(10)(C) International Child Abduction	212(a)(10)(B)(ii) Child located in a foreign state that is party to the Hague Convention	NIV: 212(d)(3) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(10)(D) Unlawful voters	212(a)(10)(D)(ii) Reasonable mistaken belief at time of violation that he was USC + parent are USC + LPR before	NIV: 212(d)(3) IV: NO WAIVER Legalization: 245A(d)(2)(B)(i)
212(a)(10)(E) Former USC who renounces to avoid taxation		NIV: 212(d)(3)(A) IV: NO WAIVER
212(f) Present can use executive proclamation to suspend the admission of persons into US		

NOTE: INA § 212(c) may be available to LPRs who pled guilty to criminal offense prior to April 1, 1997, if the LPR would have been eligible for § 212(c) at the time of the plea. Consequently, key dates for determining eligibility for §212(c) are when various laws went into effect amending § 212(c), i.e. November 29, 1990 (IMMACT '90), April 24, 1996 (AEDPA) and April 1, 1997 (IIRIRA).

A.4 Common Immigration Forms

Form	Name
AR-11	Alien's Change of Address Card
EOIR-26	Notice of Appeal from a Decision of an Immigration Judge
EOIR-28	Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court
EOIR-40	Application for Suspension of Deportation
EOIR-42A	Application for Cancellation of Removal for Certain Permanent Residents
EOIR-42B	Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents
G-28	Notice of Entry of Appearance as Attorney or Accredited Representative (DHS)
G-325A	Biographic Information (for Deferred Action)
G-639	Freedom of Information/Privacy Act Request (DHS)
G-1055	Fee Schedule (USCIS)
G-1145	e-Notification of Application/Petition Acceptance (DHS)
I-9	Employment Eligibility Verification
I-90	Application to Replace Permanent Resident Card (Green Card)
I-129	Petition for a Nonimmigrant Worker
I-130	Petition for Alien Relative
I-134	Affidavit of Support
I-140	Immigrant Petition for Alien Workers
I-212	Application for Permission to Reapply for Admission into the United States After Deportation or Removal
I-221	Order to Show Cause and Notice of Hearing
I-485	Application to Register Permanent Residence or Adjust Status
I-539	Application To Extend/Change Nonimmigrant Status
I-589	Application for Asylum and for Withholding of Removal
I-601	Application for Waiver of Grounds of Inadmissibility
I-601A	Application for Provisional Unlawful Presence Waiver
I-751	Petition to Remove Conditions on Residence
I-765	Application for Employment Authorization
I-797	Notice of Action
I-821	Application for Temporary Protected Status
I-821D	Consideration of Deferred Action for Childhood Arrivals
I-862	Notice to Appear
I-864	Affidavit of Support Under Section 213A of the INA
I-907	Request for Premium Processing Service
I-912	Request for Fee Waiver
I-914	Application for T Nonimmigrant Status
I-918	Petition for U Nonimmigrant Status
N-400	Application for Naturalization

Form	Name
N-600	Application for Certificate of Citizenship

A.5 Immigration and Nationality Act to United States Code Conversion Table

INA	U.S.C.	Title
Title I: General Provisions		
INA § 101	8 U.S.C. § 1101	Definitions
INA § 102	8 U.S.C. § 1102	Diplomatic and semidiplomatic immunities
INA § 103	8 U.S.C. § 1103	Powers and duties of the Secretary, the Under Secretary, and the Attorney General
INA § 104	8 U.S.C. § 1104	Powers and duties of Secretary of State
INA § 105	8 U.S.C. § 1105	Liaison with internal security officers; data exchange
INA § 106	8 U.S.C. § 1105a	Employment authorization for battered spouses of certain nonimmigrants
Title II: Immigration		
INA § 201	8 U.S.C. § 1151	Worldwide level of immigration
INA § 202	8 U.S.C. § 1152	Numerical limitations on individual foreign states
INA § 203	8 U.S.C. § 1153	Allocation of immigrant visas
INA § 204	8 U.S.C. § 1154	Procedure for granting immigrant status
INA § 205	8 U.S.C. § 1155	Revocation of approval of petitions; effective date
INA § 206	8 U.S.C. § 1156	Unused immigrant visas
INA § 207	8 U.S.C. § 1157	Annual admission of refugees and admission of emergency situation refugees
INA § 208	8 U.S.C. § 1158	Asylum
INA § 209	8 U.S.C. § 1159	Adjustment of status of refugees
INA § 210	8 U.S.C. § 1160	Special agricultural workers
INA § 211	8 U.S.C. § 1181	Admission of immigrants into the United States
INA § 212	8 U.S.C. § 1182	Inadmissible aliens
INA § 213	8 U.S.C. § 1183	Admission of aliens on giving bond or undertaking; return upon permanent departure
INA § 213A	8 U.S.C. § 1183a	Requirements for sponsor's affidavit of support
INA § 214	8 U.S.C. § 1184	Admission of nonimmigrants
INA § 215	8 U.S.C. § 1185	Travel control of citizens and aliens
INA § 216	8 U.S.C. § 1186a	Conditional permanent resident status for certain alien spouses and sons and daughters
INA § 216A	8 U.S.C. § 1186b	Conditional permanent resident status for certain alien entrepreneurs, spouses, and children
INA § 217	8 U.S.C. § 1187	Visa waiver program for certain visitors
INA § 218	8 U.S.C. § 1188	Admission of temporary H-2A workers
INA § 219	8 U.S.C. § 1189	Designation of foreign terrorist organizations
INA § 221	8 U.S.C. § 1201	Issuance of visas
INA § 222	8 U.S.C. § 1202	Application for visas
INA § 223	8 U.S.C. § 1203	Reentry permit
INA § 224	8 U.S.C. § 1204	Immediate relative and special immigrant visas
INA § 231	8 U.S.C. § 1221	Lists of alien and citizen passengers arriving and departing

INA	U.S.C.	Title
INA § 232	8 U.S.C. § 1222	Detention of aliens for physical and mental examination
INA § 233	8 U.S.C. § 1223	Entry through or from foreign territory and adjacent islands
INA § 234	8 U.S.C. § 1224	Designation of ports of entry for aliens arriving by aircraft
INA § 235	8 U.S.C. § 1225	Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing
INA § 235A	8 U.S.C. § 1225a	Preinspection at foreign airports
INA § 236	8 U.S.C. § 1226	Apprehension and detention of aliens
INA § 236A	8 U.S.C. § 1226a	Mandatory detention of suspected terrorists; habeas corpus; judicial review
INA § 237	8 U.S.C. § 1227	Deportable aliens
INA § 238	8 U.S.C. § 1228	Expedited removal of aliens convicted of committing aggravated felonies
INA § 239	8 U.S.C. § 1229	Initiation of removal proceedings
INA § 240	8 U.S.C. § 1229a	Removal proceedings
INA § 240A	8 U.S.C. § 1229b	Cancellation of removal; adjustment of status
INA § 240B	8 U.S.C. § 1229c	Voluntary departure
INA § 240C	8 U.S.C. § 1230	Records of admission
INA § 241	8 U.S.C. § 1231	Detention and removal of aliens ordered removed
INA § 242	8 U.S.C. § 1252	Judicial review of orders of removal
INA § 243	8 U.S.C. § 1253	Penalties related to removal
INA § 244	8 U.S.C. § 1254a	Temporary protected status
INA § 245	8 U.S.C. § 1255	Adjustment of status of nonimmigrant to that of person admitted for permanent residence
INA § 245A	8 U.S.C. § 1255a	Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence
INA § 246	8 U.S.C. § 1256	Rescission of adjustment of status; effect upon naturalized citizen
INA § 247	8 U.S.C. § 1257	Adjustment of status of certain resident aliens to nonimmigrant status; exceptions
INA § 248	8 U.S.C. § 1258	Change of nonimmigrant classification
INA § 249	8 U.S.C. § 1259	Record of admission for permanent residence in the case of certain aliens who entered the United States prior to January 1, 1972
INA § 250	8 U.S.C. § 1260	Removal of aliens falling into distress
INA § 251	8 U.S.C. § 1281	Alien crewmen
INA § 252	8 U.S.C. § 1282	Conditional permits to land temporarily
INA § 253	8 U.S.C. § 1283	Hospital treatment of alien crewmen afflicted with certain diseases
INA § 254	8 U.S.C. § 1284	Control of alien crewmen
INA § 255	8 U.S.C. § 1285	Employment on passenger vessels of aliens afflicted with certain disabilities
INA § 256	8 U.S.C. § 1286	Discharge of alien crewmen; penalties
INA § 257	8 U.S.C. § 1287	Alien crewmen brought into the United States with intent to evade immigration laws; penalties

INA	U.S.C.	Title
INA § 258	8 U.S.C. § 1288	Limitations on performance of longshore work by alien crewmen
INA § 261	8 U.S.C. § 1301	Alien seeking entry; contents
INA § 262	8 U.S.C. § 1302	Registration of aliens
INA § 263	8 U.S.C. § 1303	Registration of special groups
INA § 264	8 U.S.C. § 1304	Forms for registration and fingerprinting
INA § 265	8 U.S.C. § 1305	Notices of change of address
INA § 266	8 U.S.C. § 1306	Penalties
INA § 271	8 U.S.C. § 1321	Prevention of unauthorized landing of aliens
INA § 272	8 U.S.C. § 1322	Bringing in aliens subject to denial of admission on a health-related ground; persons liable; clearance papers; exceptions; "person" defined
INA § 273	8 U.S.C. § 1323	Unlawful bringing of aliens into United States
INA § 274	8 U.S.C. § 1324	Bringing in and harboring certain aliens
INA § 274A	8 U.S.C. § 1324a	Unlawful employment of aliens
INA § 274B	8 U.S.C. § 1324b	Unfair immigration-related employment practices
INA § 274C	8 U.S.C. § 1324c	Penalties for document fraud
INA § 274D	8 U.S.C. § 1324d	Civil penalties for failure to depart
INA § 275	8 U.S.C. § 1325	Improper entry by alien
INA § 276	8 U.S.C. § 1326	Reentry of removed aliens
INA § 277	8 U.S.C. § 1327	Aiding or assisting certain aliens to enter
INA § 278	8 U.S.C. § 1328	Importation of alien for immoral purpose
INA § 279	8 U.S.C. § 1329	Jurisdiction of district courts
INA § 280	8 U.S.C. § 1330	Collection of penalties and expenses
INA § 281	8 U.S.C. § 1351	Nonimmigrant visa fees
INA § 282	8 U.S.C. § 1352	Printing of reentry permits and blank forms of manifest and crew lists; sale to public
INA § 283	8 U.S.C. § 1353	Travel expenses and expense of transporting remains of officers and employees dying outside of United States
INA § 284	8 U.S.C. § 1354	Applicability to members of the Armed Forces
INA § 285	8 U.S.C. § 1355	Disposal of privileges at immigrant stations; rentals; retail sale; disposition of receipts
INA § 286	8 U.S.C. § 1356	Disposition of moneys collected under the provisions of this subchapter
INA § 287	8 U.S.C. § 1357	Powers of immigration officers and employees
INA § 288	8 U.S.C. § 1358	Local jurisdiction over immigrant stations
INA § 289	8 U.S.C. § 1359	Application to American Indians born in Canada
INA § 290	8 U.S.C. § 1360	Establishment of central file; information from other departments and agencies
INA § 291	8 U.S.C. § 1361	Burden of proof upon alien
INA § 292	8 U.S.C. § 1362	Right to counsel
INA § 293	8 U.S.C. § 1363	Deposit of and interest on cash received to secure immigration bonds
INA § 294	8 U.S.C. § 1363a	Undercover investigation authority

INA	U.S.C.	Title
Title III: Nationality and Naturalization		
INA § 301	8 U.S.C. § 1401	Nationals and citizens of United States at birth
INA § 302	8 U.S.C. § 1402	Persons born in Puerto Rico on or after April 11, 1899
INA § 303	8 U.S.C. § 1403	Persons born in the Canal Zone or Republic of Panama on or after February 26, 1904
INA § 304	8 U.S.C. § 1404	Persons born in Alaska on or after March 30, 1867
INA § 305	8 U.S.C. § 1405	Persons born in Hawaii
INA § 306	8 U.S.C. § 1406	Persons living in and born in the Virgin Islands
INA § 307	8 U.S.C. § 1407	Persons living in and born in Guam
INA § 308	8 U.S.C. § 1408	Nationals but not citizens of the United States at birth
INA § 309	8 U.S.C. § 1409	Children born out of wedlock
INA § 310	8 U.S.C. § 1421	Naturalization authority
INA § 311	8 U.S.C. § 1422	Eligibility for naturalization
INA § 312	8 U.S.C. § 1423	Requirements as to understanding the English language, history, principles and form of government of the United States
INA § 313	8 U.S.C. § 1424	Prohibition upon the naturalization of persons opposed to government or law, or who favor totalitarian forms of government
INA § 314	8 U.S.C. § 1425	Ineligibility to naturalization of deserters from the Armed Forces
INA § 315	8 U.S.C. § 1426	Citizenship denied alien relieved of service in Armed Forces because of alienage
INA § 316	8 U.S.C. § 1427	Requirements of naturalization
INA § 317	8 U.S.C. § 1428	Temporary absence of persons performing religious duties
INA § 318	8 U.S.C. § 1429	Prerequisite to naturalization; burden of proof
INA § 319	8 U.S.C. § 1430	Married persons and employees of certain nonprofit organizations
INA § 320	8 U.S.C. § 1431	Children born outside the United States and residing permanently in the United States; conditions under which citizenship automatically acquired; determinations of name and birth date
INA § 322	8 U.S.C. § 1433	Children born and residing outside the United States; conditions for acquiring certificate of citizenship
INA § 324	8 U.S.C. § 1435	Former citizens regaining citizenship
INA § 325	8 U.S.C. § 1436	Nationals but not citizens; residence within outlying possessions
INA § 326	8 U.S.C. § 1437	Resident Philippine citizens excepted from certain requirements
INA § 327	8 U.S.C. § 1438	Former citizens losing citizenship by entering armed forces of foreign countries during World War II
INA § 328	8 U.S.C. § 1439	Naturalization through service in the armed forces
INA § 329	8 U.S.C. § 1440	Naturalization through active-duty service in the Armed Forces during World War I, World War II, Korean hostilities, Vietnam hostilities, or other periods of military hostilities

INA	U.S.C.	Title
INA § 329A	8 U.S.C. § 1440-1	Posthumous citizenship through death while on active-duty service in armed forces during World War I, World War II, the Korean hostilities, the Vietnam hostilities, or in other periods of military hostilities
INA § 330	8 U.S.C. § 1441	Constructive residence through service on certain United States vessels
INA § 331	8 U.S.C. § 1442	Alien enemies
INA § 332	8 U.S.C. § 1443	Administration
INA § 333	8 U.S.C. § 1444	Photographs; number
INA § 334	8 U.S.C. § 1445	Application for naturalization; declaration of intention
INA § 335	8 U.S.C. § 1446	Investigation of applicants; examination of applications
INA § 336	8 U.S.C. § 1447	Hearings on denials of applications for naturalization
INA § 337	8 U.S.C. § 1448	Oath of renunciation and allegiance
INA § 338	8 U.S.C. § 1449	Certificate of naturalization; contents
INA § 339	8 U.S.C. § 1450	Functions and duties of clerks and records of declarations of intention and applications for naturalization
INA § 340	8 U.S.C. § 1451	Revocation of naturalization
INA § 341	8 U.S.C. § 1452	Certificates of citizenship or U.S. noncitizen national status; procedure
INA § 342	8 U.S.C. § 1453	Cancellation of certificates issued by Attorney General, the Commissioner or a Deputy Commissioner; action not to affect citizenship status
INA § 343	8 U.S.C. § 1454	Documents and copies issued by Attorney General
INA § 344	8 U.S.C. § 1455	Fiscal provisions
INA § 346	8 U.S.C. § 1457	Publication and distribution of citizenship textbooks; use of naturalization fees
INA § 347	8 U.S.C. § 1458	Compilation of naturalization statistics and payment for equipment
INA § 349	8 U.S.C. § 1481	Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions
INA § 351	8 U.S.C. § 1483	Restrictions on loss of nationality
INA § 356	8 U.S.C. § 1488	Nationality lost solely from performance of acts or fulfillment of conditions
INA § 357	8 U.S.C. § 1489	Application of treaties; exceptions
INA § 358	8 U.S.C. § 1501	Certificate of diplomatic or consular officer of United States as to loss of American nationality.
INA § 359	8 U.S.C. § 1502	Certificate of nationality issued by Secretary of State for person not a naturalized citizen of United States for use in proceedings of a foreign state
INA § 360	8 U.S.C. § 1503	Denial of rights and privileges as national
INA § 361	8 U.S.C. § 1504	Cancellation of United States passports and Consular Reports of Birth
Title IV: Refugee Assistance		
INA § 404	8 U.S.C. § 1101, note	Authorization of Appropriations

INA	**U.S.C.**	**Title**
INA § 405	8 U.S.C. § 1101, note	Savings Clauses
INA § 406	8 U.S.C. § 1101, note	Separability
INA § 411	8 U.S.C. § 1521	Office of Refugee Resettlement; establishment; appointment of Director; functions
INA § 412	8 U.S.C. § 1522	Authorization for programs for domestic resettlement of and assistance to refugees
INA § 413	8 U.S.C. § 1523	Congressional reports
INA § 414	8 U.S.C. § 1524	Authorization of appropriations
Title V: Alien Terrorist Removal Procedures		
INA § 501	8 U.S.C. § 1531	Definitions
INA § 502	8 U.S.C. § 1532	Establishment of removal court
INA § 503	8 U.S.C. § 1533	Removal court procedure
INA § 504	8 U.S.C. § 1534	Removal hearing
INA § 505	8 U.S.C. § 1535	Appeals
INA § 506	8 U.S.C. § 1536	Custody and release pending removal hearing
INA § 507	8 U.S.C. § 1537	Custody and release after removal hearing

A.6 Presidential Terms & Political Party Control

No.	President	Term	Pres. Party	House Control	Senate Control
47	Donald Trump	2025–	Republican	Republican	Republican
46	Joe Biden	2021–2025	Democratic	Republican (2023–2025) Democratic (2021–2023)	Democratic
45	Donald Trump	2017–2021	Republican	Democratic (2019–2021) Republican (2017–2019)	Republican
44	Barack Obama	2009–2017	Democratic	Republican (2011–2017) Democratic (2009–2011)	Republican (2015-2017) Democratic (2009-2015)
43	George W. Bush	2001–2009	Republican	Democratic (2007–2009) Republican (2001–2007)	Democratic (2007–2009) Republican (2003–2007) Alternating (2001–2003)
42	Bill Clinton	1993–2001	Democratic	Republican (1995–2001) Democratic (1993–1995)	Republican (1995–2001) Democratic (1993–1995)
41	George H.W. Bush	1989–1993	Republican	Democratic	Democratic
40	Ronald Reagan	1981–1989	Republican	Democratic	Democratic (1987–1989) Republican (1981–1987)
39	Jimmy Carter	1977–1981	Democratic	Democratic	Democratic
38	Gerald Ford	1974–1977	Republican	Democratic	Democratic
37	Richard Nixon	1969–1974	Republican	Democratic	Democratic
36	Lyndon B. Johnson	1963–1969	Democratic	Democratic	Democratic
35	John F. Kennedy	1961–1963	Democratic	Democratic	Democratic
34	Dwight D. Eisenhower	1953–1961	Republican	Democratic (1955–1961) Republican (1953–1955)	Democratic (1955–1961) Republican (1953–1955)
33	Harry S. Truman	1945–1953	Democratic	Democratic (1949-1953) Republican (1947–1949) Democratic (1945-1947)	Democratic (1949-1953) Republican (1947–1949) Democrat (1945-1947)
32	Franklin D. Roosevelt	1933–1945	Democratic	Democratic	Democratic
31	Herbert Hoover	1929–1933	Republican	Democratic (1931-1933) Republican (1929-1931)	Republican
30	Calvin Coolidge	1923–1929	Republican	Republican	Republican
29	Warren G. Harding	1921–1923	Republican	Republican	Republican

No.	President	Term	Pres. Party	House Control	Senate Control
28	Woodrow Wilson	1913–1921	Democratic	Republican (1919-1921) Democratic (1913-1919)	Republican (1919–1921) Democratic (1913–1919)
27	William Howard Taft	1909–1913	Republican	Democratic (1911–1913) Republican (1909–1911)	Republican
26	Theodore Roosevelt	1901–1909	Republican	Republican	Republican
25	William McKinley	1897–1901	Republican	Republican	Republican
24	Grover Cleveland	1893–1897	Democratic	Republican (1895-1897) Democratic (1893-1895)	Democratic (1893-1895) Republican (1895-1897)
23	Benjamin Harrison	1889–1893	Republican	Democratic (1891-1893) Republican (1889-1891)	Republican
22	Grover Cleveland	1885–1889	Democratic	Democratic	Republican
21	Chester A. Arthur	1881–1885	Republican	Democratic (1883–1885) Republican (1881–1883)	Republican
20	James A. Garfield	1881	Republican	Republican	Republican
19	Rutherford B. Hayes	1877–1881	Republican	Democratic	Democratic (1879-1881) Republican (1877-1879)
18	Ulysses S. Grant	1869–1877	Republican	Democratic (1875-1877) Republican (1869-1875)	Republican
17	Andrew Johnson	1865–1869	Democratic	Republican	Republican
16	Abraham Lincoln	1861–1865	Republican	Republican	Republican
15	James Buchanan	1857–1861	Democratic	Republican (1859-1861) Democratic (1857-1859)	Democratic
14	Franklin Pierce	1853–1857	Democratic	Opposition (1855-1857) Democratic (1853-1855)	Democratic
13	Millard Fillmore	1850–1853	Whig	Democratic	Democratic
12	Zachary Taylor	1849–1850	Whig	Democratic	Democratic
11	James K. Polk	1845–1849	Democratic	Whig (1847-1849) Democratic (1845-1847)	Democratic
10	John Tyler	1841–1845	Whig	Democratic (1843-1845) Whig (1841-1843)	Whig
9	William Henry Harrison	1841	Whig	Whig	Whig
8	Martin Van Buren	1837–1841	Democratic	Democratic	Democratic

No.	President	Term	Pres. Party	House Control	Senate Control
7	Andrew Jackson	1829–1837	Democratic	Jacksonian	Jacksonian (1835-1837) Anti-Jacksonian (1833-1835) Jacksonian (1829-1833)
6	John Quincy Adams	1825–1829	Democratic-Republican	Jacksonian (1827-1829) Anti-Jackson (1825-1827)	Jacksonian (1825-1829)
5	James Monroe	1817–1825	Democratic-Republican	Democratic-Republican	Democratic-Republican
4	James Madison	1809–1817	Democratic-Republican	Democratic-Republican	Democratic-Republican
3	Thomas Jefferson	1801–1809	Democratic-Republican	Democratic-Republican	Democratic-Republican
2	John Adams	1797–1801	Federalist	Federalist	Federalist
1	George Washington	1789–1797	Unaffiliated	Democratic Republican (1795-1797) Pro-Administration (1789-1795)	Federalist (1795-1797) Pro-Administration (1789-1795)

Further Editing Notes

Idiosyncratic unmarked edits were made as follows:

Section 1.1: In the *Lozano* opinion, larger paragraphs have been split into smaller paragraphs to increase readability, and the order of some material has been switched. In addition "IIRAIRA" has been changed to the more commonly used "IIRIRA."

Section 1.4: The order of material has been altered, and headings have been added.

Section 3.1: Quotation marks have been added around the phrase "immediate relatives."

Section 3.15: The *Matter of Martin Kaplan* decision concerned three separate appeals regarding employment applications for specialized domestic cooks (kosher, vegetarian, and Polish). Since only the portions dealing with Kosher cooking are included in the casebook, plural nouns and verbs such as "Employers are" have been changed to the singular "Employer is" without special notation. Cross references to the U.S. code have been removed without notation. Block quotes have been replaced by adding quotation marks around the block-cited material.

Section 7.3: In *Rosenberg v. Fleuti*, single quotes have been replaced by double quotes without specification. An unpaired quotation has been omitted from the dissent. The Court's asterisks to denote removed material have been swapped for ellipses.

Section 9.3: In *Aguilera-Enriquez v. INS*, the court's asterisks to denote removed material have been swapped for ellipses.

Section 9.5: Section headings have been added for clarity. Some material has been rearranged for clarity of reading.

Section 9.8: Formatting has been changed and the order of material has been altered for clarity.

Section 10.1: The word antiSemitism has been replaced with antisemitism.

Section 10.2: The order of material has been altered for clarity.

Section 10.5: The typographically erroneous phrases “apply to be become” and “determines than” have been replaced with “apply to become” and “determines that.”

Section 10.11: The court’s formatting of text has been simplified.

Section 10.25: Quotation marks have been placed around “Salvadoran women” and “Salvadoran women viewed as property” throughout.

Section 12.6: The provisions regarding military naturalizations have been inserted before the provisions regarding the oath of allegiance.

Finally, in all EOUSA materials (unless quoting statutory language) the term “an alien” has been replaced by “a noncitizen.” See sections 1.4, 3.1, 3.8, 6.2, 6.4, 7.2, 8.8, 8.10, 8.14, 9.1, 9.10, 10.43, and 12.5.