BIA PRECEDENT TABLE

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This document compiles headnotes from BIA precedent cases published in volumes 21, 22, and 23 of the *Administrative Decisions under the Immigration and Nationality Laws of the United States*, organized by topic. As such, it includes all BIA cases published from *Matter of Esposito* (March 30, 1995) to the present.

Please note that the headnotes were sometimes drawn from slip opinions and may not reflect the precise wording that appears in the *Administrative Decisions under the Immigration and Nationality Laws of the United States*.

Also please note that this document was primarily designed with viewing, not printing in mind. If you wish to locate a case or term, you can search for it via WordPerfect's "Find" function. If there is a topic you are interested in, you can click that topic in the list below, and your cursor will automatically "jump" to that page. If you wish to print this document, be sure to print it from WordPerfect.

Please alert Juan Osuna or Donna Fry if you discover any errors or have any recommendations on how to improve this document. It will be updated periodically.

LIST OF TOPICS

ADJUSTMENT OF STATUS

Cuban Refugee Adjustment Act

Matter of Artigas, 23 I&N Dec. 99 (BIA 2001)

An Immigration Judge has jurisdiction to adjudicate an application for adjustment of status under the Cuban Refugee Adjustment Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended, when the respondent is charged as an arriving alien without a valid visa or entry document in removal proceedings.

Rescission of Adjustment of Status

Matter of Masri, 22 I&N Dec. 1145 (BIA 1999)

(1) The Immigration Judge and the Board of Immigration Appeals have jurisdiction over proceedings conducted pursuant to section 246 of the Immigration and Nationality Act, 8 U.S.C. § 1256 (Supp. II 1996), to rescind adjustment of status granted under section 210 of the Act, 8 U.S.C. § 1160 (1988 & Supp. II 1990).

(2) Information provided in an application to adjust an alien's status to that of a lawful temporary resident under section 210 of the Act is confidential and prohibited from use in rescission proceedings under section 246 of the Act, or for any purpose other than to make a determination on an application for lawful temporary residence, to terminate such temporary residence, or to prosecute the alien for fraud during the time of application.

Section 245(i) Adjustment

Matter of Fesale, 21 I&N Dec. 114 (BIA 1995)

(1) The remittance required by section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i) (1994), added by the Department of Commerce, Justice, and State Appropriations Act for 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1765, equalling five times the processing fee for an application for adjustment of status, is by definition a statutorily mandated "sum," and a requirement separate and apart from the fee which federal regulations at 8 C.F.R. § 103.7 (1995) require an alien to pay when filing an application for adjustment of status under section 245 of the Act.

(2) The statutorily mandated sum required by section 245(i) of the Act cannot be waived by an Immigration Judge under the "fee waiver" provisions of 8 C.F.R. §§ 3.24 and 103.7 (1995), based on a showing of an alien's indigency.

ADMINISTRATIVE CLOSURE OF CASES

Matter of Gutierrez, 21 I&N Dec. 479 (BIA 1996)

(1) Administrative closure of a case is used to temporarily remove the case from an Immigration Judge's calendar or from the Board of Immigration Appeal's docket. A case may not be administratively closed if opposed by either of the parties. Administrative closing of a case does not

result in a final order. It is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations.

(2) The settlement agreement under American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D.Cal.1991) ("ABC"), specifically states that nothing in the agreement shall limit the right of a class member to pursue other legal rights to which he or she might be entitled under the Immigration and Nationality Act. This language is mandatory and does not indicate that such action by an alien would be curtailed by the administrative closing of each class member's case or postponed until the eventual final resolution of each class member's remedies under the settlement agreement itself.

(3) An ABC alien's right to apply for relief from deportation is not prohibited due to the administrative closure of his or her case. Such an alien, therefore, may file a motion to reopen with the administrative body which administratively closed his or her case in order to pursue issues or relief from deportation which were not raised in the administratively closed proceedings. Such motion must comply with all applicable regulations in order for the alien's case to be reopened.

(4) An alien who has had his or her case reopened and who receives an adverse decision from an Immigration Judge in the reopened proceedings must file an appeal of that new decision, in accordance with applicable regulations, in order to vest the Board with jurisdiction to review the Immigration Judge's decision on the issues raised in the reopened proceedings. That appeal would be a separate and independent appeal from any previously filed appeal and would not be consolidated with an appeal before the Board regarding issues which have been administratively closed.

(5) Any appeal pending before the Board regarding issues or forms of relief from deportation which have been administratively closed by the Board prior to the reopening of the alien's proceedings will remain administratively closed. A motion to reinstate an appeal is required before issues which have been administratively closed can be considered by the Board.

ADMISSION / ENTRY

Arriving Alien

Matter of Oseiwusu, 22 I&N Dec. 19 (BIA 1998)

(1) An alien who arrives in the United States pursuant to a grant of advance parole is an “arriving alien,” as that term is defined in the federal regulations.

(2) According to the regulations, an Immigration Judge has no authority over the apprehension, custody, and detention of arriving aliens and is therefore without authority to consider the bond request of an alien returning pursuant to a grant of advance parole.

Nunc Pro Tunc Permission to Reapply

Matter of Garcia, 21 I&N Dec. 254 (BIA 1996)

(1) Nunc pro tunc permission to reapply for admission, an administrative practice not expressly authorized by statute, is available only in the limited circumstances where a grant of such relief would effect a complete disposition of the case, i.e., where the only ground of deportability or inadmissability would be eliminated or where the alien would receive a grant of adjustment of status in conjunction with the grant of any appropriate waivers of inadmissability.

(2) A grant of nunc pro tunc permission to reapply for admission is not available to a respondent who, in spite of such a grant, would remain deportable under sections 241(a)(2)(A)(iii) and (B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(2)(A)(iii) and (B)(i) (1994), as a result of a drug-related conviction.

(3) An alien who returned to the United States following deportation with a visa, but without obtaining advance permission to reapply, is not eligible to apply for nunc pro tunc permission to reapply for admission in conjunction with an application for a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994), because he is not independently eligible for the waiver as a result of his unlawful entry.

Returning Lawful Permanent Resident

Matter of Collado, 21 I&N Dec. 1061 (BIA 1998)

(1) A lawful permanent resident of the United States described in sections 101(a)(13)(C)(I)-(vi) of the Immigration and Nationality Act (to be codified at 8 U.S.C. § 1101(a)(13)(C)(i)-(vi)) is to be regarded as "seeking an admission into the United States for purposes of the immigration laws," without further inquiry into the nature and circumstances of a departure from and return to this country.

(2) The Immigration Judge erred in finding that the Fleuti doctrine, first enunciated by the United States Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449 (1963), requires the admission into the United States of a returning lawful permanent resident alien who falls within the definition of section 101(a)(13)(C)(v) of the Act, if that alien's departure from the United States was "brief, casual, and innocent."

Withdrawal of Application for Admission

Matter of Sanchez, 21 I&N Dec. 444 (BIA 1996)

(1) under the present statutory and regulatory scheme, an Immigration Judge properly declined to order an alien excluded in absentia where the Immigration and Naturalization Service did not detain or parole the alien at the time he applied for admission to the United States, but instead returned him to Mexico with instructions to appear for an exclusion hearing at a later date.

(2) By directing an applicant for admission to return to Mexico after being served with a Notice to Applicant for Admission Detained for Hearing before an Immigration Judge (Form I-122), the Service in effect consented to the alien's withdrawal of that application when the alien elected not to return to pursue his application for admission to the United States.

AGGRAVATED FELONIES

Accessory After the Fact

Matter of Batista, 21 I&N Dec. 955 (BIA 1997)

(1) The offense of accessory after the fact to a drug-trafficking crime, pursuant to 18 U.S.C. § 3 (Supp. V 1993), is not considered an inchoate crime and is not sufficiently related to a controlled

substance violation to support a finding of deportability pursuant to section 241(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(B)(i) (1994).

(2) The respondent's conviction pursuant to 18 U.S.C. § 3 establishes his deportability as an alien convicted of an aggravated felony under section 241(a)(2)(A)(iii) of the Act,because the offense of accessory after the fact falls within the definition of an obstruction of justice crime under section 101(a)(43)(S) of the Act, 8 U.S.C.A. § 1101(a)(43)(S) (West Supp. 1997), and because the respondent's sentence, regardless of any suspension of the imposition or execution of that sentence, "is at least one year."

Adjustment of Status

Matter of Rosas, 22 I&N Dec. 616 (BIA 1999)

An alien whose conviction for an aggravated felony was subsequent to her adjustment of status to that of a lawful permanent resident is deportable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. II 1996), as an alien who was convicted of an aggravated felony "after admission.@

Alien Smuggling

Matter of Alvarado-Alvino, 22 I&N Dec. 718 (BIA 1999)

An alien convicted of an offense described in section 275(a) of the Immigration and Nationality Act, 8 U.S.C. § 1325 (Supp. II 1996), is not convicted of an aggravated felony as that term is defined in section 101(a)(43)(N) of the Act, 8 U.S.C. § 1101(a)(43)(N) (Supp. II 1996), which specifically refers to those offenses relating to alien smuggling described in sections 274(a)(1)(A) and (2) of the Act, 8 U.S.C. § 1324(a)(1)(A) and (2) (Supp. II 1996).

Arson

Matter of Palacios, 22 I&N Dec. 434 (BIA 1998)

An alien who was convicted of arson in the first degree under the law of Alaska and sentenced to 7 years' imprisonment with 3 years suspended was convicted of a "crime of violence" within the meaning of section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996), and therefore is deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. II 1996), as an alien convicted of an aggravated felony.

Burglary

Matter of Perez, 22 I&N Dec. 1325 (BIA 2000) (Burglary of a Vehicle)

The offense of burglary of a vehicle in violation of section 30.04(a) of the Texas Penal Code Annotated is not a "burglary offense" within the definition of an aggravated felony in section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G) (Supp. IV 1998).

Controlled Substances

Matter of L-G-, 21 I&N Dec. 89 (BIA 1995) (modified by *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002))

(1) A federal definition applies to determine whether or not a crime is a "felony" within the meaning of 18 U.S.C. § 924(c)(2) (1994), and therefore is an "aggravated felony" under section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (Supp. V 1993).

(2) For immigration purposes, a state drug offense qualifies as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) if it is punishable as a felony under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). Matter of Davis, 20 I&N Dec. 536 (BIA 1992), and Matter of Barrett, 20 I&N Dec. 171 (BIA 1990), reaffirmed.

(3) Although we disagree with the decision of the United States Court of Appeals for the Second Circuit in Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994), which holds that an alien's state conviction for a drug offense that is a felony under state law, but a misdemeanor under federal law, qualifies as a conviction for an aggravated felony, we will follow this decision in matters arising within the Second Circuit's jurisdiction.

Matter of K-V-D-, 22 I&N Dec. 1163 (BIA 1999) (overruled by *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002))

(1) Where a circuit court of appeals has interpreted the definition of an "aggravated felony" under section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (1994), only for purposes of criminal sentence enhancement, the Board of Immigration Appeals may interpret the phrase differently for purposes of implementing the immigration laws in cases arising within that circuit.

(2) An alien convicted in Texas of simple possession of a controlled substance, which would be a felony under Texas law but a misdemeanor under federal law, is not convicted of an aggravated felony within the meaning of section 101(a)(43)(B) of the Act. Matter of L-G-, 21 I&N Dec. 89 (BIA 1995), affirmed.

Matter of Yanez, 23 I&N Dec. 390 (BIA 2002)

The determination whether a state drug offense constitutes a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) (2000), such that it may be considered an "aggravated felony" under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B) (2000), shall be made by reference to decisional authority from the federal circuit courts of appeals, and not by reference to any separate legal standard adopted by the Board of Immigration Appeals. Matter of K-V-D-, 22 I&N Dec. 1163 (BIA 1999), overruled. Matter of L-G-, 21 I&N Dec. 89 (BIA 1995), and Matter of Davis, 20 I&N Dec. 536 (BIA 1992), modified.

Matter of Santos-Lopez, 23 I&N Dec. 419 (BIA 2002)

(1) Under the decisions of the United States Court of Appeals for the Fifth Circuit in United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir.), cert. denied, 122 S. Ct. 305 (2001), and United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997), a determination whether an offense is a "felony" for purposes of 18 U.S.C. § 924(c)(2) (2000) depends on the classification of the offense under the law of the convicting jurisdiction. Matter of Yanez, 23 I&N Dec. 390 (BIA 2002), followed.

(2) Each of the respondent's two convictions for possession of marihuana is classified as a misdemeanor offense under Texas law; therefore, neither conviction is for a "felony" within the meaning of 18 U.S.C. § 924(c)(2) or an "aggravated felony" within the meaning of section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B) (2000).

Crimes of Violence

Matter of Magallanes, 22 I&N Dec. 1 (BIA 1998) (Driving Under the Influence) (overruled by *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002)

An alien who was convicted of aggravated driving while under the influence and sentenced to 2½ years in prison was convicted of a "crime of violence" within the meaning of section 101(a)(43)(F) of the Immigration and Nationality Act (to be codified at 8 U.S.C. § 1101(a)(43)(F)), and therefore is deportable under section 241(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(iii)(1994), as an alien convicted of an aggravated felony.

Matter of Puente, 22 I&N Dec. 1006 (BIA 1999) (Driving Under the Influence) (overruled by *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002)

A conviction for the crime of driving while intoxicated under section 49.04 of the Texas Penal Code, which is a felony as a result of an enhanced punishment, is a conviction for a crime of violence and therefore an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996).

Matter of Herrera, 23 I&N Dec. 43 (BIA 2001) (Driving Under the Influence)

Respondent's motion for a stay of deportation, pending consideration of his simultaneously filed motion to reopen and reconsider, is granted in light of the decision of the United States Court of Appeals for the Fifth Circuit in United States v. Chapa-Garza, 2001 WL 209468 (5th Cir. 2001), which held that a conviction for driving while intoxicated in violation of section 49.09 of the Texas Penal Code is not a conviction for a crime of violence under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (Supp. V 1999).

Matter of Olivares, 23 I&N Dec. 148 (BIA 2001) (Driving Under the Influence)

Under United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001), and United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2001), a Texas conviction for felony DWI is not classifiable as a crime of violence conviction under 18 U.S.C. § 16(b) (1994) for purposes of removability in cases arising in the United States Court of Appeals for the Fifth Circuit; accordingly, in cases arising in the Fifth Circuit, Matter of Puente, 22 I&N Dec. 1006 (BIA 1999), will not be applied.

Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999) (Criminally Negligent Child Abuse)

(1) Where the state statute under which an alien has been convicted is divisible, meaning it encompasses offenses that constitute crimes of violence as defined under 18 U.S.C. § 16 (1994) and offenses that do not, it is necessary to look to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes an aggravated felony as defined in section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996).

(2) for purposes of determining whether an offense is a crime of violence as defined in 18 U.S.C. § 16(b), it is necessary to examine the criminal conduct required for conviction, rather than the

consequence of the crime, to find if the offense, by its nature, involves "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

(3) To find that a criminal offense is a crime of violence under 18 U.S.C. § 16(b), a causal link between the potential for harm and the Asubstantial risk@ of Aphysical force@ being used must be present. Matter of Magallanes, 22 I&N Dec. 1 (BIA 1998), clarified.

(4) An alien convicted of criminally negligent child abuse under sections 18-6-401(1) and (7) of the Colorado Revised Statutes, whose negligence in leaving his stepson alone in a bathtub resulted in the child's death, was not convicted of a crime of violence under 18 U.S.C. § 16(b) because there was not Asubstantial risk that physical force@ would be used in the commission of the crime.

Matter of Aldabesheh, 22 I&N Dec. 983 (BIA 1999) (Criminal Contempt and Forgery)

(1) A conviction for criminal contempt in the first degree, in violation of section 215.51(b)(i) of the New York Penal Law, with a sentence to imprisonment of at least 1 year, is a conviction for a crime of violence as defined under 18 U.S.C. § 16(b) (1994), thus rendering it an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996).

(2) A conviction for forgery in the second degree, in violation of section 170.10(2) of the New York Penal Law, with a sentence to imprisonment of at least 1 year, is a conviction for an aggravated felony under section 101(a)(43)(R) of the Act.

(3) Where an alien has been convicted of two or more aggravated felonies and has received concurrent sentences to imprisonment, the alien's Aaggregate term of imprisonment,@ for purposes of determining eligibility for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3) (Supp. II 1996), is equal to the length of the alien's longest concurrent sentence.

Matter of Ramos, 23 I&N Dec. 336 (BIA 2002)

(1) In cases arising in circuits where the federal court of appeals has not decided whether the offense of driving under the influence is a crime of violence under 18 U.S.C. § 16(b) (2000), an offense will be considered a crime of violence if it is committed at least recklessly and involves a substantial risk that the perpetrator may resort to the use of force to carry out the crime; otherwise, where the circuit court has ruled on the issue, the law of the circuit will be applied to cases arising in that jurisdiction.

(2) The offense of operating a motor vehicle while under the influence of intoxicating liquor in violation of chapter 90, section 24(1)(a)(1) of the Massachusetts General Laws is not a felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense and is therefore not a crime of violence. Matter of Puente, 22 I&N Dec. 1006 (BIA 1999), and Matter of Magallanes, 22 I&N Dec. 1 (BIA 1998), overruled.

Matter of Martin, 23 I&N Dec. 491 (BIA 2002)

The offense of third-degree assault in violation of section 53a-61(a)(1) of the Connecticut General Statutes, which involves the intentional infliction of physical injury upon another, is a crime of violence under 18 U.S.C. § 16(a) (2000) and is therefore an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (2000).

Date of Conviction

Matter of Lettman, 22 I&N Dec. 365 (BIA 1998)

An alien convicted of an aggravated felony is subject to deportation regardless of the date of the conviction when the alien is placed in deportation proceedings on or after March 1, 1991, and the crime falls within the aggravated felony definition.

Matter of Truong, 22 I&N Dec. 1090 (BIA 1999)

(1) An alien whose June 8, 1987, conviction for second degree robbery was not, at the time of his conviction, included in the aggravated felony definition was not deportable, even after that offense was included in the aggravated felony definition as a crime of violence under the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, due to its provisions regarding effective dates; however, the alien became deportable upon enactment of section 321(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 (enacted Sept. 30, 1996) ("IIRIRA"), because that section established an aggravated felony definition that is to be applied without temporal limitations, regardless of the date of conviction.

(2) The term "actions taken" in section 321(c) of the IIRIRA, 110 Stat. at 3009-628, which limits the applicability of the aggravated felony definition of section 321(b), includes consideration of a case by the Board of Immigration Appeals; therefore that section's aggravated felony definition is applicable to cases decided by the Board on or after the IIRIRA's September 30, 1996, enactment date.

(3) The Attorney General's decision in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), remains binding on the Board, notwithstanding decisions in some courts of appeals that have rejected that decision.

Divisible Statutes

Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999)

(1) Where the state statute under which an alien has been convicted is divisible, meaning it encompasses offenses that constitute crimes of violence as defined under 18 U.S.C. § 16 (1994) and offenses that do not, it is necessary to look to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes an aggravated felony as defined in section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996).

(2) For purposes of determining whether an offense is a crime of violence as defined in 18 U.S.C. § 16(b), it is necessary to examine the criminal conduct required for conviction, rather than the consequence of the crime, to find if the offense, by its nature, involves "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

(3) To find that a criminal offense is a crime of violence under 18 U.S.C. § 16(b), a causal link between the potential for harm and the Asubstantial risk@ of Aphysical force@ being used must be present. Matter of Magallanes, 22 I&N Dec. 1 (BIA 1998), clarified.

(4) An alien convicted of criminally negligent child abuse under sections 18-6-401(1) and (7) of the Colorado Revised Statutes, whose negligence in leaving his stepson alone in a bathtub resulted in the child's death, was not convicted of a crime of violence under 18 U.S.C. § 16(b) because there was not Asubstantial risk that physical force@ would be used in the commission of the crime.

Firearms

Matter of Vasquez-Muniz, 22 I&N Dec. 1415 (BIA 2000) (overruled by *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002))

Possession of a firearm by a felon in violation of section 12021(a)(1) of the California Penal Code is not an aggravated felony under section 101(a)(43)(E) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(E) (1994), because it is not an offense "described in" 18 U.S.C. § 922(g)(1) (1994).

Matter of Vasquez-Muniz, 23 I&N Dec. 207 (BIA 2002)

(1) An offense defined by state or foreign law may be classified as an aggravated felony as an offense "described in" a federal statute enumerated in section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (1994 & Supp. V 1999), even if it lacks the jurisdictional element of the federal statute.

(2) Possession of a firearm by a felon in violation of section 12021(a)(1) of the California Penal Code is an aggravated felony under section 101(a)(43)(E)(ii) of the Act because it is "described in" 18 U.S.C. § 922(g)(1) (1994). Matter of Vasquez-Muniz, 22 I&N Dec. 1415 (BIA 2000), overruled.

Fraud and Deceit

Matter of Onyido, 22 I&N Dec. 552 (BIA 1999)

An alien who was convicted of submitting a false claim with intent to defraud arising from an unsuccessful scheme to obtain $15,000 from an insurance company was convicted of an "attempt" to commit a fraud in which the loss to the victim exceeded $10,000 within the meaning of section 101(a)(43)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(U) (Supp. II 1996), and therefore is deportable under section 241(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(iii) (1994), as an alien convicted of an aggravated felony.

Misprision of a Felony

Matter of Espinoza, 22 I&N Dec. 889 (BIA 1999)

A conviction for misprision of a felony under 18 U.S.C. § 4 (1994) does not constitute a conviction for an aggravated felony under section 101(a)(43)(S) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(S) (Supp. II 1996), as an offense relating to obstruction of justice. Matter of Batista-Hernandez, 21 I&N Dec. 955 (BIA 1997), distinguished.

Obstruction of Justice

Matter of Batista, 21 I&N Dec. 955 (BIA 1997)

(1) The offense of accessory after the fact to a drug-trafficking crime, pursuant to 18 U.S.C. § 3 (Supp. V 1993), is not considered an inchoate crime and is not sufficiently related to a controlled substance violation to support a finding of deportability pursuant to section 241(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(B)(i) (1994).

(2) The respondent's conviction pursuant to 18 U.S.C. § 3 establishes his deportability as an alien convicted of an aggravated felony under section 241(a)(2)(A)(iii) of the Act,because the offense of accessory after the fact falls within the definition of an obstruction of justice crime under section 101(a)(43)(S) of the Act, 8 U.S.C.A. § 1101(a)(43)(S) (West Supp. 1997), and because the respondent's sentence, regardless of any suspension of the imposition or execution of that sentence, "is at least one year."

Perjury

Matter of Martinez-Recinos, 23 I&N Dec. 175 (BIA 2001)

A conviction for perjury in violation of section 118(a) of the California Penal Code constitutes a conviction for an aggravated felony under section 101(a)(43)(S) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(S) (Supp. V 1999).

Rape

Matter of B-, 21 I&N Dec. 287 (BIA 1996)

The respondent's conviction for second-degree rape under Article 27, section 463(a)(3) of the Annotated Code of Maryland, for which he was sentenced to 10 years' imprisonment, constitutes a "crime of violence" under 18 U.S.C. § 16(b) (1994) and, hence, an "aggravated felony" under section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (1994).

Robbery

Matter of Truong, 22 I&N Dec. 1090 (BIA 1999)

(1) An alien whose June 8, 1987, conviction for second degree robbery was not, at the time of his conviction, included in the aggravated felony definition was not deportable, even after that offense was included in the aggravated felony definition as a crime of violence under the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, due to its provisions regarding effective dates; however, the alien became deportable upon enactment of section 321(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 (enacted Sept. 30, 1996) ("IIRIRA"), because that section established an aggravated felony definition that is to be applied without temporal limitations, regardless of the date of conviction.

(2) The term "actions taken" in section 321(c) of the IIRIRA, 110 Stat. at 3009-628, which limits the applicability of the aggravated felony definition of section 321(b), includes consideration of a case by the Board of Immigration Appeals; therefore that section's aggravated felony definition is applicable to cases decided by the Board on or after the IIRIRA's September 30, 1996, enactment date.

(3) The Attorney General's decision in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), remains binding on the Board, notwithstanding decisions in some courts of appeals that have rejected that decision.

Section 212(h) Waivers

Matter of Pineda, 21 I&N Dec. 1017 (BIA 1997)

(1) Section 348(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, _____ ("IIRIRA"), enacted on September 30, 1996, amended section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (1994), to add restrictions precluding a grant of a waiver to any alien admitted as a lawful permanent resident who either has been convicted of an aggravated felony since the date of admission or did not have 7 years of continuous residence prior to the initiation of immigration proceedings.

(2) Section 348(b) of the IIRIRA provides that the restrictions in the amendments to section 212(h) of the Act apply to aliens in exclusion or deportation proceedings as of September 30, 1996, unless a final order of deportation has been entered as of such date.

(3) An aggravated felon who had a final administrative order of deportation as of September 30, 1996, would be subject to the restrictions on eligibility for a section 212(h) waiver if his proceedings were thereafter reopened; therefore, his motion to reopen deportation proceedings to apply for adjustment of status in conjunction with a section 212(h) waiver was properly denied.

Matter of Michel, 21 I&N Dec. 1101 (BIA 1998)

(1) Pursuant to 62 Fed. Reg. 10,312, 10,369 (to be codified at 8 C.F.R. § 240.10(a)(1) (interim, effective Apr. 1, 1997), an Immigration Judge must ascertain whether an alien desires representation in removal proceedings.

(2) An alien who has not previously been admitted to the United States as an alien lawfully admitted for permanent residence is statutorily eligible for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (to be codified at 8 U.S.C. § 1182(h)), despite his conviction for an aggravated felony.

Sentence Enhancement

Matter of K-V-D-, 22 I&N Dec. 1163 (BIA 1999)

(1) Where a circuit court of appeals has interpreted the definition of an "aggravated felony" under section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (1994), only for purposes of criminal sentence enhancement, the Board of Immigration Appeals may interpret the phrase differently for purposes of implementing the immigration laws in cases arising within that circuit.

(2) An alien convicted in Texas of simple possession of a controlled substance, which would be a felony under Texas law but a misdemeanor under federal law, is not convicted of an aggravated felony within the meaning of section 101(a)(43)(B) of the Act. Matter of L-G-, 21 I&N Dec. 89 (BIA 1995), affirmed.

Sexual Abuse of a Minor

Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA 1999)

The offense of indecency with a child by exposure pursuant to section 21.11(a)(2) of the Texas Penal Code Annotated constitutes sexual abuse of a minor and is therefore an aggravated felony within the meaning of section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (Supp. II 1996).

Matter of Crammond, 23 I&N Dec. 38 (BIA 2001) (vacated by *Matter of Crammond*, 23 I&N Dec. 179 (BIA 2001))

(1) A conviction for "murder, rape, or sexual abuse of a minor" must be for a felony offense in order for the crime to be considered an aggravated felony under section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (Supp. V 1999).

(2) In determining whether a state conviction is for a felony offense for immigration purposes, the Board of Immigration Appeals applies the federal definition of a felony set forth at 18 U.S.C. § 3559(a)(5) (1994).

Matter of Small, 23 I&N Dec. 448 (BIA 2002)

A misdemeanor offense of sexual abuse of a minor constitutes an aggravated felony under section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (2000).

Theft Offenses

Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000)

(1) A taking of property constitutes a "theft offense" within the definition of an aggravated felony in section 101(a)(43)(G) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1101(a)(43)(G) (Supp. IV 1998), 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.

(2) The respondent's conviction for unlawful driving and taking of a vehicle in violation of section 10851 of the California Vehicle Code is a "theft offense" under section 101(a)(43)(G) of the Act.

Matter of Bahta, 22 I&N Dec. 1381 (BIA 2000) (Possession of Stolen Property)

(1) The respondent's conviction for attempted possession of stolen property, in violation of sections 193.330 and 205.275 of the Nevada Revised Statutes, is a conviction for an attempted "theft offense (including receipt of stolen property)," and therefore an aggravated felony, within the meaning of sections 101(a)(43)(G) and (U) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(G) and (U) (Supp. IV 1998).

(2) The Immigration and Naturalization Service retains prosecutorial discretion to decide whether or not to commence removal proceedings against a respondent subsequent to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546.

Transportation of Undocumented Aliens

Matter of Ruiz, 22 I&N Dec. 486 (BIA 1999)

An alien who is convicted of transporting an illegal alien within the United States in violation of section 274(a)(1)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1324(a)(1)(A)(ii) (1994), was convicted of an aggravated felony as defined in section 101(a)(43)(N) of the Act, 8 U.S.C. § 1101(a)(43)(N) (Supp. II 1996), and is therefore deportable under section 241(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(iii) (1994), as an alien convicted of an aggravated felony. Matter of I-M-, 7 I&N Dec. 389 (BIA 1957), distinguished.

AIRLINE FINES

Matter of Varig Brazilian Airlines Flight No. 830, 21 I&N Dec. 744 (BIA 1997)

(1) The reasonable diligence standard of section 273(c) of the Immigration and Nationality Act, 8 U.S.C. § 1323(c) (Supp. III 1991), is applied both to the determination of whether the passenger was an alien and to the adequacy of the carrier's examination of the passenger's documents.

(2) In a determination of reasonable diligence under section 273(c) of the Act, the carrier must demonstrate by a preponderance of the evidence that it has established, and its staff has complied with, procedures to ensure that all of its passengers' travel documents have been inspected prior to boarding so that only those with valid passports and visas are permitted to board.

(3) Where a document is altered, counterfeit, or expired, or where a passenger is an imposter, to the extent that a reasonable person should be able to identify the deficiency, a carrier is required to refuse boarding as a matter of reasonable diligence.

(4) In denying reconsideration, the Board of Immigration Appeals reaffirms its decision that, in fine proceedings, the reasonable diligence standard is applied both to the determination of whether a passenger is an alien and to the adequacy of the carrier's examination of the passenger's documents.

Matter of Air India Flight No. 101, 21 I&N Dec. 890 (BIA 1997)

A decision of the Immigration and Naturalization Service regarding the imposition of a fine that does not state the specific reasons for the determination fails to meet the requirements of 8 C.F.R. § 103.3(a)(1) (1996) and is inadequate for purposes of appellate review.

Matter of Air India Airlines Flight No. AI 101, 22 I&N Dec. 681 (BIA 1999)

A carrier is subject to fine under section 273(a) of the Immigration and Nationality Act, 8 U.S.C. § 1323(a) (Supp. V 1993), for bringing an alien passenger without proper documents to the United States even though the alien passenger is a lawful permanent resident who was subsequently granted a waiver under 8 C.F.R. § 211.1(b)(3) (1994).

Matter of United Airlines Flight UA802, 22 I&N Dec. 777 (BIA 1999)

A carrier is subject to fine under section 273(a) of the Immigration and Nationality Act, 8 U.S.C. § 1323(a) (1994), when an alien passenger it has transported to the United States is paroled into the country but is not granted a waiver of documents under 8 C.F.R. § 212.1(g) (1995).

Matter of Finnair Flight AY103, 23 I&N Dec. 140 (BIA 2001)

A carrier is subject to a fine under section 273(a) of the Immigration and Nationality Act, 8 U.S.C. § 1323(a) (1994), for bringing an alien passenger to the United States without a valid nonimmigrant visa even though the passenger was subsequently granted a waiver of the nonimmigrant documentary requirements pursuant to 8 C.F.R. § 212.1(g) (1997).

Matter of Northwest Airlines Flight NW 1821, 21 I&N Dec. 38 (BIA 2001)

A carrier is subject to fine under section 231(b) of the Immigration and Nationality Act, 8 U.S.C. § 1221(b) (Supp. IV 1998), when it fails to file a properly completed Form I-94T (Arrival-Departure Record (Transit Without Visa)) for an alien who is a transit without visa passenger not departing directly on the same flight.

AMERICAN BAPTIST CHURCHES (ABC) SETTLEMENT

Matter of Morales, 21 I&N Dec. 130 (BIA 1995, 1996)

(1) Where an alien in exclusion or deportation proceedings requests administrative closure pursuant to the settlement agreement set forth in American Baptist Churches et al. v. Thornburgh, 760 F. Supp. 797 (N.D.Cal.1991) ("ABC agreement"), the function of the Executive Office for Immigration Review ("EOIR") is restricted to the inquiries required under paragraph 19 of the agreement, i.e., (1) whether an alien is a class member, (2) whether he has been convicted of an aggravated felony, and (3) whether he poses one of the three safety concerns enumerated in paragraph 17.

(2) If a class member requesting administrative closure under the ABC agreement has not been convicted of an aggravated felony and does not fall within one of the three listed categories of public safety concerns under paragraph 17 of the agreement, EOIR must administratively close the matter to afford the alien the opportunity to pursue his rights in a special proceeding before the Immigration and Naturalization Service.

(3) If the applicant is subsequently found ineligible for the benefits of the ABC agreement in the nonadversarial proceeding before the asylum officer, or if he is denied asylum after a full de novo hearing, the Service may reinstitute exclusion or deportation proceedings by filing a motion with the Immigration Judge to recalendar the case, and such motion need only show, through evidence of an asylum officer's decision in the matter, that the class member's rights under paragraph 2 of the agreement have been exercised.

(4) Neither the Board of Immigration Appeals nor the Immigration Judges will review the Service's eligibility determinations under paragraph 2 of the ABC agreement.

APPEALS

Factfinding on Appeal

Matter of S-H-, 23 I&N Dec. 462 (BIA 2002)

Under new regulations that become effective on September 25, 2002, the Board of Immigration Appeals has limited fact-finding ability on appeal, which heightens the need for Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law. Matter of Vilanova-Gonzalez, 13 I&N Dec. 399 (BIA 1999), and Matter of Becerra-Miranda, 12 I&N Dec. 358 (BIA 1967), superseded.

Timeliness

Matter of Lopez, 22 I&N Dec. 16 (BIA 1998)

Where the Board of Immigration Appeals dismisses an appeal as untimely, without adjudication on the merits, the Board retains jurisdiction over a motion to reconsider its dismissal of the untimely appeal to the extent that the motion challenges the finding of untimeliness or requests consideration of the reasons for untimeliness. Matter of Mladineo, 14 I&N Dec. 591 (BIA 1974), modified.

Waiver of Right to Appeal

Matter of L-V-K-, 22 I&N Dec. 976 (BIA 1999)

(1) An Immigration Judge's order of deportation becomes a final administrative decision upon an alien's waiver of the right to appeal.

(2) Where an alien files a motion to remand during the pendency of an appeal from an Immigration Judge's denial of a motion to reopen a final administrative decision and more than 90 days have passed since entry of that final administrative decision, the Board of Immigration Appeals lacks jurisdiction to adjudicate the motion because it is time-barred by 8 C.F.R. § 3.2(c)(2) (1999).

Matter of Ocampo, 22 I&N Dec. 1301 (BIA 2000)

Voluntary departure may not be granted prior to the completion of removal proceedings without an express waiver of the right to appeal by the alien or the alien's representative.

Matter of Rodriguez-Diaz, 22 I&N Dec. 1320 (BIA 2000)

An unrepresented alien who accepts an Immigration Judge's decision as "final" does not effectively waive the right to appeal where the Immigration Judge failed to make clear that such acceptance constitutes an irrevocable waiver of appeal rights; therefore, the Board of Immigration Appeals has jurisdiction to consider the alien's appeal.

Matter of Patino, 23 I&N Dec. 74 (BIA 2001)

A party wishing to challenge the validity of an appeal waiver may file either a motion to reconsider with the Immigration Judge or an appeal directly with the Board of Immigration Appeals.

ASYLUM

Country Conditions

Matter of E-P-, 21 I&N Dec. 860 (BIA 1997)

(1) A finding of credible testimony by an asylum applicant is not dispositive as to whether asylum should be granted; rather, the specific content of the testimony, and any other relevant evidence in the record, is also considered.

(2) When evaluating an asylum claim, the changed conditions of the country at issue, as properly established in the record of proceedings, may be a significant factor in concluding that an applicant has not established a well-founded fear of persecution.

Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998)

(1) The reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure.

(2) Where evidence from the United States Department of State indicates that country conditions have changed after an alien's departure from his native country and that the Peruvian Government has reduced the Shining Path's ability to carry out persecutory acts, the alien failed to establish a well-founded fear of persecution in Peru.

(3) An alien who failed to rebut evidence from the United States Department of State indicating that the Shining Path operates in only a few areas of Peru did not establish a well-founded fear of country-wide persecution in that country.

Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998)

(1) Under 8 C.F.R. § 208.13(b)(1)(i) (1998), where an asylum applicant has shown that he has been persecuted in the past on account of a statutorily-protected ground, and the record reflects that country conditions have changed to such an extent that the asylum applicant no longer has a well-founded fear of persecution from his original persecutors, the applicant bears the burden of demonstrating that he has a well-founded fear of persecution from any new source.

(2) An asylum applicant who no longer has a well-founded fear of persecution due to changed country conditions may still be eligible for a discretionary grant of asylum under 8 C.F.R. § 208.13(b)(1)(ii) only if he establishes, as a threshold matter, compelling reasons for being unwilling to return to his country of nationality or last habitual residence arising out of the severity of the past persecution.

(3) The applicant failed to establish compelling reasons arising out of the severity of the past persecution for being unwilling to return to Afghanistan where he suffered beatings during a month-long detention and the disappearance and likely death of his father.

Countrywide Persecution

Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998)

(1) The reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure.

(2) Where evidence from the United States Department of State indicates that country conditions have changed after an alien's departure from his native country and that the Peruvian Government has reduced the Shining Path's ability to carry out persecutory acts, the alien failed to establish a well-founded fear of persecution in Peru.

(3) An alien who failed to rebut evidence from the United States Department of State indicating that the Shining Path operates in only a few areas of Peru did not establish a well-founded fear of country-wide persecution in that country.

Credibility and Corroboration

Matter of B-, 21 I&N Dec. 66 (BIA 1995)

Under the circumstances of this case, where an asylum applicant's testimony was plausible, detailed, internally consistent, consistent with the asylum application, and unembellished during the applicant's

repeated relating of events in a probing cross-examination, the Board declines to adopt the Immigration Judge's adverse credibility finding.

Matter of S-S-, 21 I&N Dec. 121 (BIA 1995)

(1) In order to fully and fairly review a decision of an Asylum Office Director in asylum proceedings, the Board of Immigration Appeals must have before it the primary evidentiary matters relied upon by the initial adjudicator.

(2) When the credibility of an applicant for asylum and withholding of deportation is placed in issue because of alleged statements made at the asylum interview, at a minimum, the record of the interview must contain a meaningful, clear, and reliable summary of the statements made by the applicant. In the alternative, a record of the interview might be preserved in a handwritten account of the specific questions asked of the applicant and his specific responses or through transcription of an electronic recording.

Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997)

(1) General background information about a country, where available, must be included in the record as a foundation for an applicant's claim of asylum and withholding of deportation.

(2) Where the record contains general country condition information and an applicant's claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the asylum applicant's particular experience is not required; but where it is reasonable to expect such corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided or an explanation should be given as to why such information was not presented. Matter of Dass, 20 I&N Dec. 120 (BIA 1989); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), clarified.

(3) The Immigration and Naturalization Service should play an active role in introducing evidence regarding current country conditions.

(4) Although the burden of proof is not on the Immigration Judge, if background evidence is central to an alien's claim and the Immigration Judge relies on the country conditions in adjudicating the alien's case, the source of the Immigration Judge's knowledge of the particular country must be made part of the record.

Matter of E-P-, 21 I&N Dec. 860 (BIA 1997)

(1) A finding of credible testimony by an asylum applicant is not dispositive as to whether asylum should be granted; rather, the specific content of the testimony, and any other relevant evidence in the record, is also considered.

(2) When evaluating an asylum claim, the changed conditions of the country at issue, as properly established in the record of proceedings, may be a significant factor in concluding that an applicant has not established a well-founded fear of persecution.

Matter of S-S-, 21 I&N Dec. 900 (BIA 1997) (Asylum Interview Statement)

(1) In order to fully and fairly review a decision of an Asylum Office Director in asylum proceedings, the Board of Immigration Appeals must have before it the primary evidentiary matters relied upon by the initial adjudicator.

(2) When the credibility of an applicant for asylum and withholding of deportation is placed in issue because of alleged statements made at the asylum interview, at a minimum, the record of the interview must contain a meaningful, clear, and reliable summary of the statements made by the applicant. In the alternative, a record of the interview might be preserved in a handwritten account of the specific questions asked of the applicant and his specific responses or through transcription of an electronic recording.

Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998) (Counterfeit Document)

Presentation by an asylum applicant of an identification document that is found to be counterfeit by forensic experts not only discredits the applicant's claim as to the critical elements of identity and nationality, but, in the absence of an explanation or rebuttal, also indicates an overall lack of credibility regarding the entire claim.

Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998)

(1) Although the Board of Immigration Appeals has de novo review authority, the Board accords deference to an Immigration Judge's findings concerning credibility and credibility-related issues.

(2) The Board of Immigration Appeals defers to an adverse credibility finding based upon inconsistencies and omissions regarding events central to an alien's asylum claim where a review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions has not been supplied by the alien.

(3) Since an Immigration Judge is in the unique position to observe the testimony of an alien, a credibility finding which is supported by a reasonable adverse inference drawn from an alien's demeanor generally should be accorded a high degree of deference, especially where such inference is supported by specific and cogent reasons for doubting the veracity of the substance of the alien's testimony.

Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998)

(1) An asylum applicant does not meet his or her burden of proof by general and meager testimony.

(2) Specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum.

(3) The weaker an applicant's testimony, the greater the need for corrobative evidence.

Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998) (Identity)

An alien who did not provide any evidence to corroborate his purported identity, nationality, claim of persecution, or his former presence or his family's current presence at a refugee camp, where it was reasonable to expect such evidence, failed to meet his burden of proof to establish his asylum claim.

Criminal Activity

Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997)

(1) An asylum applicant who has been convicted of robbery with a deadly weapon (handgun) and sentenced to 2 1/2 years in prison is not eligible for asylum because he has been convicted of an aggravated felony, that is, a crime of violence for which the sentence is at least 1 year.

(2) An applicant for withholding of deportation who has been convicted of robbery with a deadly weapon (handgun) has been convicted of a particularly serious crime and is not eligible for withholding of deportation regardless of the length of his sentence.

Matter of Jean, 23 I&N Dec. 323 (A.G. 2002)

(1) The 30-day period set forth in 8 C.F.R. § 3.38(b) (2002) for filing an appeal to the Board of Immigration Appeals is mandatory and jurisdictional, and it begins to run upon the issuance of a final disposition in the case.

(2) The Board of Immigration Appeals' authority under 8 C.F.R. § 3.1(c) (2002) to certify cases to itself in its discretion is limited to exceptional circumstances, and is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.

(3) In evaluating the propriety of granting an otherwise inadmissible alien a discretionary waiver to permit adjustment of status from refugee to lawful permanent resident pursuant to section 209(c) of the Immigration and Nationality Act, 8 U.S.C. § 1159(c) (2000), any humanitarian, family unity preservation, or public interest considerations must be balanced against the seriousness of the criminal offense that rendered the alien inadmissible.

(4) Aliens who have committed violent or dangerous crimes will not be granted a discretionary waiver to permit adjustment of status from refugee to lawful permanent resident pursuant to section 209(c) of the Act except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient.

(5) Aliens who have committed violent or dangerous crimes will not be granted asylum, even if they are technically eligible for such relief, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient.

Exclusion Proceedings

Matter of G-A-C-, 22 I&N Dec. 83 (BIA 1998)

An applicant for asylum who departed the United States after having been granted an advance authorization for parole, and who, on his return, was paroled into this country under the provisions of section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (Supp. V 1993), was properly placed in exclusion proceedings following the Immigration and Naturalization Service's denial of his application for asylum and revocation of his parole. Navarro-Aispura v. INS, 53 F.3d 233 (9th Cir. 1995); and Barney v. Rogers, 83 F.3d 318 (9th Cir. 1996), distinguished.

Matter of A-N- & R-M-N-, 22 I&N Dec. 953 (BIA 1999)

Aliens seeking to reopen exclusion proceedings to apply for asylum and withholding of deportation who have presented evidence establishing materially changed circumstances in their homeland or place of last habitual residence, such that they meet the general requirements for motions to reopen, need not demonstrate Areasonable cause@ for their failure to appear at the prior exclusion hearing.

Jurisdiction of Immigration Judges

Matter of P-L-P-, 21 I&N Dec. 887 (BIA 1997)

(1) Under 8 C.F.R. § 208.2(a) (1996), the Office of Refugees, Asylum, and Parole has initial jurisdiction over an alien's asylum application when the alien has not been served an Order to Show Cause and Notice of Hearing (Form I-221).

(2) Under 8 C.F.R. § 208.2(b) (1996), an Immigration Judge has exclusive jurisdiction over an asylum application filed by an alien once an Order to Show Cause has been served upon the alien and filed with the Immigration Court.

One-Year Application Deadline

Matter of Y-C-, 23 I&N Dec. 286 (BIA 2002)

An unaccompanied minor who was in the custody of the Immigration and Naturalization Service pending removal proceedings during the 1-year period following his arrival in the United States established extraordinary circumstances that excused his failure to file an asylum application within 1 year after the date of his arrival.

Past Persecution

Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998)

(1) Under 8 C.F.R. § 208.13(b)(1)(i) (1998), where an asylum applicant has shown that he has been persecuted in the past on account of a statutorily-protected ground, and the record reflects that country conditions have changed to such an extent that the asylum applicant no longer has a well-founded fear of persecution from his original persecutors, the applicant bears the burden of demonstrating that he has a well-founded fear of persecution from any new source.

(2) An asylum applicant who no longer has a well-founded fear of persecution due to changed country conditions may still be eligible for a discretionary grant of asylum under 8 C.F.R. § 208.13(b)(1)(ii) only if he establishes, as a threshold matter, compelling reasons for being unwilling to return to his country of nationality or last habitual residence arising out of the severity of the past persecution.

(3) The applicant failed to establish compelling reasons arising out of the severity of the past persecution for being unwilling to return to Afghanistan where he suffered beatings during a month-long detention and the disappearance and likely death of his father.

Persecution - Antisemitism

Matter of O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998)

An alien who suffered repeated beatings and received multiple handwritten anti-Semitic threats, whose apartment was vandalized by anti-Semitic nationalists, and whose son was subjected to degradation and intimidation on account of his Jewish nationality established that he has suffered harm which, in the aggregate, rises to the level of persecution as contemplated by the Immigration and Nationality Act.

Persecution - Clan Membership

Matter of H-, 21 I&N Dec. 337 (BIA 1996)

(1) Membership in a clan can constitute membership in a "particular social group" within the meaning of section 208(a) of the Immigration & Nationality Act, 8 U.S.C. § 1158(a)(1994); the Marehan subclan of Somalia, the members of which share ties of kinship and linguistic commonalities, is such a "particular social group."

(2) While interclan violence may arise during the course of civil strife, such circumstances do not preclude the possibility that harm inflicted during the course of such strife may constitute persecution within the meaning of section 208(a) of the Act; and, persecution may occur irrespective of whether or not a national government exists.

(3) An alien who has demonstrated past persecution is presumed to have a well-founded fear of future persecution unless it is demonstrated by a preponderance of the evidence that, since the time the persecution occurred, conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear of persecution in that country.

(4) In the consideration of whether a favorable exercise of discretion should be afforded an applicant who has established eligibility for asylum on the basis of past persecution, careful attention should be given to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past.

Persecution - Coercive Population Control

Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996)

(1) An alien who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for resistance to a coercive population control program, has suffered past persecution on account of political opinion and qualifies as a refugee within the amended definition of that term under section 101(a)(42) of the Immigration and Nationality Act (to be codified at 8 U.S.C. § 1101(a)(42)). Matter of Chang, 20 I&N Dec. 38 (BIA 1989), superseded.

(2) The language of section 101(a)(42) of the Act deeming persons who have been subject to population control measures or persecuted for resistance to such programs to have been persecuted on account of political opinion applies to determinations of eligibility for withholding of deportation, as well as asylum.

(3) Section 207(a)(5) of the Act (to be codified at 8 U.S.C. § 1157(a)(5)) limits the number of refugees that may be admitted to the United States or granted asylum pursuant to the provisions of section 101(a)(42) of the Act relating to persecution for resistance to coercive population control methods.

(4) The applicant, who was forcibly sterilized for violating the coercive population control policies of China, is granted asylum conditioned upon a determination by the Immigration and Naturalization

Service that a number is available for such grant; withholding of exclusion and deportation is also granted without condition.

Matter of C-Y-Z-, 21 I&N Dec. 915 (BIA 1997)

(1) An alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the definition of section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1994), as amended by section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____.

(2) The regulatory presumption of a well-founded fear of future persecution may not be rebutted in the absence of changed country conditions, regardless of the fact that the sterilization of the alien's spouse negates the likelihood of future sterilization to the alien.

Matter of X-G-W-, 22 I&N Dec. 71 (BIA 1998) (superseded by *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002))

Due to a fundamental change in the definition of a "refugee" brought about by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, the Board of Immigration Appeals will allow reopening of proceedings to pursue asylum claims based on coerced population control policies, notwithstanding the time and number limitations on motions specified in 8 C.F.R. § 3.2 (1997).

Matter of G-C-L-, 23 I&N Dec. 359 (BIA 2002)

The Board of Immigration Appeals withdraws from its policy of granting untimely motions to reopen by applicants claiming eligibility for asylum based solely on coercive population control policies, effective 90 days from the date of this decision. Matter of X-G-W-, 22 I&N Dec. 71 (BIA 1998), superseded.

Persecution - Domestic Violence

Matter of R-A-, 22 I&N Dec. 906 (BIA 1999) (vacated by the Attorney General, Jan. 19, 2001)

(1) Where a victim of domestic violence fails to introduce meaningful evidence that her husband's behavior was influenced by his perception of her opinion, she has not demonstrated harm on account of political opinion or imputed political opinion.

(2) The existence of shared descriptive characteristics is not necessarily sufficient to qualify those possessing the common characteristics as members of a Aparticular social group@ for the purposes of the refugee definition at section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994); rather, in construing the term in keeping with the other four statutory grounds, a number of factors are considered in deciding whether a grouping should be recognized as a basis for asylum, including how members of the grouping are perceived by the potential persecutor, by the asylum applicant, and by other members of the society.

(3) An applicant making a Aparticular social group@ claim must make a showing from which it is reasonable to conclude that the persecutor was motivated to harm the applicant, at least in part, by the asserted group membership.

(4) An asylum applicant who claims persecution on the basis of a group defined as AGuatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination@ must demonstrate, inter alia, that her persecutor husband targeted and harmed her because he perceived her to be a member of this particular social group.

Persecution - Extortion

Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997)

(1) An applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future. However, the applicant must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground.

(2) Criminal extortion efforts do not constitute persecution "on account of" political opinion where it is reasonable to conclude that those who threatened or harmed the respondent were not motivated by her political opinion.

(3) Country profiles submitted by the Department of State's Bureau of Democracy, Human Rights and Labor are entitled to considerable deference.

Persecution - Female Genital Mutilation

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996)

(1) The practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution.

(2) Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a "particular social group" within the definition of the term "refugee" under section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994).

(3) The applicant has met her burden of proving through credible testimony and supporting documentary evidence (1) that a reasonable person in her circumstances would fear country-wide persecution in Togo on account of her membership in a recognized social group and (2) that a favorable exercise of discretion required for a grant of asylum is warranted.

Persecution - Guerrilla Recruitment

Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997)

(1) An alien, who served as a soldier in the Guatemalan Army, has not established a well-founded fear of persecution by the guerrillas on account of one of the five grounds enumerated in section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994), where he claims that his personal file from the army fell into the hands of the guerrillas, who sought to recruit him for his artillery expertise.

(2) An alien has failed to establish that he has a well-founded fear of country-wide persecution from the guerrillas in Guatemala where he was able to live for more than 1 year in different areas within

the country, including an area well known for its guerrilla operations, without experiencing any problems from the guerrillas.

Persecution - Kidnapping

Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997)

(1) Although kidnapping is a very serious offense, the seriousness of conduct is not dispositive in determining persecution, which does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional.

(2) While there may be a number of reasons for a kidnapping, an asylum applicant bears the burden of establishing that one motivation was to persecute him on account of an enumerated ground, and evidence that indicates that the perpetrators were motivated by the victim's wealth, in the absence of evidence to suggest other motivations, will not support a finding of persecution within the meaning of the Immigration and Nationality Act.

Persecution - Mixed Motives

Matter of S-P-, 21 I&N Dec. 486 (BIA 1996)

(1) Although an applicant for asylum must demonstrate that harm has been or would be inflicted on account of one of the protected grounds specified in the "refugee" definition, persecution for "imputed" reasons can satisfy that definition.

(2) In mixed motive cases, an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur; however, in proving past persecution, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground.

(3) In situations involving general civil unrest, the motive for harm should be determined by considering the statements or actions of the perpetrators; abuse or punishment out of proportion to nonpolitical ends; treatment of others similarly situated; conformity to procedures for criminal prosecution or military law; the application of antiterrorism laws to suppress political opinion; and the subjection of political opponents to arbitrary arrest, detention, and abuse.

(4) Asylum was granted where the applicant was detained and abused by the Sri Lankan Government, not only to obtain information about the identity of guerrilla members and the location of their camps, but also because of an assumption that his political views were antithetical to those of the Government.

Persecution - Rape

Matter of D-V-, 21 I&N Dec. 77 (BIA 1993)

Well-founded fear of persecution in Haiti was established by a 27-year-old married female activist member of a pro-Aristide church group who was gang-raped and beaten in her home by soldiers and who was targeted by her attackers because of her political opinion and religion.

Persecution - Reasons for Persecution

Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997)

(1) An applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future. However, the applicant must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground.

(2) Criminal extortion efforts do not constitute persecution "on account of" political opinion where it is reasonable to conclude that those who threatened or harmed the respondent were not motivated by her political opinion.

(3) Country profiles submitted by the Department of State's Bureau of Democracy, Human Rights and Labor are entitled to considerable deference.

Persecution - Religion

Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000)

A woman with liberal Muslim beliefs established by credible evidence that she suffered past persecution and has a well-founded fear of future persecution at the hands of her father on account of her religious beliefs, which differ from her father's orthodox Muslim views concerning the proper role of women in Moroccan society.

Stowaways

Matter of M-S-, 21 I&N Dec. 125 (BIA 1995)

(1) In asylum proceedings involving a stowaway applicant, where an adverse credibility find-ing is adequately supported by information provided in documents executed by the applicant, without reliance upon statements allegedly made by the applicant in his interview with an asylum officer, it is not necessary to remand the case for a record of the interview which satisfies the requirements of Matter of S-S-, 21 I&N Dec. 121 (BIA 1995). Matter of S-S-, supra, distinguished.

(2) Where new asylum proceedings are conducted as a result of some defect in the original proceedings, statements made by the applicant in the original proceedings which are relevant to his persecution claim may be considered in the new proceedings.

(3) In asylum proceedings within the jurisdiction of the Immigration and Naturalization Service's Office of Refugees, Asylum, and Parole, which include proceedings involving stowaway applicants, new regulations at 8 C.F.R. § 208.9(g) (1995) require an applicant who is unable to proceed with his asylum interview in English to provide, at no expense to the government, a competent interpreter who is fluent in both English and the applicant's native language.

(4) In the interest of developing a full and complete record for review by the Board of Immigration Appeals, an asylum officer should draw a stowaway applicant's attention to any inconsistencies in his account which may be apparent at the time of his asylum interview and accord the applicant an opportunity to address those inconsistencies at the interview.

Terrorists

Matter of U-H-, 23 I&N Dec. 355 (BIA 2002)

Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 351 ("USA PATRIOT ACT"), does not change the standard employed to determine, for purposes of adjudicating an application for asylum or withholding of removal, whether there is reasonable ground to believe that an alien is engaged in, or is likely to engage in, terrorist activity under section 212(a)(3)(B)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(i)(II) (2000), or whether there are reasonable grounds to believe that he or she is a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, 8 U.S.C. § 1231(b)(3)(B)(iv) (2000).

Visa Waiver Program

Matter of Gallardo, 21 I&N Dec. 210 (BIA 1996)

An alien's admission pursuant to the Visa Waiver Pilot Program does not curtail his ability to obtain a bond redetermination hearing when the Immigration and Naturalization Service has issued an Order to Show Cause and Notice of Hearing (Form I-221) and the alien has applied for asylum and withholding of deportation.

Matter of Kanagasundram, 22 I&N Dec. 963 (BIA 1999)

Under the provisions of 8 C.F.R. § 217.4(a)(1) (1999), proceedings against an alien who has been refused admission under the Visa Waiver Pilot Program and who has applied for asylum must be commenced with a Notice of Referral to Immigration Judge (Form I-863).

ATTORNEY GENERAL CERTIFICATION

Matter of E-L-H-, 22 I&N Dec. 21 (BIA 1998)

Precedent decisions of the Board of Immigration Appeals which have been certified to the Attorney General for review are binding on the Immigration and Naturalization Service and the Immigration Judges and continue to serve as precedent in all proceedings involving the same issue or issues unless or until they are modified or overruled by the Board or the Attorney General.

CANCELLATION OF REMOVAL (LAWFUL PERMANENT RESIDENTS)

Continuous Residence

Matter of Perez, 22 I&N Dec. 689 (BIA 1999)

(1) Pursuant to section 240A(d)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d)(1) (Supp. II 1996), continuous residence or physical presence for cancellation of removal purposes is deemed to end on the date that a qualifying offense has been committed.

(2) The period of continuous residence required for relief under section 240A(a) commences when the alien has been admitted in any status, which includes admission as a temporary resident.

(3) An offense described in section 240A(d)(1) is deemed to end continuous residence or physical presence for cancellation of removal purposes as of the date of its commission, even if the offense was committed prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546.

Matter of Campos-Torres, 22 I&N Dec. 1289 (BIA 2000)

(1) Pursuant to section 240A(d)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d)(1) (Supp. II 1996), an offense must be one "referred to in section 212(a)(2)" of the Act, 8 U.S.C. § 1182(a)(2) (1994 & Supp. II 1996), to terminate the period of continuous residence or continuous physical presence required for cancellation of removal.

(2) A firearms offense that renders an alien removable under section 237(a)(2)(C) of the Act, 8 U.S.C. § 1227(a)(2)(C) (Supp. II 1996), is not one "referred to in section 212(a)(2)" and thus does not stop the further accrual of continuous residence or continuous physical presence for purposes of establishing eligibility for cancellation of removal.

Standards

Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998)

(1) To be statutorily eligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act (to be codified at 8 U.S.C. § 1229b(a)), an alien must demonstrate that he or she has been lawfully admitted for permanent residence for not less than 5 years, has resided in the United States continuously for 7 years after having been admitted in any status, and has not been convicted of an aggravated felony.

(2) In addition to satisfying the three statutory eligibility requirements, an applicant for relief under section 240A(a) of the Act must establish that he or she warrants such relief as a matter of discretion.

(3) The general standards developed in Matter of Marin, 16 I&N Dec. 581, 584-85 (BIA 1978), for the exercise of discretion under section 212(c) of the Act, 8 U.S.C. § 1182(c)(1994), which was the predecessor provision to section 240A(a), are applicable to the exercise of discretion under section 240A(a).

Matter of Sotelo, 23 I&N Dec. 201 (BIA 2001)

An applicant for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (Supp. V 1999), need not meet a threshold test requiring a showing of "unusual or outstanding equities" before a balancing of the favorable and adverse factors of record will be made to determine whether relief should be granted in the exercise of discretion. Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998), clarified.

Matter of Blancas, 23 I&N Dec. 458 (BIA 2002)

The period of an alien's residence in the United States after admission as a nonimmigrant may be considered in calculating the 7 years of continuous residence required to establish eligibility for cancellation of removal under section 240A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a)(2) (Supp. V 1999).

CANCELLATION OF REMOVAL (NON-LAWFUL PERMANENT RESIDENTS)

Continuous Residence

Matter of Campos-Torres, 22 I&N Dec. 1289 (BIA 2000)

(1) Pursuant to section 240A(d)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d)(1) (Supp. II 1996), an offense must be one "referred to in section 212(a)(2)" of the Act, 8 U.S.C. § 1182(a)(2) (1994 & Supp. II 1996), to terminate the period of continuous residence or continuous physical presence required for cancellation of removal.

(2) A firearms offense that renders an alien removable under section 237(a)(2)(C) of the Act, 8 U.S.C. § 1227(a)(2)(C) (Supp. II 1996), is not one "referred to in section 212(a)(2)" and thus does not stop the further accrual of continuous residence or continuous physical presence for purposes of establishing eligibility for cancellation of removal.

Matter of Romalez, 23 I&N Dec. 423 (BIA 2002)

For purposes of determining eligibility for cancellation of removal pursuant to section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (Supp. IV 1998), continuous physical presence is deemed to end at the time an alien is compelled to depart the United States under threat of the institution of deportation or removal proceedings.

Exceptional and Extremely Unusual Hardship

Matter of Monreal, 23 I&N Dec. 56 (BIA 2001)

(1) To establish "exceptional and extremely unusual hardship," an applicant for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (Supp. V 1999), 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 alien's deportation, but need not show that such hardship would be "unconscionable."

(2) Although many of the factors that were considered in assessing "extreme hardship" for suspension of deportation should also be considered in evaluating "exceptional and extremely unusual hardship," an applicant for cancellation of removal must demonstrate hardship beyond that which has historically been required in suspension of deportation cases involving the "extreme hardship" standard.

(3) In establishing eligibility for cancellation of removal, only hardship to qualifying relatives, not to the applicant himself or herself, may be considered, and hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to a qualifying relative.

Matter of Andazola, 23 I&N Dec. 319 (BIA 2002)

(1) The respondent, an unmarried mother, did not establish eligibility for cancellation of removal under
section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2000), because she failed to demonstrate that her 6- and 11-year-old United States citizen children will suffer exceptional and extremely unusual hardship upon her removal to Mexico.

(2) The factors considered in assessing the hardship to the respondent's children include the poor economic conditions and diminished educational opportunities in Mexico and the fact that the respondent is unmarried and has no family in that country to assist in their adjustment upon her return.

Matter of Recinas, 23 I&N Dec. 467 (BIA 2002)

(1) The respondent, a single mother who has no immediate family remaining in Mexico, provides the sole support for her six children, and has limited financial resources, established eligibility for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2002), because she demonstrated that her United States citizen children, who are 12, 11, 8, and 5 years old, will suffer exceptional and extremely unusual hardship upon her removal to her native country.

(2) The factors considered in assessing the hardship to the respondent's children include the heavy burden imposed on the respondent to provide the sole financial and familial support for her six children if she is deported to Mexico, the lack of any family in her native country, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country.

CITIZENSHIP

Acquisition of Citizenship by a Child

Matter of Fuentes-Martinez, 21 I&N Dec. 893 (BIA 1997)

(1) A child who has satisfied the statutory conditions of section 321(a) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a) (1994), before the age of 18 years has acquired derivative United States citizenship regardless of the child's age at the time the amendments to that section by the Act of October 5, 1978, Pub. L. No. 95-417, 92 Stat. 917 ("1978 Amendments"), took effect.

(2) The respondent, who was 16 years and 4 months of age when his mother was naturalized, and who resided in the United States at that time as a lawful permanent resident while under the age of 18 years, became a derivative United States citizen, even though he was already 18 years old when the 1978 Amendments took effect.

Matter of Rodriguez-Tejedor, 23 I&N Dec. 153 (BIA 2001)

(1) The automatic citizenship provisions of section 320 of the Immigration and Nationality Act, 8 U.S.C. § 1431 (1994), as amended by the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 ("CCA"), are not retroactive and, consequently, do not apply to an individual who resided in the United States with his United States citizen parents as a lawful permanent resident while under the age of 18 years, but who was over the age of 18 years on the CCA effective date.

(2) The respondent, who resided in the United States with his United States citizen adoptive parents as a lawful permanent resident while under the age of 18 years, but who was over the age of 18 years on the CCA effective date, is ineligible for automatic citizenship under section 320 of the Act.

Ineligible to Citizenship

Matter of Kanga, 22 I&N Dec. 1206 (BIA 2000)

(1) The phrase "ineligible to citizenship" in section 212(a)(8)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(8)(A) (Supp. II 1996), refers only to those aliens who are barred from naturalization by virtue of their evasion of military service.

(2) An alien convicted of an aggravated felony is not thereby rendered inadmissible under section 212(a)(8)(A) of the Act as an alien who is permanently "ineligible to citizenship."

CONVENTION AGAINST TORTURE

Acquiesence of Public Official

Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000)

An applicant for protection under Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must establish that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity; therefore, protection does not extend to persons who fear entities that a government is unable to control.

Matter of Y-L-, A-G- and R-S-R-, 23 I&N Dec. 270 (A.G. 2002)

(1) Aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute "particularly serious crimes" within the meaning of section 241(b)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B) (2000), and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible. Matter of S-S-, 22 I&N Dec. 458 (BIA 1999), overruled.

(2) The respondents are not eligible for deferral of removal under Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment where each failed to establish that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity. Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000), followed.

Burden of Proof

Matter of M-B-A-, 23 I&N Dec. 474 (BIA 2002)

A Nigerian convicted of a drug offense in the United States failed to establish eligibility for deferral of removal under Article 3 of the Convention Against Torture because the evidence she presented regarding the enforcement of Decree No. 33 of the Nigerian National Drug Law Enforcement Agency against individuals similarly situated to her was insufficient to demonstrate that it is more likely than not that she will be tortured by a public official, or at the instigation or with the consent or acquiescence of such an official, if she is deported to Nigeria.

Definition of Torture

Matter of J-E-, 23 I&N Dec. 291 (BIA 2002)

(1) An alien seeking protection under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must establish that it is more likely than not that he will be tortured in the country of removal.

(2) Torture within the meaning of the Convention Against Torture and 8 C.F.R. § 208.18(a) (2001) is an extreme form of cruel and inhuman treatment and does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment.

(3) For an act to constitute "torture" it must satisfy each of the following five elements in the definition of torture set forth at 8 C.F.R. § 208.18(a): (1) the act must cause severe physical or mental pain or suffering; (2) the act must be intentionally inflicted; (3) the act must be inflicted for a proscribed purpose; (4) the act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) the act cannot arise from lawful sanctions.

(4) According to 8 C.F.R. § 208.16(c)(3) (2001), in adjudicating a claim for protection under Article 3 of the Convention Against Torture, all evidence relevant to the possibilityof future torture must be considered, including, but not limited to: (1) evidence of past torture inflicted upon the applicant; (2) evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (3) evidence of gross, flagrant, or mass violations of human rights within the country of removal, where applicable; and (4) other relevant information regarding conditions in the country of removal.

(5) The indefinite detention of criminal deportees by Haitian authorities does not constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally and deliberately detain deportees in order to inflict torture.

(6) Substandard prison conditions in Haiti do not constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture.

(7) Evidence of the occurrence in Haitian prisons of isolated instances of mistreatment that may rise to the level of torture as defined in the Convention Against Torture is insufficient to establish that it is more likely than not that the respondent will be tortured if returned to Haiti.

Matter of G-A-, 23 I&N Dec. 366 (BIA 2002)

An Iranian Christian of Armenian descent demonstrated eligibility for deferral of removal under Article 3 of the Convention Against Torture and 8 C.F.R. § 208.17(a) (2001) by establishing that it is more likely than not that he will be tortured if deported to Iran based on a combination of factors, including his religion, his ethnicity, the duration of his residence in the United States, and his drug-related convictions in this country.

Jurisdiction

Matter of H-M-V-, 22 I&N Dec. 256 (BIA 1998)

The Board of Immigration Appeals lacks jurisdiction to adjudicate a claim for relief from deportation pursuant to Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, as there has been no specific legislation to implement the provisions of Article 3, no regulations have been promulgated with respect to Article 3, and the United States Senate has declared that Article 3 is a non-self-executing treaty provision.

CRIMES INVOLVING MORAL TURPITUDE

Assault

Matter of Fualaau, 21 I&N Dec. 475 (BIA 1996)

(1) Assault in the third degree under section 707-712 of the Hawaii Revised Statute is not a crime involving moral turpitude within the meaning of section 241(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 241(a)(2)(A)(ii) (1994), where the offense is similar to a simple assault.

(2) Where reckless conduct is an element of the statute, a crime of assault can be, but is not per se, a crime involving moral turpitude.

Controlled Substances

Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997)

A conviction for distribution of cocaine under 21 U.S.C.§ 841(a)(1) (1988), is a conviction for a crime involving moral turpitude within the meaning of section 241(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(ii) (1994), where knowledge or intent is an element of the offense. Matter of Serna, 20 I&N Dec. 579 (BIA 1992), modified.

Corporal Injury on a Spouse

Matter of Tran, 21 I&N Dec. 291 (BIA 1996)

Willful infliction of corporal injury on a spouse, cohabitant, or parent of the perpetrator's child, in violation of section 273.5(a) of the California Penal Code, constitutes a crime involving moral turpitude.

Driving Under the Influence

Matter of Lopez-Meza, 22 I&N Dec. 1188 (BIA 1999)

Under Arizona law, the offense of aggravated driving under the influence, which requires the driver to know that he or she is prohibited from driving under any circumstances, is a crime involving moral turpitude.

Matter of Torres-Varela, 23 I&N Dec. 78 (BIA 2001)

Under Arizona law, the offense of aggravated driving under the influence ("DUI") with two or more prior DUI convictions is not a crime involving moral turpitude. Matter of Lopez-Meza, 22 I&N Dec. 1188 (BIA 1999), distinguished.

Financial Violations

Matter of L-V-C-, 22 I&N Dec. 594 (BIA 1999)

An alien convicted of causing a financial institution to fail to file currency transaction reports and of structuring currency transactions to evade reporting requirements, in violation of 31 U.S.C. §§ 5324(1) and (3) (1998), whose offense did not include any morally reprehensible conduct, is not convicted of a crime involving moral turpitude. Matter of Goldeshtein, 20 I&N Dec. 382 (BIA 1991), rev'd, 8 F.3d 645 (9th Cir. 1993), overruled.

Section 212(c) Eligibility

Matter of Fortiz, 21 I&N Dec. 1199 (BIA 1998)

(1) An alien who is deportable under section 241(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(ii) (1994), as an alien convicted of two or more crimes involving moral turpitude, and whose deportation proceedings were initiated prior to the April 24, 1996, enactment date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), is not ineligible for a waiver under section 212(c) of the Act (to be codified at 8 U.S.C. § 1182(c)) unless more than one conviction resulted in a sentence or confinement of 1 year or longer pursuant to the former version of section 241(a)(2)(A)(i)(II), prior to its amendment by the AEDPA.

(2) For an alien to be barred from eligibility for a waiver under section 212(c) of the Act as one who "is deportable" by reason of having committed a criminal offense covered by one of the criminal deportation grounds enumerated in the statute, he or she must have been charged with, and found deportable on, such grounds.

Stalking

Matter of Ajami, 22 I&N Dec. 949 (BIA 1999)

The offense of aggravated stalking pursuant to section 750.411i of the Michigan Compiled Laws Annotated is a crime involving moral turpitude.

CRIMINAL CONVICTIONS

Finality

Matter of Thomas, 21 I&N Dec. 20 (BIA 1995)

(1) Inasmuch as a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review has been exhausted or waived, a non-final conviction cannot support a charge of deportability, and likewise does not trigger a statutory bar to relief, under a section of the Immigration and Nationality Act premised on the existence of a conviction.

(2) In determining whether an application for relief is merited as a matter of discretion, evidence of unfavorable conduct, including criminal conduct which has not culminated in a final conviction for purposes of the Act, may be considered.

(3) When considering evidence of criminality in conjunction with an application for discretionary relief, the probative value of and corresponding weight, if any, assigned to that evidence will vary according to the facts and circumstances of each case and the nature and strength of the evidence presented.

Matter of Chairez, 21 I&N Dec. 44 (BIA 1995).

(1) A right to appeal such issues as whether a violation of probation has occurred or the sentence imposed upon entry of judgment was correct will not prevent a finding of a final conviction for immigration purposes under the third prong of the standard set forth in Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988), which requires that any further proceedings available to an alien must relate to the issue of "guilt or innocence of the original charge."

(2) After a breach of a condition of an order deferring judgment and sentence under Colorado Revised Statutes § 16-7-403, no further proceedings are available to a defendant to contest his guilt.

(3) Where the period during which the respondent's judgment and sentence were deferred under Colorado law had been completed, any right he may have had to appeal had lapsed and could no longer prevent a finding that his conviction was final.

Foreign Convictions

Matter of Dillingham, 21 I&N Dec. 1001 (BIA 1997)

The expungement of an alien's foreign drug-related conviction pursuant to a foreign rehabilitation statute is not effective to prevent a finding of his inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) (1994), even if he would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) (1994) had he been prosecuted in the United States. Matter of Manrique, 21 I&N Dec. 3250 (BIA 1995), distinguished.

Deferred Adjudication

Matter of Punu, 22 I&N Dec. 224 (BIA 1998)

(1) The third prong of the standard for determining whether a conviction exists with regard to deferred adjudications has been eliminated pursuant to section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (Supp. II 1996). Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988), superseded.

(2) A deferred adjudication under article 42.12, § 5 of the Texas Code of Criminal Procedure is a conviction for immigration purposes.

Records of Conviction

Matter of Teixeira, 21 I&N Dec. 316 (BIA 1996)

(1) Where the statute under which an alien was convicted encompasses offenses that constitute firearms violations and offenses that do not, the Board of Immigration Appeals looks to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes a firearms violation within the meaning of section 241(a)(2)(C) of Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(C) (Supp. V 1993).

(2) A police report, standing alone, is not part of a "record of conviction," nor does it fit any of the regulatory descriptions found at 8 C.F.R. § 3.41 (1995) for documents that are admissible as evidence in any proceeding before an Immigration Judge in proving a criminal conviction, and it therefore

should not be considered in determining whether the specific offense of which an alien was convicted constituted a firearms violation.

(3) Although a police report concerning circumstances of arrest that is not part of a record of conviction is appropriately admitted into evidence for the purpose of considering an application for discretionary relief, it should not be considered for the purpose of determining deportability where the Act mandates a focus on a criminal conviction, rather than on conduct.

Matter of Madrigal, 21 I&N Dec. 323 (BIA 1996)

(1) Where the statute under which an alien has been convicted encompasses offenses that constitute firearms violations and offenses that do not, the Immigration and Naturalization Service must establish through the record of conviction, and other documents admissible as evidence in proving a criminal conviction, that the specific offense of which the alien was convicted constitutes a firearms violation within the meaning of section 241(a)(2)(C) of Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(C) (1994).

(2) The transcript from the respondent's plea and sentence hearing, during which the respondent admitted possession of a firearm, is part of the record of conviction and, consequently, was sufficient to establish that the respondent had been convicted of a firearms offense and was deportable under section 241(a)(2)(C) of the Act.

(3) The respondent's right to counsel was not violated where the Immigration Judge properly informed the respondent of his right to counsel and provided him with adequate opportunity to obtain representation.

Matter of Pichardo, 21 I&N Dec. 330 (BIA 1996)

(1) Where the statute under which an alien has been convicted encompasses offenses that constitute firearms violations and offenses that do not, the Board of Immigration Appeals will look beyond the statute, but only to consider such facts which appear from the record of conviction, or other documents admissible under federal regulations as evidence in proving a criminal conviction, to determine whether the specific offense for which the alien was convicted constitutes a firearms violation within the meaning of section 241(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(C) (1994).

(2) Where the only criminal court document offered into the record to prove an alien's deportability under section 241(a)(2)(C) of the Act consists of a Certificate of Disposition which fails to identify the subdivision under which the alien was convicted or the weapon that he was convicted of possessing, deportability has not been established, even where the alien testifies that the weapon in his possession at the time of his arrest was a gun, since it is the crime that the alien was convicted of rather than a crime that he may have committed which determines whether he is deportable.

Rehabilitative Statutes

Matter of Manrique, 21 I&N Dec. 58 (BIA 1995) (superseded by *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999))

As a matter of policy in cases dealing with drug-related convictions under state law, any alien who has been accorded rehabilitative treatment pursuant to a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) (1988) had he been prosecuted under federal law. Matter of Deris, 20 I&N

Dec. 5 (BIA 1989); Matter of Garcia, 19 I&N Dec. 270 (BIA 1985); Matter of Carrillo, 19 I&N Dec. 77 (BIA 1984); Matter of Forstner, 18 I&N Dec. 374 (BIA 1983); Matter of Golshan, 18 I&N Dec. 92 (BIA 1981); Matter of Kaneda, 16 I&N Dec. 677 (BIA 1979); Matter of Haddad, 16 I&N Dec. 253 (BIA 1977); and Matter of Werk, 16 I&N Dec. 234 (BIA 1977), modified.

Matter of Roldan, 22 I&N Dec. 512 (BIA 1999)

(1) Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (Supp. II 1996), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.

(2) With the enactment of the federal statute defining "conviction" with respect to an alien, our decisions in Matter of G-, 9 I&N Dec. 159 (BIA 1960, A.G. 1961); Matter of Ibarra-Obando, 12 I&N Dec. 576 (BIA 1966, A.G. 1967); Matter of Luviano, 21 I&N Dec. 235 (BIA 1996), and others which address the impact of state rehabilitative actions on whether an alien is "convicted" for immigration purposes are no longer controlling.

(3) Once an alien is subject to a "conviction" as that term is defined at section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure.

(4) The policy exception in Matter of Manrique, 21 I&N Dec. 58 (BIA 1995), which accorded federal first offender treatment to certain drug offenders who had received state rehabilitative treatment is superseded by the enactment of section 101(a)(48)(A), which gives no effect to state rehabilitative actions in immigration proceedings. Matter of Manrique, supra, superseded.

(5) An alien, who has had his guilty plea to the offense of possession of a controlled substance vacated and his case dismissed upon termination of his probation pursuant to section 19-2604(1) of the Idaho Code, is considered to have a conviction for immigration purposes.

Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378 (BIA 2000)

A conviction that has been vacated pursuant to article 440 of the New York Criminal Procedure Law does not constitute a conviction for immigration purposes within the meaning of section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (Supp. IV 1998). Matter of Roldan, 22 I&N Dec. 512 (BIA 1999), distinguished.

Matter of Salazar, 23 I&N Dec. 223 (BIA 2002)

(1) An alien whose adjudication of guilt was deferred pursuant to article 42.12, section 5(a) of the Texas Code of Criminal Procedure following her plea of guilty to possession of a controlled substance is considered to have been convicted of the offense. Matter of Roldan, 22 I&N Dec. 512 (BIA 1999), reaffirmed.

(2) In Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000), the United States Court of Appeals for the Ninth Circuit overruled in part Matter of Roldan, supra, which will not be applied in cases arising within the jurisdiction of the Ninth Circuit.

(3) In light of the decisions in United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2000), cert. denied, 122 S. Ct. 305 (2001), and United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir.

1997), the decision of the Board of Immigration Appeals in Matter of K-V-D-, 22 I&N Dec. 1163 (BIA 1999), will not be applied in cases arising within the jurisdiction of the Fifth Circuit.

Sentence

Matter of Esposito, 21 I&N Dec. 1 (BIA 1995)

(1) For purposes of section 212(a)(10) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(10) (1988), and its successor provision at section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B) (Supp. V 1993), a sentence is "actually imposed" where a criminal court suspends the execution of a sentence, but no sentence is "actually imposed" where the imposition of sentence is suspended. Matter of Castro, 19 I&N Dec. 692 (1988), followed.

(2) Section 212(c) of the Act is ineffective to waive deportability under former section 241(a)(14) of the Act, 8 U.S.C. § 1251(a)(14) (1988), or section 241(a)(2)(C) of the Act, 8 U.S.C. § 1251(a)(2)(C) (Supp. V 1993), for conviction of a firearms violation, even where the firearms violation is one of two or more crimes which may render the alien inadmissible under section 212(a)(10) [now section 212(a)(2)(B)] of the Act. Matter of Montenegro, 20 I&N Dec. 603 (BIA 1992); Matter of Hernandez-Casillas, 20 I&N Dec. 262 (BIA 1990; A.G. 1991), aff'd, 983 F.2d 231 (5th Cir. 1993); and Matter of Wadud, 19 I&N Dec. 182 (BIA 1984), followed.

Youthful Offenders

Matter of Devison, 22 I&N Dec. 1362 (BIA 2000)

(1) An adjudication of youthful offender status pursuant to Article 720 of the New York Criminal Procedure Law, which corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1994 & Supp. II 1996), does not constitute a judgment of conviction for a crime within the meaning of section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (Supp. IV 1998).

(2) Under New York Law, the resentencing of a youthful offender following a violation of probation does not convert the youthful offender adjudication into a judgment of conviction.

DETENTION AND BOND

Jurisdiction

Matter of Oseiwusu, 22 I&N Dec. 19 (BIA 1998)

(1) An alien who arrives in the United States pursuant to a grant of advance parole is an "arriving alien," as that term is defined in the federal regulations.

(2) According to the regulations, an Immigration Judge has no authority over the apprehension, custody, and detention of arriving aliens and is therefore without authority to consider the bond request of an alien returning pursuant to a grant of advance parole.

Matter of Saelee, 22 I&N Dec. 1258 (BIA 2000)

(1) The Board of Immigration Appeals has jurisdiction over an appeal from a district director's custody determination that was made after the entry of deportation or removal pursuant to 8 C.F.R. § 236.1 (1999), regardless of whether the alien formally initiated the review.

(2) An alien subject to a final order of deportation based on a conviction for an aggravated felony, who is unable to be deported, may be eligible for release from detention after the expiration of the removal period pursuant to section 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6) (Supp. II 1996).

(3) Where an alien seeking review of a district director's post-final-order custody determination failed to demonstrate by clear and convincing evidence that the release would not pose a danger to the community pursuant to 8 C.F.R. § 241.4(a) (1999), the district director's decision to continue detention was sustained.

Mandatory Detention

Matter of Joseph, 22 I&N Dec. 660 (BIA 1999)

(1) Pursuant to 8 C.F.R. § 3.19(i)(2), published as a final rule in 63 Fed. Reg. 27,441, 27,448-49 (1998), the Immigration and Naturalization Service's filing of a Form EOIR-43 (Notice of INS Intent to Appeal Custody Redetermination) provides an automatic stay of an Immigration Judge's order releasing an alien who is charged with removal under one of the mandatory detention grounds set forth in section 236(c)(1) of the Act, 8 U.S.C. § 1226(c)(1) (Supp. II 1996), even where the Immigration Judge has determined that the alien is not subject to section 236(c)(1) and has terminated the removal proceedings on that charge.

(2) The filing of an appeal from an Immigration Judge's merits decision terminating removal proceedings does not operate to stay an Immigration Judge's release order in related bond proceedings. Matter of Valles, 21 I&N Dec. 769 (BIA 1997), modified.

Matter of Joseph, 22 I&N Dec. 799 (BIA 1999)

(1) For purposes of determining the custody conditions of a lawful permanent resident under section 236 of the Immigration and Nationality Act, 8 U.S.C. § 1226 (Supp. II 1996), and 8 C.F.R. § 3.19(h)(2)(ii) (1999), a lawful permanent resident will not be considered Aproperly included@ in a mandatory detention category when an Immigration Judge or the Board of Immigration Appeals finds, on the basis of the bond record as a whole, that it is substantially unlikely that the Immigration and Naturalization Service will prevail on a charge of removability specified in section 236(c)(1) of the Act.

(2) Although a conviction document may provide the Service with sufficient reason to believe that an alien is removable under one of the mandatory detention grounds for purposes of charging the alien and making an initial custody determination, neither the Immigration Judge nor the Board is bound by the Service's decisions in that regard when determining whether an alien is properly included within one of the regulatory provisions that would deprive the Immigration Judge and the Board of jurisdiction to redetermine the custody conditions imposed on the alien by the Service. Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified.

(3) When an Immigration Judge's removal decision precedes the determination, pursuant to 8 C.F.R. § 3.19(h)(2)(ii), whether an alien is Aproperly included@ in a mandatory detention category, the removal decision may properly form the basis for that determination.

(4) An automatic stay of an Immigration Judge's release order that has been invoked by the Service pursuant to 8 C.F.R. § 3.19(i)(2) is extinguished by the Board's decision in the Service's bond appeal from that release order.

Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999)

(1) Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c) (Supp. II 1996), does not apply to aliens whose most recent release from custody by an authority other than the Immigration and Naturalization Service occurred prior to the expiration of the Transition Period Custody Rules.

(2) Custody determinations of aliens in removal proceedings who are not subject to the provisions of section 236(c) of the Act are governed by the general custody provisions at section 236(a) of the Act.

(3) By virtue of 8 C.F.R. § 236.1(c)(8) (1999), a criminal alien in a custody determination under section 236(a) of the Act must establish to the satisfaction of the Immigration Judge and the Board of Immigration Appeals that he or she does not present a danger to property or persons.

(4) When an Immigration Judge bases a bond determination on evidence presented in the underlying merits case, it is the responsibility of the parties and the Immigration Judge to ensure that the bond record establishes the nature and substance of the specific factual information considered by the Immigration Judge in reaching the bond determination.

Matter of Rojas, 23 I&N Dec. 117 (BIA 2001)

A criminal alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention pursuant to section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c) (Supp. V 1999), even if the alien is not immediately taken into custody by the Immigration and Naturalization Service when released from incarceration.

Pending Appeals

Matter of Valles, 21 I&N Dec. 769 (BIA 1997)

(1) An Immigration Judge maintains continuing jurisdiction to entertain bond redetermination requests by an alien even after the timely filing of an appeal with the Board of Immigration Appeals from a previous bond redetermination request.

(2) If, after a bond appeal has been filed by the alien, the Immigration Judge grants an alien's bond redetermination request, that appeal is rendered moot, and the Board will return the record to the Immigration Court promptly.

Terrorists

Matter of Khalifah, 21 I&N Dec. 107 (BIA 1995)

An alien subject to criminal proceedings for alleged terrorist activities in the country to which the Immigration and Naturalization Service seeks to deport him is appropriately ordered detained without bond as a poor bail risk.

Transition Period Custody Rules (TPCR)

Matter of Noble, 21 I&N Dec. 672 (BIA 1997)

(1) Bond redeterminations of detained deportable aliens convicted of an aggravated felony are governed by the Transition Period Custody Rules of section 303(b)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, (enacted Sept. 30, 1996), irrespective of how or when the alien came into immigration custody.

(2) Aliens deportable on aggravated felony grounds are eligible for release from immigration custody under the Transition Period Custody Rules, provided the alien can demonstrate that he or she was either lawfully admitted or cannot be removed because the designated country will not accept him or her, will not pose a danger to safety of persons or of property, and will likely appear for any scheduled proceeding.

Matter of Valdez, 21 I&N Dec. 703 (BIA 1997)

(1) The Transition Period Custody Rules invoked on October 9, 1996, govern bond redeterminations of aliens falling within the nonaggravated felony criminal grounds of deportation covered in those rules, regardless of when the criminal offenses and convictions occurred.

(2) The Transition Period Custody Rules govern bond redetermination appeals of otherwise covered criminal aliens who are not now in custody by virtue of immigration bond rulings rendered prior to the October 9, 1996, invocation of those rules.

Matter of Melo, 21 I&N Dec. 883 (BIA 1997)

(1) In bond proceedings under the Transition Period Custody Rules, the standards set forth in Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994), apply to the determinations of whether the alien's release pending deportation proceedings will pose a danger to the safety of persons or of property and whether he or she is likely to appear for any scheduled proceeding.

(2) The "is deportable" language as used in the Transition Period Custody Rules does not require that an alien have been charged and found deportable on that deportation ground. Matter of Ching, 12 I&N Dec. 710 (BIA 1968); and Matter of T-, 5 I&N Dec. 459 (BIA 1953), distinguished.

(3) The Transition Period Custody Rules do not limit "danger to the safety of persons or of property" to the threat of direct physical violence; the risk of continued narcotics trafficking also constitutes a danger to the safety of persons.

Matter of West, 22 I&N Dec. 1405 (BIA 2000)

The mandatory detention provisions of section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c) (Supp. IV 1998), do not apply to an alien who was convicted after the expiration of the Transition Period Custody Rules ("Transition Rules"), but who was last released from the physical custody of state authorities prior to the expiration of the Transition Rules and who was not physically confined or restrained as a result of that conviction.

EXCLUSION PROCEEDINGS

Adjustment of Status

Matter of Castro, 21 I&N Dec. 379 (BIA 1996)

(1) In exclusion proceedings, jurisdiction over an alien's application for adjustment of status generally lies with the district director of the Immigration and Naturalization Service.

(2) The regulations at 8 C.F.R. §§ 245.2(a) and 236.4 (1994) grant limited jurisdiction to the Immigration Judge in exclusion proceedings to adjudicate adjustment applications that have been denied by the district director, but only if the alien, after first having been inspected and admitted into the United States, had applied to adjust status and then departed the country under a grant of advance parole.

Asylum

Matter of G-A-C-, 22 I&N Dec. 83 (BIA 1998)

An applicant for asylum who departed the United States after having been granted an advance authorization for parole, and who, on his return, was paroled into this country under the provisions of section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (Supp. V 1993), was properly placed in exclusion proceedings following the Immigration and Naturalization Service's denial of his application for asylum and revocation of his parole. Navarro-Aispura v. INS, 53 F.3d 233 (9th Cir. 1995); and Barney v. Rogers, 83 F.3d 318 (9th Cir. 1996), distinguished.

Matter of A-N- & R-M-N-, 22 I&N Dec. 953 (BIA 1999)

Aliens seeking to reopen exclusion proceedings to apply for asylum and withholding of deportation who have presented evidence establishing materially changed circumstances in their homeland or place of last habitual residence, such that they meet the general requirements for motions to reopen, need not demonstrate Areasonable cause@ for their failure to appear at the prior exclusion hearing.

In Absentia Proceedings

Matter of N-B-, 22 I&N Dec. 590 (BIA 1999)

The regulatory language at 8 C.F.R. § 3.23(b)(4)(iii)(B) (1998) contains no time or numerical limitations on aliens who wish to file a motion to reopen exclusion proceedings conducted in absentia.

Motion to Terminate Proceedings

Matter of Singh, 21 I&N Dec. 427 (BIA 1996)

A returning applicant for legalization under section 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a (1988 & Supp. III 1991), may not, by virtue of his membership in the class action suit of Catholic Social Services v. Meese, 685 F. Supp. 1149 (E.D.Cal.1988), aff'd sub nom. Catholic Social Services v. Thornburgh, 956 F.2d 914 (9th Cir.1992), vacated sub nom. Reno v. Catholic Social Services, 509 U.S. 43 (1993), successfully file a motion to terminate exclusion proceedings based on the doctrine set forth in Rosenberg v. Fleuti, 374 U.S. 449 (1963).

Parole

Matter of S-O-S-, 22 I&N Dec. 107 (BIA 1998)

In cases falling within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, exclusion proceedings are appropriate for aliens returning to the United States under a grant of advance parole, with two exceptions. Those exceptions are aliens with pending registry applications and those not specifically informed by the Immigration and Naturalization Service that they risk being placed in exclusion proceedings upon reentry. Matter of Torres, 19 I&N Dec. 371 (BIA 1986), modified.

FIREARMS OFFENSES

Matter of Saint John, 21 I&N Dec. 593 (BIA 1996)

An alien convicted of attempting or conspiring to commit a firearms violation is deportable under section 241(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(C) (1994), which applies retroactively to convictions entered before, on, or after October 25, 1994. Matter of Hou, 20 I&N Dec. 513 (BIA 1992), superseded.

Matter of Luviano, 21 I&N Dec. 235 (BIA 1996)

A conviction for a violation of a firearms offense that has been expunged pursuant to section 1203.4 of the California Penal Code will not support a finding of deportability under section 241(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2)(C) (1994). Matter of Ibarra-Obando, 12 I&N Dec. 576 (BIA 1966; A.G. 1967); and Matter of G-, 9 I&N Dec. 159 (BIA 1960; A.G. 1961), followed.

FOREIGN POLICY GROUNDS DEPORTABILITY

Adverse Foreign Policy Consequences

Matter of Ruiz-Massieu, 22 I&N Dec. 833 (BIA 1999)

(1) In order to establish deportability under section 241(a)(4)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(4)(C)(i) (1994), the Immigration and Naturalization Service has the burden of proving by clear, unequivocal, and convincing evidence that the Secretary of State has made a facially reasonable and bona fide determination that an alien's presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States.

(2) A letter from the Secretary of State conveying the Secretary's determination that an alien's presence in this country would have potentially serious adverse foreign policy consequences for the United States, and stating facially reasonable and bona fide reasons for that determination, is presumptive and sufficient evidence that the alien is deportable under section 241(a)(4)(C)(i) of the Act, and the Service is not required to present additional evidence of deportability.

(3) The Government is not required to permit an alien who is deemed to be deportable under section 241(a)(4)(C)(i) of the Act to depart the United States voluntarily prior to the initiation of deportation proceedings where the alien's presence is pursuant to his voluntary decision to enter or seek admission to this country. Matter of Badalamenti, 19 I&N Dec. 623 (BIA 1988); Matter of Yam, 16 I&N Dec. 535 (BIA 1978); Matter of C-C-, 3 I&N Dec. 221 (BIA 1948), distinguished.

(4) Extradition proceedings are separate and apart from deportation proceedings and the Government's success or failure in obtaining an order of extradition has no effect on deportation proceedings. Matter of McMullen, 17 I&N Dec. 542 (BIA 1980), rev'd on other grounds, 658 F.2d 1312 (9th Cir. 1981), on remand, Matter of McMullen, 19 I&N Dec. 90 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986), followed.

Espionage

Matter of Luis, 22 I&N Dec. 747 (BIA 1999)

(1) Section 241(a)(4)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(4)(A)(i) (1994), which provides for the deportability of any alien who after entry has engaged in "any activity to violate any law of the United States relating to espionage," does not require evidence that the alien was either engaged in an act of espionage or was convicted of violating a law relating to espionage.

(2) An alien who has knowledge of, or has received instruction in, the espionage or counter-espionage service or tactics of a foreign government in violation of 50 U.S.C. § 851 (1994), is deportable under section 241(a)(4)(A)(i) of the Act.

GOOD MORAL CHARACTER

Matter of R-S-J-, 22 I&N Dec. 863 (BIA 1999)

For purposes of section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6) (1994), false oral statements under oath to an asylum officer can constitute false testimony as defined by the United States Court of Appeals for the Ninth Circuit in Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), rev'd on other grounds, 464 U.S. 183 (1984).

IN ABSENTIA PROCEEDINGS

Exceptional Circumstances

Matter of Grijalva, 21 I&N Dec. 472 (BIA 1996)

An order of deportation issued following a hearing conducted in absentia may be rescinded under section 242B(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3)(Supp. V 1993), where an alien properly establishes that his failure to appear was the result of ineffective assistance of counsel which amounts to "exceptional circumstances" within the meaning of section 242B(f)(2) of the Act.

Matter of S-A-, 21 I&N Dec. 1050 (BIA 1997) (Traffic)

An applicant's general assertion that he was prevented from reaching his hearing on time by heavy traffic does not constitute reasonable cause that would warrant reopening of his in absentia exclusion proceedings.

Matter of Ali, 21 I&N Dec. 1058 (BIA 1997) (Illness and Injury)

Neither an alien's long-standing minor illness existing prior to a grant of voluntary departure nor an allegation of serious illness to others, including family members, establishes the requisite exceptional circumstances under section 242B(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(f)(2) (1994), in the absence of evidence specifying how such circumstances resulted in the alien's failure to depart, which renders him or her ineligible for certain forms of discretionary relief from deportation under section 242B(e)(2) of the Act.

Matter of J-P-, 22 I&N Dec. 33 (BIA 1998) (Illness and Injury)

An alien failed to establish that a serious headache he suffered on the day of his deportation hearing amounted to exceptional circumstances to excuse his failure to appear within the meaning of section 242B(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(f)(2)(1994), where he gave no explanation for neglecting to contact the Immigration Court on the day of the hearing and did not support his claim with medical records or other evidence, such as affidavits by persons with knowledge regarding the extent and seriousness of the alien's headache and the remedies he used to treat it.

Matter of S-M-, 22 I&N Dec. 49 (BIA 1998) (Illegible Hearing Date)

An alien who claimed that his failure to appear at his deportation hearing resulted from an "illegible hearing date" on the Order to Show Cause and Notice of Hearing (Form I-221) failed to establish by sufficient evidence that he received inadequate notice of the hearing under section 242B(c)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3)(B)(1994), or that his absence was the result of exceptional circumstances under section 242B(c)(3)(A) of the Act.

Matter of B-A-S-, 22 I&N Dec. 57 (BIA 1998) (Illness and Injury)

An alien failed to establish that a foot injury he suffered on the day before his deportation hearing amounted to exceptional circumstances to excuse his failure to appear within the meaning of section 242B(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(f)(2)(1994), where he gave no explanation for neglecting to contact the Immigration Court before the hearing and did not support his claim with medical records or other evidence, such as an affidavit from his employer.

Exclusion Proceedings

Matter of N-B-, 22 I&N Dec. 590 (BIA 1999)

The regulatory language at 8 C.F.R. § 3.23(b)(4)(iii)(B) (1998) contains no time or numerical limitations on aliens who wish to file a motion to reopen exclusion proceedings conducted in absentia.

Immigration Judges

Matter of W-F-, 21 I&N Dec. 503 (BIA 1996)

(1) The provisions of section 242B of the Immigration and Nationality Act, 8 U.S.C. § 1252b (1994), apply any time an alien, whose presence has not been excused by the Immigration Judge, fails to appear for a deportation hearing after proper notice has been issued pursuant to section 242B, regardless of whether the issue of deportability has already been addressed or resolved and regardless of whether the alien has someone else appear on his behalf.

(2) An Immigration Judge retains the authority to properly excuse an alien's presence at a hearing, to grant a continuance, or to change venue for good cause shown by the alien or the Immigration and Naturalization Service either prior to or at the time of the deportation hearing.

(3) If an alien's presence at a deportation hearing has not been excused, and any request for a rescheduling of the hearing has been denied, the provisions of section 242B apply and a challenge to the entry of an in absentia deportation order based on the alien's failure to appear is governed by the "rescission" provisions of section 242B(c)(3) of the Act.

Ineffective Assistance of Counsel

Matter of Rivera, 21 I&N Dec. 599 (BIA 1996)

An alien seeking to reopen in absentia proceedings based on her unsuccessful communications with her attorney did not establish exceptional circumstances pursuant to section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3)(A) (1994), where she failed to satisfy all of the requirements for an ineffective assistance of counsel claim set out in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988).

Matter of N-K-/V-S-, 21 I&N Dec. 879 (BIA 1997)

A claim of ineffective assistance of counsel can, if the applicant meets the requirements set forth in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), form the basis of a successful motion to reopen exclusion proceedings where the applicant was ordered excluded in an in absentia hearing.

Matter of Lei, 22 I&N Dec. 113 (BIA 1998)

A claim of ineffective assistance of counsel does not constitute an exception to the 180-day statutory limit for the filing of a motion to reopen to rescind an in absentia order of deportation under section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3)(A) (1994), on the basis of exceptional circumstances.

Matter of A-A-, 22 I&N Dec. 140 (BIA 1998)

A claim of ineffective assistance of counsel does not constitute an exception to the 180-day statutory limit for the filing of a motion to reopen to rescind an in absentia order of deportation under section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3)(A) (1994), on the basis of exceptional circumstances.

Jurisdiction

Matter of Guzman, 22 I&N Dec. 722 (BIA 1999)

The Board of Immigration Appeals lacks jurisdiction to consider an appeal from an in absentia order in removal proceedings where section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(5)(C) (Supp. II 1996), provides that such an order may only be rescinded by filing a motion to reopen with the Immigration Judge. Matter of Gonzalez-Lopez, 20 I&N Dec. 644 (BIA 1993), followed.

Notice to Alien

Matter of Grijalva, 21 I&N Dec. 27 (BIA 1995)

(1) Under section 242B(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(a)(1) (Supp. V 1993), service of the Order to Show Cause (Form I-221) must be given in person to the respondent or, if personal service is not practicable, such notice must be given by certified mail to the respondent or to his counsel of record, if any, with the requirement that the certified mail receipt be signed by the respondent or a responsible person at the respondent's address to accomplish personal service. Matter of Huete, 20 I&N Dec. 250 (BIA 1991), followed.

(2) Under sections 242B(a)(2) and (c)(1) of the Act, written notice of the deportation proceedings sent by certified mail to the respondent at the last address provided by the respondent is sufficient to establish proper service by clear, unequivocal, and convincing evidence. Proof of actual service or receipt of the notice by the respondent is not required to effect service. It is incumbent upon the respondent to provide an address where he can receive mail in a regular and timely manner.

(3) For purposes of section 242B(a)(2) of the Act, "in person" service of the notice of deportation proceeding is deemed "not practicable" when the respondent is not in immigration court before the Immigration Judge.

(4) In cases where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises which only may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service.

Matter of Powell, 21 I&N Dec. 81 (BIA 1995)

(1) Under section 242B(e)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(e)(3) (1994), an alien who has received oral notice in the alien's native language or in another language the alien understands and written notice in the final order of deportation of the consequences for failing to appear for deportation, and who nevertheless fails to appear for deportation at the time and place ordered, other than because of exceptional circumstances, is ineligible for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255 (1994), for a period of 5 years after the date the alien was required to appear for deportation.

(2) When the Board of Immigration Appeals dismisses an appeal from an order of deportation issued an Immigration Judge, the Immigration Judge's order becomes the final order of deportation on the date of the Board's decision.

(3) Written notice of the consequences of an alien's failure to appear for deportation, provided in conjunction with an Immigration Judge's final order of deportation, constitutes the written notice required by section 242B(e)(3) of the Act.

Matter of Villalba, 21 I&N Dec. 842 (BIA 1997) (Order to Show Cause Warnings)

(1) Language contained in the Order to Show Cause and Notice of Hearing (Form I-221), which provides that notice of deportation hearings will be sent only to a respondent's last known address and that failure to provide an address may result in an in absentia hearing, is a reasonable construction of the notice requirements set forth in section 242B of the Immigration and Nationality Act, 8 U.S.C. § 1252b (1994).

(2) The prohibition set forth in Purba v. INS, 884 F.2d 516 (9th Cir. 1989), that a deportation hearing may not be conducted telephonically absent a respondent's affirmative waiver of the right to appear in person, does not apply in properly conducted in absentia proceedings.

Matter of Mancera, 22 I&N Dec. 79 (BIA 1998) (Proceedings under former section 242(b))

A motion to reopen deportation proceedings conducted in absentia pursuant to section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(1994), that demonstrates a lack of notice of the scheduled hearing is excepted from the regulatory time limitations on motions.

Matter of G-Y-R-, 23 I&N Dec. 181 (BIA 2001)

(1) When an alien fails to appear at removal proceedings for which notice of the hearing was served by mail, an in absentia order may only be entered where the alien has received, or can be charged with receiving, a Notice to Appear (Form I-862) informing the alien of the statutory address obligations associated with removal proceedings and of the consequences of failing to provide a current address, pursuant to section 239(a)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a)(1)(F) (Supp. V 1999).

(2) Entry of an in absentia order of removal is inappropriate where the record reflects that the alien did not receive, or could not be charged with receiving, the Notice to Appear that was served by certified mail at an address obtained from documents filed with the Immigration and Naturalization Service several years earlier.

Section 242(b) Proceedings

Matter of Cruz-Garcia, 22 I&N Dec. 1155 (BIA 1999)

(1) The regulation at 8 C.F.R. § 3.23(b)(4)(iii) (1998) imposes no time or numerical limitation on aliens seeking to reopen deportation proceedings conducted in absentia pursuant to section 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (1988). Matter of Mancera, 22 I&N Dec. 79 (BIA 1998), reaffirmed.

(2) When an alien seeks to reopen deportation proceedings conducted in absentia pursuant to section 242(b) of the Act, it is appropriate to apply the "reasonable cause" standard, not the "exceptional circumstances" standard set forth in section 242B of the Act, 8 U.S.C. § 1252b (Supp. II 1990).

(3) An alien who asserted for the first time on appeal that her failure to appear at a deportation hearing was the result of ineffective assistance of counsel, but who failed to comply with the requirements for such a claim, has not shown "reasonable cause" that warrants reopening of the proceedings.

Stays

Matter of Rivera, 21 I&N Dec. 232 (BIA 1996)

The automatic stay of deportation associated with the filing of a motion to reopen an in absentia hearing pursuant to section 242B(c)(3) of the Immigration and Nationality Act, 8 U.S.C. 1252b(c)(3)(1994), continues during the pendency of an appeal from the denial of such a motion.

Voluntary Departure

Matter of Singh, 21 I&N Dec. 998 (BIA 1997)

Matter of Shaar, 21 I&N Dec.3290 (BIA 1996), is not applicable to an alien who was ordered deported at an in absentia hearing and has therefore not remained beyond a period of voluntary departure; consequently, the proceedings may be reopened upon the filing of a timely motion showing exceptional circumstances for failure to appear. Matter of Shaar, supra, distinguished.

Warnings for Failure to Appear

Matter of M-S-, 22 I&N Dec. 349 (BIA 1998)

(1) Where an alien who did not receive oral warnings of the consequences of failing to appear at a deportation hearing pursuant to section 242B(a) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(a) (1994), moves to reopen deportation proceedings held in absentia under section 242B(c) of the Act in order to apply for a form of relief that was unavailable at the time of the hearing, the rescission requirements prescribed by section 242B(c)(3) of the Act are not applicable. Instead, the motion to reopen is subject to the regulatory requirements set forth at 8 C.F.R. §§ 3.2(c) 3.23(b)(3) (1998).

(2) Where deportation proceedings held in absentia are reopened to allow for an application for new relief, the Immigration Judge must determine in each individual case the weight to be accorded to the alien's explanation for failing to appear at the hearing and whether such explanation is a favorable or adverse factor with respect to the ultimate discretionary determination.

INEFFECTIVE ASSISTANCE OF COUNSEL

Advice to Client

Matter of B-B-, 22 I&N Dec. 309 (BIA 1998)

Where counsel's insistence on corroborating evidence discouraged the respondents from seeking asylum, but was reasonable in light of case precedent, there is no showing of ineffective assistance of counsel.

In Absentia Proceedings

Matter of Rivera, 21 I&N Dec. 599 (BIA 1996)

An alien seeking to reopen in absentia proceedings based on her unsuccessful communications with her attorney did not establish exceptional circumstances pursuant to section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3)(A) (1994), where she failed to satisfy all of the requirements for an ineffective assistance of counsel claim set out in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988).

Matter of N-K-/V-S-, 21 I&N Dec. 879 (BIA 1997)

A claim of ineffective assistance of counsel can, if the applicant meets the requirements set forth in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), form the basis of a successful motion to reopen exclusion proceedings where the applicant was ordered excluded in an in absentia hearing.

Matter of Lei, 22 I&N Dec. 113 (BIA 1998)

A claim of ineffective assistance of counsel does not constitute an exception to the 180-day statutory limit for the filing of a motion to reopen to rescind an in absentia order of deportation under section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3)(A) (1994), on the basis of exceptional circumstances.

Matter of A-A-, 22 I&N Dec. 140 (BIA 1998)

A claim of ineffective assistance of counsel does not constitute an exception to the 180-day statutory limit for the filing of a motion to reopen to rescind an in absentia order of deportation under section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3)(A) (1994), on the basis of exceptional circumstances.

MARRIAGE FRAUD

Marriage During Proceedings

Matter of Casillas, 22 I&N Dec. 154 (BIA 1998)

In order to commence proceedings against an alien for purposes of sections 204(g) and 245(e)(2) of the Immigration and Nationality Act, 8 U.S.C. §§ 1154(g) and 1255(e)(2) (1994),an Order to Show Cause and Notice of Hearing (Form I-221) that was issued on or after June 20, 1991, must be filed with the Immigration Court. Matter of Fuentes, 20 I&N Dec. 227 (BIA 1991), superseded.

Section 216(c)(4) Hardship Waivers

Matter of Stowers, 22 I&N Dec. 605 (BIA 1999)

(1) An alien whose conditional permanent residence was terminated by the Immigration and Naturalization Service under section 216(b) of the Immigration and Nationality Act, 8 U.S.C. § 1186a(b) (1994), before the 90-day petitioning period preceding the second anniversary of the grant of status, may file an application for a waiver under section 216(c)(4) of the Act, 8 U.S.C. § 1186a(c)(4).

(2) Where an alien is prima facie eligible for a waiver under section 216(c)(4) of the Act and wishes to have the Service adjudicate an application for such waiver, proceedings should be continued in order to allow the Service to adjudicate the application. Matter of Mendes, 20 I&N Dec. 833 (BIA 1994).

MINORS

Matter of Amaya, 21 I&N Dec. 583 (BIA 1996)

(1) Service of an Order to Show Cause issued against a minor under 14 years of age may properly be made on the director of a facility in which the minor is detained pursuant to 8 C.F.R. § 103.5a(c)(2)(ii) (1996).

(2) Although under 8 C.F.R. § 242.16(b) (1996), an Immigration Judge may not accept the admission to a charge of deportability by an unaccompanied and unrepresented minor under the age of 16, the regulation does not preclude an Immigration Judge from accepting such a minor's admissions to

factual allegations, which may properly form the sole basis of a finding that such a minor is deportable.

(3) Even where an unaccompanied and unrepresented minor under the age of 16 years admits to the factual allegations made against him, an Immigration Judge must take into consideration the minor's age and pro se and unaccompanied status in determining, after a comprehensive and independent inquiry, whether the minor's testimony is reliable and whether he understands any facts that are admitted, such that his deportability is established by clear, unequivocal, and convincing evidence.

Matter of Ponce-Hernandez, 22 I&N Dec. 784 (BIA 1999)

The Immigration and Naturalization Service met its burden of establishing a minor respondent's deportability for entry without inspection by clear, unequivocal, and convincing evidence, where (1) a Record of Deportable Alien (Form I-213) was submitted, documenting the respondent's identity and alienage; (2) the respondent, who failed without good cause to appear at his deportation hearing, made no challenge to the admissibility of the Form I-213; and (3) there were no grounds for a finding that the admission of the Form I-213 would be fundamentally unfair.

MOTIONS TO RECONSIDER

Deadlines

Matter of Goolcharan, 23 I&N Dec. 5 (BIA 2001)

The regulatory deadline for filing a motion to reopen or motion to reconsider before the Immigration Judge is determined by the date on which the Immigration Judge entered a final administrative order, and the regulatory deadline is not affected by subsequent actions taken by the Immigration and Naturalization Service in the course of executing the Immigration Judge's order.

Sua Sponte Authority

Matter of J-J-, 21 I&N Dec. 976 (BIA 1997)

(1) A motion to reconsider a decision of the Board of Immigration Appeals must be filed not later than 30 days after the mailing of the decision, or on or before July 31, 1996, whichever date is later. Only one motion to reconsider may be filed, and there is no exception to the time bar imposed on such motions.

(2) Only one motion to reopen is allowed and must be filed with the Board not later than 90 days after the date on which the final administrative decision was rendered, or on or before September 30, 1996, whichever date is later. An exception exists for motions to reopen to apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality, if evidence is presented that is material and was not available and could not have been discovered or presented at the former hearing.

(3) An appeal or motion is deemed filed when it is received at the Board, irrespective of whether the alien is in custody.

(4) The Board's power to reopen or reconsider cases sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship.

Untimely Appeals

Matter of Lopez, 22 I&N Dec. 16 (BIA 1998)

Where the Board of Immigration Appeals dismisses an appeal as untimely, without adjudication on the merits, the Board retains jurisdiction over a motion to reconsider its dismissal of the untimely appeal to the extent that the motion challenges the finding of untimeliness or requests consideration of the reasons for untimeliness. Matter of Mladineo, 14 I&N Dec. 591 (BIA 1974), modified.

MOTIONS TO REMAND

Joint Motions

Matter of Yewondwosen, 21 I&N Dec. 1025 (BIA 1997)

Where an alien has not strictly complied with the regulatory requirements of 8 C.F.R. § 3.2(c)(1) (1997) by failing to submit an application for relief in support of a motion to reopen or remand, but the Immigration and Naturalization Service affirmatively joins the motion, the Board of Immigration Appeals or an Immigration Judge may still grant the motion.

Time and Number Limits

Matter of L-V-K-, 22 I&N Dec. 976 (BIA 1999)

(1) An Immigration Judge's order of deportation becomes a final administrative decision upon an alien's waiver of the right to appeal.

(2) Where an alien files a motion to remand during the pendency of an appeal from an Immigration Judge's denial of a motion to reopen a final administrative decision and more than 90 days have passed since entry of that final administrative decision, the Board of Immigration Appeals lacks jurisdiction to adjudicate the motion because it is time-barred by 8 C.F.R. § 3.2(c)(2) (1999).

Matter of Oparah, 23 I&N Dec. 1 (BIA 2000)

A motion to remand submitted during the pendency of an appeal from an Immigration Judge's denial of an untimely motion to reopen and filed after the entry of a final administrative decision does not cure the untimeliness of the initial motion to reopen, nor is it excepted from the numerical restriction that permits the filing of only one motion to reopen.

MOTIONS TO REOPEN

Burden of Proof

Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996)

(1) Reopening may be had where the new facts alleged, together with the facts already of record, indicate a reasonable likelihood of success on the merits, so as to make it worthwhile to develop the issues at a hearing. Where ruling on a motion requires the exercise of judgment regarding eligibility for the relief sought, the Board does not require a conclusive showing that, assuming the facts alleged to be true, eligibility for relief has been established. By granting reopening the Board does not rule on the ultimate merits of the application for relief. Matter of Sipus, 14 I&N Dec. 229 (BIA 1972), reaffirmed.

(2) Reopening to apply for suspension of deportation is granted where 1) the 15-year-old respondent has lived in the United States since the age of 6; 2) the adult respondent, her mother, also has a 6-year-old United States citizen child; 3) the respondents are from a country where economic and political conditions are poor; and 4) the respondents have been covered by the Nicaraguan Review Program since 1987.

Matter of Beckford, 22 I&N Dec. 1216 (BIA 2000)

(1) Where an alien has filed an untimely motion to reopen alleging that the Immigration and Naturalization Service failed to prove the alien's removability, the burden of proof no longer lies with the Service to establish removability, but shifts to the alien to demonstrate that an exceptional situation exists that warrants reopening by the Board of Immigration Appeals on its own motion.

(2) Where an alien seeking to reopen removal proceedings failed to demonstrate a substantial likelihood that the result in his case would be changed if the proceedings were reopened, by showing that he was not, in fact, removable, he failed to present an exceptional situation to warrant a grant of his untimely motion.

Coercive Family Planning Claims

Matter of X-G-W-, 22 I&N Dec. 71 (BIA 1998) (superseded by *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002)

Due to a fundamental change in the definition of a "refugee" brought about by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, the Board of Immigration Appeals will allow reopening of proceedings to pursue asylum claims based on coerced population control policies, notwithstanding the time and number limitations on motions specified in 8 C.F.R. § 3.2 (1997).

Matter of G-C-L-, 23 I&N Dec. 359 (BIA 2002)

The Board of Immigration Appeals withdraws from its policy of granting untimely motions to reopen by applicants claiming eligibility for asylum based solely on coercive population control policies, effective 90 days from the date of this decision. Matter of X-G-W-, 22 I&N Dec. 71 (BIA 1998), superseded.

Deadlines

Matter of Goolcharan, 23 I&N Dec. 5 (BIA 2001)

The regulatory deadline for filing a motion to reopen or motion to reconsider before the Immigration Judge is determined by the date on which the Immigration Judge entered a final administrative order, and the regulatory deadline is not affected by subsequent actions taken by the Immigration and Naturalization Service in the course of executing the Immigration Judge's order.

Joint Motions

Matter of Yewondwosen, 21 I&N Dec. 1025 (BIA 1997)

Where an alien has not strictly complied with the regulatory requirements of 8 C.F.R. § 3.2(c)(1) (1997) by failing to submit an application for relief in support of a motion to reopen or remand, but the Immigration and Naturalization Service affirmatively joins the motion, the Board of Immigration Appeals or an Immigration Judge may still grant the motion.

Jurisdisdiction

Matter of Crammond, 23 I&N Dec. 179 (BIA 2001) (vacating *Matter of Crammond*, 23 I&N Dec. 9 (BIA 2001)

(1) The Board of Immigration Appeals lacks jurisdiction over a motion to reopen where the motion is withdrawn, within the meaning of 8 C.F.R. § 3.2(d) (2001), by the departure of the alien from the United States prior to a ruling on the motion.

(2) When the Board is presented with evidence that it has granted a motion to reopen after the alien's departure from the United States, it is appropriate to reconsider and vacate the prior order on jurisdictional grounds. Matter of Crammond, 23 I&N Dec. 9 (BIA 2001), vacated.

Sua Sponte Authority

Matter of J-J-, 21 I&N Dec. 976 (BIA 1997)

(1) A motion to reconsider a decision of the Board of Immigration Appeals must be filed not later than 30 days after the mailing of the decision, or on or before July 31, 1996, whichever date is later. Only one motion to reconsider may be filed, and there is no exception to the time bar imposed on such motions.

(2) Only one motion to reopen is allowed and must be filed with the Board not later than 90 days after the date on which the final administrative decision was rendered, or on or before September 30, 1996, whichever date is later. An exception exists for motions to reopen to apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality, if evidence is presented that is material and was not available and could not have been discovered or presented at the former hearing.

(3) An appeal or motion is deemed filed when it is received at the Board, irrespective of whether the alien is in custody.

(4) The Board's power to reopen or reconsider cases sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship.

Matter of G-D-, 22 I&N Dec. 1132 (BIA 1999)

In order for a change in the law to qualify as an exceptional situation that merits the exercise of discretion by the Board of Immigration Appeals to reopen or reconsider a case sua sponte, the change must be fundamental in nature and not merely an incremental development in the state of the law.

Time and Number Limits

Matter of H-A-, 22 I&N Dec. 728 (BIA 1999) (modified, *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002)

Matter of Arthur, 20 I&N Dec. 475 (BIA 1992), is not inconsistent with the motions to reopen regulations at 8 C.F.R. §§ 3.2(c)(2) and 3.23(b)(4)(i) (effective July 1, 1996). Matter of Arthur, supra, reaffirmed.

Matter of Velarde-Pacheco, 23 I&N Dec. 253 (BIA 2002)

A properly filed motion to reopen for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted in the exercise of discretion, notwithstanding the pendency of a visa petition filed on the alien's behalf, where: (1) the motion to reopen is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by Matter of Shaar, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds; (4) clear and convincing evidence is presented indicating a strong likelihood that the marriage is bona fide; and (5) the Immigration and Naturalization Service does not oppose the motion or bases its opposition solely on Matter of Arthur, 20 I&N Dec. 475 (BIA 1992). Matter of H-A-, 22 I&N Dec. 728 (BIA 1999), and Matter of Arthur, supra, modified.

Matter of Susma, 22 I&N Dec. 947 (BIA 1999)

(1) Pursuant to 8 C.F.R. § 3.2(c)(2) (1999), a motion to reopen must be filed no later than 90 days after the date of the final administrative decision of the Immigration Judge or the Board of Immigration Appeals.

(2) A motion to reopen a decision of the Board following judicial review is untimely if it is filed more than 90 days after the date of the Board's decision, even if the motion is filed within 90 days of the order of the court.

Matter of Oparah, 23 I&N Dec. 1 (BIA 2000)

A motion to remand submitted during the pendency of an appeal from an Immigration Judge's denial of an untimely motion to reopen and filed after the entry of a final administrative decision does not cure the untimeliness of the initial motion to reopen, nor is it excepted from the numerical restriction that permits the filing of only one motion to reopen.

Voluntary Departure

Matter of Shaar, 21 I&N Dec. 541 (BIA 1996)

(1) An alien who has filed a motion to reopen during the pendency of a voluntary departure period in order to apply for suspension of deportation and who subsequently remains in the United States after the scheduled date of departure is statutorily ineligible for suspension of deportation pursuant to section 242B(e)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(e)(2)(A) (Supp.

V 1993), if the notice requirements of that section have been satisfied, absent a showing that the alien's failure to timely depart the United States was due to "exceptional circumstances" under section 242B(f)(2) of the Act.

(2) Neither the filing of a motion to reopen to apply for suspension of deportation during the pendency of a period of voluntary departure, nor the Immigration Judge's failure to adjudicate the motion to reopen prior to the expiration of the alien's voluntary departure period constitutes an "exceptional circumstance."

ORDERS TO SHOW CAUSE

Matter of Hernandez, 21 I&N Dec. 224 (BIA 1996)

(1) The violation of 8 C.F.R. § 242.1(c) (1995), which requires that the contents of an Order to Show Cause and Notice of Hearing (Form I-221) be explained to an alien under certain circumstances, does not necessarily result in prejudice to the alien.

(2) Where an alien raises the issue of violation of 8 C.F.R. § 242.1(c), and the Immigration Judge finds that the alien was prejudiced by such violation, the Immigration Judge, where possible, can and should take corrective action short of termination of the proceedings.

(3) The explanation requirement of 8 C.F.R. § 242.1(c) is not jurisdictional. As long as the statutory requirements regarding the Order to Show Cause and regarding notice of deportation proceedings are satisfied, and the alien appears for the scheduled hearing, service of the order without prior explanation of its contents by the Service is sufficient to confer jurisdiction over the alien.

RECOGNITION AND ACCREDITATION

Matter of Chaplain Services, 21 I&N Dec. 578 (BIA 1996)

(1) In an application for recognition, an applicant must respond to and successfully rebut an adverse recommendation made by the district director, even when such recommendation has been made in a prior recognition proceeding involving the applicant.

(2) Denial of the applicant's recognition request is justified by unrebutted allegations in the district director's recommendation made in prior recognition proceedings that the applicant's personnel supplied clients with misinformation; that the applicant improperly submitted Notices of Entry of Appearance as Attorney or Representative (Forms G-28) on behalf of a purportedly associated attorney who never performed services; that the applicant's clients had been charged excessive amounts for services in spite of the applicant's fee list which reflects nominal charges; and that the member of the applicant's staff upon whose expertise the applicant relies has been the subject of complaints for the unauthorized practice of law.

REMOVAL PROCEEDINGS

Alienage and Identity

Matter of Ponce-Hernandez, 22 I&N Dec. 784 (BIA 1999)

The Immigration and Naturalization Service met its burden of establishing a minor respondent's deportability for entry without inspection by clear, unequivocal, and convincing evidence, where (1) a Record of Deportable Alien (Form I-213) was submitted, documenting the respondent's identity and alienage; (2) the respondent, who failed without good cause to appear at his deportation hearing, made no challenge to the admissibility of the Form I-213; and (3) there were no grounds for a finding that the admission of the Form I-213 would be fundamentally unfair.

Immigration Judges

Matter of A-P-, 22 I&N Dec. 468 (BIA 1999)

(1) A summary decision pursuant to 8 C.F.R. § 240.12(b) (1998) may properly be issued by an Immigration Judge in removal proceedings in lieu of an oral or written decision only when the respondent has expressly admitted to both the factual allegations and the charges of removability; and, either the respondent's ineligibility for any form of relief is clearly established on the pleadings; or, after appropriate advisement of and opportunity to apply for any form of relief for which it appears from the pleadings that he or she may be eligible, the respondent chooses not to apply for relief or applies only for, and is granted, the relief of voluntary departure.

(2) A summary decision should adequately link the respondent's admissions to the factual allegations and the charges of removability to the applicable law.

(3) When an Immigration Judge issues an oral decision, the transcribed oral decision shall be included in the record in a manner that clearly separates it from the remainder of the transcript.

Matter of Rodriguez-Carrillo, 22 I&N Dec. 1031 (BIA 1999)

A remand of the record for issuance of a full and separate decision apprising the parties of the legal basis of the Immigration Judge's decision is not required under Matter of A-P-, 22 I&N Dec. 468 (BIA 1999), where the respondent had notice of the factual and legal basis of the decision and had an adequate opportunity to contest them on appeal, the uncontested facts established at the hearing are dispositive of the issues raised on appeal, and the hearing was fundamentally fair.

Prosecutorial Discretion

Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998)

(1) A decision by the Immigration and Naturalization Service to institute removal or other proceedings, or to cancel a Notice to Appear or other charging document before jurisdiction vests with the Immigration Judge, involves the exercise of prosecutorial discretion and is not a decision that the Immigration Judge or this Board may review.

(2) Once the charging document is filed with the Immigration Court and jurisdiction is vested in the Immigration Judge, the Service may move to terminate the proceedings, but it may not simply cancel the charging document. The Immigration Judge is not required to terminate proceedings upon the Service's invocation of prosecutorial discretion but rather must adjudicate the motion on the merits according to the regulations at 8 C.F.R. § 239.2 (1998).

(3) The Immigration Judge and the Board of Immigration Appeals lack jurisdiction to review a decision of the Immigration and Naturalization Service to reinstate a prior order of removal pursuant to section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(5) (Supp. II 1996).

SECTION 209(C) WAIVERS

Matter of H-N-, 22 I&N Dec. 1039 (BIA 1999)

The Immigration Judge and the Board of Immigration Appeals have jurisdiction to adjudicate an alien's request for a waiver of inadmissibility pursuant to section 209(c) of the Immigration and Nationality Act, 8 U.S.C. § 1159(c) (1994 & Supp. II 1996), following the initial denial of such a waiver by the Immigration and Naturalization Service.

Matter of Jean, 23 I&N Dec. 323 (A.G. 2002)

(1) The 30-day period set forth in 8 C.F.R. § 3.38(b) (2002) for filing an appeal to the Board of Immigration Appeals is mandatory and jurisdictional, and it begins to run upon the issuance of a final disposition in the case.

(2) The Board of Immigration Appeals' authority under 8 C.F.R. § 3.1(c) (2002) to certify cases to itself in its discretion is limited to exceptional circumstances, and is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.

(3) In evaluating the propriety of granting an otherwise inadmissible alien a discretionary waiver to permit adjustment of status from refugee to lawful permanent resident pursuant to section 209(c) of the Immigration and Nationality Act, 8 U.S.C. § 1159(c) (2000), any humanitarian, family unity preservation, or public interest considerations must be balanced against the seriousness of the criminal offense that rendered the alien inadmissible.

(4) Aliens who have committed violent or dangerous crimes will not be granted a discretionary waiver to permit adjustment of status from refugee to lawful permanent resident pursuant to section 209(c) of the Act except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient.

(5) Aliens who have committed violent or dangerous crimes will not be granted asylum, even if they are technically eligible for such relief, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient.

SECTION 212(C) WAIVERS

Adjustment of Status

Matter of Rodarte, 21 I&N Dec. 150 (BIA 1995)

(1) The regulations at 8 C.F.R. § 245.1(f) (1995) permit concurrent applications for relief under sections 212(c) and 245 of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(c) and 1255 (1994). Matter of Gabryelsky, 20 I&N Dec. 750 (BIA 1993), clarified.

(2) The regulation applies where the respondent is seeking further consideration of his section 212(c) application, as well as where initial consideration of the application is sought.

(3) Reopening to allow the respondent to apply for section 212(c) and section 245 relief is granted where the respondent last appeared before an Immigration Judge in 1990, and since that time has married a United States citizen, had two citizen children, worked steadily, and maintained a clean record.

Aggravated Felonies

Matter of Gonzalez, 21 I&N Dec. 937 (BIA 1997)

An alien who is deportable under sections 241(a)(2)(A)(iii) and (B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(2)(A)(iii) and (B)(i) (1994), is ineligible for a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994), as amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996), regardless of whether the waiver is requested alone or in conjunction with an application for adjustment of status.

Matter of Fortiz, 21 I&N Dec. 1199 (BIA 1998)

(1) An alien who is deportable under section 241(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(ii) (1994), as an alien convicted of two or more crimes involving moral turpitude, and whose deportation proceedings were initiated prior to the April 24, 1996, enactment date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), is not ineligible for a waiver under section 212(c) of the Act (to be codified at 8 U.S.C. § 1182(c)) unless more than one conviction resulted in a sentence or confinement of 1 year or longer pursuant to the former version of section 241(a)(2)(A)(i)(II), prior to its amendment by the AEDPA.

(2) For an alien to be barred from eligibility for a waiver under section 212(c) of the Act as one who "is deportable" by reason of having committed a criminal offense covered by one of the criminal deportation grounds enumerated in the statute, he or she must have been charged with, and found deportable on, such grounds.

Drug Offenses

Matter of Fuentes-Campos, 21 I&N Dec. 905 (BIA 1997)

An applicant for admission in exclusion proceedings who is inadmissible on the basis of a controlled substance offense is statutorily eligible for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), as amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277.

Factors

Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995)

(1) An alien who has committed a serious drug offense faces a difficult task in establishing that she merits discretionary relief; nevertheless, the applicant met her burden of demonstrating that relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (Supp. V 1993), was warranted where this was her only conviction, the sentencing court noted her acceptance of responsibility and "minor role" in the offense, there was substantial evidence of efforts toward rehabilitation, and the applicant presented unusual or outstanding equities, including nearly 20 years of lawful residence and two minor dependent United States citizen children.

(2) In considering the factors to be weighed in the exercise of discretion with regard to an application for relief under section 212(c) of the Act, evidence such as community ties, property and business holdings, or special service to the community are to be considered in the applicant's favor; however, the absence of those additional ties in themselves does not negate the weight to be accorded an applicant's long residence in this country.

Falsification of Documents

Matter of Jimenez, 21 I&N Dec. 567 (BIA 1996)

A waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), is not available to waive an alien's deportability under section 241(a)(3)(B)(iii) of the Act, 8 U.S.C. § 1251(a)(3)(B)(iii) (1994), as an alien convicted of a violation of 18 U.S.C. § 1546 (1994), because there is no comparable statutory counterpart to section 241(a)(3)(B)(iii) among the various grounds for exclusion enumerated in section 212(a) of the Act. Matter of Esposito, 21 I&N Dec. 1 (BIA 1995); Matter of Hernandez-Casillas, 20 I & N Dec. 262 (BIA 1990; A.G. 1991), aff'd, 983 F.2d 231 (5th Cir.1993); Matter of Wadud, 19 I & N Dec. 182 (BIA 1984), followed.

Residence and Domicile

Matter of Ponce de Leon, 21 I&N Dec. 154 (BIA 1996, 1997; A.G. 1997)

Absent contrary circuit court precedent, the Board of Immigration Appeals will follow 8 C.F.R. § 212.3(f)(2) (1995), which states that an application for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), shall be denied if the alien has not maintained lawful permanent resident status in the United States for at least 7 consecutive years.

Matter of Cazares, 21 I&N Dec. 188 (BIA 1996, 1997; A.G. 1997)

(1) In cases arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the Board of Immigration Appeals will follow the holding of that court in Ortega de Robles v. INS, 58 F.3d 1355 (9th Cir.1995), that a lawful permanent resident, who gained such status under section 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a (1994), by first becoming a lawful temporary resident, establishes "lawful domicile" for under section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994), for purposes of eligibility as of the date the alien filed his or her application for temporary resident status.

(2) Although Ortega de Robles v. INS, supra, is in conflict with and does not explicitly address the provisions of 8 C.F.R. § 212.3(f)(2) (1995), an Attorney General regulation that would otherwise control the Immigration Judges and this Board, the Board will not decline to follow the holding in Ortega de Robles in cases arising within the Ninth circuit, particularly where the court has ruled on the specific legal issue before the Board, the Immigration and Naturalization Service does not argue that the relevant regulation represents anything other than the codification of prior Board precedent, and the Service has advised the Board that the Attorney General has decided not to seek further

review of that court decision and that "a 'Departmental review' with a view to amendment of the regulation will be conducted."

Retroactivity

Matter of Davis, 22 I&N Dec. 1411 (BIA 2000)

(1) Pursuant to Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), cert. denied sub nom. Reno v. Navas, 526 U.S. 1004 (1999), a respondent within the jurisdiction of the United States Court of Appeals for the Second Circuit whose deportation proceedings were pending on April 24, 1996, is not subject to the amendments made to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 ("AEDPA"), as amended by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(d), 110 Stat. 3009-546, 3009-612.

(2) A respondent convicted of an aggravated felony for which he served more than 5 years in prison is barred from establishing eligibility for a section 212(c) waiver if the provisions of section 440(d) of the AEDPA are inapplicable to him.

Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997) (superseded by regulation)

(1) The 1996 amendments to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), bar relief to aliens deportable by reason of having committed any of the criminal offenses described in the amended section 212(c).

(2) The bar to relief under the amended section 212(c) applies only to applications filed after the April 24, 1996, date of enactment of the amendments.

(3) The respondent remained eligible for relief under the amended section 212(c) of the Act because his application for that relief had been filed by April 24, 1996.

SECTION 212(H) WAIVERS

Matter of Yeung, 21 I&N Dec. 610 (BIA 1996, 1997)

(1) Under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (1994), as amended by section 348(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ("IIRIRA"), an alien who has been admitted to the United States as a lawful permanent resident and who has been convicted of an aggravated felony since the date of such admission is ineligible for a waiver.

(2) The amendment to section 212(h) of the Act is effective on the date of the enactment of the IIRIRA (September 30, 1996) and applies to aliens who were in exclusion and deportation proceedings as of that date.

(3) The respondent is ineligible for relief under section 212(h) of the Act because he was convicted of an aggravated felony.

(4) An aggravated felon whose order of deportation had been reversed by a court of appeals and was pending on remand before the Board on September 30, 1996, did not have a final administrative order of deportation on that date, so the restrictions on eligibility for a section 212(h) waiver apply.

(5) Any presumption against the retroactive application of a statute does not apply where Congress has clearly stated that a statute is to be applied retroactively.

Matter of Pineda, 21 I&N Dec. 1017 (BIA 1997)

(1) Section 348(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, _____ ("IIRIRA"), enacted on September 30, 1996, amended section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (1994), to add restrictions precluding a grant of a waiver to any alien admitted as a lawful permanent resident who either has been convicted of an aggravated felony since the date of admission or did not have 7 years of continuous residence prior to the initiation of immigration proceedings.

(2) Section 348(b) of the IIRIRA provides that the restrictions in the amendments to section 212(h) of the Act apply to aliens in exclusion or deportation proceedings as of September 30, 1996, unless a final order of deportation has been entered as of such date.

(3) An aggravated felon who had a final administrative order of deportation as of September 30, 1996, would be subject to the restrictions on eligibility for a section 212(h) waiver if his proceedings were thereafter reopened; therefore, his motion to reopen deportation proceedings to apply for adjustment of status in conjunction with a section 212(h) waiver was properly denied.

Matter of Michel, 21 I&N Dec. 1101 (BIA 1998)

(1) Pursuant to 62 Fed. Reg. 10,312, 10,369 (to be codified at 8 C.F.R. § 240.10(a)(1) (interim, effective Apr. 1, 1997), an Immigration Judge must ascertain whether an alien desires representation in removal proceedings.

(2) An alien who has not previously been admitted to the United States as an alien lawfully admitted for permanent residence is statutorily eligible for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (to be codified at 8 U.S.C. § 1182(h)), despite his conviction for an aggravated felony.

Matter of Ayala, 22 I&N Dec. 398 (BIA 1998)

(1) A discretionary waiver under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (Supp. II 1996), is not available to an alien who has been convicted of an aggravated felony, or to an alien who has not lawfully resided continuously in the United States for the statutorily required period of 7 years, where the alien has previously been lawfully admitted for permanent residence but subsequently has been found to have been excludable at entry or inadmissible on the date admitted.

(2) Matter of Michel, 21 I&N Dec. 1101 (BIA 1998), is not applicable to an alien who has previously been lawfully admitted for permanent residence to the United States but later claims that such admission was not lawful because he concealed from the Immigration and Naturalization Service criminal activities that, if known, would have precluded his admission, so the Immigration Judge correctly found that the respondent was statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act. Matter of Michel, supra, distinguished.

SECTION 212(I) WAIVERS

Matter of Mendez, 21 I&N Dec. 296 (BIA 1996)

(1) In assessing whether an applicant has met his burden of establishing that a grant of a waiver of inadmissibility is warranted in the exercise of discretion under section 212(h)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. 1182(h)(1)(B) (1994), the Immigration Judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country.

(2) Establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create any entitlement to that relief; extreme hardship, once established, is but one favorable discretionary factor to be considered.

(3) The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence.

(4) Taking responsibility and showing remorse for one's criminal behavior does constitute some evidence of rehabilitation, although an alien who claims innocence and does not express remorse is not precluded from ever presenting persuasive evidence of rehabilitation by other means.

(5) While the lack of persuasive evidence of rehabilitation may not in itself be an adverse factor, the absence of this equity in the alien's favor may ultimately be determinative in a given case concerning the exercise of discretion under section 212(h)(1)(B) of the Act, particularly where an alien has engaged in serious misconduct and there are questions whether the alien will revert to criminal behavior; and conversely, evidence of rehabilitation in some cases may constitute the factor that raises the significance of the alien's equities in total so as to be sufficient to counterbalance the adverse factors in the case and warrant a favorable exercise of discretion.

Matter of Lazarte, 21 I&N Dec. 214 (BIA 1996)

Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) (1994), which waives inadmissibility under section 212(a)(6)(C) of the Act for fraud or willful misrepresentation of a material fact in relation to procuring a visa, other documentation, or entry into the United States or other benefit provided under the Act, is not applicable to waive inadmissibility under section 212(a)(6)(F) of the Act for document fraud in violation of section 274C of the Act, 8 U.S.C. § 1324c (1994).

Matter of Cervantes, 22 I&N Dec. 560 (BIA 1999)

(1) The recently amended provisions of section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) (Supp. II 1996), which require that an alien establish extreme hardship to his or her United States citizen or permanent resident alien spouse or parent in order to qualify for a waiver of inadmissibility, are applicable to pending cases. Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), followed.

(2) The factors to be used in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act include, but are not limited to, the following: the presence of lawful

permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to the unavailability of suitable medical care in the country to which the qualifying relative would relocate.

(3) The underlying fraud or misrepresentation for which an alien seeks a waiver of inadmissibility under section 212(i) of the Act may be considered as an adverse factor in adjudicating the waiver application in the exercise of discretion. Matter of Tijam, 22 I&N Dec. 408 (BIA 1998), followed.

SECTION 213 WAIVERS

Matter of Ulloa, 22 I&N Dec. 725 (BIA 1999)

Immigration Judges have jurisdiction to grant a waiver of inadmissibility under section 213 of the Immigration and Nationality Act, 8 U.S.C. § 1183 (Supp. II 1996), and are required to advise an alien found to be inadmissible as a public charge under section 212(a)(4)(B) of the Act, 8 U.S.C. § 1182(a)(4)(B) (Supp. II 1996), of his or her right to apply for a waiver.

SECTION 241(A)(1)(H) WAIVERS

Matter of Tijam, 22 I&N Dec. 408 (BIA 1998)

(1) In making the discretionary determination on a waiver of deportability pursuant to section 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(H) (1994), an Immigration Judge should consider the alien's initial fraud or misrepresentation in the overall assessment of positive and negative factors.

(2) The Board of Immigration Appeals declines to follow the policy set forth by the Commissioner of the Immigration and Naturalization Service in Matter of Alonzo, 17 I&N Dec. 292 (Comm. 1979), that the underlying fraud or misrepresentation for which the alien seeks a waiver should be disregarded.

SMUGGLING OF ALIENS

Matter of Compean, 21 I&N Dec. 51 (BIA 1995)

To be eligible for relief under section 212(d)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(11) (Supp. V 1993), both a lawful permanent resident alien returning from a temporary trip abroad and an alien seeking admission or adjustment of status as an immediate relative or family-sponsored immigrant under sections 203(a)(1)-(3) of the Act, 8 U.S.C. §§ 1153(a)(1)-(3) (Supp. V 1993), must show that the object of the alien's smuggling attempt was the alien's spouse, parent, son, or daughter.

Matter of Farias, 21 I&N Dec. 269 (BIA 1996, 1997; A.G. 1997)

(1) The waiver provisions of section 241(a)(1)(E)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(E)(iii) (1994), were amended to limit availability to aliens who had the required familial relationship to the smuggled alien at the time the smuggling act occurred.

(2) The amendments to the smuggling waiver provision apply to applications filed before, on, or after the date of their enactment, but only if no final determination on the application had been made prior to that date.

(3) Because the decision of the Board of Immigration Appeals was pending review before the Attorney General on certification on the date of enactment of the waiver amendments, no final determination had been made under 8 C.F.R. § 3.1(d)(2) (1996), and the amended version of the waiver applies to the respondent.

(4) The respondent was not married to her current husband at the time she assisted him to enter the United States and therefore is ineligible for a waiver under the amended version of section 241(a)(1)(E)(iii) of the Act.

SUSPENSION OF DEPORTATION

Extreme Hardship

Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996)

Suspension of deportation was granted where the 24-year-old Nicaraguan respondent lived in the United States since the age of 13, was educated in this country, speaks English fluently, is fully assimilated into American life and culture, is involved in various activities in this country, runs a small trucking business, has no other means of obtaining lawful permanent resident status, and if deported, would return to a country where economic and political conditions were difficult.

Matter of Pilch, 21 I&N Dec. 627 (BIA 1996)

The respondents, husband and wife, failed to show, either individually or cumulatively, factors which demonstrate extreme hardship over and above the normal economic and social disruptions involved in deportation to themselves or to their three United States citizen children in order to establish suspension of deportation under section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a) (1994).

Matter of Kao & Lin, 23 I&N Dec. 45 (BIA 2001)

(1) In evaluating an application for suspension of deportation, the hardship to the applicant's United States citizen child must be given careful consideration, as the applicant's eligibility for relief may be established by demonstrating that his or her deportation would result in extreme hardship to the child.

(2) The standard for determining "extreme hardship" in applications for suspension of deportation is also applied in adjudicating petitions for immigrant status under section 204(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1) (1994 & Supp. V 1999), as amended, and waivers of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i) (Supp. V 1999).

(3) The respondents met the extreme hardship requirement for suspension of deportation where their oldest daughter, who is a 15-year-old United States citizen, has spent her entire life in the United

States, has been completely integrated into the American lifestyle, and is not sufficiently fluent in the Chinese language to make an adequate transition to daily life in her parents' native country of Taiwan. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996), distinguished.

Physical Presence

Matter of Cervantes, 21 I&N Dec. 351 (BIA 1996)

An alien is not barred from demonstrating continuous physical presence for purposes of section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1) (1994), when he has made brief, casual, and innocent departures from the United States during the pendency of his deportation proceedings, and when the Immigration and Naturalization Service has readmitted him as a returning applicant for temporary resident status under section 210 of the Act, 8 U.S.C. § 1160 (1988).

Stop-Time Rule

Matter of N-J-B-, 21 I&N Dec. 812 (BIA, AG 1997)

(1) The general effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is April 1, 1997. Section 309(c)(5) of the IIRIRA creates an exception to the general effective date with regard to suspension of deportation for aliens with pending deportation proceedings and establishes a transition rule to be applied in these pending cases.

(2) Under the provisions of the IIRIRA transition rule, service of the Order to Show Cause ends the period of continuous physical presence prior to the acquisition of the requisite 7 years.

(3) The respondent was served with an Order to Show Cause before the IIRIRA's enactment and deportation proceedings are still pending. Inasmuch as the Order to Show Cause was served prior to the respondent's acquisition of the 7 years' continuous physical presence, she is ineligible for suspension of deportation under the transition rule.

(4) The Attorney General vacates the decision of the Board of Immigration Appeals pending her further determination.

Matter of N-J-B-, 22 I&N Dec. 1057 (BIA, A.G. 1999)

(1) The general effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), is April 1, 1997. Section 309(c)(5) of the IIRIRA, 110 Stat. at 3009-627, creates an exception to the general effective date with regard to suspension of deportation for aliens with pending deportation proceedings and establishes a transition rule to be applied in these pending cases.

(2) Under the provisions of the IIRIRA transition rule, service of the Order to Show Cause ends the period of continuous physical presence prior to the acquisition of the requisite 7 years.

(3) The respondent was served with an Order to Show Cause before the IIRIRA's enactment and deportation proceedings are still pending. Inasmuch as the Order to Show Cause was served prior to the respondent's acquisition of the 7 years' continuous physical presence, she is ineligible for suspension of deportation under the transition rule.

(4) The Attorney General vacates the decision of the Board of Immigration Appeals pending her further determination.

(5) The Attorney General remands the case to the Board for a determination of the respondent's eligibility for adjustment of status under section 202 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit.II, 111 Stat. 2193, 2193 (1997).

Matter of Nolasco, 22 I&N Dec. 632 (BIA 1999)

For purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the service of the Order to Show Cause and Notice of Hearing (Form I-221) on the alien, irrespective of the date that it was issued.

Matter of Mendoza-Sandino, 22 I&N Dec. 1236 (BIA 2000)

Pursuant to section 240A(d)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d)(1) (Supp. II 1996), an alien may not accrue the requisite 7 years of continuous physical presence for suspension of deportation after the service of the Order to Show Cause and Notice of Hearing (Form I-221), as service of the Order to Show Cause ends continuous physical presence.

VISA PETITIONS

Adoption

Matter of Xiu Hong Li, Beneficiary of visa petition filed by Bao Yi Xu, 21 I&N Dec. 13 (BIA 1995).

(1) If the provisions of section 101(b)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(E) (1988), have been invoked in order to obtain or confer an immigration benefit by virtue of an adoptive relationship, the natural relationship will not thereafter be recognized for immigration purposes even if it is established that the adoptive relationship has been legally terminated.

(2) A natural parent-child relationship can again be recognized for immigration purposes following the legal termination of an adoption meeting the requirements of section 101(b)(1)(E) of the Act if the petitioner can establish the following four criteria: (1) that no immigration benefit was obtained or conferred through the adoptive relationship, (2) that a natural parent-child relationship meeting the requirements of section 101(b) of the Act once existed, (3) that the adoption has been lawfully terminated under applicable law, and (4) that the natural relationship has been reestablished by law.

Matter of Ma, 22 I&N Dec. 67 (BIA 1998)

In considering the opinion of the United States Court of Appeals for the Ninth Circuit in Young v. Reno, 114 F.3d 879 (9th Cir. 1997), the Board of Immigration Appeals reaffirms its holding in Matter of Li, 20 I&N Dec. 700 (BIA 1993), that a petitioner who qualifies as an adopted child under section 101(b)(1)(e) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(e) (1994), cannot confer immigration benefits on a natural sibling.

Legitimated Children

Matter of Bueno, 21 I&N Dec. 1029 (BIA 1997)

(1) In order to qualify as the legitimated child of the petitioner under section 101(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(C) (1994), the beneficiary must be the biological child of the petitioner.

(2) A delayed birth certificate does not necessarily offer conclusive evidence of paternity even if it is unrebutted by contradictory evidence; it must instead be evaluated in light of the other evidence of record and the circumstances of the case.

Matter of Cabrera, 21 I&N Dec. 589 (BIA 1996) (Dominican Republic)

A child born out of wedlock in the Dominican Republic is placed in the same legal position as one born in wedlock once the child has been acknowledged by the father in accordance with Dominican law and hence qualifies as a "legitimated" child under section 101(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(C) (1994). Matter of Reyes, 17 I & N Dec. 512 (BIA 1980), overruled.

Matter of Martinez, 21 I&N Dec. 1035 (BIA 1997) (Dominican Republic)

(1) A child legitimated under the laws of his or her residence or domicile may only be included within the definition of the term "child" provided in section 101(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(C) (1994), if the legitimizing act occurred prior to the child's 18th birthday.

(2) In order to qualify as a legitimated child under section 101(b)(1)(C) of the Act, a child residing or domiciled in the Dominican Republic must have been under the age of 18 at the time the new law regarding legitimation took effect and must have been acknowledged by his or her father prior to her 18th birthday, unless he or she was legitimated under the former laws of that country.

Matter of Torres, 22 I&N Dec. 28 (BIA 1998) (Peru)

In order to qualify as a "legitimated" child under section 101(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(C)(1994), a child residing or domiciled in Peru must have been under the age of 18 at the time the changes in Peruvian law regarding legitimation took effect, and "extramarital filiation" must have been established prior to the child's 18th birthday, unless he or she was legitimated under the former laws of that country. Matter of Quispe, 16 I&N Dec. 174 (BIA 1977); and Matter of Breninzon, 19 I&N Dec. 40 (BIA 1984), modified.

Matter of Pagan, 22 I&N Dec. 547 (BIA 1999)

(1) Although the paternity of a beneficiary must be established in order to qualify as a "legitimated" child under section 101(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(C) (1994), the child's father need not prove that they have any relationship other than a purely biological one.

(2) As blood tests are the sole manner of proving a claimed biological relationship expressly mentioned in the federal regulations that do not require any previous personal relationship between a father and his child, when primary evidence of paternity in the form of a birth certificate is unavailable or insufficient, the Immigration and Naturalization Service should, in its request for additional evidence, advise a petitioner of the alternative of submitting the results of blood tests if affidavits and historical secondary evidence are not available.

Matter of Moraga, 23 I&N Dec. 195 (BIA 2001) (El Salvador)

A child born out of wedlock in El Salvador on or after December 16, 1965, is placed in the same legal position as one born in wedlock once the child's paternity is established and therefore qualifies as a "legitimated" child under section 101(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(C) (1994). Matter of Ramirez, 16 I&N Dec. 222 (BIA 1977), modified.

Widows

Matter of Minkova, 22 I&N Dec. 1161 (BIA 1999)

There is no provision in the Immigration and Nationality Act for a widow or widower to file a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) on behalf of a child; however, under 8 C.F.R. § 204.2(b)(4) (1999), the child may be eligible for derivative classification as an immediate relative and may accompany or follow to join the principal alien (widow or widower) to the United States, if the principal alien includes the child in a visa petition filed pursuant to section 204(a)(1)(A)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(ii) (1994).

VOLUNTARY DEPARTURE

Appeal Waiver

Matter of Ocampo, 22 I&N Dec. 1301 (BIA 2000)

Voluntary departure may not be granted prior to the completion of removal proceedings without an express waiver of the right to appeal by the alien or the alien's representative.

Duty to Inform

Matter of Cordova, 22 I&N Dec. 966 (BIA 1999)

(1) If the evidence in the record does not indicate that an alien has been convicted of an aggravated felony or charged with deportability under section 237(a)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(4) (Supp. II 1996), the Immigration Judge has the duty to provide the alien with information about the availability and requirements of voluntary departure under section 240B(a) of the Act, 8 U.S.C. § 1229c(a) (Supp. II 1996), and to provide the alien the opportunity to apply for this relief prior to taking the pleadings.

(2) An alien does not forfeit the right to apply for voluntary departure under section 240B(a) of the Act by appealing an erroneous denial of this relief.

In Absentia Proceedings

Matter of Singh, 21 I&N Dec. 998 (BIA 1997)

Matter of Shaar, 21 I&N Dec. 541 (BIA 1996), is not applicable to an alien who was ordered deported at an in absentia hearing and has therefore not remained beyond a period of voluntary departure; consequently, the proceedings may be reopened upon the filing of a timely motion showing exceptional circumstances for failure to appear. Matter of Shaar, supra, distinguished.

Motions to Reopen

Matter of Shaar, 21 I&N Dec. 541 (BIA 1996)

(1) An alien who has filed a motion to reopen during the pendency of a voluntary departure period in order to apply for suspension of deportation and who subsequently remains in the United States after the scheduled date of departure is statutorily ineligible for suspension of deportation pursuant to section 242B(e)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(e)(2)(A) (Supp. V 1993), if the notice requirements of that section have been satisfied, absent a showing that the alien's failure to timely depart the United States was due to "exceptional circumstances" under section 242B(f)(2) of the Act.

(2) Neither the filing of a motion to reopen to apply for suspension of deportation during the pendency of a period of voluntary departure, nor the Immigration Judge's failure to adjudicate the motion to reopen prior to the expiration of the alien's voluntary departure period constitutes an "exceptional circumstance."

Standards

Matter of Arguelles, 22 I&N Dec. 811 (BIA 1999)

(1) Effective April 1, 1997, an alien may apply for voluntary departure either in lieu of being subject to removal proceedings or before the conclusion of the proceedings under section 240B(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(a) (Supp. II 1990), or at the conclusion of the proceedings under section 240B(b) of the Act.

(2) An alien who applies for voluntary departure at the conclusion of removal proceedings pursuant to section 240B(b) of the Act must demonstrate, inter alia, both good moral character for a period of 5 years preceding the application for relief and the financial means to depart the United States, but an alien who applies before the conclusion of the proceedings pursuant to section 240B(a) is not subject to those requirements.

(3) Although an alien who applies for voluntary departure under either section 240B(a) or 240B(b) of the Act must establish that a favorable exercise of discretion is warranted upon consideration of the factors set forth in Matter of Gamboa, 14 I&N Dec. 244 (BIA 1972), which governed applications for voluntary departure under the former section 244(e) of the Act, 8 U.S.C. § 1254(e) (1970), the Immigration Judge has broader authority to grant voluntary departure in discretion before the conclusion of removal proceedings under section 240B(a) than under section 240B(b) or the former section 244(e). Matter of Gamboa, supra, followed.

(4) An alien who had been granted voluntary departure five times pursuant to former section 244(e) of the Act and had returned each time without inspection was eligible to apply for voluntary departure in removal proceedings under section 240B, because the restrictions on eligibility of section 240B(c), relating to aliens who return after having previously been granted voluntary departure, only apply if relief was granted under section 240B.

WITHHOLDING OF REMOVAL

Convention Against Torture (CAT) Claims

See Convention Against Torture

Particularly Serious Crime

Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996)

(1) Under section 243(h)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2) (1994), an alien convicted of an aggravated felony is considered to have committed a particularly serious crime, which bars the alien from applying for withholding of deportation under section 243(h)(1) of the Act ("aggravated felony bar").

(2) Under section 243(h)(3) of the Act (to be codified at 8 U.S.C. § 1253(h)(3)), as enacted by section 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996) ("AEDPA"), the Attorney General may apply section 243(h)(1) of the Act to any alien, notwithstanding any other provision of law, if she determines in her discretion that it is necessary to do so "to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees," Jan. 31, 1967, 1968 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 ("Protocol").

(3) Section 243(h)(3) of the Act did not repeal the aggravated felony bar directly or by implication, but amended it to the limited extent necessary to ensure that refoulement of a particular criminal alien would not place compliance with the Protocol in jeopardy.

(4) Under the provisions of section 305(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009,___ (effective April 1, 1997) ("IIRIRA"), an alien convicted of one or more aggravated felonies for which the aggregate sentence is at least 5 years is considered to have committed a particularly serious crime, which bars the alien from eligibility for withholding of removal.

(5) In cases governed by the provisions of section 243(h) of the Act, the standards for determining whether the deportation of an alien convicted of an aggravated felony, as defined in the AEDPA, must be withheld under section 243(h)(1) in order to ensure compliance with the Protocol should not be inconsistent with the relevant provisions of the IIRIRA.

(6) For purposes of applying section 243(h) of the Act, an alien who has been convicted of an aggravated felony, as defined in the AEDPA, and sentenced to an aggregate of at least 5 years' imprisonment, is deemed conclusively barred from relief under section 243(h)(1), and such ineligibility is in compliance with the Protocol.

(7) For purposes of applying section 243(h) of the Act, an alien convicted of an aggravated felony, as defined in the AEDPA, who has been sentenced to less than 5 years' imprisonment, is subject to a rebuttable presumption that he or she has been convicted of a particularly serious crime, which bars eligibility for relief under section 243(h)(1) of the Act.

(8) For purposes of applying section 243(h) of the Act, in determining whether or not a particular aggravated felon, as defined in the AEDPA, who has not been sentenced to at least 5 years' imprisonment, has overcome the presumption that he or she has committed a particularly serious crime, consistent with the meaning of that term in the Protocol, the appropriate standard is whether there is any unusual aspect of the alien's particular aggravated felony conviction that convincingly evidences that the crime cannot rationally be deemed "particularly serious" in light of treaty obligations under the Protocol.

(9) Although the respondent's convictions for "illicit trafficking in firearms" fall within the aggravated felony definition of the AEDPA and he has been sentenced to less than 5 years' imprisonment, the nature and circumstances of the convictions are such that overriding the aggravated felony bar in this case is not necessary to ensure the United States' compliance with the Protocol.

Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997) (Robbery)

(1) An asylum applicant who has been convicted of robbery with a deadly weapon (handgun) and sentenced to 2 1/2 years in prison is not eligible for asylum because he has been convicted of an aggravated felony, that is, a crime of violence for which the sentence is at least 1 year.

(2) An applicant for withholding of deportation who has been convicted of robbery with a deadly weapon (handgun) has been convicted of a particularly serious crime and is not eligible for withholding of deportation regardless of the length of his sentence.

Matter of S-S-, 22 I&N Dec. 458 (BIA 1999) (overruled by *Matter of Y-L-, A-G- and R-S-R-*, 23 I&N Dec. 270 (A.G. 2002)

(1) Under section 241(b)(3)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(b)(3)(B)(ii) (Supp. II 1996), a determination of whether an alien convicted of an aggravated felony and sentenced to less than 5 years' imprisonment has been convicted of a "particularly serious crime," thus barring the alien from withholding of removal, requires an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction. Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), followed.

(2) Under section 241(b)(3)(B) of the Act, a determination of whether an aggravated felony conviction constitutes a "particularly serious crime" per se is based on the length of sentence imposed, rather than on the category or type of aggravated felony conviction that resulted in the conviction. Matter of Gonzalez, 19 I&N Dec. 692 (BIA 1988), explained and distinguished.

(3) Under section 241(b)(3)(B) of the Act, there no longer exists a rebuttable presumption that an alien convicted of an aggravated felony for which a sentence of less than 5 years was imposed has been convicted of a "particularly serious crime" rendering the alien ineligible for withholding of deportation. Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996), distinguished.

(4) An alien who was convicted of first degree robbery of an occupied home while armed with a handgun and sentenced to 55 months' imprisonment has been convicted of an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (Supp. II 1996), and, upon consideration of the nature of the conviction and the sentence imposed, as well as the underlying facts and circumstances of the conviction, has been convicted of a "particularly serious crime" rendering the alien ineligible for withholding of removal under section 241(b)(3)(B)(ii) of the Act.

Matter of L-S-, 22 I&N Dec. 645 (BIA 1999) (Bringing Undocumented Aliens to U.S.)

(1) Under Section 241(b)(3)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (Supp. II 1996), a determination whether an alien convicted of an aggravated felony and sentenced to less than 5 years' imprisonment has been convicted of a "particularly serious crime," thus barring the alien from withholding of removal, requires an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction. Matter of S-S-, 22 I&N Dec. 458 (BIA 1999); and Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), followed.

(2) An alien who was convicted of bringing an illegal alien into the United States in violation of section 274(a)(2)(B)(iii) of the Act, 8 U.S.C. § 1324(a)(2)(B)(iii) (1994 & Supp. II 1996), and sentenced to 3½ months' imprisonment has, upon consideration of the nature of the conviction and the sentence imposed, as well as the underlying facts and circumstances of the conviction, not been convicted of a "particularly serious crime" and is eligible to apply for withholding of removal under section 241(b)(3)(B)(ii) of the Act.

Matter of Y-L-, A-G- and R-S-R-, 23 I&N Dec. 270 (A.G. 2002)

(1) Aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute "particularly serious crimes" within the meaning of section 241(b)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B) (2000), and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible. Matter of S-S-, 22 I&N Dec. 458 (BIA 1999), overruled.

(2) The respondents are not eligible for deferral of removal under Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment where each failed to establish that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity. Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000), followed.