Immigration Judge Benchbook Index

(October 2001)

Immigration Judge Benchbook Index

(October 2001)

Part I. Substantive Law Portion

Immigration Judge Benchbook Index

(October 2001)

Chapter One - Evidence

CHAPTER ONE

EVIDENCE

I. OVERVIEW

A. IN GENERAL

1. Immigration proceedings are not bound by the strict rules of evidence. Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983); Dallo v. INS, 765 F.2d 581 (6th Cir. 1985); Longoria-Castaneda v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977).

2. The general rule with respect to evidence in immigration proceedings favors admissibility as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law. Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983); Tashnizi v. INS, 585 F.2d 781 (5th Cir. 1978); Trias-Hernandez v. INS, 528 F.2d 366 (9th Cir. 1975); Marlowe v. INS, 457 F.2d 1314 (9th Cir. 1972); Matter of Toro, 17 I&N Dec. 340 (BIA 1980); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Lam, 14 I&N Dec. 168 (BIA 1972). Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable without the evidence. Relevant evidence must either tend to prove or disprove an issue of fact in a case.

3. Pertinent regulations at 8 C.F.R. §§ 242.14(c) (1997) and 240.7 (2000) provide that an Immigration Judge "may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."

    a. However, 8 C.F.R. § 3.19(d) (2000) provides that consideration by

an Immigration Judge of an application or request regarding custody or bond shall be separate and apart from, and shall form no part of, any deportation or removal hearing. Therefore, it would seem that an Immigration Judge may be precluded from considering any evidence from a bond hearing in the course of a hearing on removability or deportability or relief from deportation unless, of course, the evidence is reintroduced and received in the deportation or removal hearing. INS attorneys may introduce evidence and question the respondent regarding inconsistent statements.

b. The opposite is not true, however. See 8 C.F.R. § 3.19(d) (2000). The determination of the Immigration Judge as to custody status or bond may be based upon any information available to the Immigration Judge (such as information from the deportation hearing) or upon any evidence that is presented during the bond hearing by the respondent or the INS.

4. Since the rules of evidence are not applicable and admissibility is favored, the pertinent question regarding most evidence in immigration proceedings is not whether it is admissible, but what weight the fact finder should accord it in adjudicating the issues on which the evidence has been submitted.

5. See Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997), regarding the responsibilities of the parties and the Immigration Judge with respect to evidence in the record. Generally the Immigration Judge has the duty to make certain that the record is complete.

6. See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998), regarding credibility findings by an Immigration Judge. Detailed credibility findings are a must in asylum cases.

B. BURDEN OF PROOF AND PRESUMPTIONS

The burden of proof is the duty of a party to prove a certain issue by the assigned standard of proof. The burden of proof determines who must go forward and prove their case.

1. In Deportation Proceedings

a. The INS bears the burden of establishing deportability. Deportability must be established by evidence which is clear, unequivocal, and convincing. Woodby v. INS, 385 U.S. 276 (1966).

b. An exception to the "clear, unequivocal, and convincing" standard exists in deportation proceedings in which the alien is charged with deportability pursuant to section 241(a)(1)(D)(i) of the Act as an alien whose status as a conditional permanent resident has been terminated under section 216(b) of the Act. Section 216(b)(2) of the Act states that the INS bears the burden of demonstrating "by a preponderance of the evidence" that a condition described in section 216(b)(1)(A) of the Act is met. Matter of Lemhammad, 20 I&N Dec. 316 (BIA 1991).

c. However, once alienage is established, the burden is on the respondent to show the time, place, and manner of entry. INA § 291. If this burden of proof is not sustained, the respondent is presumed to be in the United States in violation of the law. Id. In presenting this proof, the respondent is entitled to the production of his visa or other entry document, if any, and of any other documents and records pertaining to his entry which are in the custody of the INS and not considered confidential by the Attorney General. Id.

i. This burden and presumption is applicable to any charge of deportability which brings into question the time, place, and manner of entry. Matter of Benitez, 19 I&N Dec. 173 (BIA 1984).

The United States Court of Appeals for the Ninth Circuit disagrees and holds that the presumption only applies in cases involving illegal entry. Iran v. INS, 656 F.2d 469 (9th Cir. 1981).

ii. In a case involving time, place, and manner of entry, the INS burden may only be to establish alienage.

In deportation proceedings there is no presumption of citizenship, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923). A person born abroad is presumed to be an alien until he or she shows otherwise. See Murphy v. INS, 54 F.3d 605 (9th Cir. 1995); Corona-

Palomera v. INS, 661 F.2d 814 (9th Cir. 1981); United States ex ref. Rongetti v. Neelly, 207 F.2d 281 (7th Cir. 1953); Matter of Ponco, 15 I&N Dec. 120 (BIA 1974); Matter of Tijerina-Villarreal, 13 I&N Dec. 327 (BIA 1969); Matter of A-M-, 7 I&N Dec. 332 (BIA 1956).

d. In applications for relief from deportation, the burden of proof is on the respondent.

2. In Exclusion Proceedings

a. The burden of proof in exclusion proceedings is on the applicant to show to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of the Act. INA § 291. Once an alien has presented a prima facie case of admissibility, the Service has the burden of presenting some evidence which would support a contrary finding. See Matter of Walsh and Pollard, 20 I&N Dec. 60 (BIA 1988). The applicant for admission, however, still retains the ultimate burden of proof. Id.; See Matter of Y-G-, 20 I&N Dec. 794 (BIA 1994).

b. However, an exception to the alien bearing the burden of proof occurs when the applicant has a "colorable" claim to status as a returning lawful permanent resident. In that case, the burden of proof to establish excludability is on the INS. Matter of Kane, 15 I&N Dec. 258 (BIA 1975). The INS burden in such a case is to show by "clear, unequivocal, and convincing evidence" that the applicant should be deprived of lawful permanent resident status. See Matter of Huang, 19 I&N Dec. 749 (BIA 1988).

c. Another exception involves an alien "commuter" who is not returning to an actual unrelinquished permanent residence in the United States. Such an alien maintains the burden of proof to show that he is not excludable. Matter of Moore, 13 I&N Dec. 711 (BIA 1971).

d. If the lawful permanent resident contends that exclusion proceedings are not proper under Rosenberg v. Fleuti, 374 U.S. 449 (1963) (Fleuti), he bears the burden to prove that he comes within the Fleuti exception to the entry definition. See Molina v. Sewell, 983 F.2d 676 (5th Cir. 1993).

In exclusion proceedings where the applicant has no "colorable claim" to lawful permanent resident status and alleges that exclusion proceedings are improper because he made an entry and should therefore be in deportation proceedings, the burden is on the applicant to show that he has effected an entry. See Matter of Z-, 20 I&N Dec. 707 (BIA 1993); Matter of Matelot, 18 I&N Dec. 334 (BIA 1982); Matter of Phelisna, 18 I&N Dec. 272 (BIA 1982).

e. Under section 214(b) of the Act, every alien is presumed to be an immigrant. The burden of proof is on the alien to establish nonimmigrant status under section l0l(a)(15) of the Act.

f. In cases in which the applicant bears the burden of proof, the burden of proof never shifts and is always on the applicant. Matter of M-, 3 I&N Dec. 777 (BIA 1949); Matter of Rivero-Diaz, 12 I&N Dec. 475 (BIA 1967). Where the evidence is of equal probative weight, the party having the burden of proof cannot prevail. Id. An applicant for admission to the United States as a citizen of the United States has the burden of proving citizenship. Matter of G-R-, 3 I&N Dec. 141 (BIA 1948). Once the applicant establishes that he was once a citizen and the INS asserts that he lost that status, then the INS bears the burden of proving expatriation. Id. The standard of proof to establish expatriation is less than the "clear, unequivocal, and convincing" evidence test as applied in denaturalization cases but more than a mere preponderance of evidence. The proof must be strict and exact. Id.

3. In Rescission Proceedings

a. In rescission proceedings the burden of proof is on the INS.

b. Rescission must be established by evidence that is "clear, unequivocal, and convincing." Matter of Vilanova-Gonzalez, 13 I&N Dec. 399 (BIA 1969); Waziri v. INS, 392 F.2d 55 (9th Cir. 1968).

c. This is the same burden as the INS bears in deportation proceedings.

4. In Removal Proceedings

a. Deportable: INS has burden of proving that alien is deportable by evidence which is clear and convincing. INA § 240(c)(3); 8 C.F.R. § 240.8(a) (2000).

b. Inadmissible - arriving alien: Alien has burden to prove clearly and beyond doubt entitled to be admitted and is not inadmissible. 8 C.F.R. § 240.8(b) (2000).

c. Aliens present in United States without being admitted or paroled (entry without inspection): INS has initial burden to establish the alienage of the respondent; once alienage established, the respondent must establish by clear and convincing evidence that he was lawfully admitted to the United States. If the respondent cannot, the respondent must prove clearly and beyond doubt that he or she is entitled to be admitted and is not inadmissible. 8 C.F.R. § 240.8(c) (2000).

d. In absentia removal hearing: An alien shall be ordered removed in absentia if the INS establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable. INA § 240(b)(5)(A).

e. Relief from Removal: The respondent shall have the burden of establishing that she is eligible for any requested relief, benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

II. SPECIFIC AREAS

A. DOCUMENTARY EVIDENCE

The decision to admit documentary evidence is a function committed to the discretion of the Immigration Judge. In order to assure clarity of the record, all documents should be marked and identified. Before a document may be admitted into evidence it must meet certain criteria. Opposing counsel should be given the opportunity to question the witness as to the identification and authenticity of a document. There may be also a question regarding relevance of a document. The Immigration Judge must then determine whether to admit the document. Even if a document is not admitted it must be preserved as part of the record. There are

numerous requirements regarding the admission of official documents. See e.g., Matter of O-D-, 21 I&N Dec.1079 (BIA 1998) (regarding the presentation of a counterfeit identity document).

1. Certification

    a. Domestic Documents

        i. Under 8 C.F.R. § 287.6(a) (2000) an official record, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy.

        ii. However, under 8 C.F.R. § 3.41 (2000), the following documents are admissible to prove a criminal conviction:

            a. A record of judgment and conviction. 8 C.F.R. § 3.41(a)(1) (2000);

            b. A record of plea, verdict, and sentence. 8 C.F.R. § 3.41(a)(2) (2000);

            c. A docket entry from court records that indicates the existence of a conviction. 8 C.F.R. § 3.41(a)(3) (2000);

            d. Minutes of a court proceeding or a transcript of a hearing that indicates the existence of a conviction. 8 C.F.R. § 3.41(a)(4) (2000);

            e. An abstract of a record of conviction prepared by the court in which the conviction was entered or by a state official associated with the state's repository of criminal records which indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence. 8 C.F.R. § 3.41(a)(5) (2000);

            f. Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction. 8

C.F.R. § 3.41(a)(6) (2000).

iii. Pursuant to 8 C.F.R. § 3.41(b) (2000) any document may be submitted if it complies with the provisions of 8 C.F.R. § 287.6(a) (2000); i.e., attested by the custodian of the document or his authorized deputy, or it is attested by an immigration officer to be a true and correct copy of the original.

iv. In accordance with 8 C.F.R. § 3.41(c) (2000) any record of conviction or abstract submitted by electronic means to the Service from a state or Federal court shall be admissible as evidence to prove a criminal conviction if:

a. It is certified by a state official associated with the state's repository of criminal justice records as an official record from its repository, or by a court official from the court in which the conviction was entered as an official record from its repository (8 C.F.R. § 3.41(c)(1) (2000) provides that the certification may be by means of a computer generated signature and statement of authenticity) and:

b. It is certified in writing by an INS official as having been received electronically from the state's record repository or the court's record repository.

v. Lastly, 8 C.F.R. § 3.41(d) (2000) provides that any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.

Foreign documents.

1. Documents from Canada may be introduced with proper certification from the official having legal custody of the record. 8 C.F.R. § 287.6(d) (2000). The same is true for countries that are a signatory to the Convention Abolishing the Requirement of Legislation for Foreign Public Document (Convention). These documents must be properly certified under the Convention.

2. Documents from countries who are a signatory to the Convention Abolishing the Requirement of Legislation for Foreign Public Document.

    a. Under 8 C.F.R. § 287.6(c) (2000), a public document or entry therein, when admissible for any purpose, may be evidenced by an official publication or by a copy properly certified under the Convention.

    b. No certification is needed from an officer in the Foreign Service of public documents. 8 C.F.R. § 287.6(c)(2). But to be properly certified, the copy must be accompanied by a certificate in the form dictated by the Convention.

    c. Under 8 C.F.R. § 287.6(c)(3) (2000), in accordance with the Convention, the following documents are deemed to be public documents:

        - Documents emanating from an authority or an official connected with the courts or tribunals of the state, including those emanating from a public prosecutor, a clerk of a court, or a process server;

        - administrative documents;

        - notarial acts;

        - official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures.

d. Under 8 C.F.R. § 287.6(c)(4) (2000) in accordance with the Convention, the following documents are deemed not to be public documents and are subject to the more stringent requirements of 8 C.F.R. § 287.6(b) (2000):

- documents executed by diplomatic or consular agents;
- administrative documents dealing directly with commercial or customs operations.

3. Documents from countries not signatories to the Convention.

a. There are more stringent requirements for documents from a country not a signatory to the Convention. Regulations provide that an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized. 8 C.F.R. § 287.6(b)(1) (2000). This attested copy, with the additional foreign certificates, if any, must be certified by an officer in the Foreign Service of the United States, stationed in the country where the record is kept. 8 C.F.R. § 287.6(b)(2) (2000). The Foreign Service officer must certify the genuineness of the signature and the official position of either:

- the attesting officer, or
- any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. The

regulations at 8 C.F.R. § 287.6(a)(1) (2000) provide that the copy attested by an authorized foreign officer may, but need not, be certified in turn by any authorized foreign officer both as to the genuineness of the signature of the attesting officer and as to his/her official position. The signature and official position of this certifying officer may then likewise be certified by any other foreign officer so authorized, thereby creating a chain of certificates. In that situation, the officer of the Foreign Service of the United States may certify any signature in the chain.

2. Translation of Documents In accordance with 8 C.F.R. § 3.33 (2000) any document in a foreign language offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed. Such certification must include a statement that the translator is competent to translate the document and that the translation is true and accurate to the best of the translator's abilities.

3. Copies

    a. Under 8 C.F.R. § 3.32(a) (2000), except for an in absentia hearing, a copy of all documents (including proposed exhibits or applications) filed with or presented to the Immigration Judge shall be simultaneously served by the presenting party on the opposing party or parties.

    b. Service of copies shall be in person or by first class mail to the most recent address contained in the Record of Proceeding. 8 C.F.R. § 3.32(a) (2000).

    c. Any documents or applications not containing a certificate certifying service on the opposing party on a date certain will not be considered by the Immigration Judge unless service is made on the record during the hearing. 8 C.F.R. § 3.32(a) (2000).

4. Size and Format of Documents

    a. Unless otherwise permitted by the Immigration Judge, all written material presented to Immigration Judges must be on 8 ½" x 11" size paper. 8 C.F.R. § 3.32(b) (2000).

    b. An Immigration Judge may require that exhibits or other written material presented be indexed and paginated and that a table of contents be provided. 8 C.F.R. § 3.32(b) (2000).

5. Presumption of Regularity of Government Documents

    The BIA has held that government documents are entitled to a presumption of regularity. Matter of P- N-, 8 I&N Dec. 456 (BIA 1959). It is the respondent/applicant's burden to overcome this presumption.

6. Similarity of Names

    When documentary evidence bears a name identical to that of the respondent, an Immigration Judge may reasonably infer that such evidence relates to the respondent in the absence of evidence that it does not relate to him. See United States v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Leyva, 16 I&N Dec. 118 (BIA 1977); Matter of Li, 15 I&N Dec. 514 (BIA 1975); Matter of Cheung, 13 I&N Dec. 794 (BIA 1971).

7. Cases Regarding Specific Documents

    a. Form I-213, Record of Deportable/Inadmissible Alien.

        i. Absent proof that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability or inadmissibility. Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988); Matter of Mejia, 16 I&N Dec. 6 (BIA 1976). But see, Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983) and other cases which hold that Form I-213s and affidavits, when the accuracy of the document is disputed by the alien, are not admissible when the right to cross-examination is thwarted, unless the declarant is unavailable and reasonable efforts were made to produce the declarant.

ii. In fact, the document would be admissible even under the Federal Rules of Evidence as an exception to the hearsay rule as a public record or report. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).

iii. Form I-213, Record of Deportable/Inadmissible Alien cannot be used where minor made admission without representation and was unaccompanied. Davila-Bardales v. INS, 27 F.3d 1 (1st Cir. 1994). See Matter of Amaya, 21 I&N Dec. 583 (BIA 1996).

b. Form I-130, Visa Petition - A Form I-130 and accompanying documents (birth certificate, marriage certificate, etc.) are admissible, even without identification of the Form I-130 by its maker, if there is an identity of name with the name of the respondent. Matter of Gonzalez, 16 I&N Dec. 44 (BIA 1976).

c. Form I-589, Request for Asylum in the United States - the Service may use information supplied in an application for asylum or withholding of deportation or removal submitted to the Service on or after January 4, 1995, as the basis for issuance of a charging document or to establish alienage or deportability in a case referred to an Immigration Judge under 8 C.F.R. § 208.3(c)(1) (2000).

B. ADMISSIONS MADE BY COUNSEL

1. Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds the respondent as a judicial admission. Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986). Thus, when an admission (of deportability) is made as a tactical decision by an attorney in deportation proceedings, the admission is binding on the respondent and may be relied upon as evidence of deportability. Id. There is a strong presumption that an attorney's decision to concede an alien's deportability in a motion for change of venue was a reasonable tactical decision, and, absent a showing of egregious circumstances, such a concession is binding upon the alien as an admission. Id. It is immaterial whether an alien actually authorized the attorney to concede deportability in a motion to change venue. As long as the motion was prepared and filed by an attorney on behalf of the respondent, it is prima facie regarded as authorized by the alien and is admissible as evidence. An allegation that an attorney was authorized to

represent an alien only to the extent necessary to secure a reduction in the amount of bond does not render inadmissible the attorney's concession of deportability in a pleading filed in regard to another matter (a motion for change of venue filed in the deportation hearing), for there is no "limited" appearance of counsel in immigration proceedings.

2. The Service should be held to the same standards as the respondent and is also bound by the admissions of counsel. Thus, if counsel for the Service states at a master calendar hearing that the Service is not opposed to a grant of voluntary departure, the Service cannot oppose that relief and argue that the respondent has failed to appear and establish his eligibility if the respondent is absent from a later hearing on another application for relief and his counsel withdraws the application and asks only for voluntary departure. The Service would have to present evidence of the respondent's ineligibility for voluntary departure to support its change in position concerning the relief.

C. TESTIMONY

1. Calling the Alien to Testify

a. The INS may call the respondent as a witness to establish deportability. Requiring the respondent to testify does not violate due process, absent a valid claim of self-incrimination. Matter of Laqui, 13 I&N Dec. 232 (BIA 1969), aff'd, Laqui v. INS, 422 F.2d 807 (7th Cir. 1970).

b. A valid claim to privilege against compulsory self-incrimination under the Fifth Amendment may be raised only as to questions that present a real and substantial danger of self-incrimination. Marchetti v. United States, 390 U.S. 39 (1968). Therefore, an Immigration Judge does not err in compelling nonincriminating testimony. Wall v. INS, 722 F.2d 1442 (9th Cir. 1984); Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975); Matter of Santos, 19 I&N Dec. 105 (BIA 1984) (stating that no crime is implicated when a nonimmigrant overstays his allotted time of admission).

c. Neither the Immigration Judge nor the INS attorney is in a position to offer immunity from criminal prosecution. This is an action which can only be authorized by the Attorney General or certain officials designated by her. Matter of King and Yang, 16 I&N Dec. 502 (BIA 1978); Matter of Exantus and Pierre, 16 I&N Dec. 382

(BIA 1977); Matter of Carrillo, 17 I&N Dec. 30 (BIA 1979).

2. Refusal by the Alien to Testify

a. On the issue of deportability.

i. Refusal to testify without legal justification in deportation proceedings concerning the questions of alienage, time, place, and manner of entry constitutes reliable, substantial, and probative evidence supporting a finding of deportability. Matter of R-S-, 7 I&N Dec. 271 (BIA, A.G. 1956); Matter of Pang, 11 I&N Dec. 489 (BIA 1966).

ii. It is also proper to draw an unfavorable inference from refusal to answer pertinent questions where such refusal is based upon a permissible claim of privilege as well as where privilege is not a factor. Matter of O-, 6 I&N Dec. 246 (BIA 1954). The prohibition against the drawing of an unfavorable inference from a claim of privilege arises in criminal proceedings, not civil proceedings. Id. The logical conclusion to be drawn from the silence of one who claims his answers may subject him to possible prosecution or punishment is that the testimony withheld would be adverse to the interests of the person claiming the privilege. Id. Even if the refusal to testify is based on the Fifth Amendment privilege against self-incrimination, the refusal forms the basis of an inference and such inference is evidence. United States v. Alderete-Deras, 743 F.2d 645 (9th Cir. 1984) (citing Bilokumsky v. Tod, 263 U.S. 149 (1923)); Matter of M-, 8 I&N Dec. 535 (BIA 1960); Matter of V-, 7 I&N Dec. 308 (BIA 1956); Matter of P-, 7 I&N Dec. 133 (BIA 1956).

iii. Although it is proper to draw an unfavorable inference from a respondent's refusal to answer pertinent questions, the inference may only be drawn after a prima facie case of deportability has been established. Matter of O-, 6 I&N Dec. 246 (BIA 1954); Matter of J-, 8 I&N Dec. 568 (BIA 1960). In deportation proceedings, the respondent's silence alone, in the absence of any other evidence of record, is insufficient to constitute prima facie evidence of the respondent's alienage and is therefore also insufficient to establish the respondent's deportability. Matter of Guevara, 20 I&N Dec. 238 (BIA

1990, 1991). Also, the record should show that the respondent was requested to give testimony, that there was a refusal to testify, and the ground of refusal. Matter of J-, supra.

b. On the issue of relief.

i. In the case of an alien who refused to answer the questions of a congressional committee on the grounds that the answers might incriminate him, the BIA held that it might well be inferred that what would be revealed by the answers to such questions would not add to the alien's desirability as a resident. Therefore, he was found not to be a desirable resident of the United States and his application for suspension of deportation was denied as a matter of discretion. Matter of M-, 5 I&N Dec. 261 (BIA 1953).

ii. An applicant for the exercise of discretion has the duty of making a full disclosure of all pertinent information. If, under a claim of privilege against self-incrimination pursuant to the Fifth Amendment, an applicant refuses to testify concerning prior false claims to United States citizenship, denial of his application is justified on the ground that he has failed to meet the burden of proving his fitness for relief. Matter of Y-, 7 I&N Dec. 697 (BIA 1958).

iii. A respondent's refusal to answer questions pertaining to his application for voluntary departure prevented a full examination of his statutory (or discretionary, depending on the questions) eligibility for the relief sought, and such relief is properly denied. Matter of Li, 15 I&N Dec. 514 (BIA 1975). Since the grant of voluntary departure is a matter of discretion and administrative grace, a respondent's refusal to answer questions directed to him bearing on his application for voluntary departure is a factor which an Immigration Judge may consider in the exercise of discretion. Matter of Mariani, 11 I&N Dec. 210 (BIA 1965). The same applies to an application for registry under section 249 of the Act. See Matter of DeLucia, 11 I&N Dec. 565 (BIA 1966).

iv. An alien seeking a favorable exercise of discretion cannot limit the inquiry to the favorable aspects of the case and

reserve the right to be silent on the unfavorable aspects. Matter of DeLucia, 11 I&N Dec. 565 (BIA 1966); Matter of Y-, 7 I&N Dec. 697 (BIA 1958).

v. A respondent has every right to assert his Fifth Amendment privilege against self-incrimination. However, as an applicant for adjustment of status, he also is required to provide information relevant to the exercise of discretion. In refusing to disclose such information, the respondent prevents an Immigration Judge from reaching a conclusion as to the respondent's entitlement to adjustment of status. Therefore, the respondent has failed to sustain the burden of establishing that he is entitled to the privilege of adjustment of status and his application is properly denied. Matter of Marques, 16 I&N Dec. 314 (BIA 1977).

D. THE EXCLUSIONARY RULE FOR EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT PROHIBITION AGAINST UNLAWFUL SEARCH AND SEIZURE

Deportation proceedings are civil, not criminal; therefore, the Fourth Amendment exclusionary rule is not applicable to deportation proceedings. See INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). Evidence obtained as the result of an illegal search or as the fruit of an illegal arrest. It could, however, possibly result in suppression of the evidence if the government conduct was egregious.

E. EVIDENCE OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

1. The BIA has held that evidence obtained by coercion or other activity which violates the due process clause of the Fifth Amendment may be excluded. Matter of Toro, 17 I&N Dec. 340 (BIA 1980).

2. However, a mere demand for a suppression hearing is not enough to cause one to be held. In a claim that evidence was obtained in violation of due process, the burden is on the respondent to establish a prima facie case of illegality before the INS will be called upon to assume the burden of justifying the manner in which it obtained its evidence. Matter of Burgos, 15 I&N Dec. 278 (BIA 1975); Matter of Wong, 13 I&N Dec. 820 (BIA 1971); Matter of Tang, 13 I&N Dec. 691 (BIA 1971).

3. To establish a prima facie case, statements alleging illegality must be specific and detailed, not general, conclusory, or based on conjecture. They must be based on personal knowledge, not merely the allegations of counsel. Matter of Wong, 13 I&N Dec. 820 (BIA 1971).

4. In addition to establishing a prima facie case, a motion to suppress evidence must enumerate the articles to be suppressed. Matter of Wong, 13 I&N Dec. 820 (BIA 1971).

5. Where a party wishes to challenge the admissibility of a document allegedly obtained in violation of the due process clause of the Fifth Amendment, the offering of an affidavit which describes how the document or the information therein was obtained is not sufficient to sustain the burden of establishing a prima facie case. If an affidavit is offered which, if accepted as true, would not form a basis for excluding the evidence, the contested document may be admitted into the record. If the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported by testimony. Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988).

6. Even where certain evidence may have been acquired in violation of due process, the identity of the alien is not suppressible. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Bilokumsky v. Tod, 263 U.S. 149 (1923); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). Therefore, a respondent is not justified in refusing to identify himself at a deportation hearing.

   In an unpublished decision, the BIA noted that neither the respondent nor his counsel objected at the outset of each of his hearings when the Immigration Judge identified the respondent by name and indicated that he was present each time. While counsel motioned the Immigration Judge to allow the respondent to refuse to identify himself, the Board held that such a motion does not effectively amount to a denial by the respondent of this true identity. The Board concluded that either the respondent's silence or lack of objection to the Immigration Judge's identifying the respondent by name are sufficient inferences that the respondent was correctly identified as the alien in the deportation proceedings.

F. THE DOCTRINE OF EQUITABLE ESTOPPEL

1. Equitable estoppel is a judicially devised doctrine which precludes a party to a lawsuit, because of some improper conduct on that party's part, from

asserting a claim or defense, regardless of its substantive validity. Matter of Hernandez-Puente, 20 I&N Dec. 335 (BIA 1991) (citing Phelps v. Federal Emergency Management Agency, 785 F.2d 13 (1st Cir. 1986)).

2. The Supreme Court has recognized the possibility that the doctrine of equitable estoppel might be applied against the government in a case where it is established that its agents engaged in "affirmative misconduct." INS v. Hibi, 414 U.S. 5 (1973); Montana v. Kennedy, 366 U.S. 308 (1961). However, the Supreme Court has not yet decided whether "affirmative misconduct" is sufficient to estop the government from enforcing the immigration laws. INS v. Miranda, 459 U.S. 14 (1982).

3. Some federal courts have found "affirmative misconduct" and applied estoppel against the Government. Fano v. O'Neill, 806 F.2d 1262 (5th Cir. 1987); Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976).

4. Estoppel is an equitable form of action and only equitable rights are recognized. By contrast, the BIA can only exercise such discretion and authority conferred upon the Attorney General by law. The Board's jurisdiction is defined by the regulations and it has no jurisdiction unless it is affirmatively granted by the regulations. Therefore, the BIA and Immigration Judges are without authority to apply the doctrine of equitable estoppel against the INS so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. Matter of Hernandez-Puente, 20 I&N Dec. 335 (BIA 1991).

G. THE DOCTRINE OF COLLATERAL ESTOPPEL OR RES JUDICATA

1. In general

a. The doctrine of collateral estoppel precludes parties to a judgment on the merits in a prior suit from relitigating in a subsequent suit issues that were actually litigated and necessary to the outcome of the prior suit. Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984).

b. The doctrine of collateral estoppel generally applies to the government as well as to private litigants. Id.

c. The doctrine of collateral estoppel may be applied to preclude reconsideration of an issue of law, as well as fact, so long as the issue arises in both the prior and subsequent suits from virtually identical facts and there has been no change in the controlling law.

Id.

d. The doctrine of collateral estoppel applies in deportation proceedings when there has been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect, the parties had a full and fair opportunity to litigate the issues resolved by and necessary to the outcome of the prior judgment, and the use of collateral estoppel is not unfair. Id.

e. The language in section 242(b) of the Act, which provides that deportation proceedings shall be "the sole and exclusive procedure for determining the deportability of an alien," does not preclude the use of collateral estoppel in a deportation proceeding. Rather, this language was intended to exempt deportation proceedings from the provisions of any other law, most particularly the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, repealed by Pub. L. No. 89-554, 80 Stat. 378 (1966). Id.

f. Under the doctrine of collateral estoppel, a prior judgment conclusively establishes the "ultimate facts" of a subsequent deportation proceedings; i.e., those facts upon which an alien's deportability and eligibility for relief from deportation are to be determined. Collateral estoppel also precludes reconsideration of issues of law resolved by the prior judgment, so long as the issues in the prior suit and the deportation proceedings arise from virtually identical facts and there has been no change in the controlling law. Id.

2. Decisions in Criminal Proceedings

a. The adverse judgment of a court in a criminal proceeding is binding in deportation proceedings in which the respondent was the defendant in the criminal case and in which the issue is one that was also an issue in the criminal case. Matter of Z-, 5 I&N Dec. 708 (BIA 1954).

b. Where a respondent has been convicted in a criminal proceeding of a conspiracy to violate section 275 of the Act (entry without inspection or by willfully false or misleading representation or the willful concealment of a material fact) but the indictment does not contain an allegation that the respondent procured a visa by fraud, his conviction will not, under the doctrine of collateral estoppel,

establish his deportability as an alien who procured a visa by fraud. Matter of Marinho, 10 I&N Dec. 214 (BIA 1962, 1963).

c. An alien attempting to enter the United States by presenting a false Alien Registration Card, and who was paroled for prosecution and thereafter convicted in a criminal proceeding of a violation of section 275 of the Act (8 U.S.C. § 1325 - illegal entry), is not properly placed in exclusion proceedings. Although the applicant was paroled into the United States, he was prosecuted and convicted of illegal entry. Therefore, an exclusion proceeding will be terminated because, under the doctrine of collateral estoppel, the INS is prevented from denying that the applicant made an entry. Matter of Barragan-Garibay, 15 I&N Dec. 77 (BIA 1974).

d. The definition of the term "entry" in former section l0l(a)(13) of the Act applies to both the criminal provisions of section 275 of the Act and the deportation provisions of (former) section 241(a)(2) of the Act. The definition of "entry" in section l0l(a) (13) of the Act was interpreted in Rosenberg v. Fleuti, 374 U.S. 449 (1963). Since the respondent was convicted of illegal entry in a criminal proceeding, that decision is dispositive of any possible Fleuti issue, and the respondent is collaterally estopped from relitigating the issue of illegal entry in a subsequent deportation proceeding. Matter of Rina, 15 I&N Dec. 346 (BIA 1975).

e. Where a respondent has been acquitted on a criminal charge, one of the essential elements of which was alienage, the doctrine of collateral estoppel does not preclude litigation of the question of his alienage in subsequent deportation proceedings because of the difference in the burden of proof applicable to criminal proceedings and to deportation proceedings. Matter of Perez-Valle, 17 I&N Dec. 581 (BIA 1980).

f. An applicant in exclusion proceedings is estopped from contending that he was brought to the United States against his will where, in criminal proceedings for attempted smuggling of heroin into the United States, the court considered the same contention and found that the applicant came to the United States voluntarily. An applicant in possession of a visa for entry into the United States, destined to the United States, voluntarily arriving in the United States, and submitting his luggage for inspection by Customs officials, must be considered an applicant for admission. Matter of

Grandi, 13 I&N Dec. 798 (BIA 1971).

g. Ordinarily a court decision may be res judicata or operate as a collateral estoppel in a subsequent administrative proceeding. When a respondent presented a fraudulent offer of employment with his application for an immigrant visa, however, and was later convicted in a criminal proceeding of a conspiracy to violate 18 U.S.C. § 1001 (making false statements or using false writings), because of the issue of materiality the doctrine of collateral estoppel does not estop the respondent from denying that he was excludable at entry under (former) section 212(a)(19) of the Act [procured visa by fraud or willfully misrepresenting a material fact] or (former) section 212 (a)(20) of the Act [immigrant not in possession of a valid immigrant visa]. In a deportation proceeding, the test of materiality is whether the matter concealed concerned a ground of inadmissibility. See Matter of S- and B-C-, 9 I&N Dec. 436 (BIA 1960; A.G. 1961). In a criminal case (in those jurisdictions where materiality is required), the test of materiality is merely whether the false statement could affect or influence the exercise of a governmental function. An offer of employment is not legally required as an absolute condition for the issuance of an immigrant visa. The purpose of such a document is merely to assist the Consul in the determination of whether to issue the visa. Therefore, the respondent's misrepresentation was not material and he is not deportable for being excludable at entry. Matter of Martinez-Lopez, 10 I&N Dec. 409 (BIA 1962; A.G. 1964).

3. Decisions in Denaturalization Cases

a. Under the doctrine of collateral estoppel, a prior denaturalization judgment conclusively establishes the "ultimate facts" of subsequent deportation proceedings, i.e. those facts upon which an alien's deportability and eligibility for relief from deportation are to be determined. The doctrine precludes reconsideration of issues of law resolved by the prior judgment, so long as the issues in the prior suit and the deportation proceedings arise from virtually identical facts and there has been no change in the controlling law. Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984).

b. Where one of the principal issues in a denaturalization suit was whether the respondent had been a member of the Communist Party from 1930 to 1936, and this issue was litigated and was essential to

the court's determination resulting in a judgment revoking citizenship, by the doctrine of collateral estoppel the finding by the court in the denaturalization suit was conclusive in the subsequent deportation proceeding involving a charge based upon a like period of membership in the Communist Party. Matter of C-, 8 I&N Dec. 577 (BIA 1960).

c. Under the doctrine of collateral estoppel, a finding by a denaturalization court, which was essential to its judgment, that the respondent was a member of the Communist Party from 1937 to 1945 is conclusive in subsequent deportation proceedings. Matter of T-, 9 I&N Dec. 127 (BIA 1960).

4. Decisions in Extradition Proceedings

Decisions resulting from extradition proceedings are not entitled to res judicata effect in later proceedings. The parties to an extradition proceeding are not the same as in a deportation proceeding since the real party in interest in extradition proceedings is the foreign country seeking the respondent's extradition, not the United States. Also, the res judicata bar goes into effect only where a valid, final judgment has been rendered on the merits. It is well established that decisions and orders regarding extraditability embody no judgment on the guilt or innocence of the accused, but serve only to insure that his culpability will be determined in another forum. While deportation proceedings also do not serve to decide an alien's guilt or innocence of a crime, those cases holding that extradition decisions do not bind judicial bodies in later criminal proceedings are also applicable to subsequent deportation proceedings. The issues involved in a deportation hearing differ from those involved in an extradition case, and resolution of even a common issue in one proceeding is not binding in the other. Therefore, a magistrate's decision in extradition proceedings that the crimes committed by the respondent in a foreign country were political crimes barring his extradition does not bind the BIA. Matter of McMullen, 17 I&N Dec. 542 (BIA 1980).

5. Decisions in Declaratory Judgment Cases

A suit under section 503 of the Nationality Act of 1940 for a judgment declaring the respondent to be a national of the United States is not the same cause of action as a proceeding to deport the respondent. Hence, the doctrine of collateral estoppel cannot be invoked in the deportation proceeding as settling the issue of alienage, notwithstanding the court's

dismissal of the declaratory judgment suit. In his action for a judgment declaring him to be a national of the United States, the respondent has the burden of proving his case by a preponderance of the evidence. In deportation proceedings, the INS has the burden of proving alienage, and where it is shown that the respondent acquired United States citizenship by birth in the United States, the INS must prove expatriation by clear, unequivocal, and convincing evidence. Because of the different burden of proof involved, the doctrine of collateral estoppel does not render conclusive in deportation proceedings the findings as to expatriation made by the court in dismissing the respondent's suit for a declaratory judgment. Matter of H-, 7 I&N Dec. 407 (BIA 1957).

6. Decisions in Prior Deportation Proceedings or Other Administrative Decisions

   The doctrine of res judicata does not apply to administrative decisions of the Executive Branch. Matter of M-, 8 I&N Dec. 535 (BIA 1960); Matter of K-, 3 I&N Dec. 575 (BIA 1949). Therefore, an alien found not to be deportable by the BIA is subject to subsequent deportation proceedings by reason of a changed interpretation of the pertinent statutes together with an additional criminal conviction of the respondent. Matter of K-, supra.

7. Miscellaneous Cases

   a. The fact that a respondent was inspected and erroneously admitted to the United States by an INS officer does not operate to estop the INS from instituting a deportation proceeding against the respondent if it is later discovered that he was excludable at the time of his admission. Matter of Khan, 14 I&N Dec. 397 (BIA 1973); Matter of Polanco, 14 I&N Dec. 483 (BIA 1973).

   b. A respondent admitted for permanent residence in possession of an immigrant visa issued to him as the spouse of a United States citizen upon the basis of a visa petition approved by the INS subsequent to the commencement but prior to the conclusion of deportation proceedings instituted against his wife which resulted in a determination, ultimately sustained by the United States Court of Appeals, that she was not in fact a citizen of the United States is not immune to deportation proceedings. Notwithstanding that the visa petition approval may have been an erroneous act, there was no "affirmative misconduct," and the INS is not estopped in subsequent deportation proceedings against the respondent from showing that

his wife was not a citizen. The fact that a formal decision was made on the visa petition does not, by itself, give substantial weight to the respondent's estoppel argument. The approval of the petition was by no means a final determination of the citizenship claim of the respondent's wife. Matter of Morales, 15 I&N Dec. 411 (BIA 1975). This decision was based on a lack of equitable estoppel rather than on the doctrine of collateral estoppel. Under the doctrine of collateral estoppel, the respondent was not a party to the previous visa petition proceeding. As to the deportation proceedings brought against his wife, the doctrine of collateral estoppel might not apply because the burden of proof may be different in visa petition proceedings than in deportation proceedings.

c. Since applicants are not entitled to immediate relative status on the basis of claimed adoption in the Yemen Arab Republic (which does not recognize the practice of adoption), the INS is not estopped from excluding them under (former) section 212(a)(20) of the Act as immigrants not in possession of valid immigrant visas notwithstanding the erroneous approval of visa petitions according them immediate relative status. Not only is the INS empowered to make a redetermination of an applicant's admissibility upon arrival at a port of entry with an immigrant visa, it is under an absolute duty to do so. See INA §§ 204(e) and 235(b); see also Matter of Mozeb,15 I&N Dec. 430 (BIA 1975).

H. ADMINISTRATIVE NOTICE

1. Although immigration proceedings are not bound by the Federal Rules of Evidence, reference is made to the Federal Rules of Evidence for the purposes of definition and background.

2. Rule 201(b) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

3. Rule 201(c) provides that judicial notice is discretionary and a court may take judicial notice, whether requested or not. Rule 201(d) discusses when judicial notice is mandatory and provides that a court shall take judicial notice if requested by a party and supplied with the necessary information.

4. Rule 201(e) discusses the opportunity to be heard and states that a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. It goes on to state that in the absence of prior notification, the request may be made after judicial notice has been taken.

5. The BIA has held that it is well established that administrative agencies and the courts may take judicial (or administrative) notice of commonly known facts. Matter of R-R-, 20 I&N Dec. 547 (BIA 1992)(citing Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937)).

6. The issue of administrative notice arises most often in the asylum context, and the BIA has held that it may take administrative notice of changes in foreign governments. Matter of R-R-, 20 I&N Dec. 547 (BIA 1992)(citing Wojcik v. INS, 951 F.2d 172 (8th Cir. 1991)); Janusiak v. INS, 947 F.2d 46 (3d Cir. 1991); Kapcia v. INS, 944 F.2d 702 (10th Cir. 1991); Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir.), cert. denied, 502 U.S. 981 (1991); Kubon v. INS, 913 F.2d 386 (7th Cir. 1990).

7. The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) has held that it is improper for the BIA to take administrative notice of changed conditions in a particular country unless the respondent is given an opportunity to dispute whether notice should be taken and an opportunity to present contrary evidence. Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992). The Ninth Circuit allowed the BIA to take administrative notice of the change of government in Poland in Acewicz v. INS, 984 F.2d 1056 (9th Cir. 1993), because the respondent had ample opportunity to introduce evidence regarding the effect of the change in government. Comparing these two cases, the BIA concluded that it may take administrative notice of a change in conditions of a country, even in cases within the Ninth Circuit, when the respondent acknowledges the Board's authority to take administrative notice and discusses the changed circumstances on appeal. Matter of H-M-, 20 I&N Dec. 683 (BIA 1993). In 1994, the Ninth Circuit reversed another BIA decision for the same reasons as set forth in Castillo-Villagra, supra. See Kahssai v. INS, 16 F.3d 323 (9th Cir. 1994).

8. The United States Court of Appeals for the Tenth Circuit has also held that the BIA's denial of asylum based on facts administratively noticed without notifying the respondent and providing an opportunity to be heard violates the respondent's right to due process. Llana-Castellon v. INS, 16 F.3d 1093 (10th Cir. 1994).

I. ITEMS WHICH ARE NOT EVIDENCE

1. The arguments of counsel and statements made in a brief or on a Notice of Appeal are not evidence and therefore not entitled to any evidentiary weight. See INS v. Phinpathya, 464 U.S. 183 (1984); Matter of M/V "Runaway", 18 I&N Dec. 127 (BIA 1981); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

2. In an unpublished decision, the BIA held that a copy of an unpublished BIA decision presented to an Immigration Judge for the purpose of supporting the INS argument that certain published Board precedents should be applied to a respondent's case, does not constitute "evidence" so that the alien has a right to examine it or object to it under 8 C.F.R. § 242.16(a) (1997).

3. Evidence first submitted on appeal and not offered at the trial level is not considered by the BIA unless it is considered as part of a motion to remand. See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Arias, 19 I&N Dec. 568 (BIA 1988); Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988); Matter of Estime, 19 I&N Dec. 450 (BIA 1987).

Immigration Judge Benchbook Index

(October 2001)

Chapter Two - Telephonic/TeleVideo Hearings

CHAPTER TWO

TELEPHONIC HEARINGS / TELEVIDEO HEARINGS

I. OVERVIEW

A. GENERALLY

1. Traditionally, telephonic hearings are conducted at the Immigration Court having administrative control (Administrative Control Office) by the presiding Immigration Judge by telephone to a detail city where the INS and the alien are present. As a general rule, these are master calendar and custody/bond hearings. Contested full evidentiary hearings on the merits may be conducted telephonically only with the consent of the alien. The alien is advised of her rights and pleadings of the alien are taken on the record by a tape recorder at the Administrative Control Office. In some instances, the case may be heard and completed on the merits. In other instances, the case is scheduled for an individual hearing on a date when the Immigration Judge visits the detail city.

2. Recently, the Institutional Hearing Program (IHP) has utilized telephonic hearings more extensively in state correctional institutions. Telephonic hearings in the IHP provide several benefits, including limiting the necessity of prisoner movement, thereby enhancing security, and improving the ability of counsel to represent detained aliens. State corrections officers act as a part of the Court by distributing forms, moving aliens and in general taking direction from the Judge during the proceedings.

3. TeleVideo hearings are conducted in much the same way except that the Judge can see what is happening in the hearing room instead of relying what she hears over a speaker telephone. TeleVideo hearings are being successfully conducted on a regular basis in state correctional facilities in Florida and Texas, and expansion of the program is planned. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) specifically authorizes TeleVideo hearings. INA § 240(b)(2)(A)(iii), as added by IIRIRA.

B. ADVANTAGES

Telephonic hearings are an effective and efficient way for the Court to do business. They are cost effective as they require no travel or per diem expenditures. They enable Judges to resolve many minor or uncontested cases. Further, they help to more effectively utilize the Court's time when visiting a detail city. All cases convened by the Immigration Judge at a detail city are individual cases on the merits where a dispute exists among the parties. TeleVideo hearings can, in the Judge's discretion, eliminate the need for in-person hearings. This results in a more efficient use of a Judge's calendar time.

C. CONTROL OF PROCEEDINGS BY THE IMMIGRATION JUDGE

1. It is essential that the Immigration Judge maintain full control of the proceedings telephonically and via TeleVideo. For example, an alien that is unrepresented may be subject to prompting by others should the Judge have failed to state at the outset how the proceedings will be conducted.

    a. It is recommended that the Judge announce prior to the calling of the first case for the day what she expects of the parties on the other end. The Judge sets the tone for the proceedings on the other end. All parties on the other end must be instructed to speak loudly and clearly. A test should be done with the tape recorder both in the courtroom and on the other end to make certain that the parties are being properly recorded to avoid transcriptions that have a number of "indiscernible" notations on them.

    b. Tests of recording equipment and sound should also be conducted with TeleVideo equipment as well to make certain that an audible and accurate transcription of the proceedings is being created.

2. In the event that an order is issued or a case reset as a part of the telephonic proceeding, care must be taken to have the respondent present

for the purpose of receiving a verbal advisal of rights, including failure to appear for a subsequent hearing, failure to depart in compliance with a grant of voluntary departure, and that failure to appear for deportation. The person with the alien at the other end will have to furnish the written advisals after the Judge has given the oral advisals. Written advisals under IIRIRA are given in the English language and no other.

D. AUTHORITY

Section 240(b) of the Act, as added by IIRIRA makes specific statutory provisions for both telephonic hearings and video conference hearings. Under IIRIRA an alien does not have the right to an in-person hearing where video conferencing equipment is used.

1. Background: Exclusion, Deportation and Rescission.

   a. Prior regulations at 8 C.F.R. § 3.25(c) (1995) provided that: "An Immigration Judge may conduct hearings via video electronic media or by telephonic media in any proceeding under 8 U.S.C. §§ 1226, 1252, or 1256, except that contested full evidentiary hearings on the merits may be conducted by telephonic media only with the consent of the alien."

   b. Following sections 240(b)(2)(A) and (B) of the Act as added by IIRIRA, the regulations now distinguish between video electronic media hearings and telephonic hearings, and do not require consent to the video electronic media hearings. Therefore, for removal proceedings, video electronic media hearings are within the discretion of the Immigration Judge. The current regulation at 8 C.F.R. § 3.25(c) (2000) provides that:

      An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person. An Immigration Judge may also conduct a hearing through a telephone conference, but an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference, except that credible fear determinations may be reviewed by the Immigration Judge through a telephone conference without the consent of the alien.

c. It is also important to be aware that the United States Court of Appeals for the Ninth Circuit determined in 1989 that section 242(b) of the Act required that deportation hearings be conducted with the hearing participants in the physical presence of the Immigration Judge, and that "telephonic hearings by an Immigration Judge, absent consent of the parties, simply are not authorized by statute." Purba v. INS, 884 F.2d 516, 518 (9th Cir. 1989). This view has thus been incorporated into the statute at section 240(a)(2)(B) of the Act for purposes of removal proceedings.

2. Custody/Bond

a. Regulations at 8 C.F.R. § 3.19 (2000) permits an Immigration Judge in his or her discretion, to conduct custody/bond determination by telephone.

b. It is the policy of the Office of the Chief Immigration Judge (OCIJ) to conduct all master calendar hearings in detail cities telephonically. The reasons for this are set forth in paragraph B above. Bond hearings require immediate attention and therefore are always conducted telephonically to detail cities unless the Immigration Judge is present at the detail city when a request for a custody/bond hearing is made.

E. CREDIBILITY AND DUE PROCESS CONCERNS

1. The demeanor of witnesses in telephonic hearings, despite the inability to observe the appearance of the witness, can still be judged by other factors, such as the inherent plausibility of the testimony, the tenor of the witness's voice, inconsistencies and contradictions in testimony and specificity of testimony. See, e.g., Babcock v. Unemployment Division, 696 P.2d 19, 21 (1985).

2. Although the subject of an administrative hearing has the right to give oral testimony, actual physical presence is not required. See Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970); Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975).

II. TELEPHONIC HEARING CHECKLIST

A. PRE-HEARING (Master/Individual)

1. Proceedings may not commence until the charging document has been received by the Immigration Court having administrative control over the city or site where the hearing is to be held. See 8 C.F.R. § 3.14(a) (2000) The exception to this rule is the conducting of a bond/custody hearing which may be held before the Immigration Court receives the charging document. Note that the respondent must have been served with the charging document for all hearings except for bond/custody proceedings.

2. Prior to the telephonic hearing date the Immigration Judge should encourage parties to conduct a pre-trial conference to reach stipulations and narrow issues for consideration by the Court. This will shorten the length of the hearing.

3. Require all parties to exchange documentary evidence and other documentation.

4. Ad-hoc telephonic conferences can be useful to ensure that all parties are ready to proceed as scheduled at a detail city. This mechanism is a useful tool when a case is on a call-up calendar and before the Immigration Judge to determine if applications have been timely filed and/or a Form I-130 or Form I-751 has been properly adjudicated by INS.

B. PRIOR TO COMMENCEMENT OF HEARING

1. Ensure that the parties and the interpreter (if one is present) are all positioned so that you can hear them clearly through the speaker and they can hear you. This will also afford an opportunity to check the clarity of the connection.

2. Many connections will be made by means of a telecommunications satellite. This means that the speaker's voice must travel to the satellite for retransmission to the receiving phone. This entire procedure takes only about three seconds but it is important that you instruct the parties to pause three seconds before speaking, thus ensuring that the entire statement is recorded. Instruct the parties to identify themselves before speaking.

III. HEARING PROCEDURE

A. GENERALLY

1. Start the recorder and make the usual opening statement for the record, reciting the name and "A" number of the case, the date of hearing, your name, the names of the representatives and the name and language of the interpreter. It is also appropriate to state for the record that the hearing is being held telephonically, giving your location and the location of the parties.

2. Proceed as though conducting an in-person hearing. See Chapters Three (Bond/Custody Hearings), Four (Exclusion Hearings), Five (Deportation Hearings), and Seven (Removal Proceedings). Inform the alien of his or her right to be able to hear all of the proceedings.

3. It would then be appropriate to have the parties state any stipulations for the record.

4. Mark the exhibits. The first exhibit for the record is almost always the charging document. Mark it in evidence, stating for the record that you have done so.

5. Schedule a date for the individual hearing (next available date when you or another detail judge will be sitting in the detail city) and give notice of date, time, and location of the hearing to the parties. In certain prison settings security concerns of the institution may frown upon this practice, however, in many prison settings, hearings require adjournment because the prison custodian has failed to deliver a hearing notice. If the Immigration Judge gives out the hearing notice, then lack of notice to the alien ceases to be an issue. Unless untimely notice of a hearing is waived by the alien, the statutory time frames for notice depending on the type of proceeding must be observed, and the hearing continued if necessary.

6. In instances where an individual telephonic hearing has been held:

    a. Once the record is fully developed as to all issues and after the parties have rested, render your decision.

    b. Use the appropriate form to memorialize your decision. If you use a Form EOIR-6 or 7, you must dictate a complete oral decision unless the alien accepts your decision and waives appeal. If appropriate, enter a written form order, clearly stating the reasons for your decision. Give the alien the appeal date, have the party on the other end serve the alien with the appeal form as well as the fee

waiver form and serve copies of your order on the parties by mail.

c. It is recommended that you staple a yellow "Rush--Detained at Government Expense" card on the front of the ROP. Certain unscrupulous attorneys and representatives have been known to file appeals checking the "non-detained" box on the appeal form attempting to secure release of an alien in custody. When the ROP is properly noted as a detained case, an appeal if filed timely is placed on a fast track at the BIA.

d. Once the decision is entered, ascertain which party, if any, wishes to reserve appeal. If appeal is reserved, the forms should be given to the respondent or counsel and have the record reflect that this has been done. Then, close the hearing. It is recommended that in all settings that the Judge furnish appeal forms directly to the alien and explain the process to the alien. The BIA is now strictly imposing filing deadlines and appeals are routinely dismissed if they are not timely filed. Attorneys many times are the worst violators of following filing deadlines.

IV. POST HEARING ACTIONS

A. SERVICE OF DECISION

1. If you have entered a summary written decision on Form EOIR-6 or 7, or other form at your location, ensure that copies of the decision are mailed to the parties immediately, and that the appeal date is clearly noted on the lower left hand corner of the order. If appeal is waived, circle on the order that appeal has been waived by both parties. This has great significance as when appeal is waived, the order becomes administratively final. See Matter of Shih, 20 I&N Dec. 697 (1993); see also Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

2. If you have rendered an oral decision, you should prepare a memorandum of the decision and serve it on both parties. The ANSIR system has separate memorandum of decision forms for Exclusion, Deportation, and Removal.

B. MISCELLANEOUS

The normal clerical procedures should be completed, including the posting of the

hearing calendar, assembly of the exhibits, putting all tapes in the tape envelope, and instructing the clerk on the disposition of closed files. In the case the use of a contract interpreter, (you most likely will not have a Court interpreter present) the burden is on you to get the file to the correct place.

V. BOND/CUSTODY TELEPHONIC/TELEVIDEO HEARING PROCEDURE

A. GENERALLY

1. Application to review bond determinations must be made to one of the following Courts in this order: (1) Where the alien is detained; (2) to the Immigration Court having jurisdiction over the place of detention; (3) the Immigration Court having administrative control over the case; or (4) to the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court. 8 C.F.R. § 3.19(c) (2000).

2. The hearing need not be recorded. See Matter of Chirinos, 16 I&N Dec. 276 (BIA 1977). Generally the bond/custody hearing is not recorded unless the hearing is complicated, testimony is taken, and the Judge feels it appropriate to record. If the hearing is recorded, follow the procedure outlined in section III of this chapter.

3. Advise the alien of the nature and purpose of the proceedings and her legal rights, including service of List of Free Legal Services Providers. Verify that the alien has requested a bond/custody redetermination hearing and instruct the parties on how you wish them to proceed. It is suggested that the Judge advise the alien that the request for a redetermination of the bond/custody can result in an increase as well as a decrease in the bond amount.

4. Specifically, you should determine what the alien is seeking -- the reduction of bond and/or changes in conditions, and the reasons why reduction and/or change is appropriate. You should also determine the position of the INS and why the INS has taken that position.

5. Avoid the tendency toward a formal hearing unless you feel it critical to the decision. Bond hearings should be brief. The Transitional Period Custody Rules (TPCR) expired on October 9, 1998. As of this writing, Congress has made no provision to extend these rules. Generally, INS must pick up an alien after the conclusion of the hearing and hold the alien without bond until removal. Certain exceptions exist, however, they apply to aliens that cannot be readily removed from the United States. After

October 9, 1998, the INA as amended by IIRIRA imposes the duty of detention on the INS in almost all circumstances.

6. As an option, you may wish to use a Custody Redetermination Questionnaire that you have designed based on the factors and cases presented in this chapter.

7. Render your decision and record your order on Form EOIR-1, advising parties of appeal rights.

8. Follow regular post-trial procedures and serve the order on parties by mail.

B. APPEAL RIGHTS

1. If an appeal is taken, it is required that you make a written memorandum of your oral decision for review by the Board of Immigration Appeals.

2. No fee is required for a bond appeal.

Immigration Judge Benchbook Index

(October 2001)

Chapter Three - Bond/Custody

CHAPTER THREE

BOND AND CUSTODY HEARINGS

I. OVERVIEW

A. APPLICATION BEFORE AN IMMIGRATION JUDGE

The controlling provisions for bond/custody redetermination hearings before an Immigration Judge are found at INA § 236; 8 C.F.R. §§ 3.19 and 236.1 (2000). The bond hearing is separate and apart from, and shall form no part of the removal hearings. 8 C.F.R. § 3.19(d) (2000). The application for a bond redetermination hearing is made to one of the following offices, in the following order prescribed at 8 C.F.R. § 3.19:

1. If the alien is detained, to the Immigration Court that has jurisdiction over the place of detention. Note: the filing of a charging document is not a prerequisite to bond hearing jurisdiction. See Matter of Sanchez, 20 I&N Dec. 223, 225 (BIA 1990);

2. To the Immigration Court that has administrative control over the case. See 8 C.F.R. § 3.13 (2000); or,

3. To the Office of the Chief Immigration Judge (OCIJ) for designation of the appropriate Immigration Court to accept and hear the application.

B. TIME

1. After the Service makes its initial custody determination, and

2. Before an administratively final order of deportation or removal. 8 C.F.R. §§ 236.1, 3.19 (2000); Matter of Uluocha, 20 I&N Dec. 133, 134 (BIA 1989); Matter of Sanchez, 20 I&N Dec. 176, 177 (BIA 1981); Matter of Vea, 18 I&N Dec. 171, 173 (BIA 1981) .

C. SUBSEQUENT HEARING

The Immigration Judge may conduct a subsequent custody hearing so long as the request is made in writing and based on a showing that the alien's circumstances have changed materially since the initial bond redetermination hearing. 8 C.F.R. § 3.19(e) (2000); Matter of Uluocha, 20 I&N Dec. 133 (BIA 1989).

D. WHILE A BOND APPEAL IS PENDING

When appropriate, an Immigration Judge may entertain a bond redetermination request, even when a previous bond redetermination by the Immigration Judge has been appealed to the Board of Immigration Appeals (BIA). Matter of Valles, 21 I&N Dec. 769 (BIA 1997). If a bond redetermination request is granted by an Immigration Judge while a bond appeal is pending with the BIA, the appeal is rendered moot. Id. If an Immigration Judge declines to change the amount or conditions of bond, the Service must notify the BIA in writing, with proof of service on the opposing party, within 30 days, if it wishes to pursue its original bond appeal. Id.

E. NON-MANDATORY CUSTODY ALIENS

1. For non-mandatory custody aliens, Immigration Judges can: (1) continue to detain; or (2) release on bond of not less than $1,500.00. Note: Immigration Judges do not have authority to consider or review INS parole decisions.

2. It appears from the language of the statute that ordering release on the alien's own recognizance is no longer an option.

3. However, the IIRIRA regulation on bond provides that the alien may petition the Immigration Judge for "amelioration of the conditions under which he or she may be released. . .the Immigration Judge is authorized to

exercise the authority in section 236 of the Act to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may released." 8 C.F.R. § 236.1(d) (2000) (emphasis added).

a. Query: Is the regulation in conflict with the statute? If so, which controls?

b. In considering this issue of possible "OR" release, remember that section 242(b) of the Act, which governed release of alien before the advent of IIRIRA, had almost identical language to the present-day section 236 of the Act. The jurisprudence arising under the old law stood for the general proposition that an alien should not be held for bond unless the alien is a threat or a poor risk to appear for hearing. There is nothing expressed in IIRIRA that requires a contrary ruling.

4. Under BIA case law addressing general bond provisions of prior law, an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight. See Matter of Patel, 15 I&N Dec. 666 (BIA 1976). By virtue of 8 C.F.R. § 236.1(c)(8) (2000), a criminal alien must demonstrate that he is not a threat to the national security, that his release would not pose a danger to property or persons, and that he is likely to appear for any future proceedings. Matter of Adeniji, Interim Decision 3417 (BIA 1999).

5. Juveniles (i.e., under 18) have special conditions of release. See 8 C.F.R. § 236.3 (2000).

a. Juveniles, in addition to having monetary bond, will have conditions of release in that they can only be released, in order of preference, to :

i. a parent,

ii. legal guardian, or

iii. adult relative.

b. The regulation governing juvenile conditions of release is quite detailed and specific. There is no authority for the Immigration

Judge to fashion independent conditions of release.

F. MANDATORY CUSTODY ALIENS

1. The Immigration Court has no bond/custody redetermination authority over those aliens defined in section 236(c)(1) of the Act unless it falls within the enumerated exception. The exception provides that the alien may be released if it is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or to protect an immediate family member of such witness. The alien must satisfy the Attorney General that he or she will not pose a danger to the safety of other persons or of property and is likely to appear for hearings.

2. However, an alien may request a hearing before an Immigration Judge to contest the INS determination that he or she is subject to mandatory detention under section 236(c)(1) of the Act. See 8 C.F.R. §§ 3.19(h)(1)(ii), 3.19(h)(2)(ii) (2000).

3. An alien is not subject to mandatory detention under section 236(c) of the Act if he was released from his non-Service custodial setting on or before October 1998, the expiration date of the Transition Period Custody Rules. Matter of Adeniji, Interim Decision 3417 (BIA 1999).

4. Section 236(c)(1) of the Act provides that the Attorney General shall take into custody any alien when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense, who-

    a. Is inadmissible by reason of having committed any offense covered in section 212(a)(2) of the Act. This includes:

    Conviction or sufficient admission of CIMT

    Conviction of controlled substance violation

    Multiple criminal convictions with aggregate sentences of 5 years

    Controlled substance traffickers and certain immediate relatives

Prostitution and commercialized vice

Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Foreign government officials who have engaged in particularly severe violations of religious freedom.

b. Is deportable by reason of having committed any offense in section 237(a)(2)(A)(ii) [two or more CIMTs], (A)(iii) [Conviction of aggravated felony], (B) [Conviction of controlled substance violation; drug abusers and addicts], (C) [Conviction of firearms offense], or (D) [Certain enumerated convictions].

c. Is deportable under section 237(a)(2)(A)(i) [CIMT] on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

d. Is inadmissible under section 212(a)(3)(B) of the Act or deportable under section 237(a)(4)(B) of the Act [Terrorists activity].

5. Where the District Director has denied the alien's request for release or has set a bond of $10,000 or more, any order of the Immigration Judge authorizing release shall be stayed upon the Service's filing of Form EOIR-43 with the Immigration Court on the day the order is issued, and the decision shall be held in abeyance pending decision on the appeal by the BIA. 8 C.F.R. § 3.19(i)(2) (2000); Matter of Joseph, Interim Decision 3387 (BIA 1999), clarified, Matter of Joseph, Interim Decision 3398 (BIA 1999).

G. AN IMMIGRATION JUDGE MAY NOT REDETERMINE CUSTODY STATUS

1. On the Judge's own motion. Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1992). The application must be made by the alien or the alien's counsel or representative. 8 C.F.R. § 3.19(b) (2000).

2. If the alien is not in INS custody (e.g., alien is in state custody). Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990).

3. If more than 7 days have elapsed since the alien was released from INS

custody. 8 C.F.R. § 236.1(d) (2000); Matter of Valles, 21 I&N Dec. 769 (BIA 1997); Matter of Daryoush, 18 I&N Dec. 352 (BIA 1982); Matter of Sio, 18 I&N Dec. 176, 177 (BIA 1981); Matter of Vea, 18 I&N Dec. 171, 173 (BIA 1981). After the expiration of the 7-day period the respondent may request review by the District Director. 8 C.F.R. § 236.1(d)(2) (2000).

4. The following aliens have no recourse to the Immigration Court for bond hearing:

    a. The arriving alien in removal proceedings, including aliens paroled after arrival under section 212(d)(5) of the Act;

    b. The alien in claimed status proceedings;

    c. The alien in credible fear proceedings;

    d. The alien in exclusion proceedings;

    e. The alien in summary removal proceedings.

    f. The aggravated felony alien in expedited removal proceedings under section 238 of the Act.

5. Neither an Immigration Judge nor the BIA has authority to adjudicate parole matters. Matter of Oseiwusu, Interim Decision 3344 (BIA 1998) Matter of Matelot, 18 I&N Dec. 334, 336 (BIA 1982); Matter of Castellon, 17 I&N Dec. 616 (1981). A returning permanent resident alien is regarded as an "arriving alien" seeking admission if he falls within one of the following categories of section 101(a)(13)(C) of the Act:

    a. has abandoned or relinquished that status;

    b. has been absent from the United States for a continuous period in excess of 180 days;

    c. has engaged in illegal activity after having departed the United States;

    d. has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under the INA and extradition proceedings;

e. has committed an offense identified in section 212(a)(2) of the Act, unless since such offense the alien has been granted relief under sections 212(h) or 240A(a) of the Act, or;

f. is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

6. If the alien has an administratively final order of removal or deportation. INA § 241; 8 C.F.R. § 236.1(d)(1) (2000); Matter of Valles, 21 I&N Dec. 769 (BIA 1997). After an order becomes administratively final, the respondent may seek BIA review of the District Director's custody determination. 8 C.F.R. § 236.1(d)(1) (2000).

7. Aliens described in section 237(a)(4) of the Act (security and related grounds). 8 C.F.R. § 236.1(c)(5)(ii) (2000).

H. SIGNIFICANT FACTORS IN A BOND DETERMINATION

1. Fixed address in the United States. Mater of Patel, 15 I&N Dec. 666 (BIA 1979).

2. Length of residence in the United States. Matter of Shaw, 17 I&N Dec. 177 (BIA 1979).

3. Family ties in the United States, particularly those who can confer immigration benefits on the alien. Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).

4. Employment history in the United States, including length and stability. Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).

5. Immigration Record. Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1974); Matter of Moise, 12 I&N Dec. 102 (BIA 1967).

6. Attempts to escape from authorities or other flight to avoid prosecution. Matter of Patel, 15 I&N Dec. 666 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1967).

7. Prior failures to appear for scheduled court proceedings. Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1967).

8. Criminal record, including extensiveness and recency, indicating consistent disrespect for the law and ineligibility for relief from deportation/removal. Matter of Andrade, 19 I&N Dec. 488 (BIA 1987).

I. LESS SIGNIFICANT FACTORS IN A BOND DETERMINATION

1. Early release from prison, parole, or low bond in related criminal proceedings. Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Mater of Shaw, I&N Dec. 177 (BIA 1979).

2. Ability to pay is not dispositive.

3. INS difficulties in executing a final order of deportation. Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1991).

II. II. CASE CITATIONS--QUICK REFERENCE

Matter of Saelee, Interim Decision 3427 (BIA 1999). The BIA has jurisdiction over an appeal from a district director's custody determination that was made after the entry of a final order of deportation or removal under 8 C.F.R. § 236.1 (2000).

Matter of Adeniji, Interim Decision 3417 (BIA 1999). Section 236(c) of the Act does not apply to aliens whose most recent release from non-Service custody occurred prior to October 9, 1998. A criminal alien seeking custody redetermination under section 236(a) of the Act must show he or she does not present a danger to property or persons. It is the responsibility of the Immigration Judge and parties to ensure the bond record establishes the nature and substance of the specific factual information considered in reaching the bond determination.

Matter of Joseph, Interim Decision 3398 (BIA 1999). The requisite "reason to believe" that allows the INS to claim a respondent is subject to the mandatory detention for purposes of the automatic stay is not sufficient for the merits of the bond appeal. Matter of Joseph, Interim Decision 3387 (BIA 1999), clarified. For purposes of determining the custody conditions of a lawful permanent resident under section 236(c) of the Act, a lawful permanent resident will not be considered "properly included" in a mandatory detention category when an Immigration Judge or the BIA finds it is substantially unlikely that the INS will prevail on a charge of removability specified under section

236(c)(1) of Act.

Matter of Joseph, Interim Decision 3387 (BIA 1999). The filing of an appeal from an Immigration Judge's merits decision terminating removal proceedings does not operate to stay the Judge's release order in related bond proceedings. Matter of Valles, 21 I&N Dec. 769 (BIA 1997), modified.

Matter of Oseiwusu, Interim Decision 3344 (BIA 1998). 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 Collado, 21 I&N Dec. 1061 (BIA 1998). A returning lawful permanent resident cannot use the Fleuti doctrine to seek admission to the United States. The alien must be admissible to the United States. Matter of Ellis, 20 I&N Dec. 641 (1993), distinguished.

Matter of Melo, 21 I&N Dec. 883 (BIA 1997). 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. The "in 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 Valles, 21 I&N Dec. 769 (BIA 1997). An Immigration Judge maintains continuing jurisdiction to entertain bond redetermination requests by an alien even after the timely filing of an appeal with the BIA from a previous bond redetermination request.

Matter of Valdez, 21 I&N Dec. 703 (BIA 1997). The Transition Period Custody Rules invoked 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. 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, invocation of those rules.

Matter of Noble, 21 I&N Dec. 672 (BIA 1997). Bond redeterminations of detained deportable aliens convicted of an aggravated felony are governed by the Transition Period Custody Rules irrespective of how or when the alien came into immigration custody.

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 INS seeks to deport him is appropriately ordered detained without bond as a poor bail risk.

Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994). An aggravated felon must pass a two-step analysis for an aggravated felon to overcome the rebuttable presumption against his release. One, that he is not a threat to the community, and two, that he is not likely to abscond.

Matter of Ellis, 20 I&N Dec. 641 (1993). In bond proceedings governed by section 242(a)(2)(B) of the Act, the alien bears the burden of showing that he is lawfully admitted to the United States, not a threat to the community, and likely to appear before any scheduled hearings.

Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1991). An Immigration Judge may not redetermine custody status on his own motion, only upon application by respondent or his representative.

Matter of De la Cruz, 20 I&N Dec. 346 (BIA 1991), modified, Matter of Ellis, 20 I&N Dec. 641 (1993). There is a presumption against the release of any alien from Service custody convicted of an aggravated felony unless the alien demonstrates certain factors. See also Matter of Yeung, 21 I&N Dec. 610 (1996).

Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990). It is not proper for an Immigration Judge to make a custody determination under 8 C.F.R. § 242.2(c) unless INS has custody of the respondent. A respondent who is in the custody of a state or agency other than the INS is not in the custody of INS.

Matter of Eden, 20 I&N Dec. 209 (BIA 1990). An alien convicted of an aggravated felony is subject to detention under section 242(a)(2) of the Act upon completion of the incarceration or confinement ordered by the court for such conviction.

Matter of Uluocha, 20 I&N Dec. 133 (BIA 1989) Immigration Judges may further consider requests to modify bonds by detained aliens without a formal motion to reopen. Such requests should be considered on the merits. However, if there are no changed circumstances shown, the Immigration Judge may decline to change the prior bond decision.

Matter of Andrade, 19 I&N Dec. 488 (BIA 1987). Case includes factors to consider and effect of early releases on parole.

Matter of Sueay, 17 I&N Dec. 637 (BIA 1981). Factors to consider when analyzing a bond case include employment history; length of residence in community; family ties; record of nonappearance; criminal violations; immigration violations; and eligibility for relief.

Matter of Shaw, 17 I&N Dec. 177 (BIA 1979). Factors to consider in a bond case include the manner of entering; community ties; criminal arrest and characteristics; state criminal bond amount; and family ties.

Matter of Chirinos, 16 I&N Dec. 276 (BIA 1977). A bond hearing is a hearing separate and apart from other proceedings. The hearing is informal and there is no right to a transcript. The record may contain any information in addition to the memorandum of decision and other EOIR forms.

Immigration Judge Benchbook Index

(October 2001)

Chapter Four - Exclusion Hearings

B. Individual Hearing

CHAPTER FOUR

EXCLUSION HEARINGS

I. INTRODUCTION - APPLICABLE TO PROCEEDINGS COMMENCED PRIOR TO APRIL 1, 1997

A. GENERALLY

1. The General Rule is, unless otherwise expressly provided by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), that the new rules do

not apply in the case of aliens in proceedings before April 1, 1997. IIRIRA § 304. However, IIRIRA provides for two exceptions to this general rule:

a. If an alien is in proceedings prior to April 1, 1997, but no evidentiary hearing has been conducted, the Attorney General can apply the new law if the alien is notified not later than 30 days before the first evidentiary hearing that the new law will be applicable to his or her case. INS probably will not have to issue a new charging document under this provision; or

b. If an alien is in proceedings prior to April 1, 1997, but there has not been a final administrative decision in his case, the Attorney General can terminate the proceedings and refile under the new law. There is no indication at the present time that the Attorney General, through the INS, will trigger this exception.

c. An exclusion hearing is used to determine the admissibility of an arriving alien. The hearing differs from a deportation hearing in that the initial burden of proof is with the applicant for admission. Only a District Director of the Immigration and Naturalization Service has the authority to determine if parole shall be given; an Immigration Judge lacks such authority.

B. EXCLUSION AND DEPORTATION PROCEEDINGS DISTINGUISHED

1. Traditionally, the distinction between exclusion and deportation proceedings was based upon the concept of "entry." If the alien has effected an entry, deportation proceedings were proper; if the alien had not made an entry, exclusion proceedings were required. IIRIRA eliminated the "entry" definition, and replaced it with "admission" and "admitted."

2. The alien in deportation proceedings is called the respondent as he is deemed to be responding to the charging

document, which is called an Order to Show Cause. The alien in exclusion proceedings is called the applicant as he or she is applying for admission to the country.

C. ENTRY DEFINED [Former INA § 101(a)(13)]: [Prior to April 1, 1997]

1. An Entry for immigration purposes is any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided, that no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception. INA § l0l(a) (13).

2. Note that this definition has been replaced by "admission" and "admitted." See Chapter Seven, Removal Proceedings.

D. REQUIREMENTS FOR AN ENTRY

The Board of Immigration Appeals (BIA) has determined that entry involves: (1) crossing into the territorial limits of the United States (i.e., physical presence); (2) the inspection and admission by an immigration official, or (b) actual and intentional evasion of inspection at the nearest inspection checkpoint; and (3) freedom from official restraint. See Matter of Z-, 20 I&N Dec. 707 (BIA 1993); Matter of Patel, 20 I&N Dec. 368 (BIA 1991).

E. CHARGING DOCUMENT

1. The charging document in exclusion proceedings is the Form I-122 Notice to Applicant Detained for Hearing Before Immigration Judge.

It must contain a charge(s) of excludability but does not have factual allegations.

2. At Master Calendar hearing, determine from INS counsel what facts are alleged.

3. The applicant has certain rights during the exclusion hearing:

    a. To be represented by counsel of his own choice at no expense to the government;

    b. To object to evidence from INS and cross-examine INS witnesses;

    c. To present evidence and witnesses;

    d. To apply for those forms of relief for which he shows apparent eligibility. See INA § 242(b);

    e. The right to a hearing separate and apart from the public;

    f. The right to have a friend or relative present during hearing. See INA § 236.

4. In exclusion proceedings where the alien has no colorable claim to lawful permanent resident status, the burden of proof is upon the alien to show that he effected an entry and that exclusion proceedings are, thus, improper. Matter of Z-, 20 I&N Dec. 707 (BIA 1993).

5. An alien who is refused admission but escapes from carrier custody has made an entry. Matter of Ching and Chen, 19 I&N Dec. 203 (BIA 1984). Also, an alien who debarks a vessel at a place not designated as a port of entry and flees into the interior undetected, with every apparent intention of evading immigration inspection, has made an entry. Matter of Z-, supra.

6. The mere fact that the alien enters an area under federal

jurisdiction for reasons unrelated to immigration processing does not establish that the alien was under official restraint. Id. On the other hand, where an alien clears primary inspection at an airport she is still under official restraint inasmuch as she is subject to inspection at all times before passing through the "Customs Enclosure" exit control. Correa v. Thornburgh, 901 F.2d 166 (2d Cir. 1990).

7. Escape from detention facilities while awaiting exclusion proceedings is not an entry. Matter of Lin, 18 I&N Dec. 219 (BIA 1982).

8. Parole is not an entry. Leng May Ma v. Barber, 357 U.S. 185 (1958). An absconding parolee is considered an inadmissible alien. Vitale v. INS, 463 F.2d 579 (7th Cir. 1972).

9. As indicated in the definition above, entry means any coming of an alien into the United States, regardless of whether the alien has entered on a prior occasion. See United States ex rel. Lam v. Corsi, 61 F.2d 964 (2d Cir. 1932).

   This is the "reentry" doctrine and, under this concept, an alien who departs the United States is also subject to the immigration law upon return, despite the brevity of the trip. In Rosenberg v. Fleuti, 374 U.S. 449 (1963), however, the Supreme Court held that, in the case of a returning lawful permanent resident, the alien does not make an entry upon her return if her trip was "innocent, casual, and brief" and was not "meaningfully interruptive" of her lawful permanent residence. For a discussion of cases which have attempted to define the meaning of "innocent, casual and brief." See C. Gordon & S. Mailman, Immigration Law and Procedure, 3, Chap. 71 (1994) (hereinafter Gordon & Mailman).

10. In Matter of Collado, 21 I&N Dec. 1061 (BIA 1998), the BIA concluded that the Fleuti principle does not require the admission of a lawful permanent resident who has been placed in removal proceedings as an arriving alien. However, in Richardson v. Reno, No. 97-3799-CIV-DAVIS (S.D.Fla. 1998), the Court rejected the Collado decision and

pointed out that Congress intended to overturn only certain interpretations of Fleuti. See also Matter of S-O-S-, Interim Decision 3355 (BIA 1998).

11. An application for admission is a continuing one and admissibility is determined upon the facts and law existing at the time the application is actually considered. Matter of Kazemi, 19 I&N Dec. 49 (BIA 1984). However, section 304 of IIRIRA states that, with certain exceptions, the new rules do not apply in the case of aliens in proceedings prior to April 1, 1997.

12. If exclusion proceedings are terminated because an entry was effected, the alien may be subject to removal proceedings instituted on or after April 1, 1997.

II. GROUNDS OF EXCLUDABILITY

APPLICABLE TO PROCEEDINGS INSTITUTED PRIOR TO APRIL 1, 1997.

A. INTRODUCTION

1. Aliens seeking admission to the United States are admissible unless they fall within a class of excludable aliens. The Immigration Act of 1990 revised the grounds for exclusion into nine basic categories: (1) health-related grounds; (2) criminal and related grounds; (3) security and related grounds; (4) public charges; (5) labor grounds; (6) previous immigration violations; (7) documentation grounds; (8) ineligibility for citizenship; and (9) miscellaneous grounds. The grounds listed in section 212(a) of the Act are exclusive. See Gegiow v. Uhl, 239 U.S. 3 (1915).

2. For a discussion of relief from excludability, see infra Chapter Six.

B. HEALTH-RELATED GROUNDS

1. In the Immigration Act of 1990, Congress made several

changes regarding the excludability of aliens for mental or physical health reasons.

a. Under section 212(a)(1)(A)(i) of the Act an alien is excludable who is determined, in accordance with regulations prescribed by the Secretary of Health and Human Services, to have a communicable disease of public health significance, which shall include infection with the etiologic agent for Acquired Immune Deficiency Syndrome (AIDS). The specific language referring to AIDS was added by Congress in 1993. The Public Health Service maintains a list of communicable diseases posing a significant health threat. Other diseases on the list include infectious leprosy, active tuberculosis, infectious syphilis, lymphogranuloma venereum, chancroid, gonorrhea, and granuloma inguinale.

b. Under section 212(a)(1)(A)(ii) of the Act, aliens are excludable who are determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with Attorney General) to have a mental disorder and behavior associated with the disorder that may pose (or has posed) a threat to the property, safety, or welfare of the alien or others or if the alien has a history of mental disorder and threatening behavior associated with it that is likely to recur or lead to other harmful behavior.

c. Mental retardation and insanity are no longer grounds for excludability. Such persons could be excluded, however, if they otherwise meet the definition of having a "mental disorder."

d. Until 1990, persons determined to have a "psychopathic personality" were excluded. This was used to target homosexuals, even though the Public Health Service has refused to certify homosexuals as suffering from such "affliction" since the 1970s. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), removed such ground, and

homosexuals are no longer excludable simply because of their sexual orientation.

e. Section 212(g) of the Act provides a waiver of the application of section 212(a)(1)(A)(i) of the Act (relating to physical health) in the case of any alien who is the parent, spouse, unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, a lawful permanent resident, or an alien issued an immigrant visa. Section 212(g) of the Act also waives subsection 212(a)(1)(A)(ii) (relating to mental health) under conditions imposed by regulation by the Attorney General in her discretion, after consultation with the Secretary of Health and Human Services.

f. The final health-related exclusion ground is found in section 212(a)(l)(A)(iii) of the Act. This provision excludes aliens who are determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be drug abusers or addicts. There is no provision for a waiver of this subsection.

C. CRIMINAL AND RELATED GROUNDS

1. Several criminal exclusion grounds require a conviction for the alien to be excludable. Under Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988), a conviction exists for immigration purposes where an alien has had a formal judgment of guilt entered by a court or, if adjudication of guilt has been withheld, where all of the following elements are present: (1) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a guilty finding; (2) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed; and (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the alien's guilt or innocence of the original charge. See also Matter of S-S, 21 I&N Dec.

900 (BIA 1997).

2. The conviction must also be final. A conviction is not considered final until the direct appeal has been waived or exhausted. Will v. INS, 447 F.2d 529 (7th Cir. 1971).

3. IIRIRA amended the definition of a conviction. Section 101(a)(48) of the Act defines "conviction" as a formal judgment of guilt of alien entered by a court, or if adjudication of guilt has been withheld, where a judge/jury has found alien guilty, or the alien has entered a plea of guilty or has admitted sufficient facts to warrant a finding of guilty, and the judge ordered some form of punishment, penalty or restraint on an alien's liberty. See Matter of Rodriguez-Ruiz, Interim Decision 3436 (BIA 2000); Matter of Devison, Interim Decision 3435 (BIA 2000); Matter of Roldan, Interim Decision 3377 (BIA 1999); Matter of Dillingham, 21 I&N Dec. 1001 (BIA l997). See also Matter of Punu, Interim Decision 3364 (BIA 1998).

4. It is well established that an act of juvenile delinquency is not a crime within the meaning of immigration laws and, thus, a conviction for a delinquent act will not support a ground of excludability. See, e.g., Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981).

5. Crimes Involving Moral Turpitude

    a. Under section 212(a)(2)(A)(i)(I) of the Act, an alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) is excludable. There are two exceptions to this general rule. Under section 212(a)(2)(A)(ii)(I) of the Act the first exception applies if the crime was committed when the alien was under age eighteen, the crime was committed more than five years before the date of the visa application, and the date of application for admission, and the alien has been released from any imprisonment for such crimes for at least five years. Under section 212(a)(2)(A)(ii)(II) of the Act the

other exception, commonly referred to as the "petty offense" exception, applies if the maximum penalty for the crime did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months, regardless of the actual amount of time served.

b. There is no fixed definition of the phrase "crime involving moral turpitude." The BIA has said that in determining whether a crime involves moral turpitude, it "consider[s] whether the act is accompanied by a vicious motive or corrupt mind." Matter of Perez-Contreras, 20 I&N Dec. 615 (BIA 1992). Moral turpitude has also been defined as an "act of baseness, vileness, or depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man." Black's Law Dictionary 910 (5th ed. 1979). The Board has stated: "A crime, committed without contemplating death, without malice, and without intent, and ordinarily committed while engaged in a lawful act but committed through carelessness or because of the absence of due caution or circumspection does not include an evil intent and therefore does not involve moral turpitude." Matter of Mueller, 11 I&N Dec. 268, 269 (BIA 1965) (citing Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929)).

c. The BIA has tended to focus on whether an act was accompanied by a vicious motive or a corrupt mind. Where knowing or intentional conduct is an element of an offense, moral turpitude has been found to be present. Matter of Perez-Contreras, 20 I&N Dec. 615 (BIA 1992). Where the required mens rea cannot be determined from the statute, moral turpitude does not inhere. Matter of Lopez, 13 I&N Dec. 725, 726-27 (BIA 1971). Any doubts in deciding whether an offense involves moral turpitude must be resolved in the alien's favor. See Fong Haw Tan v. Phelan, 333

U.S. 6 (1948); Matter of Serna, 20 I&N Dec. 579, 581 (BIA 1992); Matter of Hou, 20 I&N Dec. 513, 520 (BIA 1992).

d. The relative seriousness of the offense does not determine whether moral turpitude inheres in a crime. A crime may or may not involve moral turpitude whether it is a felony or a misdemeanor. Matter of Grazley, 14 I&N Dec. 330 (BIA 1973); see also Gonzales v. Barber, 207 F.2d 398 (9th Cir. 1953), aff'd, 347 U.S. 637 (1954). Furthermore, the amount of bodily harm incurred is not controlling. See Matter of Perez-Contreras, supra. The severity of the sentence imposed is also not determinative of whether the crime involved moral turpitude. See Matter of Serna, supra.

e. Moral turpitude is found where intentional conduct is an element of the offense. In two cases, however, the BIA has found criminally reckless conduct to involve moral turpitude where the statutes at issue defined recklessness as an awareness of and conscious disregard of a substantial and unjustifiable risk. See Matter of Woitkow, 18 I&N Dec. 111 (BIA 1981); Matter of Medina, 15 I&N Dec. 611 (BIA 1976), aff'd sub nom, Medina-Luna v. INS, 547 F.2d 1171 (7th Cir. 1977). The Board has declined to find moral turpitude to inhere in criminally negligent conduct. Matter of Perez-Contreras, supra. The BIA did find moral turpitude in the offense of aggravated stalking (Michigan). Matter of Ajami, Interim Decision 3405 (BIA 1999).

f. The BIA concluded that a conviction for distribution of cocaine is a crime involving moral turpitude where knowledge or intent is an element of the crime. Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997).

g. It is important to determine if the conduct at issue is considered a crime under the law of the place where it occurred. Exclusion is not proper where the alien

has admitted misconduct which is not punished as a crime at the place of commission. Matter of R-, 1 I&N Dec. 118 (BIA 1941).

h. The admission of a crime must be voluntary and not coerced. Matter of G-, 1 I&N Dec. 225 (BIA 1942).

i. For a discussion of specific crimes that are crimes involving moral turpitude, see Gordon & Mailman, § 71.05.

6. Multiple Criminal Convictions

Under section 212(a)(2)(B) of the Act, any alien convicted of two or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences imposed were five years or more is excludable. Note that this rule differs from that involving multiple convictions for deportation purposes.

7. Controlled Substance Violations

a. Any alien who is convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation or a conspiracy to violate any law or regulation of a foreign country, a State, or the United States relating to a controlled substance is excludable under section 212(a)(2)(A)(i)(II) of the Act. Note that a conviction is not required for this subsection to be operative.

b. A waiver of inadmissibility is provided in section 212(h) of the Act. This provision was significantly modified in IIRIRA, and these modifications apply to pending cases. See discussion in Chapter Six, Relief From Exclusion and Deportation. Matter of Yeung, 21 I&N Dec. 610 (BIA 1997); see also Matter of Pineda, 21 I&N Dec. 1017 (BIA l997). Note that the waiver is limited and does not apply to

trafficking in drugs of any kind.

c. Controlled substance traffickers are excluded under section 212(a)(2)(C) of the Act. Specifically, any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any controlled substance is excludable. This includes aliens who have been illegal traffickers in marijuana. See Matter of Rico, 16 I&N Dec. 181 (BIA 1977). The BIA has held that an alien who brought six marijuana cigarettes into the United States for his personal use was not excludable as a drug trafficker. Matter of McDonald and Brewster, 15 I&N Dec. 203 (BIA 1975). The only waiver available to drug traffickers is a section 212 (c) of the Act waiver of inadmissibility. See Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997); Matter of Fuentes-Campos, 21 I&N Dec. 905 (BIA l997). See also Tasios v. Reno, 204 F.3d 544 (4th Cir. 2000); Matter of Michel, 21 I&N Dec. 1101 (BIA 1998).

8. Prostitution and Commercialized Vice

a. Section 212(a)(2)(D) of the Act provides that any alien who is coming to the United States to engage in prostitution or has engaged in prostitution within ten years of the date of application for entry is excludable. Persons who procure or attempt to procure prostitution are also excludable. In addition, any alien who is coming to the United States to engage in any other unlawful commercialized vice is excludable.

b. This is not a true criminal ground of exclusion inasmuch as it bars aliens who practiced prostitution lawfully in another country. See Matter of G-, 5 I&N Dec. 559 (BIA 1954). "Engaging" in prostitution means that the alien must have participated in such conduct over a period of time rather than simply engaging in a single act of prostitution. Matter of T-, 6 I&N Dec. 474 (BIA 1955). Note, however, that an

alien whose prostitution-related activities have not reached the level such that he or she can be considered to have "engaged" in prostitution may still be excludable for committing a crime involving moral turpitude. See, e.g., Matter of W-, 4 I&N Dec. 401 (BIA 1951).

c. Medical personnel who work at a house of prostitution under an arrangement with a governmental entity are not excludable for prostitution-related activities inasmuch as such persons work to fulfill health regulations. Matter of C-, 7 I&N Dec. 432 (BIA 1957).

d. In determining the applicability of a waiver of this ground of excludability see section 212(h) of the Act.

9. Aliens Involved in Serious Criminal Activity Who Have Asserted Immunity from Prosecution

Section 212(a)(2)(E) of the Act excludes former foreign diplomats from reentering the United States who escaped criminal prosecution or punishment in the United States because they asserted their diplomatic immunity. "Serious criminal activity" is defined at section 101(h) of the Act. It includes traffic crimes, such as driving under the influence of alcohol, if the crime resulted in injury to another person. Felonies and crimes of violence are also serious criminal offenses.

D. SECURITY AND RELATED GROUNDS

1. Any alien who a consular officer or the Attorney General knows, or has reasonable grounds to believe, is seeking to enter the United States to engage in any crime relating to espionage or an activity to overthrow the United States Government by violent or other unlawful means is excludable. INA § 212(a)(3)(A). Terrorists are also excludable. Members of the Palestine Liberation Organization (PLO) are named specifically as being considered terrorists. INA § 212(a)(3)(B).

2. Any alien whose entry or proposed activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States is excludable. INA § 212 (a)(3)(C)(i). There is an exception for an alien who is an official of a foreign government or a candidate for an election to such a position. INA § 212(a)(3)(C)(ii). Section 212(a)(3)(C)(iii) of the Act also provides an exception for "other" aliens.

3. Persons seeking to enter the United States as immigrants who are or have been members of or affiliated with the Communist or other totalitarian party are excludable under section 212 (a)(3)(D)(i) of the Act.

4. Any alien who participated in Nazi persecutions is excludable. Also, any alien who has engaged in any conduct defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is excludable. See INA § 212(a)(3)(E).

E. PUBLIC CHARGES

Prior immigration law excluded economic "undesirables" under such terms as "vagrants," "professional beggars," or "paupers." The INA, as amended by the Immigration Act of 1990, simply excludes aliens who are likely at any time" to become a public charge." INA § 212(a)(4). The determination of whether a person is likely to become a public charge is made by a consular officer at the time of the application for the visa. Even if the consular officer determines that the alien is not likely to become a public charge, the immigration official at the port of entry may deny entry for such reason. Such occurrences are rare. Even if the alien is found likely to become a public charge, he may still enter, in the discretion of the Attorney General, if he posts a bond which would indemnify the federal or a state government against his becoming a public charge. See INA § 213; Matter of Ulloa, Interim Decision 3393 (BIA 1999).

F. LABOR GROUNDS

Any alien who seeks to enter the United States for the purpose of

performing unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of the visa application and in the place where the alien is to perform the work. In addition, the Labor Secretary must certify that the alien's employment will not adversely affect the wages and working conditions of workers in the United States who are similarly employed. INA § 212(a)(5). A waiver may be available under section 212(k) of the Act.

G. PREVIOUS IMMIGRATION VIOLATIONS

1. Any alien who has been previously excluded from admission and who again seeks admission within one year of the date of exclusion and deportation is excludable, unless prior to the alien's reembarkation at a place outside the United States the Attorney General has consented to the alien's reapplying for admission. INA § 212(a)(6)(A).

2. Section 212(a)(6)(B) of the Act bars aliens who have been deported from reentering the United States for a period of five years, unless the Attorney General consents to their reentry during this period. Aliens not having the proper consent are excludable. It also excludes aliens who have been removed as an alien enemy or who have been removed at government expense in lieu of deportation. An alien who has left the United States at his own expense after a deportation order has been entered against him is excludable under this provision. Dragon v. INS, 748 F.2d 1304 (9th Cir. 1984). An alien departing under a grant of voluntary departure, however, is not excludable under this subsection. 8 C.F.R. § 243.5 (1997). A previously deported aggravated felon must remain outside the United States for twenty consecutive years before he is eligible to reenter the United States. 8 C.F.R. § 212.2(a) (1997).

3. Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) entry into the United States or other benefit under the Act is excludable. INA § 212(a)(6)(C). A waiver of this ground is provided at INA § 212(i), which was significantly modified by IIRIRA. The phrase "other

benefit" is meant to include adjustment of status applications, visa petitions, requests for employment authorization, voluntary departure, etc. The visa fraud exclusion ground is not applicable if the statements made by the alien were not false when they were uttered. Id. The misrepresentation must be "willful." This does not require that the alien have the *intent* to deceive. Instead, "[i]t is sufficient that the false statement be made in a deliberate and voluntary manner or that the applicant has knowledge of the falsity of the documentation he or she is employing." Suite v. INS, 594 F.2d 972 (3d Cir. 1979); Espinoza-Espinoza v. INS, 554 F.2d 921 (9th Cir. 1977). However, a finding of fraud requires close scrutiny due to its perpetual bar from admissibility. See Matter of Y-G-, 20 I&N Dec. 794 (BIA 1994), and cases cited therein. Moreover, the fraud or willful misrepresentation of a material fact must be made to a United States authority. Id.

Note that under IIRIRA, arriving aliens who are inadmissible because of fraud or willful misrepresentation are subject to expedited removal, and are not placed in proceedings before Immigration Judges unless the INS elects to file the charging document with additional charges.

4. Stowaways are excludable. INA § 212(a)(6)(D). A stowaway is an alien who conceals himself in a ship or aircraft. Stowaways are not entitled to an exclusion hearing before an Immigration Judge. INA § 273(d). The regulations, however, provide that a stowaway may submit an application for asylum to an Asylum Officer and appeal an adverse decision to the Board of Immigration Appeals. 8 C.F.R. § 253.1(f). But see Chun v. Sava, 708 F.2d 869 (2d Cir. 1983).

   Note that IIRIRA provides that Immigration Judges have exclusive jurisdiction over all asylum applications filed by stowaways after April 1, 1997. 8 C.F.R.§ 208.2(b). They are provided an "asylum-only" hearing before the Immigration Judge.

5. 5. Alien smugglers are excludable. Specifically, any alien who at any time knowingly has encouraged, induced,

assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is excludable. INA § 212(a)(6)(E)(i). There is no longer a requirement that the smuggler have acted "for gain." There is a limited waiver available for aliens who are already lawful permanent residents if the person they encouraged or assisted to enter illegally was their spouse, parent, son, or daughter. INA § 212(d)(11). The Attorney General is authorized to grant the waiver for humanitarian purposes, to assure family unity, or when it is in the public interest. An eligible lawful permanent resident may also obtain a waiver of section 212(a)(6)(E)(i) excludability under section § 212(c) of the Act.

H. DOCUMENTATION GROUNDS

1. Section 212(a)(7) of the Act lists the grounds of exclusion for failure to fulfill documentation requirements for both immigrants and nonimmigrants.

2. An immigrant may not enter the United States unless the alien possesses a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document, and a valid unexpired passport or other proper travel document. A waiver is authorized under section 212(k) of the Act.

3. Nonimmigrants must possess a passport valid for at least six months beyond the period for which admission is permitted and a valid nonimmigrant visa or border crossing card; otherwise, they are excludable. A waiver is authorized at section 212(d)(4) of the Act . Section 217 of the Act discusses the authority to waive the requirements under the Visa Waiver Pilot Program. An alien cannot be excludable as both an immigrant without a valid immigrant visa and a nonimmigrant without a valid nonimmigrant visa at the same time. See Matter of Healy and Goodchild, 17 I&N Dec. 22 (BIA 1979).

4. Under IIRIRA, arriving aliens inadmissible for failure to possess proper documents are subject to expedited removal, and are not placed in proceedings before Immigration

Judges unless the INS elects to file the charging documents with additional charges.

I. INELIGIBILITY FOR CITIZENSHIP

Any immigrant who is permanently ineligible to citizenship is excludable. INA § 212(a)(8). The phrase "ineligible to citizenship" when used in reference to an individual means that not withstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen under section 3(a) of the Selective Training and Service Act of 1940, as amended or under section 4(a) of the Selective Service Act of 1948, as amended or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any such sections or Acts. INA § l0l(a)(19). The goal of this provision is to exclude alien draft evaders. To be permanently barred from citizenship and, thus, excludable under this provision, all of the following elements must be present:

a. the alien must apply for exemption or discharge;

b. the exemption or discharge must be from training or service in the United States Armed Forces or the United States National Security Training Corps;

c. the basis for the request for exemption or discharge must be the fact that the applicant is an alien; and

d. the applicant must have been relieved or discharged from such training or service based on alienage.

This exclusion ground applies only if the alien sought and received a permanent exemption. Aliens who are automatically exempted from military service are not excludable based upon this provision. Id.

J. MISCELLANEOUS GROUNDS

Section 212(a)(9) of the Act lists three "miscellaneous" grounds for exclusion.

a. Any immigrant who is coming to the United States to practice polygamy is excludable under section 212(a)(9)(A) of the Act. This is a change from prior law in that the alien is no longer excludable for advocating the practice of polygamy or for actually having practiced it in the past. A waiver under section 212(c) of the Act may apply.

b. Alien guardians accompanying excluded aliens may also be excluded under section 212(a)(9)(B) of the Act if their guardianship is necessary because the excluded aliens are helpless from sickness, mental or physical disability, or infancy if so certified by a medical examiner pursuant to section 237(e) of the Act. A waiver may be available under section 212(c) or 212(d)(3) of the Act.

c. International child abductors are excludable under section 212(a)(9)(C) of the Act. It excludes aliens who take United States citizen children abroad where custody of the child has been granted to a United States citizen by a court in the United States. Excludability continues until the alien surrenders custody of the child to the proper custodian. This provision does not apply so long as the child is located in a foreign country that is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. A waiver may be available under section 212(d)(3) of the Act, but is not available under section 212(c).

III. THE MASTER CALENDAR HEARING

A. MECHANICS OF THE HEARING

1. It is important to pay attention to detail in conducting the master calendar hearing because, unlike the Order to Show Cause, the Notice to Applicant Detained for Hearing Before Immigration Judge (Form I-122) contains no factual allegations. A successful session will identify all issues, set filing deadlines for motions and relief applications, and set the case to the individual calendar for hearing on the merits and oral decision in one hearing session.

2. Therefore, attention should be given to the following:

    a. Does the applicant or any of the witnesses need the services of an interpreter, and if so, in what language. An interpreter must be ordered unless the applicant and all contemplated witnesses are fluent in the English language.

    b. Conduct a voir dire of INS counsel to learn the facts of the case, and ask the applicant what the pleading will be to the following:

        i. Of what country is the applicant a native and citizen?

        ii. If ordered excluded, is the applicant fearful of returning home? If so, set an asylum filing schedule and reset the case to another master calendar for the filing of an asylum application.

        iii. On what date did the applicant arrive in the United States and at what port of entry?

        iv. What application for admission did the alien make? E.g., immigrant, nonimmigrant, United States citizen or national, returning resident immigrant.

        v. What documents did the applicant present upon arrival? E.g., a passport, reentry permit, immigrant card.

        vi. Where are the documents now and are they still valid?

        vii. If not valid, set a filing date for the appropriate document waiver application.

    c. Is the applicant on parole or detained by INS? If detained, give priority to the case as the alien is held

at government expense.

d. What are the facts surrounding the ground(s) of excludability? Ask INS counsel to state in plain language the facts surrounding the ground(s) of excludability.

3. Ask the applicant to plead to the charge(s) of excludability and address issues of relief.

a. If there is a contest, ask the theory of contest. Will the applicant testify on the issue? Set a filing schedule for a motion to terminate.

b. Explore the issue of possible challenge to exclusion jurisdiction.

i. Does the applicant contend that he or she has effected an entry into the United States? If so, set a filing schedule for a motion to terminate on that basis.

ii. Does the applicant, as a returning resident immigrant, contend he or she is not subject to an exclusion hearing because the absence from this country was innocent, brief and casual under the so-called Fleuti Rule?

iii. The Supreme Court has held that an innocent, brief, and casual departure from the United States by a returning resident immigrant will not subject the immigrant to the legal consequences of entry upon return (or, more precisely, reentry). Rosenberg v. Fleuti, 374 U.S. 449 (1963). Thus, INS must pursue such alien, if at all, in deportation [now removal] rather than exclusion proceedings. See Matter of Collado, 21 I&N Dec. 1061 (BIA 1998) finding that the Fleuti doctrine does not apply in removal. The Fleuti principle was codified in the statutory definition of entry. Section 101(a)(13), but has been amended by IIRIRA

. The Immigration Judge must remember that he or she is bound by the law on entry of the federal circuit jurisdiction where the case is decided.

iv. The United States Court Appeals for the Ninth Circuit holds that the mere fact the alien departed the United States with innocent intentions does not give him Fleuti protection when trying to return after misconduct abroad. See Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974).

v. The United States Court of Appeals for the Fifth Circuit holds that the alien who departs the country with innocent intentions does not lose Fleuti protection because of misconduct abroad and exclusion proceedings are not the proper forum in which to test his right to continued presence in this country. Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972).

vi. The BIA follows the rationale of Palatian, 502 F.2d 1091 (9th Cir. 1974). See Matter of Valdovinos, 14 I&N Dec. 438 (BIA 1973).

vii. If the Immigration Judge finds the returning resident alien to be within the protection of Fleuti, then the Immigration Judge must order his or her admission as a returning resident immigrant and terminate proceedings.

viii. Temporary immigrants and all nonimmigrants do not have Fleuti protection. They are subject to exclusion proceedings even though the absence was innocent, brief, and casual. Matter of Mundell, 18 I&N Dec. 467 (BIA 1983).

c. What application(s) for relief or waiver does the applicant make?

Set a filing date for waiver applications, motions, etc.

d. Aside from the applicant, how many witnesses will the applicant and INS call at the individual calendar hearing? Ask the parties to estimate the time it will take to directly examine the witnesses. This will also be an accurate gauge of individual calendar time needed.

B. SPECIAL ISSUES TO ADDRESS AT THE MASTER CALENDAR

1. The applicant may be present in the United States on some form of immigration parole. Parole authority is exercised only by the INS District Director and not by the Immigration Judge. INA § 212(d)(5). The exclusion applicant may be on parole in a number of different scenarios. The applicant may be:

a. free on his own recognizance;

b. free on bond and residing in the United States awaiting his immigration hearing. If hearing is held at an Immigration Court near the border, on parole to attend the hearing, and INS will return the alien to Mexico/Canada once hearing is over.

c. under advance parole where the alien was in the United States previously with an adjustment of status application pending and INS granted advance parole to leave the country and then return to pursue the application. This presents the only situation where the Immigration Judge has authority to rule on adjustment of status as a remedy against exclusion except for qualified aliens for adjustment of status under the Nicaraguan and Central American Relief Act (NACARA).

d. Detained by INS under arrest.

2. The Immigration Judge should determine what the parole situation is to learn if adjustment of status is a permissible remedy and also gauge when the individual calendar hearing should be held.

3. Before the Immigration Judge hears the merits of the case, the INS counsel at hearing must serve on the applicant notice of parole termination. 8 C.F.R. § 212.5 (1997). But see Matter of Grandi, 13 I&N Dec. 798 (BIA 1971) (exclusion proceedings proper even though parole not terminated).

4. Evidence of parole is the Form I-94 Arrival and Departure Record, which should have been completed by the INS inspector at the port of entry. INS is sometimes lax in this regard and no form may have been completed. If the alien does not concede parole, the issue is one of jurisdiction (i.e., whether an entry has been made) and must be litigated at an individual calendar merits hearing. But see Matter of Grandi, 13 I&N Dec. 798 (BIA 1971) (exclusion proceedings proper even though parole not terminated).

IV. THE INDIVIDUAL CALENDAR HEARING

A. JOINDER OF APPLICANTS

1. The Immigration Judge at a detention center may wish to join pro se detainees for common hearing. There is no prohibition against joinder but each applicant must expressly understand and waive his right to a separate hearing closed to the public.

2. The Immigration Judge will always want to make sure to join family members that are in exclusion proceedings if at all possible. In most cases, family members came to the United States at the same time and for the same reasons. If joinder of family members does not occur, individual hearings for each family member in exclusion proceedings must be held.

B. GOING FORWARD WITH THE EVIDENCE

1. Once a returning resident immigrant demonstrates such status (i.e., returning from a temporary absence abroad) by presenting the immigrant card, the burden of proof shifts to INS to show excludability by clear, convincing, and unequivocal evidence.

2. All other applicants for admission must prove the following:

    a. That they are entitled to admission in the status claimed; e.g., nonimmigrant visitor or student, etc; and

    b. That they are not subject to any ground of excludability.

    c. Once the alien rests, INS must then be given a chance to present its case.

C. RELIEF FROM EXCLUSION

1. Withdraw the application for admission. There is no voluntary departure remedy in exclusion proceedings but there is something akin to it called a withdrawal of the application for admission. Withdrawal has been codified by IIRIRA in removal proceedings.

    a. If the motion is made before the issue of excludability is litigated, the Immigration Judge can grant it even in the face of INS opposition. However, if it is made once excludability is litigated, it should ordinarily be granted with the concurrence of the INS. Matter of Gutierrez, 19 I&N Dec. 562 (BIA 1988).

    b. The alien should prove that she is ready to depart the United States and can pay travel costs. Id.

    c. The Immigration Judge cannot set time limits for departing the country. This is left to the INS. Id.

    d. A motion to withdraw can be granted only upon a

showing that it is in the interests of justice to permit withdrawal. Thus, a balancing of the equities is inappropriate in ruling on the motion. Id.

2. Waivers of excludability. Various waivers available in exclusion proceedings are found in section 212 of the Act. The issue of a waiver is litigated only after the Immigration Judge rules that the applicant is excludable.

3. Asylum and/or withholding of exclusion is a remedy available in exclusion proceedings.

    a. If the Immigration Judge grants asylum, the proceedings are terminated.

    b. If the Immigration Judge denies asylum but grants withholding, the Immigration Judge orders that exclusion and deportation be withheld as to a specified country.

4. Adjustment of status. As stated above, this remedy is available in exclusion proceedings to a very limited extent.

    a. It arises only if the alien was in the country prior to institution of exclusion proceedings with an adjustment application pending before the INS and then departed under an INS grant of advance parole.

    b. The Immigration Judge in that limited setting can entertain an adjustment application if the INS denied the application subsequent to the alien's return.

    c. There may be a case where the alien in exclusion proceedings is adjustment eligible; e.g., the alien spouse of a United States citizen who is charged with excludability as an intending immigrant without valid immigrant visa. The INS may elect to allow the alien to apply to the INS for adjustment, or decline to entertain such application. If the INS refuses to entertain the application, the exclusion hearing should go forward and the alien left to any remedy at

law to compel INS action (petition for writ of mandamus). If the INS decides to entertain the application, the Immigration Judge has several options in handling the exclusion case:

i. Administratively close the case, that is, take it from the active docket and place it on the inactive docket, where it would repose until one of the parties asks for recalendaring. Jurisprudence dictates that administrative closure cannot be ordered if one of the parties objects, except in very limited circumstances. See Matter of Morales, 21 I&N Dec. 130 (BIA 1995).

ii. The Immigration Judge could continue the case to await INS adjudication on the application for adjustment. The caveat here is that INS does not always act with dispatch and the Immigration Judge may have to continue the case over an extended period of time, from one master calendar to the next, awaiting INS action.

iii. The Immigration Judge could proceed with hearing to a decision, observing that, if the alien is ordered excluded but later granted adjustment, this would be a "new fact" the applicant could use to support a motion to reopen exclusion proceedings. The disadvantage to this course of action is that it generates litigation, and an appeal, when this might be avoided if the INS could act promptly on the adjustment application.

iv. The Immigration Judge could, with the concurrence of the parties, terminate proceedings without prejudice. The INS would continue the alien on parole and, if adjustment is later granted, there is no need for a further exclusion hearing. If the INS later denies adjustment, the agency can then

file a motion to reopen the exclusion hearing.

d. It also arises in NACARA cases. Eligible applicants in exclusion proceedings can request adjustment of status before the Immigration Judge in accordance with section 202 of NACARA.

5. Suspension of deportation is not available in an exclusion setting. Castellon-Magallon v. INS, 729 F.2d 1227 (9th Cir. 1984). Note that cancellation of removal is available to NACARA aliens in exclusion proceedings in accordance with section 203 of NACARA.

D. COMPLETING THE RECORD

1. The Immigration Judge should ask if either side has any further evidence to present.

2. Once both sides rest on the record, allow a brief closing argument.

E. THE DECISION

1. The decision of the Immigration Judge can be either oral or written. Oral decisions are preferred and in almost all cases there is no reason to render a written decision.

a. It is necessary that the Immigration Judge become proficient in rendering an oral decision after both sides have rested on the record.

b. The decision of the Immigration Judge should simply state what facts were found to be true, an accurate statement of the law, what factors were considered on the issue of relief, including the exercise of discretion. The Immigration Judge should describe the weight given to the evidence including determining the credibility of witnesses. In terms of discretion, the Immigration Judge should weigh all factors, both favorable and adverse, to determine whether, if statutory eligible for the discretionary

relief, relief is warranted.

c. The decision should state an order relating to each application.

d. After the parties rest on the record, the Immigration Judge can recess for some minutes to sort out hearing notes in chambers, then reconvene and state the decision.

e. If the Immigration Judge is not prepared to state the decision at hearing's close, then she can adjourn the case to another individual calendar date and dictate the decision at that time. The proper adjournment code to use for the rescheduled hearing is a code 13.

2. A written decision should be made only in handling a case with a lengthy record of testimony and/or many exhibits.

   Deadlines apply for all reserved decisions. For a detained case, a decision must be rendered within 10 days of the date of the completion of the hearing. For non-detained cases the decision must be rendered within 60 days of the date of the completion of the hearing.

V. CONSTITUTIONAL RIGHTS

DUE PROCESS

1. Procedural due process of law is not guaranteed by the Fifth Amendment to inadmissible aliens. Instead, "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

2. The Fifth Amendment does, however, protect inadmissible aliens as "persons" in certain areas, including: criminal matters, United States v. Henry, 604 F.2d 908 (5th Cir. 1979); detention, Jean v. Nelson, 472 U.S. 846 (1985); and deprivations of property, Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). Failure to

follow the regulations may constitute a due process violation. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Similarly, failure to follow normal procedures may render the hearing unconstitutional. Jean v. Nelson, 472 U.S. 846 (1985).

3. Lawful permanent residents returning after a brief absence are entitled to fair hearings in accordance with procedural due process. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953). For a discussion of the rights of a person making a claim to citizenship, see United States ex rel. Lee Kum Hoy v. Murff, 355 U.S. 169 (1957).

VI. MOTIONS

A. CHANGE OF VENUE

In exclusion hearings, the Immigration Judge may rule on a motion to change venue without infringing upon the general parole authority of the District Director of the Immigration and Naturalization Service. Matter of Wadas, 17 I&N Dec. 346 (BIA 1980). If an alien is detained, the Immigration Judge should carefully consider the competing factors before changing venue. 8 C.F.R. § 3.20 (2000); Matter of Rahman, 20 I&N Dec. 480(BIA 1992).

B. ALL OTHER MOTIONS

Refer to Chapter Eight for a complete discussion of motions generally.

VII. APPEAL

A. APPEAL IS APPLICABLE TO BOTH SIDES

1. Either party may appeal the Immigration Judge's decision. INA § 236(b); 8 C.F.R. §§ 3.1(b) and 236.7 (1997).

2. The appealing party is required to submit a completed Form EOIR-26 with the required fee (or affidavit in forma pauperis requesting a waiver of the fee), within 30 calendar days of the decision. If the last day for filing falls on

Saturday, Sunday, or a federal holiday, the time is extended to the next business day. 8 C.F.R. § 3.38 (1997). The completed appeal form, fee or fee waiver must be received by the BIA by the due date. The BIA has strictly interpreted filing deadlines. Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

3. Execution of the exclusion order is stayed during the pendency of an appeal. 8 C.F.R. § 3.6 (1997).

4. The decision of the BIA is the final administrative action except in the very few cases reviewed by the Attorney General.

B. EXCEPTIONS TO APPEAL RIGHTS

1. No appeal is applicable if:

   a. It was determined that the alien is a security risk. INA § 235(c);

   b. Exclusion was for a mental or physical affliction based on a Class A Certificate. INA § 236(d).

2. There is no appeal right if both parties waive appeal. See Matter of Shih, 20 I&N Dec. 697 (BIA 1993).

VIII. PROCEDURAL CHECKLIST FOR EXCLUSION HEARINGS

A. PRE-HEARING CONFERENCE

1. Agreements of the parties.

2. Stipulations.

3. Is excludability contested?

4. Relief sought.

5. Continuances required, time needed to complete the hearing, available calendar dates.

B. INDIVIDUAL HEARING

1. For the record, identify the following:

    a. Type of hearing;

    b. Date;

    c. Location of Hearing;

    d. Name of presiding Immigration Judge;

    e. Name and "A" number of the applicant;

    f. Applicant's attorney (or indicate that the applicant is appearing pro se);

    g. INS attorney;

    h. Interpreter (whether EOIR, INS, contract, or other) (swear in interpreter if contract or other, see 8 C.F.R. § 3.22 (2000));

2. Communication. If there are any questions about the interpreter's abilities, determine if the alien and the interpreter can understand each other.

3. Swear in the applicant.

4. Verify the service of the Form I-122 and the list of free legal services.

5. Verify true and correct name on the Form I-122.

6. If there are no objections, mark and enter the Form I-122 into evidence.

7. Mark and enter the Form I-110, "subject to proof. "

IF ALIEN IS REPRESENTED:

8. Verify that the Form EOIR-28 is on file.

9. Ask the applicant if he understands the nature and purpose of the hearing and the required burden of proof.

10. Determine if the alien wishes for the hearing to remain closed to the public. The alien may have a friend or relative present or have a public hearing. If the friend or relative is to be called as a witness, determine this early so that the witness can be called first or be excused from the hearing until called.

11. Ask if the alien seeks to contest any of the Form I-122 charges. If so, determine the basis upon which the alien is applying for admission. Where the alien seeks admission as a lawful resident or a citizen, ask the INS to go forward.

12. If found excludable, inform the parties and deny any motion to terminate. The address the pending relief applications.

13. Decision.

14. Inform of right to appeal, and furnish all appropriate appeal forms.

IF ALIEN IS UNREPRESENTED:

15. Advise of right to counsel at no expense to the Government. Determine whether a continuance should be granted for that purpose. Advise on availability of free legal services. Ensure that applicant has received a copy of that list.

16. If the alien elects to proceed pro se:

    a. Explain the function of the Immigration Judge and the nature and purpose of the exclusion hearing;

    b. Explain that, by law, the burden is on the applicant to show admissibility;

c. Advise that, by law, the hearing is closed to the public but that the applicant may have one friend or relative present or may open the hearing to the public.

17. Explain the following procedural rights:

    a. Right to present witnesses and evidence;

    b. The right to object to any evidence offered by the INS;

    c. Right to cross-examine and consider evidence;

    d. The hearing is de novo and no effect will be given to the immigration inspector's action;

    e. The decision will be based solely upon evidence in the record;

    f. The alien has the right to present their case, but that the INS attorney or the judge may also ask questions.

18. Explain the charges on the Form I-122 and ask if they are true or not.

19. Question the alien as to the nature and purpose of the desired entry. The following questions are useful:

    a. What is your complete name?

    b. When and where were you born? Were your parents or grandparents United States citizens?

    c. Of what country are you a citizen or subject?

    d. When and where did you arrive in the United States?

    e. Where were you coming from?

f. Do you have any documents relating to your departure from_____?

g. Do you have any documents relating to your arrival in the United States?

h. For what purpose do you desire to enter the United States?

i. Do you have any fear of returning to your native country or the country from which you came?

20. Address the excludability issue upon the conclusion of the applicant's testimony and Service evidence. Advise the applicant of any possible relief and ensure that the applicant is given an opportunity to make application for that relief.

21. Decision.

22. Inform of right to appeal.

Immigration Judge Benchbook Index

(October 2001)

Chapter Five - Deportation Hearings

CHAPTER FIVE

DEPORTATION HEARINGS

APPLICABLE TO PROCEEDINGS COMMENCED PRIOR TO APRIL 1, 1997

The purpose of this chapter is to provide information on the basic procedure in deportation hearings. Section I provides a list of statutory and regulatory procedural requirements for deportation proceedings. Section II provides a step-by-step approach to

master and individual calendar hearings, including in absentia proceedings.

NOTE: The general rule is, unless otherwise expressly provided by IIRIRA, the new rules do not apply in the case of aliens in proceedings before April 1, 1997. However, there are two exceptions: if an alien is in proceedings before April 1, 1997, but no evidentiary hearing has been conducted, the Attorney General can apply the new law if the alien is notified at least 30 days prior to the first evidentiary hearing that the new law will be applicable; or, if an alien is in proceedings but there has not been a final administrative decision, the Attorney General can terminate the proceedings and refile under the new law [i.e., removal proceedings].

An Immigration Judge should be familiar with the following:

1. Former INA §§ 241, 242, 242B, and 243.

2. 8 C.F.R. Part 3, Subpart C.

3. 8 C.F.R. Part 242.

4. Local Operating Procedures of the Immigration Court in which the Immigration Judge is sitting.

5. Applicable Operating Policy and Procedures Memoranda (OPPMs).

In reading or consulting this chapter, the Immigration Judge should also bear in mind that, within the confines of the Act and the regulations thereunder, practice varies between one Immigration Court and another. The variations may be informal or "traditional" or may be set out in Local Operating Procedures. As noted, this chapter tries to provide only the basic format.

I. STATUTORY AND REGULATORY REQUIREMENTS OF HEARINGS

A. PRE-HEARING MOTIONS

An Immigration Judge may be required to resolve a number of legal issues by motion either before or during the proceedings. Motions should be written, but may sometimes be oral. Consult 8 C.F.R. Part 3, Subpart A; and 8 C.F.R. Part 240.

1. Motion for Continuance (8 C.F.R. §§ 3.29 and 240.45 (2000)). The Immigration Judge may grant a reasonable adjournment for good cause

shown. See OPPM 94-6.

a. Normally, no more than two continuances should be granted for the alien to obtain legal representation.

b. A decision on a motion for continuance is within the sound discretion of the Immigration Judge; parties must appear unless the motion has been granted. Matter of Patel, 19 I&N Dec. 260 (BIA 1985).

c. A motion for continuance based upon an asserted lack of preparation and request for additional time must be supported, at a minimum, by a reasonable showing that the lack of preparation occurred despite a diligent effort to be ready to proceed. See Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983).

d. A decision by the Immigration Judge denying the motion for continuance can be reversed, on appeal, only if the respondent establishes, by a full articulation of the particular facts involved or evidence which she would have presented:

i. That the denial caused her actual prejudice and harm; and

ii. That the denial materially affected the outcome of the case.

2. Motion to Terminate

a. Prior to commencement of proceedings, the INS may cancel an Order to Show Cause or terminate proceedings for reasons set forth in 8 C.F.R. § 242.7 (1997).

b. After the commencement of the hearing, only an Immigration Judge may terminate proceedings upon the request or motion of either party.

c. Respondent may request termination on grounds such as the following:

i. The Order to Show Cause is defective; i.e., not signed, incongruity between charge and allegations, etc.;

ii. The Service has not met its burden of proof; or

iii. She can pursue an application for naturalization. This defense may be raised by members of the Armed Forces of the United States. See INA § 318.

d. A termination order is without prejudice to the right of the Service to file the same charge or a new charge at a later time (8 C.F.R. § 242.7(b)) unless res judicata applies. See Ramon-Sepulveda v. INS, 743 F.2d 1307 (9th Cir. 1984).

3. Motion to Change Venue

a. A motion to change venue can be decided only by the Immigration Judge where the Order to Show Cause is filed. The decision to grant or deny a change of venue motion is made in the sound exercise of discretion, and can only be made after the other party has been given notice and an opportunity to respond to the motion to change venue. See 8 C.F.R. § 3.20 (2000); Matter of Rahman, 20 I&N Dec. 480 (BIA 1992). See OPPM 97-10. Note that the Immigration Judge may not change venue on his or her own motion.

b. No change of venue shall be granted without identification of a fixed street address (including city, state and ZIP code) where the respondent may be reached for further hearing notification. 8 C.F.R. § 3.20.

c. Usually before a change of venue is granted, the alien should plead to the charging document. See Matter of Rivera, 19 I&N Dec. 688 (BIA 1988).

4. Motion to Withdraw as Counsel

The motion to withdraw under 8 C.F.R. § 3.17 (1997) must be written and must conform to the requirements of Matter of Rosales, 19 I&N Dec. 655 (BIA 1988). Counsel must state the reason(s) for the request, the last known address of the respondent, and that counsel has advised the respondent of the date, time, and place of the next hearing in the deportation proceedings. The decision on the motion to withdraw is within the Immigration Judge's discretion.

B. THE ORDER TO SHOW CAUSE

1. Deportation proceedings commence when the INS files an Order to Show Cause with an Immigration Court. See 8 C.F.R. § 3.14 (1997). Only the INS can file an Order to Show Cause.

2. An Order to Show Cause Must Contain the Following (INA § 242B; 8 C.F.R. § 3.15 (1997)):

    a. The alien's name and any known aliases;

    b. The alien's address, unless in the custody of the INS;

    c. The alien's alien registration number. This number is also known as the "A number." It can also be referred to as the "Case number";

    d. The language that the alien speaks and understands best;

    e. The nature of the proceedings against the alien;

    f. The legal authority under which the procedures are conducted;

    g. An allegation of the alien's nationality and citizenship, and factual allegations of the acts or conduct that the INS believes support a charge of deportability;

    h. The charge(s) against the alien with citation to the statutory provision(s) that the INS believes to have been violated;

    i. Notice that the alien may be represented, at no cost to the Government, by counsel or other representative authorized to appear pursuant to 8 C.F.R. § 292.1 (1997);

    j. The address of the Immigration Court where the INS will file the Order to Show Cause;

    k. A statement that the respondent must advise the Immigration Court of her current address and telephone number and a statement that failure to provide such information may result in an in absentia hearing in accordance with 8 C.F.R. § 3.26; and

    l. The Order to Show Cause should also bear a certificate of service

that shows how and when the respondent has been served with the Order to Show Cause. 8 C.F.R. § 3.32 (1997).

3. Cancellation or Amendment of Order to Show Cause

a. Prior to the commencement of proceedings any District Director, Acting District Director, Deputy District Director, Assistant District Director for Investigations or other specified INS officers may cancel an Order to Show Cause for the reasons set forth in 8 C.F.R. § 242.7 (1997).

b. After commencement of proceedings, either party may move the Court for the dismissal of proceedings for the same reasons.

c. An INS attorney who has been assigned to a case may lodge additional written factual allegation(s) and charge(s) against the respondent (8 C.F.R. §§ 3.30 and 242.16(d) (1997)).

C. SERVICE OF THE ORDER TO SHOW CAUSE AND NOTICE OF THE DEPORTATION HEARING

In a deportation proceeding, the Immigration Judge must first determine whether the respondent has been served with the Order to Show Cause and has received proper notice of the hearing date and time. This involves an inquiry into the time of the service and the propriety of the means of service.

1. Service of the Order to Show Cause

a. The INS is responsible for service of the Order to Show Cause. Service of the Order to Show Cause may be accomplished by either personal service or by certified mail. See former INA § 242B(a)(1).

b. Determination of whether service of the Order to Show Cause has been accomplished can often be made simply by asking the respondent at hearing if she has a copy of the Order to Show Cause in her possession. If the respondent is represented by counsel, counsel should be asked to state whether proper service is conceded. In other situations, e.g., in absentia proceedings, the Immigration Judge must determine whether service has been made.

c. Failure to show proper service of the Order to Show Cause requires

termination of the deportation proceedings. Matter of Huete, 20 I&N Dec. 250 (BIA 1991) (Order to Show Cause not properly served by certified mail where return receipt not signed and returned).

2. Notice of the Deportation Hearing

   a. The Immigration Court is responsible for providing notice of the hearing date and time to both the respondent and to the Service. Initially, such notice is provided by certified mail, and therefore must be given not less than fourteen days before the scheduled hearing. Note that this differs from removal and exclusion proceedings in that notice is given personally, or by ordinary mail.

   b. When the parties appear personally for the hearing, notice of any subsequent hearing is provided to the parties personally. However, if a hearing date and time are set or changed by the Immigration Judge without appearance of the parties, notice must be served by certified mail.

   c. Usually, the effectiveness of the service of notice is determined simply by the parties' appearance at the scheduled date and time. If, however, there is a failure to appear, the Immigration Judge must inquire whether proper service of the notice has in fact been accomplished.

D. GROUNDS FOR DEPORTATION - Section 241 of Act

The statutory grounds for deportation are set forth in the Immigration and Nationality Act (§ 241) and are broken down into the following general categories. The references to the statute are to the provisions as written prior to the amendments made to the Act by IIRIRA. The statute must be read carefully.

1. Section 241(a)(1) of the Act - Excludable at time of entry, violation of conditions of entry, entry without inspection, termination of conditional permanent resident status under section 216 of the Act, alien smuggling, failure to maintain employment, and marriage fraud.

2. Section 241(a)(2) of the Act - Conviction of a crime involving moral turpitude within five years of entry or two such crimes at any time after entry, conviction of an aggravated felony at any time after entry; conviction for any controlled substance violation after entry (unless a

single offense of simple possession of under 30 grams of marijuana for personal use); any firearms offense after entry; and other crimes as designated therein.

3. Section 241(a)(3) of the Act - Document fraud, certain criminal convictions as to misuse of visas, etc.

4. Section 241(a)(4) of the Act - Espionage, sabotage, terrorism, participation in Nazi activities, etc.

5. Section 241(a)(5) of the Act - Alien who has become a public charge within five years of entry for reasons that have not arisen since entry.

E. RESPONDENT'S RIGHTS (Former Sections 242(b), 242(B) of Act, 8 C.F.R. Part 3)

At the deportation hearing, the Immigration Judge must advise the alien of the following:

1. The right to representation, at no expense to the Government, by counsel of her own choice authorized to practice in the proceedings. The Immigration Judge must require the respondent to state whether she desires representation.

2. The availability of free legal service programs located in the district where the deportation hearing is being held. The Immigration Judge must ascertain that the respondent has received the free legal service providers list available and a copy of the Written Notice of Appeal Rights.

3. The right to have additional time to prepare a defense;

4. The right to state then and there whether she desires a continuance to obtain counsel or prepare a defense.

Additionally, the Immigration Judge must do the following:

1. Advise the respondent that she will have a reasonable opportunity:

    a. To examine and object to the evidence against her;

    b. To present evidence in her own behalf; and

c. To cross-examine witnesses presented by the government.

2. Read the factual allegations and the charges in the Order to Show Cause to the respondent and explain them to her in nontechnical language. If the respondent is already represented by counsel, counsel should be asked whether she waives the full advisal of rights and the reading and explanation of the Order to Show Cause.

F. ADVISALS UNDER SECTION 242B OF THE ACT

At each hearing that will be adjourned for further proceedings, the respondent must be advised as follows:

1. That the respondent is being provided with written notice of the date, time, and location of the next hearing.

2. That if the respondent fails to appear at the next hearing, the Immigration Judge has the authority to conduct the proceedings in absentia.

3. That the only acceptable excuses for failure to appear are those that involve exceptional circumstances (e.g., the respondent's own serious illness, or the death of a close family member).

4. That if the respondent fails to appear at the next hearing and an order of deportation is entered in absentia, the respondent is ineligible for a five-year period for various forms of relief from deportation, including voluntary departure, suspension of deportation, adjustment of status, and registry.

5. That if the respondent changes his address from the address provided to the Immigration Court, he must complete an appropriate change of address form (Form EOIR-33) and mail it to the Immigration Court within five calendar days of his move.

6. That if the respondent fails to make the notification of change of address, his last known address will be considered his correct address for all purposes.

These advisals particularly the section 242B of the Act advisals, should be given orally to a respondent through the interpreter. Each respondent should be provided with the advisals in writing in English and Spanish,

even where Spanish is not a language spoken by the respondent.

G. PLEADING TO THE CHARGES AND DETERMINATION OF DEPORTABILITY

1. After ascertaining that the alien understands his rights in the proceeding, as well as the nature of the charges, the Immigration Judge then shall require the respondent to plead to the Order to Show Cause by stating under oath whether he admits or denies the factual allegations. If the respondent is represented by counsel, counsel should plead on his respondent's behalf.

2. If the respondent admits to the truth the factual allegations and the Immigration Judge is satisfied that no issues of law or fact remain, the Immigration Judge may determine whether deportability as charged has been established by the admissions of the respondent. If the respondent is represented by counsel, counsel should state whether the charge of deportability is or is not conceded.

3. The Immigration Judge shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and not accompanied by a guardian, relative, or friend. See Matter of Amaya, 21 I&N Dec. 583 (BIA 1996).

4. If factual allegations material to the charge of deportability are denied, the Immigration Judge shall receive evidence at that time or at a subsequent hearing as to any unresolved issues. It is the Immigration and Naturalization Service, not the respondent, that has the full burden of proving deportability by clear, unequivocal, and convincing evidence. See Woodby v. INS, 385 U.S. 276 (1966).

5. In the vast majority of cases, deportability is not a major issue. Rather, the respondent is interested in applying for various forms of relief from deportation. See Chapter 6 (Relief from Exclusion and Deportation).

H. DESIGNATION OF COUNTRY OF DEPORTATION SECTION 243(a) OF THE ACT

1. After the question of deportability is resolved the Immigration Judge:

    a. Must inform the respondent of the privilege of designating a country of deportation and must give the respondent an opportunity to make such a designation; and

b. Should notify the respondent of an alternative country of deportation if the country of respondent's choice will not accept her. If the alien does not designate a country of deportation, the Immigration Judge should initially designate any country where the respondent is a subject, national or citizen.

c. If the alien fails to designate a country of deportation, advise the respondent that she may apply for asylum and withholding of deportation to the country directed by the Immigration Judge. The respondent does not have to be told of the opportunity to seek asylum and withholding of deportation as to the country designated by her. See Duran v. INS, 756 F.2d 1338 (9th Cir. 1985); Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984), reh'g denied, 751 F.2d 383 (5th Cir. 1984); Villegas v. INS, 745 F.2d 950 (5th Cir. 1984).

2. No respondent shall be permitted to make more than one designation.

3. The respondent cannot designate any foreign territory contiguous to the United States or any island adjacent thereto unless she is a native, citizen or national or a subject thereof, or has resided there. If the respondent cannot make such a showing, then the Immigration Judge should advise that the designation cannot be honored and inquire of counsel or respondent whether she wishes to designate another country.

4. If the respondent chooses a country of deportation other than that of her birth or citizenship and the Immigration Judge finds the designation legally permissible, the Immigration Judge can accept the choice, but in the absence of a convincing showing that such country would accept the respondent, the Immigration Judge should designate an alternate country of deportation, usually the country of the respondent's birth and citizenship. Although this is the common practice, it is not a requirement, as the statute gives seven (7) alternatives. See former INA § 243(a).

I. RELIEF FROM DEPORTATION AND WAIVERS OF DEPORTATION GROUNDS

A respondent may apply for the following relief from deportation. These forms of relief are more fully discussed in Chapter 6 (Relief from Exclusion and Deportation) of this Benchbook. The statutory references are to Act as written prior to the amendments made by IIRIRA.

1. Section 208(a) of the Act, asylum. Applications filed on or after April 1, 1997, require the Immigration Judge to give warnings regarding the consequences of knowingly filing a frivolous application for asylum as provided by IIRIRA.

2. Section 243(h) of the Act, withholding of deportation.

3. Section 212(c) of the Act, waiver of certain grounds of deportability. This form of relief was significantly limited by AEDPA, and was eliminated by IIRIRA. It continues to be available in deportation and exclusion hearings.

4. Section 244(a) of the Act, suspension of deportation.

5. Section 244(e) of the Act, voluntary departure.

6. Section 245(a) of the Act, adjustment of status.

7. Section 249 of the Act, registry, record of admission for permanent resident status.

8. Sections 212(g), (h) and (i) of the Act, waivers when subsidiary to other applications such as an application for adjustment of status.

9. Section 241(a)(1)(H) of the Act, waiver of fraud.

10. Section 241(a)(1)(E)(iii) of the Act, waiver of alien smuggling.

11. Section 216 of the Act and regulations thereunder grant to the Attorney General the authority to waive deportability under section 241(a)(1)(D) of the Act. The regulations provide that waivers under section 216 of the Act which are denied by the INS may be considered again in deportation proceedings. See generally 8 C.F.R. Part 216. The Immigration Judge does not have the initial authority to consider such waivers without an adjudication by the INS. Note: The Immigration Judge may find that sometimes the waiver application is pending with the INS at the time the deportation proceedings begin. In such a case, a motion to continue or administratively close is not unusual.

12. Adjustment of Status: Special provisions may be available to natives of Cuba and Nicaragua (NACARA) and Haitians (HRIFA).

II. PROCEDURES

As a federal official with complete decision-making independence, the Immigration Judge should and will develop his or her own individual style. In this respect, the following is meant only to provide general guidelines and suggestions for the hearing process.

A. PREHEARING

1. Review of Files and Preparation

The Immigration Judge will receive a number of files before the scheduled master or individual calendar hearing because they will be transmitted with pending motions.

Even if there are no pending motions, some Immigration Judges like to review the master calendar files before the master calendar hearing. If so, the files should be available to the Immigration Judge because they are generally "batched" by the Immigration Court staff before hearing. A staff member should provide the files to the Immigration Judge upon request or if the Immigration Judge has a standing request for the files, they should be provided in accordance with the request.

In any event, all individual calendar files should be provided to the Immigration Judge at least in the week before the scheduled hearings. This is extremely important so that the Immigration Judge can review the cases before merits hearing to determine issues, read briefs and applications, perform research, and focus on the Immigration Judge's areas of interest in the case. The Immigration Judge should establish a standing procedure for the staff to supply the files.

2. Establishing the Order of Hearings

For master calendar, a sign-up sheet can be provided for attorneys and/or respondents to "check in." The sheet can also be used to determine the order in which the cases should be heard, the number of unrepresented persons, etc. On master calendar, many Immigration Judges prefer to hear first the cases of represented persons. Some Immigration Judges follow the order of the sign up sheet to encourage promptness. The sign up sheet can also be used to determine the language that a respondent speaks.

The Immigration Judge should be familiar with and adopt local custom and

procedures regarding the hearing procedures.

3. Calendar Review

   Before a master calendar session in particular, the Immigration Judge should review his calendar to determine the available dates for individual calendar hearings. In this way, the master calendar hearings will be more efficient. It is recommended that the Immigration Judge set the dates of hearings so that he can monitor and regulate his own calendar. The reason is that only the Immigration Judge knows the difficulty of the cases and other special calendaring considerations.

4. Supplies

   The courtroom should be fully supplied.

   The recording equipment should be checked often to determine that all the components are functioning. If the equipment is not functioning, there cannot be a complete record of proceedings for transcription. If so, there can be no meaningful appellate review or review for any purpose, including the Immigration Judge's purpose in preparing a decision. If there is not a complete record, the hearing will probably have to be conducted again de novo.

   An adequate supply of tapes, form orders, hearing notices, lists of low cost and pro bono counsel, office supplies, etc., should always be available. Some Immigration Courts designate a person(s) to keep the bench and the clerk's area fully supplied with these items.

   A most important supply is law materials. The Immigration Judge should have a copy of the Act and a copy of Title 8 of the Code of Federal Regulations at his or her elbow. The Immigration Judge should also have select state and federal codes, particularly those that concern criminal law. Last, the Immigration Judge should have personal files of citations, research, standard language, etc., that are used on the bench.

5. Personnel

   The Immigration Judge should be aware which clerk or interpreter will be in the courtroom for a given hearing or session, and which clerk or interpreter is responsible for care of the files. If the Immigration Judge

knows the personnel assigned to the Immigration Judge for a period of time or for the hearing or session in question, the Immigration Judge will know the "contact person" for interpretation, calendaring, mailing of notices, clerical assistance, and general assistance for the hearing or session in question.

The Immigration Judge should also be aware of the person(s) responsible for ordering contract interpreters. In general, the Immigration Judge should be aware of the assigned job duties of the personnel at his Immigration Court.

The Immigration Judge should be aware of the requirements of confidentiality imposed by section 384 of IIRIRA as they relate to battered aliens, and to take appropriate action to secure such confidentiality.

B. THE MASTER CALENDAR

1. Be prompt. Start the calendar on time. If the Immigration Judge is on time, respondents and representatives will understand that they are expected to be on time.

2. Wear a robe and have a serious demeanor. Note that serious does not equal dour. Courtesy is always necessary.

3. Have the clerk or interpreter who is assisting the Immigration Judge for the hearing or session advise the Immigration Judge when the calendar is ready to begin. Then, enter the courtroom. The clerk should call court to order. Those who are present should stand when the Immigration Judge enters. These proceedings are very serious.

4. Have the clerk or interpreter call the cases.

5. The following is a suggested format for one case on the master calendar in which the respondent has counsel:

    a. Turn on the recorder and identify the date of the hearing, yourself, your location, the name of the case, and the case number;

    b. Ask counsel to identify themselves by name; and

    c. Be sure that counsel for the respondent has submitted a Notice of

Entry of Appearance as Attorney or Representative on Form EOIR-28.

d. Ask counsel for the respondent if the client is present and where the respondent is located in the court room. The respondent should be seated near counsel.

e. Ask counsel what language the respondent speaks and understands best and note that that language will be the language of the proceedings.

f. Ask counsel to confirm the current address of the respondent.

g. Ask counsel if she concedes proper service of the Order to Show Cause, waives the reading and explanation of the document, and waives an explanation of the hearing rights.

h. Ask counsel to plead to the Order to Show Cause.

i. When pleading is completed, mark the Order to Show Cause as Exhibit One in the record of proceedings.

j. Ask counsel to designate a country of deportation if deportation should become necessary. If counsel indicates that her client will not designate a country, the Immigration Judge should designate a country as discussed in Part I, Section H of this Chapter.

k. Inquire what applications for relief (if any) will be made. At this time, there may be some discussion as to the type of application or issues that may arise in the application.

    i. If the application is for voluntary departure only, the hearing can be completed usually on the master calendar unless, the INS opposes voluntary departure or an issue of eligibility for voluntary departure arises.

    ii. For other applications for relief, set a firm deadline for submission of the application. The deadline depends on the nature of your calendar. For example, if you can hear individual cases within a few months, then a shorter (but realistic) deadline may be appropriate. If your calendar is set

farther into the future, then a longer deadline is appropriate.

iii. Advise counsel that, if the applications are not received timely or a timely request for an extension of time is not made, you will go forward to enter a final order of deportation on the ground that the application is deemed abandoned.

Note that asylum applications filed "defensively" in deportation proceedings must be filed at a master calendar, and the case will be continued for that purpose. In addition, applications filed on or after April 1, 1997, require advisals regarding the consequences of knowingly filing a frivolous application for asylum.

l. Set an individual calendar hearing date and time for the case.

m. If the Immigration Judge believes that briefs would be helpful, set a briefing schedule.

n. Provide the parties with written notice of the date and time of the next hearing.

o. Provide to the respondent the advisals mentioned in Part I, Section F of this Chapter.

p. Master calendars focus heavily on the respondent. Therefore, be sure to ask the counsel for the INS if she has anything to add.

q. Close the hearing.

r. Some jurisdictions permit written pleadings in lieu of a master calendar appearance.

6. The following is a model for one case on the master calendar if the respondent is not represented by counsel:

a. Turn on the tape machine and identify the date of the hearing, yourself, the location, and the case name and number as described above.

b. Identify counsel for the INS.

c. Swear in the respondent if he speaks English or Spanish, or a language for which a staff interpreter is available. If the respondent cannot communicate in these languages, a telephonic interpreter may be available or the matter will have to be set to another master calendar and an interpreter ordered in the respondent's language. At that hearing, the Immigration Judge will have to swear in the interpreter and then proceed to swear in the respondent in his native language.

d. Ask the respondent his true name and address.

e. Ask the respondent if he has a copy of the Order to Show Cause with him or at home so that service can be verified. If he does not have a copy, counsel for the Service may have an extra copy. Otherwise, consider having your staff make a copy for the respondent. In this case, the certainty of service outweighs the inconvenience.

f. Make sure the respondent understands the nature of the proceedings.

g. Advise the respondent of his rights as noted in Part I, Section E of this Chapter.

h. If respondent wishes to seek counsel, the Immigration Judge must grant him at least one continuance to do so. Supply the respondent with a list of the low cost and pro bono services in your area. Advise the respondent that he is not limited to the list and that he can have whatever counsel he wants or that he can represent himself if he wants inasmuch as the law does not require him to have counsel. Such advice will clear up misconceptions as to the nature of the list and the right to counsel.

   Although the respondent has the right to represent himself, it is appropriate to encourage him to seek out counsel or at least to consult with counsel. In this respect, the Immigration Judge might advise respondent of the importance of the proceedings and the size of his stake in the outcome.

i. As soon as the respondent indicates a desire to seek counsel, do not

go forward with the merits of the case in order to avoid infringing on the alien's statutory right to counsel.

j. Set a continuation date on the master calendar and give the respondent written notice of the date and time of the next hearing. Tell him to keep the notice for his own reference and to show it to any counsel that he consults.

k. Give the respondent the advisals noted in Part I, Section F of this Chapter.

l. Ask the respondent if he has any questions.

m. Ask the counsel for the INS if he has anything to address at that hearing.

n. Close the hearing. Every respondent (or his attorney or representative) should leave the master calendar session with a "piece of paper," either a notice of further hearing or a written order or memorandum of decision.

NOTE: If the pro se respondent indicates a desire to go forward at the hearing without counsel, the Immigration Judge must read and explain the Order to Show Cause to the respondent. The INS then must establish, by the respondent's testimony or otherwise, the truth of the allegations of the Order to Show Cause and the Immigration Judge must determine deportability. Then, the Immigration Judge has a responsibility to advise the respondent of any relief to which he may be entitled to apply. If the respondent wishes to make such applications, the Immigration Judge must state a filing deadline and give the respondent an individual calendar hearing date. If, however, the relief is limited to an uncontested application for voluntary departure, the Immigration Judge can proceed with the hearing at the master calendar session.

In all pro se matters, the Immigration Judge must be careful and solicitous of the respondent. In this way, the Immigration Judge is certain to have advised the respondent of all of his rights and obligations and the consequences of his obligations. Also, all of the respondent's questions will be answered. Importantly, there will be both justice and the appearance of justice.

C. THE INDIVIDUAL CALENDAR HEARING

1. The considerations regarding promptness and demeanor apply in the context of the individual calendar hearing.

2. Make sure that the interpreter is present if one is needed for the case.

3. Ask counsel or the respondent, if pro se, whether there are witnesses besides the respondent. If so, they should be excluded from the courtroom until called to testify.

4. If an application for relief is the subject of the hearing, counsel or the respondent should have already provided a complete application. In addition, they should already have provided updated materials or additional materials in support of any application. The requirement of the early submission of supplemental materials is one of the values of Local Operating Procedures. Sometimes, however, there may be materials that the parties wish to submit on the day of the hearing. It is a good practice to mark those documents for identification purposes and give the opposing party an opportunity to object to them. Upon considering the views of both parties, the Immigration Judge can then rule on whether to admit the documents or sustain a pertinent objection and leave the documents marked for identification purposes only.

5. Open the hearing as in a master calendar hearing.

6. If deportability is at issue and if appropriate, let the parties make an opening statement and proceed to the testimony of witnesses and the admission of documents as exhibits.

7. If an application is to be heard, begin by marking the application and related materials (for example, a State Department opinion in asylum cases) as exhibits. At this point, the Immigration Judge may also be able to mark into the record supplemental materials, and materials submitted on the day of the hearing which were discussed before the opening of the hearing, as noted in item 4 above.

   When marking and numbering exhibits, be clear as to the identification of each exhibit and its number in the record. Mark exhibits for identification (for example, "Exhibit Five for identification"), if there is an objection to the exhibit which the Immigration Judge sustains, or if the exhibit is being admitted for purposes of identification until a foundation is laid for its

admission.

8. Swear in the interpreter unless the interpreter is an Immigration Court interpreter. Give the parties an opportunity to voir dire the interpreter.

9. Begin the taking of testimony, on direct, cross, and redirect examination. Be sure to swear in each witness.

10. Take detailed notes on the testimony and the evidence as it is presented. These will help the Immigration Judge to focus.

11. Be aware of efficiency and relevance. If questioning appears to be "going astray," do not hesitate to challenge the questioner in this regard. The Immigration Judge, and not counsel, is presiding.

12. When the parties have completed examination, the Immigration Judge may ask questions of the witness. When the Immigration Judge has completed his or her questions, invite the parties to ask further questions.

13. The Immigration Judge has the statutory right to ask questions. Sometimes, the Immigration Judge may want to ask questions in the course of direct, cross or redirect examination. The Immigration Judge should not hesitate to do so especially if clarification is needed or something said was not heard. See Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997).

14. During the course of the hearing, make sure that names and places are spelled out. Foreign names can be spelled out by the interpreter or by consensus of counsel. Such spelling is important for purposes of transcription and clarity if there should be an appeal from the Immigration Judge's decision.

15. Make sure that the respondent has put on all of his case by asking if there is anything further.

16. Permit the parties to make a closing statement or to present their points of view.

17. Bring the evidentiary phase of the hearing to closure by having the parties state expressly that the matter is submitted.

18. Render your oral decision or indicate that the decision will be reserved for

written decision or that the oral decision will be given at a date and time certain.

19. If an oral decision is to be made immediately, adjourn the hearing for a short time at least to allow you to frame your decision.

20. Deliver the oral decision and order.

21. Advise the parties on the record of their appeal rights and of the jurisdictional due date for the notice of appeal.

22. Close the hearing.

23. Whether the oral decision is delivered at the end of the hearing or on another day, provide the parties with a written memorandum of your order.

24. A written memorandum of your order is not necessary if your entire decision will be in writing.

25. If the Immigration Judge has decided to issue a written decision, state that the matter is taken under submission or is reserved for decision and close the hearing.

    NOTE: The procedure for respondents who are pro se is essentially the same as for represented respondents. However, the Immigration Judge has the responsibility for assuring that the respondent is accorded all of his rights and full due process. Also, the Immigration Judge should be more considerate of the unrepresented respondent. He is often frightened or nervous, poor**,** and uneducated. Be sure that everyone in the courtroom treats him with dignity and respect. Be sure that everything, including the marking of exhibits, is very clear to the respondent in nontechnical language. In this way, the proceedings will be realistic and not mysterious.

    In the case of the unrepresented respondent, the Immigration Judge will have to take a more active role in the development of the hearing. Whatever method the Immigration Judge uses, it is important that true, accurate, and relevant testimony and evidence be elicited. The respondent may wish to tell his own story or he may wish to respond to questions posed by the Immigration Judge. Of course, the INS has the right to cross-examine the respondent and the respondent's witnesses and to submit documentary evidence and the testimony of INS witnesses.

D. DECISIONS

1. In General

As a general rule, the oral decision at the end of hearing is preferable simply because of the volume and pressure of an Immigration Judge's caseload. If decisions are reserved for written decision, it is often the case that the Immigration Judge will spend so much time on the bench that he or she will have a hard time turning to the decision writing process. If too much time passes, then other inefficiencies creep in. For example, the Immigration Judge may have to listen to the tapes of the hearing to refresh his or her memory of the evidence and the issues. [See Operating Policies and Procedures Memorandum 93-1, Immigration Judge Decisions and Immigration Judge Orders indicating that detained reserved cases to be completed within 10 days and non-detained within 60 days].

Nonetheless, the Immigration Judge's duty is the independent issuance of correct and conscientious decisions. Some cases do require a written decision. In this connection, if the Immigration Judge decides that a written decision is appropriate, do not hesitate to reserve the case for such a decision.

On the other hand, the Immigration Judge's needs for factual and legal reflection may be satisfied by taking a middle road by resetting the hearing for oral decision on the next day or a later day. In this way, the Immigration Judge can get the time that is required for additional reflection without spending the time to write out a formal decision.

However, do not fall into the temptation of reserving decision out of convenience alone. Also, recognize that reserving decision can be a trap: the reserved decisions can pile up and sap your energy in the course of an already intense workload.

An Immigration Judge must strike the balance. By virtue of circumstances, most cases must be decided by immediate oral decision.

If the pleadings establish deportability and no issue of law or fact is presented, an Immigration Judge can enter a summary written decision. If there is no contest on deportability and the respondent makes no application for relief from deportation whatsoever, a so-called "straight" deportation order can be entered on an EOIR form order. Again, if there is no contest on deportability and the only relief sought is voluntary

departure, an Immigration Judge's summary written decision should be entered on the EOIR form for voluntary departure.

If there is a contest as to deportability or as to an application for relief, an Immigration Judge must issue a separate oral decision or written decision. As a matter of form, the oral decision must be separate from the transcript itself. See Matter of A-P-, Interim Decision 3375 (BIA 1999).

The method or format for an oral decision can be found in Part II, The Oral Decision.

a. As noted above, an Immigration Judge should have available on the bench various law books and personal files to aid in focusing on the applicable law and in choosing language for the decision. An Immigration Judge's colleagues on the bench can give invaluable assistance in compiling such files.

b. If an Immigration Judge feels it is necessary, the hearing should be adjourned so that time can be spent organizing notes and formulating the decision.

c. After adjournment, turn on the recorder and address the transcriber. Advise the transcriber that you are about to deliver the oral decision.

d. State the case name and number; the charges of deportability; and the types of relief sought.

e. Indicate that you are about to begin the oral decision.

f. Note paragraph changes for the transcriber. Also, spell out case names, foreign words, names, and place names, and unusual words, terms, and place names.

g. The first paragraph traditionally states the name, sex, nationality, and age of the respondent. If the Immigration Judge wants to avoid phrases like "The respondent is a 48-year-old female, native and citizen of Colombia", the following is an alternative: "The respondent, Ms. X, is a native and citizen of Colombia. At this time, she is 48 years old."

h. The first section of any oral decision in deportation proceedings must consider the respondent's deportability. In this connection, identify the Order to Show Cause in the record and state the charge of deportability with reference to the factual allegations and the section(s) of the Act that the INS claims the respondent has violated.

i. If deportability has been conceded at the hearing, state this. But also make a specific statement that you find deportability under the sections of the Act in question.

j. If deportability has been denied, either because some or all of the allegations have been denied or because the charge(s) has been denied, then the Immigration Judge must discuss the issues and the evidence. Every case is different. However, every decision should relate the issues raised, the evidence, and the legal principles that apply.

   The Immigration Judge should state a clear conclusion whether the INS has carried its burden of demonstrating deportability by clear, unequivocal, and convincing evidence under the standard of Woodby v. INS, 385 U.S. 276 (1966).

k. When considering deportability, remain aware that the INS has the burden of proof and that the standard for success is a high one. This is one of the few areas in deportation proceedings in which the INS must carry a burden and not the respondent.

l. In assessing evidence, whether in the context of deportability or in other areas, the Immigration Judge must consider the weight of each item of evidence and the credibility or reliability of the evidence. According the proper weight to documents can be difficult and require an analysis as to the contents of the document, how or why it was generated, how it came into the possession of the INS or the respondent, whether it requires foundation by the personal testimony of the maker, whether the maker can be reasonably expected to be available, whether the documents are authenticated, and so forth. Assessing the credibility of testimony is also extremely difficult. The demeanor and responsiveness of the witness are very important, of course. However, in foreign language hearings, you must recall that the testimony is presented in English through an interpreter. In addition, you must be sensitive to the

witness' level of education, his cultural or economic background, the recency of the events testified to, his interest in the outcome of the hearing, and so forth. Also, on the substantive side, you must judge the plausibility of the witness' "story." You must also assess discrepancies within the testimony and between the testimony and writings, such as applications that the witness prepared and submitted earlier. The witness should explain the latter type of discrepancy. You may also have to assess the testimony in light of conditions in the witness' home country.

This type of assessment may be particularly important in cases in which the applications made are for asylum, withholding of deportation, or suspension of deportation.

m. Expressly state your evaluation of the evidence. If you believe that a document should be accorded little or no weight or great weight, you should say so. Also**,** you should state whether you find a witness to be credible or incredible and whether the witness' testimony is clear or unclear.

n. After the decision has expressed your finding on deportability, turn to the applications (if any) for relief from deportation. At this point, you may wish to note what applications the respondent is making. List all of the applications before you.

o. State which application you will consider first. Then proceed with the applications one by one. As with the assessment of deportability, state the issues, the legal standard, and the evidence. Then, state the basis for your decision.

p. In stating legal standards, it may be helpful to you to have in your files a basic recitation of the general standards for a given type of application. In this way, if the case before you does not present an unusual argument legally, you will have a statement of law at hand already. This means that you can concentrate on the facts.

q. Deciding applications is essentially a process in which you first determine eligibility and then exercise discretion. Thus, the decision should clearly separate the eligibility determination from the determination based on discretion. In this respect, the eligibility requirements are often "narrower" than the entire record: that is, they depend on certain factors in isolation from others. For

example, the requirement of "good moral character" for suspension of deportation under section 244(a) of the Act may not require an assessment of the entire factual record. However, the exercise of discretion takes into account the record as a whole.

r. Bear in mind that the same evidence can apply to more than one application. For example, the evidence on an asylum application under section 208 of the Act is often the same evidence that underlies a companion application for withholding of deportation under section 243(h) of the Act. Similarly, evidence and issues are the same or at least overlap when the respondent makes an application for a waiver under section 241(a)(1)(H) of the Act and an application for suspension of deportation under section 244(a) of the Act.

s. In the situations described above, it is important to note that, although the evidence underlying multiple applications may be the same, the standards for deciding the applications are not. Therefore, you must keep the legal standards very clear in the course of your decision. Sometimes you may not have to rule on each application. For example, if you grant the respondent asylum under section 208 of the Act, you may decide not to rule on the companion application for withholding of deportation under section 243(h) of the Act, unless asylum is being granted conditionally. Similarly, if you grant relief under section 241(a)(1)(H) of the Act, it is not necessary to consider an application for suspension of deportation under section 244(a) of the Act. Note also that if asylum is granted, suspension of deportation may not be granted. 8 C.F.R.§ 244 (1997). Of course, when applications are denied, the same rules do not apply. Denial of one application mandates consideration of the other(s). Thus, if you deny the application for asylum, you must rule on the application for withholding. If you deny the waiver in section 241(a)(1)(H) of the Act, you must consider any application for suspension of deportation and vice versa.

t. The decision is summarized in your order which is the last portion of the oral decision. The order should state clearly what you have decided in clear, short language: for example, "The application of the respondent [Name] for asylum in the United States under section 208(a) of the Immigration and Nationality Act should be and hereby is granted." You should state an order on every application you have decided.

Note that if the alien has knowingly filed a frivolous application for asylum, you must state that finding and all other relief is barred. This consequence only applies to applications for asylum filed on or after April 1, 1997.

You should also state the order of deportation or the order granting voluntary departure. In stating the order of deportation do not forget to note the country of deportation: for example, "It is ordered that the respondent [Name] be deported to France, his/her country of citizenship and nationality." Similarly, the order of voluntary departure must contain a country of deportation in the event that the respondent fails to abide by the terms of voluntary departure: for example, "It is ordered that the respondent [Name] be granted the privilege of voluntarily departing the United States on or before [Date]. If the respondent fails to depart on or before this date or on or before any date by which the District Director of the Immigration and Naturalization Service should extend the period of voluntary departure, this Court's order shall automatically become an order of deportation to [Country]."

2. The Written Decision

As noted above, you may wish to prepare a written decision. Be aware, however, of the problems that are inherent in this route because of the volume of cases and the multiple demands on your time.

Also, note that, unfortunately, you may end up writing and typing the decision or waiting for the judicial law clerk to write and type a draft for you. Be aware that, at this time, the Immigration Judges have very little, if any, clerical assistance for orders and decisions.

Also, do not wait too long to prepare the written decision. Memories of even the most heated and interesting hearing can fade. In this respect, you may find that, although you remember the broad issues and the facts in general, you may not remember the details upon which your decision may turn.

Under OPPM 93-1; Immigration Judge Decisions and Immigration Judge Decisions and Immigration Judge Orders, an Immigration Judge must complete the written decision within 60 days of submission of the case or within 10 days if the respondent is detained.

There is no set form for the written decision. However, tradition and logic will result in a written decision having the same format as oral decisions. Therefore, all of the considerations mentioned in the discussion of oral decisions apply to written decisions.

Remember that a written decision, like an oral decision, should expressly state your order at the end of the decision.

3. The Transcribed Oral Decision

If an appeal from your order is taken, the hearing and your oral decision will be transcribed. The transcripts will be presented to you for review. At this point, you must review the oral decision and sign it. In reviewing the decision, you may correct misspellings or clarify language. OCIJ policy and fairness to the parties does not allow you to change the decision substantively or by adding material to it. In other words, your oral decision must stand as you dictated it.

Unfortunately, the transcription service cannot retype all material in which corrections are made in handwriting. Therefore, sometimes you may sign a document that does not have an unqualifiedly professional appearance. Nonetheless, if errors are numerous (including spelling errors) or you believe that material has been omitted or distorted, the transcript should be redone. You should bring these matters to the attention of the staff at your Immigration Court that handles appeal preparation. The staff can then contact the transcription service. In this way, your decision will be correctly transcribed and the transcription service and OCIJ will be aware of problems or trends in the quality of transcription generally.

E. THE APPEAL PERIOD

1. Your order becomes final if appeal to the Board of Immigration Appeals is waived or if no appeal is filed timely in the 30-day jurisdictional appeal period. See 8 C.F.R. § 3.39 (2000); see also Matter of Shih, 20 I&N Dec. 697 (BIA 1993).

2. Once a Notice of Appeal is filed, jurisdiction "vests" in the Board and you entirely lose jurisdiction. Therefore, you cannot make any substantive decision in the appealed case. Only the Board has authority over the case.

3. Also, once the Board has assumed jurisdiction over a case, jurisdiction

remains with the Board unless the Board remands the matter back to Immigration Court. Therefore, if a party files a motion to reopen a proceeding that the Board has already decided on appeal, the motion must be ruled on by the Board no matter how much time may have passed since the Board's decision.

4. If no appeal has been filed, the Immigration Judge retains jurisdiction to decide motions to reopen or to reconsider. Also, the Immigration Judge retains jurisdiction to reopen or to reconsider on her own motion. See 8 C.F.R. §§ 3.23 and 242.22 (1997).

5. Note that, by statute, there is now no appeal permitted from an Immigration Judge's order of deportation rendered during an in absentia proceeding. See INA § 242B(c)(3). The statute provides that an in absentia order can be "rescinded" only by motion to reopen addressed to the Immigration Judge within 180 days of the deportation order; or at any time if the motion raises the claim that the respondent did not have notice of the proceedings. The Immigration Judge's decision on such a motion can, however, be appealed to the Board. See discussion of in absentia proceedings in Section F below.

F. IN ABSENTIA PROCEEDINGS

1. In the context of deportation proceedings, in absentia proceedings are authorized by sections 242(b) and 242B(c)(1) of the Act.

2. Section 242B of the Act is a complex statute that requires careful reading. Briefly stated, section 242B of the Act requires in absentia proceedings if service of the Order to Show Cause and service of notice of the date, time, and place of hearing are clear.

3. In absentia proceedings occur in two contexts. In the first, the respondent has never appeared at a hearing before the Immigration Judge. In the second, the respondent has appeared before an Immigration Judge at least one time, and may have already conceded deportability.

4. In the first situation, careful review of service is necessary in order to insure that the respondent did have notice of the proceedings and of the date, time, and place of hearing. In the second situation, review of service is usually shortened because, in most cases, at the master calendar hearing or any previous hearing, the respondent has acknowledged service of the Order to Show Cause and has personally received written notice of the next

hearing.

5. Once you are assured of service of the Order to Show Cause and of the notice of hearing, you must turn to the issue of deportability. Again, the two contexts mentioned above may determine how you proceed. First, if the respondent has previously appeared before you, he may have pleaded to the Order to Show Cause and to have admitted the truth of the allegations and to have conceded deportability as charged. If so, the finding of deportability is easy to make.

6. If, however, the respondent has never appeared before you the INS must carry its burden of demonstrating deportability by clear, unequivocal, and convincing evidence as required by Woodby v. INS, 385 U.S. 276 (1966). The INS is not relieved of this burden simply because the respondent is not present. In this respect, deportation proceedings are different from "default judgments" in civil suits. The failure to contest does not lead to judgment against the respondent simply because he has failed to appear.

7. The INS may present documents to prove deportability.

8. Once the issue of deportability is decided, you may have to rule on applications for relief that the respondent has already submitted. The general rule is that a failure to prosecute an application is deemed an abandonment of the application. Therefore, the respondent's failure to appear in the proceedings, after proper notice, is an abandonment of applications for relief that have already been submitted. See Matter of R-R-, 20 I&N Dec. 547 (BIA 1992).

9. Note that there is no appeal from an in absentia order of deportation. Under section 242B(c)(3) of the Act, the order may be "rescinded" only upon motion made to the Immigration Judge.

10. In absentia proceedings must occur on the record. The proceedings must progress with the formality used in proceedings in which respondent does appear. The following are some suggestions for the format of the in absentia hearing.

    a. Open the hearing by identifying yourself, the case, place, and date as you would for any other record hearing.

    b. Identify the INS representative or ask counsel for the INS and the respondent to identify themselves.

c. Indicate the time the hearing was scheduled to begin and the time at which you are actually opening the hearing.

d. If counsel for the respondent is not present, indicate that the respondent is not present and that no representative, friend, or relative is present on the respondent's behalf. Indicate how you know this. For example, if the hearing is taking place at the end of a master calendar, mention that you have completed the Court's business for the session in question and no other persons remain present (with the exception of the INS) who have business before the Court. If the hearing is an individual calendar, note that you have waited a set time for the respondent to appear and she has not done so.

e. If counsel for the respondent is present, ask if she has an explanation for the respondent's failure to appear. If you are satisfied by the explanation, continue the hearing. Note, however, that, under section 242B of the Act, a failure to attend a duly noticed hearing can be excused only by "exceptional circumstances."

f. Indicate that the Court has received no communication from the respondent to explain the failure to appear or to request another hearing date and/or time.

g. Ask the INS representative whether the INS has received any communication from the respondent.

h. Proceed with the hearing by marking exhibits. Mark the Order to Show Cause as an exhibit, taking note of whether the certificate of service on the Order to Show Cause indicates personal service or service by certified mail. If the latter, include the receipt for certified mail as part of the exhibit. Discuss your conclusion as to service of the Order to Show Cause.

i. Mark the Court's copy of the hearing notice together with the domestic return receipt and receipt for certified mail. Discuss service of the notice.

j. Ask the Service what is its position on service and on proceedings.

k. If the Immigration Judge determines that service is proper, then the Immigration Judge will proceed to the deportability phase of the hearing. Ask the INS for its proof or note that the respondent has already admitted the allegations of the Order to Show Cause and has conceded deportability.

l. If in the Court's view the INS has not demonstrated deportability by the required degree of proof, the Immigration Judge may consider continuing the case if the Service makes a proper motion or may enter an order terminating the proceedings.

m. If, on the other hand, the Immigration Judge is satisfied that deportability has been established by the INS proof or by the respondent's previous admissions and concessions on the record, then the Immigration Judge will turn to any applications for relief. The Immigration Judge will mark the applications as exhibits and note that the application are deemed abandoned.

n. If the Immigration Judge is satisfied that deportability has been demonstrated, she will enter an order of deportation. Note that it is ordinarily not possible to grant voluntary departure during an in absentia proceeding for the simple reason that the respondent is not present to testify as to her eligibility for voluntary departure.

o. An in absentia decision must be written. Matter of Charles, 16 I&N Dec. 241 (BIA 1972). An Immigration Judge should state an order of deportation or termination orally on the record as is the general rule for all decisions. Section III also contains specific written decisions that may be helpful for an in absentia proceeding.

p. The written decision must be served on the parties, including the respondent at her last known address.

Immigration Judge Benchbook Index

(October 2001)

Chapter Six - Relief From Exclusion And Deportation

CHAPTER SIX

RELIEF FROM DEPORTATION AND EXCLUSION

I. INTRODUCTION

This chapter is neither designed nor intended to provide the Immigration Judge with "all the law" relating to relief from deportation and exclusion. Its more modest aim is to help the Immigration Judge understand and deal with the most commonly encountered areas of relief. Knowledge of relief is critical in that the Immigration Judge is required to inform aliens of apparent eligibility for relief. 8 C.F.R. § 242.17(c) (1997).

Relief in Removal Proceedings is covered separately, but overlaps and is cross-referenced.

The areas of relief from deportation, exclusion, and removal are the most troublesome that face the Immigration Judge because it is these issues which are most frequently contested and appealed to the Board of Immigration Appeals. Time spent reviewing the applicable law, regulations, precedents, and other legal requirements before conducting the hearing will pay dividends in allowing you to narrow issues and control the course of the hearing. Your hearing will be more structured and will move from issue to issue without wandering into irrelevant areas.

II. TERMINATION OF DEPORTATION PROCEEDINGS

A. GENERALLY

Anytime the respondent denies the charge of deportability, the denial is treated as a motion to terminate proceedings. Proceedings may be terminated because the respondent is a United States citizen or because the allegations, even if true, do not lead to a finding of deportability.

This is also true in removal proceedings where the respondent is charged with being removable because she is deportable.

B. UNITED STATES CITIZEN

Not all persons born abroad are aliens. Persons born outside of the United States of a United States citizen parent or parents may themselves be United States citizens. During the hearing ascertain whether or not either of the respondent 's parents was ever a citizen of the United States. Existence of United States parent(s) should lead to further inquiry by the Immigration Judge. See INA §§ 301-308, 320-

321.

C. JURISDICTIONAL ISSUES

Proceedings may be terminated for jurisdictional reasons (such as departure or death of the respondent) or for the respondent to pursue an application for naturalization. See 8 C.F.R. § 242.7 (1997).

D. LEGAL SUFFICIENCY

The Immigration Judge is required to find deportability of an alien by evidence which is clear, unequivocal, and convincing. 8 C.F.R. § 242.14 (1997). The Order to Show Cause may be legally insufficient to sustain or support a charge of deportability. Either the factual allegations, or charge of deportability, or both, may be legally insufficient.

Note: The Attorney General can terminate exclusion or deportation proceedings and refile under IIRIRA. The alien will then be in Removal Proceedings.

E. TERMINATION FOR NATURALIZATION

The Immigration Judge may terminate the removal proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization when the respondent has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors. In every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings. 8 C.F.R. § 239.2(f) (2000).

III. VOLUNTARY DEPARTURE [NOT AVAILABLE IN EXCLUSION PROCEEDINGS]

A. GENERALLY

Voluntary departure is the area of relief from deportation which is most frequently encountered by the Immigration Judge. This remedy has several advantages for the alien. He will not be arrested and

deported, thus not requiring special permission to return to the country. The requirements are in former section 244(e) of the Act.

B. STATUTORY REQUIREMENTS

One must establish the immediate means with which to make a prompt departure, the willingness to depart, and good moral character for at least the past five years. "Good moral character" is defined in section 101(f) of the Act, which lists statutory preclusions along with a "catch-all" phrase: "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

C. LIMITATION ON REMEDY

The Immigration Judge has no authority to grant unlimited or "extended" voluntary departure. See Matter of Quintero, 18 I&N Dec. 348 (BIA 1982). Nor is there authority to reinstate voluntary departure after reopening proceedings where the sole grounds for reopening is the voluntary departure request. See 8 C.F.R. § 244.2 (1997).

D. DISCRETION

This form of relief is discretionary. If any adverse factors are of record, the respondent must have sufficient equities to overcome them. The following checklist is provided as a useful tool for all cases involving discretionary relief:

POSITIVE FACTORS NEGATIVE FACTORS

United States citizen or Prior deportation

lawful permanent resident spouse,

parent, children or siblings Criminal activity or convictions

Lengthy residence in United States Prior illegal entries

Illness of close family members Welfare fraud

Gainful employment Unauthorized employment

Legal entry Neglect of children

Active in civic groups Failure to pay support

Honorable service in United States military

Compliance with INS orders

Cooperation with law enforcement

Drug/alcohol abuse programs

Evidence of rehabilitation

Note that the requirements for voluntary departure in deportation proceedings differ substantially from those for voluntary departure in removal proceedings. In deportation proceedings there are no statutory time limitations. Nor is the respondent required to present travel documents or post a bond.

IV. ADJUSTMENT OF STATUS (SECTION 245 OF THE ACT)

A. GENERALLY

Adjustment of status is the changing of an alien's status from that of a nonimmigrant, an alien who has been paroled into the United States, and certain aliens who had entered without inspection to a lawful permanent resident. The alien may apply for adjustment to either the District Director, or if in deportation proceedings, to the Immigration Judge, on Form I-485.

B. STATUTORY REQUISITES

1. The alien must have been inspected and admitted. See INA § 245(a). See also Matter of Arequillin, 17 I&N Dec. 308 (BIA 1980); Matter of O, 16 I&N Dec. 344 (BIA 1977); Matter of Bufalino, 11 I&N Dec. 351 (BIA 1965).

    a. Intentional false claim to United States citizenship not

considered inspected. Reid v. INS, 420 U.S. 619 (1975).

b. Honest, but erroneous, belief of United States citizenship considered inspected. Matter of Wong, 12 I&N Dec. 733 (BIA 1968); Matter of F-, 9 I&N Dec. 54 (BIA 1960).

c. Aliens paroled into the United States may adjust. Matter of C-H-, 9 I&N Dec. 265 (BIA 1961). However, note that arriving aliens in removal proceedings are ineligible for adjustment, presumably even if application is made to the District Director of INS. See 8 C.F.R. § 245.1(c)(8) (2000).

d. Under section 245(i) of the Act, adjustment is available to aliens previously ineligible for adjustment who are willing and able to pay the prescribed application fee plus a penalty assessment of five times the application fee.

NOTE: SECTION 245(i) OF THE ACT EXPIRED JANUARY 14, 1998, AND CONTINUES TO APPLY ONLY TO ADJUSTMENT APPLICATIONS WHERE THE UNDERLYING VISA PETITION OR LABOR CERTIFICATION WAS FILED ON OR BEFORE THAT DATE.

2. The alien must be eligible to receive an immigrant visa and must be admissible to the United States for permanent residence. Admissibility must be determined under the law existing at the time of adjudication.

a. The alien must prove he is the beneficiary of an approved preference petition (section 203(a) of the Act), immediate relative petition (section 201(b) of the Act), or qualifies as a "special immigrant" (section 101(a)(27), of the Act).

b. The alien must establish that he is not excludable (inadmissible) under section 212(a) of the Act.

c. Note that the alien may be required to demonstrate admissibility in compliance with requirements made by IIRIRA, including presentation of evidence of immunizations and presentation of affidavits of support, depending upon the date the application was filed. For instance, applications filed on or after December 19, 1997, must be supported by affidavits of support which meet the requirements of section 213(a) of the Act as amended by IIRIRA.

d. If excludable, the alien may apply for a waiver of excludability (such as 212(h), 212(i) or 212(k)) in conjunction with his adjustment of status. 8 C.F.R. § 242.17(a)(1997); see also Matter of Parodi, 17 I&N Dec. 608 (BIA 1980).

3. An immigrant visa must be immediately available to the alien at the time the application for adjustment of status is filed.

a. Alien must have an approved visa petition to adjust status. The Immigration Judge does not have the authority to grant visa petitions. Matter of Ching, 15 I&N Dec. 772 (BIA 1976).

b. The Immigration Judge may grant continuances to permit adjudication of relative visa petitions unless it is clear that the alien is ineligible. Matter of Garcia, 16 I&N Dec. 653 (BIA 1978). But see Matter of Arthur, 20 I&N Dec. 475 (BIA 1992) (regarding granting motions to reopen where certain sections of the Act are implicated). See also Matter of Guiragossian, 17 I&N Dec. 161 (BIA 1979).

c. Priority dates to determine availability of visas are defined in 8 C.F.R. § 245.1.

d. The Immigration Judge may not conditionally grant an adjustment application on the condition that a visa number becomes available. Matter of Reyes, 17 I&N Dec. 239 (BIA 1980).

e. The alien satisfies the availability requirement only if a visa number was available when the application was originally filed. Matter of Huang, 16 I&N Dec. 358 (BIA 1978). The visa number must also be available at the time of the grant of adjustment.

f. For an applicant applying on the basis of an approved immediate relative petition or as a special immigrant, there are no numerical limits, therefore, an immigrant visa is always "immediately available."

4. Alien must not fall within one of the following statutorily ineligible classes unless exempted under section 245(i) of the Act:

   a. Alien Crewman;

   b. Alien admitted in transit without visa;

   c. Aliens engaged in unauthorized employment (Exception for immediate relatives and special immigrants);

   d. Aliens who are not in a legal immigration status on the date of filing of the adjustment application. (Exception for immediate relatives and special immigrants);

   e. Aliens who have failed to maintain continuously legal status since entry unless through no fault of their own (Exception for immediate relatives or special immigrants);

   f. Alien who was admitted as a nonimmigrant visitor without a visa under section 217 of the Act (Exception for immediate relatives) or under 8 C.F.R. § 212.1(e) (2000);

   g. Any nonpreference alien who is seeking or engaging in gainful employment who does not have valid labor certification from the Secretary of Labor;

h. Any alien who has nonimmigrant status as a government official or servant of such official;

i. Any alien who is an exchange visitor and subject to foreign residence requirements;

j. Any alien who claims immediate relative status under section 201(b) of the Act or preference status under section 203(a) of the Act or section 203(b) of the Act, unless the alien is the beneficiary of a valid unexpired visa petition; and

k. Any alien already lawfully admitted for permanent residence on a conditional basis.

5. Adjustment of status is discretionary, involving a balancing of favorable and adverse factors. Patel v. INS, 738 F.2d 239 (7th Cir. 1984).

a. Favorable factors include the following: family ties in the United States, lengthy residence in the United States, approved labor certification or preference petition, hardship if the applicant were forced to apply for an immigrant visa from overseas, payment of taxes, community service, good moral character, employment history as well as business and property ties. Matter of Blas, 15 I&N Dec. 626 (BIA 1974; A.G. 1976); Matter of Arai, 13 I&N Dec. 494 (BIA 1970).

b. Adverse factors include: criminal conduct, flagrant immigration violations, unlawful entry into the United States, preconceived intent to enter and remain permanently, false statements, and failure to file income tax returns. Jain v. INS, 612 F.2d 683 (2d Cir. 1979), cert. denied, 466 U.S. 937 (1980); Matter of Chartier, 16 I&N Dec. 284 (BIA 1977); Matter of Hosseinpour, 15 I&N Dec. 191 (BIA 1975); Matter of Janus & Janek, 12 I&N Dec. 866 (BIA 1968).

c. Where adverse factors are present it may be necessary for the applicant to offset these by showing unusual or outstanding equities. See Matter of Arai, 13 I&N Dec.

494 (BIA 1970).

d. In the absence of adverse factors, adjustment will ordinarily be granted as a matter of discretion. Matter of Arai, 13 I&N Dec. 494 (BIA 1970).

C. RENEWAL IN EXCLUSION PROCEEDINGS

An adjustment application made by an alien paroled under section 212(d)(5) of the Act, which has been denied by the INS District Director, may be renewed in exclusion proceedings before an Immigration Judge only under two conditions: (1) the denied application must have been properly filed subsequent to the applicant's earlier inspection and admission to the United States, and (2) the applicant's later absence from and return to the United States must have been under the terms of an advanced parole authorization granted to permit the absence and return to pursue the previously filed adjustment application. 8 C.F.R. §§ 236 and 245.2(a)(1) (1997).

D. CUBAN/NICARAGUAN ADJUSTMENT

There is a special adjustment provision available to Nicaraguans and Cubans pursuant to NACARA. The Attorney General shall adjust any Cuban or Nicaraguan national physically present in the United States for a continuous period (aggregate absences of 180 days or less will not break the period) since December 1, 1995, if the alien applies before April 1, 2000, and is otherwise admissible for permanent residence (sections 212(a)(6)(a), 7(a), (9)(b) of the Act do not apply). On March 24, 2000 regulations implementing section 202 of NACARA became final. See 8 C.F.R. § 245.13 (2000).

E. THE HAITIAN REFUGEE IMMIGRATION FAIRNESS ACT OF 1998 (HRIFA)

This Act provides adjustment availability to some Haitian nationals present in the United States since December 31, 1995, and who meet other requirements. See 8 C.F.R. § 245.15 (2000)

V. ASYLUM AND WITHHOLDING OF DEPORTATION

A. INTRODUCTION

An alien may apply for asylum and/or withholding of deportation either before an asylum officer of the Service or before an Immigration Judge in removal, deportation, and exclusion proceedings. See 8 C.F.R. Part 208. The types of filings can generally be divided into two categories: Pre-Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and Post-IIRIRA filings; i.e., Applications filed before April 1, 1997, and those which are filed on or after April 1, 1997.

B. PRE-IIRIRA APPLICATIONS FOR ASYLUM AND WITHHOLDING - [Applications filed before April 1, 1997]

1. After pleadings have been taken, in a deportation case, the alien is given the opportunity to designate a country of choice, should deportation become necessary. If she declines, the Court directs a country or countries. After doing so, the Court is required to advise the alien of the right to file for asylum which is automatically considered as a request for withholding of deportation. See INA §§ 208(a) and 243(a). The request is made on Form 1-589.

2. In exclusion proceedings, the applicant is excluded and deported "from whence he came," and there is no designation of the place of removal. However, the Immigration Judge should inquire as to whether the applicant has a fear of persecution.

3. Jurisdiction

    a. It should be noted that once an alien has been placed in deportation, removal or exclusion proceedings, only the Court has jurisdiction over the application. See 8 C.F.R. § 208.2(b)(3) (2000).

    b. Spouses and minor children may be included in the same asylum application, if they are in the United States. 8 C.F.R. § 208.3(a) (2000).

4. Conditions and Consequences of Filing the Application for

Asylum.

a. If the application was filed on or after January 4, 1995, information provided in the application may be used as a basis for the initiation of removal proceedings, or to satisfy any burden of proof in exclusion, deportation, or removal proceedings.

b. If the application for asylum was filed on or after January 4, 1995, then it is subject to regulatory and statutory time limits for processing and completion. They are "expedited" cases, and are calendared for adjudication ahead of other cases in order to comply with these restrictions. The Immigration Judge should refer to OPPM 00-01 (Asylum Request Processing) regarding the processing of expedited asylum applications. Section 208(d)(5)(A)(ii) of the Act requires that an initial hearing on the asylum application be conducted within 45 days of its filing.

5. Filing of the application with the Immigration Court.

A copy of every asylum application is referred to the Department of State. See 8 C.F.R. §§ 208.4, 236.3, and 242.17 (1997). At its option, the Department of State also may comment on an application. Additionally, the Immigration Judge may request specific comments from the Department of State regarding individual cases or types of claims. See 8 C.F.R. § 208.11 (b) (1997). Note OPPM 00-01 regarding the process for requesting advisory opinions. It is neither necessary nor required that a Department of State opinion be received and in the file prior to proceeding in the case.

6. Eligibility.

a. Burden of Proof.

The Supreme Court has held that a well-founded fear of persecution exists where an objective situation is established which makes persecution a "reasonable possibility." INS v. Cardoza-Fonseca, 480 U.S. 421

(1987). The BIA has held that a claimant meets the burden if it is established that a reasonable person in his or her circumstances would fear persecution. See Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

The burden for withholding of deportation is higher than that for asylum. The statute requires a showing that one's "life or freedom would be threatened" due to any of the five statutory grounds. INA § 243(h) (now INA § 241(b)(3)). The Supreme Court has indicated that the government is correct in assessing the burden of a "clear probability" of persecution for this form of relief. That is, it must be shown that persecution is more likely than not to occur. INS v. Stevic, 467 U.S. 407 (1984).

b. Requirements.

To qualify for asylum an applicant must demonstrate that he or she is unwilling to return to his homeland because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This is simply the definition for the term "refugee." See INA §§ 101(a)(42)(A), 208. This definition was substantially revised by section 601 of IIRIRA, and now includes aliens who were forced to abort pregnancy, forced to undergo sterilization, persecuted for failure to undergo such a procedure or for resistance to a coercive population program. The Immigration Judge may only grant an application on that basis conditioned upon a subsequent administrative determination by INS that a number is available under section 207(a)(5) of the Act. See Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996).

"Persecution" has been defined as "the infliction of suffering or harm upon those who differ in a way regarded as offensive." Kovac v. INS, 407 F.2d 102 (9th Cir. 1969). The feared persecution may be at the hands of the government or a group which operates outside the realm of government (such as guerrillas). In

such instances, the claimant must establish that the government is unwilling or unable to protect him from the actions of this group. See Matter of McMullen, 17 I&N Dec. 542 (BIA 1980).

c. Evidence.

- The respondent cannot meet his burden of proof unless he testifies under oath regarding his application. An Immigration Judge should not proceed to adjudicate a written application for asylum if no oral testimony has been offered in support of that application. See Matter of Fefe, 20 I&N Dec. 116 (BIA 1989).

- A claimant need not present evidence which corroborates the claim where such evidence is not available. But see Matter of Dass, 20 I&N Dec. 120 (BIA 1989). Therefore, since the case will often stand or fall on the testimony of the respondent, it is absolutely essential that detailed credibility findings be made in every asylum case. See also Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998).

d. Statutory and regulatory bars under sections 101(a)(42) and 208(d) of the Act; 8 C.F.R. § 208.13(c)(2) (2000). Asylum shall be denied where:

- The alien was involved in the persecution of others. See Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988).

- The alien, having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community.

- The alien has been "firmly resettled" within the meaning of 8 C.F.R. § 208.15 (2000).

- There are reasonable grounds for regarding the alien as a danger to the security of the United States.

- The alien has been convicted of an aggravated felony. Note that an alien who has been convicted of an aggravated felony is considered to have been convicted of a particularly serious crime and to constitute a danger to the community, without further inquiry for asylum purposes. See INA § 208(d); Matter of A-A-, 20 I&N Dec. 492 (BIA 1992); Matter of K-, 20 I&N Dec. 418 (BIA 1991); but see Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996) (withholding of deportation and removal).

e. Discretion.

Except where the applicant is barred from relief (as noted above), withholding of deportation is a mandatory form of relief for those who meet the standard. Asylum (except as noted above) is a discretionary form of relief. Adverse factors include criminal offenses, the use of fraud to gain admittance to the United States, and circumvention of orderly refugee processing abroad. See Matter of Pula, 19 I&N Dec. 467 (BIA 1987). The Immigration Judge should note that withholding of deportation confers no immigration benefit other than a prohibition against deportation to a particular country. This benefit may be withdrawn where conditions change in the country from which the applicant fled. A successful asylum applicant may apply for lawful permanent resident status after one year has elapsed. See INA § 209(b).

C. POST-IIRIRA APPLICATIONS FOR ASYLUM AND WITHHOLDING - [Applications filed on or after April 1, 1997]

1. Generally, the requirements stated above are applicable to asylum applications filed on or after April 1, 1997 except as indicated below.

2. Jurisdiction.

a. "Asylum Only" Hearings. Once a Notice of Referral to Immigration Judge (Form-863) has been filed with the Immigration Court, the Immigration Judge shall have exclusive jurisdiction over any asylum applications filed by:

- An alien crewman who is an applicant for a landing permit, has been refused permission to land under section 252 of the Act, or was granted permission on or after April 1, 1997 to land under section 252 of the Act;
- An alien stowaway who has been found to have a credible fear of persecution;
- An alien who is an applicant for admission pursuant to the Visa Waiver Pilot Program under section 217 of the Act;
- An alien who was admitted to the United States pursuant to the Visa Waiver Pilot Program under section 214 of the Act and has remained longer than authorized or has otherwise violated his immigration status;
- An alien who has been ordered removed under section 235(c) of the Act; or
- An alien who is an applicant for admission, or has been admitted, as an alien classified under section 101(a)(15)(S) of the Act.

Note that the regulations limit the scope of the proceedings. See 8 C.F.R. § 208.2(b)(2) (2000). The rule of procedure as proceedings under section 240 apply, except the scope of review shall be limited to a determination of whether the alien is eligible for asylum or withholding of removal and whether asylum should be granted in the exercise of discretion. The

parties are prohibited from raising or considering any other issues, including but not limited to issues of removability and all forms of relief except for asylum and withholding of removal. At the end of the hearing, the Immigration Judge enters a decision on the applications for asylum, withholding and the Convention Against Torture, without any removal findings or order.

b. Once the alien has been placed in deportation, removal or exclusion proceedings, only the Court has jurisdiction over the application.

3. Conditions and Consequences of Filing the Application for Asylum.

a. If the application was filed on or after January 4, 1995, information provided in the application may be used as a basis for the initiation of removal proceedings, or to satisfy any burden of proof in exclusion, deportation, or removal proceedings. 8 C.F.R. § 208.3 (c)(2000).

b. An applicant for asylum is subject to the consequences of knowingly filing a frivolous application for asylum. An alien found to have knowingly filed such an application is forever barred from relief under the Immigration and Nationality Act. Because this is an extremely serious consequence, the Immigration Judge must take care to be sure the alien is aware of these consequences, by furnishing the appropriate oral and written warnings at the time of filing. Section 208(d)(4) of the Act requires that the applicant be advised specifically about the consequences of knowingly filing a frivolous application for asylum in the United States. A frivolous application for asylum is one which contains statements or responses to questions that are deliberately fabricated.

4. Filing of the application with the Court.

a. The respondent must file the Form I-589 version dated, May 1, 1998.

b. The Immigration Judge must advise the alien of the consequences of knowingly filing a frivolous application for asylum, by furnishing the appropriate oral and written warnings at the time of filing. Section 208(d)(4) of the Act requires that the applicant be advised specifically about the consequences of knowingly filing a frivolous application for asylum in the United States. A frivolous application for asylum is one which contains statements or responses to questions that are deliberately fabricated. The advisals regarding these consequences are to be given at the time of filing the application. In our proceedings, they should ordinarily be given at the Master Calendar appearance prior to filing and when filed, and should be given both orally and in writing. See Part III.

5. Eligibility

a. The Burden of Proof and Requirements. Except as noted below, the burden of proof for asylum and withholding is the same for applications filed before April 1, 1997.

b. Precluded from filing. Section 208(a)(2) of the Act, as amended by IIRIRA, provides that an alien is statutorily ineligible to apply for asylum after April 1, 1997, if he falls within one of the following statutory bars:

- Safe third country;
- Fails to file asylum within one year of arrival in the United States (unless there are either changed circumstances or extraordinary circumstances as set out in 8 C.F.R. § 208.4(a)(4)-(5) (2000) preventing the filing within one year); or
- The alien was previously denied asylum either by an Immigration Judge or the BIA (unless the changed circumstance exception applies).

Note: That the Immigration Judge will still have to consider the respondent's request for withholding of removal.

c. Mandatory denials. An alien who files an application for asylum on or after April 1, 1997, cannot be granted asylum if one of the following statutory bars applies:

- Persecuted others;
- Convicted of a particularly serious crime;
- Reason to believe the applicant committed a serious nonpolitical crime outside the United States prior to alien's arrival in the United States;
- Danger to security of United States;
- Engaged in terrorist activities; or
- Firmly resettled in another country.

Most of these same proscriptions apply to withholding of deportation. See INA § 243(h)(2); 8 C.F.R. § 208.16 (1997). An alien convicted of an aggravated felony is barred. However, the Immigration Judges must be familiar with sections 243(h)(2) and (3) of the Act, 8 C.F.R. § 208.16(c)(3) (1997), and Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996), discussing amendments which were made by AEDPA and IIRIRA.

d. Asylum cannot be granted until the identity of the respondent has been checked against all appropriate records maintained by the Attorney General and by the Secretary of State.

e. Applications subject to numerical limitation (coercive family planning cases) may be granted conditioned

upon the availability of a number under section 207(a)(5) of the Act.

D. RELIEF UNDER THE CONVENTION AGAINST TORTURE

The Torture Convention is discussed in further detail in Chapter Nine of Part One of the Benchbook.

VI. SUSPENSION OF DEPORTATION

This form of relief is not available in exclusion proceedings, was repealed by IIRIRA and modified by NACARA. It continues to be available to aliens in deportation proceedings, but certain transitional rules apply. A modified suspension of deportation application applies in removal proceedings to respondents who are described in section 309(c)(5)(C)(i) of IIRIRA (see attached chart). (Chart6-13.pdf)

A. GENERAL PROVISIONS

1. Sections 244(a)(1), (2) and (3) of the Act provide for the termination of deportation proceedings and the adjustment of the alien's status to that of a lawfully admitted permanent resident.

2. Suspension of deportation can only be applied for by filing Form EOIR-40 with the Immigration Judge in the course of a deportation proceeding. Note: By regulation the Attorney General may provide for adjudication of certain applications by asylum officers.

3. The burden of proof is on the alien to establish not only that she meets the statutory prerequisites as a matter of law, but also that she merits relief as a matter of discretion.

B. STATUTORY REQUIREMENTS

1. Seven-year cases under section 244(a)(1) of the Act. Alien must establish:

    a. She has been physically present in the United States continuously for at least the immediate past seven years

before the service of the Order to Show Cause and the application for suspension;

b. She is and has been a person of good moral character during the past seven years; and

c. Deportation would result in extreme hardship to the respondent or to a spouse, parent, or child, who is a United States citizen or permanent resident.

2. Ten-Year cases under Section 244(a)(2) of Act

This section applies to aliens found deportable for certain kinds of serious conduct under former sections 241(a) (2), (3) or (4) of the Act. The alien must establish:

a. Continuous physical presence in the United States for at least the immediate past 10 years since the commission of the deportable act, and prior to the service of the Order to Show Cause.

b. Good moral character during this 10-year period; and

c. Deportation would result in exceptional and extremely unusual hardship to the alien or to his or her spouse, parent, or child who is a United States citizen or permanent resident.

3. Three-year cases under section 244(a)(3) of the Act. Applications by aliens who have been physically present for a continuous period of not less than 3 years prior to service of the Order to Show Cause, and who have been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident; who can show good moral character during the 3-year period, and whose deportation would result in extreme hardship to the alien or the alien's parent or child.

C. CONTINUOUS PHYSICAL PRESENCE

The most controversial aspect of the physical presence

requirement is the issue whether presence has been broken. Since the passage of section 315(b) of the Illegal Immigration Reform and Control Act of 1996, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), the words "physically present in the United States for a continuous period" have been defined to allow for absences that are "brief casual and innocent" and that do "not meaningfully interrupt the continuous physical presence." See INA § 244(b)(2).

a. This amendment to the Act abrogated the Supreme Court's decision in INS v. Phinpathya, 464 U.S. 183 (1984), which interpreted the continuous physical presence requirement literally-- no departures.

   NOTE: IIRIRA and NACARA provide new rules relating to continuous physical presence which are applicable even though the alien is in deportation proceedings. For instance, pursuant to section 309(c)(5)(A) of IIRIRA, new rules relating to continuous residence and physical presence are applicable to aliens in deportation proceedings. The applicability of these rules was modified by NACARA, and thus the Immigration Judge must review provisions of both laws in order to determine which applies. In particular, this is critical because under section 240A(d) of the Act, the periods of residence and physical presence are terminated by service of the charging document upon the alien. See Matter of Mendoza-Sandino, Interim Decision 3426 (BIA 2000); Matter of Nolasco, Interim Decision 3385 (BIA 1999).

   The "clock-stopping" provisions do not apply to an alien who has not been convicted of an aggravated felony and who falls into one of the classes described at IIRIRA section 309(c)(5)(C)(i), but other requirements for suspension remain in effect. See attached schedule regarding these provisions.

b. Fleuti and Wadman concepts:

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

look at length of time absent, purpose of visit and whether procured travel documents to make trip.

- Wadman v. INS, 329 F.2d 812 (9th Cir. 1964) - five-day vacation in Mexico not a significant enough interruption.

- Bilbao-Bastida v. INS, 409 F.2d 820 (9th Cir.), cert. dismissed, 396 U.S. 802 (1969) - entry found with two-month trip abroad with illegal visit to Cuba and the need for travel documents.

- Heitland v. INS, 551 F.2d 495 (2d Cir.), cert. denied, 434 U.S. 819 (1977) - six weeks out of country coupled with misrepresentations broke seven-year requirement.

- Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979) 30 days absence not interruptive.

- de Gallardo v. INS, 624 F. 2d 85 (9th Cir. 1980) - three and a half months not interruptive.

c. Generally, any material misrepresentations used to gain reentry or brief trips outside the United States to further any unlawful activity will be deemed acts that are "meaningfully interruptive."

- Matter of Contreras, 18 I&N Dec. 30 (BIA 1981) - smuggling aliens.

- Matter of Herrera, 18 I&N Dec. 4 (BIA 1981) - Obtained visa based on a sham marriage.

- Fidalgo/Velez v. INS, 697 F.2d 1026 (11th Cir. 1983) - alien knowingly concealed her husband's death from the consul who issued her

a spousal immigrant visa that she used for her return to the United States the same day - found interruptive.

- McColvin v. INS, 648 F.2d 935 (4th Cir. 1981) - absence of one day found to be meaningfully interruptive where the alien departed under voluntary departure granted by the Immigration Judge.

D. EXTREME HARDSHIP

1. Matter of Kim, 15 I&N Dec. 88 (BIA 1974) - extreme hardship is not a term of fixed and inflexible content or meaning.

2. Matter of Sangster, 11 I&N Dec. 309 (BIA 1965) - must look to each particular case, more than economic detriment.

3. Matter of Anderson, 16 I&N Dec. 596 (BIA 1978) - criteria established - political/economic conditions relevant but do not justify grant without advanced age; severe illness, family ties, community ties, etc.

4. Faddah v. INS, 553 F.2d 491 (5th Cir. 1977) - existence of citizen child or children who would have to accompany their parents abroad is not enough.

5. Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978) - economic hardship and cultural and social uprooting are hardships suffered by nearly every alien who has spent a considerable time period in United States.

6. INS v. Wang, 450 U.S. 139 (1981) a narrow construction extreme hardship is permissible; two citizen children going to a country of a lower standard of living was insufficient to establish extreme hardship.

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

E. DISCRETION

1. As with most other benefits relieving deportation, the Immigration Judge must weigh the factors presented to determine if suspension is warranted in the exercise of discretion.

2. Matter of Turcotte, 12 I&N Dec. 206 (BIA 1967) - matter of grace to receive, must show worthy of it.

3. Matter of Reyes, 18 I&N Dec. 249 (BIA 1982) - even assuming statutory eligibility for suspension of deportation, a motion to reopen was denied for purely discretionary reasons.

   The Act specifically excludes from suspension of deportation eligibility crewmen who entered after June 30, 1964; nonimmigrant J-1 exchange aliens admitted to receive graduate medical education whether or not subject to the two-year foreign residence requirement; and all other nonimmigrant J-1 and J-2 exchange aliens who did not fulfill the two-year foreign residence requirement or receive a waiver of that requirement. INA § 244(f).

   IIRIRA provided an annual limitation (4,000) on the number of applications for suspension cases which may be granted. This was further refined by NACARA, which sets forth classes of aliens who are exempt from the annual cap. If the case is one which is exempt from the annual limitation, it may be granted unconditionally. However, all other cases must be granted conditioned upon the availability of a number, and must also include an alternate order of voluntary departure. In addition, new regulations prohibit grants of suspension where asylum is granted.

VII. REGISTRY [SECTION 249 OF THE ACT]

Registry is a discretionary form of relief available to long-time residents of the United States. INA § 249 sets forth the following requirements:

REQUIREMENTS

1. Applicant must have entered the United States prior to January 1, 1972.

2. Applicant must have maintained a continuous residence in the United States since his entry. This would allow for "brief, casual and innocent" departures under Fleuti.

3. Applicant must not be inadmissible under section 212(a)(3)(E) of the Act. This section refers to the excludability of participants in Nazi persecutions or genocide.

4. Applicant must not be inadmissible under section 212(a) of the Act as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotics law or smugglers of aliens.

   NOTE: Congress never changed narcotics to controlled substance. A marijuana conviction is not a preclusion but one could argue that one convicted of marijuana may not be able to establish good moral character. See INA § 101(f). However, good moral character only has to be established for a reasonable time.

5. Applicant must be a person of good moral character. No time frame for the establishment of good moral character is specified; however, a reasonable amount of time may be inferred. See Matter of Sanchez-Linn, 20 I&N Dec. 362 (BIA 1991).

6. Applicant must not be ineligible for citizenship.

   NOTE: Certain waivers of inadmissibility may be available. See 8 C.F.R. § 249.1 (2000).

VIII. WAIVERS OF DEPORTABILITY

A. ALIEN SMUGGLING - SECTION 241(a)(1)(E)(iii) OF THE ACT

1. In General. Section 241(a)(1)(E)(iii) of the Act authorizes a discretionary waiver for aliens deportable under section 241(A)(1)(E)(i) of the Act for smuggling an immediate relative.

2. Statutory Requirements.

    a. Alien must be a lawful permanent resident:

    b. Alien encouraged, induced, assisted, abetted, or aided spouse, parent, son, or daughter to enter United States illegally;

    NOTE: Under revised provision, relationship had to exist at the time of the smuggling.

    c. Respondent must show the he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

3. Special exception. Section 241(a)(1)(E)(i) of the Act does not apply to eligible immigrants who were physically present in the United States on May 5, 1988, and seek admission under section 203(a)(2) of the Act or as an immediate relative.

B. FRAUD OR MISREPRESENTATION [SECTION 241(a)(1)(H) OF THE ACT]

1. In General. Section 241(a)(1)(H) of the Act added by IMMACT 90, replaced former section 241(f) waiver. Section 241(a)(1)(H) of Act authorizes a discretionary waiver for an alien deportable under section 241(a)(1)(A) of the Act (excludable at time of entry) where the alien was excludable under section 212(a)(6)(C)(i) of the Act for having sought entry by fraud or willful misrepresentation of a material fact. Section 241(a)(1)(H) of the Act also waives those grounds of inadmissibility at entry directly resulting from that fraud or misrepresentation.

2. Statutory Requirements.

    a. Alien seeking waiver must be spouse, parent, son, or daughter of a United States citizen or lawful permanent resident;

b. Alien was in possession of an immigrant visa or equivalent document. See Caddali v. INS, 975 F.2d 1428 (9th Cir. 1992) (nonimmigrant fiancee visa not sufficient);

c. Excludable at time of entry under section 212(a)(6)(C)(i) of the Act for fraudulently, willfully, or even innocently misrepresenting material fact to procure a visa, other documentation, or entry into the United States or to procure other benefit under the Act. See INS v. Errico, 385 U.S. 214 (1966).

d. Alien was admissible but for the misrepresentation or fraud, except for those grounds of inadmissibility under sections 212(a)(5)(A) and (7)(A) of the Act that were a direct result of the fraud or misrepresentation. Matter of Anabo, 18 I&N Dec. 87 (1981) (waiver granted to married son of United States citizen who failed to disclose his marriage, thereby evading quota restrictions and entering as first preference rather than fourth preference); Matter of Senior, 12 I&N Dec. 861 (BIA 1968); see also Matter of Roman, 19 I&N Dec. 855 (BIA 1988) (alien not otherwise admissible at time of entry and thus ineligible for relief under section 241(a)(1)(H) of the Act, if alien is also excludable for failing to gain permission to reapply for admission after deportation);

e. Respondent must show that he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

3. Miscellaneous.

a. Adjustment. Waiver inapplicable to fraud committed to procure adjustment of status under section 245 of the Act. See Matter of Connelly, 19 I&N Dec. 156 (BIA 1984).

b. Burden of Proof. Borne by alien. See Matter of Matti, 19 I&N Dec. 43 (BIA 1984).

c. Rescission. Waiver inapplicable to rescission proceedings instituted to determine alien's eligibility for previous grant of adjustment of status. See Matter of Pereira, 19 I&N Dec. 169 (BIA 1984).

d. Marriage Fraud. Alien excludable for marriage fraud cannot rely on sham marriage to procure waiver. See Matter of Matti, 19 I&N Dec. 43 (BIA 1984).

C. CRIMINAL OFFENSES [SECTION 241(a)(2)(A)(iv) OF THE ACT]

1. In General. Section 241(a)(2)(A)(iv) of the Act authorized a mandatory waiver for an alien no longer deportable under sections 241(a)(2)(A)(i) (crime involving moral turpitude), (A)(ii) (multiple criminal convictions), and (A)(iii) (aggravated felony conviction) of the Act.

2. Statutory Requirements. Alien must have received full and unconditional pardon by Governor of any state or the President. A pardon, even if full and unconditional, does not "excuse" a drug trafficking or controlled substance offense. See Matter of Yeun, 12 I&N Dec. 325 (BIA 1967). But see INA § 237 (a)(2)(A)(v).

D. HARDSHIP [SECTION 216(c)(4) OF THE ACT]

1. In General. Aliens who marry within two years of entry receive permanent resident status on a conditional basis. After two years, the alien must file a petition to remove the conditional status and be interviewed by the INS. Failure to meet these requirements results in termination of the alien's conditional permanent resident status. This waiver provides an exception for those respondents who qualify.

2. Statutory Requirements.

a. Alien fails to meet requirement of section 216(c)(1) of the Act; i.e., fails to file joint petition and appear at joint interview.

b. Alien proves she merits the waiver because:

- Deportation would result in extreme hardship (only factors arising during period of conditional lawful permanent resident status can be considered); or

- Alien spouse entered qualifying marriage in good faith, but the marriage has been terminated (other than through death of the spouse) and alien was not at fault for failing to file or appear at the interview; or

- Alien spouse entered the marriage in good faith and during the marriage the United States citizen or lawful permanent resident spouse battered the alien spouse or child, and the alien spouse was not at fault for failing to file or appear at interview.

c. Respondent must show the she warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

E. LONG-TERM RESIDENCE WAIVER - SECTION 212(c) OF THE ACT

NOTE: This provision was repealed by IIRIRA and substantially modified by AEDPA. See Matter of Soriano, 21 I&N Dec. 516 (A.G. 1997).

This discussion has been retained in this area because there is some continuing applicability in deportation proceedings, and because it is still available in exclusion proceedings. Matter of Michel, 21 I&N Dec. 1101 (BIA 1998); see Henderson v. INS, 157 F.3d 106 (2d Cir. 1998).

1. In General. Section 212(c) of the Act affords relief to those aliens excludable under section 212(a) of the Act. Inasmuch as returning lawful permanent residents were placed in a more

favorable position than lawful permanent residents in deportation, the courts extended section 212(c) relief to them as well. See Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

2. Statutory Requirements

   a. Alien must be a lawful permanent resident. See Matter of Anwo, 16 I&N Dec. 293 (BIA 1977);

   b. Alien must have maintained unrelinquished domicile of at least 7 consecutive years. See Francis v. INS, 532 F.2d 268 (2d Cir. 1976); Matter of Silva, 16 I&N Dec. 26 (BIA 1976); Matter of Garcia-Quintero, 15 I&N Dec. 244 (BIA 1975); cf. Matter of Carrasco, 16 I&N Dec. 195 (BIA 1977) (abandonment breaks statutory period); Gamero v. INS, 367 F.2d 123 (9th Cir. 1966) (absence cannot be 17 years).

   c. Basis for waiver in deportation must be based on comparable ground for waiver in exclusion. See 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 Meza, 20 I&N Dec. 257 (BIA 1991); Matter of Wadud, 19 I&N Dec. 182 (BIA 1984); Matter of Granados, 16 I&N Dec. 726 (BIA 1979).

   d. The respondent must show that he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion). See Matter of Marin, 16 I&N Dec. 581, 583 (BIA 1978).

3. Miscellaneous.

   a. Review District Director denial. Applications denied by the District Director can be renewed before the Immigration Judge. See 8 C.F.R. § 212.3(c) (2000).

   b. Burden of Proof. Borne by alien. See Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995); Matter of Roberts, 20 I&N Dec. 294 (BIA 1991); Matter of

Edwards, 20 I&N Dec. 191 (BIA 1990); Matter of Marin, 16 I&N Dec. 581, 583 (BIA 1978).

c. Factors. See Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988); Matter of Wadud, 19 I&N Dec.182 (BIA 1984); Matter of Duarte, 18 I&N Dec. 329 (BIA 1982); Matter of Khalik, 17 I&N Dec. 518 (BIA 1980); Matter of Marin, 16 I&N Dec. 581 (BIA 1978).

- Positive factors include family ties, long residence, hardship, good moral character, military service, employment history, property, community service, and rehabilitation.

- Negative factors include criminal records, types of crime committed, immigration violations, bad character, and lack of rehabilitation.

- Unusual and outstanding equities. As negative factors grow more serious, alien must introduce additional offsetting equities. See Matter of Edwards, 20 I&N Dec. 191 (BIA 1990) (establishing unusual and outstanding equities does not compel favorable exercise of discretion); Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988) (heightened showing required for single serious crime or series of criminal acts establishing pattern of serious criminal misconduct); Matter of Marin, 16 I&N Dec. 581 (BIA 1978) (explaining balancing test).

- Rehabilitation. Aliens with a criminal record are ordinarily required to demonstrate rehabilitation, but this is only one factor to be considered.

NOTE: Under AEDPA, this form of relief is unavailable to any alien deportable on account of any conviction for a controlled substance, or any aggravated felony, etc. It continues to be available in exclusion proceedings, and there is a similar relief

available in removal proceedings under "cancellation" provisions in section 240A(a) of the Act. See Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997); see also Matter of Michel, 21 I&N Dec. 1101 (BIA 1998).

d. Adjustment. Immigration Judges can entertain application for a 212(c) waiver in conjunction with an adjustment of status application under section 245(a) of the Act. See Matter of Gabryelsky, 20 I&N Dec. 750 (BIA 1993).

e. Unavailability. The section 212(c) of the Act waiver is unavailable if the alien:

- Entered without inspection. Matter of Hernandez-Casillas, 20 I&N Dec. 262 (BIA 1990; A. G.. 1991), aff'd, 983 F.2d 231 (5th Cir. 1993).

- Procured initial entry by fraud, unless alien subsequently became lawful permanent resident. See Monet v. INS, 791 F.2d 752 (9th Cir. 1986); Matter of T-, 6 I&N Dec. 136 (BIA 1954; A.G. 1957) (unlawful admission for concealing prior marijuana conviction); cf. Matter of Sosa-Hernandez, 20 I&N Dec. 758 (BIA 1993) (section 241(f) of the Act held to validate an alien's initial entry for purposes of section 212(c) eligibility).

- Has had a change in status. See generally Rivera v. INS, 810 F.2d 540 (5th Cir. 1987) (immigrant becomes nonimmigrant); Matter of Cerna, 20 I&N Dec. 399 (BIA 1991) (final administrative order of deportation); Matter of Duarte, 18 I&N Dec. 329 (BIA 1982) (abandonment of residence and departure under order of deportation/exclusion); Matter of Lok, 18 I&N Dec. 101, 107 n.8 (BIA 1981) (rescission of adjustment of status); Matter of Morcos, 11 I&N Dec. 740 (BIA 1966)

(voluntary removal due to indigence); Matter of T-, 6 I&N Dec. 778 (BIA 1955) (repatriation to enemy country).

- Violated Registration Act. Matter of Wadud, 19 I&N Dec. 182 (BIA 1984).

- Committed certain firearms offenses. Matter of Granados, 16 I&N Dec. 726 (BIA 1979) (possession of sawed-off shotgun); Matter of Montenegro, 20 I&N Dec. 603 (BIA 1992) (assault with firearm); Matter of Rodriquez-Cortes, 20 I&N Dec. 587 (BIA 1992) (same).

- Is a saboteur (section 212(a)(3)(A) of the Act), terrorist (section 212(a)(3)(B) of the Act), member of totalitarian party (section 212(a)(3)(D) of the Act), international child abductor (section 212(a)(9)(C) of the Act); Nazi persecutor (section 212(a)(3)(E) of the Act); or contrary to United States foreign policy (section 212(a)(3)(C) of the Act).

- Committed aggravated felony and sentenced to at least five years in prison. Matter of Ramirez-Somera, 20 I&N Dec. 564 (BIA 1992) (actual time served when relief sought controls); Matter of A-A-, 20 I&N Dec. 492 (BIA 1992) (bar applies regardless of date of conviction, except for newest categories of crimes, but only to applications submitted after November 29, 1990).

- Applies for section 212(c) relief within 5 years of barring act listed in section 242B(e)(1) - (4) of the Act. See 8 C.F.R. § 212.3(f)(5) (2000).

F. CRIMINALS [SECTION 212(h) OF THE ACT]

1. In General. This section authorizes discretionary waiver for an alien excludable under section 212(a)(2) of the Act for certain criminal activity. Drug traffickers and those who admit

committing acts which constitute essential elements of a violation of a law or regulation relating to a controlled substance (except for simple possession of 30 grams or less of marijuana) are ineligible for this relief. Also ineligible are murderers and persecutors. See Matter of Grijalva, 19 I&N Dec. 713 (BIA 1988) (concerning de minimis marijuana exception).

NOTE: Under section 212(h) of the Act, as amended by 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. See Matter of Yeung, 21 I&N Dec. 611 (BIA 1996). The lawful permanent resident is also ineligible unless he has lawfully resided continuously in the United States for 7 years prior to the institution of proceedings. In addition, this revision was effective on September 30, 1996, and applies in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date. Section 348(b) of the IIRIRA.

2. Statutory Requirements:

    a. Requirements for section 212(h)(1)(A) of the Act.

        - Alien is an immigrant excludable under section 212(a)(2)(D)(i)-(ii) of the Act (prostitution or commercial vice),

        - Alien is an immigrant, and

            - the activities for which the alien is excludable occurred more than 15 years before the date of the alien's application for a visa, entry, or adjustment of status;

            - the admission of the alien to the United States is not contrary to national welfare, safety, or security;

- alien is rehabilitated;

- Discretion. Attorney General must consent to alien's applying or reapplying for a visa, admission, or adjustment of status. Respondent must show that he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion)

b. Requirements for section 212(h)(1)(B) of the Act.

- Alien is an immigrant who is spouse, parent, son, or daughter of United States citizen or lawful permanent resident and whose exclusion would result in extreme hardship to the qualifying relative (not alien him or herself). See Matter of Sanchez, 17 I&N Dec. 218 (BIA 1980); see also Osuchukwu v. INS, 744 F.2d 1136 (5th Cir. 1984) (finding extreme hardship under section 244(a)(1) of the Act analogous to section 212(h) of the Act); Chiaramonte v. INS, 626 F. 2d 1093 (5th Cir. 1980); and

- Discretion. Attorney General must consent to alien's applying or reapplying for a visa, admission, or adjustment of status.

c. Miscellaneous.

- Burden of proof borne by alien. Matter of Ngai, 19 I&N Dec. 245 (Comm'r 1984).

- Renewed Applications. Immigration Judges can hear applications after the District Director's denial of section 212(h) application (Form I-601). See 8 C.F.R. § 235.9(c) (1997).

- Nunc Pro Tunc Grant. Immigration Judge can

grant this waiver nunc pro tunc during deportation proceedings to cure deportability for being excludable at entry. Matter of Sanchez, 17 I&N Dec. 218 (BIA 1980); Matter of Bemabella, 13 I&N Dec. 42 (BIA 1968); Matter of Haller, 12 I&N Dec. 319 (BIA 1967); see also Matter of Parodi, 17 I&N Dec. 608 (BIA 1980) (must have departed from United States since time of excludable act to be eligible for nunc pro tune relief).

- Entry. "Entry" need not be entry under Fleuti in the case of lawful permanent resident seeking this waiver. Matter of Sanchez, 17 I&N Dec. 218 (BIA 1980).

- Adjustment. Waiver available in adjustment context. Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992); Matter of Goldeshtein, 20 I&N Dec. 382 (BIA 1991); Matter of Battista, 19 I&N Dec. 484 (BIA 1987); see also 8 C.F.R. §§ 212.7(a)(1)(ii), 245.1(f), and 245.2(a)(1) (2000).

- Good Moral Character. This waiver cannot cure lack of good moral character under section 101(f) of the Act to qualify for suspension, registry, and voluntary departure. Miller v. INS, 762 F.2d 21 (3d Cir. 1985).

G. FRAUD [SECTION 212(i) OF THE ACT]

This provision was revised by IIRIRA, and is now available only to aliens who are the spouse, son, or daughter of a United States citizen whose spouse or parent would suffer extreme hardship if the alien was refused admission to the United States.

1. In General. This discretionary waiver is available to immigrants excludable because they fraudulently or willfully misrepresented a material fact to procure a visa, other documentation, or entry into the United States or to procure another benefit under section 212(a)(6)(C)(i) of the Act.

2. Elements of section 212(a)(6)(C)(i) of the Act.

    a. Alien fraudulently or willfully misrepresents material fact, seeking to procure a visa, other documentation, or entry into the United States or to procure other benefit provided under the Act; and

    b. Alien "otherwise admissible." See Matter of Diaz, 17 I&N Dec. 488 (BIA 1975).

3. Statutory Requirements.

    a. Requirements of section 212(i)(1) of the Act.

        - Alien is spouse, son, or daughter of United States citizen or lawful permanent resident. [Prior to IIRIRA, included those who had a United States citizen or lawful permanent resident child, but this was changed effective with IIRIRA.]

        - Extreme hardship to qualifying relative. Matter of Cervantes, Interim Decision 3380 (BIA 1999).

        - Discretion. See Matter of Cervantes, Interim Decision 3380 (BIA 1999) (concluding that the fraud may be considered as an adverse factor).

    b. Requirements of section 212(i)(2) of the Act.

        - Alien committed fraud or misrepresentation at least 10 years ago before the date of the immigrant's application for a visa, entry, or adjustment of status;

        - Not contrary to the national welfare, safety, or security of the United States.

4. Adjustment. Immigration Judge can only consider application

in conjunction with entry or adjustment of status. Compare Matter of Anderson, 12 I&N Dec. 399 (Reg. Comm'r 1967) with 8 C.F.R. § 212.7(a) (2000).

H. TWO-YEAR FOREIGN RESIDENCY [SECTION 212(e) OF THE ACT]

1. In General. Certain aliens admitted on an exchange visitor "J" visa (section 101(a)(15)(1) of the Act) are required to return to their home country for two years upon completion of their stay before applying for adjustment of status or change of nonimmigrant status. This section enables Immigration Judges to waive that requirement as a matter of discretion.

2. Statutory Requirements.

a. Alien must meet one of four requirements:

- Alien's deportation from United States would impose exceptional hardship on alien's United States citizen or lawful permanent resident spouse or child; OR
- Alien would be subject to persecution if returned to her country of nationality or last residence; OR
- Attorney General finds alien's admission to be in public interest; OR
- Foreign country does not object to waiver.

b. United States Information Agency recommends INS grant waiver. See INA § 212(e); 8 C.F.R. § 212.7(c) (2000); see also Matter of Tayabji, 19 I&N Dec. 264 (BIA 1985) (favorable recommendation prerequisite).

c. The respondent must show the he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

3. Miscellaneous.

   Immigration Judge authority. Sole authority of Immigration Judge is to rescind adjustment of status where District Director was without authority to grant waiver. See Matter of Tayabji, 19 I&N Dec. 264 (BIA 1985).

I. NONIMMIGRANT DOCUMENT [SECTION 212(d)(4) OF THE ACT]

1. In General. The Attorney General acting jointly with the Secretary of State can waive either or both of the requirements of section 212(a)(7)(B)(i) of the Act.

2. Statutory Requirements.

   a. Nonimmigrant alien;

   b. One of three bases:

      - Unforeseen emergency for particular alien: OR

      - Reciprocity between the United States and foreign contiguous territory or adjacent islands; OR

      - Transit Without Visa alien (TWOV). Alien in immediate and continuous transit through the United States under contracts authorized in section 238(c) of the Act;

   c. The respondent must show the he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

3. Special exemptions. Nationals of Canada, Mexico, and Caribbean Islands are specially exempted. See Daniel Levy, Documentary Requirements - New INA § 212(a)(7), 91-09 Immigration Briefings, 7 at n.561, n.578 (Sept. 1990).

J. VISA WAIVER PILOT PROGRAM - SECTION 217 OF THE ACT

1. In General. This provision waives visa requirements for nationals of certain countries and permits them to enter the United States as nonimmigrant visitors for a 90-day period.

2. Statutory Requirements.

    a. Alien must be a national from designated country. Countries are listed at 8 C.F.R. § 217.5 (1997).

    b. Waiver of rights. Alien waives right to review or appeal immigration officer's determination of admissibility at port of entry, and to contest (except on the basis of an application for asylum) any action for deportation. See INA § 217(b).

K. SPECIAL EXEMPTIONS FROM THE PASSPORT AND NONIMMIGRANT VISA REQUIREMENTS BY LAW OR TREATY

1. Member of the United States armed forces who has proper military identification or who is in uniform, and who is entering under official orders or permit. See INA § 284.

2. American Indian born in Canada who has at least 50% American Indian blood. See INA § 289.

3. Armed services personnel of a NATO member-state entering the United States under provisions of the North Atlantic Treaty. See 22 C.F.R. §§ 41.1(d)-(e) (1997).

4. Aliens entering pursuant to the International Boundary and Water Commission Treaty. See 22 C.F.R. § 41.1(f) (1997).

5. Special Waiver for 15-day visit (for business or pleasure) to Guam. See INA § 212(l).

L. MENTAL/MEDICAL CONDITIONS - SECTION 212(g) OF THE ACT

1. In General. This section authorizes a discretionary waiver of an alien excludable under both section 212(a)(1)(A)(i) of the Act for having a communicable disease of public health significance and under section 212(a)(1)(A)(ii) of the Act for having a physical or mental disorder.

2. Statutory Requirements.

    a. Section 212(a)(1)(A)(i) of the Act.

        - Alien must have communicable disease of public health significance;

        - Alien (immigrant or nonimmigrant) must be the parent, spouse, unmarried son or daughter, or the minor unmarried lawfully adopted child of a United States citizen or lawful permanent resident alien with a properly issued immigrant visa;

        - The respondent must show that he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

    b. Section 212(a)(1)(A)(ii) of the Act.

        - Alien (immigrant or nonimmigrant) must have physical or mental disorder coupled with harmful behavior.

        - The respondent must show the he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

3. Miscellaneous

a. Immigration Judges can hear a renewed application in exclusion proceedings and deportation proceedings following a District Director's denial of a section 212(g) application. See 8 C.F.R. § 235.9(c) (1997).

b. Adjustment. Immigration Judges can entertain these application in conjunction with an application for adjustment of status under section 245(a) of the Act. See 8 C.F.R. §§ 245.1(e), 245.2(a)(1) (1997).

c. Drug abusers or addicts. No waiver available.

d. A waiver of immunization requirements is available under this provision and relates to the IIRIRA requirements that an immigrant present evidence of appropriate immunizations.

M. BROAD NONIMMIGRANT WAIVER-SECTION 212(d)(3) OF THE ACT

1. In General. This section establishes a broad discretionary waiver for nonimmigrant aliens.

2. Statutory Requirements.

a. Alien cannot be:

- Security risk (section 212(a)(3)(A)(i)-(iii) of the Act); OR
- A cause of foreign policy concern (section 212(a)(3)(C) of the Act); OR
- Nazi persecutor (section 212(a)(3)(E) of the Act).

b. Discretion. Immigration Judge, in addition to regular factors, must consider:

- The risk of harm to society if applicant is admitted;

- The seriousness of applicant's prior immigration or criminal violations;

- The nature of the applicant's reasons for visiting the United States. See Matter of Hranka, 16 I&N Dec. 491, 492 (BIA 1978).

3. Miscellaneous. The waiver may not be granted nunc pro tunc in deportation proceedings. Matter of Fueyo, 20 I&N Dec. 84 (BIA 1989).

    a. Terrorists eligible. Section 212(d)(3) of the Act waiver can apply to terrorists when:

        - Alien is excludable under section 212(a) of the Act;

        - Application is for nonimmigrant visa;

        - Application processed with United States consulate abroad;

        - State Department recommends waiver;

        - Attorney General approves State Department or consular officer's recommendation.

    b. Aliens with visas or those aliens visiting from a country which does not require a visa are eligible when:

        - Alien is excludable under section 212(a) of the Act;

        - Alien has appropriate documents or received a waiver thereof;

        - Bona fide intending nonimmigrant admitted temporarily as a nonimmigrant.

        - Alien files INS Form I-192 with District

Director prior to arrival in the United States. See 8 C.F.R. § 212.4(b) (1997).

IX. WAIVERS OF EXCLUDABILITY

A. GENERAL WAIVERS OF EXCLUSION SECTION 212(c) OF THE ACT

See discussion under Waivers of Deportability, at Section VIII, at 18.

B. CRIMES SECTION 212(h) OF THE ACT

See discussion under Waivers of Deportability, at Section VIII, at 18; see also Matter of Millard, 11 I&N Dec. 175 (BIA 1965) (can cure inadmissibility in exclusion proceedings).

C. RETURNING RESIDENTS SECTION 211(b) OF THE ACT

1. In General. Section 211(b) of the Act authorizes a discretionary waiver for returning resident aliens excludable under section 212(a)(7)(A) of the Act for failure to be in possession of proper documentation.

2. Statutory Requirements.

    a. Alien must be a returning resident. Section 101(a)(27)(A) of the Act defines returning resident immigrant. 8 C. F. R. § 211.1(b)(3) (1997) adds that the immigrant must be returning to an unrelinquished lawful permanent residence in the United States.

    b. The respondent must show that he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

3. For a discussion on returning residents and abandonment of status see Matter of Huang, 19 I&N Dec. 749 (BIA 1988).

    NOTE: Section 101(a)(13)(C) of the Act as amended by IIRIRA provides for an express period of time of absence for

an alien lawfully admitted for permanent residence to be regard as seeking admission. The alien must have been absent for a continuous period in excess of 180 days.

D. ALIENS WHO HAD BEEN PREVIOUSLY EXCLUDED AND DEPORTED SECTIONS 212(a)(6)(A) AND (B) OF THE ACT

1. In General. Sections 212(a)(6)(A) and (B) bars admission of an excluded alien seeking to reenter within a year of his exclusion and deportation or a deported alien seeking to reenter within 5 years of his/her deportation (except an aggravated felon, who must wait 20 years). The Attorney General however, can exercise discretion to waive this bar.

2. Statutory Requirements.

   a. Requirements for section 212(a)(6)(A) of the Act.

      - Alien previously excluded and deported;
      - Alien seeks admission within one year of the date of deportation outside the United States or attempts to be admitted from foreign contiguous territory;
      - Attorney General consents to alien's reapplication.

   b. Requirements for section 212(a)(6)(B) of the Act.

      - Alien previously deported;
      - Alien seeks admission within 5 years of date of deportation (20 years if alien is aggravated felon) outside the United States or attempts to be admitted from foreign contiguous territory;
      - Attorney General consents to alien's reapplication.

3. Miscellaneous

a. Form I-212 in conjunction with adjustment. Immigration Judges can permit the reentry of an excluded/deported alien by adjudicating a Form I-212 in conjunction with an application for adjustment of status under section 245(a) of the Act.

b. Renewed Applications. Immigration Judges can hear a renewed application in exclusion/deportation proceedings after a denial by the District Director. See Matter of Ng, 17 I&N Dec. 63 (BIA 1979); 8 C.F.R. §§ 235.7 and 212.2(h) (1997).

c. Nunc pro tunc. Permission to apply for relief nunc pro tunc must eliminate all grounds of deportation. See Matter of Roman, 19 I&N Dec. 855 (BIA 1988) (respondent was not separately eligible for nunc pro tunc permission to reapply for admission and therefore could not establish his eligibility by combining applications).

E. ALIEN SMUGGLING - SECTION 212(d)(11) OF THE ACT

1. In General. This discretionary waiver enables aliens otherwise inadmissible for smuggling an immediate relative to enter the United States.

2. Statutory Requirements.

a. Alien is a lawful permanent resident (or alien is seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) of the Act, except section 203(a)(4) of the Act);

b. Alien encouraged, induced, assisted, abetted, or aided his/her spouse, parent, son, or daughter;

c. Discretion: humanitarian concerns, family unity, or public interest.

F. DOCUMENTARY REQUIREMENTS, - SECTION 212(k) OF

THE ACT

1. In General. This section authorizes a discretionary waiver for an alien who is excludable for not possessing a valid labor certification (section 212(a)(5)(A) of the Act) or proper immigrant documentation (section 212(a)(7)(A)(i) of the Act).

2. Statutory Requirements.

    a. Alien must be in possession of immigrant visa;

    b. Alien must be "otherwise admissible";

    c. Basis of the applicant's inadmissibility must not have been known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission. See Matter of Aurelio, 19 I&N Dec. 458 (BIA 1987).

    d. The respondent must show that he warrants a favorable exercise of discretion; e.g., humanitarian concerns, family unity, or public interest. See supra, at 6-3, 6-16 (Checklist for Exercise of Discretion).

3. Miscellaneous

    a. Renewed Applications. Immigration Judges can hear a renewed application in exclusion and deportation proceedings after the District Director's denial of application. See 8 C.F.R. § 212.10 (1997).

    b. First instance. Immigration Judges can make an initial adjudication of the application too. See Matter of Aurelio, 19 I&N Dec. 458 (BIA 1987).

c. In deportation proceedings. Immigration Judges can address an application for a section 212(k) waiver in deportation proceedings. See id.; 8 C.F.R. § 242.8(a) (1997).

d. Adjustment. Immigration Judges can entertain application of status in conjunction with adjustment under section 245(a) of the Act. See 8 C.F.R. § 245.2(e) (1997).

Immigration Judge Benchbook Index

(October 2001)

Chapter Seven - Removal Proceedings

B. Cancellation of Removal For Certain Permanent Residents Section 240a(a) of the Act, Effective April 1, 1997

C. Cancellation of Removal and Adjustment for Certain Nonpermanent Residents - Section 240a(b)(1) of the Act Effective April 1, 1997

D. Cancellation of Removal [Battered Persons Provisions] Section 240a(b)(2) of the Act Effective April 1, 1997

E. Asylum - Section 208

F. Withholding of Removal - Section 241(b)(3) of The Act

G. Credible Fear Review: Section 235(b) of the Act

H. Claimed Status Review

CHAPTER SEVEN

REMOVAL PROCEEDINGS

APPLICABLE TO PROCEEDINGS COMMENCED ON OR AFTER APRIL 1, 1997

I. SECTION 240 OF THE ACT

A. GENERAL OVERVIEW

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides a unified procedure for conducting hearings to determine whether an alien should be removed from the United States. While many of the new procedures soften distinctions between aliens previously in deportation or exclusion proceedings, in many respects those distinctions remain. There are three categories of aliens subject to removal proceedings instituted on or after April 1, 1997:

1. Arriving aliens - those aliens who arrive at a designated port of entry and who seek "admission" to the United States;

2. Aliens who are present in the United States without having been "admitted" or paroled - (the old "EWI"); and

3. Aliens who were previously admitted to the United States, but who are deportable.

B. ARRIVING ALIENS

1. Aliens who arrive at a United States port of entry present themselves for admission. Under IIRIRA, INS inspectors may deny admission to aliens arriving in the United States without any documents, or with improper documents [inadmissible under sections 212(a)(6)(C) and (a)(7) of the Act]. Such aliens may be subjected to an "expedited removal" procedure, and do not appear before an Immigration Judge in removal proceedings. If the INS uses charges other than no visa or fraudulent documents, removal proceedings must be instituted, and the alien will receive a hearing before the Immigration Judge.

2. Arriving aliens who are subject to expedited removal and who express a fear of persecution or an intention to apply for asylum, will be interviewed by an INS officer. If the officer determines that the alien has a "credible fear" of persecution, the alien will be permitted to seek asylum in a removal proceeding. If the INS officer finds the alien does not have a credible fear of persecution, the alien may request a review of that determination before an Immigration Judge. (This review procedure will be discussed at the end of this Chapter.)

3. In addition, aliens who claim, under oath, that they are United States citizens, or were previously accorded status as a refugee, asylee or lawful permanent resident, will have their claim reviewed by an Immigration Judge. This "claimed status" review procedure will also be discussed later.

C. IMMIGRATION JUDGE AUTHORITY

1. The authority to conduct Removal Proceedings is found in section 240(b)(1) of the Act and 8 C.F.R. § 240.1. This includes authority to:

    a. Conduct proceedings

b. Administer oaths

c. Receive evidence

d. Interrogate

e. Examine and cross-examine the alien and witnesses

f. Issue subpoenas

g. Sanction by civil money penalty

h. Render final administrative decisions and orders.

2. The Immigration Judge is also authorized to conduct "in absentia" hearings under section 240(b)(5)(A), if the alien fails to appear without exceptional circumstances and if the alien was properly served with the NTA and was provided proper notice of the hearing. The Service must prove by clear, convincing and unequivocal evidence that the NTA and the notice of hearing were properly served and that alien is removable. 8 C.F.R. 3.26(c).

3. The Immigration Judge may also rule on applications for relief from removal - authority found generally under appropriate sections of INA and 8 C.F.R. § 240.1. These forms of relief include the following:

a. Adjustment of status to lawful permanent resident - sections 216, 216A, 245 of the Act generally, 8 C.F.R. §§ 216.4, 216.5 and 245;

b. Cancellation of removal for certain nonpermanent residents - section 240A(b), 8 C.F.R. § 240.20;

c. Cancellation of removal for certain lawful permanent residents - section 240A(a) of the Act, 8 C.F.R. § 240.20;

d. Asylum - section 208 of the Act; 8 C.F.R. § 208.1 et seq. Note that while asylum is available in deportation,

exclusion, and removal proceedings the date the application was filed may be determinative of which rules are applicable to the asylum application.

e. Withholding of removal - section 241(b)(3) of the Act;

f. Deferred removal - under United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 8 C.F.R. §§ 208.17, 208.18;

g. Waivers of inadmissibility if it will dispose of the matter - section 212 of the Act;

h. Removal of conditional resident status (de novo review) - sections 216 and 216A of the Act, 8 C.F.R. § 216.5;

i. Registry - creation of lawful permanent resident status for entrants prior to July 1, 1924, or January 1, 1972 - section 249 of the Act, 8 C.F.R. § 249.2;

j. Temporary protective status - de novo review of application section 244 of the Act; 8 C.F.R. § 244.16(b);

k. Voluntary departure - section 240B of the Act, 8 C.F.R. § 240.26;

l. Attorney sanctions - 8 C.F.R. § 292. 1;

m. Special cases-- OSI cases, section 215 departure application cases;

n. Naturalization ceremonies - 8 C.F.R. § 3.37.

4. The actual procedures for removal proceedings at Master and Individual Calendars are similar to the procedures for deportation and exclusion hearings, and the Immigration Judge should read Chapters 4 and 5 of the Benchbook to become familiar with such procedures. Just as in deportation

proceedings, the Immigration Judge must determine whether proper service of the Notice to Appear was made, whether the facts support the charge of removability, and comply with all of the procedural requirements and advisals.

5. There are certain additional requirements, however. In particular, the Immigration Judge should note that there is a distinction between voluntary departure granted prior to or at the conclusion of the proceedings, the alien should be informed at Master Calendar (MC) that if the alien will not seek preconclusion voluntary departure and seeks postconclusion voluntary departure, additional requirements must be fulfilled at the conclusion of proceedings, including the presentation of a travel document and posting of a bond in not less than the amount of $500. The respondent should also be informed of the time limitations (60 days at conclusion, 120 days prior to conclusion), as well as the good moral character requirement. See Matter of Ocampo, Interim Decision 3429 (BIA 2000); Matter of Cordova, Interim Decision 3408 (BIA 1999); Matter of Arguelles-Campos, Interim Decision 3399 (BIA 1999).

6. Under section 239 of the Act a removal proceeding is instituted by the filing of a Notice to Appear (NTA) with the Immigration Court. The NTA, unlike the Order to Show Cause (OSC), is served upon the alien in person or, if that is not practicable, by ordinary mail. Certified mail is not the specified means of service. The NTA is not translated into Spanish, as is an OSC, and the alien is given 10 days from service of the NTA prior to the MC hearing. Note also that the consequences of failing to appear at the removal hearing are different from a deportation hearing. The alien in removal proceedings is barred from certain forms of relief for 10, not 5 years. The warnings regarding these consequences must be accurately provided at the hearings, but there is no requirement that they be provided in writing in Spanish.

7. If the NTA is served upon the alien but never filed with the Immigration Court, the matter may be closed as a "failure to prosecute," (FTP) even if the alien appears. Please consult Operating Policies and Procedures Memorandum (OPPM) No. 00-01, Asylum Request Processing, regarding this

procedure and for the form which may be provided to the alien to advise him of the status of the case.

8. The statute also now provides for the conduct of the hearing through video conference, and also states that a merits hearing may only be conducted through a telephone conference with the consent of the alien involved after he has been advised of the right to proceed in person or through video conference. INA § 240(b)(2).

9. The term "removable" means:

    a. In the case of an alien not admitted to the United States, that the alien is inadmissible under section 212, or

    b. In the case of an alien admitted to the United States, that the alien is deportable under section 237.

10. These roughly correlate to the old distinction between excludable and deportable aliens except that aliens who have not been "admitted" to the United States are inadmissible, and that includes the old category of aliens who entered without inspection. "Entry" has been eliminated, and replaced with "admitted." An alien is admitted after: A lawful entry to the US, and inspection and authorization by an immigration officer. INA § l01(a)(13)(A).

11. A lawful permanent resident's return to the United States does not constitute an application for admission unless: [INA § 101(a)(13)(C)]

    a. Lawful permanent resident status has been abandoned; or

    b. The absence from the United States was for more than 180 days; or

    c. The alien engaged in illegal activity after departure; or

    d. The alien departed while in removal proceedings; or

e. The alien committed a 212(a)(2) crime, unless relief has been granted under section 212(h) or section 240A(a) of the Act; or

f. The alien attempts to return without inspection or authorization.

12. The burdens of proof in removal proceedings were discussed in Chapter 1, Evidence. Aliens who are applicants for admission have the burden of establishing that they are clearly and beyond doubt entitled to be admitted and are not inadmissible under section 212 of the Act. INA § 240(c)(2)(A). An alien who is not an applicant for admission has the burden of establishing by clear and convincing evidence that she is lawfully present pursuant to a prior admission. INA § 240(c)(2)(B). If the alien establishes that she has been admitted, the INS has the burden of establishing by clear and convincing evidence that the alien is deportable. INA § 240(c)(3)(A).

13. Aliens who fail to attend a removal hearing are inadmissible for five years from the date of departure, and are ineligible for cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status and registry for 10 years, if they received oral and written notice of the time, date, and place of the hearing and of the consequences for failing to attend. INA § 240(b)(7) of the Act. Removal orders issued in absentia may be rescinded upon a motion filed within 180 days of the order if there were exceptional circumstances beyond the alien's control, or at any time if notice was not proper. INA § 240(b)(5)(C); 8 C.F.R. § 3.23(b)(4)(ii) (2000).

14. In addition, there are legal consequences of removal. [See chart attached.] (212a9Table.pdf)

15. The country to which an alien may be removed is specified in section 241(b) of the Act. An alien must immediately designate a country of removal. If the alien fails to so designate, the right is waived.

16. An arriving alien is generally removed to country in which the

alien boarded the vessel; other aliens may select the country of removal. However, the Attorney General may disregard the designation if the alien fails to designate a country promptly or the country is unwilling to accept alien.

17. Note the provision that a removal proceeding shall be open to the public except pursuant to 8 C.F.R. § 3.27 (2000). As with deportation proceedings, however, care must be exercised to protect the confidentiality of battered aliens. Section 284 of IIRIRA.

II. GROUNDS OF INADMISSIBILITY - SECTION 212 OF THE ACT

A. HEALTH RELATED GROUNDS - Section 212(a)(1) of the Act - note requirement of immunizations as added by IIRIRA. Also note that determinations of ineligibility otherwise must be made with reference to the regulations of the Secretary of Health and Human Services.

B. CRIMINAL AND RELATED GROUNDS - Section 212(a)(2) of the Act:

1. Conviction or admission to certain crimes;

2. Controlled-substance traffickers or a trafficker's spouse, son or daughter who, within prior five years, obtained any financial or other benefit, knowing or when should have known the benefit was the product of illicit trafficking;

3. Prostitution and commercialized vice;

4. Serious criminal activity with immunity assertion.

C. SECURITY AND RELATED GROUNDS - Section 212(a)(3) of the Act:

1. General;

2. Terrorist activities;

3. Foreign policy;

4. Immigrant - membership in totalitarian party;

5. Participants in Nazi persecutions, genocide.

D. PUBLIC CHARGE - Section 212(a)(4) of the Act.

E. LABOR CERTIFICATION AND QUALIFICATIONS FOR CERTAIN IMMIGRANTS - Section 212(a)(5) of the Act:

1. Labor certification;

2. Unqualified physicians;

3. Uncertified foreign health care workers.

F. ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS - Section 212(a)(6) of the Act:

1. Aliens present without permission or parole;

2. Aliens who fail to attend removal proceedings;

3. Aliens who made misrepresentations;

4. Stowaways;

5. Smugglers;

6. Aliens who engaged in document fraud [section 274 of the Act];

7. Student visa abusers.

G. DOCUMENTATION REQUIREMENTS - Section 212(a)(7) of the Act:

1. Immigrants;

2. Nonimmigrants.

H. INELIGIBLE FOR CITIZENSHIP - Section 212(a)(8) of the Act:

1. In General;

2. Draft evaders.

I. ALIENS PREVIOUSLY REMOVED - Section 212(a)(9) of the Act [see chart attached]: (212a9Table.pdf)

1. Certain aliens previously removed;

2. Aliens unlawfully present;

3. Aliens unlawfully present after previous immigration violations.

J. MISCELLANEOUS - Section 212(a)(10) of the Act:

1. Practicing polygamists;

2. Guardian required to accompany helpless aliens;

3. International child abductors;

4. Unlawful voters - applies to voting occurring before, on or after date of enactment;

5. Former citizens who renounced citizenship to avoid taxation.

K. GENERAL CONSIDERATIONS

1. Termination

   As with deportation hearings, the alien may move to terminate the removal proceedings for jurisdictional, technical or evidentiary reasons. Refer to Chapter 5, Deportation Proceedings.

2. Waivers:

a. Review waivers under Chapters 4 and 5, and 6 relating to Excludability, Deportability, and Relief.

b. Section 211(b) of the Act - waives documents for returning residents.

c. Section 212(d)(3) of the Act - for certain nonimmigrants - available to nonimmigrants at time of visa application and at time of application for admission; waives all grounds of inadmissibility except sections 212(a)(3)(A), (C) and (E) of the Act; three factors to consider: risk of harm to society if applicant admitted; seriousness of the applicant's prior immigration law or criminal law violations, if any; and the nature of the applicant's reasons for visit.

d. Section 212(d)(4) of the Act- waives documents, visa for nonimmigrants.

e. Section 212(d)(11) of the Act - for lawful permanent residents who smuggled spouse, parent, son or daughter.

f. Section 212(d)(12) of the Act - available to lawful permanent residents and intending immediate relative immigrants inadmissible because of a Section 274C violation.

g. Section 212(g) of the Act -waiver of health grounds.

h. Section 212(h) of the Act - waiver of criminal grounds.

i. Section 212(i) of the Act- waiver of fraud, misrepresentation.

j. Section 212(k) of the Act - waiver of documents where alien unaware of grounds of inadmissibility.

k. Section 212(a)(9)(B)(v) of the Act - waiver of inadmissibility relating to unlawful presence. [See chart attached] (212a9Table.pdf)

Note: Section 212(c) was repealed by IIRIRA, but continues to remain available in exclusion proceedings and, to a limited extent, in deportation proceedings. Matter of Michel, 21 I&N Dec. 1101 (BIA 1998); Matter of Fuentes-Campos, 21 I&N Dec. 905 (1997); Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), the Attorney General vacated the Board's decision and ruled that 1996 AEDPA amendments to 212(c) barred relief to aliens who were deportable by reason of having committed any of the offenses described in the amended section 212(c). Since that ruling, eight of the Circuit Courts of Appeals have disagreed with the Attorney General and have instead held that aliens who had filed applications for relief before AEDPA was signed were not barred from relief. Goncalves v. Reno, 144 F.3d 110 (1st cir. 1998) cert. denied, 119 S.Ct. 1140(1999); Henderson v. INS, 157 F3d. 106 (2nd Cir. 1998) cert. denied sub nom. Reno v. Navas, 119 S.Ct. 1141 (1999); Sandoval v. Reno, 166 F.3d 225 (3rd Cir. 1999); Pak v. Reno, 193 F.3d 666 (6th Cir. 1999): Shah v. Reno, 184 F.3d 719 (8th Cir. 1999); Magana-Pizano v. INS, 200 F.3d 603 (9th Cir. 1999).

The Attorney General is currently considering regulations which would effectively reverse her decision in Soriano and adopt, in some form, the circuits' decisions.

REPAPERING DEPORTATION AND EXCLUSIONS CASES AS A REMOVAL CASES

The Attorney General is also considering regulations which will implement a procedure for terminating deportation proceedings for certain lawful permanent residents who were precluded from 212(c) relief by the enactment of AEDPA, but who would be eligible for cancellation of removal if the case were "re-papered" under the removal statute. Cases which meet this criteria should be administratively closed. See December 9, 1998, Memo from Office of the Chief Immigration Judge; 76 Interpreter Releases 171 (January 25, 1999). Only pending cases can be administratively closed for this purpose. "Re-papering does not apply to aliens who have a final order of deportation or exclusion. A motion to reopen may not be granted for the purpose of "re-papering," although a matter reopened on an independent ground may be then administratively closed for "re-

papering."

III. GENERAL CLASSES OF DEPORTABLE ALIENS - SECTION 237 OF THE ACT

A. INADMISSIBLE AT TIME OF ENTRY, ADJUSTMENT OF STATUS OR VIOLATES STATUS

1. Inadmissible aliens - may seek waiver for which he was eligible at time of entry, adjustment, etc.;

2. Present in violation of law;

3. Violated nonimmigrant status or conditions of entry;

4. Termination of conditional permanent residence (Sections 216 or 216A of the Act) - hardship waiver under section 216(c)(4) of the Act;

5. Smuggling - waiver under section 237(a)(1)(E)(iii) of the Act;

6. Marriage fraud;

7. Waiver authorized for certain misrepresentations - section 237(a)(1)(H) of the Act.

B. CRIMINAL OFFENSES

1. General crimes - Note section 237(a)(2)(A)(v) of the Act regarding pardons;

2. Controlled substances;

3. Certain firearms offenses;

4. Miscellaneous crimes;

5. Crimes of domestic violence, stalking or child abuse.

C. FAILURE TO REGISTER AND FALSIFICATION OF

DOCUMENTS

1. Change of address;

2. Failure to register or falsification of documents;

3. Document fraud - section 274C of the Act - Note waiver available to lawful permanent residents under section 237(a)(3)(C)(ii) of the Act;

4. Falsely claiming citizenship - effective for representations made on or after 9/30/96.

D. SECURITY AND RELATED GROUNDS

1. In general;

2. Terrorist activities;

3. Foreign policy;

4. Assisted in Nazi persecution or engaged in genocide.

E. PUBLIC CHARGE

F. UNLAWFUL VOTERS

Applies to voting occurring before, on or after the date of enactment.

Specific waivers are noted above. In addition, an alien who is removable may be eligible for relief, such as asylum, voluntary departure, cancellation of removal, etc.

Asylum and adjustment of status are the same in removal as in other proceedings. However, voluntary departure in removal proceedings is very different from voluntary departure in deportation. See 8 C.F.R. § 240.26 (2000).

IV. RELIEF FROM REMOVAL

A. VOLUNTARY DEPARTURE - Section 240B of the Act.

1. Prior to the conclusion of removal proceedings.

a. The Attorney General may permit an alien voluntarily to depart the United States at her own expense in lieu of removal proceedings or prior to the conclusion of removal proceedings. INA § 240B(a). This must be done at Master Calendar, or within 30 days of Master Calendar. The Immigration Judge has a duty to inform the respondent of the availability of this specific form of relief. See Matter of Cordova, Interim Decision 3408 (BIA 1999).

b. The Immigration Judge may grant up to 120 days for the alien to depart, but the alien must concede removability, withdraw all other applications for relief, and waive appeal on all issues.

c. The Immigration Judge may set a bond to be posted, but bond is not required prior to conclusion of proceedings. The regulations provide that at any time prior to the completion of removal proceedings, the INS counsel may stipulate to a grant of voluntary departure under section 240B(a) of the Act, thereby avoiding the more stringent requirements and permitting a more generous period of time. 8 C.F.R. § 240.26(b)(2) (2000).

d. The Immigration Judge must require that the alien present travel documents within a designated time frame or the grant of voluntary departure will automatically result in order of removal.

e. The Immigration Judge must provide an alternate order of removal in the event the alien fails to comply (bond or travel documents) or depart.

f. Note that there is no requirement that the alien be a person of good moral character for the past five years, as in deportation proceedings, but those convicted of aggravated felonies or who are deportable as terrorists

are barred.

g. An alien need not have been physically present for any given period of time to be eligible for preconclusion voluntary departure. An arriving alien is not eligible for this form of relief but may be permitted to withdraw the application for admissions. See INA § 240B(a)(4).

h. An alien who was previously found inadmissible under section 212(a)(6) of the Act (illegally entered or present without being admitted or paroled) and who was then granted voluntary departure is not eligible for preconclusion voluntary departure or voluntary departure at the conclusion of the proceedings. INA § 240B(c).

i. Voluntary departure prior to the conclusion of proceedings remains a discretionary form of relief. See Matter of Arguelles, Interim Decision 3399 (BIA 1999).

2. At the conclusion of removal proceedings.

a. Voluntary departure may be permitted by the Immigration Judge at the conclusion of proceedings for a period of up to 60 days if, under Section 240B(b) of the Act:

- The alien has been physically present for at least one year preceding the service of the NTA;
- Alien has been a person of good moral character for five years;
- Alien is not deportable as an aggravated felon or terrorist;
- Alien posts a voluntary departure bond of not less than $500;
- Alien was not previously permitted to depart

voluntarily after being found inadmissible under section 212(a)(6)(A) of the Act; and

- Alien establishes by clear and convincing evidence that the alien has both the means to depart the United States and intends to do so.

b. The Immigration Judge must also require that the alien present or obtain a travel document if needed for removal and enter an alternate order of removal. The alien must post the voluntary departure bond within 5 business days of the voluntary departure order, or the order will automatically vacate and the alternate order of removal will take effect the following day.

c. A person who fails to depart voluntarily is ineligible for voluntary departure and other relief from removal for 10 years and is subject to a monetary penalty. INA § 240B(d).

d. As in deportation proceedings, voluntary departure in removal proceedings - whether prior to or at the conclusion of the proceedings is a discretionary form of relief. See discussion of discretionary factors in connection with deportation proceedings.

e. Voluntary departure is <u>not</u> available to an "arriving alien" in removal proceedings, but such an alien may seek to withdraw her application for admission. INA § 235(a)(4).

B. <u>CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS</u> -Section 240A(a) of the Act, effective April 1, 1997.

1. This form of relief which is somewhat similar to section 212(c), which was repealed by IIRIRA, is available to permanent residents who are in removal proceedings. Aliens in deportation or exclusion proceedings who are not eligible for 212(c) relief but would be eligible for cancellation of removal as a legal permanent resident may have their case "re-papered" thus resulting in the termination of the deportation or

exclusion matter and the refiling of the case as a removal matter. See December 9, 1998, Memo from Office of the Chief Immigration Judge; 76 Interpreter Releases 171 (January 25, 1999). Deportation and exclusion cases in which the alien appears to be eligible for re-papering should be administratively closed in accordance with this memorandum.

2. The alien is required to file for this relief on Form EOIR-42A and to submit a completed biographic information form and have fingerprints taken by an INS fingerprinting facility.

3. The remedy of cancellation of removal under section 240A(a) of the Act eliminated the broader bars to section 212(c) of the Act relief for aliens who were deportable by reason of having committed any criminal offense covered in sections 241(a)(2)(A), 241(a)(2)(B), 241(a)(2)(C) or 241(a)(2)(D) of the Act. Thus, it broadened the category of deportable permanent resident aliens in removal proceedings who are eligible for cancellation of removal under section 240A(a) of the Act. For example, aliens with a conviction for simple possession of a firearm or a controlled substance may be eligible.

    a. Eligibility:

        - Has been an alien lawfully admitted for permanent residence for not less than 5 years prior to service of NTA or prior to committing an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or prior to being deportable under sections 237(a)(2) or 237(a)(4) of the Act, whichever is earliest. See Matter of Campos-Torres, Interim Decision 3428 (BIA 2000); Matter of Perez, Interim Decision 3389 (BIA 1989).

        - Alien has 7 years of continuous residence after having been admitted in any status; and

        - Alien has not been convicted of any aggravated felony.

- Alien demonstrates that the relief is merited in the exercise of discretion. See Matter of C-V-T-, Interim Decision 3342 (BIA 1998).

b. Ineligibility:

- Alien entered United States as a crewman after June 30, 1964;

- Admitted to United States as, or later became nonimmigrant exchange visitor (J-1), in order to receive graduate medical education or training, regardless of whether subject to or fulfilled 2-year foreign residence requirement of section 212(e) of the Act;

- Admitted to United States or later became nonimmigrant J-1, other than to receive graduate medical education or training, and the alien is subject to an unfulfilled 2-year foreign residence requirement for which no waiver has been granted;

- Persecuted others on account of race, religion, nationality, membership in a particular social group or political opinion;

- Was previously granted relief under prior sections 212(c) or 244(a), or 240A of the Act.

C. CANCELLATION OF REMOVAL AND ADJUSTMENT FOR CERTAIN NONPERMANENT RESIDENTS - Section 240A(b)(1) of the Act effective April 1, 1997.

1. This form of relief is similar to suspension of deportation, however, IIRIRA renamed this remedy as cancellation of removal and significantly curtailed the remedy of suspension of deportation while also raising the standards of eligibility.

2. Eligibility:

a. Ten years of continuous physical presence accrued prior to service of the NTA or prior to committing an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible; or prior to being deportable under sections 237(a)(2) or 237(a)(4) of the Act, whichever is earliest. See Matter of Campos-Torres, Interim Decision 3428 (BIA 2000); see also Matter of Mendoza-Sandino, Interim Decision 3426 (BIA 2000);

b. Alien has been a person of good moral character [Section101(f) of the Act] for 10 years; and

c. Alien has established that his removal would result in exceptional and extremely unusual hardship [rather than just extreme] to his United States citizen or lawful permanent resident spouse, parent or child. Hardship to the respondent is no longer a basis for consideration.

d. Alien has not been convicted of or committed an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act; and

e. Alien has established that he is deserving of this relief in the exercise of discretion.

3. Ineligibility:

a. Entered as a crewman after June 30, 1964;

b. Admitted to United States as or later became an exchange visitor (J-1) in order to obtain graduate medical education or training, regardless of whether subject to or has fulfilled 2-year foreign residence requirement;

c. Admitted to United States as or later became nonimmigrant J-1 other than to receive graduate medical education or training and the alien is subject to a 2-year foreign residence requirement which is neither fulfilled nor subject to a waiver;

d. Persecuted others on account of race, religion, nationality, political opinion, or membership in a particular social group.

e. Was previously granted relief under former sections 212(c) or 244(a) of the Act, or was previously granted cancellation of removal.

4. Note: There is a numerical limitation of 4,000 grant of suspension of deportation/cancellation of removal in any fiscal year. The Immigration Judge must determine whether the applicant is subject to that limitation, considering NACARA, and issue an appropriate order.

5. Note also that cancellation may not be granted if asylum is granted. Clearly, it is not intended that this form of relief be granted where there are alternate means of relief available to the alien.

D. CANCELLATION OF REMOVAL [BATTERED PERSONS PROVISIONS] -Section 240A(b)(2) of the Act effective April 1, 1997.

Eligibility. An Alien seeking cancellation of her removal must establish the following:

a. That she has been battered or subjected to extreme cruelty in the United States by her United States citizen or lawful permanent resident spouse or parent, or that she is the parent of a child of a United States citizen or lawful permanent and the child has been battered or subjected to extreme cruelty in the United States by such citizen or lawful permanent resident parent;

b. Three years of continuous physical presence accrued prior to service of the NTA or prior to committing an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible; or prior to being deportable under sections 237(a)(2) or 237(a)(4) of the Act, whichever is earliest. See Matter of Campos-

Torres, Interim Decision 3428 (BIA 2000); see also Matter of Mendoza-Sandino, Interim Decision 3426 (BIA 2000);

c. Alien has been person of good moral character, as defined in section 101(f) of the Act for the 3-year period of the required continuous physical presence period;

d. Alien has to establish that the removal would result in extreme hardship to the alien, the alien's child, or in the case of an alien who is a child to the alien's parent; or

e. Alien is not inadmissible under sections 212(a)(2) or (3) of the Act; or deportable under section 237(a)(1)(G) or section 237(a)(4) of the Act, and the alien has not been convicted of an aggravated felony as defined in section 101(a)(43) of the Act; and

f. Alien establishes that she is deserving of this relief in the exercise of discretion.

E. ASYLUM - SECTION 208. SEE DISCUSSION UNDER RELIEF FROM DEPORTATION AND EXCLUSION IN CHAPTER SIX.

F. WITHHOLDING OF REMOVAL - SECTION 241(b)(3) OF THE ACT INCLUDING WITHHOLDING AND DEFERRAL UNDER THE CONVENTION AGAINST TORTURE (CAT). SEE DISCUSSION UNDER RELIEF FROM DEPORTATION AND EXCLUSION IN CHAPTER SIX AND CONVENTION AGAINST TORTURE CHAPTER NINE .

G. CREDIBLE FEAR REVIEW: SECTION 235(b) OF THE ACT

1. If the Asylum Officer determines that the arriving alien has failed to demonstrate a credible fear review, the alien may request that the determination be reviewed by an Immigration Judge, and the Asylum Officer will refer the matter to the Immigration Judge.

2. The hearing must be recorded, but may be conducted by telephone or video-conferencing at the discretion of the Immigration Judge.

3. The alien will be questioned by the Immigration Judge under oath.

4. The review is de novo and must be completed within 7 calendar days of the decision of the Supervisory Asylum Officer.

5. There is no appeal of the Immigration Judge decision. If the Immigration Judge finds a credible fear of persecution, the alien will be placed in proceedings under section 240 of the Act, and all issues of admissibility and asylum are within the jurisdiction of the Immigration Judge. See 8 C.F.R. § 208.30(f)(2) (2000). If the Immigration Judge finds that there is no credible fear of persecution, the INS order of removal will be enforced.

6. The alien is not entitled to representation during the hearing, but may consult with another individual prior to the review. 8 C.F.R. § 3.42(c) (2000).

H. CLAIMED STATUS REVIEW: UNITED STATES CITIZEN, LAWFUL PERMANENT RESIDENT, REFUGEE OR ASYLEE- Section 235(b)(1)(C) of the Act; 8 C.F.R. § 235.3(b)(5).

1. Hearing may be conducted by telephone, video or in person;

2. Review will be recorded;

3. Alien must be placed under oath [or affirmation] to testify;

4. Alien may be represented, at no expense to government [see OPPM 97-3];

5. Record of review will merge with subsequent removal proceeding.

6. There is no appeal of an adverse decision by Immigration

Judge, and alien will be removed. If Immigration Judge determines he has demonstrated the status claimed, the INS may institute removal proceedings, except against the individual who has established status as a United States citizen.

Immigration Judge Benchbook Index

(October 2001)

Chapter Eight - Motions

CHAPTER EIGHT

MOTIONS

I. MOTIONS BEFORE ENTRY OF A DECISION

An Immigration Judge may be required to resolve a number of legal issues by motion either before, during, or after the proceedings.

Unless otherwise permitted by the Immigration Judge, motions submitted prior to the final order of an Immigration Judge shall be in writing and shall state with particularity the grounds, the relief sought, and the jurisdiction. 8 C.F.R. § 3.23(a) (2000).

The Immigration Judge may set and extend time limits for the making of motions and replies thereto. Id.

A motion shall be deemed unopposed unless timely response is made. 8 C.F.R. § 3.23(a) (2000).

An Immigration Judge must state the reasons for ruling on a motion irrespective of whether ruling is oral or in writing; otherwise parties are deprived of a fair opportunity to contest the Immigration Judge's determination, and on appeal the BIA is unable to meaningfully exercise its responsibility of reviewing a decision in light of the arguments on appeal. Matter of M-P-, 20 I&N Dec. 786 (BIA 1994).

A. MOTION TO TERMINATE

1. Prior to the commencement of proceedings, INS may cancel an Order To Show Cause (OSC), a Notice to Appear (NTA), or terminate proceedings for the reasons set forth in 8 C.F.R. § 242.7 (1997) or in 8 C.F.R. § 239.2(f) (2000). Proceedings are commenced when the charging document is filed with the Immigration Court.

2. After the commencement of the hearing, only an Immigration Judge may terminate proceedings upon the request or motion of either party. Matter of G-N-C-, Interim Decision 3366 (BIA 1998).

3. The alien may request termination on grounds such as: the charging document is defective, e.g., not signed; incongruity between charge and allegations; the INS has not met its burden of proof; or the alien can pursue an application for naturalization (this defense can only be raised by members of the Armed Forces of the United States. INA § 318 and 328). In many cases, INS will ask that proceedings be terminated because it has issued two charging documents with different alien numbers.

4. A termination order is without prejudice to the INS to file the same charge or a new charge at a later time. 8 C.F.R. § 242.7(b) (1997), unless res judicata applies. Ramon-Sepulveda v. INS, 743 F.2d 1307 (9th Cir. 1984).

B. MOTION TO SUPPRESS

1. Motions to suppress are available only in a limited context.

2. Statements in a motion to suppress must be specific and detailed and based on personal knowledge. Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

3. An alien who questions the legality of evidence presented against him or her must come forward with proof establishing a prima facie case before the INS will be called upon to assume the burden of justifying the manner in which it obtained the evidence. Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988).

4. Even if an arrest or interrogation is unlawful, it may have no bearing on resulting immigration proceedings because the Fourth Amendment exclusionary rule is not applicable to the civil proceeding. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). However, where there are egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the value of the evidence obtained, INS will be precluded from using such evidence. INS v. Lopez-Mendoza, supra; Matter of Garcia, 17 I&N Dec. 319 (BIA 1980).

5. Compliance with regulatory requirements is relevant in assessing the voluntariness of statements and thus their admissibility into evidence. See 8 C.F.R. §§ 287.1, 287.3, and 287.5 (2000). In order to exclude evidence based upon the noncompliance with INS regulations, the alien must meet a heavy burden of proving: (1) that the regulation was not adhered to; (2) that the regulation was intended to serve a purpose of benefit to the alien; and (3) that the violation prejudiced the alien's interest in that it affected the outcome of the proceedings. Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980).

6. The exclusionary rule is not applicable, but evidence is nevertheless inadmissible, if it was obtained in violation of the alien's privilege against self-incrimination, or if the statement was involuntary or coerced. Matter of Garcia, 17 I&N Dec. 319 (BIA 1980).

7. The alien bears the burden of proving that INS's evidence was unlawfully obtained. Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

8. The amendments to the Act enhanced the enforcement authority of the INS officers by allowing them to make arrests, without warrants, for any federal offense committed in their presence, or for any federal felony, if there are grounds to believe that the person in question has committed, or is committing, a felony. The INS officer must be performing enforcement duties at the time of the arrest, and it must be likely that the arrested person could escape before an arrest warrant could be obtained.

9. Section 287(c) of the Act empowers immigration officers to search, without warrant, the person and personal effects of arriving passengers, if they have reasonable cause for suspecting that such a search would disclose grounds for exclusion from the United States.

    a. Any immigration officer has the power, without warrant, to interrogate any alien or person believed to be an alien as to his or her right to be or remain in the United States. INA § 287(a)(1); 8 C.F.R. § 287.3 (2000); Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959); Matter of Pang, 11 I&N Dec. 213 (BIA 1965).

    b. There is no requirement that the officer must have probable cause for such an inquiry. Matter of Perez-Lopez, 14 I&N Dec. 79 (BIA 1972).

10. The Miranda requirements are not controlling in deportation proceedings, since deportation proceedings are civil, not criminal, in nature. Matter of Pang, 11 I&N Dec. 213 (BIA 1965); Matter of Argyros, 11 I&N Dec. 585 (BIA 1966); see also Matter of Lavoie, 12 I&N Dec. 821 (BIA 1968) (no requirement that alien be advised of right to counsel when taking preliminary statement); Matter of Baltazar, 16 I&N Dec. 108 (BIA 1977). After the examining officer has determined that formal proceedings will be instituted, an alien arrested without warrant of arrest shall be advised of the

reason for his or her arrest and shall also be advised that any statement made may be used against him or her in a subsequent proceeding. 8 C.F.R. § 287.3 (2000).

11. The regulations at 8 C.F.R. § 287.3 (2000) provide that an alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Act will be examined by an officer other than the arresting officer, with limited exceptions.

12. Except at the border or its functional equivalents, officers on roving patrol may stop vehicles to question the occupants about their citizenship and immigration status only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

    The Supreme Court has distinguished United States v. Brignoni-Ponce, 422 U.S. 873 (1975), as it relates to stopping of vehicles, from stopping and questioning of persons. INS v. Delgado, 466 U.S. 210 (1984). The Supreme Court ruled that detaining a person for questioning on a suspicion of alienage alone would diminish the privacy and security interests of both citizens and aliens legally in this country and would grant the INS impermissible discretion to detain and question an individual at whim. The Supreme Court ruled that there was no need for individualized suspicion to support the questioning by immigration officers of all workers in a factory entered by the officers on a warrant of consent, unless the questioned person had a reasonable basis for believing that he or she was not free to leave.

13. An immigration officer may ask questions to which a person responds voluntarily, provided there is no use of force, display of a weapon, the threatening presence of several officers, or other circumstances leading the questioned person reasonably to believe that he or she is not free to leave. Benitez-Mendez v. INS, 707 F.2d 1107 (9th Cir. 1983), rehr'g granted and

opinion modified, 752 F.2d 1309 (9th Cir. 1984) (concluding that the seizure of the alien violated the Fourth Amendment but statements obtained from the alien as a result of the illegal arrest were admissible at the deportation hearing).

14. Trained and experienced immigration officers may draw inferences and make deductions based on an assessment of the whole picture, which can supply a basis for a valid investigatory stop predicated on a reasonable suspicion of illegal activity. United States v. Cortez, 449 U.S. 411 (1981).

    a. An investigatory stop cannot support prolonged interrogation without probable cause to believe that a violation has occurred, particularly if the detained person is required to accompany the officers to their office. Dunaway v. New York, 442 U.S. 200 (1979).

    b. The Court in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), upheld the power of immigration officers to stop automobiles and question their occupants concerning their immigration status at reasonably located traffic checkpoints even in the absence of individualized suspicion of any impropriety. It is also constitutional to refer motorists selectively to a secondary inspection area for further inquiry on the basis of criteria that would not sustain a roving-patrol stop even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry. Factors that may be taken into account in determining whether stopping a vehicle in a border area is justified: characteristics of the area; proximity to the border; patterns of traffic on the particular road; previous illegal traffic; information about recent illegal border crossings in the area; behavior of the driver (such as erratic driving or obvious attempts to evade officers); appearance of the vehicle (load, compartments, large number of passengers); occupants trying to hide. The government argued that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. The Court however found that Mexican ancestry would not in itself support a reasonable

suspicion that the occupants in the vehicle were aliens, but that it could be taken into account as a relevant factor. In all situations the officer is entitled to assess the facts in light of his or her experience detecting illegal entry and smuggling.

c. A brief "investigatory stop" of a suspicious individual in order to determine his or her identity or to maintain the status quo momentarily while obtaining more information may be reasonable. Adams v. Williams, 407 U.S. 143 (1972).

15. Under appropriate circumstances, a proper interrogation may involve some measure of restraint, short of arrest, to complete the interrogation. Matter of Yau, 14 I&N Dec. 630 (BIA 1974); Matter of Wong and Chan, 13 I&N Dec. 141 (BIA 1969).

    Forcible temporary restraint incidental to interrogation is valid, and any resulting evidence is admissible, if the officer acted reasonably, in the light of the surrounding circumstances. Lau v. INS, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971).

16. A search conducted with the consent of a person who is not in custody is valid if the consent is voluntarily given, without any duress or coercion, express or implied. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The government has the burden of showing that such consent was voluntary, based on the totality of all the surrounding circumstances.

C. MOTION TO REDETERMINE BOND OR CUSTODY DETERMINATION

Pursuant to 8 C.F.R. § 3.19 (e) (2000), after an initial bond redetermination, a request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination. See Chapter Three (Bond/Custody) for more information.

D. MOTION TO WITHDRAW AS COUNSEL OF RECORD

1. Once a notice of appearance has been filed with the Immigration Court, a withdrawal or substitution of counsel may only be permitted by an Immigration Judge only upon an oral or written motion without a fee. 8 C.F.R. § 3.17 (b) (2000).

2. Whether to grant a motion to withdraw as counsel is a matter left to the discretion of the Immigration Judge. It is suggested that the Immigration Judge use the common sense test to determine whether or not to grant a motion to withdraw.

    a. The Immigration Judge should expect counsel to explain the reasons for the withdrawal, if the reasons in the motion are vague, in order to protect the rights of the alien. The Immigration Judge must develop a complete record.

    b. A difference of opinion over direction of the case between counsel and the alien may be a valid reason to grant a motion for a withdrawal.

    c. An alien failing to cooperate with an attorney in preparing his or her case may be a sufficient ground to grant a withdrawal.

3. An alien failing to keep his or her attorney apprised of his or her whereabouts and failing to appear for a hearing is probably also a valid reason to grant a withdrawal on a conditional basis. See Matter of Rosales, 19 I&N Dec. 655 (BIA 1988).

    Under these circumstances, a grant of withdrawal can be either conditional or unconditional. Matter of Rosales, 19 I&N Dec. 655 (BIA 1988) (alien failed to keep the INS or his attorney apprised of his whereabouts). The Board in Rosales stated that where an attorney asks to withdraw, his request should include evidence that he attempted to advise the respondent, at his last known address, of the date, time, and place of the scheduled hearing. Counsel should also provide the Immigration Judge with the respondent's last known address, assuming it is more

current than any address previously provided to the Immigration Judge. Unless these requirements have been met, a request to withdraw from representation should not be unconditionally granted since counsel is responsible for acceptance of service of documents pursuant to 8 C.F.R. § 292.5(a) (2000). Such precautions help insure that proper notice of a hearing is given and increase the likelihood that a respondent receives notice and appears for a scheduled hearing. If these steps have not been taken, counsel's withdrawal should only be conditionally granted; i.e., granted for all purposes except for the receipt of an in absentia order.

4. If the Immigration Judge is convinced that the attorney has done all he or she can to contact his client and advise him or her of the hearing date and the consequences of failing to appear, then he or she can grant an unconditional withdrawal. However, if the Immigration Judge believes that the attorney could have done more to contact the alien, then he or she should grant a conditional withdrawal, requiring that the attorney accept service of documents, and perhaps be able to contact the alien.

5. If the withdrawal is granted, the Immigration Judge must again be aware of the need to protect the alien's rights. The Immigration Judge should again advise the alien of the right to obtain counsel and that in fact it might be in their best interest to obtain counsel. [When a withdrawal of counsel is granted, the name of prior counsel must be deleted immediately from the ANSIR system.]

E. MOTIONS TO RECUSE

In ruling on a motion to recuse, the Immigration Judge should state why the Immigration Judge is objective and not biased and therefore should go forward, or, alternatively, why recusal is appropriate. Many times motions to recuse are oral at the time of the hearing. NEVER go off the record to address the situation. State clearly on the record why you are in or out of the case. See Memorandum from Michael J. Creppy, Chief Immigration Judge, "Recusal in Immigration Court Proceedings" (July 18, 1997), as guidance for when and under what

circumstances recusal is appropriate. See Matter of G-, 20 I&N Dec. 764 (BIA 1993); Matter of Exame, 18 I&N Dec. 303 (BIA 1982).

F. MOTIONS TO CHANGE VENUE

1. Venue lies at the Immigration Court where the charging document is filed by the Service. 8 C.F.R. §§ 3.14(a), and 3.20(a) (2000).

2. The Immigration Judge, for good cause shown, may upon his or her discretion, change venue only upon motion by one of the parties. 8 C.F.R. § 3.20(b) (2000); Matter of Dobere, 20 I&N Dec. 188 (BIA 1990) (regulations authorize Immigration Judge to direct change of venue in exclusion, deportation, and removal cases).

3. Good cause for change of venue is determined by balancing the relevant factors affecting fundamental fairness, including administrative convenience, expeditious treatment of the case, location of witnesses, and cost of transporting witnesses to new location. Matter of Rahman, 20 I&N Dec. 480 (BIA 1992); Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986).

4. In exclusion cases, the place of interrupted entry into the United States may have little relevance to the venue of the hearing. Matter of Rahman, 20 I&N Dec. 480 (BIA 1992). An Immigration Judge may not change venue without giving the Service an opportunity to respond. In exclusion cases, the Service almost always opposes a change of venue.

5. While the applicant's place of residence may be relevant, it may be outweighed by demonstration that the INS would be prejudiced by such a change of venue. Matter of Rahman 20 I&N Dec. 480 (BIA 1992).

6. The convenience of counsel may also be relevant, but this factor may be outweighed by the availability of experienced counsel in the area of detention and by prejudice to the Service. Matter of Rahman, 20 I&N Dec. 480 (1992).

7. The Immigration Judge may grant a change of venue only

after the other party has been given notice and an opportunity to respond to the motion to change venue. Matter of Rahman, 20 I&N Dec. (BIA 1992).

8. No change of venue shall be granted without identification of a fixed street address, including city, state and ZIP code, where the respondent/applicant may be reached for further hearing notification. 8 C.F.R. § 3.20(c) (2000).

9. Before a change of venue is granted, the alien should plead to the charging document. See Matter of Rivera, 19 I&N Dec. 688 (BIA 1988).

> In addition, the Immigration Judge should attempt to resolve the issue of deportability or inadmissibility, and determine what forms of relief will be sought. The Immigration Judge may set a date certain by which the relief applications, if any, must be filed with the sending court, and state on the record that failure to comply with the filing deadline will constitute abandonment of the relief applications and may result in the Immigration Judge rendering a decision on the record as constituted. A copy of the asylum application submitted to support a motion for change of venue is not a definitive filing. The actual filing must occur in open court, at the court to which the case is transferred. The warnings for filing frivolous applications for asylum must be given orally and in writing to the alien at the time of filing in front of you.

10. The mere submission of a motion for a change of venue does not relieve an alien or his or her attorney from the responsibility to attend a hearing of which they have been given notice. It may not be assumed that the motion will be granted. Matter of Patel, 19 I&N Dec. 260 (BIA 1985).

11. Other factors to be considered in determining a change of venue include: (1) nature of evidence and its importance to the alien's claim; (2) whether the request is due to unreasonable conduct on the alien's part; and (3) the number of prior continuances granted. Matter of Seren, 15 I&N Dec. 590 (1976).

12. The respondent's request for change of venue to present expert witness testimony was properly denied where the respondent made no attempt to submit an offer of proof related to the witness, identity, qualifications, and testimony, or to state his opinion by way of an affidavit to the Immigration Judge. Matter of Bader, 17 I&N Dec. 525 (BIA 1980).

G. MOTION FOR CONTINUANCE

1. The Immigration Judge may grant a motion for a reasonable continuance, either at his or her own instance or for good cause shown, upon application by the alien or the Service. 8 C.F.R. §§ 3.29 (2000), 242.13 (1997).

2. A continuance may be requested at a master calendar hearing, individual calendar hearing or at any time during the pendency of the proceedings.

3. Local operating procedures may include a requirement for the submission of applications for continuances of a scheduled hearing. Sometimes they will require the submission of a written motion, when time permits. A sudden medical or other emergency, or unusual circumstance may justify a telephone request to the Immigration Court for such a continuance to be made, but that may also depend on the existence of Local Operating Procedures.

4. The sound discretion of the Immigration Judge to grant or deny requests for continuances is very broad. An Immigration Judge may grant a continuance only for "good cause" shown.

5. The issue for the Immigration Judge is whether the alien would be prejudiced by the denial of a continuance. The courts are divided on how liberally an Immigration Judge should exercise discretion in granting a continuance. Baries v. INS, 856 F.2d 89 (9th Cir. 1988) (expeditiousness in the face of a justifiable request for delay can render the alien's statutory rights merely an empty formality); Molina v. INS, 981 F.2d 14 (lst Cir. 1992) (Immigration Judge has broad legal power to decide continuances); Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983) (alien must establish by full and specific

articulation of the facts involved or evidence which he or she would have presented, that the denial caused actual prejudice and harm and materially affected the outcome of the case).

6. Situations under a which a continuance may be warranted:

    a. Attorney recently retained and not familiar with the case.

    b. Obtain witnesses or documents crucial to the case.

    c. Visa petition pending, which if approved will dispose of the case.

    d. Pending FOIA request (but remember, no right of discovery).

    e. INS does not have "A" file.

    f. Serious illness or death of alien or attorney.

7. A motion for continuance based upon an asserted lack of preparation and request for additional time must be supported, at a minimum, by a reasonable showing that the lack of preparation occurred despite a diligent effort to be ready to proceed. Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983).

8. Parties must appear unless the motion has been granted. Matter of Patel, 19 I&N Dec. 260 (BIA 1985).

H. MOTION TO WAIVE THE PRESENCE OF THE PARTIES

The Immigration Judge may for good cause, and consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal

representative, a near relative, legal guardian or friend. 8 C.F.R. § 3.25(a) (2000).

II. MOTIONS AFTER ENTRY OF A DECISION

A. MOTIONS TO RECONSIDER

1. Motions to reconsider and motions to reopen are separate and distinct motions with different requirements. A motion to reconsider requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. Matter of Cerna, 20 I&N Dec. 399 (BIA 1991).

2. The Immigration Judge may reconsider the grant of any discretionary relief before it becomes final. Matter of Vanisi, 12 I&N Dec. 616 (BIA 1968).

3. A motion to reconsider must specify the errors of law or fact in the previous order and must be supported by pertinent authority. INA § 240(c)(5)(C); 8 C.F.R. §§ 3.23(b)(2) and 103.5(a)(3) (2000).

4. Evidence submitted in support of a motion to reconsider must establish a prima facie case that the respondent is eligible for the relief sought. Matter of Heidari, 16 I&N Dec. 203 (BIA 1977).

5. A motion to reconsider a decision rendered by an Immigration Judge that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed by the Board to be a motion to remand the decision for further proceedings before the Immigration Judge from whose decision the appeal was taken. 8 C.F.R. § 3.2 (2000).

6. An alien may file one motion to reconsider a decision that he is removable from the United States. INA § 240(c)(5)(A); 8 C.F.R. § 3.23(b)(2000); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

a. An alien may not seek reconsideration of a decision denying a previous motion to reconsider. 8 C.F.R. § 3.23(b)(2) (2000); see also 8 C.F.R. § 3.2(b)(2)(2000).

b. The motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation or exclusion. INA § 240(c)(5)(B); 8 C.F.R. §§ 3.23(b)(3) (2000); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

c. A motion to reconsider a decision of the Board must be filed not later than 30 days after the mailing of the decision. 8 C.F.R. § 3.2(b)(2) (2000); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

B. MOTIONS TO REOPEN

1. Motions to reconsider and motions to reopen are separate and distinct motions with different requirements. A motion to reopen seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing. Matter of Cerna, 20 I&N Dec. 399 (BIA 1991).

2. A party seeking reopening bears a heavy burden because motions for reopening are disfavored. Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

3. There is a need for strict compliance with the regulations. INS v. Jong Ha Wang, 450 U.S. 139 (1981) (motion to reopen to apply for suspension of deportation denied where the allegations of hardship were conclusory and unsupported by affidavit). Saiyid v. INS, 132 F.3d 1380 (11th Cir. 1998).

4. In general, a motion to reopen shall state new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material. INA § 240(c)(6)(B); 8 C.F.R. § 3.2(c)(1)(2000); INS v. Wang, 450 U.S. 139 (1981) (unsupported statements by counsel or the alien in the motion itself have no evidentiary value); Matter of Barrera, 19 I&N Dec. 837 (BIA 1989); Wolf v. Boyd, 238 F.2d 249 (9th Cir. 1957), cert. denied, 353 U.S.

936 (1957); Matter of Escalante, 13 I&N Dec. 223 (BIA 1969) (denied for lack of supporting evidence showing eligibility for any relief).

5. A motion to reopen can also be filed if there is new law or intervening circumstances that might change the result in the case. INS v. Rios-Pineda, 471 U.S. 444 (1985); Matter of X-G-W-, Interim Decision 3352 (BIA 1998).

6. A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing. 8 C.F.R. §§ 3.23(b)(3) (2000); 242.22 and 246.8 (1997); INS v. Wang, 450 U.S. 139 (1981); Matter of Coehlo, 20 I&N Dec. 464 (BIA 1992); Matter of Barrera, 19 I&N Dec. 837 (BIA 1989); Matter of Rodriguez-Vera, 17 I&N Dec. 105 (BIA 1979); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972); Matter of Lam, 14 I&N Dec. 98 (BIA 1972).

7. A motion to reopen will not be granted for the purpose of providing the alien an opportunity to apply for any form of discretionary relief if the alien's rights to make such application were fully explained to him or her by the Immigration Judge and he or she was afforded an opportunity to apply at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. 8 C.F.R. §§ 3.23(b)(3) (2000); 242.17 and 242.22 (1997); Matter of Barrera, 19 I&N Dec. 837 (1989).

8. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. 8 C.F.R. §§ 3.23(b)(3), 208.4(b)(3)-(4) (2000). But see Matter of Yewondwosen, 21 I&N Dec. 1025 (BIA 1997) (holding that where an alien has not strictly complied with 8 C.F.R. § 3.2(c)(1) (2000) by having failed to submit an application for relief in support of a motion to reopen or remand, and the INS affirmatively joins the motion, the BIA or an Immigration Judge may still grant the motion in the interests of fairness and administrative economy).

9. An alien must show prima facie eligibility for the requested relief and that relief is warranted in the exercise of discretion. INS v Abudu, 485 U.S. 94 (1988); INS v. Wang, 450 U.S. 139 (1981); Matter of Coelho, 20 I&N Dec. 464 (BIA 1992); Matter of Barrera, 19 I&N Dec. 837 (1989); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985) (could properly deny motion to reopen if it did not present prima facie case); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir.1985) (reopening to apply for asylum improperly denied since there was an adequate prima facie showing which required a hearing); Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985) (same; suspension of deportation); Samini v. INS, 714 F.2d 992 (9th Cir. 1983) (prima facie showing of eligibility based on totality of circumstances warranting hearing); Matter of Escobar, 18 I&N Dec. 412 (BIA 1983) (no prima facie showing of eligibility for suspension of deportation or asylum); Matter of Patel, 16 I&N Dec. 600 (BIA 1978) (no prima facie showing of hardship where conclusory assertions of hardship insufficient).

   > A prima facie showing has been described as proof sufficiently strong to suffice on its own until it is contradicted or overruled by other evidence. Conclusory and conjectural allegations are insufficient to establish eligibility for reopening. Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981), aff'd, 692 F.2d 595 (9th Cir. 1982); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972).

10. A prima facie showing of apparent eligibility entails statutory eligibility and that the relief may be warranted as a matter of discretion. INS v. Wang, 450 U.S. 139 (1981); INS v. Bagamasbad, 429 U.S. 24 (1976); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982); Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981), aff'd, 692 F.2d 595 (9th Cir. 1982); Matter of Lett, 17 I&N Dec. 312 (BIA 1980); Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980); Matter of Rodriguez-Vera, 17 I&N Dec. 105 (BIA 1979) (discretion clearly unwarranted since applicant was serving sentence for recent murder of wife); Matter of Garcia, 16 I&N Dec. 653 (BIA 1978); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972); Matter of Lam, 14 I&N Dec. 98 (BIA 1972).

11. Equities acquired after a final order of deportation may be given less weight than those acquired before the alien was found deportable. Matter of Correa, 19 I&N Dec. 130, (BIA 1984). But see Matter of Rodarte, 21 I&N Dec. 150 (BIA 1996) (motion to reopen granted and remanded to Immigration Judge for a hearing on adjustment of status and 212(c) applications; the new evidence requirement for reopening was satisfied by the presentation of equities acquired since respondent's deportation hearing).

12. Even if a prima facie case of apparent eligibility is shown, the motion to reopen can be denied in the exercise of discretion. 8 C.F.R. § 3.23(b)(3) (2000); INS v. Rios-Pineda, 471 U.S. 444 (1985) (Board has broad discretion to deny reopening even if a prima facie case of eligibility shown); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982).

    a. The grant of reopening or reconsideration is a matter of discretion. 8 C.F.R.§ 3.23 (2000); Greene v. INS, 313 F.2d 148 (9th Cir.), cert. denied, 374 U.S. 828 (1963) (no statute requires reopening or fixes the conditions on which it is to be granted).

    b. The alien must be eligible for reopening as a matter of discretion. If he or she failed to surrender to the INS for deportation, the motion can be denied as a matter of discretion. See Matter of Barocio, 19 I&N Dec. 255 (BIA 1985).

    c. A motion may be denied in the exercise of discretion because of adverse circumstances not offset by counterbalancing equities, without otherwise addressing statutory eligibility for the relief being sought. INS v. Wang, 450 U.S. 139 (1981); INS v. Abudu, 485 U.S. 94 (1988); INS v. Bagamasbad, 429 U.S. 24 (1976); Matter of Barocio, 19 I&N Dec. 255 (BIA 1985); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982); Matter of Rodriguez-Vera, 17 I&N Dec. 105 (BIA 1979).

    d. A motion to reopen can be denied on discretionary

grounds alone where there are significant reasons for denying reopening. INS v. Rios-Pineda, 471 U.S. 444 (1985); INS v. Phinpathya, 464 U.S. 183 (1984); INS v. Wang, 450 U.S. 139 (1981); INS v. Bagamasbad, 429 U.S. 24 (1976); Matter of Barrera, 19 I&N Dec. 837 (1989). The Attorney General has broad discretion to grant or deny motions to reopen. INS v. Doherty, 502 U.S. 314 (1992). Where the ultimate relief is discretionary, the Immigration Judge may conclude that he or she would not grant the relief in the exercise of discretion; therefore the moving party must establish that he or she warrants the relief sought as a matter of discretion. Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

e. The deliberate flouting of the immigration laws is a very serious adverse factor in the exercise of discretion. Matter of Barocio, 19 I&N Dec. 255 (BIA 1985) (failure to report for deportation following notification by the INS). See also Saiyid v. INS, 132 F.3d 1380 (11th Cir. 1998).

13. An alien may file one motion to reopen proceedings (whether before the Board or the Immigration Judge) with limited exceptions relating to asylum and in absentia orders found at 3.23(b)(4) (2000). INA § 240(c)(6)(A); 8 C.F.R. §§ 3.2(c)(2) and 3.23(b)(4) (2000); Matter of Mancera, Interim Decision 3353 (BIA 1998); Matter of X-G-W-, Interim Decision 3352 (BIA 1998); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

14. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion. INA § 240(c)(6)(C)(i); 8 C.F.R. §§ 3.2(c)(2), 3.23(b)(4)(i) (2000). An order becomes administratively final under one of three circumstances, whichever occurs first: (1) Appeal is waived by the parties at which time the order becomes administratively final immediately. Matter of Shih, 20 I&N Dec. 697 (1993); (2) It is administratively final when the time expires for filing an appeal. [Note, the BIA is very strict on deadlines for appeal and motion filing.]; (3) When the BIA has dismissed an appeal that was timely filed.

a. There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving adversaries a fair opportunity to develop and present their respective cases. INS v. Abudu, 485 U.S. 94 (1988).

b. These limitations do not apply, however, to motions to reopen filed by the INS in removal proceedings pursuant to INA § 240. 8 C.F.R. § 3.23 (2000).

c. These time and number limits on the filing of a motion to reopen likewise do not apply if the basis of the motion is:

- to rescind an order of deportation/removal entered in absentia pursuant to INA § 242B(c)(3); INA § 240(b)(5)(C)(ii); 8 C.F.R. § 3.23(b)(4)(iii) (2000); or

- to apply or reapply for asylum or withholding of deportation or removal and is based on changed country conditions arising in the country of nationality or the country to which removal, deportation or exclusion has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See also INA § 240(c)(6)(C)(ii); 8 C.F.R. §§ 3.2(c)(3)(ii) and 3.23(b)(4)(i) (2000); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997). If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal. 8 C.F.R. § 3.23(b)(4); or

- agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding. INS may not waive statutory bars to relief by joining in a motion. An Immigration Judge may not reopen a matter for

relief despite the fact that the parties have jointly moved in the face of a statutory bar. INA § 242B; or

- filed by the INS in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with 8 C.F.R. § 208.23(f) (2000); see also 8 C.F.R. §§ 3.2 and 3.23(b)(1)(2000).

15. An alien in deportation proceedings will not be prima facie eligible for voluntary departure, suspension of deportation, and/or adjustment of status for a period of five years, if he or she received the section 242B warnings and failed to appear for the hearing, failed to depart as required under an order of voluntary departure, to failed to report for deportation, absent exceptional circumstances. INA § 242B(e). An alien is not subject to this provision or to the consequences of failing to appear, if he or she did not receive oral notice, either in his or her native language or in a language he or she understands. This provision applies only where the in absentia order was issued in which service or attempted service of the notice of hearing was made on or after June 13, 1992.

16. An alien in removal proceedings will not be prima facie eligible for voluntary departure, cancellation of removal, and/or adjustment of status for a period of ten years, if he or she received the section 240 warnings and failed to appear for the hearing absent exceptional circumstances. INA § 240(b)(7). An alien in removal proceedings who fails to depart as required under an order of voluntary departure shall be subject to a civil penalty of not less than $1000 and not more than $5000, and will not be prima facie eligible for voluntary departure, cancellation of removal, and/or adjustment of status for a period of ten years. The statute requires that the "order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection." INS § 240B(d) of the Act. Section 240B(d) of the Act does not refer to an excuse based on "exceptional circumstances" for failing to timely depart. Section 240B(d) of the Act also does not refer to limitations on discretionary relief for failure to report for

removal as required. However, proposed rules published September 4, 1998 [63 Fed. Reg. 47208] do seek to add a 10-year bar on relief, including asylum, for failure to timely surrender for removal absent exceptional circumstances.

17. The BIA has held that an alien who during the pendency of a period of voluntary departure, files a motion to reopen in order to apply for suspension of deportation is statutorily ineligible for suspension pursuant to section 242B(e)(2) of the Act, if he or she subsequently remains in the United States after the scheduled date of departure, provided the notice requirements of the section have been satisfied and there is no showing that failure to depart timely was due to "exceptional circumstances" as provided in section 242B(f)(2) of the Act. Matter of Shaar, 21 I&N Dec. 541 (BIA 1996). aff'd, 141 F.3d 953 (9th Cir. 1998).

18. A motion to reopen to apply for asylum must comply with additional requirements and reasonably explain the alien's failure to do so during the proceedings. 8 C.F.R. § 208.4(b)(3)-(4) (2000); Matter of R-R-, 20 I&N Dec. 547 (1992); see also INS v. Doherty, 502 U.S. 314 (1992); INS v. Wang, 450 U.S. 139 (1981); Matter of Lam, 14 I&N Dec. 98 (BIA 1972); INS v. Abudu, 485 U.S. 94 (1988); Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981), aff'd, 692 F.2d 595 (9th Cir. 1982); Matter of Jean, 17 I&N Dec. 100 (BIA 1979).

19. An alien whose case was administratively closed pursuant to the ABC settlement terms can obtain reopening of proceedings even where no request has been made to reinstate appeal before the BIA or to recalendar case before an Immigration Judge. Matter of Gutierrez-Lopez, 21 I&N Dec. 479 (BIA 1996).

20. Notwithstanding 8 C.F.R. § 1.1(p), a motion to reopen proceedings for consideration or further consideration of an application for relief pursuant to section 212(c) of the Act may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation. 8 C.F.R. § 3.23 (b)(4) (2000).

a. The Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), enacted on April 24, 1996, significantly restricted the availability of section 212(c) relief. Under the Attorney General's decision in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), the AEDPA restrictions on section 212(c) relief were held to apply to all 212(c) applications filed prior to the April 24, 1996, enactment date. However, the Attorney General also directed the Immigration Judges to reopen cases upon petition filed by aliens who conceded deportability prior to April 24, 1996, for the limited purpose of allowing them to contest deportability.

b. In the Soriano situation, the motion to reopen may be in the form of a letter or any other document. The motion should be signed by the alien or his or her authorized representative, and must be served on the INS. A copy of the BIA's decision dismissing the appeal based on Soriano should be included. Both the motion and the envelope should state "SORIANO REOPENING." The motion should state that the alien conceded deportability prior to April 24, 1996, in reliance on the availability of section 212(c) relief, and that he or she desires reopening for the limited purpose of contesting deportability. Even if the alien did not concede deportability before April 24, 1996, but thinks that he or she may somehow qualify for reopening under Soriano, the alien may nevertheless move to reopen under Soriano. There is no fee for this motion. This motion is not subject to the usual time and number limitations. There is no time limit for filing this type of motion to reopen. However, once the BIA has rendered a decision, the alien becomes subject to immediate deportation. There is no stay of deportation until the BIA grants the motion to reopen or the BIA grants a stay of deportation.

21. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of

removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief prior to the service of a notice to appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) or (a)(4) of the Act, whichever is earliest. 8 C.F.R. § 3.23(b)(3) (2000).

22. Motions to reopen to apply for adjustment of status under section 245 of the Act will not be granted without an approved visa petition on the alien's behalf. Matter of Arthur, 20 I&N Dec. 475 (BIA 1992). Further, the alien must not be statutorily barred from reopening based on the time and number limitation of motions or for failing to depart under a grant of voluntary departure or for failing to appear for deportation or removal when noticed by the INS.

23. An Immigration Judge may reinstate voluntary departure in a deportation proceeding that has been reopened for a purpose other than solely making an application for voluntary departure if reopening was granted prior to the expiration of the original period of voluntary departure. 8 C.F.R. § 240.26(f) (2000). Note: In removal proceedings, there are statutory and regulatory periods prescribed for voluntary departure. There is no specific statutory or regulatory authority for either an Immigration Judge or the BIA to extend the time of voluntary departure. The BIA decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), which permitted tolling of the voluntary departure period on appeal, was rendered in the absence of such periods, and is therefore arguably overruled.

24. An alien ordered removed in absentia may rescind the order:

    a. upon a motion to reopen filed within 180 days after the date of the order of removal or deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances, OR

    b. upon a motion to reopen filed at any time if the alien

demonstrates: (1) that he did not receive notice in accordance with INA § 239(a)(1), INA § 242B(a)(2), or; (2) the alien demonstrates that he or she was in Federal or State custody and the failure to appear was through no fault of the alien. INA § 242B(c)(3); 8 C.F.R. § 3.23(b)(4) (2000).

25. A motion to rescind an in absentia order of deportation in exclusion proceedings shall be denied unless the alien provides a reasonable explanation for his or her failure to appear. See Matter of S-A-, 21 I&N Dec. 1050 (BIA 1998) (holding that traffic is not a reasonable cause to warrant the reopening of exclusion proceedings).

26. For deportation proceedings where notice of the hearing was served or attempted service was made prior to June 13, 1992, and in cases where the notice requirements were not followed in section 242B of the Act: Where an alien can demonstrate reasonable cause for his or her failure to appear, section 242(b) of the Act guarantees his right to a hearing. A prima facie showing of eligibility for relief is not a prerequisite to reopening proceedings following an in absentia hearing. Matter of Ruiz, 20 I&N 91 (BIA 1989).

27. The BIA held that Matter of Shaar, 21 I&N Dec. 541 (BIA 1996), aff'd, 141 F.3d 953 (9th Cir. 1998) 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 Singh, 21 I&N Dec. 998 (BIA 1997); Matter of Ruiz, 20 I&N Dec. 91 (BIA 1989) (motion to reopen in absentia hearing granted upon a showing that his failure to appear was caused by illness; did not need to make a prima facie showing of eligibility for relief on the merits).

28. The proper filing of the motion to reopen an order entered in absentia stays the removal or deportation of the alien pending disposition of the motion by the Immigration Judge. INA § 242B(c)(3); INA § 240(b)(5)(C) and 240(c)(6)(C)(iii); 8 C.F.R. §§ 3.6(b), 3.23(b)(4)(iii)(C) (2000) and § 242.22

(1997). The IIRIRA added the words "by the immigration judge." Compare prior INA § 242B(c)(3) with INA § 240(b)(5)(C). Before the IIRIRA's amendment, the filing of a motion to reopen an in absentia deportation order stayed the order pending a decision by the Board as well as pending decision by the Immigration Judge. Matter of Rivera-Claros, 21 I&N Dec. 232 (BIA 1996). The regulations state that there is no automatic stay of removal or deportation pending the Board's determination of other motions to reopen. 8 C.F.R. §§ 3.2(f) and 3.6(b) (2000). A respondent appealing an Immigration Judge's denial of a motion to reopen can file a request for a stay with the Board. Some courts have held, however, that failure to grant a stay pending determination of a motion to reopen may raise constitutional concerns. See Castandea-Suarez v. INS, 993 F.2d 142 (7th Cir. 1993); Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992).

29. The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the alien's spouse, child or parent, but not including less compelling circumstances) beyond the control of the alien. INA § 240(e)(1); 8 C.F.R. § 3.23(b)(4)(iii)(A)(1) (2000). The ineffective assistance of counsel constitutes "exceptional circumstances" excusing the failure to appear. Matter of Grijalva, 21 I&N Dec. 472 (BIA 1996). Immigration Judge's should ALWAYS read and issue all warnings, advisals, dates for applications as well as the penalties that apply should applications not be timely filed directly to the alien through an interpreter so that there is no question in the mind of the alien what must be done in his or her case. This eliminates many "ineffective assistance" issues that may otherwise result in remands.

    a. An alien seeking to reopen in absentia proceedings based on his or her unsuccessful communications with his or her attorney did not establish exceptional circumstances pursuant to section 242B(c)(3)(A) of the Act when she failed to satisfy all of the requirements for a claim of ineffective assistance of counsel as set out in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). Matter of Rivera-Claros, 21 I&N Dec. 599 (BIA 1996); cf. also Matter of A-A-, Interim Decision 3357

(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 on the basis of exceptional circumstances); Matter of Lei, Interim Decision 3356 (BIA 1998) (same).

b. An alien's failure to appear at his or her rescheduled deportation hearing due to his inability to leave his or her employment on a fishing vessel was not an "exceptional circumstance." Matter of W-F-, 21 I&N Dec. 503 (BIA 1996).

30. A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia may be filed at anytime and must be supported by evidence that the alien had reasonable cause for his or her failure to appear. INA § 212(a)(6)(B); 8 C.F.R. § 3.23(b)(4)(iii)(B) (2000).

31. Cases which have considered what constitutes "reasonable cause" for failure to appear include: Hernandez-Vivas v. INS, 23 F.3d 1557 (9th Cir. 1994); Maldonado-Perez v. INS, 865 F.2d 328 (D.C. Cir. 1989); Matter of Nafi, 19 I&N Dec. 430 (BIA 1987). Remember that "reasonable cause" is different from "exceptional circumstances" which are defined by statute. See Matter of S-A-, 21 I&N Dec. 1050 (BIA 1998).

32. A motion to reopen exclusion proceedings decided in absentia is properly granted where the applicants met the requirements for an ineffective assistance of counsel claim set in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). The attorney of record failed to give the applicants notice of their hearing. Matter of N-K and V-S-, 21 I&N Dec. 879 (BIA 1997).

C. COMMONALITIES OF MOTIONS TO REOPEN AND RECONSIDER

1. The Immigration Judge is authorized to reopen or reconsider his or her decision, on his or her own initiative, or upon motion by either party, at any time before jurisdiction has vested in the BIA through the filing of a notice of appeal or

certification of the case to it. INA § 240 (c)(5)-(6) of the Act; 8 C.F.R. §§ 3.23(b)(1) (2000) and 242.22 (1997).

2. Where the BIA dismisses an appeal from the decision of an Immigration Judge solely for lack of jurisdiction, without adjudication on the merits, the attempted appeal was nugatory and the decision of the Immigration Judge remained undisturbed. Thereafter, if a motion is made to reopen or reconsider, there is no reason why the Immigration Judge should not adjudicate it as he does in other cases where there was no appeal from his or her prior order. Matter of Mladineo, 14 I&N Dec. 591, 592 (1974).

3. 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. 8 C.F.R. § 3.2(a) (2000); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

4. Motions to reopen or reconsider are subject to the requirements and limitations set forth in 8 C.F.R. §§ 3.23 (2000) and 242.22 (1997).

5. Motions to reopen or reconsider a decision of the Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceedings (ROP). 8 C.F.R. §§ 3.23(b)(1), 3.31(a) (2000). The regulations create an exception for the filing of certain motions under NACARA.

   Such motions shall comply with applicable provisions of 8 C.F.R. §§ 3.2, 208.4, (2000) and 242.22 (1997).

6. A motion is deemed filed when it is received at the BIA, irrespective of whether the alien is in custody. Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

7. A motion to reopen or reconsider must be in writing and signed by the affected party or the attorney or representative of record, if any, and submitted in duplicate if addressed to an Immigration Judge. 8 C.F.R. §§ 103.5(a)(1)(iii)(A) and 103.5 (a)(1)(iii)(B) (2000).

8. A motion to reopen or a motion to reconsider, and any submission made in conjunction with such motion must be in English or accompanied by a certified English translation. 8 C.F.R. §§ 3.2(g)(1) and 3.33 (2000).

9. Payment of the required fee may be waived by the Immigration Judge in any case in which the alien is unable to pay the prescribed fee. 8 C.F.R. § 103.7(c) (2000). To qualify for such waiver, the alien must submit a statement or affidavit stating: (1) that the alien believes that he or she is entitled to or deserving of the benefit requested; and (2) the reasons for his or her inability to pay. The alien must support the waiver request with sufficient evidence. Matter of Alejandro, 19 I&N Dec. 75 (BIA 1984); Matter of Chicas, 19 I&N Dec. 114 (BIA 1984).

10. A motion to reopen or a motion to reconsider shall include proof of service on the opposing party of the motion and all attachments. 8 C.F.R. §§ 3.2(g)(1) and 103.5a (2000).

11. In general, the fee for filing a motion to reopen or reconsider is $110. 8 C.F.R. § 103.7(b) (2000). Exceptions to the rule include:

    a. If both a motion to reopen and a motion for reconsideration are filed, only one $110 fee need be paid. 8 C.F.R. §§ 3.8(a) and 103.7(b)(1) (2000).

    b. A fee is not required to file a motion to reopen or reconsider after an in absentia order was entered because the alien was in Federal or State custody or the alien did not receive notice of a hearing.

    c. A filing fee is not charged for a motion to reopen or reconsider regarding an underlying application for which no fee is chargeable. 8 C.F.R. § 103.7(b)(1) (2000).

12. A motion to reopen or reconsider, submitted with the required fee, may not be rejected as inadequate without a written

adjudication. The written adjudication must sufficiently state the basis for the decision, so that an appellate tribunal can review it. Matter of Felix, 14 I&N Dec. 143 (1972); Matter of M-P-, 20 I&N Dec. 786 (BIA 1994).

13. If an alien files a motion asking for his or her case to be reopened or reconsidered while the case is on appeal, the BIA may deem it a motion to remand for further proceedings before the Immigration Judge from whose decision the appeal was taken. 8 C.F.R. § 3.2(c)(4) (2000).

14. When the INS is the moving party in a proceeding before the Immigration Judge, a copy of the motion must be served on the affected party. 8 C.F.R. § 103.5a (2000). The motion and proof of service must be filed with the office having jurisdiction. Id. The affected party has 13 days from the date of service to submit a brief. Id. This time period may be extended.

15. The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. 8 C.F.R. § 3.23(b)(1) (2000).

16. A motion to reopen or reconsider shall be deemed unopposed unless a timely response is made. 8 C.F.R. §§ 3.23(a) and (b) (2000). An unopposed motion may still be denied if the requisite showings are not made.

17. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation or exclusion proceedings subsequent to his or her departure from the United States. 8 C.F.R. § 3.2(d) (2000); Matter of Estrada, 17 I&N Dec. 187 (1979); Matter of Rangel-Cantu, 12 I&N Dec. 73 (BIA 1967). Any departure from the United States, including the deportation of a person who is the subject of removal, deportation or exclusion proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion. 8 C.F.R. § 3.2(d) (2000); Matter of Palma, 14 I&N Dec. 486 (BIA 1973) (departure executed outstanding deportation order). Circuit courts have entertained motions to reopen made after the alien's deportation on the ground that

the alien's departure was not legally executed. See Wiedersperg v. INS, 896 F.2d 1179 (9th Cir. 1990); Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir. 1981). Courts have held in the excepted case, the alien may be readmitted with the same status he or she held prior to departure, and will be permitted to pursue any administrative and judicial remedies to which he or she is entitled. Mendez v. INS, 563 F.2d 956 (9th Cir. 1977).

18. Motions to reopen or reconsider shall state whether the validity of the deportation or exclusion order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which the proceeding took place or is pending, and its result or status. 8 C.F.R. §§ 3.2(e) and 103.5(a)(1)(iii)(D) (2000); Matter of Wong, 13 I&N Dec. 258 (BIA 1969) (motion denied as insubstantial and dilatory). In any case in which a deportation or exclusion order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under section 242(e) of the Act, and if so, the status of that proceeding. Id.

19. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. 8 C.F.R. § 3.2(e) (2000).

20. If an individual files a motion to reopen or reconsider concurrently with an application for relief for which a fee is chargeable, the individual initially must pay only the fee required for the motion to reopen or reconsider, unless a fee waiver has been granted. 8 C.F.R. § 103.7(b)(1) (2000). If the motion to reopen or reconsider is granted, the individual then must pay the fee required for the underlying application for relief, unless a fee waiver has been granted. Id.

21. If the motion is opposed, the Immigration Judge in ruling on the motion must state in writing, however briefly, the reasons for his or her decision. Matter of Correa, 19 I&N Dec. 130

(BIA 1984). The ruling on the motion shall be in written form fully explaining the reasons for the decision. See Matter of M-P-, 20 I&N Dec. 786 (BIA 1994).

22. The basis for denial of a motion to reopen or reconsider must be stated with specificity. Matter of Felix, 14 I&N Dec. 143 (BIA 1982); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985) (must clearly articulate the factors considered and the basis for its discretionary determination). In exercising its discretion the court must show that it has considered all factors, both favorable and unfavorable, and must state its reasons and show proper consideration of all factors when weighing equities and denying relief.

D. MOTION FOR STAY OF DEPORTATION

1. Except where a motion is filed pursuant to INA § 240(b)(5)(C)(i) or (ii), or former 242B(c)(3), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. 8 C.F.R. §§ 3.2(f) (2000), 242.22 (1997). Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Court, or an authorized officer of the INS. 8 C.F.R. §§ 3.2(f), 3.6(b), 3.23(b)(2) (2000), 242.22 (1997); Matter of Valiyee, 14 I&N Dec. 710 (BIA 1974). The Immigration Judge may stay deportation pending his or her determination of the motion and also pending the taking and disposition of an appeal from such determination. 8 C.F.R. §§ 242.22 and 243.4 (1997); Matter of Correa-Garces, 20 I&N Dec. 451 (BIA 1992); Matter of Mladineo, 14 I&N Dec. 591 (BIA 1974) (BIA took case on certification and denied motion to reopen). The burden of proof for obtaining a stay of deportation is upon the alien who must show that there is a likelihood of success of the underlying basis for reopening.

2. There is no right to an evidentiary hearing on the merits of the motion. 8 C.F.R. §§ 3.1(b) and 3.2 (2000); INS v.Wang, 450 U.S. 139 (1981); Urbano de Malaluan v. INS, 577 F.2d 589 (9th Cir. 1980).

3. An alien who files a motion and submits the required fee, or a fee waiver, is entitled to an adjudication of the request. Matter

of Felix, 14 I&N Dec. 143 (BIA 1972).

E. MOTION TO REMAND

1. Motions to remand are not expressly addressed by the Act or the regulations. Such motions are commonly addressed to the BIA. Motions to remand are an accepted part of appellate civil procedure and serve a useful function. Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

2. A motion to reopen a decision rendered by an Immigration Judge that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge from whose decision the appeal was taken. 8 C.F.R. § 3.2(c)(4) (2000).

3. The number and time limits do not apply to motions filed with the Board while an appeal is pending. A motion that asks the BIA to order the Immigration Judge to reopen his or her decision still can be made at any time until the BIA renders its decision on the underlying appeal and is considered a motion to remand. 8 C.F.R. § 3.2(c)(4) (2000).

Immigration Judge Benchbook Index

(October 2001)

Chapter Nine - Convention Against Torture

CHAPTER NINE

CONVENTION AGAINST TORTURE

This outline is intended to provide the basic framework and necessary elements in considering a Convention Against Torture claim. Upon receipt of a Convention Against Torture application, a number of legal documents control how the application is to be considered: 1) the text of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture); 2) the United States' declarations, reservations, and understandings attached to the U.S. ratification of the Convention Against Torture on October 27, 1990; 3) the October 21, 1998, U.S. legislation requiring the implementation of the Convention Against Torture; and 4) the regulations implementing the Convention Against Torture. Each of these documents further defines the obligations of the adjudicator in a claim for protection from torture under the Convention Against Torture. For additional procedural information, refer to 1) Operating Policies and Procedures Memorandum (OPPM) No. 99-5: Implementation of Article 3 of the U.N. Convention Against Torture, dated May 14, 1999, which details procedures relating to Convention Against Torture claims in Removal/Deportation/Exclusion Proceedings, Expedited Removal Proceedings (Credible Fear Determinations), Administrative Deportation or Reinstatement Proceedings (Reasonable Fear Determinations), Withholding-Only Proceedings, and Asylum-Only Hearings, as well as procedures concerning Termination of Deferral of Removal and the Diplomatic Assurances Process; and 2) Convention Against Torture Sample

Decision, Part II of Bench Book.

I. BACKGROUND OF THE CONVENTION AGAINST TORTURE IN THE UNITED STATES

A. UNITED NATIONS TREATY AGREEMENT

1. Cite: The United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984)(available on the U.N. website http://www.un.org/ [hereinafter Convention Against Torture].

2. Obligation: "No State party shall expel, return, ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture, supra Part I.A.1., at art. 3.

3. Definition of Torture: "[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information, or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Convention Against Torture, supra Part I.A.1., at art. 1.

4. Note that Article 16 separately addresses other forms of cruel, inhuman, or degrading treatment or punishment not amounting to torture. Article 16 makes clear that those fearing this type of cruel, inhuman or degrading treatment and punishment, which does not amount to torture, are not entitled to Article 3 relief. Instead, a more limited obligation requiring parties to attempt "to prevent" this type of punishment or treatment in their jurisdictions is created by

Article 16. See Convention Against Torture, supra Part I.A.1. See also Regulations Concerning the Convention Against Torture, Interim Rule, Supplementary Information, 64 Fed. Reg. 8478, 8482 (Feb. 19, 1999).

5. U.N. Website: Terms and signatories of the Convention Against Torture, those parties which have recognized the competence of the Committee Against Torture (discussed below) http://www.unhchr.ch/html/menu3/b/h_cat39.htm

B. DOMESTIC IMPLEMENTATION AND RELATED LEGISLATIVE DISCUSSION

1. Senate Advice and Consent to the Convention Against Torture set forth the United States Senate's understanding of the terms of the Convention Against Torture and its reservations to the treaty's implementation.

   a. Cite: U.S. Senate Advice and Consent to the Ratification of the Convention Against Torture, 136 Cong. Rec. S. 17,486-92, 1990 WL 168442 (Oct. 27, 1990) [hereinafter Senate Reservations] (Unanimous.pdf)

   b. The Senate agreed to two reservations, five understandings, two declarations and a "proviso." See Senate Reservations. A "reservation" is attached by a state party when it excludes or modifies the substantive legal effect of a treaty's application to itself. See David P. Stewart, The Torture Convention and the Reception of International Criminal Law within the United States, 15 Nova L. Rev. 449, 451 n.8. (1991), citing Vienna Convention on the Law of Treaties, May 23, 1969, art. 2 § 1(d), 1155 U.N.T.S. 331; Restatement (Third) of the Foreign Relations Law of the United States § 313 (1986). An "understanding" is binding domestically but not internationally. Id., citing Restatement (Third) of the Foreign Relations Law of the United States § 314 (1986). Both "declarations" and "provisos" have no substantive effect either internationally or domestically, but express domestic

legal or political concerns. Id., citing Restatement (Third) of the Foreign Relations Law of the United States § 314 (1986). (Unanimous.pdf)

c. The Senate's reservations, understandings, declarations and provisos were adopted and incorporated in the implementing regulations. See 8 C.F.R. § 208.18(a).

d. The definition of torture in the Convention Against Torture does "not categorize the acts that constitute torture but rather provides criteria by which to determine if an act is torture." Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1, 6 (1990) [hereinafter Committee on Foreign Relations]; see Regulations Concerning the Convention Against Torture, Interim Rule, Supplementary Information, 64 Fed. Reg. at 8482 (Feb. 19, 1999).

2. Senate Legislation Authorizing Regulations Implementing of the Convention Against Torture

a. Cite: Foreign Affairs Reform and Restructuring Act of 1998, section 2242 (P.L. 105-277. Div. G, Oct. 21, 1998) [hereinafter Foreign Affairs Reform Act].

b. The legislation had the following qualification: "To the maximum extent consistent with [our Convention Against Torture obligations]," the implementing regulations "shall exclude from protection . . . aliens described in [the Immigration and Nationality Act] section 241 (b)(3)(B)" (i.e., aliens ineligible for withholding of removal because they have persecuted others, committed serious non-political crimes, or endanger U.S. national security). Foreign Affairs Reform Act, supra Part I.B.2.a.

3. The Implementing Interim Regulations

a. Cite: Regulations concerning the Convention Against Torture, were published as an Interim Rule at 64 Fed. Reg. 8478 (Feb. 19, 1999), and became effective

March 22, 1999. On March 23, 1999, the Department published corrections to the interim regulations at 64 Fed. Reg. 13881 (Mar. 23, 1999). See Memorandum from the Office of the Chief Immigration Judge, "Correction Regulation and New Forms Implementing the UN Convention Against Torture" (Mar. 26, 1999) (explaining March 23, 1999, regulatory changes). [Hereinafter, if supplementary information accompanying the February 19, 1999, interim regulations is referenced, it will be referred to as "Supplementary Information"; if the cite references language from the interim regulation, it will refer directly to the 8 C.F.R. section].

b. These regulations incorporate Articles 1 and 3 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the U.S. Senate resolution of the ratification of the Convention Against Torture Senate Reservations, and the implementing legislation (Foreign Affairs Reform Act, supra Part I.B.2.a.). See Supplementary Information, supra Part I.B.3.a., at 8478. (Unanimous.pdf)

II. INTERNATIONAL BODIES INTERPRETING THE CONVENTION AGAINST TORTURE (NON-BINDING ON THE U.S.)

"Torture" as defined by United States in its various interpretations has a distinct and unique meaning compared to other signatory countries. The definitions and findings of "torture" prohibited under other international instruments may offer some illustrative or persuasive purposes, but no other international definition of torture is binding on the United States at this time.

A. United Nations Intergovernmental Bodies Dealing with Human Rights: The United Nations (U.N.) established several bodies to ensure that human rights awareness and the needs of States to be provided with advisory services and technical assistance to overcome obstacles to securing the human rights of all. The bodies also promote economic, social and cultural rights, including the right to development and the right to an adequate standard of living. Increased attention is also being given to the protection of the rights

of vulnerable groups in society, including minorities and indigenous people. This outline only deals with those bodies that deal with "torture."

1. Committee Against Torture: The U.N. established the Committee Against Torture in 1988 as a monitoring body for the implementation and observance of the Convention Against Torture.

    a. Human Rights Convention: Convention Against Torture, supra Part I.A.1., at arts. 17, 22.

    b. Torture defined: The Committee applies the definition as stated in Article 1 of the Convention Against Torture without any reservations or understandings attached. See Convention Against Torture, supra Part I.A.1., at art. 1.

    c. Background: The Committee normally meets twice a year to review reports submitted by state parties regarding their implementation of the Convention Against Torture and to hear either inter-state or individual complaints alleging that a state party is not discharging its duties under the Convention, including Article 3. After the Committee considers the complaint and any submissions made by the parties, it will issue its final views to the complainant and the state concerned and include a summary in its annual report. The state is invited by the Committee to inform it of the action it takes in conformity with the Committee's views. A survey of a sampling of cases is attached.

    d. Competence: The U.S. and United Kingdom recognize the Committee but do not recognize the Committee's competence to consider cases brought by one state party against another or cases brought by an individual against a state party. As a result, the U.S. does not find the Committee competent to consider a Convention Against Torture decision made by a U.S. adjudicatory body in an individual party's case. On May 14, 1999, the following countries had not recognized the Committee: Afghanistan, Belarus,

Bulgaria, China, Cuba, Israel, Kuwait, Morocco, Saudi Arabia, and Ukraine. See Committee Against Torture Concludes Twenty-second Session, Press Release HR/4412 available on the UN website, infra. A greater majority of European countries have agreed to the complaint procedures of the Committee; a much smaller number of African or South-east Asian have recognized the Committee. See Arthur M. Wiesburd, The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights, 25 Ga. J. Int'l & Comp. L. 99, 128 (1996).

e. Internet Caselaw Database: http://www.unhchr.ch/html/menu2/6/cat.htm

2. Other U.N. Bodies: Office of the U.N. High Commissioner for Human Rights, the U.N. Commission on Human Rights, and the U.N. Special Rapporteur on Torture are U.N. bodies that may offer additional interpretation of the Convention Against Torture. Internet Site: http://www.un.org/rights/

B. International Human Rights Systems: There are several regional human rights conventions which contain prohibitions against torture. Often, these systems provide for an "appeal" for complaints alleging human rights violations. Usually, cases will first be heard and determined by a signatory state. Then, any of the parties may apply for review of that decision to the international reviewing body, whether that be a court or a commission. Further, the alien may appeal to the U.N. Committee Against Torture if the State party involved has recognized the Committee (discussed above). The United States has not agreed to be subject to any of these reviewing bodies. See Gabriel M. Wilner, Reflections on Regional Human Rights Law, 25 Ga. J. Int'l & Comp. L. 407 (1996).

1. European Court on Human Rights (ECHR): The Council of Europe created this court system specifically to hear claims related to human rights. This court was established pursuant to the 1950 European Convention for the protection of Human Rights and Fundamental Freedoms, infra. It has developed the most substantial amount of jurisprudence regarding protection from torture.

a. Human Rights Convention: European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221 [hereinafter European Convention].

b. Torture defined: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, supra Part II.C.1.a., at art. 3. This definition includes "inhuman or degrading treatment or punishment." In contrast, the U.S. definition of torture does not include those lesser forms inhuman treatment. Nonetheless, the analysis in the jurisprudence distinguishing between the types of treatment may be useful to U.S. adjudicators.

c. Background: The European Convention established a hearing system composed of the Commission and the Court. The Council of Europe has recently combined the Commission and the Court into one unified New European Court of Human Rights. The basic system remains in place, but the procedure has been streamlined. The case is first domestically determined by the signatory country. After all domestic remedies have been exhausted, either of the parties may apply to the Court for review of the individual country's decision under the European Convention. See Protocol No. 11 to Amend the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature May 11, 1994, 33 I.L.M. 943.

d. Internet Caselaw Database: Council of Europe's, European Court of Human Rights' webpage at http://www.echr.coe.int/

2. Inter-American Commission on Human Rights: On November 22, 1969, the American Convention on Human Rights, infra, was adopted in San José, Costa Rica. This convention, at Part II, Chapter VII, created an Inter-American Court of Human Rights, infra.

a. Human Rights Convention: American Convention on

Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) [hereinafter American Convention].

b. Torture defined: "(N)o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." American Convention, supra Part II.C.2.a., at art.5(2). The American Convention further defined torture as: "Any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish." American Convention, supra Part II.C.2.a., at art. 2.

c. Background: The court's jurisdiction commenced on January 1, 1980. It has adjudicatory and advisory jurisdiction and only hears cases brought by the Inter-American Commission and state parties after all domestic procedures have been exhausted. The State Party must recognize the jurisdiction of the Court. The U.S. is a signatory, but has not ratified this Convention. The rulings of this Court are not binding on the U.S.

d. Internet Site: http://wwwl.umn.edu/humanrts/iachr/iachr.html. Also available on Westlaw database: IACHR-OAS.

3. African Commission on Human and Peoples' Rights: Created to guarantee that each signatory state was taking legislative and other necessary measures to give effect to the rights and

freedoms guaranteed by the U.N. Universal Declaration of Human Rights, G. A. Res. 217A, U.N. G.A.O.R., 3d Sess., U.N. Doc. A/180, at 71 (1948).

a. Human Rights Convention: African Charter on Human and Peoples' Rights, which was adopted by the Assembly of Heads of States and Governments of the Organization of African Unity (OAU) on June 26, 1981, art. 5, reprinted in 21 I.L.M. 59 (1982) as Banjul Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG./67/3/Rev.5.

b. Torture defined: The term is not specifically defined. The preamble affirmed the signatory states "adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other international instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations." African Charter on Human and Peoples' Rights, supra Part II.B.3.a., at preamble. However, the member states qualified this adherence by stating "[n]o preconcieved model, however, can be prescribed on an universal scale." Regional Conference for Africa of the World Conference on Human Rights, U.N. GAOR, 47th Sess. at 63, U.N. Doc. A/Conf.157.Afrm/14 (1992), ¶ 8.

c. Background: As of 1996, there were 42 member states. The African Charter established a fact-finding commission in conjunction with the regional treaty. See Gabriel M. Wilner, Reflections on Regional Human Rights Law, 25 Ga. J. Int'l & Comp. L. 407 (1996). The fact- finding commission has been slow to develop and exercise its authority. To this point, it has not distributed written decisions or opinions regarding the meaning and its interpretation of its human rights conventions.

d. Internet Site: http://www1.umn.edu/humanrts/africa/comision.html

4. Interparliamentary Organization of the Association of South-East Asian Nations (ASEAN): Founded to provide a framework for regional cooperation in Southeast Asia. Human rights issues are an ancillary consideration of the organization.

    a. Human Rights Declaration: Kuala Lumpur Declaration on Human Rights, adopted Sept. 1993, reprinted in Arthur M. Wiesburd, The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights, 25 Ga. J. Int'l & Comp. L. 99, 142 (1996).

    b. Torture defined: No specific definition of torture. Member countries reaffirmed the U.N. Declaration of Human Rights, supra Part I.C.3., but also recognized the sovereignty of each country to determine its scope of human rights protection. The declaration provided that the protection of human rights as defined by international agreements is subject to the limitations or definitions set forth in each countries norms and laws.

    c. Competence: Signatory states are Cambodia, Laos, Burma, Indonesia, the Philippines, Malaysia, Singapore, Thailand, Brunei and Vietnam.

    d. Background: This regional system has not interpreted or expanded the definition of torture. In fact, it has limited the application of the Convention Against Torture to its member countries. See Gabriel M. Wilner, Reflections on Regional Human Rights Law, 25 Ga. J. Int'l & Comp. L. 407 (1996).

    e. Internet Site: http://www.asean.or.id/

C. Individual Countries Implementation of the Convention Against Torture

1. Australia, similar to the United States, will hear Convention Against Torture claims and make a ruling on them. However, unlike the United States, Australia recognizes the competence of the Committee Against Torture to receive and consider

individual claims. Therefore, its decisions are subject to review by the Committee Against Torture.

2. Austria has incorporated the European Convention provisions regarding torture directly into its federal constitution. See Les Constitutions de L'Europe des Douze (H. Oberdorf ed., 1992) (contains texts of the constitutions of 12 of the European states that are parties to the European Convention). In Spain and Switzerland, the European Convention is superior to previously adopted and future legislation. See Gabriel M. Wilner, Reflections on Regional Human Rights Law, 25 Ga. J. Int'l & Comp. L. 407, 413 (1996). Finland, Italy, and Germany have incorporated European Convention provisions into their legislation, but have maintained that the provisions are subject to future legislation. Id.

III. ADJUDICATION OF A CONVENTION AGAINST TORTURE CLAIM

THE FOLLOWING SECTIONS WILL LIST THE CRITICAL FACTORS IN CONVENTION AGAINST TORTURE CLAIMS AS DEFINED BY THE UNITED STATES THROUGH ITS RESERVATIONS, UNDERSTANDINGS, AND IMPLEMENTING REGULATIONS. IF THE VARIOUS HUMAN RIGHTS SYSTEMS HAVE ADDRESSED THE ISSUES, RELEVANT JURISPRUDENCE HAS BEEN NOTED.

A. BURDEN OF PROOF

1. Alien bears the burden to establish that he or she is more likely than not to be tortured if returned to country of removal. See 8 C.F.R. § 208.16(c)(2).

> It was initially argued to the Senate Foreign Relations Committee that the standard for protection under the Convention Against Torture should be a "clear probability" of torture. Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State to Senator Pell (Dec. 10, 1989), Appendix 4, Correspondence from the Bush Administration to Members of the Foreign Relations Committee, Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1, 41 (1990) [hereinafter

Letter]. However, the Senate later clarified that the "substantial grounds" language in the Convention Against Torture equated to the "more likely than not" standard already in place for withholding of removal. Senate Reservations, at 17,492. (Appendix4.pdf and Unanimous.pdf respectively)

2. Note when reviewing jurisprudence from the various regional human rights systems that the burden of proof may be interpreted differently from the U.S. standard.

B. EVIDENCE

1. All evidence relevant to the possibility of future torture must be considered. See 8 C.F.R. § 208.16(c)(3). Evidence may include, but is not limited to, information relating to:

    - past torture;
    - possible relocation within the country of removal where the alien is not likely to be tortured;
    - country conditions.
    - or gross, flagrant, or mass violations of human rights within the country of removal where applicable. Id.

    a. The phrase "where applicable" requires that in each case the adjudicator must determine if, and to what extent evidence of human rights violations is a relevant factor to the specific case. For example, evidence that freedom of the press is flagrantly denied may not, by itself, tend to show that the alien would be subject to torture if returned to that country. See Supplementary Information, supra Part I.B.3., at 8480.

    b. Note that the evidence must indicate that there will be future torture. Unlike the standard for asylum, evidence of past torture is not enough to establish eligibility for Convention Against Torture protection. See 8 C.F.R. § 208.16(c)(3).

2. Committee Against Torture: General situation of human rights in the country of removal must be taken into account, but the existence of a consistent pattern of gross, flagrant, or mass violations of human rights is not in and of itself determinative, see K.N. v. Switzerland, U.N. GAOR Comm. against Torture, 53rd Sess., Supp. No. 44, Annex X, Comm. No. 94/1997, U.N. Doc. A/53/44 (1998); the individual concerned must personally be at risk of being subjected to torture, see Mutombo v. Switzerland, U.N. GAOR Comm. against Torture, 50th Sess., Supp. No. 44, Annex V, Comm. No. 13/1993 U.N. Doc. A/50/44 (1995); and such torture must be a necessary and foreseeable consequence of the return of the person to his or her country, see Tala v. Sweden, U.N. GAOR Comm. against Torture, 51st Sess., Supp. No. 44, Annex V, Comm. No. 43/1996, U.N. Doc. A/51/44 (1996).

   The Committee Against Torture in its Guidelines, Annual Report May 1998, Annex IX, ¶ 6 [hereinafter Guidelines], established the following guidelines to assist with determining if evidence is relevant:

   a. Is there evidence that State concerned has a consistent pattern of gross, flagrant, or mass violations of human rights? If so, is there evidence that internal situation has changed?

      i. Fact that a country is a party to Convention Against Torture and has recognized the Committee's competence does not always constitute a sufficient guarantee of safety. See Alan v. Switzerland, U.N. GAOR Comm. against Torture, 51st Sess., Supp. No. 44, Comm. No. 21/1995, U.N. Doc. A/51/44 (1996).

      ii. Cannot rely on diplomatic information (i.e., information supplied by embassies), or reports of those previously deported to that country, the specific case must be examined. See Paez v. Sweden, U.N. GAOR Comm. against Torture, 52nd Sess., Supp. No. 44, Comm. No. 31/1996, U.N. Doc. A/52/44 (1997).

b. Has the alien been tortured in the past? In the recent past?

Although past torture is one of the elements to be taken into account, the aim of the evaluation is to find whether the alien is more than likely to be subjected to torture now. See X, Y, and Z v. Sweden, U.N. GAOR Comm. against Torture, 53rd Sess., Supp. No. 44, Annex X, Comm. No. 61/1996, U.N. Doc. A/53/44 (1998); I.A.O. v. Sweden, U.N. GAOR Comm. against Torture, 53rd Sess., Supp. No. 44, Annex X, Comm. No. 65/1997, U.N. Doc. A/53/44 (1998); A.L.N. v. Switzerland, U.N. GAOR Comm. against Torture, 53rd Sess., Supp. No. 44, Annex X, Comm. No. 90/1997, U.N. Doc. A/53/44 (1998).

c. Is there medical or independent evidence to support claim? Is there evidence of after-effects?

A.L.N. v. Switzerland, supra Part III.B.2.b.(1) (Angolan did not show substantial grounds that he was at a foreseeable, real, and personal risk of being tortured as he supplied no evidence, medical evidence included). I.A.O. v. Sweden, supra Part III.B.2.b.(1) (alien had been tortured and suffered from post-traumatic stress disorder, therefore, inconsistencies in his account were explained. Nonetheless, the Committee found that the alien did not establish substantial grounds for showing that he will be subject to torture).

d. Has the alien engaged in political or other activity within or outside the deporting State that would make him/her particularly vulnerable to the risk of torture if returned to State where alien claims risk of torture?

Alien's activity which causes him or her to be

subjected to torture may be committed outside of the country from which the alien is claiming protection. See Aemei v. Switzerland, U.N. GAOR Comm. against Torture, 52nd Sess., Supp. No. 44, Comm. No. 34/1995, U.N. Doc. A/52/44 (1997).

3. ECHR: A general situation of violence does not, in itself, implicate a violation of European Convention, Article 3, standards will be violated. See H.L.R. v. France, 11/1996/630/813 (1997), §§ 41, 42 (letters from the applicant's aunt and evidence of general civil discord did not show a high foreseeability that the applicant would be tortured upon return). Risk assessed at the date that the Court considers the case, thus, the Court takes into account information made available since the case was examined. Id. at § 37.

C. CREDIBILITY

1. Alien can meet the burden of proof through credible testimony without corroboration as with asylum. See 8 C.F.R. § 208.16(c)(2); Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998).

2. Committee Against Torture: Complete accuracy is seldom to be expected from victims of torture. Inconsistencies may be tolerated so long as they are not material and do not raise doubts about the general veracity of the alien's claims. See Kioski v. Switzerland, U.N. GAOR Comm. against Torture, 51st Sess., Supp. No. 44, Comm. No. 41/1996, U.N. Doc. A/51/44 (1996).

   Guidelines, supra Part III.B.2, suggest to ask: Is alien credible? If not, are the inconsistencies relevant factual inconsistencies in alien's claims?

3. ECHR: The evaluation should recognize that people who have been tortured may feel apprehensive toward authorities and may be afraid to provide information about their cases. See Cruz Varas and Others v. Sweden, 46/1990/237/307 § 71 (1991).

IV. ELEMENTS OF A TORTURE CLAIM AS ESTABLISHED BY IMPLEMENTING REGULATIONS

THE FOLLOWING SECTIONS WILL LIST THE CRITICAL FACTORS IN CONVENTION AGAINST TORTURE CLAIMS AS DEFINED BY THE UNITED STATES THROUGH ITS RESERVATIONS, UNDERSTANDINGS, AND IMPLEMENTING REGULATIONS. IF THE VARIOUS HUMAN RIGHTS SYSTEMS HAVE ADDRESSED THE ISSUES, RELEVANT JURISPRUDENCE HAS BEEN NOTED.

A. MENTAL ELEMENT

1. Specific intent is required. See 8 C.F.R. §§ 208.18 (a)(1), (5). An act resulting in unanticipated or unexpected severe pain or suffering is not torture. "[T]o sustain a successful prosecution it will be necessary to establish beyond a reasonable doubt that the alleged perpetrator formed the specific intent to commit torture." Letter, supra Part III.A.1.a., at 40.

2. Committee Against Torture: An applicant must show that the action was intended to be torture and was specifically directed at himself or a group that he was identified as a part of. I.A.O. v. Sweden, supra Part III.B.2.b.(1) (After writing articles criticizing the political situation, a journalist was arrested, tortured, and released several times. Regardless of the human right violations in the applicant's home country, the Committee found that periodicals circulate freely without any indication that the government tries to repress them, nor that the government has specific intent to torture journalists or that the journalists are specifically targeted for repression).

3. ECHR: "Torture" equals only deliberate inhuman treatment causing very serious and cruel suffering. Incidental harm, without the specific intent to harm, does not constitute torture. See Aksoy v. Turkey, 100/1995/606/694 § 63 (1996). The distinction between torture and inhuman and degrading treatment derives principally from a difference in the intensity of the suffering inflicted. See Ireland v. the United Kingdom, 2/1976/18/31 § 167 (1978).

B. PURPOSES FOR THE ALLEGED TORTURE

1. The act causing severe pain and suffering may be inflicted for such purposes as to obtain information or a confession from the victim or a third person; to punish an act the victim or a third person has committed or is suspected of having committed; to intimidate or coerce the victim or a third person; or to discriminate for any reason. See 8 § 208.18(a)(1).

    a. The purposes listed in the regulations are not exhaustive, as indicated by "the phrasing 'for such purposes as.' Rather, [the purposes listed] indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate intention or malice." Committee on Foreign Relations, supra Part I.B.1.d., at 14.

    b. Note that the alleged torturous acts must be committed against the alien applying for protection under the Convention Against Torture, but that the purposes for the torture may be directed to a third person.

2. Committee Against Torture: Purposes are defined by Article 1 of the Convention Against Torture and are the same as the U.S. standards. For example, Peruvian member of Shining Path who was forced to reveal names of Path members and would be tortured in retaliation deserves protection. He had not suffered torture in the past, but evidence that his family members had been killed showed that he would be subject to torture upon return. Paez v. Sweden, supra Part III.B.2.a.(2); 2) Iranian member of freedom movement who was harassed and later tortured for his activities. Falakaflaki v. Sweden, U.N. GAOR Comm. against Torture, 53rd Sess., Supp. No. 44, Annex X, Comm. No. 89/1997, U.N. Doc. A/53/44 (1998).

3. ECHR: Treatment administered with the aim of obtaining admissions or information from the applicant and which was inflicted with the purpose of inducing him to admit that he knew the man who had identified him amounted to torture.

See Aksoy v. Turkey, 100/1995/606/694 § 56 (1996). Chilean nationals who fled to Sweden where they continued to participate in demonstrations against the Chilean government claimed that they would be persecuted if returned to Chile because of activities participated in while in Sweden. The Court held that although protection from future torture could be based upon future torture inflicted because of the applicant's activities that occurred in a third country, these aliens had not shown that he had suffered torture in the past or substantial grounds that they would be tortured if returned. See Cruz Varas v. Sweden, 46/1990/237/307 §§ 78 - 83 (1991).

C. RESULTS OF ALLEGED TORTURE

1. The act must result in pain and suffering; See 8 C.F.R. § 208.18 (a)(1). Action which is intended to cause pain and suffering, but which does not result in pain and suffering to the alien does not constitute torture.

2. Committee Against Torture: Actions that result in post traumatic stress disorder may constitute torture. See Falakaflki v. Sweden, supra Part IV.B.2. (Iranian citizen who had been subjected to a "mock execution" where 2 others with him had been killed and who submitted evidence of post traumatic stress disorder and other injuries was protected by the Convention Against Torture); See Kioski v. Switzerland, supra III.C.2. (Woman who suffered from post traumatic stress disorder and submitted evidence showing scar tissue due to her being arrested, raped, and beaten in Zaire deserved Article 3 protection).

3. EHCR: No requirement of actual bodily injury, if the victim suffered at least intense physical and mental suffering. See Klaas v. Germany, 27/1992/372/446 § 83 (1994). Even though there may be no medical evidence of burns or other marks when applicant claimed he was subjected to electric shock, evidence tending to show injury consistent with other forms of claimed mistreatment may be enough to sustain a claim for protection from torture. See Aksoy v. Turkey, 100/1995/606/694 §§ 60-64 (1996).

D. CIRCUMSTANCES OF ALLEGED TORTURE

1. The alien must be in the physical control or custody of the torturer. See 8 C.F.R. § 208.18 (a)(6).

    a. The Convention Against Torture applies "only to custodial situations, i.e., when the person is actually under the control of a public official." Letter, supra Part III.A.1.a., at 40.

    b. "[D]esigned to clarify the relationship of the Convention to normal military and law enforcement operations." Committee on Foreign Relations, supra Part I.B.1.d., at 9.

2. Committee Against Torture: Article 3 protection may not be granted to an alien who never claimed he was tortured. See Babikir v. Switzerland, Comm. No. 38/1995 (adopted 5/9/97). See also, K.N. v. Switzerland, supra Part III.B.2., (Sri Lankan citizen who is a Tamil and Christian and whose brother is suspected to have been abducted by the government must show more than just general country conditions and threat of detention if returned. He must show that he will personally be subjected to torture.)

E. PERPETRATOR OF ALLEGED TORTURE

1. Consented to, or inflicted, instigated, or acquiesced by a public official. See 8 C.F.R. § 208.18 (a)(1).

    a. Acquiescence requires: 1) prior awareness of the activity; 2) legal responsibility to intervene to prevent the activity; and 3) a breach of that responsibility. See 8 C.F.R. § 208.18 (a)(7); See also Senate Reservations. (Unanimous.pdf)

        i. Actual knowledge not required. "Awareness" replaced "knowledge" in both the reservations and the regulations. "The purpose of this condition is to make it clear that both actual knowledge and 'willful blindness' fall within the

definition of the term 'acquiescence.'" Committee on Foreign Relations, supra Part I.B.1.d., at 9.

ii. Legal responsibility to intervene is not explained in the resolutions or the regulations. It has been argued that a violation of obligations under the Convention Against Torture to prevent torture domestically, to criminalize torture, to train government officials to recognize torture, to review domestic interrogation and custody procedures, as well as a violation of any obligation found in the domestic law, would constitute a violation of a "legal responsibility." See Kristen B. Rosati, Finally! U.S. Law Implements Article 3 of the U.N. Convention Against Torture, property of the American Immigration Lawyers Association, portions of an earlier version of the article appeared in Bender's Immigration Bulletin (Feb. 1999).

b. Public official defined as a person acting in an official capacity. See 8 C.F.R. § 208.18(a)(1).

i. "The Convention deals only with torture committed in the context of governmental authority; acts of torture committed by private individuals are excluded." Committee on Foreign Relations, supra Part I.B.1.d., at 14.

ii. Torture must be inflicted under the "color of law." See Committee on Foreign Relations, supra Part I.B.1.d., at 14.

2. Committee Against Torture: Violations must be at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Guidelines, supra Part III.B.2., at ¶ 3. Pain inflicted by non-governmental entity, without the consent or acquiescence of the government, not within scope of Article 3. See G.R.B. v. Sweden, U.N. GAOR Comm. against Torture, 53rd Sess.,

Supp. No. 44, Annex X, Comm. No. 83/1997, U.N. Doc. A/53/44 (1998).

3. ECHR: Drug courier who feared acts of vengeance by drug smugglers was not granted protection because he did not establish his personal situation would be worse than other Colombians or that the Colombian authorities were incapable of protecting him. Nonetheless, the Court did "not rule out the possibility that Article 3 may also apply where danger emanates from persons or groups of persons who are not public officials. See H.L.R. v. France, 11/1996/630/813 (1997). See also A. v. U.K., 100/1997/884/1096 § 21 (1998) (nine year-old child beaten repeatedly by father was a vulnerable individual who was entitled to state protection against such treatment; U.K. violated Article 3 of European Convention).

4. Inter-American Commission: Includes those acting under color of law. For example, agents of the Government of Guatemala acting under color of their official capacity when using a police car to transport the applicant and detained her in a Guatemalan military installation regardless of government's denial of involvement. See Inter-Am. C.H.R. 45, OEA/ser. L./VII./95 doc. 7 rev., Case 10.526-Guatemala (1996), available in 1996 IACHR 332.

F. TYPE OF PAIN OR SUFFERING

1. Mental pain or suffering may constitute torture if it is prolonged pain or suffering caused by or resulting from the actual infliction or threatened infliction of the following: severe physical pain; administration of mind altering substances or procedures to profoundly disrupt the senses or personality; death; or threatened death of a third person. See 8 C.F.R. § 208.18(a)(4).

> As mental pain and suffering is a more subjective phenomenon than physical pain, it may be necessary and helpful to look to other, more objective criteria such as the degree of cruelty or inhumanity of the conduct causing the pain. Committee on Foreign Relations, supra Part I.B.1.d.

2. ECHR: "Ill treatment must attain a minimum level of severity to fall within the scope of Article 3;" Vilvarajah and Others v. U.K., 45/1990/236/302-306 § 288 (1991). It depends on all of the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects, and, in some instances, the sex, age and state of health of the victim. See Soering v. U.K. 1/1989/161/217 § 100 (1989). See also Costello-Roberts v. U.K., 89/1991/341/414 § 30 (1993) (discussed mental health of victim).

G. PUNISHMENT IMPOSED FOR UNLAWFUL ACTIONS

1. Lawful Sanctions causing pain or suffering do not constitute torture unless they are intended to defeat the purpose of the Convention Against Torture. See 8 C.F.R. § 208.18(a)(3). Sanctions are understood to be judicially-imposed or sanctions authorized by United States law. Originally, the Senate's understanding of the term required that such sanctions or actions must not be "clearly prohibited under international law." However, parties in the Senate later argued that the reference to international law should be eliminated. The language was revised to read, "Nonetheless, a State Party can not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture." Senate Reservations, at 17,488. See also, 8 C.F.R. § 208.18(a)(3). (Unanimous.pdf)

2. Committee Against Torture: Although the law in the country of removal may allow for imprisonment of those convicted in other countries, there is no indication that the country of removal would do so in every case. Even if the country of removal did imprison the alien, it may not be assumed without evidence that the alien would be tortured during detention. See P.Q.L. v. Canada, U.N. GAOR Comm. against Torture, 53rd Sess., Supp. No. 44, Annex X, Comm. No. 57/1996, U.N. Doc. A/53/44 (1997).

3. ECHR: "Birching"as a form of corporeal punishment does not rise to the level of torture as contemplated by the Convention Against Torture. The offender had a right of appeal and there

were certain medical safeguards built into the process. See Tryer v. U.K., application number 00005856/72 (1978) (treatment was not torture, but was degrading treatment under the European Convention in that it assaulted the person's dignity and physical integrity).

V. PROCESS IN CONSIDERING A CONVENTION AGAINST TORTURE CLAIM

An alien who establishes that it is more likely than not that he or she will be tortured if returned to the country of removal is protected from removal to that country under the Convention Against Torture. However, the alien may be subject to mandatory denial of withholding of removal under the Convention Against Torture pursuant to one of the bars contained in section 241(b)(3)(B) of the INA. As a result, the alien may be granted one of two forms of protection: 1) withholding of removal under the Convention Against Torture (see 8 C.F.R. § 208.16); or 2) deferral of removal (see 8 C.F.R. § 208.17).

A. WITHHOLDING OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE

1. An alien, if eligible, who has established that it more likely than not that he or she will be tortured, shall be granted withholding of removal under the Convention Against Torture, unless the alien is subject to a ground of mandatory denial. See 8 C.F.R. §§ 208.16(c) and (d).

2. A grant of withholding of removal under the Convention Against Torture has the same consequences as a grant of withholding of removal under § 241(b)(3) of the INA, i.e., the alien may not be removed to a country where it has been determined that it is more likely than not that he or she would be tortured.

3. The Immigration Judge's decision may be appealed the Board of Immigration Appeals (BIA).

4. If the alien has met the burden of proof for Convention Against Torture protection, but is subject to the bars contained in section 241(b)(3)(B) of the INA, the Immigration Judge must deny the alien withholding of

removal under the Convention Against Torture and grant the alien deferral of removal under 8 C.F.R. § 208.17. See 8 C.F.R. § 208.16(c)(4).

B. DEFERRAL OF REMOVAL

1. An alien is barred from a grant of withholding under the Convention Against Torture if evidence reveals the following about the alien:

    a. alien's actions constitute assistance in Nazi persecution or genocide which renders the alien deportable under section 237(a)(4)(D) of the INA;

    b. alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

    c. alien was convicted of a particularly serious crime; or

    d. alien's conduct constitutes reason to believe that alien is a danger to the security of the United States. See 8 C.F.R. § 208.16(d)(2).

2. An alien subject to one of the bars listed above, but who has established it is more likely than not that he or she will be tortured if returned, shall be granted deferral of removal.

3. The INS may file a motion to schedule a hearing to consider the termination of deferral of removal that is not subject to the same requirements as a regular motion to reopen. See 8 C.F.R. § 208.17(d)(2). The motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would not be tortured in the country of removal and that was not presented at the previous hearing. See also, OPPM No. 99-5: Implementation of Article 3 of the UN Convention Against Torture, dated May 14, 1999.

COMMITTEE AGAINST TORTURE ADOPTED VIEWS[1]

note: A State party to the Convention Against Torture may at any time declare that it recognizes the competence of the Committee Against Torture to receive and consider communications from, or on behalf of, individuals subject to its jurisdiction who claim to be victims of a violation by a State party of the provisions of the Convention Against Torture. The parties presenting "communications" to the Committee are 1) the "Author," most often the alien claiming protection under Article 3 of the Convention Against Torture, and 2) the State, the country where the alien has sought protection and which has ordered the alien's return to his or her country. Parties have agreed to the Committee's jurisdiction. All domestic claims for relief must have been exhausted prior to submission to the Committee. There are 10 Committee members elected by State parties.

Standard Language

> In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

Criteria Established by Committee

> 1) the general situation of human rights in a country must be taken into account, but the existence of a consistent pattern of gross, flagrant, or mass violations of human rights is not in and of itself determinative; 2) the individual concerned must personally be at risk of being subjected to torture; 3) such torture must be a necessary and foreseeable consequence of the return of the person to his or her country.

---

[1] The Committee Against Torture [hereinafter the Committee] was established on January 1, 1988, pursuant to article 17 of the Convention. It is set up as a monitoring body whose main function is to ensure that the Convention is observed and implemented. Accordingly, the Committee sets out a number of obligations designed to strengthen the sphere of protection of human rights and fundamental freedoms, while conferring upon the Committee broad powers of examination and investigation calculated to ensure effectiveness in practice.

Elmi v. Australia, U.N. Comm. against Torture, 22nd Sess., Annex, Comm. No. 120/1998: Australia. 25/05/99. CAT/C/22/D/120/1998 (decided 5/25/99)

Facts: Author claimed that as a member of a minority clan in Somalia whose family had been targeted, tortured and killed by members of a dominant clan militia, he should be granted protection. His father and brother were killed and his sister was raped by militia members, and he survived by repeatedly relocating to different areas of Somalia for six years. The State found that although the author had, at times, had to flee civil war in Somalia, he had failed to show that he would be targeted if returned to Somalia.

Committee view: Due to a lack of functioning central government in Somalia for a number of years, certain clans such as the Hawiye Clan are acting in *de facto* government capacity. Thus the actions of their members can, for purposes of the application of the Convention Against Torture, fall within the definition of "public officials" or "others acting in an official capacity". Moreover, due to flagrant and mass human rights violations in Somalia and apparent acceptance by the State of the veracity of the author's claim relating to his family by the Hawiye Clan, the author had established that substantial grounds exist for believing that the author would be in danger of being tortured if returned to Somalia.

Interesting Issues: In the absence of a functioning central government, the terms "public official" and "other persons acting in official capacity" may include members of a faction exercising control and performing some traditional government function, and thus acting in *de facto* government capacity.

Tala v. Sweden, U.N. GAOR Comm. against Torture, 51st Sess., Supp. No. 44, Annex V, 17th Sess., Comm. No. 43/1996, U.N. Doc. A/51/44 (1996).

Facts: Author claimed that because of his political affiliation with the People's Mujahedin Organization and activities, and his history of detention and torture he should be granted protection. The State found that although the Author had been injured, he was not credible in his account of who caused the injuries. Nor did the State find the Author to be credible in how he had arrived in Sweden. The State concluded that the Author had not established that he was tortured or that he would be tortured if returned.

Committee View: Due to a pattern of gross human right violations in Iran and the Author's showing that he was subjected to injuries which could only have been intentionally inflicted by others, the Author established that he would be at risk of being subjected to torture if returned. It was also held that the Author could not be forcibly returned to any other country where he runs a real risk of

being expelled or returned to Iran.

Interesting Issues: "Complete accuracy is seldom to be expected by victims of torture . . . ." Evidence of post-traumatic stress disorder supported his claim and justified some of his inaccuracies.

Aemei v. Switzerland, Comm. No. 34/1995 (decided 5/9/97)

Facts: Iranian who supported Mujahedin was arrested, detained for 25 days, caned after being submerged in ice, and burned with cigarettes for throwing a moltov cocktail and stealing a license plate. Moved away for 3 years and returned to Iran until he was recognized as person throwing Moltov cocktail. After moving to Switzerland, he became involved with Armenian and Persian aid organization which is illegal in Iran. Now, he claims torture possibility on basis of that organization.

Committee View: Article 3 violation if returned to Iran based on his activities since arriving in Switzerland. Grounds for finding risk of torture may be based on acts committed in receiving country or on acts committed in country of origin before his flight.

Interesting Issues: No determination of whether the country alien claiming protection from is violating Article 3, but instead evaluating whether country attempting to deport is violating its obligation under Article 3. No violation of Article 3 if deported to a third country where the alien would not be subject to torture.

Paez v. Sweden, Comm. No. 31/1996 (adopted 4/28/97)

Facts: Peruvian member of Shining Path arrested and forced to reveal names. He was not tortured but his cousins were killed. Family's lawyer got a letter bomb. Alien claims police usually torture people who are accused of terrorism.

Committee View: Article 3 violation if returned. "Test of Article 3 is absolute . . . the nature of the activities in which person concerned engaged cannot be material consideration when making determination under" Convention Against Torture.

Interesting Issues: Cannot rely on diplomatic information (i.e., information supplied by embassies), must examine specific case. Although no torture, found that alien was Shining Path member, his family was politically active, and home searched.

Kioski v. Switzerland, Comm. No. 41/1996 (adopted 2/12/96)

Facts: Activist of opposition party in Zaire. Her husband was secretary to

leader of opposition party. She was arrested, raped, beaten, and then escaped. Refused asylum based on changed country conditions. She had medical evidence of scar tissue and post traumatic stress disorder.

Committee view: Article 3 violation if returned based on the alien's being a known member of the opposition and subject to personal risk.

Interesting issues: Complete accuracy is seldom to be expected from victims of torture and such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the alien's claims.

Khan v. Canada, Comm. No. 15/1994 (adopted 11/15/94)

Facts: Pakistani cricket player claims he was student leader, arrested, and tortured. During asylum proceedings in Canada, he never mentioned torture. Medical evidence was submitted. Canada argued that he was not credible and one of many who would be subject to torture.

Committee view: Article 3 violation if returned as the security of the author overrode credibility concerns. Personal risk of torture was found by noting that torture widely practiced against political dissenters and common detainees, the alien showed substantial grounds for believing that a political activist like him would be endangered.

Alan v. Switzerland, Comm. No. 21/1995 (adopted 5/8/96)

Facts: Kurd fled Turkey after being arrested and detained for up to 2 years. Medical report showed torture and post traumatic stress disorder. He was internally exiled and tortured while in exile. Relocated but caused suspicion so that police started looking for him again.

Committee view: Article 3 violation if returned as his house is still under surveillance, police questioned neighbors about him, brother was arrested, and village demolished. He is still subject to danger.

Interesting issues: No internal relocation would be safe for this alien, but view implies that a person would not be protected under Article 3 if could relocate within that country. Fact that a country is a party to Convention Against Torture and has recognized the Committee's competence does not always constitute a sufficient guarantee of safety.

E.A. v. Switzerland, Comm. No. 28/1995 (decided 11/10/97)

Facts: Turkish citizen of Kurdish ethnicity, left Turkey in 1990. Sympathizer of Dev-Yol, arrested in 1980, detained and tortured for 1 1/2 months. Released and later served in military.

Still harassed even though halted public political activities. In 1988, he was questioned about colleagues, was soon after hit by a military jeep which broke his leg. His family also politically involved, brother went into hiding. Five months after being questioned about his brother he left country. Wife and children moved from hometown but still in Turkey.

Committee View: Author has not shown that substantial grounds exist for believing he will be personally at risk.

Analysis: No indication that police are looking for him at present, no evidence that jeep accident was in fact attack on him, passport issued to him by Turkish authorities. He may have been tortured at one point but says he did not resume those activities and was not detained after that, only questioned.

P.Q.L. v. Canada, Comm. No. 57/1996 (decided 11/17/97)

Facts: Chinese national who was born in Vietnam. Family fled to China from Vietnamese civil war. They left China in 1988. Author convicted of robberies in Canada. Based on these convictions and his ethnicity, Author claims he may be tortured in China due to its criminal code which allows the death penalty for crimes committed outside its borders. He also claims that he would have no recourse for protection, because China is not a signatory to the Convention Against Torture.

Committee View: Alien has not shown that he would be personally at risk; he does not claim that he has participated in political activities, or belongs to political, professional, or social group targeted for repression or torture.

Analysis: Although Chinese law may allow for imprisonment of those convicted in other countries, there is no indication that China intends to do so. Even if China did imprison him, there is no indication he would be tortured during detention.

X, Y, and Z v. Sweden, Comm. No. 61/1996 (decided 5/6/98)

Facts: Nationals of the Democratic Republic of the Congo (formerly Zaire) included a husband and wife, and the husband's sister. The husband and his sister were politically active in a political opposition party which they claim led to their arrest and torture. They did not submit medical evidence of this. The wife claimed that she was tortured when looking for her husband in different prisons. Medical evidence was submitted with regard to her claim.

Committee View: No substantial grounds shown. **Although past torture in one of the elements to be taken into account, the aim of the evaluation is to find whether the alien is more than likely to be subjected to torture now.** The alien's political party is now part of the alliance forming the government.

Interesting Issues: Activities in the receiving country should be taken into account when determining whether substantial grounds exist for believing that the return to their country would expose the aliens to a risk of torture. See Aemei v. Switzerland, Comm. No. 34/1995.

I.A.O. v. Sweden, Comm. No. 65/1997 (decided 5/6/98)

Facts: National of Djibouti who wrote articles criticizing the political situation there, in particular the mistreatment of the Afar ethnic group by the politically dominant Issa ethnic group. On several occasions, he was arrested, tortured (!), and released. It was certified that he was hospitalized following one of his imprisonments. After arriving in Sweden, he continued his writings.

Committee View: **Past torture not enough to show future torture** - alien had been tortured and suffered from post-traumatic stress disorder, therefore, the inconsistencies in his account were explained. Nonetheless, the Committee found that the alien did not establish substantial grounds for showing that he will be subject to torture. Regardless of the reported human right violations, there is not enough to show that journalists are targeted for repression and opposition periodicals circulate freely.

Interesting Points: Although Sweden expressed concern that different standards were being applied for claims under the Committee's application of the Convention Against Torture and the European Commission of Human Rights (ECHR) application of its European Convention for the Protection of Human Rights which adopted nearly verbatim the Convention Against Torture. Sweden noted that the Committee had found Sweden in violation of Article 3 on each complaint it had received against Sweden, yet, the ECHR had declared most of the complaints as manifestly ill-founded. The Committee did not address this issue in its view.

G.R.B. v. Sweden, Comm. No. 83/1997 (decided 5/17/98)

Facts: Peruvian who's family sympathized with the Communist party. She left Peru to study and returned several times to visit. During one visit, the alien was abducted and raped by the Sendero Luminoso. She claims that she would be subject to torture by the Peruvian authorities with no internal flight option available because then the Sendero Luminoso would find her. After she left Peru again, several members of her family were harmed when a bomb was delivered to their home as a retaliation for her leaving Peru. She was able to get a government issued passport without a problem.

Committee View: **Pain inflicted by non-governmental entity, without the consent or acquiescence of the government, not within scope of Article 3.** Although facts were not at issue, alien suffered post traumatic stress disorder, and numerous reports of torture in Peru existed, alien did not establish that there were substantial grounds that she would be subject to torture.

Interesting Points: Internal relocation/flight was not addressed by Committee. Sweden

granted that non-governmental entities could in exceptional cases constitute a ground for granting refugee status, but not established here. Committee did not address.

Falakaflaki v. Sweden, Comm. No. 89/1997 (adopted 5/8/1998)

Facts: Iranian citizen with a politically active family. His father went into hiding. Shortly thereafter, the alien joined a political organization that was later ruled illegal by the government. He was arrested repeatedly and released. After developing a more radical policy, he was again arrested and tortured, including being subjected to a fake execution where two others who were with him were killed.

Committee View: Article 3 violation to return him to Iran. The forensic medical report showed findings similar to the alien's claims, and that he suffered post traumatic stress disorder. Information shows that torture was common in Iran.

Interesting Issues: Committee does not address but - mental suffering and anguish caused by mock execution and the role of his father's plight as coercive tactic for the government are raised.

A.L.N. v. Switzerland, Comm. No. 90/1997 (adopted 5/19/98)

Facts: Angolan who claimed that his father, who was a member UNITA, gave him a copy of a video on torture which showed the alien as a child having his hand plunged into boiling water by the MPLA. The alien claimed that the MPLA soldiers arrested him and found the video, but he was able to escape. He did not have any independent medical evidence.
He fears for his physical and mental health if returned.

Committee View: Alien did not show substantial grounds that he was at a foreseeable, real, and personal risk of being tortured. He supplied no evidence, medical evidence included, and no detailed information on his treatment after being arrested. Country conditions have improved.

Interesting Issues: "The Committee observes that past torture is one of the elements to be taken into account when examining a claim under article 3 of the Convention, but its purpose in considering the communication is to decide whether, if the author were returned to [his country], he would now risk being tortured."

K.N. v. Switzerland, Comm. No. 94/1997 (adopted 5/19/98)

Facts: Sri Lankan national who is a Tamil and Christian. He was forced to work for the "Tamil Tigers," and was then detained for several days by the Indian Army. Four years later his brother joined the Tigers, which caused the Sri Lankan armed forces to look for the alien. He fled and his father wrote that the army had come looking for him. His brother hasn't been heard from

Citation Found Document Rank 1 of 1 Database
136 Cong.Rec. S17486-01 CR
1990 WL 168442 (Cong.Rec.)
(Cite as: 136 Cong. Rec. S17486-01)

Congressional Record --- Senate
Proceedings and Debates of the 101st Congress, Second Session
Saturday, October 27, 1990

EXECUTIVE SESSION

UNANIMOUS-CONSENT AGREEMENT

Mr. SANFORD.

Mr. President, as in executive session, I ask unanimous consent that when the Senate proceeds to consideration of Executive Calendar No. 12, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it be considered as having been advanced through the various parliamentary stages up to and including the presentation of the resolution of ratification. Provided further, That the resolution be considered under a time limitation of 10 minutes, to be equally divided and controlled by the chairman and ranking member of the Committee on Foreign Relations, or their designees; that the reservations, understandings and declarations recommended in Senate Executive Committee Report 101-30 be considered as having been adopted and treated as original text for purposes of further amendment; that the following four amendments to be offered by the Senator from Rhode Island, Mr. PELL, for himself, and Mr. HELMS, be considered en bloc and be the only amendments in order: An amendment to strike the first reservation dealing with Federal-State issues; and amendment to insert an understanding on the same subject; an amendment to part C of the first understanding dealing with lawful sanctions; and an amendment to the resolution dealing with the deposition of the instrument of ratification; that the time for the amendments offered by the Senator from Rhode Island <Mr. PELL> be provided from the time on the resolution; that following the using or yielding back of time on the amendments and resolution, the Senate conduct two vote back-to-back votes, one on the en bloc amendments if a rollcall vote is ordered and on the resolution of ratification; that no motions to recommit be in order; that after the completion of the votes or vote, the Senate return to legislative session.

The PRESIDING OFFICER.

Without objection, it is so ordered.

The PRESIDING OFFICER.

The clerk will report the resolution of ratification.

The assistant legislative clerk read as follows:

Resolved, (two-thirds of the Senators present concurring therein) That the Senate advise and consent to the ratification of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988, Provided That:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States shall implement the Convention to the extent that

the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention.

(2) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or furnishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(3) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected

to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

The PRESIDING OFFICER.

Debate on the resolution will be 10 minutes equally divided between the Senator from Rhode Island and the Senator from North Carolina.

The Senator from Rhode Island is recognized.

Mr. PELL.

Mr. President, this convention is the product of some 7 years of intense negotiation in which the United States played an active role. The convention was unanimously adopted by the U.N. General Assembly on December 10, 1984, the 36th anniversary of the Universal Declaration of Human Rights. It has now been ratified by or acceded to by 51 States and signed by 21 others.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment represents a major step forward in the international community's campaign to combat torture because it makes torture a criminally punishable offense and obligates each State party to prosecute alleged torturers or extradite them for prosecution elsewhere.

The Reagan administration submitted the convention to the Senate in May 1988 with 19 proposed U.S. conditions, many of which were of concern to the human rights community, the American Bar Association, and others. After consulting with these groups, the Bush administration substantially reduced and revised the proposed list of conditions. I appreciate and applaud this effort.

The Foreign Relations Committee held a hearing on the treaty on January 30 of this year. On July 19, the committee voted 10 to 0 to report favorably the convention with a resolution of ratification containing the reservations, understandings and declarations ***S17487** proposed by the Bush administration.

In categorizing the treaties pending before the Senate, the administration

listed the Convention Against Torture as one for which there is an urgent need for Senate action. At the appropriate time, I will be offering four amendments en bloc on behalf of myself and Senator HELMS. The first three amendments would make changes in the language of the resolution of ratification dealing with the issue of Federal-State relations as it impacts on our obligations under the treaty and with the lawful sanctions issue in article 1. These have been worked out with the administration and the administration supports their adoption. The fourth amendment would add a new proviso to the resolution of ratification regarding deposition of the instrument of ratification by the President. This proviso will not be included in the instrument. The administration accepts this amendment. The administration strongly supports ratification of the convention with its proposed conditions, as modified by the committee amendments.

In 1984 Congress enacted a joint resolution, which I sponsored along with Senator Percy, reaffirming the U.S. Govenment's opposition to torture. By ratifying this convention, the United States will demonstrate that it is determined to take concrete steps to eradicate this evil and inhumane practice.

I yield the floor.

Mr. HELMS.

Mr. President, I commend the distinguished Senator from Rhode Island for his cooperation and courtesy in working out the problems in devleoping the proviso package to the convention. He has been unfailingly cooperative and understanding in coordinating the negotiations between our respective staffs and the Department of State. I commend him for his contribution to the negotiation process.

We now have worked out an agreement that all sides support. The State Department is satisfied that the United States will adhere to its obligations under the convention. The distinguished chairman has my assurance that the sovereignty proviso will be attached only to the resolution of ratification and not to the instrument of ratification.

Finally, I am satisfied that U.S. constitutional principles will prevail under this convention, and therefore I support its adoption with the proviso package offered by the distinguished chairman of the Foreign Relations Committee, my good friend from Rhode Island, Mr. PELL.

Mr. President, I happen to be one of those Senators who believes that the Constitution of the United States is the best form of government ever devised by the mind of man. As my late great friend and Senate mentor, Sam Ervin, often said, the Constitution should be in all of our thoughts all of the time. I feel that I would be derelict in my duties as a U.S. Senator sworn to uphold the Constitution were I to disregard the potential conflict between what the Constitution actually says and those who try to say what the Constitution says.

But all of that has been worked out. I thank my friend again.

THE U.N. CONVENTION ON TORTURE

Mr. President, we are here today to consider two lofty ideals. The first has to do with the expression of the revulsion of civilized nations against torture. The second has to do with the protection of the noblest legal expression of the human, the U.S. Constitution. After much debate and discussion about the U.N.

Convention Against Torture, I believe that we have devised a way to implement the ideals of the Torture Convention and fundamental principles of the U.S. Constitution.

In the past, multilateral conventions dealing with criminal law and procedure on the international level have raised a number of difficulties when they were sought to be applied to U.S. law. The U.S. domestic legal system is based on the U.S. Constitution. Our Constitution is unique. It does and must take precedence over any other international legal regime.

During the past decade, starting with the Genocide Convention, the Senate attached either a reservation or an understanding to eight different treaties and conventions dealing with the subject of international criminal law putting on record the primacy of the Constitution. The Senate did this because case law is not clear and convincing on the subject of constitutional sovereignty.

In the case of Ware versus Hilton, at the end of the 18th century, Justice Iredell stated that treaties were equal to the Constitution. That case has never been overruled. In the famous Curtiss-Wright decision of 1936, Justice Sutherland strongly implied that the chief executive, in matters of foreign policy, was above the Constitution. That case also has never been overruled. In the case of Reid versus Covert, nearly two generations ago, in 1952, Justice Douglass, in a two sentence expression of dicta, did assert the supremacy of the Constitution. This statement was challenged in a concurring opinion by Justice John Marshall Harlan, widely acknowledged to have been the best scholar on the Court, who flatly stated that the Constitution was not necessarily supreme over treaties. The subject matter of that case dealt with an executive agreement, not with a treaty.

Now, I happen to be one of those Senators who believes that the Constitution of the United States is the best form of government ever devised. As my great friend and Senate mentor, Sam Ervin, often said, the Constitution should be in all of our thoughts all of the time. I would be derelict in my duties as a U.S. Senator sworn to uphold the Constitution were I to disregard the potential conflict between what the Constitution actually says and those who say what the Constitution says.

Were the Senate to omit this proviso from the resolution of ratification, potential harm could be done to those constitutional safeguards guaranteed by the Bill of Rights. There could also be problems of due process, the presumption of innocence, and the right to confront one's accusers, just to name a few examples. However, I have agreed to place this proviso only on the resolution of ratification since it accomplishes international notification-the same end that would be accomplished by being included in the articles of ratification.

For the past 6 years, ever since Senate approval of the Genocide Convention, the Senate has attached to international criminal law instruments a sovereignty reservation or understanding which clearly acknowledges the supremacy of the U.S. Constitution. If, as its opponents claim, the sovereignty proviso is meaningless, then no harm is done. If, however, as I and many other Senators believe, the sovereignty clause is meaningful, then it is of the highest legal importance to have it attached to the resolution of ratification where it will put future administrations on notice as to the primacy of the Constitution in U.S. domestic law.

In addition, Mr. President, the Reagan administration had developed a reservation which exempted the United States out of the jurisdiction of the Committee on Torture, which has the responsibility of investigating alledged complaints, both by individuals and by states, of torture and other forms of cruel punishment. I believe that the Bush administration has made a serious mistake in dropping that reservation. To see why this is a mistake one only has to look at the current membership of the Committee on Torture, which includes a representative from the Soviet Union and a representative from Bulgaria.

The Soviet Union and Bulgaria have their own particular expertise in the matters of torture. This Convention's Committee on Torture is a farce, and it may be a dangerous farce. One could well say in this case that the lunatics are indeed running the asylum. I do not want those folks poking their noses into the operation of the U.S. legal system. They have plenty to do with the notorious injustice exemplified by the two countries I have just mentioned.

Therefore, Mr. President, although I am reluctantly accepting the exclusion of the Torture Committee from the proviso package I have worked out with the distinguished chairman of the Foreign Relations Committee, I am also pointing to the possibility of future difficulties caused for the United States by this Torture Committee. ***S17488** I believe that the Reagan administration was right in its more cautious approach.

However, since this Convention is primarily symbolic, it is not necessary to engage in a superfluous debate. Let us hope that the symbolism of the evils of torture will be enough to end that scourge of mankind.

AMENDMENT NO. 3200

(Purpose: To clarify ambiguities in the Federal/state system)

AMENDMENT NO. 3201

(Purpose: To clarify ambiguities in the Federal/state system)

AMENDMENT NO. 3202

(Purpose: To clarify relationship between domestic law and international law)

AMENDMENT NO. 3203

(Purpose: To add a new proviso regarding deposition of the instrument of ratification)

Mr. PELL.

Mr. President, I send to the desk now the floor amendments and ask that they be considered en bloc.

The PRESIDING OFFICER.

The clerk will report the amendments.

The assistant legislative clerk read as follows:

The Senator from Rhode Island <Mr. PELL>, for himself and Mr. HELMS, proposes

amendments en bloc numbered 3200 to 3203.

Mr. PELL.

Mr. President, I ask unanimous consent that the reading of the amendments be dispensed with.

The PRESIDING OFFICER.

Without objection, it is so ordered.

The amendments are as follows:

AMENDMENT NO. 3200

Strike the first reservation dealing with Federal/State issues in part I of the resolution of ratification.

AMENDMENT NO. 3201

Insert the following understanding on Federal/state issues in part II of the resolution of ratification: "That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.".

AMENDMENT NO. 3202

In part c of the first understanding under part II of the resolution of ratification, strike everything after the world "law" on line 5 and insert in lieu thereof the following: ". Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.".

AMENDMENT NO. 3203

At the end of the resolution of ratification, add the following:

"IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

"The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or

authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.".

Mr. PELL.

Mr. President, the first amendment strikes the first reservation dealing with the federal-state issue in the resolution of ratification.

The second amendment adds a new understanding on this matter to part II of the resolution. This new language is designed to clarify ambiguities in the original federal-state reservation and to hone in on those specific articles of the convention where the federal-state system could affect U.S. compliance.

The third amendment modifies the language in part C of the first understanding related to lawful sanctions.

Under article 1 of the convention, pain or suffering resulting from lawful sanctions does not constitute torture. The resolution of ratification stipulates that sanctions, to be lawful, would have to be permitted under U.S. law and not be prohibited under international law.

The amendment that I am offering would replace the reference to international law with a reference to the object and purposes of the convention itself.

This amendment is designed to overcome concerns raised by my distinguished colleague, Senator HELMS, about the relationship between domestic and international law in determining the lawfulness of sanctions. The language of these three amendments has been worked out in consultation with the administration and the administration supports these revisions.

The fourth amendment would add a new proviso to the resolution requiring the President to notify all present and prospective parties to the convention that nothing in the convention requires or authorizes any legislation or other action prohibited by the Constitution.

The amendment makes clear that this proviso is not to be included in the instrument of ratification.

This proviso does not constitute a reservation. It will not alter our obligations under the convention.

Because it is not a reservation, other countries cannot invoke it on a reciprocal basis to limit or eliminate their obligation to comply with the convention.

The only obligation in this amendment is for the President to notify other countries that the convention does not authorize or require action inconsistent with the Constitution-a view that the administration shares.

I believe that the President can and will comply with this proviso by simply notifying all countries of our position.

The purpose of this amendment is to address concerns raised by the distinguished ranking minority member of the committee, Senator HELMS, about the legal relationship between multilateral conventions and the Constitution.

The administration's view, which I share along with the America Bar Association and Amnesty International, is that this proviso is unnecessary because nothing in this convention requires or authorize legislation or other action prohibited by the Constitution. Also, it is well settled constitutional law that the Constitution is supreme law over a treaty, as held in Reid versus Covert.

Nevertheless, the administration is willing to accept this proviso because it is not a reservation, it will not be included in the instrument of ratification, and it will not in any way alter U.S. obligations under the convention.

Mr. President, the amendments that I am offering address all of the concerns raised vis-a-vis this treaty. I move adoption of the amendments en bloc.

I yield the floor and yield back such time as I may have.

SOVEREIGNTY AMENDMENT ON TORTURE CONVENTION

Mr. HELMS.

Mr. President, there should be no controversy regarding the proviso which I call the sovereignty proviso. Similar language has been approved by the Senate either as a reservation or as an understanding to be attached to eight different international conventions which impact upon the subject of domestic criminal law.

Today we are considering another convention which purports to undertake obligations relating to our domestic criminal law. The Senate, if it wishes to preserve the supremacy of the Constitution, should once again attach this language.

Specifically, the amendment adds to the Senate Resolution of Ratifiction by requiring that the President, before he deposits the articles of ratification, to notify all pertinent parties that nothing in this convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

It puts other countries on notice that should a conflict arise in this country between obligations imposed by this convention, and obligations imposed by the U.S. Constitution, that our country shall follow the Constitution.

It puts other countries on notice that our Constitution is the supreme law of the land, a law which can never be invalidated or modified in any degree by an international obligation.

The issue is as clear-cut as that.

I take it as a given principle that the underlying object of U.S. diplomacy is to protect and enhance, both in the short run and in the long run, the sovereignty and independence of the United States. This sovereignty is both ***S17489** inherent in, and symbolized by, the Constitution of the United States.

It follows as a necessary corollary that international law is a mere subordinate agent to the U.S. Constitution. When the President of the United States concludes a treaty with another nation or group of nations, he does so independently of any regime of international authority. A treaty is a contract between two independent parties; but unlike domestic contracts which are subordinate to the U.S. Constitution and customary law, a treaty is without sanctions other than the good faith, prestige and power of the contracting parties.

This means that the President retains full authority to interpret the treaty in any manner consistent with the U.S. Constitution, despite any interpretation placed upon it by any other party. The President, for reasons of prudence or policy, may choose to submit a dispute to arbitration; but he is neither

required to do so, nor to accept the results of any arbitration. The sovereignty of the U.S. Constitution must be his ultimate guide, even if enforcing that sovereignty derogates from any system of international law. International law is merely a combination of codification and basic international customary practice leading to expectations of action by a nation state, but it can in no way be determinative of any such act.

Moreover, the U.S. Constitution is something unique among legal systems in the world. No other country allows its sovereignty to repose in its Constitution. For most nations, a constitution is merely a basic statement of positive law intended to guide subsequent delineations of specific regulations. The U.S. Constitution is not a statement of positive law. It is a charter of permitted Federal actions, providing a framework leaving intact the legal systems of the several states. Without the Constitution, the Federal Government would have no sovereignty.

Therefore, the relative positions of the United States versus other nations are not comparable.

I think we should all agree that the Constitution is the supreme law of the land, and neither a treaty nor an executive agreement can authorize action inconsistent with it. I know that there are some who argue that the supremacy of the Constitution was unambiguously established by the Supreme Court with Reid versus Covert (1957). Although the general purport of that case would tend to support the principle, the fact is that even the affirming justices wrote several opinions, disagreeing with the reasons of the others for supporting the principle. For every distinguished jurist whom you can name who believes the matter is settled, another distinguished jurist can come forward to say that it is not settled. If the chances are only 50-50 that it is settled, the gamble is too great.

The State Department agreed only reluctantly with my proviso because they argued that my proposal becomes very damaging at the international level. Such an assertion makes sense only if you believe that the international level is superior in authority to U.S. sovereignty. Since I take an oath to uphold the U.S. Constitution, I am required to believe that the integrity of U.S. Constitution is a matter superior to any damages which might or might not result in subordinate concerns such as the international level.

The Torture Convention is by and large a rhetorical gesture, expressing the revulsion which every decent nation has against torture. Obviously, there is no way that a sovereignty clause can upset the object and purpose of a rhetorical gesture.

But if the convention is meant in itself to be anything more than a rhetorical gesture, or to lay the basis to go beyond a rhetorical gesture, then it may present a clear and present danger to U.S. sovereignty and to the people of the United States. When even nations notorious in the annals of torture such as the Soviet Union and Bulgaria, piously sign such a treaty, it cheapens the consensus.

Finally, there is the question of how the judiciary in the United States might treat the convention. If, in the future, a so-called creative judiciary here in the United States began to interpret the standards of the convention as superseding U.S. customary and constitutional law, then we will wish that the

U.S. Senate had upheld its obligation to protect the U.S. Constitution by adding this proviso.

For the last 6 years, since Senate approval of the Genocide Convention, the Senate has attached to all international instruments which impinge upon domestic criminal law a sovereignty reservation or understanding which clearly acknowledges the supremacy of the U.S. Constitution. If, as its opponents claim, the sovereignty proviso is meaningless, then no harm is done by its approval. If however, conflicts arise between U.S. obligations under this convention and under the Constitution, then this proviso will be of paramount importance in protecting the Constitution. The Senate has approved this language eight times before, and it should do so again today.

Mr. PELL.

Mr. President, I ask for a division vote.

The PRESIDING OFFICER.

The question is on agreeing to the amendments, en bloc.

Those in favor of the amendments will rise and stand until counted. (After a pause.) Those opposed will rise and stand until counted.

The amendments (No. 3200 through No. 3203) were agreed to.

Mr. PELL.

Mr. President, I thank the Senator from North Carolina for his support this afternoon. I thank him very much indeed. We worked very hard to craft this present agreement to enable Senate action on this convention.

I would also like to express my appreciation to the committee staff director, Beryld Christianson, the minority staff director, Dr. James Lucier, and the two professional staff members most responsible for the work on this convention, Dr. Nancy Stetson and Dr. Robert Friedlander.

Mr. MOYNIHAN.

Mr. President, the Senate will shortly vote to give its advice and consent to the ratification of the U.N. Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment. This is an important day for the Senate for two reasons. First, because we will be giving our consent to the ratification of a very important international agreement. The United States has invested enormous resources in this convention. For 7 years our diplomats labored to make the convention more than just words on paper. They made its obligations concrete, meaningful, and, as never before, enforceable. I believe that this is an important step in the continuing battle to end man's inhumanity to man.

This is an important day for another reason. Some years ago the Senate made a mistake. An important international agreement, the Genocide Convention, had languished on the Senate Calendar literally for decades. In order to move forward with the convention, the Senate agreed to attach a reservation to its consent to ratification. This was the so-called sovereignty reservation. It seems innocuous. It states that the convention does not require or authorize any unconstitutional legislation.

The problem with this reservation is that it renders our obligations uncertain. It is quite different from a reservation which states that the United States will not abide by this article or that. It says to every other nation in the world that they must figure out for themselves whether we adhere to a

particular provision or not. It purports to condition every provision of the treaty on the entire corpus of constitutional jurisprudence.

Not surprisingly, various nations objected. Strenuously. Our closest allies objected. By sharp contrast, however, nations which felt that the convention might be invoked against them did not object. They could see the advantage of being able to invoke their own domestic legislation to avoid their obligations and then claim that they had done no more than had the United States. In short, the sovereignty reservation distressed our allies and gave comfort to our adversaries.

Subsequently, many Senators began to realize the magnitude of this mistake. The dangers of the reservation became especially obvious when it was attached to several bilateral mutual legal assistance treaties. The United States found to its chagrin that other nations were drawn to the advantages ***S17490** of the reservation like moths to a flame, invoking their own domestic legislation in efforts to avoid their obligations. International agreements of this type are specifically intended to prevent other nations from invoking their domestic legislation and the Sovereignty Reservation directly undermines this objective.

Ironically, the reservation is also completely unnecessary. The Supreme Court emphatically resolved this point over three decade ago. In Reid versus Covert, decided in 1957, Justice Black wrote:

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights-let alone alien to our entire constitutional history and tradition-to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.

Thus, the reservation does no more than state established constitutional law as regards our domestic legal system. It is clear that the U.S. Government cannot carry out any action which would violate the Constitution even if it is obligated by a treaty to do so. If a treaty obligation violates the Constitution, the U.S. Government will be in violation of its international obligations when it fails to comply. But it cannot-it does not have the constitutional authority-to rectify that fact.

Let me be clear. Neither the Genocide Convention nor the Torture Convention require the United States to undertake any unconstitutional acts. Were that to be the case, the Senate would not give its consent to ratification or would insist upon a specific reservation stating that the United States would not agree to be bound by that specific unconstitutional obligation.

In the case of this convention the Senate is not adopting a sovereignty reservation. The Senate is not insisting upon a reservation. This is not an understanding. It will not be attached to our instrument or ratification. The Senate is simply stating a constitutional truism. Namely: as a matter of

domestic law, the Convention does not-as, indeed, it could not-authorize any unconstitutional legislation. The Senate is simply stating that the President will not deposit the instrument of ratification until it has informed other states of this fact of our constitutional system.

This does not, in any way, alter the legal obligations of the United States as a matter of international law. The United States will not be able to invoke this statement as a defense to its obligations under the convention and no other state will be able to invoke this statement on a reciprocal basis against the United States.

I remain concerned that this statement will create a political and diplomatic problem for the United States and provide a rhetorical device which nations using torture can employ to defend their actions. This will not, as I have stated, be a sound legal defense to their conduct. Nonetheless, it will inevitably and unfortunately be used. I continue to oppose this wholly unnecessary statement and will oppose even this type of proviso in the future. It is only because the United States has invested so much in this convention and because the failure of the United States to ratify during this Congress would be so very unfortunate and would so damage our reputation in international circles that I have reluctantly agreed to this arrangement. It has no legal effect whatsoever. It is unwise and unnecessary. But it is a step in the right direction.

Mr. President, I ask unanimous consent that a letter concerning the sovereignty reservation signed by a bipartisan group of eight Senators be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
Washington, DC, October 5, 1990.

DEAR COLLEAGUE: The United Nations Convention Against Torture will come before the Senate shortly. It is strongly supported by the Administration, the Committee on Foreign Relations and the American Bar Association. The Convention establishes standards which can be used to bring charges against countries practicing torture like Iraq.

The Senate may be asked to create a dangerous "escape clause" for human rights abusers by adopting a totally superfluous "sovereignty reservation".

The reservation-which states that the Convention does not authorize unconstitutional laws-is superfluous because it is already established constitutional law that a treaty cannot override the Constitution (see Reid v. Covert, 354 U.S. 1, 16-17 (1957)). Moreover, the Convention simply does not require unconstitutional legislation.

The reservation is unnecessary-it also has the potential to do great harm. The "sovereignty reservation" will protect human rights abusers because it can be invoked on a reciprocal basis by every state abusing human rights pursuant to its domestic legal system. Our Constitution does not allow human rights abuses, but that is not true for every nation. In fact, it is not uncommon for other nations to permit "exceptions" to the normal protection of human rights during emergencies. If we attach the reservation to the Torture Convention states like the People's Republic of China which permit "reeducation" and forced labor can

reject complaints based on the Convention by invoking our own reservation. The Administration, the ABA, Amnesty International and other human rights groups strongly oppose the reservation for that reason.

True, the Senate adopted the "sovereignty reservation" on the Genocide Convention and some legal assistance treaties. The result? Our closest allies have vigorously objected to our "sovereignty reservation", arguing that it undercuts the Convention. Experience has convinced the Departments of State and Justice that it is not in our national interests to adopt the reservation.

In the case of the legal assistance treaties, we have given other states a right to refuse to help the U.S. bring criminals to justice if they can claim that it would violate their constitutions. Some constitutions restrict extradiction. Other nations might refuse to help track illegal drug profits by invoking bank secrecy provisions. In other words, the "sovereignty reservation" deprives the United States of the very leverage over other states which these treaties were intended to create.

Who does the "sovereignty reservation" help? Not Americans. They are fully protected by the Supremacy Clause of the Constitution. It only provides comfort to states who wish to abuse human rights and protect criminals by invoking their domestic legal systems as a shield for their wrongdoing. That is precisely what these international agreements are intended to prevent.

We strongly urge you to vote to reject the "sovereignty reservation" if it comes before the Senate.

Sincerely,

Daniel Patrick Moynihan, Claiborne Pell, John Kerry, Alan Cranston, Richard Lugar, Nancy Kassebaum, Mark Hatfield, Joseph R. Biden, Jr.

Mr. LUGAR.

Mr. President, the Convention Against Torture that is before the Senate is an important international treaty that merits the Senate's approval. Senator PELL and Senator HELMS have proposed a package of four amendments to the resolution of advise and consent to the Convention as a response to various concerns that have been expressed about the Convention. I would like to briefly comment on the fourth amendment in this package.

The amendment in question is being offered by the distinguished chairman and ranking member of the Foreign Relations Committee in order to help clarify the issue of the constitutionality and sovereignty as they relate to the Convention. They propose adding a new proviso to the resolution of advise and consent-not to the instrument of ratification-that would, in their view, make this clarification. They have made it clear that this proviso does not constitute a reservation to the convention.

Mr. President, I believe it would be preferable if the Senate did not adopt this proviso. Nonetheless, I can accept the proposed amendment with the knowledge that throughout the entire review process here in the Senate no one in the administration, and no one speaking in this body has ever suggested that the Convention requires or authorizes legislation or other actions prohibited by the U.S. Constitution. No one has ever suggested that the convention in any way is in violation of the protection and guarantees in our Constitution. It could be argued, therefore, that it is not necessary to include this proviso in the resolution of advise and consent since the Convention does not, in any way,

authorize ***S17491** action inconsistent with our Constitution.

I know that it is not the intention of the sponsors of this amendment to question or weaken the protection against torture in the Convention, but I fear that we might be inadvertently doing that very thing. We must make clear that adoption of this proviso in no way provides other countries, which might be less inclined to protect citizens from torture than are we, a way to wiggle out of the prohibition against torture in the convention.

Mr. President, I understand that this proviso is not a reservation to our treaty obligations. It will not be included in the instrument of ratification. It does not permit other coutries, under international treaty law, to invoke reciprocal arguments that they need to abide by the Convention's provisions against torture.

The sole requirement of this amendment would be that the President inform other states of the inclusion of this proviso and that it does not violate or is in any way inconsistent with our Constitution.

This is a good convention. It is worth supporting. I believe circumstances before us are such that we should support this amendment and the resolution of advise and consent to the Convention.

Mrs. KASSEBAUM.

Mr. President, I rise today to express my strong support for ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. I am sure my colleagues would agree that the United States can no longer wait to join with other countries who have made this treaty binding.

Last July, Amnesty International released its 1990 report documenting the incidence of torture of thousands of individuals in more than 100 countries. Though we do live with the reality of state-sanctioned torture in some countries, as well as its random occurrence, amnesty's statistics were nothing less than shocking.

Our ratification of the Convention Against Torture will, in itself, lead us closer to the goal it represents. The convention makes legitimate the right of nations to be concerned and to intercede regarding the behavior of another country toward its citizens. The findings of the Committee Against Torture, the overseeing body created by the convention, will aid human rights work throughout the world.

The convention reinforces the international definition of torture and forces each state party to take steps to prevent the practice in each country. Every state party to the convention must make torture a punishable offense and require that torturers be prosecuted or extradited.

Mr. President, some may ask why we should agree to accept the force of this treaty when other countries that are known to condone the practice of torture have accepted it as well. Mr. President, I believe that the fact that these countries want to be seen as opposed to torture is at least a step in the right direction.

Critics of this convention also say it may give other countries opportunity to make charges against the United States. I do not agree with this because I believe we have nothing to fear about our compliance with the terms of this treaty. Torture is simply not accepted in this country, and never will be.

Though I see it as unnecessary, I can accept the provision offered by Senator

HELMS in the package of committee amendments. My colleague from North Carolina continues to insist that this convention be amended to indicate that nothing in it authorizes or requires action prohibited by the U.S. Constitution. This provision we have agreed upon is acceptable because it in no way modifies our obligations under the convention. The compromise does not undercut the purpose and nature of the treaty, nor does it make our stance ambiguous to the other states party to the convention.

I must say, however, that in general I oppose the concept of a sovereignty clause. Such a clause was added to the Genocide Convention, and in the year since its ratification, some 12 countries, all European allies, have formally registered objections to it. I agree with the Bush administration's view that the sovereignty clause is not harmless but, instead, threatens to undermine the whole purpose of the convention, which is the establishment of an effective international legal prohibition against torture.

Mr. President, I would note that the United States is the only permanent member of the U.N. Security Council which has not ratified the convention. The climate of international cooperation supporting Operation Desert Shield makes ratification at this time ideal and necessary. It is important that the United States be consistent in its condemnation of human rights violations.

The Torture Convention, as it is presented to the Senate today, is an agreement in which we should take part. At the very least, it would send a powerful signal to torturers around the world that the United States will not tolerate its practice. As we near the end of the 20th century, let us take this step to help bring the world closer to ending practices which deny individuals basic human dignity.

The PRESIDING OFFICER.

Is all time yielded back on the resolution?

Mr. PELL.

I yield back the remainder of my time.

Mr. HELMS.

I also yield back the remainder of my time.

The PRESIDING OFFICER.

The question occurs on the resolution.

Is there a division requested on the resolution of ratification?

Mr. PELL.

Yes.

The PRESIDING OFFICER.

A division is requested. Senators in favor of the resolution of ratification will rise and stand until counted. (After a pause.) Those opposed will rise and stand until counted.

On a division, two-thirds of the Senators present and voting having voted in the affirmative, the resolution of ratification is agreed to.

The resolution of ratification, as agreed to, is a follows:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988: Provided, That:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itselfs bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Aritic1e 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physcial or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senese or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility ***S17492** to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14

requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United Staes of America may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Mr. PELL.

Mr. President, I move to reconsider the vote.

Mr. HELMS.

I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. PELL.

Mr. President, I am very pleased that the Senate has given its advice and consent to ratification of this very important convention. I believe that we have moved a step closer to the elimination of the inhumane practice of torture. I urge the President to ratify this convention as quickly as possible.

Mr. HELMS.

136 Cong.Rec. S17486-01
(Cite as: 136 Cong. Rec. S17486-01, *S17492)

Mr. President, I suggest the absence of a quorum.
The PRESIDING OFFICER.
The clerk will call the roll.
The assistant legislative clerk proceeded to call the roll.
Mr. SPECTER.
Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.
The PRESIDING OFFICER.
Without objection, it is so ordered.
136 Cong. Rec. S17486-01, 1990 WL 168442 (Cong.Rec.)
END OF DOCUMENT

101ST CONGRESS
2d Session

SENATE

EXEC. REPORT
101-30

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

AUGUST 30, 1990.—Ordered to be printed

Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany Treaty Doc. 100-20]

The Committee on Foreign Relations to which was referred the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988, having considered the same, reports favorably thereon with three reservations, eight understandings, and two declarations, and recommends that the Senate give its advice and consent to ratification thereof.

CONTENTS

33-584

PURPOSE

The Convention establishes a regime for international cooperation in the criminal prosecution of torturers relying on the principle of "universal jurisdiction" and on the obligation to extradite or prosecute. Each State Party is bound to establish criminal jurisdiction over torture and to prosecute torturers who are found in its territory or to extradite them to other countries for prosecution. The Convention also obligates States Parties to include acts of torture as extraditable offenses in treaties concluded between them.

States Parties are obligated to take legislative, administrative, judicial, or other measures to prevent acts of torture in territories under their jurisdiction. The Convention also requires States Parties to undertake to prevent acts of cruel, inhuman, or degrading treatment or punishment in their territories.

The Convention establishes a Committee Against Torture to monitor compliance and to investigate allegations of the use of torture.

BACKGROUND

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and entered into force on June 26, 1987. As of August 1 of this year, 52 States had become Party to the Convention and 21 others had signed.

The United States signed the Convention on April 18, 1988. President Reagan transmitted the Convention to the Senate on May 20, 1988, with several proposed U.S. conditions. In a letter of May 8, 1989 to Senator Pell, the chairman of the Foreign Relations Committee, the Bush administration designated the Convention Against Torture as one for which there is an "urgent need for Senate approval." In January 1990, the Bush administration submitted a revised and reduced list of proposed U.S. conditions.

Adoption of the Convention in 1984 culminated more than a decade of efforts at the international level to eliminate the practice of torture. In 1973 the U.N. General Assembly adopted Resolution 3059 rejecting "any form of torture and other cruel, inhuman or degrading treatment or punishment." Two years later, it adopted the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2 of the declaration states that "any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights." Article 3 states that "no State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment." The declaration served as the foundation for the Convention.

The Convention itself was the product of 7 years of intense negotiations, in which the United States played an active part. The United States helped to focus the Convention on torture rather

than other less abhorrent practices and to strengthen the effectiveness of the Convention by pressing for provisions that would ensure that torture is a punishable offense. Congress demonstrated its support for these activities in 1984 through passage of a joint resolution, sponsored by Senators Pell and Percy, reaffirming the U.S. Government's opposition to torture and commitment to combat the practice of torture and expressing support for the involvement of the U.S. Government in the formulation of international standards and effective implementing mechanisms against torture.

COMMITTEE ACTION

On January 30, 1990, the Committee on Foreign Relations held a public hearing on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Testimony was heard from two administration witnesses, Abraham D. Sofaer, Legal Adviser, Department of State, and Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice. The following public witnesses also presented testimony: Winston Nagan, Chairman, Board of Directors, Amnesty International USA; David Forte, Professor of Law, Cleveland State University; James Silkenat, Chairman, Section of International Law and Practice, American Bar Association; Charles Rice, Professor of Law, Notre Dame Law School; and David Weissbrodt, Briggs and Morgan Professor of Law, University of Minnesota, and Center for Victims of Torture, the Minnesota Lawyers International Human Rights Committee.

The committee met to consider the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on July 19, 1990. The committee voted 10 to 0 to report favorably the Convention with a resolution of ratification to the Senate for its advice and consent. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, and Robb.

The resolution of ratification reported by the committee contains the reservations, understandings, and declarations submitted by the Bush administration.

COMMITTEE COMMENTS

The committee regards the Convention Against Torture as a major step forward in the international community's efforts to eliminate torture and other cruel, inhuman or degrading treatment or punishment. The Convention codifies international law as it has evolved, particularly in the 1970's, on the subject of torture and takes a comprehensive approach to the problem of combating torture. The strength of the Convention lies in the obligation of States Parties to make torture a crime and to prosecute or extradite alleged torturers found in their territory.

Ratification of the Convention Against Torture will demonstrate clearly and unequivocally U.S. opposition to torture and U.S. determination to take steps to eradicate it. Ratification is a natural follow-on to the active role that the United States played in the negotiating process for the Convention and is consistent with longstanding U.S. efforts to promote and protect basic human rights and fundamental freedoms throughout the world. As a party to the

Convention, the United States will be in a stronger position to prosecute alleged torturers and to bring to task those countries in the international arena that continue to engage in this heinous and inhumane practice.

The committee appreciates the efforts of the present administration to address the concerns raised by the human rights community and others, including members of this committee, about the reservations, understandings and declarations submitted by the Reagan administration. Those conditions, in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide. The conditions proposed by the present administration in large measure eliminate this problem.

The reservations, understandings, and declarations proposed by the Bush administration, which are incorporated in the resolution of advice and consent to ratification, are the product of a cooperative and successful negotiating process between the executive branch, this committee, and interested private groups. The committee has adopted these conditions with the understanding that they reflect a broad consensus and with the strong belief that they resolve fully any potential conflicts between the Convention and U.S. law.

During the course of the committee's hearing on the Convention and in subsequent correspondence between various members of the committee and the administration, several issues were raised. Three of these deserve comment because they relate directly to the basic goal of this Convention, to eliminate the practice of torture, and to the ability of the United States to lead the international community in the attainment of this goal.

The first relates to constitutional protections, specifically whether a reservation is necessary in the instrument of ratification to ensure that ratification of the Convention does not bind the United States to take actions prohibited by the Constitution. The administration opposes the so-called constitutional reservation on the grounds that it is "unnecessary" at the domestic level and "damaging" at the international level. A majority of the committee shares this view.

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert*, 354 U.S. 1, 17 (1957). As a matter of domestic law, the Constitution necessarily circumscribes the Government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the Convention whether or not "constitutional" reservation were included in the instrument of ratification.

The Convention Against Torture does not and could not require the United States to take any legislative or other action prohibited by the Constitution. Therefore, a constitutional reservation would add nothing in the way of constitutional protection. However, such a reservation could create numerous problems at the international level.

It could raise questions as to the exact nature of the treaty obligations undertaken by the United States. Moreover, under international treaty law, it automatically becomes available to all other

States. Although the U.S. Constitution provides no justification for torture, other States could limit their compliance with the Convention by invoking the terms of their own constitutions, which may be vague or easily altered. The cornerstone of the regime established by the Convention is the obligation to prosecute or extradite alleged torturers. This obligation could be altered or even negated through reciprocal constitutional reservations. In such circumstances, the Convention's absolute prohibition on torture would be severely undermined.

The inclusion of a constitutional proviso in the U.S. instruments of ratification for the International Convention on the Prevention and Punishment of the Crime of Genocide and, more recently, on six Mutual Legal Assistance Treaties (MLAT's) has turned out to be problematic. In the case of the Genocide Convention, 12 Western European nations have filed written objections to the reservation and others have indicated their intention to oppose a similar reservation if taken on the Convention Against Torture. With respect to the MLAT's, four of the six States involved have voiced strong concerns about the proviso and/or have taken similar reciprocal provisos. Presumably, the reaction would be the same to a constitutional proviso with respect to the Convention Against Torture. In the case of a multilateral treaty, the adverse consequences of such reservations and objections to them are magnified.

The second issue is whether the United States should accept the competence of the Committee Against Torture. Established by the Convention as a monitoring mechanism, the committee consists of 10 experts with recognized competence in the field of human rights who have been nominated and elected by States Parties to the Convention. The committee has competence to investigate reports of the use of torture, to consider complaints from one State Party that another State Party is failing to comply with the Convention, and to consider complaints from individuals against a State Party. The committee's decisions are nonbinding.

During the negotiating process, the United States, under the Reagan administration, attached great importance to the inclusion of adequate implementation provisions and regarded the committee as a "well-conceived, adequately circumscribed scheme" containing the "minimal elements necessary for assuring effective control over compliance with the convention." Regrettably, the Reagan administration reversed itself on this important is sue when it submitted the Convention to the Senate with a reservation stating that the committee's competence would not be recognized by the United States. The formulation proposed by the present administration, that is to recognize the first two aspects of the committee's competence, is a significant improvement. Participation will allow the United States to seek to concentrate the committee's work on situations where the problem of torture is most serious. On the other hand, refusal to recognize the committee's competence would send the wrong signal about the seriousness of the U.S. commitment to eliminate torture and undermine our ability to call another State's actions into question.

The third issue relates to the criteria for determining the meaning of the term "lawful sanctions" in the definition of "torture" in Article 1 of the Convention. The definition excludes pain or suffer-

ng caused as a result of "lawful sanctions." A majority of the committee agrees with the administration's position that the term hould be defined with reference to both domestic and internation- l law and therefore has included the administration's proposed nderstanding on this matter in the resolution of ratification. It is nperative that other States Parties be prevented from using the lawful sanctions" exemption to justify actions which are clearly rture by declaring them lawful under domestic law.

Major Provisions

1. DEFINITION OF "TORTURE"

The Convention makes a distinction between "torture" and ther acts of cruel, inhuman or degrading treatment or punishent." As defined in the Convention, "torture" is:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person * * * when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention's definition is more specific and comprehensive an definitions of "torture" in other human rights treaties. The clusion of "mental" pain and suffering in the definition reflects e increasing use by many countries of psychological forms of tore.

The Convention does not categorize the acts that constitute tore but rather provides criteria by which to determine if an act is rture. For an act to be "torture," it must be an extreme form of uel and inhuman treatment, cause severe pain and suffering, and intended to cause severe pain and suffering. The Convention als only with torture committed in the context of governmental thority; acts of torture committed by private individuals are exded.

2. EFFECTIVE MEASURES TO PREVENT ACTS OF TORTURE

The Convention obligates each State Party to take "effective legative, administrative, judicial or other measures" to prevent acts torture in any territory under its jurisdiction.

3. UNIVERSAL JURISDICTION/EXTRADITION

The Convention establishes a regime for international cooperan in the criminal prosecution of torturers based on the principle "universal jurisdiction" and on the obligation to extradite or secute. Each State Party to the Convention has an obligation to ablish criminal jurisdiction to prosecute alleged torturers who found in its territory or to extradite them to other countries for secution. The Convention obligates States Parties to include acts torture as extraditable offenses in treaties concluded between m.

4. WAR/SUPERIOR ORDERS

The Convention specifies that "no exceptional circumstances," including war, internal political instability, other public emergencies, or orders from a superior officer or public authorities, may be invoked as a justification for torture.

5. NONREFOULEMENT

States Parties have an obligation not to expel, return ("refouler") or extradite a person to another State where there are "substantial grounds" for believing that the individual would be tortured.

6. EDUCATION AND TRAINING

The Convention requires each State Party to ensure that education and information regarding prohibitions against torture be included in the training of law enforcement officers and other relevant personnel and public officials.

7. CIVIL REDRESS

States Parties to the Convention are required to provide a victim of torture with a legal redress and an enforceable right to fair and adequate compensation. Victims, therefore, can sue for damages the authorities responsible for the acts of the torturer.

8. CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The Convention requires States Parties to "undertake to prevent" other acts of "cruel, inhuman or degrading treatment or punishment which do not amount to torture" in territories under their jurisdiction. Such acts must be committed by an individual acting in an official capacity.

9. COMMITTEE AGAINST TORTURE

The Convention establishes a Committee Against Torture composed of 10 experts in the human rights field, nominated and elected by the States Parties. The committee has the authority to receive compliance reports from the States Parties and the competence to investigate allegations of the use of torture by one State Party against another and by individuals against a State Party and to initiate contact with a State Party and conduct a confidential inquiry when there is reliable evidence that torture is being practiced in that State's territory. States Parties to the Convention must specifically recognize the competence of the committee to receive and consider complaints from other States Parties or from individuals. States Parties may decline to recognize the committee's competence to conduct an investigation in the absence of a formal complaint.

Bush Administration Conditions

The Reagan administration transmitted the Convention to the Senate in May 1988 with 17 separate conditions (4 reservations, 9 understandings, and 4 declarations). The Bush administration reviewed these proposals in response to congressional and public concern about their impact on the international community's effort to

liminate torture. The product of this review was a reduced and re-ised package of proposed conditions to be incorporated in the in-trument of ratification. Following is a summary of the conditions roposed by the Bush administration.

RESERVATIONS

Federal-State

The Convention (Articles 10-14, 16) obligates States Parties to rovide education and training to law enforcement personnel, eview law enforcement procedures, investigate allegations of tor-ure, provide civil redress in cases of torture, and prevent other ruel, inhuman or degrading treatment or punishment not amount-ng to torture. Because of the decentralized distribution of police nd other governmental authority at Federal, State, and local vels, the administration proposed a Federal-State reservation.

This reservation states that the Federal Government will fulfill he U.S. obligation where it exercises legislative and judicial juris-iction and that it will take appropriate measures to ensure that tates and localities take steps to fulfill the provisions of the Con-ention. This reservation would not exempt State or local officials om the prohibitions against torture in the Convention.

Article 16—Cruel, Inhuman or Degrading Treatment or Punish-ment

Article 16 of the Convention obligates States Parties to prevent cts of cruel, inhuman or degrading treatment or punishment hich do not amount to torture from being practiced on their terri-ories. The administration proposed a reservation limiting its obli-ation under this article to cruel, unusual, and inhumane treat-ent or punishment prohibited by the 5th, 8th, and/or 14th mendments to the Constitution.

The administration takes the position that the reference in arti-e 16 to "cruel" and "inhuman" treatment or punishment appears be roughly equivalent to the treatment or punishment barred in e United States by the 5th, 8th, and/or 14th amendments to the onstitution. However, "degrading" treatment or punishment has en interpreted, for example by the European Commission on uman Rights, to include treatment that would probably not be rohibited by the U.S. Constitution and may not be illegal in the nited States. In view of the ambiguity of the terms, the adminis-ation believes that U.S. obligations under this article should be mited to conduct prohibited by the U.S. Constitution.

Article 30—International Court of Justice

Article 30, Paragraph 1, of the Convention provides for submis-on of a dispute which cannot be settled by arbitration to the nternational Court of Justice; paragraph 2 permits a State party reserve itself from the obligation under paragraph 1 at the time signature, ratification, or accession. Asserting its policy of not cepting the compulsory jurisdiction of the International Court of stice, the administration proposed a reservation exercising the tion under paragraph 2 of Article 30 of the Convention.

UNDERSTANDINGS

1. Article 1—Definition of "Torture"

Article 1 of the Convention defines "torture" as follows:

> • • • any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person • • • when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

2. Article 1

The administration proposed the following understandings with respect to article 1:

a. The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The above language represents a revision of the Reagan administration's proposed understanding, which was criticized for setting too high a threshold of pain for an act to constitute torture.

b. The second understanding states that the definition of "torture" in article 1 is intended to apply "only to acts directed against persons in the offender's custody or physical control." This understanding is designed to clarify the relationship of the Convention to normal military and law enforcement operations.

c. The third understanding states that the term "sanctions" in article 1 includes judicially imposed sanctions and other enforcement actions authorized by U.S. law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law." The Reagan administration's language has been revised to make it clear that to be "lawful," sanctions must also meet the standards of international law.

d. The fourth understanding states that the public official, "prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." The purpose of this condition is to make it clear that both actual knowledge and "willful blindness" fall within the definition of the term "acquiescence" in article 1.

e. In order to guard against the improper application of the Convention to legitimate U.S. law enforcement actions, the administration proposed an understanding that noncompliance with applicable legal procedural standards does not *per se* constitute "torture."

3. Article 3—Non-Refoulement

Article 3 forbids a State Party from forcibly returning a person to a country where there are "substantial grounds for believing that he would be in danger of being subjected to torture."

Under U.S. immigration law, the United States can not deport an individual if "it is more likely than not that the alien would be subject to persecution." *INS* v. *Stevic*, 467 U.S. 407 (1984). U.S. immigration law also provides that asylum may be granted to an alien who is unwilling to return to his home country "because of persecution or a well-founded fear of persecution * * *" *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987).

The administration's proposed understanding adopts the more stringent *Stevic* standard because the administration regards the nonrefoulement prohibition of article 3 as analogous to mandatory withholding of deportation. Therefore, article 3 would apply when it is "more likely than not" that the individual would be tortured upon return.

4. Article 14—Compensation

Article 14 requires each State Party to ensure that victims of torture or their surviving relative(s) have the right to redress and adequate compensation. The negotiating history of the Convention indicates that article 14 requires a State Party to provide this right of action for damages only for acts of torture committed in its territory. The administration proposed an understanding which reflects the intent of the negotiating parties.

5. Death Penalty

The administration proposed an understanding stating that international law does not prohibit the death penalty and that the United States does not consider the Convention to restrict or prohibit the use of the death penalty, including the confinement prior to imposition of sentence. This understanding is designed to clarify that ratification of the Convention will not alter U.S. law regarding the death penalty issue.

DECLARATIONS

1. Non-Self-Executing Articles

The administration proposed a declaration that the Convention is not self-executing for articles 1 through 16. Since the majority of the obligations to be undertaken by the United States pursuant to the Convention are already covered by existing law, additional implementing legislation will be needed only with respect to article 5, dealing with areas of criminal jurisdiction. The effect of the proposed declaration is to clarify that further implementation of the Convention will be through implementing legislation. In keeping with past practice, upon enactment of this legislation, the President will deposit the instrument of ratification.

2. Article 21—Committee Against Torture

The administration's proposed declaration recognizes the competence of the Committee Against Torture to investigate complaints

under the Convention. This declaration will enable the United States to bring formal complaints against other States Parties allegedly violating the Convention.

SUMMARY AND ANALYSIS

The following summary and technical analysis of the Convention was submitted by the Reagan administration at the time of transmittal of the Convention to the Senate on May 20, 1988. The Bush administration has omitted and revised some of the proposed conditions referred to in this submission, as indicated in appendix A.

SUMMARY AND ANALYSIS OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

GENERAL BACKGROUND

Among the antecedents of the Convention are the laws of war. The 1907 Hague Convention on the Laws and Customs of War on Land provides that prisoners of war "must be humanely treated" and that inhabitants of occupied territories generally may not be forced "to furnish information about the army of the other belligerent, or about its means of defense" or compelled "to swear ally glance to the hostile Power." (Annex, "Regulations Respecting the Laws and Customs of War on Land," Articles 4, 44, and 45.) The Third and Fourth Geneva Conventions of 1949, to which virtually all countries are parties, forbid "any form of torture or cruelty" toward prisoners of war and prohibit the use of "physical or moral coercion * * * against protected persons, in particular to obtain information from them or from third parties" as well as "taking any measure of such a character as to cause the physical suffering, or extermination of protected persons * * *", including "brutality" as well as "murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person. * * *" (Third Convention, Article 87; Fourth Convention, Articles 31 and 32.)

With the development of more general human rights instruments, the prohibition of torture and inhuman treatment or punishment has been established as a standard for the protection of all persons, in time of peace as well as war. The first major United Nations document on human rights, the 1948 Universal Declaration of Human Rights, provides in Article 5:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Subsequently, the International Covenant on Civil and Political Rights was developed, which elaborated binding treaty obligations with respect to a broad range of civil and political rights. This treaty, which was opened for signature in 1966, is now in force for some 80 countries (but not for the United States, which has signed but not ratified it). It provides in Article 7:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 4 further provides that no derogation can be made from this provision, even in time of public emergency.

Prohibitions against torture are also contained in the regional
iman rights conventions. American Convention on Human
ights, Article 5(2) (OAS Treaty Series No. 36) (the United States
is signed, but not ratified, this Convention); European Convention
r the Protection of Human Rights and Fundamental Freedoms,
rticle 3 (213 U.N.T.S. 221); African Charter on Human and Peo-
es' Rights, Article 5 (ASIL Int'l Legal Mat., Jan. 1981, p. 58).

A later instrument, which sets forth more detailed non-binding
uidelines" with respect to torture and other cruel, inhuman or
grading treatment or punishment, is the "Declaration on the
rotection of All Persons From Being Subjected to Torture and
ther Cruel, Inhuman or Degrading Treatment or Punishment,"
lopted by the United Nations General Assembly without a vote
December 9, 1975. A/Res/3452 (XXX). This declaration, which
ntains 12 articles defining torture and setting forth recommend-
measures for its prevention and punishment, was a point of de-
arture for the drafting of the Convention Against Torture.

The Convention is also modeled after four earlier multilateral
nventions against terrorist acts, to each of which the United
ates is a party: the 1970 Hague Convention for the Suppression
Unlawful Seizure of Aircraft (Hijacking) (TIAS 7192; 22 UST
41); the 1971 Montreal Convention for the Suppression of Unlaw-
l Acts Against the Safety of Civil Aviation (Sabotage) (TIAS 7570;
UST 564); the 1973 United Nations Convention on the Preven-
on and Punishment of Crimes Against Internationally Protected
ersons, including Diplomatic Agents (protection of Diplomats)
IAS 8532; 28 UST 1975); and the 1979 International Convention
gainst the Taking of Hostages (Hostages) (U.N.G.A. Res. 34/46,
ecember 17, 1979; Senate Ex. N, 96th Cong., 2d Sess. (1980)). Each
these conventions establishes a regime for international coopera-
on in the criminal prosecution of persons committing the specific
fense covered, relying particularly on stalled "universal jurisdic-
on"—the obligation of each State Party to establish criminal ju-
sdiction to prosecute offenders who are found in its territory—
d on the obligation to extradite offenders or submit their cases
r prosecution.

DECLARATION REGARDING THE NON-SELF-EXECUTING NATURE OF THE CONVENTION

Although the terms of the Convention, with the suggested reser-
tions and understandings, are consonant with U.S. law, it is nev-
theless preferable to leave any further implementation that may
desired to the domestic legislative and judicial process. The fol-
wing declaration is therefore recommended, to clarify that the
ovisions of the Convention would not of themselves become effec-
ve as domestic law:

> "The United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."

FEDERAL-STATE RESERVATION

Given the decentralized distribution of police and other govern-
ental authority at federal, state and local levels, it is desirable to
ake the following federal-state reservation:

> "The United States shall implement the Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention."

This reservation would relate primarily to the obligations contained in Articles 10–14 and 16 of the Convention relating to training of law enforcement personnel, review of law enforcement procedures, investigation of allegations of torture, and complaints and civil suits alleging torture. it would not exclude state or local officials from the prohibitions on torture contained in the Convention.

ARTICLE 1

Article 1 defines "torture" for purposes of the Convention. The Convention seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. "Torture" is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture.

The Convention does not attempt to catalog the various acts that constitute torture, nor was it thought possible to draw a precise line between torture and lesser forms of cruel, inhuman or degrading treatment or punishment. Rather, the Convention sets forth certain criteria which must be applied in determining whether a given act amounts to torture. For an act to constitute torture, it must be an extreme form of cruel and inhuman treatment, it must cause severe pain and suffering, and it must be intended to cause severe pain and suffering.

The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to "other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture.* * * *" The negotiating history indicates that the underlined portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.

The extreme nature of torture is further emphasized in the requirement that torture cause *severe* pain and suffering. Article 1 recognizes that severe pain and suffering may be mental as well as physical. Mental pain and suffering is, however, a relatively more subjective phenomenon than physical suffering. Accordingly, in determining when mental pain and suffering is of such severity as to constitute torture, it is important to look to other, more objective criteria such as the degree of cruelty or inhumanity of the conduct causing the pain and suffering.

Further, the requirement of intent to cause severe pain and suffering is of particular importance in the case of alleged mental

pain and suffering, as well as in cases where unexpectedly severe physical suffering is caused. Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention. The requirement of intent is emphasized in Article 1 by reference to illustrate motives for torture: obtaining information of a confession, intimidation and coercion, or any reason based on discrimination of any kind. The purposes given are not exhaustive, as is indicated by the phrasing "for such purposes as." Rather, they indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate intention or malice.

In view of the above, such rough treatment as generally falls into the category of "police brutality, " while deplorable, does not amount to "torture." The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain. *See* European Court of Human Rights, *Judg. Court*, January 18, 1978, *Case of Ireland v. United Kingdom* Series A, No. 25, 2 E.H.R.R. 25, 80; European Commission of Human Rights, *Op. Com.*, 5 November 1969, *Greek Case*, § 11, XII p. 501.

The scope of the Convention is limited to torture "inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Thus, the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted "under color of law." In addition, in our view, a public official may be deemed to "acquiesce" in a private act of torture only if the act is performed with his knowledge and the public official has a legal duty to intervene to prevent such activity.

The Convention excludes from the definition of torture such pain or suffering as arises only from or is inherent in or incidental to lawful sanctions. The term "sanctions" is not synonymous with the term "punishments." The word "punishments" may be construed more narrowly to comprehend only penalties for violation of a law, rule, or regulation, while the word "sanctions" includes as well penalties imposed in order to induce compliance. In the view of the United States, the term "sanctions" also embraces law enforcement actions other than judicially imposed penalties. The Convention does not specify whether the "lawfulness" of sanctions should be determined by domestic or international law. During the negotiations, support was expressed for both alternatives. Although law enforcement actions authorized by U.S. law are not performed with the specific intent to cause excruciating and agonizing pain or suffering (and therefore do not meet the definition of torture contained in Article 1), we believe it is desirable to express the understanding that the "lawfulness" of such actions would be determined by U.S. law or by judicial interpretation of such law, in order to guard against illegitimate claims that such law enforcement actions constitute torture.

The following understandings are recommended to reflect the [illegible] understanding of Article 1 as explained above. These

understandings are intended to guard against the improper application of the Convention to legitimate U.S. law enforcement actions and thereby would protect U.S. law enforcement interests.

"The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.

"The United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

"The United States understands that 'sanctions' includes not only judicially imposed sanctions but also other enforcement actions authorized by United States law or by judicial interpretation of such law.

"The United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have knowledge of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

"The United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture."

ARTICLE 2

Article 2 provides generally that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. The term "territory under its jurisdiction" refers to all places that the State Party controls as a governmental authority, including ships and aircraft registered in that State.

In addition, Article 2 provides that no exceptional circumstances, such as war or public emergency, may be invoked as a justification for torture. The use of torture in wartime is already prohibited within the scope of the Geneva Conventions, to which the United States and virtually all other countries are Parties, and which in any event generally reflect customary international law. The exclusion of public emergency as an excuse for torture is necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.

Article 2 further provides that the plea of "superior orders" is not a defense to torture. The United States had proposed that the Convention expressly provide that superior orders nonetheless may be considered as a factor in mitigation of punishment, corresponding to the approach taken by the Nuremberg Tribunal. While this proposal was ultimately not adopted, it appears not to have been rejected. Rather, the matter has been left to the judgment of each State Party, and the United States could thus take superior orders into account in imposing criminal punishment for torture.

Under current U.S. military law, obedience to superior orders is not a defense to charges under the Uniform Code of Military Justice, unless the accused knew the orders to be unlawful or a person

of ordinary sense and understanding would have known the orders to be unlawful. Rule for Court Martial 916(d), *Manual for Courts-Martial* (Rev. 1984). As noted above, the United States understands torture to be limited to deliberate and calculated acts of an extremely cruel and inhuman nature, performed with a specific intent to cause severe pain or suffering. A person of ordinary sense and understanding would know such acts to be criminal. Therefore, no change in U.S. military law would be required by Article 2 of the Convention.

Although no circumstances justify torture, legitimate acts of self-defense or defense of others do not constitute torture as defined by Article 1, since they are not performed with the specific intent to cause excruciating and agonizing pain or suffering. To clarify that Article 2 does not affect the availability of these common law defenses, the following understanding is recommended:

> "The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."

ARTICLE 3

Article 3 provides that no State Party shall expel, return, or extradite a person to another State where substantial grounds exist for believing that he would be in danger of being subjected to torture.

Under current U.S. law, an individual may not normally be expelled or returned where his "life or freedom would be threatened * * * on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1). The U.S. Supreme Court has interpreted this provision to mean that a person entitled to its protections may not be deported to a country where it is more likely than not that he would be persecuted. *INS* v. *Stevic*, 467 U.S. 407 (1984). To clarify that Article 3 is not intended to alter this standard of proof, the following understanding is recommended:

> "The United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'"

Article 3 would extend the prohibition on deportation under existing U.S. law to cases of torture not involving persecution on one of the listed impermissible grounds. This prohibition applies to expulsion or return of persons in the United States to a particular State, and does not grant a right to seek entry or to avoid expulsion to other States.

Article 3 would also add a further treaty basis for denying extradition as between States both of which are Parties to the Convention Against Torture. It was recognized, however, in the drafting of Article 3, that the obligation expressed might conflict in a given case with the obligation to extradite under a bilateral extradition treaty with a State which is not party to the Convention. Accordingly, it was acknowledged that some States Parties might wish to

make a reservation stating that they do not consider themselves bound by Article 3 insofar as it may not be compatible with their obligations toward States not party to the Convention under extradition treaties concluded before the date of the signature of the Convention.

Generally, the extradition treaties of the United States do not provide a basis for denying extradition on the grounds that an individual would be in danger of being subjected to "torture", as such, in the State to which he is extradited. It is likely that not all of the States with which we have extradition treaties will become parties to the Torture Convention. Thus, a conflict could conceivably arise between the obligation of the United States to extradite to a particular State under a bilateral extradition treaty, and our obligation under Article 3 of the Torture Convention not to extradite to any State where an individual would be in danger of being subjected to torture. The following reservation is recommended:

> "The United States does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not party to the Convention under bilateral extradition treaties with such States."

This reservation would eliminate the possibility of conflicting treaty obligations. This is not to say, however, that the United States would ever surrender a fugitive to a State where he would actually be in danger of being subjected to torture. Pursuant to his discretion under domestic law, and existing treaty bases for denying extradition, the Secretary of State would be able to satisfy himself on this issue before surrender. The reservation will enable the United States to avoid having to process claims under the Torture Convention when such potentially conflicting obligations are present. Instead, the executive branch will be free to act with relative speed and informality.

Article 3 further specifies that, in determining whether grounds exist to believe that an individual would be in danger of being subjected to torture, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights. The words "where applicable" indicate that the competent authorities must decide in each case whether and to what extent the existence of "human rights violations" in a given country is in fact a relevant factor in a particular case. For example, the gross and flagrant denial of freedom of the press, without more, would not generally raise a presumption of torture.

The reference in Article 3 to "competent authorities" appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return. The following declaration is recommended to specify the competent authorities:

> "The United States declares that the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases."

ecause the Convention is not self-executing, the determinations of ese authorities will not be subject to judicial review in domestic ourts.

ARTICLE 4

Article 4 provides that each State Party shall ensure that all acts f torture, as well as attempts to commit torture and complicity or articipation in torture, are criminal offenses, punishable by appro-riate penalties taking into account the grave nature of such of-nses. This article, as well as the following Articles 5–7, are closely odeled on the provisions of the Conventions on Hijacking, Sabo-age, Protection of Diplomats, and Hostages.

As discussed in greater detail in connection with Article 5, fol-owing, U.S. jurisdiction under existing law appears not to extend o acts of torture committed abroad. Acts of torture committed in he United States, however, as well as acts in the United States onstituting an attempt or conspiracy to torture, would appear to iolate criminal statutes under existing state or federal law. When uch acts are subject to state jurisdiction, the offense would pre-umably be a common crime such as assault or murder. In particu-ar cases, the nature of the activity or persons involved could give ise to a federal offense as well, such as interstate kidnapping or ostage-taking. *See, e.g.*, 18 U.S.C. § 112, § 114, § 115, § 878, § 1201 nd § 1203.

Where the acts are subject to federal jurisdiction, similar ommon crimes are defined under federal criminal law, for exam-le, assault, maiming, murder, manslaughter, attempt to commit urder or manslaughter, and rape. 18 U.S. § 113, § 114, § 1111, 1112, § 1113, and § 2031. Conspiracy to commit the above crimes nd being an accessory after the fact are also offenses. 18 U.S.C. 3, § 371 and § 1117. Moreover, where acts are committed within he special maritime and territorial jurisdiction located within a tate, federal law incorporates criminal offenses as defined by state aw. 18 U.S.C. § 13.

In addition to such common criminal offenses, federal law de-ines two "constitutional crimes" that are particularly relevant. Jnder 18 U.S.C. § 241, conspiracy to injure, oppress, threaten or In-imidate any citizen in the free exercise or enjoyment of any right r privilege secured by the Constitution or laws of the United tates is a crime punishable by a $10,000 fine, up to ten years im-risonment, or both. Under 18 U.S.C. § 242, whoever willfully sub-ects any U.S. inhabitant to deprivation of such rights, privileges, r immunities under color of law, may be fined up to $1,000, or im-risoned for up to a year, or both. Under both statutes, the offend-r may be sentenced to life imprisonment where death results. In articular cases, certain other civil rights statutes might also be elevant. *See, e.g.*, 18 U.S.C. § 245 or § 594. Moreover, under 18 .S.C. § 3571, for any offense occurring on or after December 11, 987, an individual convicted for a felony or for a misdemeanor re-ulting in the loss of human life is subject to a possible fine of up to 250,000. If convicted for any other Class A misdemeanor, the indi-

In general, protection against torture is afforded by the 8th, 5th and 14th amendments to the U.S. Constitution. The eighth amendment prohibition of cruel and unusual punishment is, of the three, the most limited in scope, as this amendment has consistently been interpreted as protecting only "those convicted of crimes." *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977). The eighth amendment does, however, afford protection against torture and ill-treatment of persons in prison and similar situations of criminal punishment.

In other situations, the 5th and 14th amendments provide protection against torture. Such protection is afforded most generally by substantive due process protection of the right to personal security. *See Youngberg* v. *Romeo*, 457 U.S. 307, 315–6 (1982). The prohibition against self-incrimination also provides more specific protection against torture being used to coerce a confession. *Williams* v. *United States*, 341 U.S. 97 (1951). *Duncan* v. *Nelson*, 466 F.2d 939 (7th Cir. 1972), *cert. den.*, 409 U.S. 894 (1972).

Torture could, in particular circumstances, violate other constitutional rights as well, for example, the fourth amendment guarantees against unreasonable searches and seizures, or sixth amendment rights concerning trial.

In view of the above, it appears that the conduct of "torture" within the United States or U.S. jurisdiction will violate some federal or state criminal law. Existing law is therefore sufficient to implement Article 4, except to reach torture occurring outside U.S. jurisdiction, as discussed below.

ARTICLE 5

Article 5 provides that each State Party shall take necessary measures to establish its jurisdiction over torture offenses, as referred to in Article 4, in three circumstances: (1) when the offense is committed in any territory under its jurisdiction, or on board a ship or aircraft registered in that State (Article 5(1)(a)), (2) when the alleged offender is a national of that State (Article 5(1)(b)), and (3) when the alleged offender is present in any territory under its jurisdiction and is not extradited as provided in Article 8 (Article 5(2)). In addition, a State may, if it "considers it appropriate," establish its jurisdiction over cases in which the victim is one of its nationals (Article 5(1)(c)).

A major concern in drafting Article 5, and indeed, in drafting the Convention as a whole, was whether the Convention should provide for possible prosecution by any State in which the alleged offender is found—so-called universal jurisdiction. The United States strongly supported the provision for universal jurisdiction, on the grounds that torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences. Provision for "universal jurisdiction" was also deemed important in view of the fact that the government of the country where official torture actually occurs may seldom be relied upon to take action. Of course,, if a foreign government were to use the universal jurisdiction provisions contained in Articles 5-

to bring an unjustified prosecution against a U.S. citizen, the U.S. overnment would strongly resist such an illegitimate action.

As discussed above, existing federal and state law appears sufficient to establish jurisdiction when the offense has allegedly been mmitted in any territory under U.S. jurisdiction or on board a ip or aircraft registered in the United States. *See* 18 U.S.C. § 7; U.S.C. App. §§ 1301 (38), 1472. Implementing legislation is therere needed only to establish Article 5(1)(b) jurisdiction over ofnses committed by U.S. nationals outside the United States, and establish Article 5(2) jurisdiction over foreign offenders commitg torture abroad who are later found in territory under U.S. judiction. Recommended legislation will be transmitted to Coness by the Department of Justice. Similar legislation has already en enacted to implement comparable provisions of the Conventns on Hijacking, Sabotage, Hostages, and Protection of Diplots. 18 U.S.C. § 32, § 112(e), § 878(d), § 1116(c), § 1201(e), and 1203; 49 U.S.C. App. § 1301(38)(d) and § 1472(n).

The following declaration is recommended:

> "The United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted."

ARTICLE 6

Article 6 describes the procedures to be followed when an alleged fender is found in the territory of a State Party. First, where the ate is satisfied that the circumstances so warrant, based on an amination of the available information, the State must take the leged offender into custody or take other legal measures to secure s presence, as provided by its law, until such time as is necessary enable either criminal proceedings or extradition to be institut-

When the individual held in custody is not a national of the holdg State, he must be assisted in communicating with a representae of the State of which he is a national. This step reflects the stomary international procedure when a non-national is held in stody. (1963 Vienna Convention on Consular Relations, Article 1)(b), TIAS 6820, 21 UST 77.)

The State that takes the individual into custody must also notify ose States that could also have jurisdiction over the offense ider Article 5 of this fact and of the circumstances that warrant s detention. The State must make a "preliminary inquiry into e facts" and inform other interested States of its findings and ether it intends to exercise jurisdiction.

This provision is closely modeled after comparable provisions of e Conventions on Hijacking, Sabotage, Protection of Diplomats, d Hostages, with certain drafting clarifications. In paragraph 1, e phrase "after an examination of information available to it" is added in order to make clear that the decision whether to take individual into custody entails an examination of available inrmation even though a stalled "preliminary" investigation will made subsequently. The word "legal" was added to the phrase ustody or other measures" ("custody or other legal measures") in

order to guard against an overly broad interpretation of the word "measures."

The implementation of this provision relies on existing law and procedure for investigating alleged crimes and no further implementing legislation is required.

ARTICLE 7

Article 7 provisions that if a State does not extradite an alleged offender found within its jurisdiction, it shall "submit the case to its competent authorities for the purpose of prosecution." A comparable provision is found in the Conventions on Hijacking, Sabotage, Protection of Diplomats, and Hostages.

Substantial debate occurred on whether to include this strict so-called extradite or prosecute rule in the Convention. A number of State proposed a weaker formulation—that a State would be obligated to submit a case for prosecution only where a request for extradition is received and refused. The United States and others were concerned, however, that a weaker provision would create "a loophole in the Convention, thereby creating potential safe-havens for torturers." After lengthy consideration, the stronger provision was adopted in 1984.

In case where torture is alleged and a State does not extradite the alleged torturer, Article 7 does not require prosecution. Rather, it requires submission of the case to competent authorities "for the purpose of prosecution." The decision whether to prosecute entails a judgment whether a sufficient legal and factual basis exists for such an action. (WG 82, para. 27.) Paragraph 2 of Article 7 provides accordingly that "these authorities shall take their decision [regarding prosecution] in the same manner as in the case of any ordinary offense of a serious nature under the law of that State." Paragraph 2 implicitly recognizes that the law of each State should be used to determine "the standards of evidence required for prosecution and conviction" and provides that no lesser standard shall be applied when jurisdiction is asserted on the basis of the presence of the offender than is applied when the alleged offender is a national or when the alleged offense occurred within the acting State's territory.

Although Article 5 provides for universal jurisdiction over acts of torture, the United States is not generally the most appropriate forum for hearing cases involving acts of torture committed in foreign countries by one alien against another. Instead, the State where the torture occurred has a greater interest than does the United States in prosecution. The following declaration is therefore recommended:

> "The United States declares that it will submit a case involving alleged torture committed by an alien outside the United States to its competent authorities for the purpose of prosecution, pursuant to Article 7(1) of the Convention, only if extradition of the offender to the State where the offense was committed is not an adequate alternative.

The application of immunities from criminal prosecution, such as those immunities enjoyed by diplomats under the Vienna Convention on Diplomatic Relations, was not explicitly discussed during

ıe negotiation of the Convention. Article 7(2), however, implicitly ·cognizes that such immunities are not affected by the Conven-on, by stating that the authorities "shall take their decision in ıe same manner as in the case of any ordinary offense of a serious ıature." (The question of immunities also arises under Article 14, hich obligates States Parties to provide an enforceable right to ıir and adequate compensation.)

Finally, Article 7(3) provides generally that the alleged offender ·hall be guaranteed fair treatment at all stages of the proceed-ıgs." This paragraph stems from a U.S. proposal and is intended ı safeguard the rights of the accused.

ARTICLE 8

Article 8 addresses the legal framework for extradition of alleged ·fenders. This provision, which is also modeled on corresponding rovisions in the Conventions on Hijacking, Sabotage, Protection of ıplomats, and Hostages, was initially proposed by the United tates. Paragraph 1 provides that the offenses described in Article will be "deemed to be included as extraditable offenses" in preex-ting extradition treaties between States Parties to the Convention ıd will be included in future extradition treaties which are con-uded. The terms of such bilateral extradition treaties, and not the onvention Against Torture, will determine whether or not the nited States has an obligation to extradite in a given case.

Paragraphs 2 and 3 concern extradition requests when no bilat-·al extradition treaty exists between the requesting and requested tate. If, under the law of the requested State, a treaty is required ·r extradition, that State may at its option consider the Conven-on as the treaty that provides the legal basis for extradition. If, ı the other hand, the law of the requested State permits extradi-on without a treat. must extradite subject to the conditions estab-·hed by its law.

Under U.S. law, a treaty is required for extradition from the nited States. However, relevant U.S. Supreme Court decisions in-ıcate that Article 8 alone would not provide a sufficient treaty ısis for extradition.

ARTICLE 9

This article, also modeled on the Conventions on Hijacking, Sabo-ıge, Protection of Diplomats, and Hostages, provides that States ·hall afford one another the greatest measure of assistance in con-ection with criminal proceedings" under the Convention, includ-ıg the supply of all evidence at their disposal necessary for the roceedings.

A U.S. proposal that Article 9(1) further provide that "the law of ıe State requested shall apply in all cases was not adopted, but it ppeared to be generally recognized that the law of the requested tate would apply to determine the scope of the assistance that can ·• afforded.

The second paragraph of Article 9 differs from the corresponding rovision of the Conventions on Hijacking, Sabotage, Protection of ·iplomats, and Hostages. These Conventions, and the initial draft

tained in paragraph 1 "shall not affect" mutual judicial assistance obligations contained in other treaties. This was revised, however, in the final text of the Torture Convention to provide that the obligation contained in paragraph 1 shall be carried out "in conformity with" any other treaties on mutual judicial assistance. This revision was intended to make it clear that paragraph 2 should not be interpreted to weaken the obligation established by paragraph 1.

In the event that no treaty on mutual judicial assistance is in effect between the respective States, Article 9(2) is irrelevant and assistance would be afforded as provided in Article 9(1) of the Convention.

ARTICLES 10 AND 11

Article 10 provides that States Parties shall ensure that education and information regarding the prohibition against torture are fully included in the training of persons who may be involved in the custody, interrogation, or treatment of persons arrested, detained, or imprisoned. Article 11 further provides that each State shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for custody and treatment with a view toward preventing cases of torture.

In keeping with the federal-state reservation discussed above, the United States would implement these obligations with respect to law enforcement forces acting under its authority or control; with respect to law enforcement forces acting under the authority or control of the states or municipalities, the Federal Government would take appropriate measures to the end that the competent authorities of the states may take appropriate measures for the fulfillment of Articles 10 and 11.

ARTICLES 12 AND 13

Article 12 provides that the competent authorities of a State will proceed to "a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." Such an investigation is to be made on the initiative of the State authorities and not only when a formal complaint is made.

Article 13 provides that an individual should have the right to bring a complaint of torture and to have his case promptly and impartially examined by the competent authorities. In such event, the State must take steps where necessary to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of bringing the complaint or giving evidence with respect to it.

ARTICLE 14

Article 14 provides that a victim of torture shall have a legal right to redress and an enforceable right to fair and adequate compensation. Where the victim dies as a result of torture, his dependents shall he entitled to compensation.

The negotiating history of the Convention indicates that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in its territory, not for

acts of torture occurring abroad. Article 14 was in fact adopted with express reference to "the victim of an act of torture *committed in any territory under its jurisdiction.*" The italicized wording appears to have been deleted by mistake. This interpretation is confirmed by the absence of any discussion of the issue, since the creation of a "universal" right to sue would have been as controversial as was the creation of "universal jurisdiction," if not more so.

The following understanding is recommended:

> "It is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party."

A question could be raised whether Article 14 is intended to require a victim compensation scheme or whether it is sufficient that victims have a right to bring a civil suit against the alleged torturer. Either approach would seem to provide "an enforceable right to fair and adequate compensation" as required by the text of Article 14. The negotiating history confirms this view, in that no requirement of a victim compensation scheme was discussed, nor does such an interpretation appear to have been suggested, notwithstanding that many if not more countries, including the United States, do not have such schemes.

Existing U.S. law already establishes private rights of suit sufficient to implement Article 14. Such a suit could take the form of a common law tort action, a civil action for violation of civil rights under 42 U.S.C. §§ 1981–1992, or a suit for constitutional tort. *See, e.g., Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and *Carlson* v. *Green*, 446 U.S. 14 (1980). In the hypothetical case of an authorized federal action in which the individual defendants could claim immunity from civil suit, an action could be brought against the United States. 28 U.S.C. § 1346(b) and § 2674. Although some U.S. courts have held that current U.S. law provides a private right of action for acts of torture occurring outside the United States, *see, e.g., Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), as discussed above this result is not compelled by the Convention.

There is no indication in the legislative history that Article 14 was intended to affect the immunities from civil jurisdiction and liability that States and certain individuals enjoy.

ARTICLE 15

This article establishes an exclusionary rule of evidence: no statement that is established to have been made as a result of torture shall be used as evidence in any proceeding, except against an alleged torturer as evidence of torture. This rule of exclusion, by the plain terms of Article 15, applies only to the statement itself and not to so-called fruits of the statement. The latter doctrine is a feature of U.S. constitutional law but is not applied in international practice.

Statements made under torture generally would be subject to exclusion under U.S. rules of evidence. Such statements could not be used against the person making them, since the statements would be involuntary. The United States rules against admissibility of illegally obtained evidence and involuntary confessions are stricter than is provided for under the Convention. Where a statement made under torture is invoked against a third party, a question could arise as to whether that party had standing to raise the illegality of the means of obtaining such evidence as a ground for exclusion. As a practical matter, however, the hearsay rule would generally operate to exclude such statements, where sought to be introduced against third parties.

ARTICLE 16

Article 16 addresses other forms of cruel, inhuman, or degrading treatment or punishment not amounting to torture (hereafter "CIDT"). Initially, the Convention provided much the same obligations with respect to torture and CIDT. The United States as well as a number of other countries expressed concern with this approach, noting that the attempt to establish the same obligations for torture as for lesser forms of ill-treatment would result either in defining obligations concerning CIDT that were overly stringent or in defining obligations concerning torture that were overly weak. This view prevailed and Article 16 thus creates a separate and more limited obligation with respect to CIDT not amounting to torture.

Article 16 provides that States undertake to prevent CIDT not amounting to torture in territories within their jurisdiction. Article 16 thus embodies an undertaking to take measures to prevent CIDT rather than a prohibition of CIDT. The particular steps that must be take in order to prevent CIDT are those specified in Articles 10–13: appropriate training of law enforcement and other appropriate personnel, review of interrogation and detention rules and practices, investigation by State authorities, and making available the right to bring a complaint for investigation.

As provided in paragraph 2, the limited scope of Article 16 is without prejudice to more extensive rights and obligations that may be established by any other applicable national or international law.

Article 16 is arguably broader than existing U.S. law. The phrase "cruel, inhuman or degrading treatment or punishment" is a standard formula in international instruments and is found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. To the extent the phrase has been interpreted in the context of those agreements, "cruel" and "inhuman" treatment or punishment appears to be roughly equivalent to the treatment or punishment barred in the United States by the 5th, 8th and 14th amendments. "Degrading" treatment or punishment, however, has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution. *See, e.g.*, European Commission of Human Rights, *Dec. on Adm.*, Dec. 15, 1977, *Case of X* v. *Federal Republic of Germany* (No. 6694/74), 11 Dec. & Rep. 16 (refusal of authorities to give formal recognition to an individual's change of sex might constitute "degrading" treatment). To make clear that the United States construes the phrase to be coextensive with its constitutional guarantees against

el, unusual, and inhumane treatment, the following understand- is recommended:

"The United States understands the term 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the 5th, 8th and/or 14th amendments to the Constitution of the United States."

Because Article 16 requires States Parties to apply the obligas in Articles 10–13 to cases of cruel, inhumane or degrading atment or punishment, the questions regarding implementation ed in connection with these Articles apply also with respect to ticle 16. Like Articles 10–13, Article 16 could be implemented by appropriate combination of federal and state action and the fedl-state reservation proposed above would be relevant.

ARTICLES 17–24 AND 28

These articles establish an international Committee Against Tore that functions as an oversight and enforcement body with rect to obligations of States Parties under the Convention. The ation of such a treaty body is a standard procedure; similar lies were established, for example, by the International Conven on Civil and Political Rights and the Convention on the Elimition of Racial Discrimination (both of these Conventions cave n signed but not ratified by the United States).

The Committee Against Torture consists of ten "experts of high ral standing and recognized competence in the field of human hts" serving in their individual capacity and not as representaes of governments. (Article 17.) These experts are elected for ur-year terms by a secret ballot of States Parties from among rsons who are nominated by States Parties. The appointment of alled "temporary alternates," who may tend to be government oials rather than independent experts, is not permitted. The ates Parties to the Convention are responsible for the expenses of e Committee, which are expected to be approximately $750,000 nually. (Article 18.) The U.S. contribution would be calculated portionately on the basis of the scale of assessments for apporning the U.N. budget, with a ceiling of 25 percent. On this basis, e U.S. contribution would be approximately $187,000 per year.

The Committee is empowered to review reports submitted by ates Parties on the measures they have taken to give effect to eir undertakings under the Convention and to make "general mments" on these reports. (Article 19.)

The Convention provides three additional powers of the Committe which it can exercise only with respect to States that choose to ant it these powers. First, the Committee may conduct investigaons on its own initiative when it "receives reliable information hich appears to it to contain well-founded indications that torture being systematically practiced." (Article 20.) A State may, howev-, make a declaration upon signature, ratification or accession at it does not recognize such competence. (Article 28.) Second, a ate may make a declaration recognizing the competence of the ommittee to consider claims made by another State Party that e former State is not fulfilling its obligations under the Conven-

tion. (Article 21.) Finally, a State may make a declaration recognizing the competence of the Committee to consider communications made by or on behalf of individuals claiming to be victims of a violation of the Convention by that State. (Article 22.)

The procedures to be followed in each of these cases are spelled out in the respective article of the Convention. Complaints by States and communications by or on behalf of individuals are not admissible until all available domestic remedies have been exhausted, except there the application of such remedies is unreasonably prolonged or unlikely to bring effective relief to the individual alleged to be the victim. A State that is subject to a complaint, communication, or investigation is given an opportunity to explain and refute allegations made against it. Communications and complaints are considered in closed, confidential sessions.

When the Committee has considered a State complaint or an individual communication, its conclusions are presented to the parties directly concerned. When the Committee investigates a situation of alleged systematic practice of torture, its findings are transmitted to the State Party concerned along with "any comments or suggestions which seem appropriate in view of the situation."

In carrying out these functions, the Committee functions as an investigatory body and not as a court; it is not empowered to issue an award against or an order to a State Party. Where a State brings a claim against another State under Article 21, however, the Committee may set up an *ad hoc* conciliation commission which would attempt to seek a "friendly solution."

The members of the Committee and of any conciliation commission that may be appointed are entitled to the facilities, privileges, and immunities of experts on mission for the United Nations as established by the Convention on the Privileges and Immunities of the United Nations. (Article 23.) The United States is a party to this Convention.

We recommend that, before accepting the competence of the Committee against Torture under Article 20 to initiate confidential investigations of the United States, we should have an opportunity to evaluate the Committee's work. Accordingly, we recommend that the United States make the following reservation:

> "Pursuant to article 28(1), the United States declares that it does not recognize the competence of the Committee Against Torture under Article 20."

It would be possible in the future to accept the competence of the Committee should experience with the Committee prove satisfactory and should this step appear desirable.

For the same reasons, we recommend that the United States not at this time make declarations upon deposit of the United States instrument of ratification, pursuant to Articles 21 and 22 of the Convention, recognizing the competence of the Committee Against Torture to receive and consider communications from States and individuals alleging that the United States is violating the Convention. As with the Committee's Article 20 powers, we should delay a final U.S. decision concerning the Committee's powers under Articles 21 and 22 until a sufficient body of experience with the Committee has been developed and we are able to evaluate its work.

ARTICLES 25–33

The final clauses of the Convention are relatively standard. The ›nvention is open for signature by all States, subject to ratifica›n, or for accession by any State. (Articles 25 and 26.) Pursuant to ·ticle 27, the Convention entered into force on June 26, 198, irty days after the twentieth State had become a Party. Any ate may terminate its adherence to the treaty, effective one year ter notice is given, but such termination shall not affect obliga›ns regarding acts or omissions prior to the effective date of ter›ination. (Article 31.)

The Convention can also be amended by a majority of States Par·s present and voting at a conference called for that purpose. ıch an amendment shall not be effective, however, until two›irds of all States Parties have accepted it, and shall be binding ›ly on those States that specifically accept it. (Article 29.)

The Convention also provides in Article 30(1) that disputes be·een two or more States Parties concerning the interpretation or ›plication of this Convention may be submitted to *ad hoc* arbitra›n, or, failing agreement on the organization of such arbitration, the International Court of Justice. Article 30(2) provides that a ate may make a declaration excluding this di5pute.resolution ob·gation at the time of signature, ratification, or accession. In Octo·r 1985, the United States withdrew its declaration under Article of the Statute of the International Court of Justice accepting the ›mpulsory jurisdiction of the Court. Consistent with that decision, ıe following reservation is recommended:

> "Pursuant to Article 30(2) of the Convention, the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case."

his reservation would allow the United States to agree to an adju›cation by a chamber of the Court in a particular case, if that ·re deemed desirable.

The U.N. Secretary-General is the depository for the Convention. \rticles 26 and 32.) The respective texts in all U.N. official lan›uages are equally authentic. (Article 33.)

COST ESTIMATE

The Congressional Budget Office has supplied the committee ith the following information on the possible budgetary impact of ıe Convention Against Torture and Other Cruel, Inhuman or De›rading Treatment or Punishment.

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, DC 20515, August 17, 1990.

lonorable CLAIBORNE PELL,
'hairman, Committee on Foreign Relations,
I.S. Senate, Washington, DC 20510

DEAR MR. CHAIRMAN: The Congressional Budget Office has re›iewed Treaty Document 100-20, the Convention Against Torture nd Other Cruel, Inhuman, or Degrading Treatment or Punish›

lations on July 19, 1990. Ratification of the Convention is estimated to cost the Federal Government between $250,000 and $350,000 annually.

The Committee on Foreign Relations has recommended that the Senate advise and consent to ratification of the Convention. The Convention ultimately would be ratified by executive action.

Ratification of the Convention would obligate the United States to help pay the costs of the Committee Against Torture, a body designed to oversee the obligations of countries that have ratified the Convention. Currently, the Committee Against Torture has an annual budget of approximately $1 million. If the United States would pay, consistent with U.S. obligations to many other international organizations, 25 to 35 percent of the annual budget, the cost to the Federal Government would be between $250,000 and $350,000 annually. However, no authorizations of appropriations have been included with the treaty document.

Ratification of the Convention would not affect the budgets of state or local governments.

Should you so desire, we would be pleased to provide further details on this estimate. The CBO staff contact is Kent Christensen at 226–2840.

Sincerely,

ROBERT D. REISCHAUER,
Director.

TEXT OF RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988, Provided that:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States shall implement the Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention.

(2) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th, and/or 14th amendments to the Constitution of the United States.

(3) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the 5th, 8th and/or 14th amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee Against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the abovementioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

ADDITIONAL VIEWS OF REPUBLICAN SENATORS ON THE CONVENTION AGAINST TORTURE

The undersigned Republican Senators strongly support the object and purpose of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We believe that prompt ratification of the convention will demonstrate the abhorrence of our Nation toward torture, and encourage more widespread prompt ratification of the convention among the community of nations.

Unfortunately, approval to report out the resolution of ratification occurred in committee without the presence of Republican members. In fact, no discussion of the convention at all took place during the business meeting at which it was reported, 10–0. The absence of Republican members in no way reflects a lack of support for the convention. Indeed, the Convention Against Torture was negotiated with bipartisan support. The resolution of ratification incorporated the package of reservations, understandings, and declarations submitted by the administration, and has the full support of the undersigned.

While a number of Republicans were engaged in urgent Senate business—the 1990 farm bill commenced debate on the Senate floor during the time of the business meeting—others declined to be present at the business meeting to protest the inadequate notice given by the chairman to mark up an entirely different piece of complex legislation, providing for aid to Eastern Europe and the Soviet Union. Thus the Torture Convention got caught up in an unrelated dispute when the chairman took advantage of the rare presence of all Democratic members, a bare quorum, to approve the convention without debate.

The dispute over the markup of the East European aid measure was, in the view of the Republican members, unfortunate and unnecessary. Over the weeks, the Democratic majority had proposed at least a dozen draft versions of the bill, each with wildly varying funding levels, unorthodox programs, complex authorities, and changing eligibilities. In the week prior to the scheduled markup, four different drafts were presented, the last version only hours before the announced time of the markup.

No documentation was provided for the changes in each version, the last of which was 114 pages long, not in due form, and lacking line numbers. Many of us felt that to participate in a markup under such circumstances would make a mockery of our obligations as Senators.

It was unfortunate that the Torture Convention was taken up under such circumstances. Perhaps the chairman decided to take advantage of the full Democratic attendance; indeed, in all but one of the seven previous business meetings, a larger percentage of the Republican members than of the Democratic members was present

and voting. In any case, no Republican had any intention of delaying consideration of the convention.

One of the most important mandates of the Foreign Relations Committee is to make recommendations to the Senate regarding treaties submitted by the President for advice and consent. Treaties usually impose upon our Nation obligations which last in perpetuity and are difficult to alter. For that reason, it is important that bipartisan participation demonstrate wide U.S. acceptance of treaty obligations, from the committee level to the Senate floor. In this instance, there was bipartisan support. Nevertheless, the action of the committee in reporting the convention without Republican participation was a failure of comity which implied a diminished appreciation of our international obligations.

Some Republican members had intended to offer and support amendments to the resolution of ratification had the committee considered the convention with Republicans present. These amendments had been discussed at length over the past 6 months with the administration, and among committee members and staff; indeed, it is our understanding the majority and the administration were prepared to accept at least some of the amendments proposed.

We hope that, before the convention is debated on the Senate floor, the chairman will convene an early business meeting to allow discussion of the Torture Convention, and to allow any interested Senators an opportunity to propose amendments to the resolution of ratification, which, if approved by the committee, would be offered as committee amendments on the Senate floor.

JESSE HELMS.
RICHARD G. LUGAR.
NANCY L. KASSEBAUM.
RUDY BOSCHWITZ.
LARRY PRESSLER.
FRANK H. MURKOWSKI.
MITCH MCCONNELL.
GORDON J. HUMPHREY.
CONNIE MACK.

APPENDIX A

BUSH ADMINISTRATION RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS, AS TRANSMITTED

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PELL

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.,
December 10, 1989.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: In his message of May 23, 1988, President Reagan transmitted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Senate for its advice and consent to ratification. As you know, the Convention was adopted by unanimous agreement of the U.N. General Assembly on December 10, 1984, and entered into force on June 26, 1987. The United States signed it on April 18, 1988. Accompanying the transmittal of the Convention to the Senate was the report of the Secretary of State containing a number of proposed reservations, understandings, and declarations.

In your letter to the Secretary of State dated July 24, 1989, you expressed concern that the administration's proposed package faced substantial opposition from human rights groups and other interested parties. In particular, you were concerned with the overall length and breadth of the package, and the understandings concerning the definition of torture. According to critics of the proposed package, the understandings to the definition of torture could be construed to raise "the threshold of pain that an individual must suffer" and to permit "certain circumstances and justifications for torture."

By letter of September 20, 1989 (copy enclosed), we agreed to review the original package and simultaneously informed you that we planned to drop the proposed reservations pursuant to Article 28(1) not recognizing the competence of the committee against torture provided for in Article 20 and that we further planned to make a declaration pursuant to Article 21 of the Convention, recognizing the competence of the committee to receive and consider, on a reciprocal basis, communications from States alleging that the United States is violating the Convention.

We have now completed that review, and I am pleased to submit herewith the enclosed revised package of reservations, understandings, and declarations for consideration by the Senate. Reflecting our consultations with various interested groups in the private sector, the package now contains a revised understanding of the definition of torture, which would not raise the high threshold of pain already required under international law, clarifies the definition of mental pain and suffering, and maintains our position that specific intent is required for torture. The revised package also eliminates the understanding relating to "common-law" defenses, makes it clear that the United States does not regard authorized sanctions that are questionably violate international law as "lawful sanctions" exempt from the prohibition on torture, and removes our reservation to the obligation not to extradite individuals if we believe they would be tortured upon return. (Of course, consistent with our letter of September 20, 1989, the revised package contains a declaration pursuant to Article 21 of the Convention, recognizing the competence of the committee against torture to receive and consider, on a reciprocal basis, communications from States alleging that the United States is violating the Convention.)

Our revised package is the result of lengthy discussions among the Department of State, Justice, and Defense. We look forward to the opportunity to explain fully the administration's proposed revised package of reservations, understandings, and

larations at the hearing before the Committee on Foreign Relations early next sion. Each of the reservations, declarations, and understandings to the Conven- in the revised package is explained briefly in the enclosure.

Sincerely yours,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

RESERVATIONS

General.—"The United states chat] implement the Convention to the extent t the Federal Government exercises legislative and judicial jurisdiction over the tters covered therein; to the extent that constituent units exercise jurisdiction r such matters, the Federal Government shall take appropriate measures, to the l that the competent authorities of the constituent units may take appropriate asures for the fulfillment of this Convention."

Explanation: Retained without modification from the 1988' transmittal.

Article 16.—"The United States considers itself bound by the obligation under icle 16 to prevent cruel, inhuman or degrading treatment or punishment,' only ofar as the term 'cruel, inhuman or degrading treatment or punishment' means cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, hth, and/or Fourteenth Amendments to the 'Constitution of the United States."

Explanation: Changed from an understanding to a reservation.

Article 30.—"Pursuant to Article 30(2) of the Convention, the United States res that it does not consider itself bound by Article 30(1), but reserves the right cifically to agree to follow this or any other procedure for arbitration in a par- ular case."

Explanation: Retained without modification from the 1988 transmittal.

UNDERSTANDINGS

Article 1.—a. "The United States understands that, in order to constitute tor- e, an act must be specifically intended to inflict severe physical or mental pain suffering and that mental pain or suffering refers to prolonged mental harm sed by or resulting from (1) the intentional infliction or threatened infliction of ere physical pain or suffering; (2) the administration or application, or threat- d administration or application, of mind altering substances or other procedures culated to disrupt profoundly the senses or the personality; (3) the threat of im- nent death; or (4) the threat that another person will imminently be subjected to th, severe physical pain or suffering, or the administration or application of nd altering substances or other procedures calculated to disrupt profoundly the ses or personality."

Explanation: Revised to clarify the definition of mental harm.

"The United States understands that the definition of torture in Article 1 is ended to apply only to acts directed against persons in the offender's custody or sical control.

Explanation: Retained without modification from the 1988 transmittal.

"The United States understands that 'sanctions' includes judicially imposed nctions and other enforcement actions authorized by United States law or by judi- l interpretation of such law provided that such sanctions or actions are not clear- prohibited under international law."

Explanation: Revised to require that, for purposes of the definition of lawful sanc- ns, any U.S. sanctions or sanctions permitted under U.S. law be not clearly pro- ibited under international law.

d. "The United States understands that the term 'acquiescence' requires that the blic official, prior to the activity constituting torture, have awareness of such ac- ity and thereafter breach his legal responsibility to intervene to prevent such ac- ity.

Explanation: Changed "knowledge" to "awareness" to make it clearer that both tual knowledge and willful blindness fall within the meaning of acquiescence.

e. "The United States understands that noncompliance with applicable legal pro- dural standards does not *per se* constitute torture."

Explanation: Retained without modification from the 1988 transmittal.

2. *Article 3.*—"The United States understands the phrase, where there are sub- antial grounds for believing that he would be in danger of being subjected to tor- re, as used in Article 3 of the Convention, to mean 'if it is more likely than not [illegible] would be tortured.'"

3. *Article 14.*—"It is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State party."

Explanation: Retained without modification from the 1988 transmittal.

DECLARATIONS

1. *General.*—"The United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."

Explanation: Retained without modification from the 1988 transmittal.

2. *Article 21.*—"The United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State party claims that another state party not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration."

Explanation: Corollary to dropping the reservation in the previous package that declared that the United States does not recognize the competence of the Committee against Torture under Article 20.

OMISSIONS

The following reservations, declarations and understandings in the 1988 transmittal have been deleted. We will explain in full before the Senate the reasons for their deletion.

Reservations Omitted

"The United States does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not party to the Convention under bilateral extradition treaties with such States."

Explanation for deletion: Upon further reflection, this provision was deemed unnecessary because it could be construed to indicate that the U.S. was retaining, insofar as it relates to nonparties, the juridical right to send a person back to a country where that person would be tortured. Such was never the intent.

"Pursuant to Article 28(1), the United States declares that it does not recognize the competence of the Committee against Torture under Article 20.'

Explanation for deletion: See declaration under Article 21 above.

Understanding Omitted

"The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."

Explanation for deletion: Upon reflection, this understanding was felt to be no longer necessary.

Declarations Omitted

"The United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted."

Explanation for deletion: Although it remains our intention to not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted, it is not necessary that this declaration be included in the formal instrument of ratification.

"The United States declares that the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases."

Explanation for deletion: Although it remains true that the competent authorities referred to in Article 3 would be the Secretary of State in extradition cases and the Attorney General in deportation cases, it is not necessary to include this declaration in the formal instrument of ratification.

"The United States declares that it will submit a case involving alleged torture committed by an alien outside the United States to its competent authorities for the purpose of prosecution, pursuant to Article 7(1) of the Convention, only if extradition of the offender to the State where the offense was committed is not an adequate alternative."

Explanation for deletion: Although it remains our intention to submit a case for prosecution only when extradition is not an adequate alternative, it is not necessary to include this declaration in the formal instrument of ratification.

Understanding proposed by the Bush administration during the hearing on the Convention on January 30, 1990:

UNDERSTANDING

1. *General.*—"The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."

APPENDIX B

CORRESPONDENCE FROM THE BUSH ADMINISTRATION TO MEMBERS OF THE FOREIGN RELATIONS COMMITTEE

LETTERS FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PELL

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC
September 20, 1989.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am responding to your recent letter to Secretary Baker concerning the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

We are pleased that a hearing on the Convention has been scheduled by the Committee on Foreign Relations for September 26. We look forward to the opportunity to explain fully the administration's proposed package of reservations, understandings, and declarations. In anticipation of Senate consideration, we have been conducting a serious review of that package, as you suggested in your letter. Pursuant to that review, we have determined to drop the proposed reservations pursuant to Article 28(1) not recognizing the competence of the Committee against Torture provided for in Article 20 and also to make a declaration pursuant to Article 21 of the Convention, recognizing the competence of the Committee against Torture to receive and consider, on a reciprocal basis, communications from State alleging that the United States is violating the Convention. The reasons underlying this change will be explained during the hearings. Other possible modifications to the package are still under review.

As Secretary Baker indicated in his letter to you of June 13, officers of the Departments of State and Justice stand ready to discuss the Convention, and the proposed ratification package, with committee staff in advance of the hearings, if that would be useful. Ratification of this important human rights convention is a matter of priority for the administration, and we look forward to early and favorable consideration by the committee and the Senate.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PRESSLER

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC
April 4, 1990.

Senator PRESSLER,
U.S. Senate, Washington, DC.

DEAR SENATOR PRESSLER: During the recent hearing before the Senate Foreign Relations Committee on the U.N. Convention Against Torture, you posed a number of specific questions about various provisions of the Convention. The Department shares most of the concerns you identified and has dealt with them in the proposed package of reservations, understandings, and declarations I sent to Chairman Pell on behalf of the administration.

First, you indicated that you do not support acceptance of the compulsory jurisdiction of the International Court of Justice. We share that view. We have proposed specifically that the United States declare, at the time of ratification, that it does not accept that provision of the Convention which establishes compulsory jurisdiction. We have asked that the Senate's resolution of advice and consent expressly support such a reservation.

Second, you indicated that the meaning of the phrase "cruel, inhuman and degrading treatment or punishment," as used in Article 16 of the Convention, is unclear. Again, we agree. Precisely for that reason, we have proposed a reservation to Article 16 which limits our undertakings to punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution.

Third, you stated that you do not like the role of the committee against torture found in Articles 17 through 24. The committee is given three different functions under the Convention, and we would ask you to assess each of them separately:

—first, the committee is empowered to look into country situations where there is reliable information containing well-founded indications that torture is being systematically practiced.

—second, the committee is empowered to look into complaints from States that a State party is not fulfilling its obligations under the Convention.

—third, the committee is empowered to look into individual complaints of torture.

We proposed to accept the first two competences of the committee, but not the third.

With respect to the first, there is no possibility of a well-founded indication of systematic torture in the United States, and very little possibility of even a politicized committee making such a finding. (To our knowledge, no human rights group has ever accused the United States of systematic torture.) The United States is, in any event, already exposed to the possibility of a politically motivated finding in the U.N. Human Rights Commission; it has not occurred. With respect to the second competence, the committee can only receive complaints from States which also accept the competence of the committee. States with political motivation to charge the United States with torture are unlikely to expose themselves to reciprocal charges. Moreover, the committee has no authority to make binding decisions. For these reasons, the United States has nothing to fear from the committee. On the other hand, we believe strongly that our substantial interest in eliminating torture, which you share, would be served by participating in the work of the committee and directing its attention to situations where torture is practiced.

However, we do not believe that we should accept the committee's third competence, to hear complaints from individuals against the United States. Although the complaints are likely to be frivolous (especially because they can only be considered if the complaining individual has first exhausted "all available domestic remedies"), it could consume substantial U.S. Government resources to respond to them.

The approach that we have recommended, of accepting the competence of the committee in part, was adopted by the United Kingdom in ratifying the Convention. Most of our European allies have accepted the full competence of the committee. The Soviets and the Eastern Bloc countries have rejected the committee's competence completely, but these are actions taken before the major recent changes in the political landscape and may be reversed, at least in the case of some Eastern European countries. We would also ask you, in considering whether the U.S. needs to be as concerned as previously with the committee, to note that four Eastern European countries joined this past month in the United Nations in criticizing the human rights situation in Cuba and that the Soviets have also started to criticize publicly the situation there.

Fourth, you questioned the omission of the understanding on common law defenses originally proposed by the Reagan administration. Upon reflection, we omitted this provision as it was no longer necessary and was potentially counterproductive. We believe that the revised first understanding under Article 1 concerning specific intent and mental harm and the understanding on custody adequately reflect the primary interest behind the former understanding to Article 2. Because the Convention applies only to custodial situations, i.e., when the person is actually under the control of a public official, the legitimate right of self-defense is not affected by the Convention. Moreover, to sustain a successful prosecution it will be necessary to establish beyond a reasonable doubt that the alleged perpetrator formed the specific intent to commit torture. Paragraph 2 of Article 2 of the Convention states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." We accept this provision, without reservation. As indicated by President Reagan when he transmitted the Torture Convention to the Senate, no circumstances can justify torture.

The Reagan administration, without in any way narrowing the prohibition on torture, had thought it desirable to clarify that the Convention does not preclude the availability of relevant common law defenses, including self-defense and defense of others. That is, the Convention does not prevent a person from acting in self-defense, as long as he does not torture. While there was no opposition to this concept, substantial concern was expressed that if this understanding were included in the instrument of ratification, it would be misinterpreted or misused by other states to justify torture in certain circumstances. We concluded that this concern was justified and therefore reviewed whether the understanding was necessary. We decided it was not, since nothing in the Convention purports to limit defenses of actions which are not committed with the specific intent to torture. We would not object to your including this letter in the Senate report on the Convention, so that U.S. courts are clear on this point.

Fifth, you indicated your strong belief that, as with the Genocide Convention, implementing legislation must be adopted before the President deposits the instrument of ratification for the Convention. We agree completely. We will not deposit the instrument of ratification until the necessary implementing legislation has been adopted.

Sixth, you indicated that you "do not support treaties which change American domestic law and legal procedures" and asked what has happened to the legal requirement that "no one can be subjected to trial and punishment under American law without a statute first having defined the crime and then provided for a specific punishment." We have proposed a formal declaration that the Convention is not "self-executing." Any prosecution (or civil action) in the United States for torture will necessarily be pursuant to existing or subsequently enacted Federal or State law. In fact, as indicated in the original Presidential transmittal, existing Federal and State law appears sufficient to implement the Convention; thus, the Convention will not itself provide an independent cause of action in U.S. courts. new Federal legislation would be required only to establish criminal jurisdiction under Article 5(1)(b) over offenses committed by U.S. nationals outside the United States and under Article 5(2) over foreign offenders committing torture abroad who are later found in territory under U.S. jurisdiction.

Seventh, you were puzzled by "an obvious contradiction in the administration's approach to asylum and deportation," in that differing standards apply to those aliens who seek to avoid persecution by claiming asylum in the United States, on the one hand, and those who seek to avoid deportation on the other. The Supreme Court has determined that U.S. law establishes such a distinction. Compare *I.N.S.* v. *Stevic*, 467 U.S. 407 (1984), with *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987). These decisions determined that relevant U.S. law provides a higher standard of proof for those seeking to avoid deportation under section 243(h) of the Immigration and Nationality Act ("clear probability of persecution") than for those seeking asylum under section 208(a) ("well founded fear of persecution"). Article 3 of the Convention places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured. This "non-refoulement" obligation is analogous to the statutory prohibition against deportation in section 243(h). The Supreme Court decided in *Stevic* that the applicable standard for evaluating such a claim is "a clear probability of persecution." We hope that on reexamination you will agree that this is the relevant legal standard to be applied under the Convention.

With respect to your final question whether the People's Republic of China is "a violator of human rights, and if so, why has the PRC not been condemned for these violations by the United Nations," we would refer you to the testimony of Ambassador Schifter before the Subcommittee on Human Rights and International Organizations of the House Foreign Affairs Committee on February 21, 1990, concerning the Department's Country Reports on Human Rights Practices for 1989. The annual report for China details the dramatic decline in the human rights climate in China during the past year, including the Beijing massacre and ensuing crackdown.

While you did not raise it, you undoubtedly know that Senator Helms proposed during the hearings that a "sovereignty" reservation should be attached to the Convention conditioning our obligations thereunder on the U.S. Constitution. We are preparing a detailed response to that proposal and will of course share it with you when it has been completed.

I trust the foregoing is responsive to your concerns. We would be pleased to provide further information if you would find it helpful.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR HELMS

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.
June 13, 1990.

Senator HELMS,
U.S. Senate, Washington, DC.

DEAR SENATOR HELMS: I am writing with regard to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is currently pending before the Committee on Foreign Relations. At the committee's hearing on January 30, you expressed a number of concerns about the Convention and the administration's proposed package of reservations, declarations, and understandings, and you urged us to consult with your staff on these issues. We have done so and have found the consultations helpful in clarifying a number of issues, one of the most important being the "sovereignty" clause you proposed at the hearing.

The "sovereignty" clause would condition the Senate's advice and consent to ratification of the Convention upon the same proviso which was applied to the Genocide Convention (and subsequently to several other treaties), namely, that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

We agree with that statement as a matter of fact and as a legal proposition. Nothing in this Convention does or could require any unconstitutional action by the United states. To our knowledge, no one—in formal testimony or otherwise—has identified any provision in the Convention that is potentially unconstitutional. (In that regard, the Torture Convention differs from the Genocide Convention, which arguably raised a potential First Amendment issue.) The Constitution is the supreme law of the land; neither a Treaty nor an executive agreement can, in our view, authorize action inconsistent with it. This was unambiguously established by the Supreme Court in *Reid* v. *Covert*, 354 U.S. 1 (1957), and remains true whether or not the Senate conditions its approval of the Convention (or any other Treaty) on a "sovereignty" clause. It was for these reasons that at the January 30 hearing we opposed the "sovereignty" clause as unnecessary.

Although unnecessary at the domestic level, the proposal becomes very damaging at the international level. In the year since we ratified the Genocide Convention subject to a similar "sovereignty" reservation, some twelve foreign governments (all of them European allies) have formally registered their objections to it. The United Kingdom is especially concerned. Other States have protested diplomatically, and have put us on notice that they will coordinate stronger objections if we repeat the reservation in other contexts. These governments have raised legitimate concerns about our reservation. It creates unacceptable uncertainty as to the extent of the legal obligations which the United States has in fact assumed under the Convention. They ask how a foreign country, not expert in the domestic constitution of another country, will know the extent of treaty obligations actually undertaken by a State which subjects its treaty obligations to such a general reservation.

They have also expressed the concern that other countries may follow the U.S. lead in conditioning their acceptance of the Convention upon their own constitutions or internal law. This problem of reciprocity exists even if other States do not attach a similar reservation to the Convention. As a matter of international treaty law, our "constitutional" reservation is reciprocally available to all other treaty partners. Thus, our ability to invoke treaty rights against them would be subject to their Constitutions. The problem is compounded since the reservation attaches to the entire Convention, leaving the overall extent of legal obligations unclear and open to substantial abuse by countries with obscure or readily-changeable constitutions. This could be a particular problem with regard to the Mutual Legal Assistance Treaties, which we intend to overcome foreign bank secrecy laws in order to assist law enforcement efforts.

From the international perspective, therefore, the proposed "sovereignty" clause is not harmless but instead threatens to upset the very object and purpose of the Convention, which is the establishment of an effective international legal prohibition against torture.

In the course of our consultations, our staffs discussed a possible accommodation of our respective concerns wherein the "sovereignty" clause would be adopted as a declaration and included in the Senate's resolution of advice and consent but would not be included in the formal instrument of ratification submitted by the United States to the United Nations. The clause would thus have its intended effect domestically, clarifying the issue of U.S. law about which you are concerned, while avoiding the difficulties that trouble us on the international level.

This procedure was followed with respect to a different provision in the Genocide Convention. In that context, the Senate included in its resolution of advice and consent the declaration that the President would not submit the instrument of ratification until implementing legislation had been adopted. It was understood, however, that this declaration would not be incorporated in the instrument of ratification filed with the treaty depositary.

While we believe that inclusion of the provision in the resolution of advice and consent is unnecessary, we would be prepared to accept this outcome as an accommodation of our respective interests.

We are grateful for the time and effort Bob Friedlander has devoted to this issue, the above proposal is due largely to his diligence.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.
July 9, 1990.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am writing to reiterate the administration's strong interest in early and favorable action by the Senate Foreign Relations Committee concerning the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We are pleased to note that the committee has scheduled a markup of the resolution of advice and consent to ratification of the Convention on July 11.

As you know, since the committee's hearing on the Convention on January 30, we have continued our consultations with committee staff, as well as the staff of individual members, concerning the proposed package of reservations, declarations, and understandings to the Convention. We have also continued to receive comments on the proposed package from interested private groups.

After careful consideration of the various issues raised, the administration stands by the package we have proposed. We continue to believe that the package is desirable to clarify the Convention and to address certain U.S. domestic legal concerns, and does not undermine our commitment to the Convention. At the same time, we believe that the additional elements which have been proposed are neither necessary nor helpful.

The explanation for the package of reservations, understandings, and declarations we have proposed was provided during the January 30 hearing and further elaborated in an April 4 letter to Senator Pressler (a copy of which was earlier provided to your staff; another is enclosed for your convenience). There are, however, two important issues on which I would like to underscore our position.

The first issue concerns a proposed "constitutional" or "sovereignty" reservation which Senator Helms has indicated he intends to offer. Such a provision would subject the Senate's advice and consent to ratification of the Convention to the same condition that was applied to the Genocide Convention (and subsequently to several other treaties), namely, that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

At the January 30 hearing, the Department's Legal Adviser, Judge Sofaer, stated, the administration's strong opposition to the imposition of such a reservation to the Convention. At the domestic level, it is entirely unnecessary. At the international level, it is very damaging, as it leaves the treaty obligations between the United

ates and other States party ambiguous and potentially asymmetrical. we therefore main strongly opposed to such a condition.

In the year since we ratified the Genocide Convention, twelve European countries ve filed written objections to the "sovereignty" reservation in the context of that nvention, and others have raised their concerns in diplomatic channels, 'indicat- g that they would strongly oppose a similar reservation to the Torture Convention. Moreover, six recently-approved Mutual Legal Assistance Treaties were all bjected to the same "sovereignty" proviso; to date, four of the six governments ncerned have reacted negatively.

As these governments note, the reservation makes the extent of U.S. legal obligaons under the Convention unclear to our treaty partners, which cannot be expect- l to understand the scope of the U.S. Constitution. Moreover, under multilateral eaty law, the reservation is automatically available reciprocally to all other States arty, thereby enabling others to limit their compliance with the Torture Convenon by invoking the terms of their own constitutions, which may be vague or easily nangeable. This leaves the legal relationship between the U.S. and other States arties unclear, and, because the U.S. Constitution does not permit torture, potenally asymmetrical. Attaching a "sovereignty" reservation to our instrument of tification thus undermines the Convention's objective of creating an effective ternational obligation to eliminate torture. One potential effect could be to erode even eliminate the central obligation to extradite or prosecute torturers.

While damaging at the international level, the reservation is unnecessary at the omestic level. Nothing in this Convention does or could require any unconstitution- l action by the United States. To our knowledge, no one—in formal testimony or therwise—has identified any provision in the Convention that is potentially uncontitutional. (In that regard, the Torture Convention differs from the Genocide Conention, which arguably raised a potential First Amendment issue.) The Constituon is the supreme law of the land; neither a Treaty nor an executive agreement an, in our view, authorize action inconsistent with it. *Reid* v. *Covert*, 354 U.S. 1 1957). This remains true whet' er or not the Senate conditions its approval of the nvention (or any other Treaty) on a "sovereignty" clause. If there are continuing oncerns about the relationship between the Convention and the Constitution, we ould suggest that this letter be included in the committee's report as a confirmaon of the Executive Branch's agreement that the Convention neither requires nor uthorizes action inconsistent with the Constitution.

The second issue involves the Committee Against Torture. On this issue, we have eceived conflicting advice during our recent consultations. Some groups have urged s to accept the full competence of the committee without reservation. Others have rged us to decline to accept any competence of the committee. After careful considration, we continue to believe it appropriate to adopt the middle course proposed in ur package of reservations and accept two of the three optional competences of the ommittee: one under Article 20 of the Convention, which empowers the committee o examine country situations when it receives reliable information containing wellounded indications that torture is being systematically practiced, and the other nder Article 21, which permits the committee to consider complaints from one State party that another is not fulfilling its obligations under the Convention. We ould not, however, propose to accept the third competence of the committee, under rticle 22, to consider complaints by individuals subject to U.S. jurisdiction claiming o be victims of a violation of the Convention.

We continue to believe strongly that our substantial interest in eliminating torure around the world will best be served by participating actively in the work of he committee and directing its attention to situations in which torture is still pracced. The committee has, to date, held four sessions, during which it began considration of initial reports from States Parties on implementation of the Convention s well as communications submitted under Article 22. Obviously, we cannot help hape the committee's direction if we do not participate, and since Article 21 requires reciprocity, we cannot call another State's actions into question unless we re also prepared to accept the committee's competence to consider reciprocal laims against us.

We do not believe that the United States has anything to fear from such particiation. There is no possibility of a well-founded indication of systematic torture in he United States (to our knowledge, no human rights group has ever accused the U.S. of systematic torture), and we do not believe that States with a political motivation to charge us with torture are likely to expose themselves to reciprocal harges. Moreover, with the changes in Eastern Europe, the risks of politically motivated "bloc voting" are substantially diminished from several years ago. In any vent, the committee has no authority to make binding decisions.

We are not inclined to accept the committee's third competence, to hear complaints of individuals subject to our jurisdiction who claim to be victims of a violation of the Convention. Claims submitted against the United States are likely to be frivolous, particularly since the claimant must have first exhausted all available domestic remedies; given the extensive remedies provided by U.S. law, we do not believe there is any need to create an additional international remedy for persons subject to our jurisdiction, nor any justification to commit substantial resources to respond to the claims that would be submitted. Moreover, there could be more serious problems concerning implications for our own domestic proceedings if the committee did not scrupulously respect the exhaustion of remedies rule. we therefore believe it would be prudent to await further committee experience before deciding to accept this third competence of the committee.

The United Kingdom has adopted the same approach to the committee which we are recommending. Other western European States generally accept all of the committee's competences. The Soviet Union and most Eastern European States have rejected the committee's competences under Articles 20–22, but these actions were takes before the recent changes in the political landscape there and may well be reversed in some cases.

We hope that you and the members of your committee will find the foregoing useful in your consideration of the Convention. As always, we stand ready to assist the committee in any way.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs

○

APPENDIX A

BUSH ADMINISTRATION RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS, AS TRANSMITTED

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PELL

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.,
December 10, 1989.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: In his message of May 23, 1988, President Reagan transmitted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Senate for its advice and consent to ratification. As you know, the Convention was adopted by unanimous agreement of the U.N. General Assembly on December 10, 1984, and entered into force on June 26, 1987. The United States signed it on April 18, 1988. Accompanying the transmittal of the Convention to the Senate was the report of the Secretary of State containing a number of proposed reservations, understandings, and declarations.

In your letter to the Secretary of State dated July 24, 1989, you expressed concern that the administration's proposed package faced substantial opposition from human rights groups and other interested parties. In particular, you were concerned with the overall length and breadth of the package, and the understandings concerning the definition of torture. According to critics of the proposed package, the understandings to the definition of torture could be construed to raise "the threshold of pain that an individual must suffer" and to permit "certain circumstances and justifications for torture."

By letter of September 20, 1989 (copy enclosed), we agreed to review the original package and simultaneously informed you that we planned to drop the proposed reservations pursuant to Article 28(1) not recognizing the competence of the committee against torture provided for in Article 20 and that we further planned to make a declaration pursuant to Article 21 of the Convention, recognizing the competence of the committee to receive and consider, on a reciprocal basis, communications from States alleging that the United States is violating the Convention.

We have now completed that review, and I am pleased to submit herewith the enclosed revised package of reservations, understandings, and declarations for consideration by the Senate. Reflecting our consultations with various interested groups in the private sector, the package now contains a revised understanding of the definition of torture, which would not raise the high threshold of pain already required under international law, clarifies the definition of mental pain and suffering, and maintains our position that specific intent is required for torture. The revised package also eliminates the understanding relating to "common-law" defenses, makes it clear that the United States does not regard authorized sanctions that are questionably violate international law as "lawful sanctions" exempt from the prohibition on torture, and removes our reservation to the obligation not to extradite individuals if we believe they would be tortured upon return. (Of course, consistent with our letter of September 20, 1989, the revised package contains a declaration pursuant to Article 21 of the Convention, recognizing the competence of the committee against torture to receive and consider, on a reciprocal basis, communications from States alleging that the United States is violating the Convention.)

Our revised package is the result of lengthy discussions among the Department of State, Justice, and Defense. We look forward to the opportunity to explain fully the administration's proposed revised package of reservations, understandings, and

larations at the hearing before the Committee on Foreign Relations early next sion. Each of the reservations, declarations, and understandings to the Conven- in the revised package is explained briefly in the enclosure.

Sincerely yours,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

RESERVATIONS

General.—"The United states chat] implement the Convention to the extent t the Federal Government exercises legislative and judicial jurisdiction over the tters covered therein; to the extent that constituent units exercise jurisdiction r such matters, the Federal Government shall take appropriate measures, to the l that the competent authorities of the constituent units may take appropriate asures for the fulfillment of this Convention."

Explanation: Retained without modification from the 1988' transmittal.

Article 16.—"The United States considers itself bound by the obligation under icle 16 to prevent cruel, inhuman or degrading treatment or punishment,' only ofar as the term 'cruel, inhuman or degrading treatment or punishment' means cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, hth, and/or Fourteenth Amendments to the 'Constitution of the United States."

Explanation: Changed from an understanding to a reservation.

Article 30.—"Pursuant to Article 30(2) of the Convention, the United States res that it does not consider itself bound by Article 30(1), but reserves the right cifically to agree to follow this or any other procedure for arbitration in a par- ular case."

Explanation: Retained without modification from the 1988 transmittal.

UNDERSTANDINGS

Article 1.—a. "The United States understands that, in order to constitute tor- e, an act must be specifically intended to inflict severe physical or mental pain suffering and that mental pain or suffering refers to prolonged mental harm sed by or resulting from (1) the intentional infliction or threatened infliction of ere physical pain or suffering; (2) the administration or application, or threat- d administration or application, of mind altering substances or other procedures culated to disrupt profoundly the senses or the personality; (3) the threat of im- nent death; or (4) the threat that another person will imminently be subjected to th, severe physical pain or suffering, or the administration or application of nd altering substances or other procedures calculated to disrupt profoundly the ses or personality."

Explanation: Revised to clarify the definition of mental harm.

"The United States understands that the definition of torture in Article 1 is ended to apply only to acts directed against persons in the offender's custody or sical control.

Explanation: Retained without modification from the 1988 transmittal.

"The United States understands that 'sanctions' includes judicially imposed nctions and other enforcement actions authorized by United States law or by judi- l interpretation of such law provided that such sanctions or actions are not clear- prohibited under international law."

Explanation: Revised to require that, for purposes of the definition of lawful sanc- ns, any U.S. sanctions or sanctions permitted under U.S. law be not clearly pro- ibited under international law.

d. "The United States understands that the term 'acquiescence' requires that the blic official, prior to the activity constituting torture, have awareness of such ac- ity and thereafter breach his legal responsibility to intervene to prevent such ac- ity.

Explanation: Changed "knowledge" to "awareness" to make it clearer that both tual knowledge and willful blindness fall within the meaning of acquiescence.

e. "The United States understands that noncompliance with applicable legal pro- dural standards does not *per se* constitute torture."

Explanation: Retained without modification from the 1988 transmittal.

2. *Article 3.*—"The United States understands the phrase, where there are sub- antial grounds for believing that he would be in danger of being subjected to tor- re, as used in Article 3 of the Convention, to mean 'if it is more likely than not [illegible] would be tortured.'"

3. *Article 14.*—"It is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State party."

Explanation: Retained without modification from the 1988 transmittal.

DECLARATIONS

1. *General.*—"The United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."

Explanation: Retained without modification from the 1988 transmittal.

2. *Article 21.*—"The United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State party claims that another state party not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration."

Explanation: Corollary to dropping the reservation in the previous package that declared that the United States does not recognize the competence of the Committee against Torture under Article 20.

OMISSIONS

The following reservations, declarations and understandings in the 1988 transmittal have been deleted. We will explain in full before the Senate the reasons for their deletion.

Reservations Omitted

"The United States does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not party to the Convention under bilateral extradition treaties with such States."

Explanation for deletion: Upon further reflection, this provision was deemed unnecessary because it could be construed to indicate that the U.S. was retaining, insofar as it relates to nonparties, the juridical right to send a person back to a country where that person would be tortured. Such was never the intent.

"Pursuant to Article 28(1), the United States declares that it does not recognize the competence of the Committee against Torture under Article 20.'

Explanation for deletion: See declaration under Article 21 above.

Understanding Omitted

"The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."

Explanation for deletion: Upon reflection, this understanding was felt to be no longer necessary.

Declarations Omitted

"The United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted."

Explanation for deletion: Although it remains our intention to not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted, it is not necessary that this declaration be included in the formal instrument of ratification.

"The United States declares that the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases."

Explanation for deletion: Although it remains true that the competent authorities referred to in Article 3 would be the Secretary of State in extradition cases and the Attorney General in deportation cases, it is not necessary to include this declaration in the formal instrument of ratification.

"The United States declares that it will submit a case involving alleged torture committed by an alien outside the United States to its competent authorities for the purpose of prosecution, pursuant to Article 7(1) of the Convention, only if extradition of the offender to the State where the offense was committed is not an adequate alternative."

Explanation for deletion: Although it remains our intention to submit a case for prosecution only when extradition is not an adequate alternative, it is not necessary to include this declaration in the formal instrument of ratification.

Understanding proposed by the Bush administration during the hearing on the Convention on January 30, 1990:

UNDERSTANDING

1. *General.*—"The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."

APPENDIX B

CORRESPONDENCE FROM THE BUSH ADMINISTRATION TO MEMBERS OF THE FOREIGN RELATIONS COMMITTEE

LETTERS FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PELL

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC
September 20, 1989.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am responding to your recent letter to Secretary Baker concerning the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

We are pleased that a hearing on the Convention has been scheduled by the Committee on Foreign Relations for September 26. We look forward to the opportunity to explain fully the administration's proposed package of reservations, understandings, and declarations. In anticipation of Senate consideration, we have been conducting a serious review of that package, as you suggested in your letter. Pursuant to that review, we have determined to drop the proposed reservations pursuant to Article 28(1) not recognizing the competence of the Committee against Torture provided for in Article 20 and also to make a declaration pursuant to Article 21 of the Convention, recognizing the competence of the Committee against Torture to receive and consider, on a reciprocal basis, communications from State alleging that the United States is violating the Convention. The reasons underlying this change will be explained during the hearings. Other possible modifications to the package are still under review.

As Secretary Baker indicated in his letter to you of June 13, officers of the Departments of State and Justice stand ready to discuss the Convention, and the proposed ratification package, with committee staff in advance of the hearings, if that would be useful. Ratification of this important human rights convention is a matter of priority for the administration, and we look forward to early and favorable consideration by the committee and the Senate.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PRESSLER

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC
April 4, 1990.

Senator PRESSLER,
U.S. Senate, Washington, DC.

DEAR SENATOR PRESSLER: During the recent hearing before the Senate Foreign Relations Committee on the U.N. Convention Against Torture, you posed a number of specific questions about various provisions of the Convention. The Department shares most of the concerns you identified and has dealt with them in the proposed package of reservations, understandings, and declarations I sent to Chairman Pell on behalf of the administration.

First, you indicated that you do not support acceptance of the compulsory jurisdiction of the International Court of Justice. We share that view. We have proposed specifically that the United States declare, at the time of ratification, that it does not accept that provision of the Convention which establishes compulsory jurisdiction. We have asked that the Senate's resolution of advice and consent expressly support such a reservation.

Second, you indicated that the meaning of the phrase "cruel, inhuman and degrading treatment or punishment," as used in Article 16 of the Convention, is unclear. Again, we agree. Precisely for that reason, we have proposed a reservation to Article 16 which limits our undertakings to punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution.

Third, you stated that you do not like the role of the committee against torture found in Articles 17 through 24. The committee is given three different functions under the Convention, and we would ask you to assess each of them separately:

—first, the committee is empowered to look into country situations where there is reliable information containing well-founded indications that torture is being systematically practiced.

—second, the committee is empowered to look into complaints from States that a State party is not fulfilling its obligations under the Convention.

—third, the committee is empowered to look into individual complaints of torture.

We proposed to accept the first two competences of the committee, but not the third.

With respect to the first, there is no possibility of a well-founded indication of systematic torture in the United States, and very little possibility of even a politicized committee making such a finding. (To our knowledge, no human rights group has ever accused the United States of systematic torture.) The United States is, in any event, already exposed to the possibility of a politically motivated finding in the U.N. Human Rights Commission; it has not occurred. With respect to the second competence, the committee can only receive complaints from States which also accept the competence of the committee. States with political motivation to charge the United States with torture are unlikely to expose themselves to reciprocal charges. Moreover, the committee has no authority to make binding decisions. For these reasons, the United States has nothing to fear from the committee. On the other hand, we believe strongly that our substantial interest in eliminating torture, which you share, would be served by participating in the work of the committee and directing its attention to situations where torture is practiced.

However, we do not believe that we should accept the committee's third competence, to hear complaints from individuals against the United States. Although the complaints are likely to be frivolous (especially because they can only be considered if the complaining individual has first exhausted "all available domestic remedies"), it could consume substantial U.S. Government resources to respond to them.

The approach that we have recommended, of accepting the competence of the committee in part, was adopted by the United Kingdom in ratifying the Convention. Most of our European allies have accepted the full competence of the committee. The Soviets and the Eastern Bloc countries have rejected the committee's competence completely, but these are actions taken before the major recent changes in the political landscape and may be reversed, at least in the case of some Eastern European countries. We would also ask you, in considering whether the U.S. needs to be as concerned as previously with the committee, to note that four Eastern European countries joined this past month in the United Nations in criticizing the human rights situation in Cuba and that the Soviets have also started to criticize publicly the situation there.

Fourth, you questioned the omission of the understanding on common law defenses originally proposed by the Reagan administration. Upon reflection, we omitted this provision as it was no longer necessary and was potentially counterproductive. We believe that the revised first understanding under Article 1 concerning specific intent and mental harm and the understanding on custody adequately reflect the primary interest behind the former understanding to Article 2. Because the Convention applies only to custodial situations, i.e., when the person is actually under the control of a public official, the legitimate right of self-defense is not affected by the Convention. Moreover, to sustain a successful prosecution it will be necessary to establish beyond a reasonable doubt that the alleged perpetrator formed the specific intent to commit torture. Paragraph 2 of Article 2 of the Convention states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." We accept this provision, without reservation. As indicated by President Reagan when he transmitted the Torture Convention to the Senate, no circumstances can justify torture.

The Reagan administration, without in any way narrowing the prohibition on torture, had thought it desirable to clarify that the Convention does not preclude the availability of relevant common law defenses, including self-defense and defense of others. That is, the Convention does not prevent a person from acting in self-defense, as long as he does not torture. While there was no opposition to this concept, substantial concern was expressed that if this understanding were included in the instrument of ratification, it would be misinterpreted or misused by other states to justify torture in certain circumstances. We concluded that this concern was justified and therefore reviewed whether the understanding was necessary. We decided it was not, since nothing in the Convention purports to limit defenses of actions which are not committed with the specific intent to torture. We would not object to your including this letter in the Senate report on the Convention, so that U.S. courts are clear on this point.

Fifth, you indicated your strong belief that, as with the Genocide Convention, implementing legislation must be adopted before the President deposits the instrument of ratification for the Convention. We agree completely. We will not deposit the instrument of ratification until the necessary implementing legislation has been adopted.

Sixth, you indicated that you "do not support treaties which change American domestic law and legal procedures" and asked what has happened to the legal requirement that "no one can be subjected to trial and punishment under American law without a statute first having defined the crime and then provided for a specific punishment." We have proposed a formal declaration that the Convention is not "self-executing." Any prosecution (or civil action) in the United States for torture will necessarily be pursuant to existing or subsequently enacted Federal or State law. In fact, as indicated in the original Presidential transmittal, existing Federal and State law appears sufficient to implement the Convention; thus, the Convention will not itself provide an independent cause of action in U.S. courts. new Federal legislation would be required only to establish criminal jurisdiction under Article 5(1)(b) over offenses committed by U.S. nationals outside the United States and under Article 5(2) over foreign offenders committing torture abroad who are later found in territory under U.S. jurisdiction.

Seventh, you were puzzled by "an obvious contradiction in the administration's approach to asylum and deportation," in that differing standards apply to those aliens who seek to avoid persecution by claiming asylum in the United States, on the one hand, and those who seek to avoid deportation on the other. The Supreme Court has determined that U.S. law establishes such a distinction. Compare *I.N.S.* v. *Stevic*, 467 U.S. 407 (1984), with *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987). These decisions determined that relevant U.S. law provides a higher standard of proof for those seeking to avoid deportation under section 243(h) of the Immigration and Nationality Act ("clear probability of persecution") than for those seeking asylum under section 208(a) ("well founded fear of persecution"). Article 3 of the Convention places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured. This "non-refoulement" obligation is analogous to the statutory prohibition against deportation in section 243(h). The Supreme Court decided in *Stevic* that the applicable standard for evaluating such a claim is "a clear probability of persecution." We hope that on reexamination you will agree that this is the relevant legal standard to be applied under the Convention.

With respect to your final question whether the People's Republic of China is "a violator of human rights, and if so, why has the PRC not been condemned for these violations by the United Nations," we would refer you to the testimony of Ambassador Schifter before the Subcommittee on Human Rights and International Organizations of the House Foreign Affairs Committee on February 21, 1990, concerning the Department's Country Reports on Human Rights Practices for 1989. The annual report for China details the dramatic decline in the human rights climate in China during the past year, including the Beijing massacre and ensuing crackdown.

While you did not raise it, you undoubtedly know that Senator Helms proposed during the hearings that a "sovereignty" reservation should be attached to the Convention conditioning our obligations thereunder on the U.S. Constitution. We are preparing a detailed response to that proposal and will of course share it with you when it has been completed.

I trust the foregoing is responsive to your concerns. We would be pleased to provide further information if you would find it helpful.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR HELMS

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.
June 13, 1990.

Senator HELMS,
U.S. Senate, Washington, DC.

DEAR SENATOR HELMS: I am writing with regard to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is currently pending before the Committee on Foreign Relations. At the committee's hearing on January 30, you expressed a number of concerns about the Convention and the administration's proposed package of reservations, declarations, and understandings, and you urged us to consult with your staff on these issues. We have done so and have found the consultations helpful in clarifying a number of issues, one of the most important being the "sovereignty" clause you proposed at the hearing.

The "sovereignty" clause would condition the Senate's advice and consent to ratification of the Convention upon the same proviso which was applied to the Genocide Convention (and subsequently to several other treaties), namely, that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

We agree with that statement as a matter of fact and as a legal proposition. Nothing in this Convention does or could require any unconstitutional action by the United states. To our knowledge, no one—in formal testimony or otherwise—has identified any provision in the Convention that is potentially unconstitutional. (In that regard, the Torture Convention differs from the Genocide Convention, which arguably raised a potential First Amendment issue.) The Constitution is the supreme law of the land; neither a Treaty nor an executive agreement can, in our view, authorize action inconsistent with it. This was unambiguously established by the Supreme Court in *Reid* v. *Covert*, 354 U.S. 1 (1957), and remains true whether or not the Senate conditions its approval of the Convention (or any other Treaty) on a "sovereignty" clause. It was for these reasons that at the January 30 hearing we opposed the "sovereignty" clause as unnecessary.

Although unnecessary at the domestic level, the proposal becomes very damaging at the international level. In the year since we ratified the Genocide Convention subject to a similar "sovereignty" reservation, some twelve foreign governments (all of them European allies) have formally registered their objections to it. The United Kingdom is especially concerned. Other States have protested diplomatically, and have put us on notice that they will coordinate stronger objections if we repeat the reservation in other contexts. These governments have raised legitimate concerns about our reservation. It creates unacceptable uncertainty as to the extent of the legal obligations which the United States has in fact assumed under the Convention. They ask how a foreign country, not expert in the domestic constitution of another country, will know the extent of treaty obligations actually undertaken by a State which subjects its treaty obligations to such a general reservation.

They have also expressed the concern that other countries may follow the U.S. lead in conditioning their acceptance of the Convention upon their own constitutions or internal law. This problem of reciprocity exists even if other States do not attach a similar reservation to the Convention. As a matter of international treaty law, our "constitutional" reservation is reciprocally available to all other treaty partners. Thus, our ability to invoke treaty rights against them would be subject to their Constitutions. The problem is compounded since the reservation attaches to the entire Convention, leaving the overall extent of legal obligations unclear and open to substantial abuse by countries with obscure or readily-changeable constitutions. This could be a particular problem with regard to the Mutual Legal Assistance Treaties, which we intend to overcome foreign bank secrecy laws in order to assist law enforcement efforts.

From the international perspective, therefore, the proposed "sovereignty" clause is not harmless but instead threatens to upset the very object and purpose of the Convention, which is the establishment of an effective international legal prohibition against torture.

In the course of our consultations, our staffs discussed a possible accommodation of our respective concerns wherein the "sovereignty" clause would be adopted as a declaration and included in the Senate's resolution of advice and consent but would not be included in the formal instrument of ratification submitted by the United States to the United Nations. The clause would thus have its intended effect domestically, clarifying the issue of U.S. law about which you are concerned, while avoiding the difficulties that trouble us on the international level.

This procedure was followed with respect to a different provision in the Genocide Convention. In that context, the Senate included in its resolution of advice and consent the declaration that the President would not submit the instrument of ratification until implementing legislation had been adopted. It was understood, however, that this declaration would not be incorporated in the instrument of ratification filed with the treaty depositary.

While we believe that inclusion of the provision in the resolution of advice and consent is unnecessary, we would be prepared to accept this outcome as an accommodation of our respective interests.

We are grateful for the time and effort Bob Friedlander has devoted to this issue, the above proposal is due largely to his diligence.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.
July 9, 1990.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am writing to reiterate the administration's strong interest in early and favorable action by the Senate Foreign Relations Committee concerning the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We are pleased to note that the committee has scheduled a markup of the resolution of advice and consent to ratification of the Convention on July 11.

As you know, since the committee's hearing on the Convention on January 30, we have continued our consultations with committee staff, as well as the staff of individual members, concerning the proposed package of reservations, declarations, and understandings to the Convention. We have also continued to receive comments on the proposed package from interested private groups.

After careful consideration of the various issues raised, the administration stands by the package we have proposed. We continue to believe that the package is desirable to clarify the Convention and to address certain U.S. domestic legal concerns, and does not undermine our commitment to the Convention. At the same time, we believe that the additional elements which have been proposed are neither necessary nor helpful.

The explanation for the package of reservations, understandings, and declarations we have proposed was provided during the January 30 hearing and further elaborated in an April 4 letter to Senator Pressler (a copy of which was earlier provided to your staff; another is enclosed for your convenience). There are, however, two important issues on which I would like to underscore our position.

The first issue concerns a proposed "constitutional" or "sovereignty" reservation which Senator Helms has indicated he intends to offer. Such a provision would subject the Senate's advice and consent to ratification of the Convention to the same condition that was applied to the Genocide Convention (and subsequently to several other treaties), namely, that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

At the January 30 hearing, the Department's Legal Adviser, Judge Sofaer, stated, the administration's strong opposition to the imposition of such a reservation to the Convention. At the domestic level, it is entirely unnecessary. At the international level, it is very damaging, as it leaves the treaty obligations between the United

ates and other States party ambiguous and potentially asymmetrical. we therefore main strongly opposed to such a condition.

In the year since we ratified the Genocide Convention, twelve European countries ve filed written objections to the "sovereignty" reservation in the context of that nvention, and others have raised their concerns in diplomatic channels, 'indicat- g that they would strongly oppose a similar reservation to the Torture Convention. Moreover, six recently-approved Mutual Legal Assistance Treaties were all bjected to the same "sovereignty" proviso; to date, four of the six governments ncerned have reacted negatively.

As these governments note, the reservation makes the extent of U.S. legal obligaons under the Convention unclear to our treaty partners, which cannot be expect- l to understand the scope of the U.S. Constitution. Moreover, under multilateral eaty law, the reservation is automatically available reciprocally to all other States arty, thereby enabling others to limit their compliance with the Torture Convenon by invoking the terms of their own constitutions, which may be vague or easily nangeable. This leaves the legal relationship between the U.S. and other States arties unclear, and, because the U.S. Constitution does not permit torture, potenally asymmetrical. Attaching a "sovereignty" reservation to our instrument of tification thus undermines the Convention's objective of creating an effective ternational obligation to eliminate torture. One potential effect could be to erode even eliminate the central obligation to extradite or prosecute torturers.

While damaging at the international level, the reservation is unnecessary at the omestic level. Nothing in this Convention does or could require any unconstitution- l action by the United States. To our knowledge, no one—in formal testimony or therwise—has identified any provision in the Convention that is potentially uncontitutional. (In that regard, the Torture Convention differs from the Genocide Conention, which arguably raised a potential First Amendment issue.) The Constituon is the supreme law of the land; neither a Treaty nor an executive agreement an, in our view, authorize action inconsistent with it. *Reid* v. *Covert*, 354 U.S. 1 1957). This remains true whet' er or not the Senate conditions its approval of the nvention (or any other Treaty) on a "sovereignty" clause. If there are continuing oncerns about the relationship between the Convention and the Constitution, we ould suggest that this letter be included in the committee's report as a confirmaon of the Executive Branch's agreement that the Convention neither requires nor uthorizes action inconsistent with the Constitution.

The second issue involves the Committee Against Torture. On this issue, we have eceived conflicting advice during our recent consultations. Some groups have urged s to accept the full competence of the committee without reservation. Others have rged us to decline to accept any competence of the committee. After careful considration, we continue to believe it appropriate to adopt the middle course proposed in ur package of reservations and accept two of the three optional competences of the ommittee: one under Article 20 of the Convention, which empowers the committee o examine country situations when it receives reliable information containing wellounded indications that torture is being systematically practiced, and the other nder Article 21, which permits the committee to consider complaints from one State party that another is not fulfilling its obligations under the Convention. We ould not, however, propose to accept the third competence of the committee, under rticle 22, to consider complaints by individuals subject to U.S. jurisdiction claiming o be victims of a violation of the Convention.

We continue to believe strongly that our substantial interest in eliminating torure around the world will best be served by participating actively in the work of he committee and directing its attention to situations in which torture is still pracced. The committee has, to date, held four sessions, during which it began considration of initial reports from States Parties on implementation of the Convention s well as communications submitted under Article 22. Obviously, we cannot help hape the committee's direction if we do not participate, and since Article 21 requires reciprocity, we cannot call another State's actions into question unless we re also prepared to accept the committee's competence to consider reciprocal laims against us.

We do not believe that the United States has anything to fear from such particiation. There is no possibility of a well-founded indication of systematic torture in he United States (to our knowledge, no human rights group has ever accused the U.S. of systematic torture), and we do not believe that States with a political motivation to charge us with torture are likely to expose themselves to reciprocal harges. Moreover, with the changes in Eastern Europe, the risks of politically motivated "bloc voting" are substantially diminished from several years ago. In any vent, the committee has no authority to make binding decisions.

We are not inclined to accept the committee's third competence, to hear complaints of individuals subject to our jurisdiction who claim to be victims of a violation of the Convention. Claims submitted against the United States are likely to be frivolous, particularly since the claimant must have first exhausted all available domestic remedies; given the extensive remedies provided by U.S. law, we do not believe there is any need to create an additional international remedy for persons subject to our jurisdiction, nor any justification to commit substantial resources to respond to the claims that would be submitted. Moreover, there could be more serious problems concerning implications for our own domestic proceedings if the committee did not scrupulously respect the exhaustion of remedies rule. we therefore believe it would be prudent to await further committee experience before deciding to accept this third competence of the committee.

The United Kingdom has adopted the same approach to the committee which we are recommending. Other western European States generally accept all of the committee's competences. The Soviet Union and most Eastern European States have rejected the committee's competences under Articles 20–22, but these actions were takes before the recent changes in the political landscape there and may well be reversed in some cases.

We hope that you and the members of your committee will find the foregoing useful in your consideration of the Convention. As always, we stand ready to assist the committee in any way.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs

○

Immigration Judge Benchbook Index

(October 2001)

Part II. Sample Decisions & Related Law Paragraphs

A. INTRODUCTION

Section II offers sample decisions or formats and relevant paragraphs of law that can be used in constructing an oral decision from the bench. The intent is that a Judge, with his or her notes of the case at hand, might follow a chosen format or combination of formats and, drawing from the information in the format and the relevant paragraphs of law, construct a fluid and thorough decision.

Some qualifications are in order:

1. Not all types of decisions are covered. If Section II proves useful, it can be expanded.

2. None of the formats or paragraphs are mandatory or officially-sanctioned. Everything here is offered for use in your discretion. To the extent any sentence in this section is interpretative, you may or may not agree, and therefore may or may not use. Also, the samples reflect denials of relief since those types of decisions are the majority in which a formal oral decision is required.

3. A deliberate attempt was made to keep the sections of law paragraphs to a manageable size. They are intended as a useable reference of commonly covered topics, not as another encyclopedia of immigration law.

4. Modify at will. No format or collection of law paragraphs is useful unless you make it your own. Please read, change, update, incorporate, delete and share your thoughts as you see fit.

Immigration Judge Benchbook Index

(October 2001)

Asylum Samples

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No: A_____ Date:

In the Matter of	)	
_____	)	IN DEPORTATION PROCEEDINGS
	)	
Respondent	)	

CHARGE(S): Section 241(a)( )( ) of the Immigration and Nationality Act -

APPLICATION(S): Asylum; withholding of deportation; voluntary departure

ON BEHALF OF RESPONDENT:

_____, Attorney at Law

ON BEHALF OF INS:

_____
Assistant District Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a ___ year old, single/married, male/female, native and citizen of _____. The United States Immigration and Naturalization Service (INS) has brought these deportation proceedings against the respondent pursuant to the authority contained in section 242 of the Immigration and Nationality Act (the Act). Proceedings were commenced with the filing of the Order to Show Cause with the Immigration Court. See Exhibit 1.

The respondent admits as alleged in the Order to Show Cause that:

> [E.g.] S/He entered the United States on or about _____ at or near _____ without inspection by an immigration officer. S/He further concedes that s/he is deportable as charged under section 241(a)(1)(B) of the Act for having entered without inspection.

On the basis of the respondent's admissions (and the supporting I-213/other records admitted into evidence) I find that the respondent's deportability has been established by evidence which is clear, unequivocal, and convincing. Woodby v. INS, 385 U.S. 276 (1966).

The respondent declined to designate a country of deportation, and _____ was directed. The respondent applied for relief from deportation in the form of asylum under section 208(a) of the Act. Applications for asylum shall also be considered as applications for withholding of deportation under section 243(h) of the Act. The respondent requests voluntary departure under section 244(e) of the Act in the alternative.

The respondent's Form I-589 application for asylum is contained in the record as Exhibit __. Prior to admission of the application the respondent confirmed in Court that he knew the contents of his application and he was given an opportunity to make any necessary corrections. The respondent then swore or affirmed before me that the contents of the application, as corrected, including the attached documents and supplements, were all true and correct to the best of his knowledge.

The application had been forwarded by the INS to the State Department for comment. The response is included in the record at Exhibit ___.

FACTS

The evidence at the hearing consisted of the respondent's written asylum application, his own testimony, his supplemental declaration attached to his asylum application, the State Department advisory opinion and Profile (country and date), the Country Report for Human Rights Practices (country and date), and _____

Written application:

In his written application the respondent stated that he was seeking asylum on the grounds of __race, __religion, __nationality, __membership in a particular social group, and __political opinion, because _____
_____
_____

He alleges that if he returned to _____ he would/could/may be _____
_____

The respondent listed himself/other family members (identify family members) as having been a member(s) of _____

The respondent stated that he was/was not ever arrested, detained, interrogated, convicted and sentenced, or imprisoned. (Facts). His family members (identify) were/were not ever arrested, detained interrogated, convicted/sentenced or imprisoned. (Facts).

On _____(date) the respondent departed _____(country). He traveled to _____(country) for _____(length of time), then to

_____(country) for _____(length of time). He did/did not seek asylum or safe haven in these countries.

Testimony:

The respondent testified at the hearing as follows:

_____

_____

STATEMENT OF THE LAW

(Trim to fit the case)

The burden of proof is on the respondent to establish that he is eligible for asylum or withholding of deportation under section 243(h) of the Act or under the Convention Against Torture.

A. Withholding under section 243(h) of the Act

To qualify for withholding of deportation under section 243(h) of the Act, the respondent's facts must show a clear probability that his life or freedom would be threatened in the country directed for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). This means that the respondent's facts must establish it is more likely than not that he would be subject to persecution for one of the grounds specified.

B. Asylum under section 208 of the Act

To qualify for asylum pursuant to section 208 of the Act the respondent must show that he is a refugee within the meaning of section 101(a)(42)(A) of the Act. See Section 208(a) of the Act. The definition of refugee includes a requirement that the respondent demonstrate either that he suffered past persecution or that he has a well-founded fear of future persecution in his country of nationality or, if stateless, his country of last habitual residence on account of one of the same five statutory grounds. The alien must show he has a subjective fear of persecution and that the fear has an objective basis. The objective basis of a well-founded fear of future persecution is referred to in the regulations as a "reasonable possibility of suffering such persecution" if the alien were to return to his home country. 8 C.F.R. § 208.13(b)(2) (2000). The objective component must be supported by credible, direct, and specific evidence in the record. De Valle v. INS, 901 F.2d 787 (9th Cir. 1990). The alien must also be both unable and unwilling to return to or avail himself of the protection of his home country because of such fear. Finally, an applicant must also establish that he merits asylum in the exercise of discretion. See Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

In evaluating a claim of future persecution the Immigration Judge does not have to require the alien to provide evidence he would be singled out individually for persecution if the alien establishes that there is a pattern or practice in his home country of persecution of groups of persons similarly situated to the applicant on one of the 5 enumerated grounds, and that the alien is included or identified with such group. 8 C.F.R. § 208.13(b)(2) (2000).

An alien who establishes he suffered past persecution within the meaning of the Act shall be presumed also to have a well-founded fear of future persecution. The presumption may be rebutted if a preponderance of the evidence establishes that, since the time the persecution occurred, conditions in the applicant's home country have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return. An alien who establishes past persecution, but not ultimately a well-founded fear of future persecution, will be denied asylum unless there are compelling reasons for not returning his which arise out of the severity of the past persecution. 8 C.F.R. § 208.13(b)(1) (2000); see also Matter of Chen, 20 I&N Dec. 16 (BIA 1989).

The well-founded fear standard required for asylum is more generous than the clear probability standard of withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). We first, therefore, apply the more liberal "well-founded fear" standard when reviewing the respondent's application, because if he fails to meet this test, it follows that he necessarily would fail to meet the clear probability test required for withholding of removal.

C. Withholding / deferral of deportation under the Convention Against Torture

In adjudicating the request for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture") I have applied the regulations at 8 C.F.R. Part 208, particularly sections 208.16, 208.17, and 208.18. See 64 Fed. Reg. 42247 (1999). "An alien who is in exclusion, deportation, or deportation proceedings on or after March 22, 1999, may apply for withholding of deportation under 208.16(c), and, if applicable, may be considered for deferral of deportation under section 208.17(a)." 8 C.F.R. § 208.18(b)(1) (2000).

Among the important tenants of this law are the following:

> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1) (2000).

To constitute torture, the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R. § 208.16(a)(6) (2000). The pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1) (2000). "Acquiescence" requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2000). Torture is an "extreme form of cruel and inhuman treatment" and does not include pain or suffering arising from lawful sanctions. 8 C.F.R. §§ 208.18(a)(2) and (3) (2000).

In order to constitute torture, mental pain or suffering must be "prolonged." 8 C.F.R. § 208.18(a)(4) (2000). It also must be caused by or resulting from intentional or threatened infliction of severe physical pain or suffering, threatened or actual administration or application of mind altering substances or similar procedures, or threatened imminent death. Id. These causes or results can be directed towards the applicant or another. Id.

The applicant for withholding of deportation under the Convention Against Torture bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2) (2000). In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including:

> (i) Evidence of past torture inflicted upon the applicant;
>
> (ii) Evidence that the applicant could relocate to a part of the country of deportation where he or she is not likely to be tortured;
>
> (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
>
> (iv) Other relevant information regarding conditions in the country of removal.

8 C.F.R. §§ 208.16(c)(3)(i-iv) (2000).

CREDIBILITY

A. General Law [NINTH CIRCUIT]

An Immigration Judge's finding regarding the credibility of a witness is ordinarily given significant deference since the judge is in the best position to observe the witness' demeanor. Paredes-Urrestarazu v. INS, 36 F.3d 801, 818-21 (9th Cir. 1994); Matter of Kulle, 19 I&N Dec. 318 (BIA 1985).

"The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.13 (2000). Adverse credibility determinations must be

based on "specific cogent reasons," which are substantial and "bear a legitimate nexus to the finding." Lopez-Reyes v. INS, 79 F.3d 908 (9th Cir. 1996). Where an Immigration Judge has reason to question the applicant's credibility, and that applicant fails to produce non-duplicative, material, easily available corroborating evidence, and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review. Sidhu v. INS, 220 F.3d 1085 (9th Cir. 2000); Mejia-Paiz v. INS, 111 F.3d 720, 724 (9th Cir. 1997). However, once an alien's testimony on specific facts is found to be credible, corroborative evidence of that testimony is not required (although the facts established by that testimony may be insufficient to establish asylum). Ladha v. INS, 215 F.3d 889 (9th Cir. 2000).

A. General Law [BIA]

An Immigration Judge's finding regarding the credibility of a witness is ordinarily given significant deference since the Judge is in the best position to observe the witness' demeanor. Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998); Matter of Kulle, 19 I&N Dec. 318 (BIA 1985); Matter of Boromand, 17 I&N Dec. 450 (BIA 1980).

The testimony of an applicant for asylum may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed, in light of general conditions in the home country, to provide a plausible and coherent account of the basis for the alleged fear. Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); 8 C.F.R. § 208.13(a) (2000).

Where an alien's asylum claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the alien's particular experience is not essential. But where it is reasonable to expect such corroborating evidence for certain alleged facts pertaining to the specifics of the claim, such evidence should be provided or an explanation should be given as to why it was not provided. Matter of S-M-J-, 21 I&N Dec. 72 (BIA 1997); see also Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998).

An adverse credibility finding can be based on inconsistent statements and fraudulent documents. See Matter of O-D-, 21 I&N Dec. 107 (BIA 1998); see also Leon-Barrios v. INS, 116 F.3d 391, 393-94 (9th Cir. 1997) (upholding adverse credibility finding where differences in asylum applications related to "heart" of asylum claim). A trier of fact's determination that testimony lacks credibility must be accompanied by specific, cogent reasons for such a finding. Matter of A-S-, supra.

A finding of credible testimony is not dispositive as to whether asylum should be granted; rather, the specific content of the testimony and any other relevant evidence is considered. Matter of E-P-, 21 I&N Dec. 860 (BIA 1997); see also Matter of Y-B-, 21 I&N Dec. 113 (BIA 1998) (the weaker an alien's testimony, the greater the need for corroborative evidence; testimony lacking in specific details; significant omissions in the written application).

B. Analysis on Credibility

Question 1. Was there corroborative evidence that was reasonably expected but not presented? Are the reasons given for failing to present the evidence persuasive? For BIA -See Matter of S-M-J-, supra, Matter of M-D-, supra. For NINTH CIRCUIT See Sidhu v. INS, supra; Mejia-Paiz v. INS, supra.

Question 2. Note demeanor factors / inconsistencies / implausibilities / omissions / lack of detail and other difficulties with respect to the respondent's testimony (within the testimony itself; between the testimony and the application; between the testimony and the declaration; etc).

Question 3. Then decide if difficulties are significant enough to render respondent lacking in credibility on all or certain issues.

Question 4. If respondent is credible, or assuming the alien is credible as an alternate finding, is the evidence sufficient to establish the elements of asylum, withholding under section 241(b)(3), or withholding / deferral under the Convention Against Torture? See Matter of Y-B-, supra; Matter of E-P-, supra; Matter of Dass, supra.

FURTHER ANALYSIS AND FINDINGS [1]

Persecution is harm or harm threaten on account of a belief or trait held by, or imputed to, an alien, and the belief or trait must be protected under one of the five grounds: race, religion, nationality, membership in a particular social group, or political opinion.

1. In Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), the Board of Immigration Appeals instructed that persecution exists where: (1) the alien possesses a belief or characteristic that a persecutor seeks to overcome in others by means of a punishment of some sort; (2) the persecutor is aware or could become aware of the person's belief or trait; (3) the persecutor has the capability to punish the alien; and (4) the persecutor has the inclination to punish the alien. [Note: Certain case law in the Ninth Circuit questions whether the Mogharrabi standard of "reasonable person in the respondent's circumstances would fear persecution" is consistent with the regulations' formulation of "reasonable possibility of actually suffering such persecution."]

2. Relevant Questions:

   a. Statutory or regulatory ineligibility? (E.g., persecutor; conviction of an aggravated felony, resettlement, bilateral treaty under section 208(a) of the Act).

      _____

      _____

   b. Who is the persecutor? (E.g., Government, guerrilla, both, other)

      i. If the persecutor is other than the government, did the respondent seek the protection of the government? Would it be useless to require him to seek protection as the group is clearly outside of the control of the government? See McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981).

   c. What is the harm feared?

      i. Not all harm (e.g., inability to pursue chosen profession, or brief detention) is serious enough to constitute persecution.

   d. What is the belief or immutable characteristic / trait held by the alien?INS v. Elias-Zacarias, 502 U.S. 478 (1992), made clear that persecution must be on account of the victim's belief or characteristic, not the persecutor's. Define

---

[1]Note to IJ: The following relates to asylum and withholding of deportation under section 243(h) of the Act. For guidance on withholding / deferral of removal under the Convention Against Torture see Bench Book Section I, Chapter 9, and Section II, Convention Against Torture Sample and Paragraphs.

carefully:

i. The belief or characteristic held by the alien is:

_____

_____

ii. Is it a protected belief or characteristic?

_____

_____

iii. Is the belief or characteristic not held by, but imputed to the alien?

_____

_____

iv. The following generally do not constitute protected beliefs or immutable traits:

(1) Employment;

(2) Recruitment by rebels (Recruitment of an individual by a guerrilla organization is not, in and of itself, persecution "on account of political opinion." INS v. Elias-Zacarias, 502 U.S. 478 (1992));

(3) Conscription by government, unless punishment is disproportionately severe, or soldier would be required to perform internationally-condemned acts;

(4) Forced contributions to rebels;

(5) Neutrality (exceptions in Ninth Circuit);

(6) Threat of retribution in personal dispute;

(7) Threat of prosecution for violation of laws of general application;

(8) Threat of discipline by rebel group;

(9) Generalized disagreement with political and/or economic system;

(10) Threat of harm to combatants, policemen, soldier, or rebel as a result of performance of duties;

(11) General conditions of strife and anarchy;

(12) Threat of harm as a result of civil war;

(13) Mistreatment during police interrogation. But see "extrajudicial punishment" deemed to be persecution. A government has a legitimate right to investigate crimes and subversive acts or groups. However, "extrajudicial punishment" may constitute persecution. See Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995); Blanco-Lopez, 858 F.2d 531 (9th Cir. 1988); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985); and,

(14) Detention does not by itself suffice to show alien has trait or belief protected by the Act.

e. Is the persecutor aware, could the persecutor become aware, of the respondent's belief or trait? (See Country Reports; Profiles; Amnesty International Reports; other background documentation)

_____
_____

f. Does the persecutor have the capability to persecute the respondent?

_____
_____

g. Does the persecutor have the inclination to persecute the respondent?

_____
_____

i. The applicant does not have to provide evidence he would be singled out individually for persecution if he establishes that there is a pattern or practice in his home country of persecution of groups of persons similarly situated to the applicant on one of the 5 enumerated grounds, and that the applicant is included or identified with such group. 8 C.F.R. § 208.13(b)(2)(2000).

h. If the respondent does not meet the well-founded fear standard:

i. "Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it necessarily follows that he has failed to satisfy the more stringent clear probability of persecution standard required for withholding of deportation."

i. If the respondent has met the well-founded fear standard does his evidence also meet the clear probability standard?

j. If the respondent has met the well-founded fear standard, is asylum merited in the exercise of discretion? Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

VOLUNTARY DEPARTURE

The respondent has requested the privilege of departing the United States voluntarily in lieu of deportation under section 244(e) of the Act. To qualify for voluntary departure he must show that he would be willing and has the means to depart immediately, that he has been a person of good moral character for at least the past 5 years, and that he is deserving of the relief in the exercise of discretion. See Matter of Seda, 17 I&N Dec. 550 (BIA 1980).

Discretionary consideration of an application for voluntary departure involves a weighing of factors, including the alien's prior immigration history, the length of his residence in the United States, and the extent of his family, business and societal ties in the United States. See Matter of Gamboa, 14 I&N Dec. 244 (BIA 1972).

Analysis:

_____

_____

Conclusion: I find that the respondent has met the statutory requirements for voluntary departure, and that relief will be granted in the exercise of discretion for a period of __ months.

ORDERS

IT IS HEREBY ORDERED, that the respondent's application for asylum be granted / denied.

IT IS HEREBY ORDERED, that the respondent's application for withholding of deportation to _____ be granted / denied.

IT IS FURTHER ORDERED, that the respondent be granted the privilege of departing the United States voluntarily in lieu of deportation and without expense to the Government on or before_____, plus any extension and on such conditions that may be granted by the District Director of the Immigration and Naturalization Service.

IT IS FURTHER ORDERED, that if the respondent does not voluntarily depart the United States when and as required, the privilege of voluntary departure shall be withdrawn, without further notice or proceedings, and the respondent shall be deported from the United States to _____ on the charge(s) contained in the Order to Show Cause.

_____
Henry P. Ipema, Jr.
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File No.:A Date:

In the Matter of)
)
Name of Respondent,) IN DEPORTATION PROCEEDINGS
)
Respondent)

CHARGE: Section 241(a)(l)(B) of the I&N Act, 8 U.S.C. Section 1251(a) (1) (B) (Entry without inspection)

APPLICATIONS: Asylum; withholding of deportation; and voluntary departure

ON BEHALF OF RESPONDENT: ON BEHALF OF INS:

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, a 39-year-old native and citizen of Guatemala, entered the United States at or near San Ysidro, California on or about April 20, 1991. At that time he had crossed into the United States illegally, without first being inspected by an Immigration Officer. As a result, on August 22, 1996, the Immigration and Naturalization Service issued to the respondent an Order to Show Cause and Notice of Hearing (Form I-221) (Exhibit 1) charging the respondent with deportability under Section 241(a)(1)(B) of the Act. The Order to Show Cause and Notice of Hearing was filed with the Court here in San Diego, California vesting this Court with jurisdiction over the respondent's case. On November 5, 1996, the respondent was present in Court and he appeared for his initial hearings. The respondent indicated he understood both the nature and purpose of the proceedings and of his right to be represented by an attorney of his own choosing at no expense to the United States government. He requested an opportunity to obtain counsel to represent him in the case and his request was granted. The case was continued for further hearing on December 5, 1996.

On December 5, 1996, the respondent was present in Court and he appeared with counsel of his own choosing. Through counsel he admitted to the truth of the four factual allegations contained in the Order to Show Cause and Notice of Hearing and conceded his deportability as charged. Based upon the respondent's admissions and concession through counsel I did find and I do find that his deportability is established by clear, unequivocal, and convincing evidence as required. See Woodby v. INS, 385 U.S. 276 (1966); see also 8 C.F.R. § 242.14(a) (1997). The

respondent declined to specify a country for deportation purposes in the event that it would become necessary. The Immigration Service motion to direct Guatemala, the country of his citizenship, was granted and Guatemala has been directed in the event that it should become necessary.

The respondent, through counsel, stated his desire to renew his applications for both asylum and withholding of deportation to Guatemala. In the alternative he requested an opportunity to seek and obtain the privilege of voluntarily departing the United States under the authority of Section 244(e) of the Act. The Court reviewed with both parties the application for asylum that had been referred to the Court by the INS (Exhibit 4) and invited the respondent the opportunity to augment that application and file other documents in support. The Court also addressed with both parties its expectation that the parties would address current country conditions in Guatemala in light of the developments that had been taking place and have taken place since the hearing on December 5, 1996. The Court indicated that the submissions were not optional but were required. The Court then set the case over for further hearing.

As discussed during the course of the proceedings itself the respondent had filed a request for an extension of time to submit the prehearing statement of position (Exhibit 7) on March 5, 1997. In that the respondent, through counsel, had requested an additional 20 days to file the prehearing statement. The only reason that had been given in the representation filed by counsel with this Court was that the respondent's attorney had filed and requested a Freedom of Information Act request and as of the date of the filing they had not received the response. The respondent requested a 20 day extension. On March 10, 1997, the Court answered the order without waiting the full customary 10 day period. In light of the looming deadline and of the importance of the submission in additional evidence the Court granted the request for the extension and extended the deadline until March 25, 1997. See Exhibit S.

The respondent then filed a second request for an extension of time to submit prehearing statement of position on March 25, 1997, (Exhibit 9) in which the attorney for the respondent represented that he was in Puerto Rico on a business trip and had inadvertently packed and brought the file with him. The attorney represents that he had brought with him all the exhibits and would be unable to file them by the deadline that had been submitted and requested an additional extension of the filing deadline. The respondent's attorney attached declaration. The declaration puts forth three different points but none of the points reflect that the respondent's counsel had taken with him exhibits.

The Service, through its representative, did file a motion to admit evidence on March 31, 1997. In it the Service filed documentation that it believed to show the ongoing process in the country of Guatemala. The Service file supporting documentation, including the Profile of Asylum Claims and Country Conditions prepared by the Department of State and dated January 1997 for the country of Guatemala.

The respondent himself did not file any exhibits or prehearing statement by the hearing date itself. Instead, on May 13, 1997, the respondent came to Court and requested a continuance. The transcript itself of the proceedings reflects the discussion that the Court had between the respondent and the Service regarding the last minute request for a continuance. The Court addressed with counsel specifically his failure to comply with the filing deadlines of the Court and also what the Court viewed as a misrepresentation or at best misleading statements in the respondent's request to extend the filing deadlines. The day of the hearing counsel had represented to the Court that the respondent himself had considered a withdrawal of his relief

applications and that rather than alert the Court that was the reason for the request for the extension had put the other reasons down in the motions in an effort to protect the respondent from having his application be abandoned or deemed withdrawn. In so doing, counsel himself has put into question his word before this Court. The central issue, though, before the Court at the outset of the hearing was the respondent's desire to continue the case in light of the letter that had been filed on his behalf by a clinical psychologist that was addressed to his attorney.

The Court concluded that "good cause" had not been shown to continue the case in light of the letter filed by the respondent. See Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983); see also 8 C.F.R. § 3.29 (2000). The reasons for the denial of the continuance are articulated in the record itself and incorporated into this final oral decision by way of reference. The letter itself was a last minute attempt to continue the hearing. The letter itself was not in any type of affidavit format. The Service did not have an opportunity to follow up given the late date of its submission. It is certainly something that could have been prepared and considered well in advance of the hearing date. Lastly the Court would point out that any request for the continuance was essentially mooted by the fact that the Court did not complete the hearing on May 13, 1997, but instead had continued the case to allow the respondent an opportunity to present the testimony of an additional witness. The Court did afford the respondent an opportunity to be recalled to the stand to testify. If in fact he had been suffering from depression and anxiety affecting his ability to participate in these proceedings on the specific date of his hearing on May 13, 1997, the intervening time would allow him to obtain some attention from appropriate medical personnel and clarify any points of testimony that might have been affected by that depression and anxiety.

As indicated by the Court at that initial hearing the respondent ascribed to the truth of the contents of his application for asylum and also offered his testimony. He filed with the Court on the date of the hearing original photographs (Group Exhibit 12) that corroborate his participation in the Policia Militar Ambulante (PMA). At the conclusion of his testimony on that date, the Court set the case over for further hearing.

The Court gave respondent's counsel an opportunity to keep his word and file a written prehearing submission outlining the respondent's position on the issues, the legal questions that had been raised to that point. The respondent was also directed, through counsel, to provide an offer of proof regarding the prospective witness if indeed it was his desire to call him as a witness. The Court directed that such submission be made within 10 days of the hearing on May 13, 1997. Once again the respondent, through counsel, did not follow through with his obligations and instead filed nothing. Because of the respondent's inability to comply with that filing deadline the Court called a special pretrial hearing conference, or in progress hearing conference on July 15, 1997. At that hearing the respondent, counsel for the respondent, and the Service representative were present in Court. On the record the Court discussed, once again directly with counsel his actions in the case. Counsel admitted his negligence on behalf of the respondent in failing to follow through with his required obligations to this Court. He acknowledged that it was not the respondent's fault as to why the Court did not receive an offer of proof as to the expected testimony of the additional witness. Mindful of the fact that this is the respondent's case and that counsel had admitted his negligence the Court did allow the
respondent one last opportunity to file the offer of proof by the close of Court business on July 15, 1997. The Court directed counsel that in the event that the offer of proof had not been filed and the respondent still desired to have this witness testify in Court the Court expected counsel to

explain his negligent behavior directly to the respondent and take the necessary action to insure that the respondent would not be prejudiced further by his negligence.

In light of counsel's admission that if he had been negligent in the case, the Court spoke directly to the respondent and indicated that if he desired to find another attorney to represent him in the case he would be expected to do so and come to Court prepared to continue. On July 15, 1997, the respondent, through counsel, did file the statement giving the Court an offer of proof regarding the expected testimony of the prospective witness (Exhibit 17). The respondent has come to Court prepared to continue with the case on August 20, 1997. In addition to the application, his testimony, and the photographs, the respondent has offered the testimony of a fellow countryman, to corroborate the conduct of the PMA as his countrymen understood it to be. The respondent argues that based upon all the evidence that he has presented he has demonstrated his eligibility for both asylum and withholding of deportation. Before addressing his eligibility the Court will put forth a statement of the relevant law.

To be eligible for withholding of deportation pursuant to section 243(h) of the Act a respondent's facts must show a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). This means that the respondent's facts must establish that it is more likely than not that he would be subject to persecution for one of the grounds specified. He must also demonstrate that he does not fall under any of the statutory provisions that would disqualify him for withholding of deportation as a matter of law. See Section 243(h)(2)(A) of the Act.

To establish eligibility for asylum under section 208(a) of the Act, a respondent must meet the definition of a "refugee" which requires him to show persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See Section l0l(a)(42)(A) of the Act. The definition of a "refugee" specifically omits or excludes from its definition "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Id. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). An applicant for asylum has established that his fear is "well-founded" if he shows that a reasonable person in his circumstances would fear persecution. See Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). Furthermore, asylum unlike withholding of deportation may be denied in the exercise of discretion to a respondent who establishes statutory eligibility for the relief.

In this case the respondent has testified as a witness in a generally credible fashion. The respondent does have a fear of going back to Guatemala even in light of the evidence presented by the Immigration Service showing the many changes that have taken place in Guatemala since the respondent left that country. On December 30, 1996, the major guerrilla groups and the government signed a peace agreement after the 36-year-old civil war. The newspaper articles by the Service also reflect that the guerrillas themselves had begun to turn in arms. The respondent, however, is afraid to go back to Guatemala despite the peace because of his actions and involvement with the PMA from 1980 until 1986.

The respondent's testimony itself reflects that he had completed the eighth grade in 1973. From 1973 until 1980 he lived with his parents in Guatemala. He went into the military from 1973 until 1977 as a soldier. Then from 1980 until 1986 he was specifically a part of the PMA.

He testified vividly in Court that he was responsible for killing many people. He stated that he considered himself responsible for the deaths of between 24 or 25 people. He justifies his actions on the statement that he believed he was following orders and that if he did not follow the orders he himself would suffer retribution.

His own testimony though is contrasted by his later testimony that he did so also because he wanted to have a good record with the military. In fact, presumably because of his skills and ability the respondent was promoted to the position of a commander of a specific unit. As the commander he also served a dual role as a judge. He testified that his unit would go into a particular community and there he would determine whether the person detained was somehow involved with the guerrillas. He stated that it was up to him to determine the fate of that individual. His specific actions and/or orders resulted in the torturing of individuals. He described the tortures that were meted out by him as shooting victims in the head. He also indicated that victims had been hanged to get the truth or stabbed to death. He acknowledged that the detachment itself was involved in criminal behavior.

The respondent was discharged through his request and based upon his good behavior in 1986. He remained in Guatemala from 1986 until 1991. Throughout that time he lived in that country fearful that the family members of the victims would seek retribution against him for the torturing that he had forced upon the victims. For that reason in 1991 he fled Guatemala and traveled to the United States. He has been in the United States since 1991 until the present.

The Court concludes that the respondent is disqualified from asylum as a matter of law. Regulations themselves point out clearly that "an applicant shall not qualify as a refugee if he ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. § 208.13(c) (2000). The regulation articulates the standard that the Court must follow. If the evidence "indicates that the applicant engaged in such conduct, he shall have the burden of proving by preponderance of the evidence that he did not so act." Id.

In this case the evidence presented to this Court shows that the respondent had been involved specifically in the torturing of 24 to 25 people as the commander of the PMA. The PMA itself appears not to be an organization that is designed to engage in combat during a civil war but instead a paramilitary organization akin to the death squads whose goal is to threaten and terrorize people of the community so that they will not support the guerrillas. As the respondent's witness testified rather concisely, the people of Guatemala are generally a humble people. They're a people who were always fearful of the PMA and its actions. Even though the witness was from a different "departmento" from the respondent the reputation of the PMA crossed the boundaries of the departments.

It is clear that had the respondent's activities related directly to the civil war then he would not be disqualified from asylum. See Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988). Furthermore, the respondent has argued that he was simply complying with orders to justify his action. The evidence, however, is not clear whether he was following orders or whether he was motivated by desire to move through the ranks of the PMA. The evidence also suggests that the respondent himself gave orders and sat in judgment of other people. Be that as it may the respondent's argument that he was simply acting out orders does not excuse his behavior or include him within the definition of a refugee. A respondent's motivations and intent behind his assistance or participation in persecution are irrelevant. See Matter of Laipenieks, 18 I&N Dec. 433 (BIA 1983). Instead the Court must look not to the respondent's objective intent,

but rather to the objective effect of his actions in determining whether he assisted or participated in the specified persecution. See Matter of Rodriguez-Majano, supra; Matter of Laipenieks, supra. Likewise it is also clear that the mere membership in an organization even one which engages in persecution is not sufficient to bar one from relief but it's only if one's action or inaction furthers that persecution in some way which determines an individual's eligibility for asylum. See Laipenieks v. INS, 750 F.2d 1427, 1435 (9th Cir. 1985); Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984); see also Fedorenko v. United States, 449 U.S. 490 (1981).

In this case the respondent was actively involved in the persecution of others. The objective effect of his actions were to result in the torturing, death, and harm to other individuals. That harm qualifies as "persecution" because it was done to instill fear in members of the community to not have any involvement with the guerrillas. The respondent himself was in a position to decide the fate of the victims. He decided so not based upon any acceptable standards of adjudication but instead his own ability to decide their fate. He did not kill in self-defense or the result of a battle arising from a civil war. Instead it was through the terrorizing of the members of the population of the communities. As such the respondent is disqualified from asylum as a matter of law because he has not proved by a preponderance of the evidence that he was not engaged in the persecution of others on account of one of the enumerated grounds. Instead the evidence presented suggests by a preponderance of the evidence that he was in fact engaged in the harm of others based upon their political views or one of the other enumerated grounds. As a matter of law and regulation then the respondent is not eligible for asylum, therefore, the Court need not address his discretionary eligibility for asylum.

The respondent is also disqualified from withholding of deportation under section 243(h)(2) of the Act since the evidence demonstrates that he was engaged in the persecution of others on account of one of the enumerated grounds. See Matter of McMullen, 19 I&N Dec. 90 (BIA 1984), aff'd on other grounds , 788 F.2d 591 (9th Cir. 1986). The rationale outlined above pertaining to asylum and the respondent's actions apply equally to the determination of his disqualification for withholding of deportation. The respondent's activities did constitute persecution or the assistance in persecution on account of the civilian populations political opinions or desires to not be involved with the government. Accordingly, the respondent is disqualified from withholding of deportation as a matter of law under section 243(h)(2)(A) of the Act and that relief is denied to him.

Lastly, the respondent seeks the privilege of voluntarily departing the United States at his own expense. The Service has argued aptly that the persecution of others is the type of action that should be considered as disqualifying under the general provision contained under section 101(f) of the Act. That provision specifies eight categories under which an individual is unable to show good moral character. There is also the general language that even though an individual may not fall within any of the eight foregoing classes that would not preclude a finding that for other reasons such a person is or was not a person of good moral character. The Court agrees with the principle enunciated by the Service that the conduct the respondent has engaged in while in Guatemala would show that he was not a person of good moral character during that time period.

Section 244(e) of the Act requires that an individual show that he's been a person of good moral character only for the five years immediately preceding his application for relief. In that regard the respondent has testified as corroborated by his witness that he has been since here in the United states a law abiding, churchgoing, and remorseful individual. He's testified that he is

now ready, willing, and able to depart the United States if given the opportunity. As such, the respondent may be at least statutorily eligible for the privilege of voluntary departure. The issue here is on whether he merits voluntary departure in the exercise of the Court's discretion. See Matter of Gamboa, 14 I&N Dec. 244 (BIA 1972). The Court concludes that the respondent has not met his burden or proof to show that he merits voluntary departure in the exercise of discretion. See Matter of Seda, 17 I&N Dec. 550 (BIA 1980), overruled in part on other grounds by Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988).

The respondent has been in the United States since 1991 for now six years. He has been attending church in this country. His asylum application had reflected two family members that might have been in the United States at some point in time. However, his application signed before the Court reflects that their address is now in Guatemala. The respondent has not presented any evidence to the Court that he has any significant familial ties to this country. The respondent through has apparently been involved in his church and community and has expressed at least some remorse for his actions in Guatemala.

The Court though considers in the exercise of discretion his conduct while in Guatemala. The respondent himself was not a foot soldier but instead a commander of a detachment for the PMA. He sat in judgment of other people and was responsible for the death of at least 24 people and those deaths did not result as any type of commonly understood military battle but instead of some investigation conducted by himself and his detachment. That type of conduct is condemned by the international community and the United States itself. It is a grave action or actions committed by the respondent himself. The seriousness of his actions are so grave that they follow him to this country. They offset the favorable factors that he has presented. Given the scope of his involvement, the seriousness of his actions, and the misery that it has caused other families in his native country, the respondent has not demonstrated that he merits the privilege of voluntary departure in the exercise of the Court's discretion and, therefore, that relief will be denied. Accordingly, the Court will enter the following orders in the case:

IT IS HEREBY ORDERED that the respondent's applications for asylum, withholding of deportation to Guatemala, and the privilege of voluntary departure be and are hereby denied.

IT IS FURTHER ORDERED that the respondent be and is hereby ordered deported from the United States to Guatemala based upon the charge contained in the Order to show Cause and Notice of Hearing.

_____

Rico J. Bartolomei
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File No.:A Date:

In the Matter of)

)

Name of Respondent,) IN DEPORTATION PROCEEDINGS

Respondent)

CHARGE: Section 241(a)(l)(B) of the I&N Act, 8 U.S.C. § 1251(a) (1) (B)
(entry without inspection).

APPLICATIONS: Asylum; withholding of deportation; and voluntary departure

ON BEHALF OF RESPONDENT: ON BEHALF OF INS:

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, a 37-year-old native and citizen of Guatemala, entered the United States without being inspected by an Immigration Officer on or about November 15, 1990. As a result on December 9, 1996, the Immigration and Naturalization Service issued to the respondent an Order to Show Cause and Notice of Nearing (Form I-221) (Exhibit 1). In it the Service charged the respondent with deportability under section 241(a) (1) (B) of the Act for that entry without inspection. The Order to Show Cause and Notice of Hearing was filed with the Court in San Diego on December 23, 1996, vesting this Court with jurisdiction over the respondent's case.

On February 18, 1997, the respondent was present in Court and he appeared with counsel of his own choosing. Through counsel he indicated that he was going to attempt to seek administrative closure of the matter and would not be conceding his deportability at that juncture. In order to explore the issue of administrative closure further the Court granted the respondent's request to continue the case and set the case over for further hearing.

On March 18, 1997, the respondent was present in Court and appeared with counsel of record. Through counsel he indicated that he was prepared to go forward and that administrative closure of the case was not considered an option for the respondent. The respondent, through counsel, admitted to the truth of the four factual allegations contained in the Order to Show Cause and conceded his deportability as charged. Based upon the respondent's admissions and concession the Court found and does find that his deportability is established by evidence which is clear, unequivocal, and convincing as required. See Woodby v. INS, 385 U.S. 276 (1966); see also 8 C.F.R. § 242.14(a) (1997). He declined to name a country for deportation purposes in the

event that it would become necessary. The Service motion to direct Guatemala was granted and Guatemala has been named. The respondent stated his desire to renew his applications for asylum and withholding of deportation and indicated the desire to seek the privilege of voluntary departure in the alternative. As the record reflects the Court addressed candidly with the parties the need for a prehearing submission and directed that they be filed in the case addressing the current conditions in Guatemala and also addressing appropriate precedent decisions. The case was then set over for a further hearing.

On May 15, 1997, the respondent filed his prehearing submission (Group Exhibit 10). He included a declaration that augmented the responses in the application for asylum. He also filed translations of articles regarding country conditions in Guatemala. He included articles that reflect raids, assaults, and other information that had pertained to criminal activities that had been taking place in Guatemala since the beginning of 1997. The respondent also included the required prehearing statement (Exhibit 9) addressing the points of law that the Court had highlighted for both parties. In essence the respondent argues in his prehearing statement that the Board of Immigration Appeals decisionMatter of C-A-L-, 21 I&N Dec. 754 (BIA 1997) is no longer a good law within the United States Court of Appeals for the 9th Circuit the jurisdiction in which this case arises.

The Service, for its part, countered with a prehearing submission and evidence offered that it believed would be germane in the case. On May 28, 1997, the Service filed its prehearing submission (Group Exhibit 11) addressing the legal questions and also filing with the Court a photocopy of a document that's titled assessment. The Court emphasizes at the outset that it attributes very little weight to the assessment except to the extent that the respondent may have answered a question acknowledging the existence of information contained therein. The assessment itself is a document that is unsigned. It has no indications within its four corners as to how it was prepared and upon what information it is based. For the most part it contains many conclusions which are unsubstantiated. The Service did file a second document from the United States Department of State the profile of asylum claims and country conditions dated March 1997. The Court does attribute significant weight to the conclusions that are put forth in that document.

On today's date both parties were present in Court prepared to go forward. The respondent under oath ascribed to the truth of the contents in both his application for asylum (Group Exhibit 3) and his declaration (Group Exhibit 10). In addition to those two documents, and the newspaper articles, the respondent relies on his testimony in an effort to meet his burden of proof as a matter of law and discretion. As the Service pointed out as an initial matter it was not clear upon which bases the respondent was attempting to qualify for asylum and withholding of deportation. The respondent has argued before the Court that he's demonstrated his eligibility based upon his political opinion or one that would be imputed to him and on account of his membership in a particular social group that is his status as a former police official in Guatemala. Although not raised in argument the respondent through his testimony has raised that it also could be on account of his family name that is being a person who is of the Hernandez family.

To be eligible for withholding of deportation pursuant to section 243(h) of the Act, a respondent's facts must show a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). This means that the respondent's facts must establish that it is more likely than not that he would be subject to persecution for one of the

grounds specified.

To establish eligibility for asylum under section 208(a) of the Act, a respondent must meet the definition of a "refugee" which requires him to show persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See Sections 101(a)(42)(A) and 208(a) of the Act. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). An applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act. See Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

An asylum applicant under Section 208(a) of the Act may establish his claim by presenting evidence of past persecution in lieu of evidence of a well-founded fear of persecution. See Matter of H-, 21 I&N Dec. 337 (BIA 1996); Matter of Chen, 20 I&N Dec. 16 (BIA 1989). If the respondent does not show past persecution he can present evidence of a well-founded fear of persecution in attempting to establish that a reasonable person in his circumstances would fear harm if returned to the country from which he fears return. There must be a reasonable possibility of actually suffering such persecution. The asylum applicant must show that his fear of returning is both subjectively genuine and objectively reasonable. See Blanco-Comarribas v. INS, 830 F.2d 1039 (9th Cir. 1987); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986). The objective component requires a showing by credible, direct, and specific evidence in the record of facts that would support a reasonable fear that the respondent faces persecution. See Diaz-Escobar v. INS, 782 F.2d 1488 (9th Cir. 1986).

As instructed by the Supreme Court and emphasized by the Board of Immigration Appeals, it is incumbent for an asylum applicant to show that the "fear" of harm is "on account of" one of the statutorily enumerated grounds. See INS v. Elias-Zacarias, 502 U.S. 478 (1992); Matter of V-T-S-, 21 I&N Dec. 992 (BIA 1997) Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); Matter of S-P-, 21 I&N Dec. 486 (BIA 1996); Matter of R-O-, 20 I&N Dec. 455 (BIA 1992). The burden of proof to establish eligibility rests squarely with the respondent. The respondent can meet his burden of proof through his own testimony if he provides a plausible, credible, and detailed account for the basis of his fear of returning. See Saballo-Cortez v. INS, 761 F.2d 1259 (9th Cir. 1985); Matter of V-T-S-, supra; Matter of S-M-J-, supra; Matter of Dass, 20 I&N Dec. 120 (BIA 1989).

The parties at the Court's direction have also addressed the burden of proof on the respondent to show whether his fear of harm is on a countrywide basis from a group that the government is unable or unwilling to control. The respondent has argued that Matter of R-, 20 I&N Dec. 621 (BIA 1992) has been overruled by United States Court of Appeals for the 9th Circuit the jurisdiction in which this case arises and that the Board decision Matter of C-A-L-, supra is no longer a binding precedent. The Court agrees with the respondent to the extent that it believes that the United States Court of Appeals for the 9th Circuit has overruled the Board's holding in Matter of R- to the extent that the Board had held that the respondent had to show a fear of harm on a countrywide basis even from government persecutors. In this Court's humble view that holding has been overruled by the United States Court of Appeals for the 9th Circuit the jurisdiction in which this case arises. See Singh v. INS, 63 F.3d 1501 (9th Cir. 1995); Singh v. INS, 53 F.3d 1031 (9th Cir. 1995). Indeed as the 9th Circuit itself pointed out in Singh v. INS this circuit has recognized that "where there was a danger of persecution in a single village from

guerrillas who knew the petitioner, and no showing of such danger elsewhere in the country, the petitioner failed to establish eligibility for asylum."Singh v. INS, 53 F.3d at 1034. The Court concludes initially that it is bound by the Board of Immigration Appeals holding Matter of C-A-L- and that holding is still viable within this circuit in the humble view of the Court.

The threshold issue before the Court is whether the respondent has provided a plausible, credible, and detailed account for the basis of his fear of returning and whether that is consistent with the information in his asylum application as he has testified before the Court today.See Matter of D-V-, I&N Dec. 79 (BIA 1993); Matter of B-, 21 I&N Dec. 66 (BIA 1995). The Court concludes that the respondent has not provided a plausible, credible, and detailed account for the basis of his fear of returning to Guatemala and that account is not consistent with his asylum application and declaration. Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998). The Court's finding is premised on the fact that it concludes that he has not been a credible witness and the credibility determination is based not only of an examination of the spoken word when compared to the written word but also based upon the respondent's demeanor as a witness. The Court emphasizes that it is mindful of the cultural pitfalls that can be made in making an adverse credibility determination on demeanor. See Matter of B-, supra. Indeed this respondent was nervous at the outset of the proceedings. Some of the inconsistencies are attributable to language. For example when the word brother is translated into Spanish that word in Spanish can cause confusion as to whether the Court is referring to "brother" or "sibling." However mindful of those potential problems that exist in similar cases, the Court was in a unique position to observe the respondent during his testimony regarding perhaps the two most important incidents. When he testified about the incident in 1982 and then in 1990 the respondent's initial testimony was responsive and straightforward. However during questioning by the Service and then later when questioned by his own counsel as to the particular details the respondent became more evasive in his answers and did not respond to the questions directly. As the Court observed the respondent when the Court asked him questions about the October 1990 incident to explain what appeared to be implausible, he took longer in answering those questions, giving the Court the impression that the answers were being constructed while the respondent thought about the implausible nature of his answers. Given the importance of those two incidents to the respondent's case and observing his testimony during his answers and evaluating his reactions when compared to his testimony throughout the proceedings, the Court first finds that the respondent lacks credibility based upon his demeanor.

The Court however would not base an adverse credibility finding on demeanor alone. The respondent's testimony is at odds with the information in his asylum application. The respondent in his application reflected that he arrived here on November 6, 1990. He completed that application with the help of another individual in April 1991. That application nowhere within its four corners mentions either the incident in 1982 when his boss was killed and another police officer was wounded. He also does not mention anywhere in the application the other incident that is the incident that was most responsible for him leaving Guatemala and coming to the United States. The respondent did mention that he was a member of the police force and resigned because of threats and intimidation by the rebels but he did not specify what those were. He mentioned his position and the position of other family members and he wrote his perception about the danger that that would cause him. He did not mention at all the incident in October 1990. Thus there is a significant discrepancy between his testimony and the application. That discrepancy is important because the whole asylum application potentially could turn on whether

the incident in October 1990 actually took place.

The respondent's testimony when compared to the declaration is further evidence to show the respondent's lack of credibility. In his declaration itself the respondent wrote about the incident in 1980 where his neighbor was taken by the guerrillas and in plain view of his town set afire and killed. The respondent said in his declaration that "we" left the town and went to the capital city of Guatemala. When the Court asked the respondent directly he first stated that his father had gone but then he immediately changed his testimony and said that his father had stayed behind. It's not clear why, if the family perceived this danger, why the whole family did not leave. The respondent's testimony is that the Hernandez family was in danger as a family. Mr. Flores was known to be a member of the judicial police but the respondent himself had not been involved in any police activities to that date. There is no credible reason before the Court why the respondent and his brother would leave that town on that day after witnessing that act while his father and other family members would stay behind when the respondent's direct testimony is that the Hernandez family was in danger and perceived harm as a result of that incident. The respondent's testimony that the Hernandez family was in danger when read with the declaration, which could imply that the whole family left at that time, is undermined by his actual testimony that only he and his brother left.

Another inconsistency between the respondent's testimony as spoken in Court with his declaration is the incident in October 1990. The declaration reflects that while the respondent was working at the market his wife called "from home." The plain reading of that statement is that there was a telephone in his home and that the respondent's spouse had called him from there. The declaration reflects that she had told the respondent that the guerrilla army had come to the house and were looking for the respondent. According to the declaration the respondent told her to wait for him outside in the back of the house. The declaration suggests that a half an hour had passed after this telephone call when five men arrived at work. According to the declaration they said that they had found him and would be waiting for him at his home and then they left. The declaration or respondent wrote that after the guerrillas had left he had stayed for another half an hour and then went to check on his family.

The declaration is contrasted with his live testimony under oath in which he told the Court that they did not have a telephone in their home but there was a telephone in the store. He described that what had happened was that the guerrillas had come to his house, knocked on the door and his spouse answered. He testified that the house was very small. His wife had told the guerrillas that the respondent was not there when they had inquired about him. Spontaneously they responded that he must be at work at the market and apparently left. According to the respondent, then his spouse told him that she went out the back and went down to the store to make a telephone call. When the respondent was asked to explain whether the guerrillas would surround the house as is common in other cases that the Court has seen he indicated that he believed that they had done so in this particular instance but that his spouse had been able to leave the small house in time to avoid detection.

His in-Court testimony is inconsistent with the declaration. According to his testimony, the respondent left the Court with the impression that less time had passed. Even perhaps equally important however is the implausible nature of the respondent's testimony itself regarding both the 1990 and the 1982 incident. As the Court articulates its basis for finding the respondent's account inherently incredible, the Court is mindful of its duty to set forth specific and cogent reasons for its conclusion and the Court will endeavor to do that within the context of this oral decision. See

Lopez-Reyes v. INS, 79 F.3d 908 (9th Cir. 1996). Firstly with the October 1990 incident and attempting to combine perhaps the oral testimony with the declaration, it seems highly implausible and simply unbelievable that the guerrillas would go to his home, be greeted by his spouse and allow her an opportunity to go out the back door of such a small place and use the telephone. In other cases that the Court's had in assessing the actions of the guerrillas from Guatemala they commonly would surround the house or stay with the individual if they were going to wait for somebody. This is of particular importance because if the respondent's testimony is to be believed, they had been searching for him since 1982 or 1983. Seven years then had passed. The respondent was apparently a target of theirs. They had searched for him or continued to look for him, located his home and place of work. It is incredulous to the Court that they would go to his home and leave his spouse unattended and let her sneak out the back to make a telephone call.

Also it stretches the limits of the Court's credulity that the guerrillas would go to his place of work, would confirm his identity at that site and then simply decide to tell him that they're going to go back to his house. Again they had been looking for him for potentially more than 7 years. They had shown their ability to be brutal by forcing a town priest to knock on another individual's door, get him to come out into the public view and then burn him in plain view of all the people of his small community. When individuals of those tactics and ilk it is not credible that they would first go to his place of work, another group would also go to the place at the market and then let him come back to his home. If it was as the respondent has testified that he believed their desire to do him harm, the guerrillas would have done so right there at the place of work or would have abducted him and taken him to wherever they wanted to bring him. The respondent's account that they came to his place of work and told him that they would go back to his house and wait for him there defies any logic.

Returning to the incident in 1982, that likewise is implausible based upon the respondent's description of it. He testified that there was approximately 60 feet between his house and the substation in San Pedro. According to the respondent's testimony, his spouse is the person who heard the guerrillas announce that they wanted him. His spouse apparently heard that from the distance that she was away. The respondent testified that there was some sort of gun battle that resulted in the guerrilla army killing his boss and wounding another police officer but according to his testimony and during this melee his spouse was able to go to another vantage point where she could see and recognize these individuals. Based upon his description of how those events purportedly took place and the danger inherent in that type of situation, the respondent's testimony is simply implausible that it took place as he described here in Court or in the declaration.

The Court concludes then that the respondent has simply not provided a credible and plausible account for why he came to the United States and why he's afraid to go back there. In addition he has failed to meet his burden of proof by offering corroborative evidence where that corroborative evidence would appear to be available to him. See Matter of V-T-S-, supra; Matter of S-M-J- supra; Matter of Dass, supra. The respondent has potentially available to him two percipient witnesses to the two events that are described in his declaration and testimony. First his brother Elmer is a lawful permanent resident in the United States and he is the individual who deserted the army and came to the United States in 1985. He is the person that could perhaps corroborate the incident regarding the guerrilla member Carlos Gibes. Secondly and perhaps even more importantly the respondent did not offer the testimony of his spouse. She is again the linchpin to two significant incidents, first in 1982 and then again in 1990. According to the

respondent's testimony she was the percipient witness who heard of the respondent's name mentioned at both of those incidents. The respondent testified that she is outside of the courtroom caring for a child or children but there's no indication why her testimony was not brought forth or why a declaration was not offered from her to corroborate the account given by the respondent and to bolster the statements made by the respondent which are attributable to her. The respondent's application then fails because he has not met his burden of proof to offer corroborative evidence where that is available to him to meet the burden of proof.

Assuming arguendo that the respondent did present a credible account and that the incidents that he had described in his direct examination did take place, he has not met his burden of proof to show that he suffered past persecution on account of any of the enumerated grounds or that he has a well-founded fear of future harm. See Fisher v. INS, 79 F.3d 955 (9th Cir. 1996). The respondent did not suffer any physical harm in the past. Instead he fears return. He believes that the guerrillas might harm him either because of his family name, his former status as a police officer, or because of his political views, that being against the guerrillas The respondent though has not shown in light of the change of country conditions that any harm that would face him would be on account of any of the three bases above. Firstly his father has lived in the same community since 1973 to the present date and has done so without being harmed because of their family name, a name which is shared by the respondent. Secondly while an individual can show membership in a particular social group by showing his inclusion in a group of people described as former police officers, the respondent has not presented any evidence to show that former police officers are now being harmed in Guatemala or that he was targeted in the past for that reason. See Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988). Lastly the respondent has not shown that the guerrillas would be interested in him or were interested in him because of a political opinion that he held. The record reflects that he was told to distribute fliers as a child and his father took them away and threw them away. Inasmuch as his father was not effected, there's no evidence presented to show that the respondent would be affected for such action for refusing to distribute the fliers. Likewise he testified that an uncle was killed but that again appears to be attributed to the lawlessness that existed during the civil war in 1975 and not on account of any political opinion attributed to the respondent or his family. The other incidents described again do not show that any motivation by the guerrillas in the past or in the future would be to harm the respondent based upon a political opinion that he possessed or one that they would attribute to him. As a matter of law then the Court concludes that the respondent has not met his burden of proof firstly because he has not provided a plausible and credible account, secondly he's failed to meet his burden of proof, and thirdly he has not shown that any harm would be on account of any of the enumerated grounds.

If the Court had erred as a matter of law and the respondent had met his burden of proof, the Court would have to address the question of discretion for purposes of asylum. The respondent's asylum application shows that he is the father of two United States citizen children. Any finding of asylum would be premised on statutory eligibility that the person is a bona fide refugee. He also has a brother who is a lawful permanent resident in this country. Assuming arguendo that the Court had erred and the respondent had shown his qualifications to be a refugee in light of that finding and also in light of the family ties to this country, the Court would have exercised its discretion in favor of the respondent. But since the Court concludes that he is clearly statutorily ineligible for asylum the Court will not address the question of discretion further.

Inasmuch as the respondent has failed to meet the lesser burden of proof for asylum, it

follows that he has failed to meet the stricter burden of proof required for withholding of deportation. As the respondent's account lacks credibility as implausible for asylum, it follows that it is implausible and incredible for withholding of deportation. Also the respondent has failed to meet the stricter burden for withholding of deportation and has not shown any harm that might befall him would be on account of any of the enumerated grounds. See Matter of Mogharrabi, supra. The evidence does not establish that it is more likely than not that the respondent would be subject to persecution on account of one of the grounds specified in Section 243(h) of the Act. See INS v. Stevic, supra. I therefore conclude that he has not shown his eligibility for withholding of deportation to Guatemala.

Lastly the respondent seeks the privilege of voluntary departure in lieu of a formal order of deportation under the authority of section 244(e) of the Act. He has demonstrated through his testimony that he would be ready, willing, and able to depart the United States if given the opportunity and believes that he merits a favorable exercise of discretion. The Court is of the opinion that much of the respondent's testimony with respect to his asylum application was invented and not plausible and this is something that the Court does consider against him for discretionary purposes for voluntary departure. The Court though must also weigh the favorable factors shown for that discretionary determination. The respondent has been in the United States now for more than 6 years. He has two children who are born in this country. He has a brother who is a lawful permanent resident. The Service itself has not argued that voluntary departure should be denied. When I weigh all of those considerations together I do find that the significant family ties to this country offset the implausible nature of the account delivered to the Court today pertaining to his asylum application. And mindful of his two young children the Court does believe that he merits voluntary departure as both a matter of law and discretion and will afford him that relief. Accordingly, the following orders will be entered in the case:

ORDERS

IT IS HEREBY ORDERED that the applications for asylum and withholding of deportation be and are hereby denied.

IT IS FURTHER ORDERED that the respondent be granted the privilege of voluntarily departing the United States at his own expense on or before January 30, 1998 or any extension that he should receive in advance from the District Director for the Immigration and Naturalization Service and under such conditions as the District Director shall direct. If the respondent should fail to depart on or before that date or any authorized extension that he should receive in advance, the following order would be entered against him without any further notice or hearing to the respondent: the respondent is ordered deported from the United States to Guatemala based upon the charge contained in the Order to Show Cause and Notice of Hearing.

_____

Rico J. Bartolomei
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No: A_____ Date:

In the Matter of	)	
_____	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE(S): Section 212(a)( )( ) [Or 237(a)( )( )] of the Immigration and Nationality Act -

APPLICATION(S): Asylum; withholding of removal under section 241(b)(3); withholding / deferral of removal under the Convention Against Torture; voluntary departure

ON BEHALF OF RESPONDENT:

_____, Attorney at Law

ON BEHALF OF INS:

_____
Assistant District Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a ___ year old, single/married, male/female, native and citizen of _____. The United States Immigration and Naturalization Service (INS) has brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act (the Act). Proceedings were commenced with the filing of the Notice to Appear (NTA) with the Immigration Court. See Exhibit 1.

The respondent admits as alleged in the Notice to Appear that:

> [E.g.] S/He entered the United States on or about _____ at or near _____. S/He further concedes that s/he is inadmissible as charged under section 212(a)(6)(A) of the Act as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place

other than as designated by the Attorney General.

On the basis of the respondent's admissions (and the supporting I-213/other records admitted into evidence) I find that the respondent's removability has been established,

> (1) [for section 212 charges:] in that the respondent has not shown that he is clearly and beyond doubt entitled to be admitted and is not inadmissible, or in that the respondent has not shown by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior admission. Section 240(c)(2) of the Act.
>
> (2) [for section 237 charges:] by the INS by clear and convincing evidence. Section 240(c)(3) of the Act.

The respondent declined to designate a country of removal, and _____ was directed. The respondent applied for relief from removal in the form of asylum under section 208(a) of the Act. Applications for asylum shall also be considered as applications for withholding of removal under section 241(b)(3) of the Act. The respondent also requests withholding / deferral of removal under the Convention Against Torture. The respondent requests voluntary departure under section 240B(b) of the Act in the alternative.

The respondent in this case has satisfied the requirement of showing by clear and convincing evidence that he applied for asylum within one year of his last arrival (or April 1, 1998, whichever is later). See 8 C.F.R. § 208.4(a)(2) (2000). At the time of filing the respondent was also advised of the consequences of knowingly filing a frivolous application for asylum.See 8 C.F.R. § 208.18 (2000).

The respondent's Form I-589 application for asylum is contained in the record as Exhibit __. Prior to admission of the application the respondent confirmed in Court that he knew the contents of his application and he was given an opportunity to make any necessary corrections. The respondent then swore or affirmed before me that the contents of the application, as corrected, including the attached documents and supplements, were all true and correct to the best of his knowledge.

The application was forwarded to the State Department for comment. The response is included in the record at Exhibit ___.

FACTS

The evidence at the hearing consisted of the respondent's written asylum application, his own testimony, his supplemental declaration attached to his asylum application, the State Department advisory opinion and Profile (country and date), the Country Report for Human Rights Practices (country and date), and _____

Written application:

In his written application the respondent stated that he was seeking asylum on the grounds of __race, __religion, __nationality, __membership in a particular social group, and __political opinion, because _____
_____
_____

He alleges that if he returned to _____ he would/could/may be ___ _____
_____

The respondent listed himself/other family members (identify family members) as having been a member(s) of _____

The respondent stated that he was/was not ever accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned. (Facts). His family members (identify) were/were not ever arrested, detained interrogated, convicted/sentenced or imprisoned. (Facts).

On _____(date) the respondent departed _____(country). He traveled to _____(country) for _____(length of time), then to _____(country) for _____(length of time). He did/did not seek asylum or safe haven in these countries.

Testimony:

The respondent testified at the hearing as follows:
_____
_____

STATEMENT OF THE LAW

(Trim to fit the case)

The burden of proof is on the respondent to establish that he is eligible for asylum or withholding of removal under section 241(b)(3) or relief under the Convention Against Torture.

A. Withholding under section 241(b)(3) of the Act

To qualify for withholding of removal under section 241(b)(3) of the Act, the respondent's facts must show a clear probability that his life or freedom would be threatened in the country directed for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). This means that the respondent's facts must establish it is more likely than not that he would be subject to persecution for one of the grounds specified.

B. Asylum under section 208 of the Act

To qualify for asylum under section 208 of the Act the respondent must show that he is a refugee within the meaning of section 101(a)(42)(A) of the Act. See Section 208(a) of the Act. The definition of refugee includes a requirement that the respondent demonstrate either that he suffered past persecution or that he has a well-founded fear of future persecution in his country of nationality or, if stateless, his country of last habitual residence on account of one of the same five statutory grounds. The alien must show he has a subjective fear of persecution and that the fear has an objective basis. The objective basis of a well-founded fear of future persecution is referred to in the regulations as a "reasonable possibility of suffering such persecution" if the alien were to return to his home country. 8 C.F.R. § 208.13(b)(2) (2000). The objective component must be supported by credible, direct, and specific evidence in the record. De Valle v. INS, 901 F.2d 787 (9th Cir. 1990). The alien must also be both unable and unwilling to return to or avail herself of the protection of his home country because of such fear. Finally, an applicant must also establish that he merits asylum in the exercise of discretion. See Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

In evaluating a claim of future persecution the Immigration Judge does not have to require the alien to provide evidence he would be singled out individually for persecution if the alien establishes that there is a pattern or practice in his home country of persecution of groups of persons similarly situated to the applicant on one of the five enumerated grounds, and that the alien is included or identified with such group. 8 C.F.R. § 208.13(b)(2) (2000).

An alien who establishes he suffered past persecution within the meaning of the Act shall be presumed also to have a well-founded fear of future persecution. The presumption may be rebutted if a preponderance of the evidence establishes that, since the time the persecution occurred, conditions in the applicant's home country have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return. An alien

who establishes past persecution, but not ultimately a well-founded fear of future persecution, will be denied asylum unless there are compelling reasons for not returning him which arise out of the severity of the past persecution. 8 C.F.R. § 208.13(b)(1) (2000); see also Matter of Chen, 20 I&N Dec. 16 (BIA 1989).

The well-founded fear standard required for asylum is more generous than the clear probability standard of withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). We first, therefore, apply the more liberal "well-founded fear" standard when reviewing the respondent's application, because if he fails to meet this test, it follows that he necessarily would fail to meet the clear probability test required for withholding of removal.

C. Withholding / deferral of removal under the Convention Against Torture

In adjudicating the request for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture") I have applied the regulations at 8 C.F.R. Part 208, particularly sections 208.16, 208.17, and 208.18. See 64 Fed. Reg. 42247 (1999). "An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999, may apply for withholding of removal under 208.16(c), and, if applicable, may be considered for deferral of removal under section 208.17(a)." 8 C.F.R. § 208.18(b)(1) (2000).

Among the important tenants of this law are the following:

> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1) (2000).

To constitute torture, the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R. § 208.16(a)(6) (2000). The pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1) (2000). "Acquiescence" requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2000). Torture is an "extreme form of cruel and inhuman treatment" and does not include pain or suffering arising from lawful sanctions. 8 C.F.R. § 208.18(a)(2) and (3) (2000).

In order to constitute torture, mental pain or suffering must be "prolonged." 8 C.F.R. § 208.18(a)(4) (2000). It also must be caused by or resulting from intentional or threatened

infliction of severe physical pain or suffering, threatened or actual administration or application of mind altering substances or similar procedures, or threatened imminent death. Id. These causes or results can be directed towards the applicant or another. Id.

The applicant for withholding of removal under the Convention Against Torture bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2) (2000). In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including:

> (i) Evidence of past torture inflicted upon the applicant;
>
> (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
>
> (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
>
> (iv) Other relevant information regarding conditions in the country of removal.

8 C.F.R. § 208.16(c)(3)(i-iv) (2000).

CREDIBILITY

A. General Law [NINTH CIRCUIT]

An Immigration Judge's finding regarding the credibility of a witness is ordinarily given significant deference since the judge is in the best position to observe the witness' demeanor. Paredes-Urrestarazu v. INS, 36 F.3d 801, 818-21 (9th Cir. 1994); Matter of Kulle, 19 I&N Dec. 318 (BIA 1985).

"The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.13 (2000). Adverse credibility determinations must be based on "specific cogent reasons," which are substantial and "bear a legitimate nexus to the finding." Lopez-Reyes v. INS, 79 F.3d 908 (9th Cir. 1996). Where an Immigration Judge has reason to question the applicant's credibility, and that applicant fails to produce non-duplicative, material, easily available corroborating evidence, and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review. Sidhu v. INS, 220 F.3d 1085 (9th Cir. 2000); Mejia-Paiz v. INS, 111 F.3d 720, 724 (9th Cir. 1997). However, once an alien's testimony on specific facts is found to be credible, corroborative evidence of that testimony is not required (although the facts established by that testimony may be insufficient to establish asylum). Ladha v. INS, 215 F.3d 889 (9th Cir. 2000).

A. General Law [BIA]

An Immigration Judge's finding regarding the credibility of a witness is ordinarily given significant deference since the Judge is in the best position to observe the witness' demeanor. Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998); Matter of Kulle, 19 I&N Dec. 318 (BIA 1985); Matter of Boromand, 17 I&N Dec. 450 (BIA 1980).

The testimony of an applicant for asylum may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed, in light of general conditions in the home country, to provide a plausible and coherent account of the basis for the alleged fear. Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); 8 C.F.R. § 208.13(a) (2000).

Where an alien's asylum claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the alien's particular experience is not essential. But where it is reasonable to expect such corroborating evidence for certain alleged facts pertaining to the specifics of the claim, such evidence should be provided or an explanation should be given as to why it was not provided. Matter of S-M-J-, 21 I&N Dec. 72 (BIA 1997); see also Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998).

An adverse credibility finding can be based on inconsistent statements and fraudulent documents. See Matter of O-D-, 21 I&N Dec. 107 (BIA 1998); see also Leon-Barrios v. INS, 116 F.3d 391, 393-94 (9th Cir. 1997) (upholding adverse credibility finding where differences in asylum applications related to "heart" of asylum claim). A trier of fact's determination that testimony lacks credibility must be accompanied by specific, cogent reasons for such a finding.Matter of A-S-, supra.

A finding of credible testimony is not dispositive as to whether asylum should be granted; rather, the specific content of the testimony and any other relevant evidence is considered. Matter of E-P-, 21 I&N Dec. 860 (BIA 1997); see also Matter of Y-B-, 21 I&N Dec. 113 (BIA 1998) (the weaker an alien's testimony, the greater the need for corroborative evidence; testimony lacking in specific details; significant omissions in the written application).

B. Analysis on Credibility

Question 1. Was there corroborative evidence that was reasonably expected but not presented? Are the reasons given for failing to present the evidence persuasive? For BIA -See Matter of S-M-J-, supra, Matter of M-D-, supra. For NINTH CIRCUIT See Sidhu v. INS, supra; Mejia-Paiz v. INS, supra.

Question 2. Note demeanor factors / inconsistencies / implausibilities / omissions / lack of detail and other difficulties with respect to the respondent's testimony (within the testimony itself; between the testimony and the application; between the testimony and the declaration; etc).

Question 3. Then decide if difficulties are significant enough to render respondent lacking in

credibility on all or certain issues.

Question 4. If respondent is credible, or assuming the alien is credible as an alternate finding, is the evidence sufficient to establish the elements of asylum, withholding under section 241(b)(3), or withholding / deferral under the Convention Against Torture? See Matter of Y-B-, supra; Matter of E-P-, supra; Matter of Dass, supra.

FURTHER ANALYSIS AND FINDINGS [1]

Persecution is harm or harm threaten on account of a belief or trait held by, or imputed to, an alien, and the belief or trait must be protected under one of the five grounds: race, religion, nationality, membership in a particular social group, or political opinion.

1. In Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), the Board of Immigration Appeals instructed that persecution exists where: (1) the alien possesses a belief or characteristic that a persecutor seeks to overcome in others by means of a punishment of some sort; (2) the persecutor is aware or could become aware of the person's belief or trait; (3) the persecutor has the capability to punish the alien; and (4) the persecutor has the inclination to punish the alien. [Note: Certain case law in the Ninth Circuit questions whether the Mogharrabi standard of "reasonable person in the respondent's circumstances would fear persecution" is consistent with the regulations' formulation of "reasonable possibility of actually suffering such persecution."]

2. Relevant Questions:

   a. Statutory or regulatory ineligibility? (E.g., persecutor; conviction of an aggravated felony, resettlement, bilateral treaty under section 208(a)).

      _____

      _____

   b. Who is the persecutor? (E.g., Government, guerilla, both, other)

      i. If the persecutor is other than the government, did the respondent seek the protection of the government? Would it be useless to require him to seek protection as the group is clearly outside of the control of the government? See McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981).

   c. What is the harm feared?

---

[1]Note to IJ: The following relates to asylum and withholding of removal under section 241(b)(3) of the Act. For guidance on withholding / deferral of removal under the Convention Against Torture see Bench Book Section I, Chapter 9, and Section II, Convention Against Torture Sample and Paragraphs.

i. Not all harm (e.g., inability to pursue chosen profession, or brief detention) is serious enough to constitute persecution.

d. What is the belief or immutable characteristic / trait held by the alien? INS v. Elias-Zacarias, 502 U.S. 478 (1992), made clear that persecution must be on account of the victim's belief or characteristic, not the persecutor's. Define carefully:

i. The belief or characteristic held by the alien is:

_____

_____

ii. Is it a protected belief or characteristic?

_____

_____

iii. Is the belief or characteristic not held by, but imputed to the alien?

_____

_____

iv. The following generally do not constitute protected beliefs or immutable traits:

(1) Employment;

(2) Recruitment by rebels (Recruitment of an individual by a guerrilla organization is not, in and of itself, persecution "on account of political opinion." INS v. Elias-Zacarias, 502 U.S. 478 (1992));

(3) Conscription by government, unless punishment is disproportionately severe, or soldier would be required to perform internationally-condemned acts;

(4) Forced contributions to rebels;

(5) Neutrality (exceptions in Ninth Circuit);

(6) Threat of retribution in personal dispute;

(7) Threat of prosecution for violation of laws of general application;

(8) Threat of discipline by rebel group;

(9) Generalized disagreement with political and/or economic system;

(10) Threat of harm to combatants, policemen, soldier, or rebel as a result of performance of duties;

(11) General conditions of strife and anarchy;

(12) Threat of harm as a result of civil war;

(13) Mistreatment during police interrogation. But see "extrajudicial punishment" deemed to be persecution. A government has a legitimate right to investigate crimes and subversive acts or groups. However, "extrajudicial punishment" may constitute persecution. See Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995); Blanco-Lopez, 858 F.2d 531 (9th Cir. 1988); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985); and,

(14) Detention does not by itself suffice to show alien has trait or belief protected by the Act.

e. Is the persecutor aware, could the persecutor become aware, of the respondent's belief or trait? (See Country Reports; Profiles; Amnesty International Reports; other background documentation)

_____
_____

f. Does the persecutor have the capability to persecute the respondent?

_____
_____

g. Does the persecutor have the inclination to persecute the respondent?

_____
_____

i. The applicant does not have to provide evidence he would be singled out individually for persecution if he establishes that there is a pattern or practice in his home country of persecution of groups of persons similarly situated to the applicant on one of the 5 enumerated grounds, and that the applicant is included or identified with such group. 8 C.F.R. § 208.13(b)(2) (2000).

h. If the respondent does not meet the well-founded fear standard:

i. "Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it necessarily follows that he has failed to satisfy the more stringent clear probability of persecution standard required for

withholding of removal."

i. If the respondent has met the well-founded fear standard does his evidence also meet the clear probability standard?

j. If the respondent has met the well-founded fear standard, is asylum merited in the exercise of discretion? Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

VOLUNTARY DEPARTURE

Pending before this court is also the respondent's request to depart the United States without expense to the Government in lieu of removal under section 240B(b) of the Act. To qualify for voluntary departure, the respondent must establish that he has been physically present in the United States for a period of at least one year immediately preceding the date the NTA was served; he is, and has been a person of good moral character for at least 5 years immediately preceding such application; he is not deportable under section 237(a)(2)(A)(iii) or 237(a)(4) of the Act; he establishes by clear and convincing evidence that he has the means to depart the United States and intends to do so; and he shall be required to post a voluntary departure bond. In addition, the respondent must be in possession of a travel document that will assure his lawful reentry into his home country.

Discretionary consideration of an application for voluntary departure involves a weighing of factors, including the respondent's prior immigration history, the length of his residence in the United States, and the extent of his family, business and societal ties in the United States.

SAMPLE ANALYSIS: The respondent testified that he has never been arrested or convicted of any crime other than traffic violations. He has never been deported or granted voluntary departure by the United States Government. He testified that he will abide by the Court's order and depart the United States when and as required, has the financial means to depart the United States without expense to the Government, and will only return to the United States by lawful means. The respondent has a _____ birth certificate and will pay a voluntary departure bond as required.

There are no other issues raised by the INS that will further negatively affect the respondent's eligibility for this minimal form of relief. The Court finds the respondent statutorily eligible and deserving of this relief in the exercise of discretion. Accordingly, the following order(s) are entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for asylum be granted [2] / denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under section 241(b)(3) of the Act to _____ (country) be granted / denied.

IT IS FURTHER ORDERED that the respondent's request for withholding / deferral of removal to _____ (country) under the Convention Against Torture be denied / granted.

IT IS FURTHER ORDERED that the respondent's request for voluntary departure in lieu of removal be denied. **(OR)**

IT IS FURTHER ORDERED that the respondent be granted voluntary departure, in lieu of removal, and without expense to the United States Government on or before _____ (maximum 60 calendar days from the date of this order).

IT IS FURTHER ORDERED that the respondent shall post a voluntary departure bond in the amount of $_____ with the Immigration and Naturalization Service on or before _____ (five business days from the date of this order).

IT IS FURTHER ORDERED that, if required by the INS, the respondent shall present to the INS all necessary travel documents for voluntary departure within 60 days.

IT IS FURTHER ORDERED that, if the respondent fails to comply with any of the above orders, the voluntary departure order shall without further notice or proceedings vacate the next day, and the respondent shall be removed from the United States to _____ on the charge(s) contained in the Notice to Appear.

WARNING TO THE RESPONDENT: Failure to depart as required means you could be removed from the United States, you may have to pay a civil penalty of $1000 to $5000, and you would become ineligible for voluntary departure, cancellation of removal, and any change or adjustment of status for 10 years to come.[3]

Also, if you fail to depart as required, and then fail to comply with the removal order, you could

---

[2] Note to IJ: Remember the alien must pass the INS asylum identity check at 208(d)(5) prior to a grant.

[3] Note to IJ: Section 240B(d) of the Act requires these penalty and limitations warnings to be in the "order"; Section 240B(d) does not provide for an "exceptional circumstances" excuse for failure to obey a voluntary departure order; and, the Act itself no longer lists the limitations on discretionary relief for failure to report for deportation as required. However, proposed rules published September 4, 1998 {63 Fed. Reg. 47208}, do seek to add a 10-year bar on relief, including asylum, for failure to timely surrender for removal absent exceptional circumstances.

also be fined $500 for each day of noncompliance.[4]

In addition, if you are removable for being deportable under section 237 of the Act, and you fail to comply with your removal order, you shall face additional fines and/or could be imprisoned for up to 4 and in some cases up to 10 years.[5]

_____

Henry P. Ipema, Jr.
U.S. Immigration Judge

[4]See § 274D of the Act (for 212 and 237).

[5]See § 243(a) of the Act.

ASYLUM LAW PARAGRAPHS

Administrative Notice

Administrative agencies and the courts may take judicial (or administrative) notice of commonly known facts. Therefore this Court may properly take administrative notice of changes in foreign governments." See Matter of R-R-, 20 I&N Dec. 547, 551 n.3 (BIA 1992).

Within the Ninth Circuit, administrative notice may be taken where the respondent has had an opportunity, either before the Immigration Judge or the BIA, to introduce evidence on the effect of a change in government. Matter of H-M-, 20 I&N Dec. 683, 689 (BIA 1993).

Advisory Opinion

Advisory opinions from the State Department must be made a part of the record and, unless the opinion is classified, the applicant shall be provided an opportunity to review and respond to such comments prior to the issuance of any decision to deny the application. 8 C.F.R. § 208.11(d) (2000). The Immigration Judge may determine the weight to be accorded the opinion. Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Matter of Exilus, 18 I&N Dec. 276 (BIA 1982); see also McLeod v. INS, 802 F.2d 89 (3d Cir. 1986). Some courts have questioned the reliability of the advisory opinions. See Khalil v. District Director, 457 F.2d 1276 (9th Cir. 1972); Hosseinmardi v. INS, 405 F.2d 25 (9th Cir. 1969); Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968); see also Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984); Zamora v. INS, 534 F.2d 1055 (2d. Cir. 1976); Paul v. INS, 521 F.2d 194 (5th Cir. 1975). However, their value as a source of information about the general conditions in foreign countries has been recognized. Matter of Exilus, supra; see Doe v. INS, 867 F.2d 285 (6th Cir. 1989); Zamora v. INS, supra; Matter of Francois, 15 I&N Dec. 534 (BIA 1975).

Armed Rebellion

A "legitimate and internationally recognized government" has the right to "defend itself from an armed rebellion." Matter of Izatula, 20 I&N Dec. 149, 153 (BIA 1990). An exception exists where citizens do not "have an opportunity to seek change in the political structure of the government via peaceful processes." Id. at 154. In Izaltula the BIA found that the citizens had "neither the right nor the ability peacefully to change their government," and so concluded that the respondent had established that he was at risk of being punished for "political activities" even if those activities included armed rebellion. Id.; see also Matter of D-L- & A-M-, 20 I&N Dec. 409 (BIA 1991) (concurring opinion).

Civil War / Civil Strife

"Harm arising from general civil strife does not amount to persecution within the meaning of the Act." Matter of T-, 20 I&N Dec. 571, 578 (BIA 1992) (citing Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982)).

Aliens fleeing general conditions of violence and upheaval in their countries do not qualify for asylum on that basis. See, e.g., Mendez-Efrain v. INS, 813 F.2d 279 (9th Cir. 1987); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.), cert. denied, 484 U.S. 826 (1987); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Rebollo-Jovel v. INS, 794 F.2d 441 (9th Cir. 1986); Lopez v. INS, 775 F.2d 1015 (9th Cir. 1985); Matter of T-, 20 I&N Dec. 571, 578 (BIA 1992); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of Pierre, 15 I&N Dec. 461 (BIA 1975).

In enacting section 208(a) of the Act, Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbances -- conditions that necessarily have political implications. Hallman v. INS, 879 F.2d 1244 (5th Cir. 1989); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.), cert. denied, 484 U.S. 826 (1987).

Coercive Family Planning Practices / Forced Abortion / Sterilization

Section 101(a)(42) of the Act has been amended to include: "For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion."

In Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996), the BIA determined that 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 at 101(a)(42) of the Act.

In Matter of C-Y-Z-, 21 I&N Dec. 915 (BIA 1997), the BIA found the applicant established past persecution where his wife was forcibly sterilized in China.

In Matter of X-G-W-, Interim Decision 3352 (BIA 1998), the BIA stated that due to a fundamental change in the definition of a "refugee" brought about by IIRIRA, the BIA will allow reopening of proceedings to pursue claims of asylum based on coerced population control policies, notwithstanding the time and number limitation specified in 8 C.F.R. § 3.2 (2000).

Combatants in armed struggle

Being a combatant in an armed struggle does not qualify one for asylum. If policemen or guerrillas are considered to be victims of persecution based solely on an attack by one against the other, virtually all participants on either side of an armed struggle could be characterized as "persecutors" of the opposing side and would thereby be ineligible for asylum or withholding of deportation. Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988).

Conscription

"A government does not engage in persecution when it requires that its citizens perform military service." Matter of R-R-, 20 I&N Dec. 547, 551 (BIA 1992) (citing Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990)); Rodriguez-Rivera v. INS, 848 F.2d 998 (9th Cir. 1988); Kaveh-Haghigy v. INS, 783 F.2d 1321 (9th Cir. 1986); see also Matter of Vigil, 19 I&N Dec. 572 (BIA 1988). "Persecution for failure to serve in the military may occur in rare cases where a disproportionately severe punishment would result on account of one of the five grounds ... or where the alien would necessarily be required to engage in inhuman conduct (that is, conduct condemned by the international community as contrary to the basic rules of human conduct) as a result of military service required by the government." Matter of R-R-, 20 I&N Dec. 547, 551 (BIA 1992) (citing Matter of A-G-, 19 I&N Dec. 502 (BIA 1987), aff'd, M.A. v. INS, 899 F.2d 304 (4th Cir. 1990) (en banc)).

Conscientious Objection

Religious objection to military service does not per se establish eligibility for asylum. Matter of Canas, 19 I&N Dec. 697 (BIA 1988), rev'd, Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990), aff'd on alt. grounds aft. remand, 970 F.2d 599 (9th Cir. 1992) (relying on imputed political opinion).

Conscientious objection to military service may provide grounds for relief from deportation where the alien would be required to engage in inhumane conduct were he to continue serving in the military. Arriaga-Barrientos v. INS, 937 F.2d 411, 414 (9th Cir. 1991); Matter of A-G-, 19 I&N Dec. 502 (BIA 1987), aff'd, M.A. v. INS, 899 F.2d 304 (4th Cir. 1990) (en banc).

Convention Against Torture

See Convention Against Torture Samples and Paragraphs

Country-wide persecution

"An alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country -- he must show that the threat of persecution exists for him country-wide." Matter of Acosta, 19 I&N Dec. 211, 235 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of C-A-L-, Interim Decision 3305 (BIA 1997); Matter of R-, 20 I&N Dec. 621, 625 (BIA 1992); see also Quintanilla-Ticas v. INS, 783 F.2d 955 (9th Cir. 1986) (threats confined to a single village); Diaz-Escobar v. INS, 782 F.2d 1488 (9th Cir. 1986) (threats confined to a single village).

But see Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995) and Singh v. Ilchert, 69 F.3d 375 (9th Cir. 1995) where the Ninth Circuit found that existence of country-wide threat of persecution is not relevant under the regulations in determining either asylum eligibility or withholding statutory eligibility if past persecution has been established. (Effectively overruling Matter of R-, 20 I&N

Dec. 621 (BIA 1992) on this issue).

And but see Singh v. Moschorak, 53 F.3d 1031, 1034 (9th Cir. 1995) where the Ninth Circuit held that Quintanilla-Ticas, supra, and Diaz-Escobar, supra, (concerning very localized danger) do not apply where the national government is the persecutor.

Even under Singh v. Ilchert, an applicant's ability to relocate in his or her home country may be considered in the Attorney General's exercise of discretion. Singh v. Ilchert, supra. However, the Court in Singh criticized the Board in Matter of R- for requiring the applicant to show the existence of a country-wide threat of persecution by a national police force. In so doing, the Court in Singh stated, "This court presumes that in a case of persecution by a governmental body such as a national police force, the government has the ability to persecute the applicant throughout the country."

Detention

Brief detention without mistreatment is not persecution. Zalega v. INS, 916 F.2d 1257 (7th Cir. 1990); Matter of D-L- & A-M-, 20 I&N Dec. 409, 413 (BIA 1991).

Detention related to prosecution is not necessarily persecution. Matter of H-M-, 20 I&N Dec. 683, 691 (BIA 1993).

Discretion

In addition to establishing statutory eligibility for asylum, an applicant also must establish that he is worthy of discretionary relief. See INA § 208(a); Matter of Shirdel, 19 I&N Dec. 33 (BIA 1984); Matter of Salim, 18 I&N Dec. 311 (BIA 1982). Among the factors which should be considered in the exercise of discretion are whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States. In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residence there are also relevant. Whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is another factor to consider. In this regard, the extent of the alien's ties to other countries where he does not fear persecution should also be examined. Moreover, if the alien engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered. The circumvention of orderly refugee procedures, while an adverse factor, is insufficient standing alone to require the most unusual showing of countervailing equities. Matter of Pula, 19 I&N Dec. 467 (BIA 1987), modifying Matter of Salim, supra. In addition to the circumstances and actions of the alien in his flight from the country where he fears persecution, general humanitarian considerations, such as an alien's tender age or poor health, may also be relevant in a discretionary determination.

Discrimination

Persecution is an extreme concept which ordinarily does not include "[d]iscrimination on the basis of race or religion, as morally reprehensible as it may be." Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995).

The asylum "statute is designed as a filter, and the mesh would be too broad if every foreign victim of discrimination in his homeland were eligible for asylum." Bucur v. INS, 109 F.3d 399 (7th Cir. 1997).

Employment / economic detriment

Alien claiming persecution for loss of ration card and deprivation of employment failed to show these actions were based on his political opinion or that they constituted persecution. Matter of H-M-, 20 I&N Dec. 683, 691 (BIA 1993) (citing Saballo-Cortez v. INS, 761 F.2d 1259 (9th Cir. 1984)).

Harassment concerning employment has been found to not constitute persecution. Zalega v. INS, 916 F.2d 1257 (7th Cir. 1990).

Severe economic deprivation which constitutes a threat to the alien's life or freedom may constitute persecution. Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).

[Or, more generally:] Deprivation of educational and employment opportunities, short of severe economic deprivation constituting a threat to an individual's life or freedom, is not generally considered to be persecution. See Kovac v. INS, 407 F.2d 102 (9th Cir. 1969); Zalega v. INS, 916 F.2d 1257 (7th Cir. 1990); Matter of H-M-, 20 I&N Dec. 683, 691 (BIA 1993).

Evidence

An applicant for asylum cannot meet his burden of proof unless he testifies under oath regarding his application; and, therefore, an Immigration Judge would not proceed to adjudicate a written application for asylum if no oral testimony has been offered in support of that application. Matter of Fefe, 20 I&N Dec. 116 (BIA 1989).

At a minimum, the regulations require that an asylum applicant take the stand, be placed under oath, and be questioned as to whether the information in his written application is complete and correct; the examination of an applicant will ordinarily be this brief only where the parties have stipulated that the applicant's oral testimony would be consistent with his written application and that his testimony would be believably presented. Matter of Fefe, 20 I&N Dec. 116 (BIA 1989).

The "general rule regarding the consideration of asylum applications by immigration judges and the Board . . . as with other matters in deportation and exclusion proceedings, is that they must be evaluated based on matters of record (i.e., based on the evidence introduced by the parties to the case under consideration)." Matter of Dass, 20 I&N Dec. 120 (BIA 1989); Matter of S-M-J-, 21

I&N Dec. 722 (BIA 1997).

An "alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his alleged fear." Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989) (citations omitted). This does "not stand for the proposition that the introduction of supporting evidence is purely an option with an asylum applicant in the ordinary case. Rather the general rule is that such evidence should be presented where available. Id. (citations omitted). "If an intelligent assessment is to be made of an asylum application, there must be sufficient information in the record to judge the plausibility and accuracy of the applicant's claim. Without background information against which to judge the alien's testimony, it may well be difficult to evaluate the credibility of the testimony." Id. "The more sweeping and general a claim, the clearer the need for an asylum applicant to introduce supporting evidence or to explain its absence." Id. at 125.

Where an alien's asylum claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the alien's particular experience is not essential. But where it is reasonable to expect such corroborating evidence for certain alleged facts pertaining to the specifics of the claim, such evidence should be provided or an explanation should be given as to why it was not provided. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997).

According to the Profile / Country Report admitted into the record: (quote or paraphrase relevant portion). "The applicant failed to cite to any persuasive background documentation in rebuttal." Matter of K-S-, 20 I&N Dec. 715, 722 (BIA 1993) (citing Matter of Dass, 20 I&N Dec. 120, 124-25 (BIA 1989)); see also Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998).

The State Department Profile, in the absence of contradictory evidence, is entitled to considerable deference. Matter of T-M-B-, I&N Dec. 775 (BIA 1997), rev'd , Borja v. INS, 175 F.3d 732 (9th Cir. 1999).

Extortion

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. Here the evidence supports the conclusion that the extortion related, not to the respondent's political opinion, but rather to her ability to pay. She was in a position to supply needed financial resources to the NPA. Matter of T-M-B-, I&N Dec. 775 (BIA 1997), rev'd , Borja v. INS, 175 F.3d 732 (9th Cir. 1999).

But see Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988) (finding eligibility for asylum following extortion by Macoutes).

False Testimony

For purposes of INA § 101(f)(6), 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). Matter of R-S-J-, Interim Decision 3401 (BIA 1999).

Failure to appear

When a respondent fails to appear at the hearing, his application for relief should be deemed abandoned. Matter of Balibundi, 19 I&N Dec. 606 (BIA 1988).

Family remaining in home country

An applicant's fear of persecution is undercut when his or her family remains in the native country unharmed. Cuadras v. United States INS, 910 F.2d 567, 571 (9th Cir. 1990); Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998).

Filing

The filing with an Immigration Judge of an application for asylum in exclusion or deportation proceedings is not a continuation or a mere updating of an application previously filed with the INS but is, in effect, a new application. Matter of B-, 20 I&N Dec. 427 (BIA 1991).

An immigration judge has authority to set reasonable time limits for the filing of written applications for asylum. When the respondent fails to file an application within such time, the immigration judge may properly conclude the deportation hearing and deem the application abandoned. 8 C.F.R. § 3.31(c) (2000); Matter of Jean, 17 I&N Dec. 100 (BIA 1979); see Matter of Nafi, 19 I&N Dec. 430 (BIA 1987) (exclusion).

Forced Contributions

An organization's act of forcing donations of goods or services to satisfy its need for supplies or manpower is not persecution on account of one of the five grounds. Matter of T-, 20 I&N Dec. 571, 577 (BIA 1992).

Harassment

Harassment may be insufficient to constitute persecution. Balazoski v. INS, 932 F.2d 638 (7th Cir. 1991).

Identity

The BIA found in Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998), that 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.

Imputed political opinion

"[I]mputed political opinion is still a valid basis for relief after Elias-Zacarias." Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995) (citing Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992)). See also Office of the United Nations High Commissioner for Refugees, The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979), at 80-83 (a government's persecution of persons to whom it attributes certain political opinions is persecution on account of political opinion).

"[E]xtra-judicial punishment of suspected anti-government guerrillas can constitute persecution on account of imputed political opinion." Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995); Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985).

"Persecution for 'imputed' grounds (e.g., where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect) can satisfy the 'refugee' definition." Matter of S-P-, 21 I&N Dec. 486 (BIA 1996) (citing Matter of A-G-, 19 I&N Dec. 502, 507 (BIA 1987)).

International law

Respondent contends that both the Geneva Convention Relative to the Protection of Civilian Persons in Time of War [Geneva Convention No. IV, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force for the United States Feb. 2, 1956)] and customary international law create a potential remedy from deportation. Such arguments were discussed and rejected Matter of Medina, 19 I&N Dec. 734 (BIA 1988).

Investigation by government

It is not persecution for a government to investigate or prosecute individuals for criminal acts. Matter of R-O-, 20 I&N Dec. 455 (BIA 1992); Perlera-Escobar v. EOIR, 894 F.2d 1292 (11th Cir. 1990); Sagermark v. INS, 767 F.2d 645 (9th Cir. 1985), cert. denied, 476 U.S. 1171 (1986). Nor is it persecution for a government to outlaw a group which is believed to advocate and/or practice terrorism against other members of the population. Moreover, a duly constituted and functioning government of a country has the internationally recognized right to protect itself against persons who seek its overthrow. Such a government has a legitimate right to investigate and detain individuals suspected of aiding or being a member of an organization that seeks to overthrow it. See generally Office of the United Nations High Commissioner for Refugees, The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979), para. 175, at 41.

The mistreatment of a Sikh in Punjab by Indian police in the course of an investigation does not establish eligibility for asylum or withholding of exclusion and deportation where the purpose of

the mistreatment was to obtain information about Sikh militants who sought the violent overthrow of the Indian Government rather than to punish him because of his political opinion or merely because he was a Sikh. Matter of R-, 20 I&N Dec. 621 (BIA 1992) (Headnote #2).

A government has a legitimate right to investigate crimes and subversive acts or groups. However, "extra-judicial punishment of suspected anti-government guerrillas can constitute persecution on account of imputed political opinion." Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995) (criticizing Matter of R-, 20 I&N Dec. 621 (BIA 1992)); Blanco-Lopez v. INS, 858 F.2d 531, 533 (9th Cir. 1988) ("We find no evidence in the record . . . that an actual, legitimate, criminal prosecution was initiated against (the alien)"; Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (If there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person there arises a presumption that the motive for harassment is political.) [But see Concurrence of Board Member Michael J. Heilman in Matter of R-, supra, criticizing continued use of Blanco-Lopez.]

Mixed or multiple motives for persecution

Persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied. Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988).

"It is recognized that some cases involve possible mixed motives for inflicting harm; therefore, an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur." Matter of E-P-, 21 I&N Dec. 860 (BIA 1997) (citing Matter of S-P-, 21 I&N Dec. 486 (BIA 1996)).

Nationality

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 Act. Matter of O-Z- & I-Z-, Interim Decision 3346 (BIA 1998).

Neutrality

An alien who merely testifies that he wishes to remain neutral in the midst of civil conflict in his country does not thereby establish a well-founded fear of persecution on account of a political opinion. Matter of Vigil, 19 I&N Dec. 572 (BIA 1988). But see Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989), rev'g, Matter of Maldonado-Cruz, 19 I&N Dec. 509 (BIA 1988).

Particularly Serious Crime

[For Deportation / Exclusion] For purposes of applying section 243(h) of the Act, an alien

convicted of an aggravated felony 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. Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996). In determining whether an individual has overcome the presumption, 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. Id.; Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982).

[For Removal] Under INA § 241(b)(3)(B)(ii), 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 L-S-, Interim Decision 3386 (BIA 1999); Matter of S-S-, Interim Decision 3374 (BIA 1999); Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982).

Persecution by non-governmental entity / Govt. unwilling or unable to protect

The persecution contemplated under the Act is not limited to the conduct of organized governments but may, under certain circumstances, be committed by individuals or nongovernmental organizations. Matter of McMullen, 19 I&N Dec. 90 (BIA 1984), aff'd, McMullen v. INS, 788 F.2d 591 (9th Cir. 1986). In such cases the respondent must establish that the government is unwilling or unable to protect him. Matter of McMullen, 17 I&N Dec. 542 (BIA 1980), rev'd on other grounds, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Matter of O-Z- & I-Z-, Interim Decision 3346 (BIA 1998); Matter of Pierre, 15 I&N Dec. 461 (BIA 1975); Matter of Tan, 12 I&N Dec. 564 (BIA 1967).

Personal Dispute, threat of retribution from

"Aliens fearing retribution over purely personal matters will not be granted asylum on that basis." Matter of Y-G-, 20 I&N Dec. 794, 799 (BIA 1994) (citing Matter of Pierre, 15 I&N Dec. 461 (BIA 1975)).

Presumption of a Well-Founded Fear

Under 8 C.F.R. § 208.13(b)(1)(i) (2000), where an asylum applicant has shown that he has been persecuted in the past on account of a 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 from a new source. Matter of N-M-A-, Interim Decision 3368 (BIA 1998).

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)(i) (2000) only if he establishes, as a threshold matter, compelling reasons for being unwilling to return to his country of nationality or, if stateless, country of last habitual residence, which arise out of the severity of the past persecution. Matter of N-M-A-, Interim Decision 3368 (BIA 1998).

Prosecution vs. Persecution

Prosecution for violation of a law of general applicability is not persecution, unless the punishment is imposed for invidious reasons. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

The general rule that prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution is inapplicable in countries where a coup is the only means of effectuating political change. Matter of Izatula, 20 I&N Dec. 149 (BIA 1990) (Afghanistan) (following Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988)).

[Additional cites:] Nor does criminal prosecution and punishment for illegal departure constitute persecution, absent evidence that the authorities had a motive (other than law enforcement) for preventing the departure or punishing the alien upon his return. See Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983); see also, e.g., Matter of Barrera, 19 I&N Dec. 837 (BIA 1989) (Marielitos returned to Cuba); Matter of Exilus, 18 I&N Dec. 276 (BIA 1982) (claim that illegal departure would result in persecution upon return to Haiti was insufficient, absent further substantial evidence that prosecution for an illegal departure would occur or would be politically motivated); Matter of Matelot, 18 I&N Dec. 334 (BIA 1982); Matter of Williams, 16 I&N Dec. 697 (BIA 1979) (unsupported allegation that alien would suffer political persecution because of her illegal exit from Haiti); Matter of Janus and Janek, 12 I&N Dec. 866 (BIA 1968) (alien must show that his departure was politically motivated and that any consequences he faces on return are political in nature even though they take the form of criminal penalties for flight); Matter of Nagy, 11 I&N Dec. 888 (BIA 1966) (possibility of prosecution for violation of law does not establish likelihood of persecution); cf. Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963) (brief confinement for illegal departure is not "physical persecution," but relief is not precluded for an alien threatened with long years of imprisonment, perhaps even life imprisonment, for attempting to escape a cruel dictatorship).

Nor does criminal prosecution constitute persecution. See Abedini v. INS, 971 F.2d 188 (9th Cir. 1992) (distributing Western films and videos, an act deemed criminal in Iran which is made applicable to all people in that country); Soric v. INS, 346 F.2d 360 (7th Cir. 1965) (conviction in absentia for illicit dealing in foreign commerce and currency shortly after alien left was not persecution where alien failed to establish that the conviction was politically motivated and without basis); Matter of Sun, 11 I&N Dec. 872 (BIA 1966) (misappropriation of funds); Matter of Laipenieks, 18 I&N Dec. 433 (BIA 1983) (punishment of criminal conduct in itself is not persecution, unless it is excessive or arbitrary and is motivated by one of the specified grounds); see also MacCaud v. INS, 500 F.2d 355 (2d Cir. 1974) (prospect of imprisonment for nonpolitical crimes in the country of deportation does not warrant stay of deportation); compare Berdo v. INS, 432 F.2d 824 (6th Cir. 1970) (street fighter in the 1956 uprising against Hungarian

Communist police and Russian military, who had publicly admitted having killed a Russian soldier since leaving); and Kovac v. INS, 407 F.2d 102 (9th Cir. 1969) (alien allegedly suffered years of "racially" [i.e., ethnically] or politically motivated employment discrimination; court said Congress did not intend to make the United States a refuge for common criminals, but it did intend to grant asylum to those who would, if returned, be punished criminally for violating a politically motivated prohibition against defection from a police state).

Reasonable Possibility

In comparing the requirements of the Immigration and Nationality Act to the 1967 United Nations Protocol Relating to the Status of Refugees, the Supreme Court in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), stated that "[t]here is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well founded fear" of the event happening." Id., at 440.

Recruitment by rebels

Recruitment of an individual by a guerrilla organization is not, in and of itself, persecution "on account of political opinion." INS v. Elias-Zacarias, 502 U.S. 478 (1992); Perlera-Escobar v. EOIR, 894 F.2d 1292 (11th Cir. 1990). The alien is not deemed politically offensive in such a case, but rather potentially useful to the guerrillas' goal of forcibly overthrowing the government. See also Matter of R-O-, 20 I&N Dec. 455 (BIA 1992); Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988). Persecution must be on account of the victim's political opinion, not the persecutor's. INS v. Elias-Zacarias, supra. The applicant in Elias-Zacarias failed to establish a well-founded fear that the guerrillas would persecute him "because of political opinion" rather than because he refused to join the guerrillas. See also Matter of R-, 20 I&N Dec. 621, 623-24 (BIA 1992).

Social Group

The terms "refugee" and "particular social group" as used in the Act originated in and conform with the United Nations Protocol Relating to the Status of Refugees, January 31, 1967 [1968], 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. [The Protocol was ratified by the United States on October 4, 1968. 114 Cong. Rec. 29,607 (1968).] See Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986). The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, (Geneva, 1988) published by the United Nations High Commissioner for Refugees, is a significant source of guidance with respect to the Protocol. Id; Ananeh-Firempong v. INS, 766 F.2d 621 (lst Cir. 1985). The Handbook states that

> A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e., race, religion or nationality.
>
> Membership of [sic] such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the

> political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.
>
> Mere membership of [sic] a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution. (Paras. 77-79, at 19).

[BIA "immutable characteristic" test:] In Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), the BIA interpreted the phrase "particular social group" in accordance with the doctrine of ejusdem generis (i.e., that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words) and concluded that membership in a particular social group, like race, religion, nationality and political opinion, refers to an immutable characteristic (such as sex, color, or kinship, or in some instances shared past experience such as former military leadership or land ownership): a characteristic that either is beyond the power of an individual to change or is so fundamental to his individual identity or conscience that it should not be required to be changed. See also Ananeh-Firempong v. INS, 766 F.2d 261 (1st Cir. 1985).

The existence of shared descriptive characteristics is not necessarily sufficient to qualify those possessing the common characteristics as members of a "particular social group" for the purposes of the refugee definition at INA § 101(a)(42)(A); 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. Matter of R-A-, Interim Decision 3403 (BIA 1999).

An applicant making a "particular 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. Matter of R-A-, Interim Decision 3403 (BIA 1999).

[9th Circuit "associational" test:] The phrase "particular social group" implies a collection of people closely affiliated with each other, a cohesive, homogeneous group, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group. Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986). The fact that a group of people face a common danger does not establish that they are a "particular social group." See id.

[Examples:] Matter R-A-, Interim Decision 3403 (BIA 1999) (group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" not found to be particular social group); Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (female genital mutilation); Matter of H-, 21 I&N Dec. 337 (BIA 1996) (clan); Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) (dismissing INS appeal of Immigration Judge grant of withholding of deportation to Cuba based on social group -

homosexuality); Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988) (possible group of former police officers); Safaie v. INS, 25 F.3d 636 (8th Cir. 1994) (possible group of Iranian woman advocating women's rights); Gebremichael v. INS, 10 F.3d 28 (1st Cir. 1993) (nuclear family).

CONVENTION AGAINST TORTURE SAMPLE LANGUAGE

BOILERPLATE FOR WITHHOLDING UNDER TORTURE CONVENTION

For asylum applications filed on or after April 1, 1997, an applicant also shall be considered for eligibility for Withholding of Removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal. See 8 C.F.R. § 208.13(c)(1) (2000).

"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." See 8 C.F.R. § 208.18(a)(1) (2000). The severe pain or suffering must be inflicted on the applicant or a third person for such purposes as: (1) "for . . . obtaining . . . information or a confession," (2) for "punishing . . . for an act . . . committed or . . . suspected of having committed;" (3) for intimidation or coercion; or (4) "for any reason based on discrimination of any kind." Id. In addition, in order to constitute "torture," the "act must be directed against a person in the offender's custody or physical control." See 8 C.F.R. § 208.18(a)(6) (2000). Further, the pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1) (2000). "Acquiescence" requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." See 8 C.F.R. § 208.18(a)(7) (2000). Torture is an "extreme form of cruel and inhuman treatment" and does not include pain or suffering arising from lawful sanctions. See 8 C.F.R. §§ 208.18(a)(2) and (3) (2000). Lawful sanctions do not include sanctions that defeat the object and purpose of the Torture Convention. See 8 C.F.R. § 208.18(a)(3) (2000).

In order to constitute torture, mental pain or suffering must be "prolonged." See 8 C.F.R. § 208.18(a)(4) (2000). It also must be caused by or resulting from intentional or threatened infliction of severe physical pain or suffering, threatened or actual administration or application of mind altering substances or similar procedures, or threatened imminent death. Id. These causes or results can be directed towards the applicant or another. Id.

The applicant for Withholding of Removal under the Torture Convention bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. See 8 C.F.R. § 208.16(c)(2) (2000). As with asylum, this burden can be established by testimony without corroboration if the testimony is credible. Id., Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998). In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including:

evidence of past torture inflicted upon the applicant;

evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

evidence of gross, flagrant or mass violations of human rights within the country of removal; or

other relevant information of conditions in the country of removal.

See 8 C.F.R. § 208.16(c)(3) (2000).

❝ In the instant case, Respondent has alleged in her Form I-589 that he/she fears torture if he/she were to be returned to _____ .

OR

❝ At a hearing on _____, Respondent requested that he/she be considered for eligibility for Withholding of Removal under the Torture Convention.

OR

❝ On _____, Respondent filed a brief with the Court seeking Withholding of Removal under the Torture Convention.

Respondent asserts that he/she fears torture were he/she to be removed to _____ because _____
_____
_____
_____
_____
_____
_____

Respondent submitted _____
_____
_____
in support of his/her claim. The documents do/do not bolster his/her assertions because_____
_____
_____
_____
_____
_____
_____
_____

Based on Respondent's testimony and the evidence in the record, the Court finds that Respondent has/has not shown that he/she is more likely than not be tortured if he/she were removed to _____.

9 If an immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the application for Withholding of Removal under the Torture Convention shall be granted, unless the alien is subject to a ground of "mandatory denial." See 8 C.F.R. §§ 208.16(c)(4) and 208.16(d)(1) and (2) (2000). For applications filed on or after April 1, 1997, withholding of removal must be denied if the alien is deportable under section 237(a)(4)(D) of the Act (assistance in Nazi persecution or genocide); if the alien participated in the persecution on a basis enumerated in the statute; if the alien has been convicted of a particularly serious crime; if there is reason to believe that the alien committed a serious, nonpolitical crime; or if there are reasonable grounds to believe that the alien is a danger to the security of the United States. See 8 C.F.R. § 208.16(d)(2) (2000); section 241(b)(3)(B) of the Act. As there is no evidence that Respondent is subject to mandatory denial under 8 C.F.R. section 208.16(d)(2) or (d)(3) (2000), his/her application for Withholding of Removal under the Torture Convention will be granted.

OR

" As Respondent has failed to satisfy his/her burden of proof, his/her application for Withholding of Removal under the Torture Convention will be denied.

ORDER

" It is hereby **ORDERED** that Respondent's application for Withholding of Removal under the Torture Convention pursuant to 8 C.F.R. section 208.16(c) (2000) is **GRANTED**.

OR

" It is hereby **ORDERED** that Respondent's application for Withholding of Removal under the Torture Convention pursuant to 8 C.F.R. section 208.16(c) (2000) is **DENIED**.

ADDITIONAL LANGUAGE FOR DEFERRAL OF REMOVAL

If an immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the application for Withholding of Removal under the Torture Convention shall be granted, unless the alien is subject to a ground of "mandatory denial." See 8 C.F.R. §§ 208.16(c)(4) and 208.16(d)(1) and (2) (2000). For applications filed on or after April 1, 1997, withholding of removal must be denied if the alien is deportable under section 237(a)(4)(D) of the Act (assistance in Nazi persecution or genocide); if the alien participated in the persecution on a basis enumerated in the statute; if the alien has been convicted of a particularly serious crime; if there is reason to believe that the alien committed a serious, nonpolitical crime; or if there are reasonable grounds to believe that the alien is a danger to the security of the United States. See 8 C.F.R. § 208.16(d)(2) (2000); section 241(b)(3)(B) of the Act.

The evidence reveals that Respondent _____
_____
_____
_____.

" Respondent's activity therefore constitutes assistance in Nazi persecution or genocide which thereby renders Respondent deportable under section 237(a)(4)(D) of the Act.

AND/OR

" Respondent therefore ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.

AND/OR

" Respondent was therefore convicted of a particularly serious crime.

AND/OR

" Respondent's activity therefore constitutes reason to believe that Respondent committed a serious, nonpolitical crime.

AND/OR

" Respondent's conduct therefore constitutes reason to believe that Respondent is a danger to the security of the United States.

Respondent's application for Withholding of Removal must therefore be denied pursuant to 8 C.F.R. sections 208.16(d)(2) and (3) (2000). Having established that he/she is more likely than

not to be tortured in _____, Respondent is still otherwise entitled to protection. Respondent's removal to _____, where he/she is more likely than not to be tortured, shall therefore be deferred under 8 C.F.R. section 208.17(a) (2000).

ORDER

IT IS HEREBY ORDERED that Respondent's application for Withholding of Removal under the Torture Convention is **DENIED**.

However, having established that he/she is more likely than not to be tortured in _____, **IT IS FURTHER ORDERED** that Respondent is **GRANTED** deferral of removal until such time as the deferral is terminated. (Pending a form which provides the required notice, the following should be included:)

Deferral of removal does not confer upon the Respondent any lawful or permanent immigration status in the United States. If Respondent is subject to custody of the Service, deferral of removal will not result in his/her being released from custody. The deferral also is limited only to_____; Respondent may be removed to a country other than _____. Deferral of removal may be terminated by the Court if the Court later determines it is not likely that Respondent would be tortured in the country to which removal has been deferred. Respondent may also terminate deferral of removal by his/her own request.

CONVENTION AGAINST TORTURE PARAGRAPHS

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 S-V-, Interim Decision 3430 (BIA 2000).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No: A_____

In the Matter of	)	
_____	)	IN DEPORTATION PROCEEDINGS
	)	
Respondent	)	

CHARGE(S): Section 241(a)( )( ) of the Immigration and Nationality Act - [Description of charge]

APPLICATION(S): Suspension of deportation; voluntary departure

ON BEHALF OF RESPONDENT:	ON BEHALF OF INS:
_____, Attorney at Law	_____
	Assistant District Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a ___ year old, single/married, male/female, native and citizen of _____. The United States Immigration and Naturalization Service (INS) has brought these deportation proceedings against the respondent pursuant to the authority contained in section 242 of the Immigration and Nationality Act (the Act). Proceedings were commenced with the filing of the Order to Show Cause with the Immigration Court. See Exhibit 1.

The respondent admits as alleged in the Order to Show Cause that:

> [For Example:] S/He entered the United States on or about _____ at or near _____ without inspection by an immigration officer. S/He further concedes that s/he is deportable as charged under section 241(a)(1)(B) of the Act for having entered without inspection.

On the basis of the respondent's admissions (and the supporting I-213/conviction records/_____ admitted into evidence) I find that the respondent's deportability has been established by evidence which is clear, unequivocal, and convincing.Woodby v. INS, 385 U.S. 276 (1966).

The respondent withdrew any request for asylum or withholding of deportation under the Act. She applied for relief from deportation in the form of suspension of deportation under section 244(a) of the Act, and in the alternative voluntary departure under section 244(e) of the Act. She bears the burdens of proof and persuasion on her requests for relief.

The respondent's Form EOIR-40 application for suspension of deportation is contained in the record as Exhibit 2. Prior to admission of the application the respondent verified in Court that she knew the contents of the application and she was given an opportunity to make any necessary corrections. The respondent then swore or affirmed before me that the contents of the application as corrected, including the attached documents and supplements, were all true and correct to the best of her knowledge.

The evidence at the hearing consisted of the respondent's statements in the application, her own testimony, her supplemental declaration attached to the application, and
_____
_____.

STATUTORY ELIGIBILITY

In order to establish eligibility for section 244(a)(1) relief, an alien must prove that she has been physically present in the United States for the seven years immediately preceding service of the Order to Show Cause on her; that she has been a person of good moral character for this same period and that her deportation would result in extreme hardship to herself or to her United States citizen or lawful permanent resident spouse, child or parent. In this case I consider extreme hardship to (the respondent only) (the respondent and ____).

The elements required to establish extreme hardship are dependent upon the facts and circumstances peculiar to each case. See Matter of Ige, 20 I&N Dec. 880 (BIA 1994). Factors relevant to the issue of extreme hardship include: the alien's age, the length of her residence in the United States, her family ties in the United States and abroad, her health, the economic and political conditions in the country to which she may be returned, her financial status (be that business or occupation), the possibility of other means of adjustment of status, her immigration history and her position in the community. See Matter of Anderson, 16 I&N Dec. 596 (BIA 1978).

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. See Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986). The Ninth Circuit also expressed inRamirez-Durazo, supra, that extreme hardship

connotes a finding of "unique" and "extenuating" circumstances.

While political and economic conditions in an alien's home country are relevant they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with such factors to make deportation extremely hard on the alien or her qualifying relatives. See Matter of Anderson, supra.

FACTS

The respondent testified as follows: (add documentary evidence as appropriate)

_____

_____

[Notes to aid in developing facts on extreme hardship:]

- Age
  - Current age
  - Age when entered? (Formative years - Matter of O-J-O-, 21 I&N 381 (BIA 1996))
  - How many years in the US?

- Entries
  - First entry _____
  - Second entry _____
  - Third entry _____
  - Did respondent enter legally? Use smuggler? (immigration history)

- Family in US:
  - Husband / Wife
    - Name / age
    - Spouse's immigration status
    - Spouse's family
    - Spouse's ties to community
  - Children
    - Name / age
    - Children's immigration status
    - Children's ties to community
    - If respondent intends to leave children in US, has she presented the affidavit required in Matter of Ige, 20 I&N Dec. 880 (BIA 1994)?
  - Parents
    - Name / age
    - Parent's immigration status
    - Parent's ties to community

- Other family in US (Siblings / extended family)

- Family OUTSIDE of the US
  - Husband / Wife
  - Children
  - Parents
  - Other

- Health
  - of respondent
  - of USC or LPR spouse, child, or parent
  - of other family members or significant individuals

- Financial Status
  - Real property / assets
  - Business (net worth, ability to sell)
  - Employment in US
    - Employment history
    - Gaps in employment
    - Earnings
    - Medical insurance through work?
    - Did respondent pay taxes on earnings?
    - File tax returns?
    - Respondent's work skills
    - Are respondent's work skills transferrable to home country?
    - Employment in home country prior to leaving?

- Government benefits (welfare / food stamps / AFDC / WIC / MediCal)

- Home country
  - Economic conditions
  - Has respondent sought employment in home country? (job application, discussions with family members)
  - Political conditions

- Emotional hardship if respondent deported
  - To Respondent
    - include "personal hardship that flows from economic detriment," see Ramirez-Gonzalez v. INS, 695 F.2d 1208 (9th Cir. 1983), and any "particular and unusual psychological hardship," see Tukhowinich v. INS, 64 F.3d 460 (9th Cir. 1995).
  - To family
  - To others

- Financial hardship if deported

- To whom?
  - to respondent
  - to respondent's family
- Respondent supports herself?
- Respondent supports immediate / extended family? (Consider loss of health insurance through work)
- Someone else supports respondent? Someone else supports / could support respondent's family?

- Other means of adjustment

- Position in community (Community Service / volunteer work)

- Special assistance to US or community

- Additional and discretionary factors
  - Problems with law enforcement
  - Drug or alcohol abuse
  - Rehabilitation
  - Military Service
  - Schooling
  - Visits to home country
  - Languages
  - Different? See Ramirez-Durazo, supra, (this "is the type of hardship experienced by most aliens who have spent time abroad").

CREDIBILITY

(Consult discussion in Asylum sample)

ANALYSIS AND FINDINGS

- 7 YEARS
  - Section 309(c)(5) of the Sept 30, 1996, Act as amended by NACARA -- 7 years prior to OSC.
  - Evidence of 7 years.
  - Absences from the US for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

- GOOD MORAL CHARACTER

- Statutory bars 101(f)
  - Convictions
    - Expungements / vacated sentence?
    - Time served
    - Petty offense exception?
- False testimony? (oral, under oath)
- Fraudulent tax returns?
- Note: you can have significant reservations about the individual's credibility without finding false testimony under oath. Note also that finding respondent lacks good moral character will bind you for purposes of voluntary departure unless the disqualifying factor is beyond the 5 years.

- EXTREME HARDSHIP

(Sample Consideration - denial)

I have weighed all the evidence of record individually and cumulatively on the issue of extreme hardship and find that the respondent failed to establish extreme hardship either to herself to her (USC or LPR spouse, parent, or child).

Hardship to Adult Respondents

A. (Length of residence) The respondent has been in the United States just more than the 7 years minimum required for suspension of deportation.

B. (Age at entry) She came as an adult. Thus, this is not a case where the respondent does not bear responsibility for the choice to enter the US illegally, or stay in the US illegally, or where she has spent her critical formative years in the US. Contrast Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996). The respondent collected equities in this country knowing full well she may be required to leave at any time. Nonetheless, this country has still agreed to provide for the suspension of deportation, but only in those cases where deportation would cause extreme hardship.

C. The respondent claims as her hardship the following:

1. _____
2. _____
3. _____
4. _____

D. (Economic detriment) However, economic detriment due to adverse conditions in the home country, loss of employment or employment benefits in the United States, even the loss of a business or the pursuit of a chosen profession in the United States, and projected difficulty in finding employment in the home country are normal occurrences of deportation and do not justify a grant of suspension in the absence of other substantial equities or unique and extenuating

circumstances. See Perez v. INS, 96 F.3d 390 (9th Cir. 1996); Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986); Mejia-Carrillo v. United States, 656 F.2d 520 (9th Cir. 1981); Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978).

Moreover, as a matter of proof / evidence, the respondent:

- Has not inquired as to possibility of employment in home country.

- Has employment skills which would transfer.

- Has not shown sale of business or home would result in a loss.

- These are investments that she made (after service of OSC) or (with full knowledge that she had no status in this country).

E. (Family ties) Description of family ties / immigration status / degree of closeness / special emotional and financial concerns / emotional impact on respondent of taking children to native country or leaving them in the United States.

Separation from friends and family members in the United States is a common result of deportation. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

Respondent would be reunited with other family members in her native country. These family members may be able to provide financial base of support as they (own their own homes; have jobs; etc). If not more, these family members may be able to provide an emotional base of support during the respondent's time of readjustment. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

F. (Support payments / "particular or unusual psychological hardship" - Tukhowinich)

The respondent testified that she sends money home to her family members. I have considered the personal hardship that may flow from economic detriment in this case, including any particular or unusual psychological hardship resulting from an inability to continue such payments to family members abroad. See Ramirez-Gonzalez v. INS, 695 F.2d 1208 (9th Cir. 1983), and Tukhowinich v. INS, 64 F.3d 460 (9th Cir. 1995). First, the respondent has not presented sufficient proof of the amount and frequency of alleged payments or the necessity of such payments. Second, the facts here are very different from those in Tukhowinich where the respondent's entire personality hinged on her support for her family members. The Court in Tukhowinich found that the applicant, a single woman, and eldest daughter, had become the primary financial support for herself and 8 other family members and that her sole reason for living seemed to be to work to support her family members.

G. (Other Adjustment possibilities)

- The respondent did / did not investigate the possibility of her employer filing a visa petition on her behalf.

- The respondent is the beneficiary of an approved visa petition. Although not currently available, the respondent then does have the potential for returning to the US as an immigrant in the not too distant future.

H. (Community ties)

The respondent's ties to her church and community, and her volunteer activities are evidence of involvement and contribution to the community and there will be emotional hardship upon having to separate from these ties. Such ties, however, can be established in the respondent's native country and the emotional hardship upon separation does not amount to an extreme hardship.

(Factors mitigating weight of claim of immersion into US society)

The respondent claims she is fully integrated, immersed, or acculturated to this society but has not demonstrated a willingness or ability to follow certain of this society's basic requirements such as

- obeying criminal code (if criminal conduct)
- paying taxes owed
- filing non-fraudulent tax forms
- driving with a valid license and car insurance
- no welfare fraud
- obtaining the required licenses for doing business,

These factors do undercut the respondent's claim of acculturation and membership in this society.

Thus I find that the respondent failed to establish extreme hardship to herself upon return to her home country.

Hardship to Children and to Parents concerning Children

The fact that an alien has a United States Citizen child does not of itself justify suspension of deportation. Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986).

(If children are staying in US):

The respondent testified that her children would not be going with her if she were required to leave the United States. Thus I do not consider societal or physical detriment to the child in the parent's native country, such as fewer economic advantages or educational opportunities. I do however consider the hardship from emotional separation to both the parents and the children.

If a young child were to be separated from his or her parents due to the parents' deportation, hardship to the family members due to separation must be considered. Perez v. INS, 96 F.3d 390 (9th Cir. 1996). In Matter of Ige, 20 I&N Dec. 880 (BIA 1994), it was stated that "Where an alien alleges extreme hardship will be suffered by his United States Citizen child were the child to remain in the US upon his parent's deportation, the claim will not be given significant weight absent an affidavit from the parent stating that it is his intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support." The court in Perez v. INS, supra, found this to be a valid evidentiary requirement. Here the respondent has not submitted the required Ige affidavit.

[Following part of Ige was overruled by Perez v. INS: "Assuming a USC child would not suffer extreme hardship if he accompanies his parent abroad, any hardship the child might face if left in the US is the result of parental choice, not of the parent's deportation." Attributing separation hardship to parental choice as was done in Ige was found in Perez v. INS to be a per se rule and therefore inappropriate.]

(If children are going to parent's homeland):

A. (Economic and Educational Opportunities) The fact that economic and educational opportunities for the child might be better in the United States than in the parent's homeland does not establish extreme hardship. Matter of Kim, 15 I&N Dec. 88 (BIA 1974); see also Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986).

B. (Medical facilities) The fact that medical facilities in the alien's homeland may not be as good as they are in this country does not establish extreme hardship to the child. Matter of Correa, 19 I&N Dec. 130 (BIA 1984).

C. (Adjustment of children) Also, precedent suggests that the readjustment of children to a new country may be easier when the children are still very young as in this case. Even so, while the children may face difficulties adjusting to life in the parent's homeland, the problems in this case do not materially differ from those encountered by other children who relocate as a consequence of their parents' deportation. Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

Hardship to Other Qualifying Relatives :

Conclusion:

In Matter of Pilch, 21 I&N Dec. 627 (BIA 1996), the Board found no extreme hardship on the following facts: the adult respondents were a married couple who had been in the United States for 11 and 9 years respectively; had not departed since entering, had 3 USC children ages 6, 5, and 4; had purchased a home with a $117,000 mortgage remaining; had always paid their taxes; were involved in their church and social club; had brothers and sisters in the US who were lawful

permanent residents; and were partners in a construction company that employed 13 people full-time. The equities here do not rise to the level of those in Matter of Pilch.

Deportation is harsh. The standard is whether it would be an extreme hardship. The bottom line in this case is that the types of hardship presented by the respondent, although without question significant to her, are the types of hardships experienced by most aliens who have spent time abroad and are now faced with the prospect of returning. Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986). They are not unique or extenuating, or unusual or beyond that which would normally be expected upon deportation. Perez v. INS, 96 F.3d 390 (9th Cir. 1996); Ramirez-Durazo v. INS, supra; Hassan v. INS, 927 F.2d 465 (9th Cir. 1991).

Thus on balance of all the factors of record both individually and cumulatively, I find that the respondent has failed to establish extreme hardship to herself or her qualifying relatives and suspension of deportation must therefore be denied.

VOLUNTARY DEPARTURE

The respondent has requested the privilege of departing the United States voluntarily in lieu of deportation under section 244(e) of the Act. To qualify for voluntary departure she must show that she would be willing and has the means to depart immediately, that she has been a person of good moral character for at least the past 5 years, and that she is deserving of the relief in the exercise of discretion. See Matter of Seda, 17 I&N Dec. 550 (BIA 1980).

Discretionary consideration of an application for voluntary departure involves a weighing of factors, including the alien's prior immigration history, the length of her residence in the United States, and the extent of her family, business and societal ties in the United States. See Matter of Gamboa, 14 I&N Dec. 244 (BIA 1972).

Analysis:

I find that the respondent has/has not met the statutory requirements for voluntary departure, and that relief will/will not be granted in the exercise of discretion for a period of _____ months.

ORDERS

IT IS HEREBY ORDERED, that the respondent's application for suspension of deportation be GRANTED/DENIED.

[IF GRANT] - IT IS FURTHER ORDERED that proceedings be terminated.]

IT IS FURTHER ORDERED, that the respondent be granted/denied the privilege of departing this country voluntarily without expense to the Government on or before _____(date), plus any extension and on such conditions that may be granted by the District Director of the Immigration and Naturalization Service.

IT IS FURTHER ORDERED, that if the respondent does not voluntarily depart the United States when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the respondent shall be deported from the United States to _____ on the charge(s) contained in the Order to Show Cause.

[IF V/D not granted and suspension denied] IT IS FURTHER ORDERED that the respondent be deported from the United States to ____ on the charges contained in the Order to Show Cause.]

_____
Henry P. Ipema, Jr.
Immigration Judge

SUSPENSION OF DEPORTATION LAW PARAGRAPHS

Burden of proof

The alien carries the burden of demonstrating both that he is statutorily eligible for relief and that he merits a favorable exercise discretion. Osuchukwu v. INS, 744 F.2d 1136 (5th Cir. 1984); Israel v. INS, 710 F.2d 601(9th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); Marcello v. INS, 694 F.2d 1033 (5th Cir.), cert. denied, 462 U.S. 1132 (1983); Chadha v. INS, 634 F.2d 408, 426-27 (9th Cir. 1980), aff'd, 462 U.S. 919 (1983); Villena v. INS, 622 F.2d 1352 (9th Cir. 1980) (en banc); Matter of Ige, 20 I&N Dec. 880 (BIA 1994).

The alien bears the burden of demonstrating both statutory eligibility and that she merits the favorable exercise of discretion. See Bu Roe v. INS, 771 F.2d 1328, 1333 (9th Cir. 1985).

Continuous Physical Presence (Application of Section 240A(d) of the Act)

Under section 240A(d)(1) of the Act, in order for an offense to terminate the period of continuous residence or continuous physical presence required for cancellation of removal it must be an offense "referred to in section 212(a)(2)" of the Act. Matter of Campos-Torres, Interim Decision 3428 (BIA 2000) (firearms offense within 237(a)(2)(C) did not stop the time).

Pursuant to section 240A(d)(1) of the Act, 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, as service of the Order to Show Cause ends continuous physical presence. Matter of Mendoza-Sandino, Interim Decision 3426 (BIA 2000).

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. Matter of N-J-B-, Interim Decision 3415 (BIA AG 1997, AG 1999).

(1) Pursuant to INA section 240A(d)(1), continuous residence or physical presence for cancellation of removal purposes is deemed to end on the date that a qualifying offense has been committed. Matter of Perez, Interim Decision 3389 (BIA 1999).
(2) The period of continuous residence required for relief under INA section 240A(a) commences when the alien has been admitted in any status, which includes admission as a temporary resident. Matter of Perez, Interim Decision 3389 (BIA 1999).
(3) An offense described in INA section 240A(d)(1) is deemed to end continuous residence or physical presence for cancellation of removal puprposes as of the date of its commission, even if the offense was committed prior to the enactment of IIRIRA. Matter of Perez, Interim Decision 3389 (BIA 1999).

For purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the issuance of the Order to Show Cause, irrespective of the date that it was issued. Matter of Nolasco, Interim Decision 3385 (BI A1999).

Continuous Physical Presence (Brief, Casual, and Innocent Generally)

In determining "brief, casual, and innocent" the adjudicator must look at the length of time the alien was absent, the purpose of visit, and whether the alien procured travel documents to make trip. Rosenberg v. Fleuti, 374 U.S. 449 (1963).

Fleuti doctrine only applies to lawful permanent residents, not lawful temporary residents under section 210 of the Act. Matter of Chavez-Calderon, 20 I&N Dec. 744 (BIA 1993).

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), 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). See Matter of Cervantes-Torres, I&N Dec. 351 (BIA 1996).

Continuous Physical Presence - Brief or Casual

Court found that 5-day vacation in Mexico was not meaningfully interruptive. Wadman v. INS, 329 F.2d 812 (9th Cir. 1964).

A 30-day trip to visit an ailing mother between semesters at school was found to not be a meaningful break in residence. Trip came in middle of 12-year residence. Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979).

Court found that a 9-month stay in home country to live and find work was neither "brief" nor "casual." Rubio-Rubio v. INS, 23 F.3d 273 (10th Cir. 1994).

In Kabongo v. INS, daily trips to and from Mexico over 1-year period to attend school was held to be "meaningfully interruptive." Kabongo v. INS, 837 F.2d 753, 757 (6th Cir.), cert. denied, 488 U.S. 982 (1988).

Having to obtain a visa to another country indicates a "planned and purposeful journey," not brief, casual & innocent. Dabone v. Karn 763 F.2d 593 (3d Cir. 1985).

Court found entry where alien was abroad 2 months, illegally visited Cuba, and procured travel documents. Bilbao-Bastida v. INS, 409 F.2d 820 (9th Cir.), cert. dismissed, 396 U.S. 802 (1969).

Finding entry following 10-day trip to Mexico. Matter of Karl, 10 I&N Dec. 480 (BIA 1964).

Court determined that month-long trip to Portugal was meaningfully interruptive. Matter of Guimaraes, 10 I&N Dec. 529 (BIA 1964).

Over three-week absence was not brief. Matter of Janati-Ataie, 14 I&N Dec. 216 (BIA; A.G.

1972).

Court found that alien's six-week absence coupled with misrepresentations broke continuous physical presence. Heitland v. INS, 551 F.2d 495 (2d Cir.), cert. denied, 434 U.S. 819 (1977).

Eighty and ninety-six days held not to be meaningfully interruptive.Chan v. INS, 649 F.2d 753 (9th Cir. 1980).

Alien's three and one-half months' absence found not to be meaningfully interruptive. Gallardo v. INS, 624 F.2d 85 (9th Cir. 1980).

Continuous Physical Presence - Unlawful purpose as meaningfully interruptive

Alien smuggling.Matter of Contreras, 18 I&N Dec. 30 (BIA 1981).

Departing to obtain a visa based on a sham marriage. Matter of Herrera, 18 I&N Dec. 4 (BIA 1981).

Alien who departs with innocent intentions and whose absence is brief, but who gets into trouble on return has meaningfully interrupted his permanent residenceLaredo- Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977) (returned as guide for other aliens entering without inspection); Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975) (left to visit mother then decided to help alien enter illegally);Palatian v. INS 502 F.2d 1091(9th Cir. 1974) (innocent reason for departure, caught smuggling drugs on return).

Voluntary Departure meaningfully interrupts alien's continuous presenceINS v. Rios-Pineda, 471 U.S. 444 (1985); see also Hernandez-Luis v. INS, 869 F.2d 496 (9th Cir. 1989) (administrative voluntary departure after apprehension by the Service);Fidalgo/Velez v. INS, 697 F.2d 1026 (11th Cir. 1983); McColvin v. INS, 648 F.2d 935 (4th Cir. 1961); Segura-Viachi v. INS, 538 F.2d 91 (5th Cir. 1976)(per curiam); Matter of Barragan, 13 I&N Dec. 759 (BIA 1971), aff'd , Barragan-Sanchez v. Rosenberg, 471 F.2d 758 (9th Cir. 1972) (prehearing voluntary return).

Illegal entry or reentry does not necessarily render absence "not innocent" and thus "meaningful." De Gallardo v. INS, 624 F.2d 85 (9th Cir. 1980).

In Alvarez-Ruiz v. INS, the Court found that the alien's return to his home country to get married and subsequent 6-month absence broke the continuity of his seven years' physical presence for purposes of suspension of deportation. Alvarez-Ruiz v. INS, 749 F.2d 1314 (9th Cir. 1984).

Alien's eight-day trip to Mexico to obtain a visa and regularize his 25-year residence in United States did not interrupt his continuous presence in the country required for suspension of deportation. See Castrejon-Garcia v. INS, 60 F.3d 1359 (9th Cir. 1995).

Permanent resident alien's return to the United States from a 27-day trip to his native Colombia constituted an "entry" within meaning of the immigration laws where the alien, who had lived in

the United States for almost nine years but had no property or employment ties with his country or any dangers awaiting him in Colombia, took such trip in unsuccessful effort to get married, had in excess of $2,100 in currency with him on trip and who on return was found to be carrying counterfeit United States currency and shortly thereafter pled guilty to possessing, with intent to defraud, counterfeit obligations of the United States. Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974).

Extreme Hardship (generally)

The Supreme Court has held that a narrow interpretation of the extreme hardship remedy is consistent with the exceptional nature of the suspension remedy. See INS v. Jong Ha Wang, 450 U.S. 139, reh'g denied, 451 U.S. 964 (1981); see also Hernandez-Cordero v. INS, 819 F.2d 558 (5th Cir. 1987).

Extreme hardship will not be found without a showing of significant actual or potential injury, in the sense that the petitioner will suffer hardship "substantially different from and more severe than that suffered by the ordinary alien who is deported."Kuciemba v. INS, 92 F.3d 496, 499 (7th Cir. 1996) (quoting Palmer v. INS, 4 F.3d 482, 487-88 (7th Cir. 1993)); see also Najafi v. INS, 104 F.3d 943 (7th Cir. 1997).

The elements required to establish extreme hardship are dependent upon the facts and circumstances peculiar to each case. See Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978); Matter of Kim, 15 1&N Dec. 88 (BIA 1974); Matter of Sangster, 11 I&N Dec. 309 (BIA 1965); see also Jara-Navarrete v. INS, 813 F.2d 1340 (9th Cir. 1987); Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984); Ramos v. INS, 695 F.2d 181 (5th Cir. 1983).

Factors relevant to the issue of extreme hardship include the alien's age; the length of his residence in the United States; his family ties in the United States and abroad; his health; the economic and political conditions in the country to which he may be returned; his financial status, business, or occupation; the possibility of other means of adjustment of status; his immigration history; and his position in the community. See Hernandez-Patino v. INS, 831 F.2d 750 (7th Cir. 1987); Jara-Navarrete v. INS, 813 F.2d 1340 (9th Cir. 1987); Matter of Ige, 20 I&N Dec. 880 (BIA 1994); Matter of Gibson, 16 1&N Dec. 58 (BIA 1976); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978); Matter of Uy, 11 I&N Dec. 159 (BIA 1965). Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. See, e.g., Hernandez-Patino v. INS, supra; Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986); Ravancho v. INS, 658 F.2d 169 (3d Cir. 1981).

The litany of factors which do not, by themselves, generally constitute extreme hardship, must be considered in proper context. Each case must be carefully evaluated, and all possible hardship factors must be weighed together. See, e.g., Turri v.INS, 997 F.2d 1306 (10th Cir. 1993); Hernandez-Cordero v. INS, 819 F.2d 558, 563 (5th Cir. 1987); Prapavat v. INS, 662 F.2d 561 (9th Cir. 1981); Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

A factor which may not in itself be determinative should be considered, and may become a

significant or even critical factor when weighed with all the other circumstances presented. In all cases, the particular degree of personal hardship resulting from each of the factors must be taken into account. Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

Extreme Hardship - BIA Fact Patterns (from concurring opinion by Board Member D. Holmes, Matter of O-J-O-)

I. Following are the Board's published cases involving "merits" adjudications of applications for suspension of deportation under section 244(a)(1) of the Act in which the Board found the requirement of "extreme hardship" not established and ultimately denied suspension of deportation or affirmed Immigration Judge denial of such relief.

1. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996). Board found no extreme hardship on the following facts: the adult respondents were a married couple who had been in the United States for 11 and 9 years respectively; had not departed since entering, had 3 USC children ages 6, 5, and 4 (with a fourth child remaining in the native country); had purchased a home with a $117,000 mortgage remaining; had always paid their taxes; were involved in their church and social club; had brothers and sisters in the US who were lawful permanent residents; and were partners in a construction company that employed 13 people full-time. "Extreme hardship" not established.

2. Matter of Saekow, 17 I&N Dec. 138 (BIA 1979). Unmarried native and citizen of Thailand; 29 years old; entered as a nonimmigrant student; 9 years' residence in the United States; no evidence of family ties to this country; employment as a specialty cook. "Extreme hardship" not established.

3. Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978). Unmarried native and citizen of Peru; 31 years old; 11 years' residence in the United States; claim of loss of job and inability to financially support mother in Peru; argued difficult readjustment to life in Peru. "Extreme hardship" not established.

4. Matter of Anderson, 16 I&N Dec. 596 (BIA 1978). Married native and citizen of the Dominican Republic; 55 years old; wife with "emotional difficulties" unlawfully present in the United States; 10 children and siblings residing in the Dominican Republic; 8 years' residence in the United States; employed as carpenter; principal claim related to economic detriment; cousins are only relatives in the United States. "Extreme hardship" not established.

5. Matter of Gibson, 16 I&N Dec. 58 (BIA 1976). Unmarried respondent from Great Britain; 2 years old; 9 years of residence in the United States; entered as nonimmigrant student; 5 semesters of college in this country; primarily employed as a custodian; should have "no difficulty" finding suitable employment abroad; "accustomed to the American way of life"; no relatives in the United States. "Extreme hardship" not established.

6. Matter of Marques, 15 I&N Dec. 200 (BIA 1975). Single native and citizen of Spain; 41 years old; entered as nonimmigrant worker; length of residence not stated, but apparently entered

as an adult; no family ties; principal hardship claim tied to future access to financial benefits (insurance and industrial commission award) that allegedly would not be available if deported; facts indicate respondent is "a man of substantial means." "Extreme hardship" not established.

7. Matter of Kim, 15 I&N Dec. 88 (BIA 1974). Korean husband and wife; both entered as nonimmigrant students after obtaining college educations in Korea; claimed personal hardship arising from unsuitable employment opportunities and hardship to 6 ½- and 3-year-old United States citizen children based on diminished educational and economic advantages in Korea. "Extreme hardship" not established.

8. Matter of Kojoory, 12 I&N Dec. 215 (BIA 1967). Unmarried native and citizen of Iran; 32 years old; 11 years' residence in the United States; no family ties in this country; entered as nonimmigrant student; hardship claim principally related to fear of persecution if returned to Iran, severely limited economic opportunities in that country, lack of opportunities in his own particular field, and difficulty adjusting to lower standard of living in Iran. "Extreme hardship" not established.

9. Matter of Sangster, 11 I&N Dec. 309 (BIA 1965). Native and citizen of Jamaica; 36 years old; entered as nonimmigrant student when over 26 years old; no dependents in this country; married to lawful permanent resident, but marriage never consummated and possibly under annulment proceedings; principal hardship would simply be economic detriment; not a "scintilla of evidence" in the record that suitable employment was unavailable in Jamaica or England. "Extreme hardship" not established.

10. Matter of Uy, 11 I&N Dec. 159 (BIA 1965). Unmarried native of the Philippines and citizen of China; 28 years old; entered as nonimmigrant student when about "19 ½ years old"; student and part-time worker; parents and siblings in Philippines, and all of his brothers employed; claim of hardship principally tied to difficulty in adjusting to new environment outside the United States and claim of limited opportunities in his field of academic training. "Extreme hardship" not established.

11. Matter of Liao, 11 I&N Dec. 113 (BIA 1965). Unmarried native of China; advanced training as a pilot, skill as contact lens technician, and college education; 39 years old; admitted as nonimmigrant worker when approximately 28 years old; hardship claim tied to fear of persecution and to claim of diminished employment opportunities; employed as stockman; sought permanent residence to complete undergraduate degree and to do postgraduate work; claim that anticipated training would be of more benefit in this country than in Formosa; Board noted in part that the respondent would "be in a better position to obtain employment . . than when he entered the United States." "Extreme hardship" not established.

II. Following are the Board's published cases involving "merits" adjudications of applications for suspension of deportation under section 244(a) (1) of the Act in which the Board found the requirement of "extreme hardship" established and ultimately granted suspension of deportation or affirmed Immigration Judge grants of such relief.

1. Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996). 24-year-old Nicaraguan respondent lived in the United states since the age of 13 ("critical formative years of adolescence"), was educated in this country, spoke English fluently, fully assimilated into American life and culture, involved in various activities in this country, ran a small trucking business, had no other means of obtaining lawful permanent resident status, and if deported, would return to a country where economic and political conditions were difficult. "Extreme Hardship" requirement met.

2. Matter of Loo, 15 I&N Dec. 601 (BIA 1976). 53-year-old native and citizen of china; 25 years' residence in the United States; lawful permanent resident daughter; small investment in United States business in which he was employed. "Extreme hardship" requirement met.

3. Matter of Piggott, 15 I&N Dec. 129 (BIA 1974). Husband and wife respondents; natives of Antigua and citizens of the United Kingdom and colonies; minor United States children; Immigration Judge finding that respondents would not be able to provide for their own necessities in Antigua and that respondents' children would suffer because of parents' inability to provide them with proper food, living facilities, and education in that country; youngest United States citizen daughter afflicted with rheumatic fever, under physician's care, and "equal medical care . . not available in Antigua." "Extreme hardship" requirement met.

4. Matter of Ching, 12 I&N Dec. 710 (BIA 1968) - Native and citizen of china; 55 years old; lawful permanent resident spouse; 16 years' residence in the United States following deportation in 1952; employed as cook; no relatives of either the respondent or his wife residing in the United States. "Extreme hardship" requirement met. Board also concluded that, even if respondent's application were considered under the more stringent provisions of section 244(a) (2) of the Act, suspension of deportation would be granted.

5. Matter of Wong, 12 I&N Dec. 271 (BIA 1967), overruled on other grounds, Matter of Dilla, 19 I&N Dec. 54 (BIA 1984). Native and citizen of China; 36 years old; 15 years' residence in the United States; married to a native and citizen of China who resided in Canada with their three children, ages 16, 6, and 5; two youngest children born in Canada; partner in grocery store; speaks "acceptable English"; would suffer "considerable financial hardship" if deported. "Extreme hardship" requirement met.

6. Matter of Gee, 11 I&N Dec. 639 (BIA 1966). Native and citizen of China; 32 years old; entered the United States when 18 years of age; 14 years' residence, interrupted by 4 months' trip to Formosa in 1960 during which the respondent was married; respondent subsequently divorced from wife and did not know her whereabouts; employed in laundry; supports mother who resides in Hong Kong; father is deceased; 2 years' honorable service in the United States Army; respondent submitted that it would be "very difficult" to obtain a job outside this country and that he had "become accustomed to the way of life here." "Extreme hardship" requirement met.

7. Matter of Lum, 11 I&N Dec. 295 (BIA 1965). Native and citizen of China; 29 years old; lived in United States for 14 years after entry at age of 15 years; regularly employed; owned ½ interest in restaurant from which he derived monthly income; "doubtful" he would be able to earn a comparable income elsewhere; "probably would suffer a substantial loss on his investment in the

restaurant"; last entered the United States in 1962 under false claim to citizenship; married to a native and citizen of China who was attending school in Hong Kong and supported by the respondent; no children; service in United States Army. "Extreme hardship" requirement met.

8. Matter of Chien, 10 I&N Dec. 387 (BIA 1963). Native and citizen of China; 32 years old; 9 years' residence; originally entered as nonimmigrant student; became exchange visitor and granted waiver of 2-year foreign residence requirement; respondent's wife apparently a native and citizen of China, who was beneficiary of a waiver of the 2-year foreign residence requirement; wife was a pediatrician, but not employed; two United States citizen children, ages 4 and 2; employed as assistant professor of psychology engaged in problems of "wound shock" under contract with the Office of the Army Surgeon General; although beneficiary of a visa petition, respondent could not "readily" obtain an immigrant visa to adjust his nonimmigrant status because the relevant quota was oversubscribed. "Extreme hardship' requirement met.

9. Matter of Woo, 10 I&N Dec. 347 (BIA 1963). Native and citizen of China; 28 years old; entered the United States at age 12 and resided here for 15 years; served in the United States Armed Forces; married a native and citizen of China in Hong Kong in 1959; wife and 2-year-old foreign-born son reside in Hong Kong; excellent employment record and reputation. "Extreme hardship" requirement met.

10. Matter of Leong, 10 I&N Dec. 274 (BIA 1963). Married, native of China; 31 years old; originally entered the United States at age 18; last entered 3 years before deportation proceedings; United States military service and service-incurred 30% degree of disability; wife was a native and citizen of China who resided in that country; graduated from high school in the United States; employed in various capacities in restaurants in -+this country; the respondent's "adult years" had been spent in the United States; his earning ability had been impaired by his service-incurred disability. "Extreme hardship" requirement met.

11. Matter of McCarthy, 10 I&N Dec. 227 (BIA 1963). Native and citizen of Canada; 45 years old; twice deported, but first entry at age 6; had presence in United States spanning some 40 years; lawful permanent resident spouse and three United States citizen children, ages 8, 16, and 19; otherwise ineligible for visa. "Extreme hardship" requirement met.

12. Matter of Louie, 10 I&N Dec. 223 (BIA 1963). Native and citizen of China; 42 years old; 11 years' residence in the United States; respondent's Chinese wife and child still resided in Hong Kong; respondent contributed to their support; employment as waiter; permanently disabled, elderly United States citizen father, who resided in "International Guest Home" in Los Angeles; respondent contributed to cost of father's maintenance and took his father to the doctor weekly; respondent and his father had no other close relatives in the United States. In view of "the father's advanced age and physical condition, . . . it would be extremely harsh, both to the respondent and his father, to deport [the respondent] from the United States. "Extreme hardship" requirement met, both as to the respondent and to his United States citizen father.

Extreme Hardship - Children - Age

General rules also revealed by study of the case law are that, with all else being equal, the younger the children, or the wealthier, better-educated, or more employable the alien, the less likely a finding of extreme hardship. See, e.g., Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996); Matter of Kim, 15 I&N Dec. 88 (BIA 1974).

Extreme Hardship - Children - Fact of USC children

The fact that an alien has a United States citizen child does not of itself justify suspension of deportation. See Israel v. INS, 710 F.2d 601 (9th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); Diaz-Salazar v. INS, 700 F.2d 1156 (7th Cir), cert. denied, 462 U.S. 1132 (1983); see also Balani v. INS, 669 F.2d 1157 (6th Cir. 1982); Ayala-Flores v. INS, 662 F.2d 444 (6th Cir. 1981); Davidson v. INS, 558 F.2d 1361 (9th Cir. 1977); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Matter of Kim, 15 I&N Dec. 88 (BIA 1974). An alien illegally in the United States does not gain a favored status by the birth of a child in this country. Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986).

Extreme Hardship - Children - Medical facilities

The fact that medical facilities in the alien's homeland may not be as good as they are in this country does not establish extreme hardship to the child. Matter of Correa, 19 I&N Dec. 130 (BIA 1984).

Extreme Hardship - Children - Readjustment to life in parent's home country

Even though the child may face difficulties adjusting to life in his parent's homeland, these problems do not materially differ from those encountered by other children who relocate with their parents, especially at a young age. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985).

Extreme Hardship - Children - Reduced economic and educational opportunities

The fact that economic and educational opportunities for the child are better in the United States than in the alien's homeland does not establish extreme hardship. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Matter of Kim, 15 I&N Dec. 88 (BIA 1974); see also Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986); (stating that the disadvantage of reduced educational opportunities is insufficient to constitute extreme hardship).

Extreme Hardship - Economic detriment

Economic detriment in the absence of other substantial equities is not extreme hardship. Matter of Ige, 20 I&N Dec. 880 (BIA 1994); Matter of Sangster, 11 I&N Dec. 309 (BIA 1965); see also, e.g., Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986); Bueno-Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982); Carnalla-Munoz v. INS, 627 F.2d 1004 (9th Cir. 1980). Even a significant reduction in the standard of living is not by itself a ground for relief. Ramirez-Durazo v. INS, supra; Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981). The loss of a job and the

concomitant financial loss incurred does not rise to the level of extreme hardshipMarquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985); Moore v. INS, 715 F.2d 13 (1st Cir. 1983); Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978).

Although economic factors are relevant in any analysis of extreme hardship, economic detriment alone is insufficient to support a finding of extreme hardship within the meaning of section 244(a) of the Act. Palmer v. INS, 4 F.3d 482, 488 (7th Cir. 1993); Mejia-Carrillo v. INS, 656 F.2d 520, 522 (9th Cir. 1981); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996); Matter of Ige, 20 I&N Dec. 880 (BIA 1994).

Moreover, the mere loss of current employment, the inability to maintain one's present standard of living or to pursue a chosen profession, separation from a family member, or cultural readjustment do not constitute extreme hardship. See Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985); Bueno-Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982); Chokloikaew v. INS, 601 F.2d 216 (5th Cir. 1979); Banks v. INS, 594 F.2d 760 (9th Cir. 1979); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978); Matter of Kojoory, 12 I&N Dec. 215 (BIA 1967).

The respondent's claim of difficulty in finding employment and inability to find employment in his trade or profession, although a relevant factor, is not sufficient to justify a grant of relief in the absence of other substantial equities. See Hernandez-Patino v. INS, 831 F.2d 750 (7th Cir. 1987); Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978). See Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985) (holding that the loss on sale of a home and loss of present employment and its benefits did not constitute extreme hardship, but were normal occurrences of deportation).

Extreme Hardship - Economic and political conditions in home country

While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relativesMatter of Anderson, 16 I&N Dec. 596 (BIA 1978); see also, e.g., Hernandez-Patino v. INS, 831 F.2d 750 (7th Cir.1987); Diaz-Salazar v. INS, 700 F.2d 1156 (7th Cir.), cert. denied, 462 U.S. 1132 (1983); Ramos v.INS, 695 F.2d 181 (5th Cir. 1983).

Additional hardship factors in this case relate to the depressed economic conditions and volatile political situation throughout Nicaragua. Although somewhat speculative these factors do provide some additional weight in the assessment of aggregate hardship. Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996); see Tukhowinich v. INS, 64 F.3d 460, 463 (9th Cir. 1995) (holding that political unrest in the country of origin should be considered in assessing hardship).

While conditions in the alien's native country may be considered in evaluating an allegation of extreme hardship, a claim of persecution may not generally be presented as a means of demonstrating extreme hardship for purposes of suspension of deportation. See Gebremichael v.

INS, 10 F.3d 28 (1st Cir. 1993); Farzad v. INS, 802 F.2d 123 (5th Cir. 1986), reh'g denied, 808 F.2d 1071 (5th Cir. 1987); Kashefi-Zihagh v. INS, 791 F.2d 708 (9th Cir. 1986); Sanchez v. INS, 707 F.2d 1523 (D.C. Cir. 1983); Hee Yung Ahn v. INS, 651 F.2d 1285 (9th Cir. 1981); Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996); Matter of Kojoory, 12 I&N Dec. 215 (BIA 1967); Matter of Liao, 11 I&N Dec. 113 (BIA 1965). But see Blanco v. INS, 68 F.3d 642 (2d Cir. 1995).

Additionally, applicants returning to a developed country are less likely to be able to demonstrate extreme hardship than those returning to a less developed or particularly impoverished country. See Banks v. INS, 594 F.2d 760 (9th Cir. 1979); Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

Extreme Hardship - Family Ties

Emotional hardship caused by severing family and community ties is a common result of deportation. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); see INS v. Jong Ha Wang, 450 U.S. 139, reh'g denied, 451 U.S. 964 (1981); Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985).

The record further reflects that their numerous family members in respondents' native country may be able to provide an emotional base during their time of readjustment. See Kuciemba v. INS, 92 F.3d 496 (7th Cir. 1996); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

See Contreras-Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983) ("We have held '[t]he most important single [hardship] factor may be the separation or the alien from family living in the United States.")

Extreme Hardship - Language Barriers

See Ramirez-Durazo v. INS, 794 F.2d 491, 498 (9th Cir. 1986) (noting that "[t]he fact that the Ramirez-Durazo family has been speaking Spanish in the home will ease the children's transition into Mexican society and schools"). See also Gutierrez-Centeno v. INS, 99 F.3d 1529 (9th Cir. 1996) (remanding in part for BIA's failure to consider alien's limited Spanish proficiency).

Extreme Hardship - Length of Residence

A mere showing of 7 years' presence in the United States does not constitute extreme hardship. Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972).

Extreme Hardship - Medical Conditions

Board of Immigration Appeals failed to properly consider aggregate effects of alien's unemployability, medical problems, and prospects for obtaining adequate medical care if she were deported to Poland, and abused its discretion when it denied suspension of deportation on grounds alien would not suffer extreme hardship if she were deported; alien was 65 years old, suffered from a heart condition that required medication, and would not receive adequate care if she were deported. Urban v. INS, 123 F.3d 644 (7th Cir. 1997)

Extreme Hardship - Medical facilities

The fact that medical facilities in the alien's homeland may not be as good as they are in this country does not establish extreme hardship. Matter of Correa, 19 I&N Dec. 130 (BIA 1984).

Extreme Hardship - Other means of adjustments

We believe that unless there is a realistic chance for adjustment through other means in the near future, this factor should not weigh against an alien. Gutierrez-Centeno v. INS, 99 F.3d 1529, 1532 n.6 (9th Cir. 1996).

Extreme Hardship - Readjustment to Life in Native Country

Ordinarily, "the readjustment of an alien to life in his native country after having spent a number of years in the United States is not the type of hardship that is characterized as extreme, since similar hardship is suffered by most aliens who have spent time abroad."Matter of Ige, 20 I&N Dec. 880 (BIA 1994); Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978); see also Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986); Pelaez v. INS, 513 F.2d 303 (5th Cir.), cert. denied, 423 U.S. 892 (1975).

When an alien has strongly embraced and deeply immersed himself in the social and cultural life of the United States, however, the emotional and psychological impact of readjustment must be considered in assessing hardship. Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996); Santana-Figueroa v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981) (finding that extreme hardship could result from "the combined effect of depriving the petitioner of his livelihood and uprooting him from a community to which he had belonged and contributed for more than a decade.")

Extreme Hardship - Subsequently-acquired equities

Equities which are acquired after a final order of deportation has been entered are generally entitled to less weight than those acquired before entry of such an order. Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996); Matter of Correa, 19 I&N Dec. 130 (BIA 1984).

Effect of Deportation

The Supreme Court has noted that "deportation may result in loss of all that makes life worth living." Bridges v. Wixon, 326 U.S. 135, 147 (1945) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

Good Moral Character

The Act defines "good moral character" in the negative. §101(f) provides that the following individuals CANNOT establish good moral character:

a) 101(f)(1)-- a habitual drunkard

b) 101(f)(2)-- [repealed]
c) 101(f)(3)-- a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of §212(a); or subparagraphs (A) and (B) of §212(a)(2) and subparagraph (C) thereof of such section (except as it relates to a single offense of simple possession of 30 grams or less of marihuana)
d) 101(f)(4)-- one whose income is derived principally from illegal gambling activities
e) 101(f)(5)-- one who has been convicted of two or more gambling offenses committed during such period
f) 101(f)(6)-- one who has given false testimony for the purpose of obtaining any benefits under this Act
g) 101(f)(7)-- one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period
h) 101(f)(8)-- one who at any time has been convicted of an aggravated felony

Additionally, any person not within any of these classes does not preclude a finding that for other reasons such person is not of good moral character. INA § 101(f).

Insufficient evidence

This allegation is not supported by any evidence. Luna-Rodriguez v. INS, 104 F.3d 313, 315 (10th Cir. 1997); Ramirez-Gonzalez v. INS, 695 F.2d 1208, 1211-12 (9th Cir.1983) (holding unsupported allegations insufficient to establish inability to find employment if deported or to trigger Board's duty to consider personal hardships resulting from unemployment);Santana-Figueroa v. INS, 644 F.2d 1354, 1357 & n.8 (9th Cir. 1981) (holding alien seeking suspension of deportation must offer more than "bare allegation" of extreme hardship);Pelaez v. INS, 513 F.2d 303, 304-05 & n.1 (5th Cir.), cert. denied, 423 U.S. 892 (1975) (rejecting unsupported claim that petitioner would be unable to find suitable work if deported).

INS failure to execute order of deportation considered as equity

As was recognized in Matter of Pena-Diaz where the Service affirmatively indicates that it does not intend to deport an alien, the alien's reliance on that fact can "contribute to the respondent's other allegations of hardship." Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996) (quoting Matter of Pena-Diaz, 20 I&N Dec. 841 (BIA 1994)).

Reopening

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 L-O-G-, 21

I&N Dec. 413 (BIA 1996); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972).

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 L-O-G-, Interim Decision 3281 (BIA 1996)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HOUSTON, TEXAS

CASE NO.:

IN THE MATTER OF	)	
	)	
	)	CASE TYPE: REMOVAL
	)	
Respondent	)	

CHARGE: Section(s) _____ of the Immigration and Nationality Act -

APPLICATIONS: Cancellation of Removal and Adjustment of Status for Non-Permanent Aliens; Voluntary Departure

ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE:

FINDINGS, DECISION, AND ORDER OF THE JUDGE

The respondent is a __ year old fe/male, single/married/divorced, native and citizen of _____. The Immigration and Naturalization Service issued a charging document, the Notice to Appear dated _____, 19__ ("NTA"), charging the respondent as removable pursuant to Section(s) _____ of the Immigration and Nationality Act ("Act"). The Service alleges that the respondent is an alien who _____
_____
_____
_____
A copy of the charging document may be found in the record as Exhibit "1".

At the master calendar hearing on _____, 19__, the respondent appeared with current counsel, and through counsel conceded to the service of the NTA, admitted and conceded to the allegations and charge therein. Removability is therefore not at issue in these proceedings. On

the basis of the respondent's plea through counsel, I find that the respondent's removability has been established by evidence that is "clear and convincing." Section 240(c)(3) of the Act.

After the court advised and warned the respondent of the consequences of withdrawing any application for asylum or withholding of removal, the respondent withdrew his/her application for political asylum, Form I-589, that s/he previously filed with the Immigration Service and which was referred to the Court for consideration. Respondent requested for an opportunity to apply for cancellation of removal and adjustment of status pursuant to Section 240A(b) of the Act, and for voluntary departure in the alternative. The respondent bears the burden of proof and persuasion on his/her requests for relief.

The respondent's Form EOIR-42B, application for cancellation of removal and adjustment of status, and supporting documents tabbed 1 through __ are contained in the record as group Exhibit "2". Counsel for the Service did not object to any of the respondent's supporting documentation. The Respondent also submitted written amendments to the application, which may be found in the record as Exhibit "3". Prior to the admission of the amended application and supporting documents, the respondent swore or affirm before me that the contents of the application, as amended, and supporting documents were all true and accurate to the best of his/her knowledge and belief.

The evidence at the hearing consisted of the respondent's application, supporting documents, the testimony of the respondent and _____.

STATUTORY ELIGIBILITY

Section 240A(b) of the Act provides that the Attorney General may cancel the removal from the United States of an alien who is inadmissible or deportable if certain criteria are met. To be eligible for this form of relief, an applicant must prove that he or she

1) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the service of the charging document;

2) has been a person of good moral character during such period and up to the date of such application;

3) has not been convicted of an offense under Sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act; and

4) establishes that removal would result in exceptional and extremely unusual hardship to the applicant's spouse, parent, or child, who is a United States citizen or lawful permanent resident.

In this case I consider "exceptional and extremely unusual hardship" to the respondent's _____.

As in cases involving suspension of deportation, the elements required to establish "exceptional and extremely unusual hardship" are dependent upon the facts and circumstances peculiar to each case. See Ramos v. INS, 695 F.2d 181, 188 (5th Cir. 1983); Matter of Ige, 20 I&N Dec. 880 (BIA 1994). (Suspension case cited for reference only). All relevant factors, though not "exceptional or extremely unusual" when considered alone, must be considered in the aggregate in determining whether "exceptional and extremely unusual hardship" exists.See Ramirez-Durazo v. INS, 795 F.2d 491 (9th Cir. 1986). (Suspension case cited for comparison only). However, the hardship exists in cancellation of removal cases must relate to the qualified relative. Therefore, any hardship identified which relates to the respondent should not be considered unless it also relates to or affects the hardship of the qualified relative.

Very little guidance can be found in precedent decisions from the Board of Immigration Appeals ("BIA") or the circuit courts relating to "exceptional and extremely unusual hardship." The BIA found that a respondent who had filed a motion to reopen to apply for suspension of deportation under former section 244(a)(2) of the Act established a prima facie showing of "exceptional and extremely unusual hardship" by demonstrating the following facts:

1) the respondent had spent almost half of his 45 years in the United States;

2) the respondent had steady employment;

3) the respondent's immediate family, including his wife and 2 United States citizen children were well established in the United States;

4) one of his citizen children was undergoing treatment for a congenital heart defect; and

5) the respondent was ineligible for any other form of relief and precluded from legal immigration because of his drug conviction.

Matter of Pena-Diaz, 20 I&N Dec. 841, 845 (BIA 1994).

Although no actual test for "exceptional and extremely unusual hardship" seems to exist, it appears to this Court that the proper standard is a heightened and more restrictive standard than that of the "extreme hardship" standard in suspension of deportation cases.See Wang v. INS, 622 F.2d 1341, 1345 n.2 (9th Cir. 1980) (en banc), rev'd on other grounds, 450 U.S. 139, 101 S.Ct. 1027 (1981).

The House Report, H.R. Conf. Rep. 104-828, 104th Cong., 2d Sess. 1996, discusses "exceptional and extremely unusual hardship," but gives little guidance as to determining what the phrase means:

> Section 240A(b)(1) replaces the relief now available under INA section 244(a) ("suspension of deportation"), but limits the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted. The managers have deliberately changed the required showing hardship from

"extreme hardship" to "exceptional and extremely unusual hardship" to emphasize that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien's deportation.

The D.C. Circuit Court has asserted that the "exceptional and extremely unusual hardship" standard amounts to a "daunting level of hardship" which is "even more restrictive than the 'extreme hardship' standard of section 244(a)(1)." Brown v. INS, 775 F.2d 383, 388-89 (D.C. Cir. 1985). The Brown Court added that Congress contemplated granting relief only to those aliens whose deportation would be "unconscionable." Supra at 389.

The word "unusual" is generally defined as "uncommon" or "extra-ordinary". The word "extremely" describes situation or condition which is "at the utmost degree". See Webster's II New World Riverside University Dictionary 1994. The term "extremely unusual" therefore means not only uncommon or extra-ordinary, but extremely uncommon and extremely extra-ordinary. In other words, rare to the utmost degree. Therefore, this Court believes that cases in which Cancellation of Removal may be granted must bear evidence that the hardship presented is not only extreme, but also so rare that denying such relief would amount to being unconscionable.

FACTS

In summary, the respondent, the qualified relative(s), and the witnesses testified as follows:

[Notes to aid in developing facts on statutorily eligibility:]

AGE:	1.	Current
	2.	When entered
RESIDENCE	1.	How many years in the United States
	2.	Any break in continuous physical presence ("CPP") by the respondent (Section 240A(e) of the Act - 90 days single trip; 180 days all trips)
	3.	Length of residence
	4.	Possibility of losing LPR status if accompanied the respondent
ENTRIES BY RESPONDENT	1.	First _____
	2.	Second _____
	3.	Third _____

IMMIGRATION HISTORY OF RESPONDENT

1. Prior Deport/Voluntary Departure/Voluntary Return
2. Use of smuggler
3. Entered without inspection
4. Abused non-immigrant visas

FAMILY IN U.S.

1. Qualified Relatives
   a. immigration status/where residing
   b. age and marital status
   c. financial status and closeness to QR
   d. work/business
2. Family members of the respondent/Qualified Relative
   a. immigration status/where residing
   b. age and marital status
   c. financial status and closeness to Respondent or QR
   d. work/business

FAMILY IN HOME COUNTRY

1
   a. Relationship and financial status
   b. Ability and willingness to assist in readjustment
   c. Employment/education
   d. Age and marital status

EMPLOYMENT

1. In U.S.
   a. Retired?
   b. Line of work - skills acquired; skills transferable?
   c. Earnings and benefits (insurance/bonus/retirement)
2. Home Country
   a. Length of employment
   b. Line of work
   c. Job opportunities
   d. Political conditions

SEPARATION

1. Qualified Relative leaves with the respondent
   a. Home country conditions for the Qualified Relative
      (1) political
      (2) economical
      (3) medical
      (4) educational
   b. Family in home country (financial and emotional support during the period of readjustment)
   c. Assets and business (possible loss)
2. Qualified Relative remains in U.S.
   a. affidavit required in Matter of Ige, 20 I&N Dec. 880 (BIA 1994)
   b. emotional
   c. opportunities to visit with the respondent

FINANCIAL

1. Qualified Relative depends on the respondent
   - a. degree of dependence
     - (1) other supporting family members
     - (2) public assistance
     - (3) ability/possibility to become self-sufficient
   - b. respondent's loss of
     - (1) employment
     - (2) insurance covering the QR

CHARACTER

1. Respondent's convictions
   - a. 101(f) bar
     - (1) Expungements or vacated sentences
     - (2) Time served
     - (3) Petty offense exception
   - b. 240A(b)(1)(C) bar: convicted of an offense under 212(a)(2); 237(a)(2); or 237(a)(3)
     - (1) crime involving moral turpitude
     - (2) drug related offense
     - (3) aggravated felony
     - (4) multiple convictions with 5 years sentence total
     - (5) prostitution
     - (6) high speed flight (18 U.S.C. section 758)
     - (7) firearm
     - (8) domestic violence; stalking; child abuse
     - (9) espionage; sabotage; treason and sedition etc.
     - (10) document fraud
     - (11) falsely claiming citizenship
2. Income tax
   - a. fraud
     - (1) claimed non-existent exemptions
3. False testimony (oral and under oath)
4. Immigration history (see above)
5. Driving without a valid license or car insurance
6. Use of welfare or government benefits (food stamps/ AFDC/ WIC/ MediCal etc.)

HEALTH OF QUALIFIED RELATIVE

1. Illness
   - a. Medical reports - diagnosis and prognosis
   - b. treatment received/anticipating
   - c. medication
   - d. cost of medical treatment
   - e. medical treatment available in home country?

COMMUNITY SERVICES/TIES

1. What community services?
2. How much of these services will suffer without Qualified Relative's

services?

3. Documentary evidence

CREDIBILITY

ANALYSIS AND FINDINGS

CONTINUOUS PHYSICAL PRESENCE ("CPP") :

1. Respondent needs to establish 10 years of CPP prior to the service of the Notice to Appear
2. Absence from the United States for any single period in excess of 90 days or for any aggregate periods exceeding 180 days will break the respondent's CPP
3. Commission of an offense referred to in section 212(a)(2) that renders the respondent inadmissible under section 212(a)(2) or removable under sections 237(a)(2) or 237(a)(4) will also break continuance physical presence. A firearms offense that renders an alien removable under section 237(a)(2)(C) of the Act is not one "referred to in section 212(a)(2) of the Act, and thus does not stop the further accrual of continuous physical presence for purposes of cancellation of removal. In re Campos-Torres, Interim Decision 3428 (BIA 2000).

(Sample Wording) The Court finds that the respondent has failed to establish continuous physical presence for the 10 years immediately before the service of the charging document. The respondent's continuous physical presence was cut off by the service of the Notice to Appear on _____, 19. She must establish continuous physical presence in the United States from _____, 19 [Date 10 years before NTA's date].

The respondent submitted documentary evidence verifying his presence in this country from 19__ to 19__ (Gp. Ex. 4). Accordingly, I find that the respondent has established his continuous physical presence in this country since _____, 19__. However, the evidence regarding his presence in this country is sparse. While the respondent has submitted a number of affidavits from friends, acquaintances, a former supervisor, a co-worker, and a former roommate, some of whom have known the respondent since 19__, the very general statements in these affidavits do not establish his continuous physical presence in this country since that time or for the requisite 10 years. (Gp. Ex.2 and 4). The respondent did not submit any rent receipts, apartment leases, or letters and records from landlords verifying his residence in this country over the last 10 years. Nor did the respondent submit sufficient documentary evidence to establish that he has been employed in the United States throughout the past 10 years. The respondent was married in Mexico on _____, 19__ (Exs. 2-1 and 2-4). The respondent's wife apparently resided in Mexico until she entered the United States in _____ of 19__. (Ex. 3). After a full review and consideration of the record, I find that the respondent failed to establish the requisite continuous physical presence.

CONVICTED OF AN OFFENSE UNDER §§ 212(a)(2), 237(a)(2), OR 237(a)(3)

Although respondent's conviction of a crime involving moral turpitude does not render him inadmissible/removable because it is a petty offense, respondent is still barred from cancellation of removal pursuant to § 240A(b) because he has been convicted of an offense under section 212(a)(2)/237(a)(2) of the Act.

(Sample wording: petty offense - burglary of a motor vehicle) As to respondent's conviction for burglary of a motor vehicle, the Court does find that offense to be one involving moral turpitude. Texas Penal Code, section 30.04 (1995). Burglary, whether grand or petty, is a crime involving moral turpitude. See Matter of Tran, 21 I&N Dec. 3271 (BIA 1996); Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982); Matter of De La Nues, 18 I&N Dec. 140 (BIA 1981); Matter of Leyva, 16 I&N Dec. 118 (BIA 1977); Matter of Scarpulla, 15 I&N Dec. 139 (BIA 1974); Matter of Gutnick, 13 I&N Dec. 672 (BIA 1971); United States v. Stromberg, 227 F.2d 903 (5th Cir. 1955). The penalty for this offense is class A misdemeanor. Texas Penal Code, section 30.04 (1995). The state court deferred adjudication of guilt in this case and ordered the respondent be placed on two years probation. Although the state filed a motion to adjudicate guilt, that motion was withdrawn and dismissed. The respondent's conviction for this offense remains within the petty offense exception. However, the Court finds that the respondent's burglary conviction statutorily bars him from cancellation of removal pursuant to § 240A(b) of the Act. Section 240A(b) requires, among other things, that the respondent has not been convicted of a crime under sections 212(a)(2), 237(a)(2), and 237(a)(3) of the Act. Although the petty offense exception bars the conviction from being a basis for inadmissibility, the offense of burglary of a motor vehicle is a crime involving moral turpitude. The exception only prohibits a petty offense from being used as a basis for inadmissibility. The exception does not otherwise alter or convert the offense to one that does not involve moral turpitude. Therefore, the court finds that the respondent has been convicted of an offense under section 212(a)(2) of the Act. Accordingly, the respondent's application for cancellation of removal pursuant to section 240A(b) of the Act must be denied.

GOOD MORAL CHARACTER

1. Statutory Bar - 101(f); 240A(b)(1)(C)
2. False testimony
3. Fraudulent tax returns
4. Note that a finding that the respondent lacks good moral character will also bar the respondent from voluntary departure at conclusion of proceedings.

(Sample wording: intentional failure to file income tax returns) The respondent flouted at the requirements of filing income tax returns and testified nonchalantly that because she received her wages in cash, she did not file any income tax returns for some ten years that she had worked in the United States. Filing income tax returns is an important responsibility that every citizen and lawful permanent resident must comply each year. Every government imposes some kind of taxation on its people. The respondent came to the United States as an adult. She knew of the requirements of paying taxes and filing returns on a regular basis. Her deliberate refusal to pay

her taxes and file her income tax returns for some ten years is another indication of her bad character and disregard of our laws.

(Sample wording: abuse of non-immigrant visa) The respondent repeatedly abused her non-immigrant visa by entering the United States, each time falsely claiming to be a visitor with no intention of abiding by the terms and conditions of each admission. Such abuse of a privilege granted her by the United States Government is an indication of the respondent's bad character and disregard of our laws.

EXCEPTIONAL AND EXTREMELY UNUSUAL HARDSHIP

I have weighed all the evidence of record both individually and cumulatively on the issue of "exceptional and extremely unusual" hardship and find that the respondent established/failed to establish "exceptional and extremely unusual hardship" to his/her qualified relative if s/he were required to depart the United States.

(Sample wording: loss of LPR status) The respondent depends upon the support from her LPR husband. She was crippled in an automobile accident. She has no family members in Mexico to look after her and her husband is the sole provider for the family. If the respondent was required to return to her home country, her husband would need to accompany her. Not only will he lose his employment and financial support to her and his family, there is a high probability that he would lose his LPR status.

To determine "exceptional and extremely unusual hardship", the Court first considers the identified hardships to the qualified relative if the respondent was required to depart the United States. In this case, I would consider hardship to the respondent's _____ _____.

AGE: The Qualified Relative is __ years old. S/He has been a lawful permanent resident for the last __ years.

HEALTH:
1. Incapacitating illness?
2. Life or death illness?
3. If Resp departs: affects QR ability to receive proper medical attention?
4. If QR departs: medical facility available?

a. (Sample wording: lack of documentation) The Qualified Relative identified two medical problems that she suffers. No medical documentation was submitted to substantiate her claims. She has chronic pain from a shingle-virus attack. She has withstood this pain for the last __ years with the help of over-the-counter pain killing medicine. There is no indication that surgery or other medical attention is required. In fact, her doctor advised her that there is no cure for her condition and nothing any doctor could do to help her. The record has no evidence that the Qualified Relative is incapacitated by this condition.

b. (Sample wording: respondent's departure would not worsen QR's health condition) The

health problems that the Qualified Relative suffers are either incurable or unavoidable, even if the respondent could remain in the United States. The Qualified Relative controls her condition by simply taking the prescribed medication.

INCOME: 1. QR depends on Resp financially?
2. QR's ability to earn if Resp leaves?

a. (Sample wording: self-sufficient) The Qualified Relative derives her income directly from the United States Government. There is no evidence that she depends on the respondent for her income. Financially the Qualified Relative is quite an independent person. She receives monthly social security check and has enough savings to even occasionally loan money to her son and the respondent.

FAMILY TIES:

a. Qualified Relative would not accompany the respondent to her home country.

(1) Separation from friends and family members in the United States is a common result of deportation.

(2) The Qualified Relative has other family members in the United States who may be able to provide an emotional base of support at least during the initial period of separation. The Qualified Relative is a lawful permanent resident. He is free to periodically travel to the respondent's home country and visit with the respondent.

(3) This Court believes, as in suspension of deportation applications, that if a young Qualified Relative were to remain in the United States and be separated from his or her parents due to their removal, that "claim will not be given significant weight absent an affidavit from the parent stating that it is his intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the Qualified Relative's care and support." See Matter of Ige, 20 I&N Dec. 880 (BIA 1994). The Court in Perez v. INS, 96 F.3d 390 (9th Cir. 1996), found this to be a valid evidentiary requirement. Here the respondent has not submitted the required Ige affidavit. (Note that these cases relate to the "extreme hardship" standard in suspension of deportation applications. They are cited here for the sole purpose of analogous comparison.)

(4) (Sample wording: alternative available) Another one of the Qualified Relative's son is a United States citizen who lives approximately 20 minutes walking distance from his mother. He loves his mother and is potentially available to help her if the respondent were to return to _____. This Court understands that the Qualified Relative does not wish to "bother" her son or to live with any of her children. However, this Court cannot ignore the fact that alternative help is readily available and grant this relief simply because the qualified relative chose to depend solely upon the respondent and not her other children who are available to help.

b. Qualified Relative would accompany the respondent to her home country:

(1) Economic detriment due to adverse conditions in the home country, loss of employment or employment benefits in the United States, even the loss of business or the pursuit of a chosen profession in the United States, and projected difficulty in finding employment in the home country are normal occurrences of deportation. See Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Perez v. INS, 96 F.3d 390 (9th Cir. 1996); Ramirez-Durazo v. INS, 795 F.2d 491 (9th Cir. 1986). (Note that these cases relate to the "extreme hardship" standard in suspension of deportation applications. They are cited here for the sole purpose of analogous comparison.)

(2) The mere fact that economic and educational opportunities for the Qualified Relative might be better in the United States than in the respondent's homeland does not even rise to the level of extreme hardship. Since the standard in cancellation of removal applications is a more restrictive one, the record fails to support a finding of "exceptional and extremely unusual hardship".

(3) Also, precedent suggests that the readjustment of children to a new country may be easier when the children are still very young as in this case. While the Qualified Relative children may face difficulties adjusting to life in the respondent's homeland, they do not materially differ from those encountered by other children who relocate as a consequence of their parents'removal. See Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996). Although these precedent decisions involve the "extreme hardship" standard in suspension of deportation cases, this Court finds them to be instructive and applicable to cancellation of removal application considerations.

COMMUNITY SERVICES:

1. QR provides community services?
2. community services stop if Resp departs?
3. How much community will suffer without QR's services

The hardship that the Qualified Relative would encounter if the respondent had to leave is not "exceptional and extremely unusual." Besides _____ and _____, the respondent has not submitted any other evidence of hardship. Although these experiences are no doubt significant to the Qualified Relative, they are typical of hardships experienced by family members of aliens who have spent time abroad and are now faced with the prospect of returning. The hardships identified by the respondent to the Qualified Relative are not unique or unusual to the extent that removal of the respondent would be unconscionable. They are those which would normally be expected upon the required departure of the respondent.

Thus on balance of all the factors of record both individually and cumulatively, I find that the respondent has failed to establish "the required 10 years of continuous physical presence"/"good moral character"/"exceptional and extremely unusual hardship" to his/her Qualified Relative" and cancellation of removal must therefore be denied.

Since the respondent has failed to establish "exceptional and extremely unusual hardship" to his/her Qualified Relative, it is unnecessary for this court to give any discretionary consideration in this application. **OR** Since the respondent has established all statutory requirements for Cancellation of Removal, the Court will now consider whether this application should be granted as a matter of discretion. ....

VOLUNTARY DEPARTURE

Pending before this court is also the respondent's request to depart the United States voluntarily without expense to the Government in lieu of removal pursuant to section 240B(b) of the Act. To qualify for voluntary departure at conclusion of proceedings, the respondent must establish that s/he has been physically present in the United States for a period of at least one year immediately preceding the date the NTA was served; s/he is, and has been a person of good moral character for at least 5 years immediately preceding such application; the respondent is not deportable under section 237(a)(2)(A)(iii) or 237(a)(4) of the Act; the respondent has established by clear and convincing evidence that s/he has the means to depart the United States and intends to do so; and the respondent shall be required to post a voluntary departure bond. In addition, the respondent must be in possession of a travel document that will assure his/her lawful reentry into his/her home country.

Discretionary consideration of an application for voluntary departure involves a weighing of factors, including the respondent's prior immigration history, the length of her residence in the United States, and the extent of his/her family, business and societal ties in the United States.

The respondent testified that s/he has never been arrested or convicted of any crime other than traffic violations. S/He has never been deported or granted voluntary departure by the United States Government. S/He testified that she will abide by the Court's order and depart the United States when and as required, has the financial means to depart the United States without expense to the Government, and will only return to the United States by lawful means. The respondent has a _____ birth certificate/passport and will pay a voluntary departure bond as required.

The Service has not raised any other issue that will (further) negatively affect the respondent's eligibility for this minimal form of relief. The Court finds the respondent both statutorily and discretionarily eligible and deserving for this relief. Based upon the foregoing, the following order(s) shall therefore be entered:

ORDER(S)

I. IT IS HEREBY ORDERED that the respondent's request for voluntary departure pursuant to section 240B of the Act be DENIED.

(OR)

I. IT IS HEREBY ORDERED that the respondent be GRANTED voluntary departure in lieu of removal without expense to the United States Government, such departure to take place on or before _____ (60 calendar days from the date of this order).

IT IS FURTHER ORDERED that the respondent shall post a voluntary departure bond in the amount of $_____ with the Immigration and Naturalization Service on or before _____ (five business days from the date of this order).

IT IS FURTHER ORDERED that the respondent shall present to the Immigration and Naturalization Service on or before _____ (thirty days from the date of this order), all necessary travel documents for voluntary departure.

IT IS FURTHER ORDERED that should the respondent fail to abide by any of the foregoing orders, this voluntary departure order shall without further notice or proceedings vacate, and the alternate order of removal shall become effective the following day: the respondent shall be removed from the United States to _____ on the charge(s) contained in the Notice to Appear.

(AND)

II. IT IS FURTHER ORDERED that the respondent's application for cancellation for removal pursuant to section 240A(b) of the Act be DENIED.

(OR)

“ IT IS HEREBY ORDERED that the respondent's application for cancellation for removal pursuant to section 240A(b) of the Act be GRANTED.

[Date]

_____
Philip Law, Judge

CANCELLATION OF REMOVAL FOR CERTAIN NONPERMANENT RESIDENTS -- LAW PARAGRAPHS

Continuous Physical Presence (Application of Section 240A(d) of the Act)

Under section 240A(d)(1) of the Act, in order for an offense to terminate the period of continuous residence or continuous physical presence required for cancellation of removal it must be an offense "referred to in section 212(a)(2)" of the Act. Matter of Campos-Torres, Interim Decision 3428 (BIA 2000) (firearms offense within 237(a)(2)(C) did not stop the time).

Pursuant to section 240A(d)(1) of the Act, 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, as service of the Order to Show Cause ends continuous physical presence. Matter of Mendoza-Sandino, Interim Decision 3426 (BIA 2000).

(1) Pursuant to INA section 240A(d)(1), continuous residence or physical presence for cancellation of removal purposes is deemed to end on the date that a qualifying offense has been committed. Matter of Perez, Interim Decision 3389 (BIA 1999).
(2) The period of continuous residence required for relief under INA section 240A(a) commences when the alien has been admitted in any status, which includes admission as a temporary resident. Matter of Perez, Interim Decision 3389 (BIA 1999).
(3) An offense described in INA section 240A(d)(1) is deemed to end continuous residence or physical presence for cancellation of removal puprposes as of the date of its commission, even if the offense was committed prior to the enactment of IIRIRA. Matter of Perez, Interim Decision 3389 (BIA 1999).

For purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the issuance of the Order to Show Cause, irrespective of the date that it was issued. Matter of Nolasco, Interim Decision 3385 (BI A1999).

The "exceptional and extremely unusual hardship" test.

Under section 244(a) of the Act the hardship to the applicant as well as to the qualifying family members could be considered in demonstrating "extreme hardship." Under section 240A(b)(l) of the Act, hardship to the applicant is no longer relevant and the qualifying family members must meet the "exceptional and extremely unusual" hardship test.

The "exceptional and extremely unusual hardship" test, [hereafter, exceptional and extremely unusual hardship], is not a new standard in immigration law. From 1952 to 1962 it was the test generally applied in suspension of deportation cases. In 1962, evidently having found the exceptional and extremely unusual hardship standard inappropriate, Congress amended the suspension statute by substituting the "extreme hardship" standard for exceptional and extremely unusual harship. The exceptional and extremely unusual harship standard was preserved for more serious deportation grounds in section 244(a)(2) cases. Until IIRIRA, a respondent seeking suspension of deportation relief in cases involving deportation grounds under sections 241(a)(2),

(3) or (4) of the Act was required to demonstrate exceptional and extremely unusual harship to himself or herself or to his or her citizen or lawful permanent resident spouse, parent or child. See INA § 244(a)(2). Thus there is a body of precedent which addresses exceptional and extremely unusual harship from cases decided between 1952 - 1962 and from cases under section 244(a)(2) of the Act addressing exceptional and extremely unusual harship. These cases and the legislative history of IIRIRA provide some indication of the extent to which the exceptional and extremely unusual harship standard elevates the showing of hardship above that required by the "extreme hardship" standard of section 244(a) of the Act.

The legislative history of the exceptional and extremely unusual harship standard.

The shift from "extreme hardship" to the exceptional and extremely unusual harship standard is explained in the IIRIRA legislative history as follows:

> The managers have deliberately changed the required showing of hardship from "extreme hardship" to "exceptional and extremely unusual hardship" to emphasize that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien's deportation. The "extreme hardship" standard has been weakened by recent administrative decisions holding that forced removal of an alien who has become "acclimated" to the United States would constitute a hardship sufficient to support a grant of suspension of deportation. See Matter of O-J-O, 21 I&N Dec. 381 (BIA 1996). Such a ruling would be inconsistent with the standard set forth in new section 240A(b)(1) of the Act. Similarly, a showing that an alien's United States citizen child would fare less well in the alien's country of nationality than in the United States does not establish "exceptional" or "extremely unusual" hardship and thus would not support a grant of relief under this provision. Our immigration law and policy clearly provide that an alien parent may not derive immigration benefits through his or her child who is a United States citizen. The availability in truly exceptional cases of relief under section 240A(b)(1) of the Act must not undermine this or other fundamental immigration enforcement policies.

Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No.104-828, 104th Cong, 2d. Sess. 1996, available in 1996 WL 563320.

The Joint Statement points out two situations in which exceptional and extremely unusual harship cannot be met. In Matter of O-J-O-, supra, a divided Board found extreme hardship in the case of a Nicaraguan native who had lived in the United States for 11 years after entry at age 13, who was educated in this country, spoke fluent English, was fully assimilated into American life and culture, was involved in various activities in the community, ran a small business, had no other means of obtaining lawful permanent resident status, and would, if deported, be returned to a country where economic and political conditions were difficult. Such a case would not meet the exceptional and extremely unusual harship standard enacted in IIRIRA. To make doubly sure, the IIRIRA also precludes consideration of any hardship to the alien.

The second example used in the legislative history (hardship to citizen children) is illustrated by

the Board's recent decision in Matter of Pilch, 21 I&N Dec. 627 (BIA 1996) finding no extreme hardship to citizen children aged 4, 5 and 6 if parents were deported to Poland where all three children had been exposed to the Polish language by their parents, there was no evidence that the children had any health problems or that they would be deprived of educational opportunities in Poland, and where extended family support was available in Poland.

Notably, very similar legislative history to that in the IIRIRA Conference Report was contained in the history to the amendments adding the exceptional and extremely unusual harship standard in 1952:

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship, and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrant but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation, the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system.

Matter of M-, 5 I&N Dec. 261, 269-270 (BIA 1953) quoting from Senate Report 1137 on S. 2550, 82d Cong., 2d Sess. (Emphasis added).

Case law applying the exceptional and extremely unusual harship standard.

A number of decisions have referred to the "unconscionable" reference in Senate Report No. 1137 as a benchmark in applying the exceptional and extremely unusual harship test. See, e.g., Matter of C-, 7 I&N Dec. 608 (BIA 1957); Wang v. INS, 622 F.2d 1341, 1345, n.2 (9th Cir. 1980) (en banc), rev'd on other grounds, INS v. Jong Ha Wang, 450 U.S. 139 (1981); Brown v. INS, 775 F.2d 383, 389 (D.C. Cir. 1985); Asikese v. Brownell, 230 F.2d 34, 36 n.2 (D.C. Cir. 1956).

From 1953 to 1957 the Board issued a number of decisions applying the exceptional and extremely unusual harship test under the 1952 Act. These cases may retain relevance for the question of exceptional and extremely unusual harship under section 240A(b)(1) insofar as the hardship relates to qualifying relatives rather than to the alien.

The Board found exceptional and extremely unusual hardship in the following cases:

1. Matter of S-, 5 I&N Dec. 409 (BIA 1953). Here 27 years, overstayed a transit visa, single, closest relatives here were two aunts. Long residence, long time for visa availability, and limited assets for travel to obtain visa amounted to exceptional and extremely unusual harship.

2. Matter of U-, 5 I&N Dec. 413 (BIA 1953). Here 16 of last 23 years, now 41 years old, citizen spouse, two citizen children, one child employed and living in household along with wife's mother who was dependent upon alien for support.

3. Matter of H-, 5 I&N Dec. 416 (BIA 1953). Here 25 years, 54 year old, single, female, no home to return to in native Ireland.

4. Matter of Z-, 5 I&N Dec. 419 (BIA 1953). Here 29 years, 52 year old, married, entered prior to any law providing for registry or suspension, difficult to reopen business if returned on a visa, difficulty of obtaining a visa abroad. wife and child, whom he supported, resided in his native Syria.

5. Matter of M-, 5 I&N Dec. 448 (BIA 1953). Here 43 years, 50 years old, unable to obtain a nonquota immigrant visa because of prior narcotics convictions, United States citizen wife
cannot work outside the home because of a nervous breakdown, sole provider for wife and one of his two United States citizen children, good moral character for the past 22 years.

6. Matter of J-, 5 I&N Dec. 509 (BIA 1953). Here 36 years, mother, brothers and sisters here in the United States, but denied in exercise of discretion primarily because of her association with communist sympathizers.

7. Matter of W-, 5 I&N Dec. 586 (BIA 1953). Here 9 years, 33-year-old native of the British Virgin Islands, legal resident husband and five United States citizen children, meager earnings and few assets. Alien's husband could not support family in the British Virgin Islands because of employment conditions there, and the fact that her infant children would be without care if she were deported. Citizen children ranged from ages 1 to 6. This is a family separation case -- she testified that her husband would not accompany her to the British Virgin Islands because he could not support her and the children there.

8. Matter of M-, 7 I&N Dec. 147 (BIA 1956). Here 24 years, 66 years old, left native Spain 35 years ago, lived in Cuba 10 years, difficulty in finding employment if returned to either Cuba or Spain.

9. Matter of Z-, 7 I&N Dec. 253 (BIA 1956). Here 46 years, now 52 years old, in poor health, out of work, fears return to Poland because of anti-communist views, citizen wife here. (Convictions for indecent assault in 1939 and receiving stolen goods in 1941).

For cases in which the Board found no exceptional and extremely unusual hardship see the

following:

1. Matter of S-, 5 I&N Dec. 695 (BIA 1954). Aliens were husband, wife, and adult unmarried daughter, here for only 8 years, income would not be materially reduced if returned to Greece, no close family American citizen ties here, no business enterprise would be disrupted, owned a home in Greece as well as in this country.

2. Matter of P-, 5 I&N Dec. 421 (BIA 1953). Here 19 years, 49 years old, citizen spouse, able to finance a trip abroad for visa. The necessary exceptional and extremely unusual harship does not exist in cases where the applicant is nonquota or came from a country with an open quota, unless he is almost indigent, or is unable to travel, or for some reason would be unable to secure a visa.

3. Matter of C-, 7 I&N Dec. 608 (BIA 1957). Here 7 years, 39 years old, no family here, entered as stowaway.

One important recent exceptional and extremely unusual hardship decision is Matter of Pena-Diaz, 20 I&N Dec. 841 (BIA 1994), in which the Board found prima facie evidence of exceptional and extremely unusual hardship for reopening under section 244(a)(2) of the Act for an alien convicted of a narcotics violation in 1976. Hardships noted were that the respondent, a 45 year old native of Mexico who entered the United States in 1972, had spent almost half of his life in this country, had been steadily employed, and owned real property. In addition, the members of respondent's immediate family were well-assimilated and one of his United States citizen children had a congenital heart defect for which she was undergoing treatment. Significantly, the Service had for many years afforded the respondent deferred action status.

Under former section 244(a)(2) of the Act, it required a showing that deportation "would . . . result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." Cortes-Castillo v. INS, 997 F.2d 1199 (9th Cir. 1993). That standard was considered even more restrictive that the standard for "extreme hardship" under former section 244(a)(1) of the Act.

The Board had in earlier cases, described the standard "exceptional and extremely unusual" as one that was not overly burdensome. See Matter of S-, 5 I&N Dec. 409 (BIA 1953); Matter of U-, 5 I&N Dec. 413 (BIA 1953). These cases, decided in 1953, defined "exceptional and extremely unusual hardship" for the purpose of determining an alien's eligibility under former section 244(a)(1). Congress amended section 244(a)(1) of the Act in 1962 to require an "extreme hardship." Section 244(a)(2), which applied to aliens convicted of crimes, demanded a heightened showing of "exceptional and extremely unusual hardship." The definition of "exceptional and extremely unusual hardship," applied only to aliens seeking relief under section 244(a)(2) of the Act, did become more stringent in the forty years since the Board decided Matter of S- and Matter of U-. As a matter of fact, the legislative history and the application of the standard demonstrated that it was meant to apply to those cases of limited category in which the deportation of the alien "would be unconscionable." Brown v. INS, 775 F.2d 383 (D.C. Cir. 1985); Rassano v. INS, 492 F.2d 220 (7th Cir. 1974); Kam NG v. Pilliod, 279 F.2d 207 (7th Cir.

1960), cert. denied, 365 U.S. 860 (1961); Vichos v. Brownell, 230 F.2d 45 (D.C. Cir. 1956); Asikese v. Brownell, 230 F.2d 34 (D.C. Cir. 1956).

In re C-V-T-, Respondent

Decided February 12, 1998

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(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).

Pro se

Robert F. Peck, Assistant District Counsel, for the Immigration and Naturalization Service

Before: Board Panel: HOLMES, FILPPU, and GUENDELSBERGER, Board Members.

HOLMES, Board Member:

In a decision dated July 25, 1997, an Immigration Judge found the respondent removable as charged under section 237(a)(2)(B)(i) of the Immigration and Nationality Act (to be codified at 8 U.S.C. § 1227(a)(2)(B)(i)), denied his applications for cancellation of

removal, asylum, and withholding of deportation,[1] and ordered him removed from the United States to Vietnam. The respondent has appealed. The appeal will be sustained and the respondent will be granted cancellation of removal under section 240A(a) of the Act (to be codified at 8 U.S.C. § 1229b(a))[2]

The respondent is a 42-year-old native and citizen of Vietnam who entered the United States as a refugee on March 1, 1983. He became a lawful permanent resident of this country in 1991. On June 11, 1997, he was convicted in a superior court for the State of Alaska of the offense of misconduct involving a controlled substance, fourth degree, in violation of section 11.71.040 of the Alaska Statutes. He was sentenced to 90 days in jail. Although the record of conviction does not reflect the pertinent subsection of the Alaska Statutes under which he was convicted, an Immigration and Naturalization Service document refers to the offense as "Misconduct involving a Controlled Substance in the Fourth Degree (possession of cocaine)," and the Service attorney advised the Immigration Judge that the respondent had pled guilty to "simple possession of drugs."

Removal proceedings were instituted in June 1997. The respondent has not contested that he is removable under section 237(a)(2)(B)(i) of the Act, as an alien convicted of a controlled substance violation. Instead, he applied for cancellation of removal under section 240A(a) of the Act. The Immigration Judge found the respondent statutorily eligible for such relief. Then, noting the absence of pertinent decisions since 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 ("IIRIRA"), regarding this new section of law, the Immigration Judge stated that she would look for guidance regarding the exercise of discretion to

---

[1] The Immigration Judge inadvertently referenced section 243(h) of the Act, 8 U.S.C. § 1253(h)(1994), in her decision. The prior law regarding withholding of deportation under section 243(h) has now been replaced with a restriction on removal in section 241(b)(3) of the Act (to be codified at 8 U.S.C. § 1231(b)(3)). See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208,§ 305(a), 110 Stat. 3009-546, 3009-597 (enacted Sept. 30, 1996) ("IIRIRA").

[2] Due to our decision in this case, we need not address the respondent's contentions concerning his request for asylum and restriction on removal.

the existing case law concerning applications for suspension of deportation under section 244(a) of the Act, 8 U.S.C. § 1254(a)(1994), and for relief under section 212(c) of the Act, 8 U.S.C. § 1182(c)(1994), which were the predecessors to sections 240A(a) and (b) prior to the enactment of the IIRIRA. The Immigration Judge ultimately concluded that the respondent had not adequately demonstrated that he warranted a favorable exercise of discretion and denied his application for cancellation of removal. The respondent appeals from the Immigration Judge's decision in this regard.

I. ISSUES

This case presents two principal issues arising from the respondent's application for cancellation of removal under section 240A(a) of the Act. The first is what standards for the exercise of discretion should be used in considering an application for cancellation of removal under section 240A(a) of the Act. Secondly, under the appropriate standards, has this respondent adequately demonstrated that he warrants, as a matter of discretion, cancellation of removal under this section of law?

II. FACTS

The respondent, the sole witness in this case, was found by the Immigration Judge to have testified credibly. He related that he was born in Saigon, Vietnam, in 1956. His elderly parents and some of his brothers still reside in that country; however, he has not been able to contact his parents by mail for over 10 years and his many attempts to have friends look for them have been unsuccessful. The respondent was in the Vietnamese Marine Corps from 1973 until 1975, when it was disbanded after "the Viet Cong took over." He testified that he returned to Saigon in 1975, was imprisoned from 1975 to 1976 because of his military service, and was forced to do heavy labor for the Communists with insufficient food. From 1976 to 1981, he was allowed to work as a mechanic on the condition that he voluntarily work for the Communists for 1 month a year. He testified that the Communists did not like those who had previously been in the Vietnamese Marine Corps. In 1981, he got into a disagreement with the police who claimed he had violated a curfew even though he had reached home 15 minutes ahead of time. He fought with the police and was charged with assaulting a police officer. He was detained for a week, held separately from others, fed once a day, yelled at because of his prior military service, and told that he had been a mercenary for the United States forces. After his parents posted a bond, he and a younger brother fled Vietnam.

The respondent was admitted to the United States as a refugee in March 1983, and became a lawful permanent resident of this country in 1991. He worked in Los Angeles until 1991, when he moved to Anchorage. His brother remained in California and he has not been in touch with him for many years. The respondent studied English and speaks and reads well enough to keep a job, read papers, and watch English-language television. He works as a mechanic and drives a taxi during the summer in Alaska, and he fishes or fixes boat engines in the winter. While in Alaska, he has volunteered to pick up trash and help clean the streets in the city for several days each summer when asked to help.

The respondent also testified regarding the circumstances of his conviction. He related that on his way home from work one day, a close friend told him that someone wanted to buy cocaine. The respondent did not have any, but knew someone who previously told him that he had cocaine available. The respondent called this person to come over and, acting as the middleman, he took the money from his friend and then gave him the drugs. He testified that he had not been paid and that he had only helped his friend once. After being arrested, the respondent disclosed the drug supplier's name to the police and assisted with his arrest.

The Service introduced into evidence a June 6, 1997, letter written to them by the Alaska assistant district attorney who had prosecuted the respondent and the other Vietnamese individual involved in the drug offense. The prosecutor wrote that he was "taking the unusual step of recommending that the INS allow both men to remain in the United States." He noted in part that "[w]hile these men certainly deserved their convictions, their conduct can only be described as purely amateur, perhaps the most amateur drug delivery case I have encountered."

III. CRITERIA FOR RELIEF UNDER SECTION 240A(a) OF THE ACT

Section 240A(a) of the Act provides that the Attorney General may cancel the removal of an alien who is inadmissible or deportable if the alien:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

Section 240A(a) of the Act.

Thus, section 240A(a) sets forth three eligibility requirements, but does not provide for the indiscriminate cancellation of removal for those who demonstrate statutory eligibility for this relief. Rather, the Attorney General, or her delegate, is vested with the discretion to determine whether or not such cancellation is warranted. Section 240A(a) does not provide express direction as to how this discretion is to be exercised. Thus, the initial question before us is what standards should be applied in exercising this discretionary authority.

The Immigration Judge concluded, in part, that she should look to the case law that had been developed regarding the exercise of discretion under section 212(c) of the Act, the predecessor provision to section 240A(a) of the Act. The Service agreed with the Immigration Judge's conclusion in this regard. We also find that the application of the general standards developed in the context of relief under the former section 212(c) of the Act are appropriate standards for the exercise of discretion under section 240A(a) of the Act.[3]

The Board has long noted both the undesirability and "the difficulty, if not impossibility, of defining any standard in discretionary matters . . . which may be applied in a stereotyped manner." Matter of L-, 3 I&N Dec. 767, 770 (BIA, A.G. 1949). Accordingly, there is no inflexible standard for determining who should be granted discretionary relief, and each case must be judged on its own merits. Id. Within this context, the Board ruled in Matter of Marin, 16 I&N Dec. 581, 584-85 (BIA 1978), that in exercising discretion under section 212(c) of the Act, an Immigration Judge, upon review of the record as a whole, "must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of . . . relief appears in the best interest of this country." We

[3] We note that section 212(c) of the Act replaced the seventh proviso to section 3 of the Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952). See generally Matter of S-, 5 I&N Dec. 116 (BIA 1953). In setting out the standards for the exercise of discretion under section 212(c), the Board looked in turn to case law that had developed regarding the exercise of discretion under the "seventh proviso." See Matter of Marin, 16 I&N Dec. 581, 584-85 (BIA 1978).

find this general standard equally appropriate in considering requests for cancellation of removal under section 240A(a) of the Act.

We also find that the factors we have enunciated as pertinent to the exercise of discretion under section 212(c) are equally relevant to the exercise of discretion under section 240A(a) of the Act. For example, favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. Matter of Marin, supra. Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of exclusion or deportation (now removal) that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Id.

In some cases, the minimum equities required to establish eligibility for relief under section 240A(a) (i.e., residence of at least 7 years and status as a lawful permanent resident for not less than 5 years) may be sufficient in and of themselves to warrant favorable discretionary action. See Matter of Marin, supra, at 585. However, as the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. Matter of Edwards, 20 I&N Dec. 191, 195-96 (BIA 1990); see also Matter of Arreguin, Interim Decision 3247 (BIA 1995); Matter of Burbano, 20 I&N Dec. 872 (BIA 1994); Matter of Roberts, 20 I&N Dec. 294 (BIA 1991); Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988); Matter of Marin, supra.[4]

[4] In the context of the exercise of discretion under section 212(c), we have held that a showing of counterbalancing unusual and outstanding equities may be required because of a single serious criminal offense or a succession of criminal acts. This now may be largely a moot point in view of the expanded “aggravated felony” definition and the ineligibility of anyone convicted of such an

(continued...)

With respect to the issue of rehabilitation, a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion. See Matter of Marin, supra, at 588; see also Matter of Buscemi, supra. However, applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. Matter of Edwards, supra. We have held that a showing of rehabilitation is not an absolute prerequisite in every case involving an alien with a criminal record. See Matter of Buscemi, supra, at 196.

As was the case in the context of adjudicating waivers of inadmissibility under section 212(c) of the Act, it remains incumbent on the Immigration Judge to clearly enunciate the basis for granting or denying a request for cancellation of removal under section 240A(a). Furthermore, it is still the alien who bears the burden of demonstrating that his or her application for relief merits favorable consideration. See Blackwood v. INS, 803 F.2d 1165 (11th Cir. 1986); Matter of Marin, supra.

Finally, we note in this regard that the Immigration Judge deemed it appropriate to cite to prior case law that was "applicable as to discretion under section 244(a)(1) of the Act," the predecessor provision to section 240A(b)(1) of the Act, enacted by the IIRIRA. However, we have found "it prudent to avoid cross-application, as between different types of relief from deportation, of particular principles or standards for the exercise of discretion." Matter of Marin, supra, at 586. Thus, as a general rule, we find it best not to apply case law regarding applications for suspension of deportation under section 244(a) of the Act when considering a request for cancellation of removal under section 240A(a) of the Act.

(...continued)
offense for relief under section 240A(a). For example, each of the aliens whose cases were before us in Matter of Arreguin, Matter of Burbano, Matter of Roberts, Matter of Buscemi, Matter of Edwards, and Matter of Marin, would be statutorily ineligible for relief under section 240A(a) of the Act, without regard to the issue of discretion. However, we need not resolve this question today.

IV. RESPONDENT'S APPLICATION FOR SECTION 240A(a) RELIEF

It is uncontested that the respondent in this case is statutorily eligible for cancellation of removal under section 240A(a) of the Act. The determinative issue is whether he has demonstrated that he warrants such relief in the exercise of discretion. In this regard, the Immigration Judge stated that the main issues were whether "the respondent's lengthy status in this country and having a brother in California outweighs his criminal record" and whether the respondent's "ties to the community and his work record merits a discretionary grant of cancellation of removal." The Immigration Judge found the respondent had been a credible witness, that he had been in the United States for many years, and that he had worked hard in this country. She recognized that he did not want to return to Vietnam, but noted that he still spoke Vietnamese fluently, that the majority of his family remained there, that there was no showing that he could not return to his prior work in that country, that he had fled from his homeland for personal reasons "as a fugitive from justice," and that there was "no evidence" that he had been persecuted in any way in Vietnam. The Immigration Judge ultimately concluded that the "equities presented by the respondent do not represent the kind of equities required to outweigh the considerable evidence of his undesirability as a permanent resident."

We initially note that the respondent's conviction for drug possession, albeit a serious matter, apparently is the entirety of his criminal record in this country. He was sentenced to 90 days in jail. The conviction was not for an aggravated felony, or the respondent would be statutorily ineligible for relief. And, in the context of the respondent's application for asylum, the Service advised the Immigration Judge that the respondent's conviction was not for a "particularly serious crime." See section 208(b)(2)(A)(ii) of the Act (to be codified at 8 U.S.C. § 1158(b)(2)(A)(ii)). The respondent, who was found to be a credible witness, related that this had been his only involvement with drugs, that it was not something that he had done for money, and that he had assisted the police in the arrest of the individual who had supplied the cocaine. The rather unusual recommendation on the respondent's behalf by the assistant district attorney who prosecuted him indicates that he was cooperative with the police and that he was an "amateur" rather than an experienced criminal. While

any drug offense that can result in an alien's removal is a serious adverse matter, the facts of this case mitigate the seriousness of this respondent's conviction record.[5]

Moreover, the respondent has presented significant equities. He is a lawful permanent resident of this country and has resided here for some 15 years, having entered lawfully as a refugee. He has learned English and has evidently been entirely self-supporting. The Immigration Judge commented favorably on his work history, noting that she had little doubt that he had worked hard in this country. And, although it is not of particular significance, the respondent has engaged in some volunteer work in Alaska.

We note that to be eligible for relief under section 240A(a) of the Act, the respondent need not demonstrate that his removal to Vietnam would result in any hardship, nor is such a showing a prerequisite to a favorable exercise of discretion. However, we do consider relevant the facts that he was admitted to the United States as a refugee from Vietnam, that he has been unable to even locate his parents for many years, that he was found to have testified credibly that the problems he had in his native country were due, in part, to his service in the Vietnamese Marine Corps, and that he had been accused of having been a "mercenary" of the United States.

Rehabilitation can be a relevant consideration in the exercise of discretion. See Matter of Arreguin, supra. The respondent served 90 days for his crime and apparently has since been in Immigration and Naturalization Service detention. Confinement can make it difficult to assess rehabilitation, and we do not find sufficient evidence of rehabilitation in this case for it to be weighed as a favorable factor on his behalf. However, the respondent has only been convicted of this one crime, there is no evidence that he has engaged in any other criminal activity in this country, the assistant district attorney who prosecuted him has written on his behalf, he apparently has had no negative history while detained,

[5] During the course of the proceedings, the Immigration Judge stated to the respondent that she considered as an adverse matter the fact that he had "committed a crime in Vietnam." However, she did not mention this in the decision itself, other than to indicate that the respondent's case presented adverse "factors." Given the respondent's testimony regarding the events in Vietnam and his subsequent admission to this country as a refugee, we do not find the circumstances surrounding his involvement with the police in that country to be clear enough to be weighed as a meaningful adverse consideration in this case.

and on appeal he has expressed remorse for his crime, promising to never again break the law if forgiven. Although the future always involves some uncertainty, the totality of these facts would indicate that the respondent does not pose a serious ongoing threat to our society.

Considering the totality of the evidence before us, we find that the respondent has adequately demonstrated that he warrants a favorable exercise of discretion and a grant of cancellation of removal under section 240A(a) of the Act. However, we advise the respondent that having once been granted cancellation of removal, he is statutorily ineligible for such relief in the future. See section 240A(c)(6) of the Act. Thus, any further criminal misconduct on his part would likely result in his removal from this country.

ORDER: The appeal is sustained and the respondent is granted cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
San Diego, California 92101

File No.: A Date:

In the Matter of

RESPONDENT,) DEPORTATION PROCEEDINGS

Respondent)

CHARGE: Section 241(a)(1)(B) of the I&N Act, 8 U.S.C. Section 1251(a)(1)(B), (entry without inspection).

APPLICATIONS: Adjustment of status; waiver of excludability under Section 212(h) of the Act; voluntary departure.

ON BEHALF OF RESPONDENT:
Attorney
San Diego, California 92101

ON BEHALF OF INS:
Assistant District Counsel
San Diego, California 92101

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, a 31-year-old native and citizen of Mexico, entered the United States without inspection on or about August 15, 1994. As a result, on December 9, 1994, the Immigration and Naturalization Service issued to the respondent an Order to Show Cause and Notice of Hearing (Form 1-221) (Exhibit 1), charging the respondent with deportability pursuant to Section 241(a)(1)(B) of the Act for the entry without inspection. The Order to Show Cause was filed in El Centro, California, vesting that Court with jurisdiction.

On December 16, 1994, the respondent was present in Court before an Immigration Judge in El Centro. The Immigration Judge explained to the respondent the nature of the proceedings and his right to be represented by an attorney. The Immigration Judge marked and received the Order to Show Cause. The respondent admitted to the truth of the factual allegations, and the Immigration Judge found him deportable by clear, unequivocal and convincing evidence. See Woodby v. INS, 385 U.S. 276 (1966). The Immigration Judge then continued the respondent's case since information was brought forth to show potential eligibility for relief. He set the case over for further hearing.

On December 19, 1994, the respondent requested a change of venue from El Centro to San Diego, California. The Immigration Service did not oppose the request to change venue (Exhibit 4). As a result, on December 28, 1994, the Immigration Judge signed an order granting the respondent's request to change venue from El Centro to San Diego, and the case was set for further hearing in this jurisdiction.

On May 9, 1995, the respondent was present in Court and appeared with counsel. He repeated that deportability would not be contested, and that the allegations of fact were admitted. Based upon the Immigration Judge's prior findings and the admissions of the respondent through counsel, I do find that his deportability is established by clear, unequivocal and convincing evidence as required. See Woodby v. INS, supra. See also 8 C.F.R. § 242.14(a) (1997). The respondent named Mexico, the country of his citizenship, as the country of choice for deportation. He indicated that he would seek adjustment of status in conjunction with a waiver of excludability under section 212(h) of the Act, and would seek voluntary departure in the alternative.

The Immigration Service, through its representative, indicated that relief would be contested. The Service presented to the Court documents relating to a conviction suffered by the respondent which would be relevant as a matter of both statute and discretion in determining the respondent's eligibility for relief. The Service provided to the Court a certified copy of a conviction record reflecting that the respondent, on November 16, 1994, was found guilty based upon his plea of guilty to a violation of California Penal Code section 245(a)(l), Penal Code section 243(d), and Penal Code Section 148, relating to an incident that occurred on August 7, 1994 (Exhibit 9).

The Court set the date for the filing of the applications for relief and an optional pre-hearing statement from either party. On July 10, 1995, the respondent filed his Application to Register Permanent Residence or Adjust Status (Form I-485), and his application for a Waiver of a Ground of Excludability (Form I-601) (Group Exhibit 11). In it, he acknowledged his conviction in November 1994. He then requested a waiver of the ground of excludability, basing it under section 212(h) of the Act. He offered the pertinent background materials and documents to show that he is married to a United States citizen and he is the father of a citizen child. Furthermore, he presented proof to show that a visa petition had been filed and was approved on his behalf. He filed with the Court further documents to reflect the sentence that he received for the three violations of California law.

The respondent seeks to adjust his status to that of a lawful permanent resident in these deportation proceedings, pursuant to the Court's authority under section 245(a) and section 245(i) of the Act. In order to be eligible to adjust his status, he must show that he is "otherwise admissible" to the United States. The respondent alone is not eligible for adjustment of status as a matter of law, since the crimes that he has suffered would render him excludable. He desires to seek a waiver of excludability in conjunction with his adjustment of status application. It is clear as a matter of law that a waiver of inadmissibility under section 212(h) of the Act is available to a respondent in deportation proceedings, in only two circumstances: in conjunction with an application for adjustment of status or nunc pro tunc, to waive a ground of exclusion that existed at the time of entry. See Matter of Balao, 20 I&N Dec. 440 (BIA 1992); Matter of Parodi, 17

I&N Dec. 608 (BIA 1980); Matter of Sanchez, 17 I&N Dec. 218 (BIA 1980).

The respondent seeks the waiver of inadmissibility under section 212(h) of the Act. That provision, that is, section 212(h) of the Act, was amended by section 601(d)(4) of the Immigration Act of 1990 in a significant fashion. The amendments were further made in 1991. The current version of section 212(h) of the Act creates two categories of immigrants eligible for relief. The first category is for those convictions received more than 15 years ago. If they are within the past 15 years, he may be eligible for a waiver if he establishes that he has the requisite relationship to a United States citizen or lawful permanent resident, and that his exclusion would result in extreme hardship to that family member. See Section 212(h) of the Act; see also Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992). As with adjustment of status, the respondent must show that he would merit the 212(h) waiver in the exercise of the Court's discretion.

The provision under section 212(h) of the Act specifically requires that the hardship occur to a qualified family member. Unlike suspension of deportation pursuant to section 244(a) of the Act, it is only the hardship to the qualified family member, and not the hardship to the respondent, which the Court must weigh. In this case the respondent has contended that his deportation would result in extreme hardship to his citizen spouse and citizen daughter. In addition to the documentary evidence, he relies on his testimony and the testimony of his spouse to meet his burden of proof.

The Service opposes the relief herein not only as a matter of statute, but also as a matter of discretion. The Service relies on the respondent's testimony and his convictions for its primary arguments.

In determining whether deportation would cause the respondent's spouse or citizen child to suffer "extreme hardship," the factors which are taken into consideration include the age of the subject, the family ties in the United States and abroad, health considerations, length of residence in the United States, the economic and political conditions in the country to which the alien would be returned and its effect on the spouse or child. See Matter of Anderson, 16 I&N Dec. 596 (BIA 1978); Matter of B-, 11 I&N Dec. 560 (BIA 1966).

The record reflects that the respondent first came to the United States in 1988. He is the father of a United States citizen who was born on March 4, 1992. He was married to his spouse on June 14, 1994, although he had been living with her since she was approximately 14 years of age, when she gave birth to their daughter.

He acknowledges that he was arrested on August 7, 1994, and convicted of a least two offenses. As a result of those convictions, he was committed to the custody of the State of California for 180 days. He was granted three years formal probation. He was instructed to pay a restitution amount and a penalty. He was also instructed to attend meetings of Alcoholics Anonymous, and given other conditions.

In terms of the hardship that might befall his spouse and child, the respondent was not at all clear as to the hardships that they may suffer. He was unable to state whether his family would

go with him or whether they would remain here in the United States. He indicated that he had not given much consideration to the prospect of being forcibly returned to Mexico, and possibly separated from his family. He believes that if he's forced to return to Mexico, his family would suffer economically since he is the primary financial support for them. He acknowledged that his spouse currently is employed part-time. He indicated that his mother-in-law, her mother, or a friend, cares for their child while she is at work.

He has family members who remain in Mexico. Both his parents and all of his siblings except for one who is here in the United States work and live in Mexico. Also, his nieces and nephews live there. He believes that they would not be able to help him since they are poor. His spouse also testified. She is 17 years of age, and she has been in the United States all her life. While she speaks Spanish fluently, she does not write or read Spanish. She confirmed that her child was born here in the United States. She began living with him when she was 14 years of age. Her mother did not want her to marry the respondent, but she did so anyway. Although she had not discussed it with her spouse, if he was ordered to return to Mexico she would stay here. She testified that it would be hard to remain in the United States since she does not have any money. She believes that her mother would not let her move in with her child, since her mother is upset that she married the respondent. Yet, contrasted with this explanation is the fact that her mother apparently cares for the respondent's child at this time on different occasions. No evidence has been offered to explain the apparent contradiction that exists between the respondent's spouses's testimony and the fact that the mother does care for her granddaughter.

The respondent's spouse has never lived in Mexico. She has visited her grandmother and uncles who live just across the border in Tijuana. She received Medical for the birth of her child, and has received welfare and state assistance. She testified that both her health and the health of her daughter is fine.

The respondent has not met his burden of proof to show that his deportation would result in extreme hardship to his spouse of his United States citizen daughter. His daughter three and one-half years of age, in apparent good health. The respondent himself was not aware of whether the child would remain in the United States, or would go with him to Mexico. The respondent's spouse has testified that she would stay here in the United States; presumably the child would remain here with her as well. The fact that the child would remain here in the United States with the mother, in and of itself, would not constitute extreme hardship, if the child would not suffer extreme hardship if he were to accompany his parent abroad. See Matter of Ige, 20 I&N Dec. 880 (BIA 1994). Any hardship that the child might face in the United States, assuming the potential loss of their dwelling, would be the choice made by the parents, and would not be as a consequence of the deportation itself. See id.

In terms of the hardships to the respondent's spouse, they appear to be economic in nature. While the Court would presume that she has-very strong emotional ties to her spouse, she's testified that she would remain in this country if he were returned to Mexico. Even if that meant that she and her daughter might not have any place to live in this country, her testimony is that she would allow him to go back to Mexico. The record reflects a complete absence of any

evidence which would show the hardships to the spouse or the child that might result, given current economic conditions in Mexico. While the Court is aware that the economic situation in Mexico is generally worse than in this country, that can be said though of most countries in the world. While the respondent has expressed an opinion that his family in Mexico would not be able to help them economically, the Court would presume that they could offer assistance to him and, perhaps most importantly, to his family if he were to decide to take his family with him, although the clear evidence suggests that the spouse and the child would remain behind. In sum, the respondent has not shown that his deportation to Mexico would result in extreme hardship to spouse and his citizen child.

The Service has opposed the waiver under section 212(h) and adjustment of status in the exercise of the Court's discretion. The Service, despite the fact that the respondent has a citizen spouse and child and a lengthy period of residence, believes that discretion, had he shown statutory eligibility, should be exercised against him and not in his favor. The Service points out that the respondent was granted an order by an Immigration Judge of voluntary departure. He left the United States and returned the same day. The Service argues that he has expressed a lack of candor, I do not discuss the issue of discretion in greater detail since I've found him statutorily ineligible for the waiver under section 212(h) of the Act, and therefore ineligible for adjustment of status, except to note that I agree with the Service position that the respondent before me displayed a complete lack of candor in discussing the incident in August 1994, giving rise to his subsequent convictions. He gave the Court the distinct impression that he did not know the alleged victim and that the incident occurring on the Friday before was a matter of happenstance which led to the confrontation on Saturday, which resulted in the respondent's convictions. The testimony of his spouse clearly undermined his testimony in that regard. I emphasize that point to note that, in weighing all the factors of discretion, I would've considered
that heavily. However, since I've found him statutorily ineligible, I do not discuss separately in detail the issue of discretion. See Matter of Dilla, 19 I&N Dec. 54 (BIA 1984).

In the alternative, the respondent seeks the privilege of voluntary departure in lieu of an order of deportation. Section 244(e) of the Act provides that the Attorney General may, in the exercise of her discretion, permit any alien under deportation proceedings, with certain specified exceptions, to depart voluntarily in lieu of deportation, if such alien shall establish that he is and has been a person of good moral character for at least five years immediately preceding his application for voluntary departure. Section 101(f) of the Act sets forth a number of categories who are barred from demonstrating good moral character, including aliens who fall within certain specified classes of excludable aliens. See Section 101(f)(3) of the Act. One of the specified classes is aliens excludable under section 212(a)(2)(A)(i) of the Act for having been convicted of crimes involving moral turpitude. In this case, the record clearly reflects that the respondent has been convicted of three crimes which do involve crimes involving moral turpitude. It's clear that his conviction under section 245(A)(1) of the California penal code, assault with great bodily injury and with a deadly weapon, is a conviction for a crime relating to moral turpitude. His convictions do render him as one who cannot show good moral character for the term for which good moral character Is required to be shown for statutory eligibility for voluntary departure. I therefore find that he is ineligible as a matter of law for the privilege with respect again to the question of discretion. Since I find him to be statutorily ineligible, I do not discuss the question of

discretion further. See Matter of Dilla, supra. As a result, I enter the following orders.

ORDER

IT IS HEREBY ORDERED that the respondent's applications for adjustment of status, the waiver of excludability in conjunction with that application, be and are hereby denied.

IT IS FURTHER ORDERED that the respondent application for voluntary departure pursuant to section 244(e) of the Act be and is hereby denied, and that the respondent be deported from the United States to Mexico based upon the charge found in the Order to Show Cause.

_____
Rico J. Bartolomei
U.S. Immigration Judge

ADJUSTMENT OF STATUS LAW PARAGRAPHS

Continuing Nature

An application for adjustment is a continuing application and is judged under law in existence when the application is ruled upon. See Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992).

Equities

The granting of immediate relative status is a special and weighty equity. See Matter of Ibrahim, 18 I&N Dec. 55, 57 (BIA 1981). A favorable ruling is generally appropriate in adjustment cases where substantial equities, such as immediate relative status, outweigh the adverse factors. See Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980); Matter of Garcia, 16 I&N Dec. 653 (BIA 1978); Matter of Arai, 13 I&N Dec. 494 (BIA 1970); see also Shin v. INS, 750 F.2d 122 (D.C. Cir. 1984).

Extraordinary Remedy

Section 245 adjustment is an extraordinary remedy inasmuch as it dispenses with the ordinary immigration procedures. See Matter of Blas, 15 I&N Dec. 626, 630 (BIA 1974; A.G. 1976). The applicant assumes posture of alien seeking entry. See Campos v. INS, 402 F.2d 758 (9th Cir. 1968); Matter of Varughese, 17 I&N Dec. 399 (BIA 1980). If the petition is based upon a petition filed by a spouse, the marriage must be viable at the time of the application. See Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979); Matter of Dixon, 16 I&N Dec. 355 (BIA 1977).

It is inappropriate to grant adjustment conditioned upon receipt of the medical report and fingerprint checks. If the checks are not completed, the case should be continued until they are. See Fulgencio v. INS, 573 F.2d 596, 599 (9th Cir. 1978); Matter of Reyes, 17 I&N Dec. 239 (BIA 1980).

Preconceived intent

Alien's use of pretext to gain entry as B-2 with preconceived intent to be a student is an adverse factor in adjustment and can be overcome only by unusual or outstanding equities. Marriage to USC during month for which he was to depart voluntary does not alone constitute such an equity. See Matter of Allotey, 15 I&N Dec. 351 (BIA 1975).

Respondent testified that he came to visit and did not tell American Consulate that he had close relatives here as he was not asked the question. Respondent came on B-2 visa even though his USC father had petitioned for him. He consistently maintained that he only came to visit and decided to stay after the family talked him to it. He also said that American Consulate never asked him about relatives here and the visa application cannot be found. HELD: No showing of preconceived intent. Respondent's testimony is consistent. The American Consulate visa had not been produced to show contrary. See Matter of Battista, 19 I&N Dec. 484 (BIA 1987).

Such intent does not bar adjustment. It is a fact to be considered in exercising discretion. See Choe v. INS, 11 F.3d 925 (9th Cir. 1993).

Remand to Service

Immigration Judge cannot remand an adjustment case to INS for adjudication without its consent as the Immigration Judge has the responsibility under section 245 of the regulations to adjudicate it. See Matter of Roussis, 18 I&N Dec. 256 (BIA 1982).

VOLUNTARY DEPARTURE LAW PARAGRAPHS

Equities

If the respondent shows his statutory eligibility, then the Court must consider all the equities present by the respondent. See Matter of Lemhammad, 20 I&N Dec. 316 (BIA 1991); Matter of Seda, 17 I&N Dec. 550, 554 (BIA 1980), overruled in part on other grounds, Matter of Ozkok, 19 I&N Dec. 546, 550 (BIA 1988); Matter of Gamboa, 14 I&N Dec. 244, 248 (BIA 1972), modified on other grounds, Matter of Torre, 19 I&N Dec. 18, 19 (BIA 1984).

Means to depart

Under prior regulations, in order to demonstrate eligibility for the privilege of voluntary departure in deportation proceedings, the respondent had to show he was willing and had the "immediate means with which to depart promptly from the United States." 8 C.F.R. § 244.1 (1997). See Lopez-Reyes v. INS, 694 F.2d 332 (5th Cir. 1982) (respondent did not establish his willingness and ability to depart promptly with the means to effectuate such a departure); Diric v. INS, 400 F.2d 658 (9th Cir. 1968), cert. denied, 394 U.S. 1015 (1969). See Matter of Anayea, 14 I&N Dec. 488 (BIA 1973) (no right to remain in the United States for an unspecified period in order to acquire the money to depart at one's own expense).

Currently, for pre-conclusion voluntary departure, the regulations state that the "judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States, including the posting of a voluntary departure bond to be canceled upon proof that the alien has departed the United States within the time specified." 8 C.F.R. § 240.26(b)(3)(i) (2000).

Currently, for voluntary departure at the conclusion of removal proceedings, the regulations state that one of the requirements for the relief is that the alien "has established by clear and convincing evidence that the alien has the means to depart the United States and has the intention to do so." 8 C.F.R. § 240.26(c)(1)(iv) (2000).

Pre-conclusion Voluntary Departure

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 Ocampo, Interim Decision 3429 (BIA 2000).

Pre-conclusion Voluntary Departure Versus Voluntary Departure at the Conclusion of Proceedings

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, the Immigration Judge has broader authority to grant voluntary departure in the exercise of discretion before the conclusion of removal proceedings under section 240B(a) than under section 240B(b) or the former section 244(e). Matter of Arguelles-Campos, Interim Decision 3399 (BIA 1999).

CONDITIONAL RESIDENT STATUS (SECTION 216) LAW PARAGRAPHS

Authority to Consider

Original jurisdiction to rule on the merits of an application for a waiver of the requirement to file a joint petition is with the appropriate Regional Service Center Director, rather than the Immigration Judge. See Matter of Anderson, 20 I&N Dec. 888 (BIA 1994); Matter of Lemhammad, 20 I&N Dec. 316 (BIA 1991); 8 C.F.R. § 216.5(c) (2000). The Immigration Judge only has jurisdiction to review the denial of a waiver application. Matter of Lemhammad, supra; 8 C.F.R. § 216.5(f) (2000). Where an alien becomes eligible for an additional waiver under section 216(c)(4) of the Act due to changed circumstances, the proceedings may be continued to give the alien a reasonable opportunity to submit an application to the Service.

INS retains authority to deny joint petition to remove conditional basis of alien's permanent residence status notwithstanding INS failure to adjudicate petition within 90 days of joint interview. Matter of Nwokoma, 20 I&N Dec. 899 (BIA 1994).

Burden

In a deportation proceeding where the alien is charged with deportability as an alien whose status as a conditional permanent resident has been terminated, the burden is on the INS to show by a "preponderance of the evidence" that one of the conditions for termination of status described in section 216(b)(1)(A) of the Act has been met. Matter of Lemhammad, 20 I&N Dec. 316 (BIA 1991).

Evidence

Evidence which is relevant to bona fide intent includes proof of a joint property lease or joint property ownership, joint tax forms, bank accounts, the existence of a period of courtship, a wedding ceremony, and testimony of mutual experiences and a shared life. Matter of Phillis, 15 I&N Dec. 385 (BIA 1975); Matter of Laureano, 19 I&N Dec. 1 (BIA 1983).

Joint petition, definition

When a citizen spouse withdraws from the joint petition to remove conditional resident status, the petition is no longer "joint" and alien spouse must then seek waiver of joint petition requirement. Matter of Mendes, 20 I&N Dec. 833 (BIA 1994).

Removal of conditional basis

The Act provides two means by which the conditional basis of a conditional permanent resident's status may be removed: the alien and the citizen spouse may file a joint petition to remove the conditional basis under section 216(c)(1) of the Act, or the alien may file an application for waiver

of the requirement to file the joint petition under section 216(c)(4) of the Act. Matter of Balsillie, 20 I&N Dec. 486 (BIA 1992).

Use of section 245(a)

An alien holding conditional permanent resident status is prohibited by section 245(d) of the Act from adjusting his status under section 245(a) of the Act. Matter of Stockwell, 20 I&N Dec. 309 (BIA 1991).

Section 245(d) of the Act does not prohibit an alien whose conditional permanent resident status has been terminated from adjusting his status under section 245(a) of the Act. Matter of Stockwell, 20 I&N Dec. 309 (BIA 1991).

Waiver of requirement to File Joint Petition:

In order to be eligible for such a waiver, the respondent must demonstrate by a preponderance of the evidence that her marriage was entered into in good faith. The central question in determining the good faith of a marriage is whether the bride and groom intended to establish a life together at the time they were married. See, e.g., Bu Roe v. INS, 771 F.2d 1328 (9th Cir. 1985); Bark v. INS, 511 F.2d 1200 (9th Cir. 1975); Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Laureano, 19 I&N Dec. 1 (BIA 1983); Matter of McKee, 17 I&N Dec. 332 (BIA 1980). To this end, the conduct of the parties before and after marriage must be examined to determine their intent at the time of marriage. Lutwak v. United States, 344 U.S. 604 (1953); Garcia-Jaramillo v. INS, 604 F.2d 1236 (9th Cir. 1979), cert. denied, 449 U.S. 828 (1980); Bark v. INS, supra; see Matter of Soriano, supra.

Waivers Generally

The waiver application contains a section which sets forth the three alternative grounds for the waiver under section 216(c) (4) of the Act and allows the alien to indicate which applies. The three waivers under section 216(c)(4) of the Act each have separate conditions, with differing evidentiary requirements. Matter of Balsillie, 20 I&N Dec. 486 (BIA 1992). The regulations at 8 C.F.R. § 216.5(e)(1) (1998) regarding the hardship waiver under section 216(c)(4)(A) place the burden on the alien to establish extreme hardship, i.e., that which exceeds the hardship necessarily attendant upon deportation. With respect to the good faith waiver under section 216(c)(4)(B), the regulations at 8 C.F.R. § 216.5(e) (2) (2000) state that evidence "relating to the amount of commitment by both parties to the marital relationship," may include documentation of joint financial activities, length of residence together, and birth certificates of children born to the marriage. The application for a waiver based on extreme mental cruelty or battery under section 216(c)(4)(C) must be supported by proof of physical abuse or of extreme mental cruelty, the latter requiring the evaluation of a professional recognized by the Service as an expert in the field. 8 C.F.R. § 216.5(e)(3) (2000).

Immigration Judge Benchbook Index

(October 2001)

Part III. Forms

INDEX TO IMMIGRATION JUDGE ANSIR DOCUMENTS

(By Subject Matter)

Asylum Only Proceedings

Form U8: Asylum Only Proceedings Order. This form is used to render your decision in proceedings where the only form of relief requested is asylum. This includes cases where the alien has not requested voluntary departure or has waived voluntary departure at the master calendar hearing.

Form U9: Frivolous Asylum Application Warnings. This form must be given to the alien and/or his/her attorney or representative at the time that the alien files an application for asylum. This form shall also be used where additional forms of relief have been requested and an asylum application has been filed as well.

Credible Fear Determination

Form Ul: Immigration Judge Worksheet. This worksheet is a guide to use in the Credible Fear Hearing. There is space for abbreviated hearing notes, a summary of the proceedings as well as a determination of the alien's credibility.

Form U2: Credible Fear Hearing Order. This form is used to render your decision to either affirm or vacate the decision of the immigration officer.

Claimed Status Review

Form V5: Claimed Status Review Order. This form is used to render your decision to either affirm or vacate the decision of the immigration officer.

Deportation Proceedings Generally

Form 1V: Voluntary Departure Order. This form is used when an alien with consolidated family members request voluntary departure as their sole form of relief. ANSIR includes all of the family members and their "A" numbers in the caption. This order saves both clerk and court time because the clerk need only input the lead "A" number for purposes of printing the necessary order-.

Form 3T: Voluntary Departure Order. This form is used when an alien requests voluntary departure as his/her sole form of relief. The 242B warnings for failure to depart as ordered are contained in the order itself in the English language. The warnings in the Spanish language must be provided as well.

Form 4T: Straight Deportation Order. This form is used when the alien has been found deportable and has made no application for relief from deportation.

Form 6Q: Summary Of Oral Decision. This form is the summary of oral decision that is in a format where you check the applicable action ordered in the proceeding. It is issued solely for the convenience of the parties and becomes the official opinion in the case if no appeal is timely filed or if appeal is waived by the parties. You MUST dictate an oral decision when using this form.

Form JV: Memorandum of Oral Decision. This form is similar to the summary of oral decision above, but is utilized when you have a case with consolidated family members. The names and alien numbers of consolidated family members appear on the order itself. Use of this form for a consolidated family eliminates the need of multiple forms 6Q when a decision is rendered. You MUST dictate an oral decision when using this form.

Form 6V: Written Warnings For Failure To Appear. This form contains the written warnings of the limitations on discretionary relief for failing to depart the United States when ordered, to appear for scheduled hearings, or for deportation when noticed by the immigration service for other than "exceptional circumstances."

Form ZZ: Failure To Appear Order. This form for in absentia proceedings in deportation proceedings cites the "exceptional circumstances" standard. Check the applicable box to, indicate deportability based on either in-court admissions or other evidence.

Form 2U: Failure To Appear Order. This form is used for an in absentia hearing by those judges that do not like to use the "check the box" form. This form is two pages in length compared with the ZZ which is one page in length.

Exclusion Proceedings Generally

Form 7T: Failure To Appear Order. This form contains three scenarios of persons that did not appear for the hearing and you have proceeded in absentia. Check the applicable box. In absentia orders of exclusion may be appealed. Note the date that the appeal is due in the lower left hand corner and reserve appeal for the alien.

Form WV: Abandonment Of Relief Order. This form is used when a call up date has been given by you for a relief application to be filed and the alien and/or counsel have not filed a timely application. When this order is signed and entered in the system, the future hearing date that is in the system will automatically be canceled by ANSIR, and open up that time on your calendar.

Form 7Q: Summary Of Oral Decision. This form is the summary of oral decision that is in a format where you check the applicable action ordered in the proceeding. It is issued solely for the convenience of the parties and becomes the official opinion in the case if no appeal is timely filed or if appeal is waived by the parties. You MUST dictate an oral decision when using this form.

Form IY: Memorandum of Oral Decision. This form is similar to the summary of oral decision above, but is utilized when you have a case, with consolidated family members. The names and alien numbers of consolidated family members appear on the order itself. Use of this form for a consolidated family eliminates the need of multiple forms 7Q when a decision is rendered. You MUST dictate an oral decision when using this form.

Removal Proceedings Generally

Form PW: Termination in Removal Proceedings. This form is to be used when terminating a case in Removal Proceedings.

Form Q6: Summary Of Oral Decision. This form is the summary of oral decision that is in a format where you check the applicable action ordered in the proceeding. It is issued solely for the convenience of the parties and becomes the official opinion in the case if no appeal is timely filed or if appeal is waived by the parties. You MUST dictate an oral decision when using this form.

Form Z1: Failure To Appear Order. This form is properly used for a hearing held in absentia in Removal proceedings. One of two boxes must be checked indicating whether the respondent admitted the allegations contained in the notice to appear previously or whether the Immigration Service submitted evidence on the date of the hearing to prove the allegations.

Form V6: Notice of Hearing with Advisals. This form is used when setting or resetting a hearing in

removal proceedings to advise the parties of the date, time, and place of the hearing and the penalties that apply for failing to appear.

Form T7: Order of Voluntary Departure. This form is used to grant voluntary departure in removal proceedings and contains the required statutory advisals in the body of the form.

All Proceedings

Form 5T: Change of Venue Order. This form is used when you have granted a change of venue. You must. obtain on the record the new address of the alien in the new city. If a new attorney or representative is known, the EOIR-28 can be entered as well. Venue may not be changed without a fixed address provided by the alien so that notice of the new hearing date and time can be served on the alien by the new hearing location.

Form V9: General Order Form. This form is generated from ANSIR with the name, alien number, type of proceeding and date. You can write or type the nature of the issue and your order in the blank space provided. The use of this general order saves time by having the above information included on it by ANSIR and eliminates the possibility of errors in the general case information.

Form 2Q: Order On Motion To Withdraw As Counsel Of Record. This form order can be used to grant outright the request of an attorney to withdraw as counsel of record, to grant on a limited basis the request of an attorney to withdraw as counsel of record, or to deny the request to withdraw. Check the applicable box.

Form 8T: Order of Administrative Closure. This form order can be used when administrative closure is requested jointly by the parties or for any other reason that the judge would like to identify in the blank spaces provided.

Form 2N: Order of Administrative Closure For Detained Alien. This form order can be used when a detained alien is not presented for hearing. In certain cases a criminal alien may be seeking post conviction relief and is temporarily transferred to a facility that is not covered on our regular IHP docket, may be in administrative confinement or is otherwise unavailable for a time not readily determinable.

Form 6T: Termination Order. This form is used when the parties do not have any opposition to the proceedings being terminated. Note: If either side opposes termination of the proceedings an oral or written decision will need to be prepared and the appropriate order used.

IMMIGRATION COURT

In the Matter of: Case No: A99-999-999

DOE, JOHN

Applicant IN ASYLUM-ONLY PROCEEDINGS

On Behalf of the Applicant On Behalf of the INS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jul 1, 1998 and is issued solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

ORDER: It is hereby ordered that the applicant's request for asylum is:

[ ] Granted [ ] Denied [ ] Withdrawn

Date: Jul 1, 1998

_____

Immigration Judge

APPEAL: WAIVED
APPEAL DUE BY: Jul 31, 1998

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---

U8

LJO

IMMIGRATION COURT

FILE: 99-999-999

RE: DOE, JOHN

NOTICE OF PRIVILEGE OF COUNSEL AND CONSEQUENCES
OF KNOWINGLY FILING A FRIVOLOUS APPLICATION FOR ASYLUM

Before you file an asylum application (Form I-589) the law (section 208(d)(4) of the Immigration and Nationality Act) requires that you be advised specifically about the consequences of knowingly filing a frivolous application for asylum in the United States.

If you knowingly file a frivolous application for asylum, YOU WILL BE BARRED FOREVER from receiving any benefits under the Immigration and Nationality Act. A frivolous application for asylum is one which contains statements or responses to questions that are deliberately fabricated. Not being granted asylum does not mean that your application is frivolous.

Please be advised you have the privilege of being represented by counsel of your choice, at no expense to the government.

CERTIFICATION OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---

U9

IMMIGRATION COURT

IMMIGRATION JUDGE WORKSHEET

In the Matter of: Case No: A99-999-999

DOE, JOHN
Applicant AKA: _____

IJ Name:
Hearing: Telephonic, Video Conference or In Person (circle one)
Location of Hearing: MIAMI, FLORIDA Review Date: _____
Location of Alien (if Telephonic or Video): _____
Best Language: _____ Interpreter: _____
Consultation: _____

A. INS Credible Fear Determination Reviewed on: _____

Notes (if any): _____
_____
_____
_____
_____
_____

B. Summary of Review Proceedings:
1. Review of Evidence
a. Alien testified? [ ] Yes [ ] No

_____
_____

b. Other Evidence? [ ] Yes [ ] No
_____
_____
_____

2. Credibility: Alien [ ] was Credible [ ] was not Credible
Reasons:
Detailed and specific [ ] Yes [ ] No
Internally consistent [ ] Yes [ ] No
Plausible in light of country conditions [ ] Yes [ ] No

3. Credible Fear
[ ] Applicant appears genuinely afraid of persecution; and
[ ] Significant possiblity that applicant could establish eligibility as a refugee

LJO

Alien Name: DOE, JOHN Alien Number: 99-999-999

IMMIGRATION JUDGE DETERMINATION:

Has the alien established a "significant possibility" of harm under the law
[ ] Yes [ ] No

If YES, vacate the expedited removal order.

If NO, upon issuance of your order affirming the immigration officer's credible fear determination, the applicant will be removed by the INS pursuant to the order it imposed prior to referral of the case to the Immigration Court.

Date: Oct 2, 1998

U1

IMMIGRATION COURT

In the Matter of: Case No: A99-999-999

DOE, JOHN

IN: CREDIBLE FEAR REVIEW PROCEEDINGS

Applicant

ORDER OF THE IMMIGRATION JUDGE

On Jul 1, 1998 at 8:00 A.M. a review of the INS Credible Fear Determination was held in the matter noted above. Testimony [ ] was [ ] was not taken regarding the background of the Applicant and the Applicant's fear of returning to his/her country of origin or last habitual residence.

After consideration of the evidence, the Court finds that the Applicant [ ] has [ ] has not established a significant possibility that he/she would be persecuted on the basis of his/her race, religion, nationality, membership in a particular social group, or because of his/her political opinion.

ORDER: It is hereby ordered that the decision of the immigration officer is:

[ ] Affirmed, and the case is returned to the INS for removal of the alien.

[ ] Vacated.

This is a final order. There is no appeal available.

DONE and ORDERED this _____ day of _____, 19 _____.

_____

Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

U2

LJO

IMMIGRATION COURT

In the Matter of: Case No. A99-999-999

DOE, JOHN
Applicant

ORDER OF THE IMMIGRATION JUDGE

On _____ at _____AM/PM, the applicant's Claimed Status was reviewed in the matter noted above. This applicant claimed the following status:

[ ] LPR [ ] Asylee [ ] Refugee [ ] U.S. Citizen

After consideration of the evidence, the Court finds that the Applicant [ ] has [ ] has not established the claimed status.

ORDER: It is hereby ordered that the decision of the immigration officer is:

[ ] Affirmed, and the case is returned to INS for removal of the alien.
[ ] Vacated.

This is a final order. There is no appeal available.

DONE and ORDERED this _____ day of _____, 19 _____

_____
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---

V5

LJO

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

IN THE MATTER OF:

DOE, JOHN

	)	Case No. A 99-999-999
RESPONDENT(S)		A 99-999-995 DOE, MATT
		99-999-996 DOE, MARY
		99-999-997 DOE, JACK
		99-999-998 DOE, JANE
		99-999-999 DOE, JOHN
	)	
IN DEPORTATION PROCEEDINGS	)	

ORDER

Upon the basis of Respondent's admissions I have determined that Respondent is deportable on the charge(s) in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

Wherefore, IT IS HEREBY ORDERED that in lieu of an Order of Deportation Respondent be granted voluntary departure without expense to the Government on or before Aug 30, 1998 or any extension beyond such date as may be granted by the District Director for the Immigration and Naturalization Service, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if Respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following ORDER shall thereupon become immediately effective: Respondent shall be deported from the United States to MEXICO on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforementioned country advises the Attorney General that it is unwilling to accept the Respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept Respondent into its territory, the Respondent shall be deported to

Date: Jul 1, 1998

cc: District Counsel
Counsel for Respondent(s)
Respondent(s)

1V

LJO

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

Case No.: A99-999-999

RESPONDENT

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is deportable on the charge(s) in the Order to Show Cause. The respondent has made application solely for voluntary departure in lieu of deportation.

It is HEREBY ORDERED that the respondent be GRANTED voluntary departure in lieu of deportation, without expense to the Government on or before Aug 30, 1998 or any extensions as may be granted by the District Director, Immigration and Naturalization Service, and under whatever conditions the District Director may direct.

It is FURTHER ORDERED that if respondent fails to depart as required, the above order shall be withdrawn without further notice or proceedings and the following order shall become immediately effective: respondent shall be deported to MEXICO on the charge(s) in the Order to Show Cause.

If you fail to appear for deportation at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances), you will not be eligible for the following forms of relief for a period of five (5) years after the date you were required to appear for deportation:

(1) Voluntary departure as provided for in section 242(b) of the Immigration and Nationality Act;
(2) Suspension of deportation or voluntary departure as provided for in section 244 of the Immigration and Nationality Act; and
(3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

_____

Immigration Judge
Date: Oct 2, 1998

Appeal: WAIVED (A/I/B)
Appeal Due By: Jul 31, 1998
LJO

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL(M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] INS

DATE: _____ BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

Case No.: A99-999-999

RESPONDENT

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is deportable on the charge(s) in the Order to Show Cause.

Respondent has made no application for relief from deportation.

It is HEREBY ORDERED that the respondent be deported from the United States to MEXICO on the charge(s) contained in the Order to Show Cause.

If you fail to appear for deportation at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances), you will not be eligible for the following forms of relief for a period of five (5) years after the date you were required to appear for deportation:

(1) Voluntary departure as provided for in section 242(b) of the Immigration and Nationality Act;
(2) Suspension of deportation or voluntary departure as provided for in section 244(e) of the Immigration and Nationality Act; and
(3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

_____

Immigration Judge
Date:

Appeal: WAIVED (A/I/B)
Appeal Due By:

LJO

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] INS

DATE: _____ BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of: Case No.: A99-999-999
DOE, JOHN

RESPONDENT IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jul 1, 1998.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

( ) The respondent was ordered deported to MEXICO, or in the alternative to
( ) Respondent's application for voluntary departure was denied and respondent was ordered deported to MEXICO or in the alternative to
( ) Respondent's application for voluntary departure was granted until , with an alternate order of deportation to MEXICO or
( ) Respondent's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.
( ) Respondent's application for withholding of deportation was ( )granted ( )denied ( )withdrawn ( )other.
( ) Respondent's application for suspension of deportation was ( ) granted under section 244(a)(1) or (2) ( ) granted under section 244(a)(3) ( ) denied ( ) withdrawn ( ) other.
( ) Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( )granted ( )denied ( )withdrawn ( )other.
( ) Respondent's application for _____ was ( )granted ( )denied ( )withdrawn ( )other.
( ) Proceedings were terminated.
( ) The application for adjustment of status under Section (216)(216A) (245)(249) was ( )granted ( )denied ( )withdrawn ( )other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
( ) Respondent's status was rescinded under Section 246.
( ) Other _____.
( ) Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Date: Jul 1, 1998

_____
Immigration Judge

Appeal: WAIVED (Alien/INS/Both)
Appeal Due by:

LJO

ALIEN NUMBER: 99-999-999 ALIEN NAME: DOE, JOHN

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

6Q

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

IN THE MATTER OF:

Date:

DOE, JOHN

) Case No. A 99-999-999
RESPONDENT(S) A 99-999-995 DOE, MATT
99-999-996 DOE, MARY
99-999-997 DOE, JACK
99-999-998 DOE, JANE
99-999-999 DOE, JOHN
)
IN DEPORTATION PROCEEDINGS)

MEMORANDUM OF ORAL DECISION

This is a summary of an oral decision entered in the above entitled matter on Jul 1, 1998 at 8:00 A.M.. If the decision is appealed the full text of the oral decision will be transcribed and will become the official decision in these proceedings.

_____ The Respondent has been found to be subject to deportation under section(s) 241(a) _____ of the Immigration and Nationality Act.
_____ The Respondent was ordered deported to MEXICO
or
_____ The Respondent was granted voluntary departure on or before:
Aug 30, 1998 with an alternate order of deportation
to MEXICO or
_____ The Respondent was granted relief under section(s) _____
of the Immigration and Nationality Act.
_____ The Respondent was denied relief under section(s) _____
of the Immigration and Nationality Act.
_____ The proceedings were terminated.
_____ The Respondent was granted a waiver under Section _____
of the Immigration and Nationality Act, and the proceedings were terminated.
_____ The Respondent has reserved appeal.
_____ The Immigration Service has reserved appeal.
_____ Other: _____
_____
_____

cc: District Counsel
Counsel for Respondent(s)
Respondent(s)

_____
U.S. Immigration Judge
JV

LJO

ALIEN NUMBER: 99-999-999 NAME: DOE, JOHN

LIMITATION ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a deportation hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years after the date of entry of the final order of deportation.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 244(e) (1) of the Immigration and Nationality Act. Remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years from the date of scheduled departure or the date of unlawful reentry, respectively.

( ) 4. A final order of deportation has been entered against you. If you fail to appear for deportation at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years after the date you are scheduled to appear.

** The term "Exceptional circumstances" refers to exceptional circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM DEPORTATION FOR WHICH YOU WILL BECOME INELIGIBLE ARE:
1) Voluntary departure as provided for in section 242(b) of the Immigration and Nationality Act;
2) Suspension of deportation or voluntary departure as provided for in section 244(e) of the Immigration and Nationality Act; and
3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English and in Spanish. Oral notice of the contents of this notice was given to the alien in his/her native language, or in a language he/she understands. For information regarding the status of your case, call toll free 1-800-898-7180.

Date: IJ/Clerk: _____ 6V
LJO

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

IN THE MATTER OF:
DOE, JOHN

DATE: Oct 2, 1998

CASE NO. A 99-999-999

RESPONDENT IN DEPORTATION PROCEEDINGS

DECISION

Jurisdiction was established in this case by the filing of an Order to Show Cause with the Immigration Court and proper service upon the respondent. See Exhibit No. 1.; 8 C.F.R. 3.14(a).

Proper notice that this deportation hearing was to be conducted on this date was given to the parties. Section 242B of the Immigration and Nationality Act. No exceptional circumstance was shown for respondent's absence. This hearing was, therefore, conducted in absentia pursuant to Section 242B of the Immigration and Nationality Act.

[ ] At an earlier hearing the respondent admitted the allegations of fact in the Order to Show Cause and conceded deportability. The court finds deportability established as charged by clear, convincing and unequivocal evidence.

[ ] At this hearing the Assistant District Counsel submitted evidence of deportability relating to the respondent which contained information establishing the allegations of fact and charge(s) of deportability in the Order to Show Cause. See Matter of Mejia, 16 I&N Dec. 6 (BIA 1976). The Court finds deportability established as charged by clear, convincing and unequivocal evidence.

Any pending applications are considered abandoned and denied. See Matter of Nafi, 19 I&N Dec. 430 (BIA 1987). Cf. Matter of Jean, 17 I&N Dec. 100 (BIA 1979); and Matter of Gonzalez-Lopez, 20 I&N Dec. 644 (BIA 1993).

ORDER: The respondent shall be deported to MEXICO on the charge(s) contained in the Order to Show Cause.

_____

Immigration Judge

cc: Assistant District Counsel
Attorney for Respondent/Respondent

ZZ

LJO

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

File A99-999-999

In the Matter of:

In Deportation Proceedings

DOE, JOHN
Respondent

CHARGE(S): 241(a)(2)

APPLICATION(S):

On behalf of the Respondent: On behalf of the Service:

DECISION OF THE IMMIGRATION JUDGE

It is charged in the Order to Show Cause that the respondent is a native and citizen of MEXICO
who entered the United States on or about _____ and is deportable under Section 241(a)(2)
of the Act.
The Order to Show Cause was served upon the respondent.
This Order to Show Cause contained a warning that a failure to attend the hearing at the time and place designated may result in a determination being made by the Immigration Judge in the respondent's absence. The respondent was duly notified of the time and place of the hearing, but without reasonable cause failed to appear on Jul 1, 1998.

Section 242(b) of the Act provides inter alia that the Immigration Judge shall have the power to conduct in absentia hearings. "If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend ... the (immigration judge) may proceed to a determination in like manner as if the alien were present."
The Supreme Court in INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984) stated, "The respondent must be given a reasonable opportunity to be present at the proceedings, but if the respondent fails to avail himself of the opportunity, the hearing may proceed in his absence." See Matter of Charles, 16 I&N Dec. 241 (BIA 1977); Matter of Marallag, 13 I&N Dec. 775 (BIA 1971).

The respondent appeared at a prior hearing on _____ and admitted the allegations and conceded the charge of deportability in the Order to Show Cause. I find that deportability has been established by evidence which is clear, convincing and unequivical. Woodby v. INS, 385 U.S. 276 (1966), 8 C.F.R. section 242.14(a). Respondent has failed to appear and has failed to establish his eligibility for any relief from deportation. I will deny any
LJO

applications for relief for lack of prosecution. Matter of Jean, 17 I&N Dec. 100 (BIA 1979); Matter of Perez, 19 I&N Dec. 433 (BIA 1987); and Matter of Patel, 19 I&N Dec. 260 (BIA 1985).

ORDER: IT IS ORDERED that respondent be deported from the United States to MEXICO or
on the charge(s) contained in the Order to Show Cause.

Date:

_____

Immigration Judge 2U

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

RESPONDENT

Case No.: A99-999-999

Docket:

IN PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On Jul 1, 1998, at 8:00 A.M., pursuant to proper notice, the above entitled matter was scheduled for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the respondent's request for relief from deportation. However,

( ) the respondent was not present.

( ) the respondent's representative was present; however, the respondent was not present.

( ) neither the respondent nor the respondent's representative was present.

Therefore, in the absence of any showing of good cause for the respondent's failure to appear at the hearing concerning the request for relief, I find that the respondent has abandoned any and all claim(s) for relief from deportation.

Wherefore, the issue of deportability having been resolved, it is HEREBY ORDERED for the reasons set forth in the Immigration and Naturalization Service charging document that the respondent be deported from the United States to MEXICO.

_____

Immigration Judge
Date:

Appeal: WAIVED (A/I/B)
Appeal Due By:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Form EOIR 36 - 7T (FTA)
LJO

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

IN THE MATTER OF:

DOE, JOHN

	)	Case No. A 99-999-999
APPLICANT(S)		A 99-999-995 DOE, MATT
		99-999-996 DOE, MARY
		99-999-997 DOE, JACK
		99-999-998 DOE, JANE
		99-999-999 DOE, JOHN
	)	
IN EXCLUSION PROCEEDINGS	)	

ORDER

At a prior hearing the Applicant was notified that any and all applications for relief from exclusion and deportation were to be filed with the Court no later than _____.

The Court takes notice upon review of the Record of Proceedings that said application has not been filed in a timely manner. Thus, this Court finds that Applicant has abandoned any and all claims for relief from exclusion and deportation.

Wherefore, the issue of excludability having been previously resolved, IT IS HEREBY ORDERED that Applicant be excluded and deported from the United States.

Date:

_____
U.S. Immigration Judge

cc: District Counsel
Counsel for Applicant(s)
Applicant(s)

WV

LJO

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

Case No.: A99-999-999

Docket:

APPLICANT

IN EXCLUSION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jul 1, 1998. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in this case.

( ) Applicant has been ordered excluded and deported from the United States.

( ) Applicant is admitted to the United States as a _____ until _____.

( ) As a condition of admission, the applicant is to post a $_____ Maintenance of Status and Departure Bond.

( ) Applicant's request to withdraw the application for admission to United States is granted. If the applicant fails to depart on or before the date set by the District Director, Immigration and Naturalization Service, the following order shall become immediately effective: Applicant shall be ordered excluded and deported from the United States.

( ) Applicant's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.

( ) Applicant's application for withholding of deportation was ( ) granted ( )denied ( )withdrawn ( )other.

( ) Applicant's application for waiver under Section _____ of the Immigration and Nationality Act was ( )granted ( )denied ( )withdrawn ( )other.

( ) Proceedings were terminated.

( ) The application for adjustment of status under section (216) (216A) (245) (249) was ( )granted ( )denied ( )withdrawn ( )other. If granted, it was ordered that the applicant be issued all appropriate documents necessary to give effect to this order.

( ) Other _____

_____

Date:

_____

Immigration Judge

Appeal: WAIVED (Alien/INS/Both)
Appeal due by:

LJO

ALIEN NUMBER: 99-999-999 ALIEN NAME: DOE, JOHN

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS

DATE: _____ BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---

7Q

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

IN THE MATTER OF:
DOE, JOHN

Date:

) Case No. A 99-999-999
) A 99-999-995 DOE, MATT
99-999-996 DOE, MARY
99-999-997 DOE, JACK
99-999-998 DOE, JANE
99-999-999 DOE, JOHN

APPLICANT(S))
IN EXCLUSION PROCEEDINGS)

MEMORANDUM OF ORAL DECISION

This is a summary of an oral decision entered on Jul 1, 1998 at 8:00 A.M.. If the decision is appealed the full text of the oral decision will be transcribed and will become the official decision in these proceedings.

_____ The Applicant has been found to be subject to exclusion under section(s) 212(a) _____ of the Immigration and Nationality Act.
_____ The Applicant has been ordered excluded and deported from the United States.
_____ The Applicant was granted relief under section(s) _____ of the Immigration and Nationality Act.
_____ The Applicant was denied relief under section(s) _____ of the Immigration and Nationality Act.
_____ The proceedings were terminated.
_____ The Applicant's request for leave to withdraw the application for admission to the United States was granted.
_____ The Applicant was granted a waiver under Section _____ of the Immigration and Nationality Act, and proceedings were terminated.
_____ The Applicant is admitted for _____ days (through _____, 19___) (on condition that a maintenance of status and departure bond in the amount of $_____ be posted).
_____ The Immigration Service has reserved appeal.
_____ The Applicant has reserved appeal.

Other: _____
_____
_____

cc: District Counsel
Counsel for Applicant
Applicant

_____
U.S. Immigration Judge

IY

LJO

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

IN THE MATTER OF

DOE, JOHN

RESPONDENT

IN DEPORTATION PROCEEDINGS

FILE NO.: A99-999-999

CHARGE(S): 241(a)(2)

ON BEHALF OF SERVICE

ON BEHALF OF RESPONDENT

ORDER ON MOTION TO TERMINATE PROCEEDINGS

Having heard and considered the motion to terminate deportation proceedings; and

There being no opposition to the motion; and

It appearing proper under the facts and circumstances of this case,

ORDER: IT IS ORDERED that deportation proceedings be and are herein terminated.

DATE:

Immigration Judge

PW

LJO

IMMIGRATION COURT

In the Matter of

Case No.: A99-999-991

DOE, JOHN
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jul 1, 1998. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to MEXICO or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to MEXICO.

[ ] Respondent's application for asylum was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( )granted ( )denied ( )withdrawn or ( )other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( )granted ( )denied ( )withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date:

Appeal: WAIVED Appeal Due By:

_____ _____

Immigration Judge

LJO

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Q6

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

IN THE MATTER OF:
DOE, JOHN

DATE: Oct 2, 1998

CASE NO. A99-999-991

RESPONDENT IN REMOVAL PROCEEDINGS

DECISION

Jurisdiction was established in this matter by the filing of the Notice to Appear issued by the Immigration and Naturalization Service, with the Executive Office for Immigration Review and by service upon the respondent. See 8 C.F.R. sections 3.14(a), 103.5a.

The respondent was provided written notification of the time, date and location of the respondent's removal hearing. The respondent was also provided a written warning that failure to attend this hearing, for other than exceptional circumstances, would result in the issuance of an order of removal in the respondent's absence provided that removability was established. Despite the written notification provided, the respondent failed to appear at his/her hearing. This hearing was, therefore, conducted in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act.

[ ] At a prior hearing the respondent admitted the factual allegations in the Notice to Appear and conceded removability. I find removability established as charged.

[ ] The Immigration and Naturalization Service submitted documentary evidence relating to the respondent which established the truth of the factual allegations contained in the Notice to Appear. I find removability established as charged.

I further find that the respondent's failure to appear and proceed with any applications for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file. Those applications are deemed abandoned and denied for lack of prosecution. See Matter of Pearson, 13 I&N Dec. 152 (BIA 1969); Matter of Perez, 19 I&N Dec. 433 (BIA 1987); Matter of R-R-Interim Decision 3182 (BIA 1992).

ORDER: The respondent shall be removed to MEXICO or in the alternative to on the charge(s) contained in the Notice to Appear.

_____

Immigration Judge

cc: Assistant District Counsel
Attorney for Respondent/Respondent

Z1

LJO

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT

RE: DOE, JOHN
FILE: A99-999-991

DATE:

TO: DOE, JOHN
123 TEST LAND DRIVE
FALLS CHURCH, VA 22041

Please take notice that the above captioned case has been scheduled for a Master/Individual hearing before the Immigration Court on _____ at _____ _____ at

155 SOUTH MIAMI AVE., ROOM 800
MIAMI, FL 33130

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions:

1) You may be taken into custody by the Immigration and Naturalization Service and held for further action.

2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Immigration and Naturalization Service established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT MIAMI, FL THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A List of Free Legal Service Providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 OR 703-305-1662.

LJO

Alien Number: 99-999-991 Alien Name: DOE, JOHN

LIMITATIONS ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years after the date of entry of the final order of removal.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for a period of ten (10) years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for ten (10) years from the date of the scheduled departure. Your Voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

**the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and
3) Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date:

Immigration Judge: _____ or Court Clerk: _____

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS

DATE: _____ BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

V6

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

Case No.: A99-999-991

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is subject to removal on the charge(s) in the Notice to Appear. The respondent has made application solely for voluntary departure in lieu of removal.

It is HEREBY ORDERED that the respondent be GRANTED voluntary departure in lieu of removal, without expense to the Government on or before _____ or any extensions as may be granted by the District Director, Immigration and Naturalization Service, and under whatever conditions the District Director may direct.

It is FURTHER ORDERED:

[ ] That the respondent post a voluntary departure bond in the amount of _____ with the Immigration and Naturalization Service on or before _____.

[ ] That the respondent shall provide the Immigration and Naturalization Service travel documentation sufficient to assure lawful entry into the country to which the alien is departing within 60 days of this order, or within any time extensions that may be granted by the Immigration and Naturalization Service.

[ ] Other _____
_____

It is FURTHER ORDERED that if any of the above ordered conditions are not met as required, the above order shall be withdrawn without futher notice or proceedings and the following shall thereupon become immediately effective: respondent shall be removed to _____ on the charge(s) in the Notice to Appear.

It is FURTHER ORDERED that if respondent fails to depart as required, the above order shall be withdrawn without further notice or proceedings and the following order shall become immediately effective: respondent shall be removed to _____ on the charge(s) in the Notice to Appear.

You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act. Remaining in the United States beyond the authorized date will result in your being found ineligible

LJO

for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years from the date of scheduled departure. Your Voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BE INELIGIBLE ARE:

1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and
3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice was given to the alien in his/her native language, or in a language he/she understands.

_____

Immigration Judge
Date:

Appeal: WAIVED (A/I/B)
Appeal Due By:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

RESPONDENT

Case No.: A99-999-991

Docket:

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon due consideration of the Motion for Change of Venue filed in the above entitled matter, it is HEREBY ORDERED;

that venue is changed to _____.

The Immigration Court having administrative control over this hearing location is MIAMI.

Alien's new address is 123 TEST LAND DRIVE
FALLS CHURCH VA 22041

Alien's new attorney/representative (if any) is

_____

Immigration Judge
Date:

Appeal: WAIVED (A/I/B)
Appeal Due By:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---

Form EOIR 34 - 5T (COV)
LJO

IMMIGRATION COURT

In the Matter of: Case No: A99-999-991

DOE, JOHN

IN DEP/EXC/RMV PROCEEDINGS

On Behalf of Respondent On Behalf of the INS

ORDER OF THE IMMIGRATION JUDGE

Date:

_____

Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] INS

DATE: _____ BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---

V9

LJO

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

Case No.: A99-999-991

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon due consideration, it is HEREBY ORDERED that the Motion to Withdraw as Counsel filed by

( ) be granted.

( ) be granted. However, counsel will remain the Attorney of Record for the limited purpose of service of any in absentia order an Immigration Judge might issue.

( ) be denied for the reason that counsel has failed to meet the standards as set forth in Matter of Rosales, 19 I&N 655 (BIA 1988).

( ) be denied for the reasons set forth in the attached decision.

( ) be denied for the reasons orally stated in the record of the hearing.

_____

Immigration Judge
Date:

2Q

LJO

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

Case No.: A99-999-991

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

It is HEREBY ORDERED that the case be administratively closed and be considered no longer pending before the Immigration Judge for the following reason:

( ) Upon joint request by both parties.

( ) Neither the respondent nor any representative on the respondent's behalf appeared for the hearing and the Service expressed no opposition.

( ) Other: _____

_____

_____

_____

If either party in this case desires further action on this matter, at any time hereafter, a written motion to recalendar the case (including a certificate of service on the opposing party) must be filed with the Office of the Immigration Court having administrative control over the Record of Proceeding in this case.

_____

Immigration Judge
Date:

Appeal: WAIVED (A/I/B)
Appeal Due By:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

---

Form EOIR 39 - 8T (Admin Close)
LJO

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

DOE, JOHN
123 TEST LAND DRIVE
FALLS CHURCH VA 22041

IN THE MATTER OF /
DOE, JOHN
Respondent/Applicant / FILE: 99-999-991
/

IN REMOVAL PROCEEDINGS

APPEARANCES:

For the Respondent/Applicant: For the Service:

On the basis of the information furnished to us that the respondent/applicant is presently detained and unable to appear at proceedings:

ORDER: IT IS HEREBY ORDERED THAT the case be administratively closed and considered no longer pending before the Immigration Judge. No further action will be taken in this matter until such time as the Immigration and Naturalization Service notifies the Office of the Immigration Judge that the respondent/applicant is available for hearing and provides this office with a current address of the respondent/applicant for notification purposes.

Immigration Judge

cc: District Counsel-INS
Atty. and/or Respondent/Applicant 2N

LJO

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of:
DOE, JOHN

Case No: A99-999-991

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

After considering the facts and circumstances of this case and as there is no opposition from the parties, it is HEREBY ORDERED that these proceedings be terminated.

_____

Immigration Judge
Date:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Form EOIR 35 - 6T (Termination)
LJO

INDEX TO IMMIGRATION JUDGE DOCUMENTS

ORDERS USED TO ADJUDICATE MOTIONS TO REOPEN

(By Type of Proceedings)

Deportation Proceedings

Form 1a: Denial of Motion For Lack of Jurisdiction. This order can be used when an alien has departed the United States and seeks reopening of his/her case, when an alien has previously filed an appeal of your decision in their case, or when an alien requests that you extend voluntary departure that you do not have jurisdiction to do.

Form 1b: Denial Of Motion For Failure To Pay Fee Or Request Fee Waiver. This order can be used to deny a motion where the motion fee has not been paid, or the fee waiver was not properly requested.

Form 1c: Denial of Motion For Failure To Submit Relief Application Or Establish Prima Facie Eligibility For Relief. This order can be used when the alien has not filed an application for relief with a motion to reopen, has failed to establish prima facie eligibility for relief, or you determine that the motion should be denied in the exercise of discretion.

Form 1d: Denial Of Motion For Relief Previously Available Or No Changed Circumstances. This order can be used when an alien seeks to apply for relief that was previously available that he/she did not pursue, or the alien seeks to apply for asylum if the alien's request is based upon changed circumstances in the alien's country of nationality, or where the alien has been ordered deported.

Form 1e: Denial Of Motion For Failure To Pursue Relief Previously Available Or The Alien Withdrew An Application For Relief At A Prior Hearing. This order can be used when an alien seeks to reopen his/her case after having withdrawn an application at a prior hearing, or if the alien seeks relief which was fully explained to the alien at a prior hearing but which he/she did not pursue.

Form 1f: Denial Of Motion Where The Alien Alleges That they Are Eligible Under Lautenberg Amendment For Adjustment of Status. This order can be used to deny a motion if the alien cannot establish prima facie eligibility for benefits under the Lautenberg Amendment, or, that even if eligibility is shown the alien is statutorily barred from adjustment of status pursuant to INA §242B.

Form 1g: Denial of Motion For Failing to Depart. This order can be used where the alien has failed to depart the United States under an order of voluntary departure after the oral and written warnings have been given to the alien advising him/her of the consequences for failing to depart.

Form 1i: Denial Of Motion Prior to "Exceptional Circumstances" Requirement. This order can be used where the alien is subject to an in absentia order prior to June 13, 1992, where "reasonable cause" was the standard used to determine whether or not it was appropriate to reopen deportation proceedings.

Form 1j: Denial Of Motion Where Alien Alleges That The Order To Show Cause Was Not Properly Served. This order can be used where the record of proceedings establishes that there was in fact proper service of the Order to Show Cause by certified mail, return receipt requested.

Form 1k: Denial of Motion Where Notice Of Hearing Was Returned As Unclaimed Or the Record Establishes That There Was In Fact Notice Of The Hearing. This order can be used where the notice of the hearing sent Certified Mail was returned marked "unclaimed," or the record

establishes that the respondent and/or attorney received notice of the hearing.

Form 1l: Denial Of Motion Where The Alien Alleges Ineffective Assistance Of Counsel As An Exceptional Circumstance. This order can be used where the alien alleges that improper representation or ineffective assistance of counsel is the reason that the alien was not present at his or her deportation hearing.

Form 1m: Denial Of Motion Where The Alien Alleges Ineffective Assistance of Counsel Was Violative of Due Process. This order can be used where the alien seeks reopening of his/her case based on a claim of denial of due process due to the ineffective assistance of counsel. This differs from the use of Form 1l above which deals with in absentia orders of deportation. This form contemplates that the alien was unable to show actual prejudice or simply did not meet the Lozada standard to warrant reopening.

Form 1n: Denial Of Motion As Untimely Or Because The Motion Exceeds The Time And Number Limitations. This order can be used where the alien has not filed a timely motion to reopen, and/or where the motion exceeds the time and numerical limitations imposed by law.

Form 1o: Denial Of Motion Based On The Previous Finding That An Asylum Application Was Frivolous. This order would be used when a motion to reopen has been filed and there was a previous finding that the asylum application filed by the respondent was frivolous. When an application has been found to be frivolous, the respondent is ineligible to file a motion to reopen, for reconsideration or for a stay of deportation.

Exclusion Proceedings

Form 1h: Denial of Motion As Failing To Establish Reasonable Cause For Failing To Appear At Exclusion Hearing. This order can be used where the alien has failed to establish that he/she had reasonable cause for failing to appear at their exclusion hearing.

Removal Proceedings

Form 2a: Denial Of Motion For Lack Of Jurisdiction. This order can be used when an alien has previously departed the United States and seeks reopening of his/her case, when an alien has previously filed an appeal of your decision in their case, or when an alien requests that you extend voluntary departure that you do not have jurisdiction to do.

Form 2b: Denial Of Motion For Failure Pay Fee Or Request Fee Waiver. This order can be used to deny a motion where the motion fee has not been paid, or fee waiver was not properly requested.

Form 2c: Denial of Motion For Failure To Submit Relief Application Or Establish Prima Facie Eligibility For Relief. This order can be used when the alien has not filed an application for relief with a motion to reopen, has failed to establish prima facie eligibility for relief or you determine that the motion should be denied in the exercise of discretion.

Form 2dl: Denial Of Motion For Relief Previously Available Or No Changed Circumstances. This order can be used when an alien seeks to apply for relief that was previously available that he/she did not pursue, or the alien seeks to apply for asylum if the alien's request is based upon changed circumstances in the alien's country of nationality or where the alien has been ordered deported.

Form 2d2: Denial Of Motion When Alien Misses One Year Filing Deadline For Asylum And Does Not Meet Extraordinary Circumstance Exception. This order can be used where the alien files a motion to reopen to apply for asylum but does not fall within one of the exceptions to excuse the one year filing deadline by showing extraordinary circumstances.

Form 2e: Denial Of Motion For Failure To Pursue Relief Previously Available Or The Alien Withdrew An Application For Relief At A Prior Hearing. This order can be used when an alien seeks to reopen his/her case after having withdrawn an application at a prior hearing, or if the alien seeks relief which was fully explained to the alien at a prior hearing which he/she did not pursue.

Form 2f: Denial Of Motion Where The Alien Alleges That they Are Eligible Under Lautenberg Amendment For Adjustment of Status. This order can be used to deny a motion if the alien cannot establish prima facie eligibility for benefits under the Lautenberg Amendment, or that even if eligibility is shown, the alien is statutorily barred from adjustment of status pursuant to INA §242B.

Form 2g: Denial of Motion For Failing to Depart. This order can be used where the alien has failed to depart the United States under an order of voluntary departure after the oral and written warnings have been given to the alien, advising him/her of the consequences for failing to depart. The order also states that the alien is subject to civil penalties for remaining beyond the voluntary departure period and that the alien is barred from discretionary relief for a period of 10 years.

Form 2j: Denial Of Motion Where Alien Alleges That The Notice To Appear Was Not Properly Served. This order can be used where the record of proceedings establishes that there was in fact proper service by mail of the notice to appear. There is no requirement of service of the notice to appear by certified mail.

Form 2k: Denial Of Motion Where Alien Failed To Appear For Hearing And The Alien Alleges Lack Of Notice Or Insufficient Notice. This order can be used where it is clear from the record that the notice to appear contained the date, time and place of the hearing, where the respondent's counsel received notice of the hearing, or that there is sufficient proof of attempted delivery of the notice to the last known address, or where the respondent could not establish an exceptional circumstance for failing to appear.

Form 2l: Denial Of Motion Where The Alien Alleges Ineffective Assistance Of Counsel As An Exceptional Circumstance. This order can be used where the alien alleges that improper representation or ineffective assistance of counsel is the reason that the alien was not present at his or her removal hearing.

Form 2m: Denial Of Motion Where The Alien Alleges Ineffective Assistance of Counsel Was Violative of Due Process. This order can be used where the alien seeks reopening of his/her case based on a claim of denial of due process due to the ineffective assistance of counsel. This differs from the use of Form 2L above which deals with in absentia orders of removal. This form contemplates that, the alien was unable to show actual prejudice or simply did not meet the Lozada standard to warrant reopening.

Form 2n: Denial Of Motion As Untimely Or Because The Motion Exceeds The Time And Number Limitations. This order can be used where the alien has not filed a timely motion to reopen, and/or where the motion exceeds the time and numerical limitations imposed by law.

Form 2o: Denial of Motion To Apply For Cancellation Of Removal. This order can be used when an alien seeks to apply for cancellation of removal but does not meet the physical presence requirements, or prior to obtaining the requisite physical presence, the respondent has committed a criminal offense that renders him/her inadmissible or removable.

Form 2p: Denial Of Motion Based On The Previous Finding That An Asylum Application Was Frivolous. This order can be used when a motion to reopen has been filed and there was a previous finding that the asylum application filed by the respondent was frivolous. When an application has been found to be frivolous, the respondent is ineligible to file a motion to reopen, for reconsideration or for a stay of removal.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
*	
	Assistant District Counsel
	*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

_____ Any departure from the United States, including the deportation of a person who is the subject of deportation proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion. 8 C.F.R. § 3.23 (b)(1) (1998). An alien's departure imparts a finality to the proceedings, and thus, there are no longer proceedings to reopen. Matter of Wang, 17 I&N Dec. 565, 568 (BIA 1980).

_____ The respondent has filed a notice of appeal with the Board of Immigration Appeals ("BIA"). Since jurisdiction has vested with the BIA, the Court lacks jurisdiction to consider the motion. *See* 8 C.F.R. §§ 3.1 (b) and 103.5 (a) (1998).

_____ The District Director has sole jurisdiction to extend voluntary departure granted by an immigration judge. Matter of Ozcan, 15 I&N Dec. 301 (BIA 1975); 8 C.F.R. § 240.26 (f) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

mtr.1a U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
*	Assistant District Counsel *(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

_____ Respondent failed to pay the required $110 filing fee. 8 C.F.R. § 103.7 (1998). Until the fee is paid, the motion is not properly submitted, and the Court cannot adjudicate the matter. Matter of Alejandro, 19 I&N Dec. 75 (BIA 1984).

_____ Respondent failed to request a fee waiver pursuant to 8 C.F.R. §§ 3.24 and 103.7 (1998). Until a waiver is requested and granted pursuant to 8 C.F.R. §§ 3.24 and 103.7 (1998), the motion is not properly submitted, and the Court cannot adjudicate the matter. Matter of Alejandro, 19 I&N Dec. 75 (BIA 1984).

_____ Respondent filed a fee waiver request, but he/she failed to submit a sworn affidavit or an unsworn declaration executed in accordance with the requirements of 28 U.S.C. § 1746; 8 C.F.R. § 3.24 (1998). *See* Matter of Alejandro, 19 I&N Dec. 75 (BIA 1984); Matter of Chicas, 19 I&N Dec. 114 (BIA 1984).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

mtr.1b U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

____ Respondent has failed to state the new facts to be provided in the reopened proceedings. Respondent has failed to submit supporting affidavits or other documentary evidence. 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has failed to offer new evidence which is material and was not available and could not have been discovered or presented at an earlier hearing. 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has failed to establish*prima facie* eligibility for the relief sought. INS v. Abudu, 485 U.S. 94 (1988); 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has failed to submit the appropriate application and supporting documents to prove his/her claim. 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has failed to show that the Motion to Reopen should be granted in the exercise of discretion. INS v. Rios-Pineda, 471 U.S. 444 (1985); 8 C.F.R. § 3.23 (b)(3) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

mtr.1c

_____
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. 8 C.F.R. § 3.23 (b)(3) (1998). A motion to reopen must also make a *prima facie* showing that the alien is eligible for the relief sought in the reopened proceedings. *See* INS v. Abudu, 485 U.S. 94, 97 (1988); INS v. Wang, 450 U.S. 139, 141 (1981) (per curiam).

In his/her motion, respondent requests that his/her application for asylum and withholding of of deportation under §§ 208 and 243(h) of the INA (1996) be reinstated. An Immigration Judge may not grant a motion to reopen to allow an alien to apply for previously available relief unless the alien's request is based upon changed circumstances in the alien's country of nationality or country to which deportation has been ordered. *See* 8 C.F.R. § 3.23 (b)(4)(i) (1998). The motion must also show that such evidence is material and was not available and could not have been discovered or presented at the previous proceedings. Respondent has not shown that new circumstances exist.

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

U.S. Immigration Judge

mtr.1d

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:)
)
*) IN DEPORTATION PROCEEDINGS
RESPONDENT)

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen deportation proceedings, any opposition of the Service, and upon reviewing the Record of Proceedings in this matter, the Court finds that:

____ Respondent is making an application for relief that could have been made at an earlier hearing. A motion to reopen filed for the purpose of providing respondent with an opportunity to make such an application shall not be granted because respondent's rights to make such application were fully explained to him/her and he/she was afforded the opportunity to do so, and new circumstances have not arisen since the prior hearing. 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent is making an application for relief that he/she withdrew at an earlier hearing. A motion to reopen filed for the purpose of providing respondent with an opportunity to make an application that he/she could have made at an earlier hearing shall not be granted because respondent's rights to make such application were fully explained to him and he/she was afforded the opportunity to do so, and new circumstances have not arisen since the prior hearing. 8 C.F.R. § 3.23 (b)(3) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

_____

mtr.1e

U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

The granting of a motion to reopen lies within the discretion of the Immigration Judge. INS v. Doherty, 504 U.S. 314, 322 (1992). For such a motion to be granted, an alien must demonstrate that the evidence that he seeks to offer is material, was previously unavailable, and not capable of discovery or presentation during the earlier proceedings. 8 C.F.R. § 3.23 (b)(3) (April 9, 1997). An alien must also demonstrate *prima facie* eligibility for the relief sought. *See* INS v. Wang, 450 U.S. 139, 141 (1981)(per curiam); Matter of Tuakoi, 19 I&N Dec. 341, 343 (BIA 1985).

Prima facie eligibility for adjustment of status under Public Law 101-167 ("Lautenberg Amendment") is demonstrated by the submission of evidence meeting the requirements for substantive relief. Aliens are eligible to apply if: (1) they are nationals of an independent state of the former Soviet Union, Latvia, Lithuania,Vietnam, Laos, or Cambodia, and (2) they were inspected and granted parole into the United States between August 15, 1988 and September 30, 1997, after being denied refugee status. 8 C.F.R. § 245.7 (b) (April 9, 1997). *See* Public Law 104-319, Title I, § 101(2) (b), Oct. 19, 1996, 110 Stat. 3865.

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

_____ Respondent has not established *prima facie* eligibility for adjustment of status under the Lautenberg Amendment. _____

_____

_____ Respondent is statutorily barred from adjustment. Respondent failed to voluntarily depart. Because respondent failed to depart and did not receive an extension of the departure date, a final order of deportation was entered. An alien who fails to report at

the time and place ordered for deportation, after a final order has been entered, is ineligible for adjustment for a period of five years after the scheduled date of departure. INA § 242B (e)(3)(A) (1996). Respondent was given oral and written notice of the limitations that would apply if she/he did not depart as ordered.

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.1f

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
*	Assistant District Counsel *(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering Respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

Respondent has remained beyond the voluntary departure period. There is no evidence that the District Director of the Service extended the respondent's voluntary departure date. Respondent also failed to show that his/her failure to depart was due to exceptional circumstances. Therefore, respondent is statutorily ineligible for the relief requested. Matter of Shaar, Int. Dec. 3290 (BIA 1996), *affd* , Shaar v. INS, 141 F.3d 953 (9th Cir. 1998).

Respondent was provided with oral and written notice of the consequences for failing to depart by the voluntary departure date. INA § 242B (e)(2) (1996). The respondent is barred from relief for five years from the date of scheduled departure. INA § 242B (e)(2)(A) (1996).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that*

Date: _____

U.S. Immigration Judge

mtr.1g

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
*	Assistant District Counsel *(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

The granting of a motion to reopen lies within the discretion of the Immigration Judge. INS v. Doherty, 502 U.S. 314, 322 (1992). For such a motion to be granted, an alien must state new facts to be proved at the reopened proceedings, and be supported by affidavits or other documentary evidence. 8 C.F.R. § 3.23 (b)(3) (1998). When a motion to reopen follows an *in absentia* hearing, an alien must establish that he had "reasonable cause" for his absence. Matter of Haim, 19 I&N Dec. 641, 642 (BIA 1996). The motion to reopen is not governed by the current *in absentia* provisions under INA § 240 (b)(5)(C) (1997) because the *in absentia* order was entered prior to June 13, 1992. Matter of Gonzalez-Lopez, 20 I&N Dec. 644, 645 (BIA 1993).

____ Respondent failed to state new facts or submit supporting affidavits or documentary evidence. 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has not shown "reasonable cause" for his/her failure to appear. A notice of hearing was sent to respondent at his/her last known address provided to the Court.

____ The filing of a motion to reopen under 8 C.F.R. § 3.23 (b)(4)(iii)(A) (1998) shall stay the deportation of the order pending decision on the motion and adjudication of any properly filed administrative appeal. 8 C.F.R. § 3.23 (b)(4)(iii)(C) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that*

Date: _____

mtr.1i U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
*	
	Assistant District Counsel
	*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. 8 C.F.R. § 3.23 (b)(3) (1998).

Following an *in absentia* order, proceedings shall be reopened if the alien establishes that he/she failed to appear because: (1) he/she was in state or federal custody and his/her failure to appear was through no fault of his/her own; (2) he/she did not receive notice of the proceedings; or (3) his/her failure to appear was due to exceptional circumstances. INA § 242B (c)(3) (1996); 8 C.F.R. § 3.23 (b)(4)(iii) (1998).

Respondent claims that the INS failed to properly serve the Order to Show Cause ("OSC"). To properly effect service of an OSC by mail, the INS must send the OSC by certified mail, return receipt requested, and the respondent or a responsible person at the respondent's address must sign the return receipt. Furthermore, the record must show proof of such service. Matter of Huete, 20 I&N Dec. 250, 252 (BIA 1991). The evidence shows that the OSC was properly served upon respondent.

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

U.S. Immigration Judge

mtr.1j

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. 8 C.F.R. § 3.23(b)(3) (1998).

An *in absentia* order may be rescinded if an alien establishes that he/she failed to appear because: (1) he/she was in state or federal custody and his/her failure to appear was through no fault of his/her own; (2) he/she did not receive notice of the proceedings; or (3) his/her failure to appear was due to exceptional circumstances. INA § 242B (c)(3) (1996); 8 C.F.R. § 3.23 (b)(4)(iii) (1998).

Former INA 242B provides that written notice of deportation proceedings shall be given in person to the alien or if personal service is not practical, written notice shall be sent by certified mail to the alien or his counsel of record. *See* former INA § 242B (a)(2)(A) (1996); Matter of Grijalva, Int. Dec. 3246 (BIA 1995).

When notice is sent by certified mail, an alien or a responsible person at the alien's address does not need to sign the certified mail receipt to effect service of notice. Grijalva, *supra.* Certified mail only needs to be sent to the alien's last known address. *See* former INA § 242B (c)(1) (1996); Grijalva, *supra.*

A motion to reopen deportation proceedings based on exceptional circumstances must be filed within 180 days of the date of the order of deportation. INA § 242B (c)(3)(A) (1996); 8 C.F.R. § 3.23 (b)(4)(iii) (1998). The term "exceptional circumstances" means a serious illness of the alien, or the death of an immediate relative, but does not include less compelling circumstances beyond the control of the alien. INA § 242B (f)(2) (1996). An Immigration Judge must examine the totality of the circumstances to determine whether exceptional circumstances exist. Matter of W-F-, Int. Dec. 3288 (BIA 1996).

Upon considering respondent's motion to reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

____ Respondent received personal service of the notice of the hearing because respondent was previously present before the Court. Matter of Grijalva, Int. Dec. 3246 (BIA 1995).

____ Respondent's counsel received proper notice. Grijalva, *supra.*

____ Notice of the hearing was sent by certified mail, return receipt requested, to the respondent's last known address. Grijalva, *supra.*

____ Respondent failed to file the motion to reopen based upon exceptional circumstances within 180 days of the *in absentia* order. INA § 242B (c)(3)(A) (1996); 8 C.F.R. § 3.23 (b)(4)(iii)(A)(1) (1998).

____ Respondent failed to show that his or her failure to appear was due to exceptional circumstances. Matter of W-F-, Int. Dec. 3288 (BIA 1988).

____ Respondent failed to articulate any reasons for his or her absence.

____ Respondent failed to advise the INS about any change of address. A reasonable construction of § 242B of the INA requires that an alien cannot move, fail to provide an address change to the INS, and then complain that he was not properly provided notice. In re Villalba, Int. Dec. 3310 (BIA 1997).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.1k

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. 8 C.F.R. § 3.23 (b)(3) (1998).

An *in absentia* order may be rescinded if an alien establishes that he/she failed to appear because: (1) he/she was in state or federal custody and his/her failure to appear was through no fault of his/her own; (2) he/she did not receive notice of the proceedings; or (3) his/her failure to appear was due to exceptional circumstances. INA § 242B (c)(3) (1996); 8 C.F.R. § 3.23 (b)(4)(iii) (1998).

A motion to reopen based on exceptional circumstances must be filed within 180 days of the date of the order of deportation. INA § 242B (1996); 8 C.F.R. § 3.23 (b)(4)(ii) (1998). The term "exceptional circumstances" means a serious illness of the alien, the death of an immediate relative, but does not include less compelling circumstances beyond the control of the alien. INA § 242B (f)(2) (1996). An Immigration Judge must examine the totality of the circumstances to determine whether exceptional circumstances exist. Matter of W-F-, Int. Dec. 3288 (BIA 1996).

When an alien makes a claim of improper representation, he must show ineffective assistance pursuant to Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). Matter of Rivera-Claros, Int. Dec. 3296 (BIA 1996). Pursuant to Lozada, the motion to reopen must include: (1) an affidavit by the respondent detailing the agreement entered into with former counsel; (2) evidence that counsel has been informed of the allegations leveled against him and that he has been afforded the opportunity to respond; and (3) information whether a complaint has been filed with the appropriate disciplinary authorities. Lozada, *supra*, at 639. The alien must also demonstrate actual prejudice. Id. at 638.

Upon considering respondent's motion to reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

____ Respondent failed to file the motion to reopen based upon exceptional circumstances within 180 days of the *in absentia* order. INA § 242B (c)(3)(A) (1996); 8 C.F.R. § 3.23 (b)(4)(iii)(A)(1) (1998).

____ Respondent has failed to produce an affidavit detailing his or her agreement with former counsel.

____ Respondent has failed to show that prior counsel was informed of the allegations against him or her and that counsel has been afforded the opportunity to respond.

____ Respondent failed to show that he or she filed a complaint with the State Bar or another appropriate disciplinary authority.

____ Respondent failed to demonstrate actual prejudice.

_____
_____

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.1l

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN DEPORTATION PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. 8 C.F.R. § 3.23 (b)(3) (1998). A motion to reopen must also make a *prima facie* showing that an alien is eligible for the relief sought in the reopened proceedings. *See* INS v. Abudu, 485 U.S. 94, 97 (1988); INS v. Wang, 450 U.S. 139, 141 (1981) (per curiam); 8 C.F.R. § 3.23 (b)(3) (1998).

When an alien alleges a claim of ineffective assistance of counsel, he/she must show the proceedings were so fundamentally unfair that he/she was denied due process. Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). The motion to reopen must include: (1) an affidavit by the respondent detailing the agreement entered into with former counsel; (2) evidence that counsel has been informed of the allegations leveled against him/her and that he/she has been afforded the opportunity to respond; and (3) information whether a complaint has been filed with the appropriate disciplinary authorities. Id. at 639. The alien must also demonstrate actual prejudice. Id. at 638.

Upon considering respondent's motion to reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

____ Respondent has failed to produce an affidavit detailing his/her agreement with former counsel.

____ Respondent has failed to show that prior counsel was informed of the allegations against him/her and that counsel has been afforded the opportunity to respond.

____ Respondent failed to show that he/she filed a complaint with the State Bar or another appropriate disciplinary authority.

____ Respondent failed to demonstrate actual prejudice.

_____

_____

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.1m

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:)
)
*) IN DEPORTATION
PROCEEDINGS
RESPONDENT)

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:
Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

_____ A party must file a motion to reopen within ninety days of the final administrative order of removal, deportation, or exclusion. 8 C.F.R. § 3.23 (b)(1) (1998). Respondent filed the motion to reopen after the effective deadline.

_____ A party may file only one motion to reopen. 8 C.F.R. § 3.23 (b)(1) (April 1, 1997). Respondent previously filed a motion to reopen.

_____ Respondent has not established any of the exceptions to the time and numerical limitations set forth in 8 C.F.R. § 3.23 (b)(4) (April 1, 1997):

_____ Respondent has not filed the motion to reopen based on exceptional circumstances within 180 days after the date of the order of deportation. 8 C.F.R. § 3.23 (b)(4)(iii)(A)(1) (1998).

_____ Respondent has not demonstrated that he or she did not receive notice or that he or she was in federal or state custody and the failure to appear was through no fault of the respondent. 8 C.F.R. § 3.23 (b)(4)(iii)(A)(2) (1998).

_____ In applying or reapplying for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, the respondent has failed to show such evidence is material and was not available and could not have been discovered or

presented at the previous hearing. 8 C.F.R. § 3.23 (b)(4)(i) (1998).

_____ Respondent's motion to reopen has not been agreed upon by all parties and jointly filed. 8 C.F.R. § 3.23 (b)(4) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

_____

U.S. Immigration Judge

mtr.1n

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:)
)
*) IN DEPORTATION
PROCEEDINGS
RESPONDENT)

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's motion to reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

The original asylum application was denied based upon a finding that it was frivolous. Therefore, the respondent is ineligible to file a motion to reopen or reconsider, or for a stay of deportation. 8 C.F.R. § 3.23 (b)(4)(i) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

_____

U.S. Immigration Judge

mtr.1o

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN EXCLUSION PROCEEDINGS
APPLICANT	)	

ON BEHALF OF THE APPLICANT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering applicant's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

A party seeking to reopen exclusion proceedings must state the new facts he intends to establish, supported by affidavits or other evidentiary materials. INS v. Wang, 450 U.S. 139 (1981) (per curiam); Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (BIA 1983); Matter of Reyes 18 I&N Dec. 249 (BIA 1982); 8 C.F.R. § 3.23 (b)(3) (1998). When a motion to reopen follows an *in absentia* hearing, an alien must establish that he had reasonable cause for his absence from the proceedings. Matter of Ruiz, 20 I&N Dec. 91 (BIA 1989); Matter of Haim, 19 I&N Dec. 641 (BIA 1988); 8 C.F.R. § 3.23 (b)(4)(iii)(B) (1998).

The Court finds that applicant has not established "reasonable cause" for his/her failure to appear. Applicant received proper notice of the hearing date. Applicant was given an opportunity to be present, but failed to avail himself/herself of that opportunity without "reasonable cause."

Therefore, it is ordered that applicant's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that*

Date: _____

U.S. Immigration Judge

mtr.1h

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

_____ Any departure from the United States, including the removal of a person who is the subject of removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion. 8 C.F.R. § 3.23 (b)(1) (1998). An alien's departure imparts a finality to the proceedings, and thus, there are no longer proceedings to reopen. Matter of Wang, 17 I&N Dec. 565, 568 (BIA 1980).

_____ The respondent has filed a notice of appeal with the Board of Immigration Appeals ("BIA"). Since jurisdiction has vested with the BIA, the Court lacks jurisdiction to consider the motion. *See* 8 C.F.R. §§ 3.1 (b) and 103.5 (a) (1998).

_____ The District Director has sole jurisdiction to extend voluntary departure granted by an immigration judge. Matter of Ozcan, 15 I&N Dec. 301 (BIA 1975); 8 C.F.R. § 240.26 (f) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

mtr.2a

U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

_____ Respondent failed to pay the required $110 filing fee. 8 C.F.R. § 103.7 (1998). Until the fee is paid, the motion is not properly submitted, and the Court cannot adjudicate the matter. Matter of Alejandro, 19 I&N Dec. 75 (BIA 1984).

_____ Respondent failed to request a fee waiver pursuant to 8 C.F.R. §§ 3.24 and 103.7 (1998). Until a waiver is requested and granted pursuant to 8 C.F.R. §§ 3.24 and 103.7 (1998), the motion is not properly submitted, and the Court cannot adjudicate the matter. Matter of Alejandro, 19 I&N Dec. 75 (BIA 1984).

_____ Respondent filed a fee waiver request, but he/she failed to submit a sworn affidavit or an unsworn declaration executed in accordance with the requirements of 28 U.S.C. § 1746. 8 C.F.R. § 3.24 (1998). *See* Matter of Alejandro, 19 I&N Dec. 75 (BIA 1984); Matter of Chicas, 19 I&N Dec. 114 (BIA 1984).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

_____

mtr.2b

U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

____ Respondent has failed to state the new facts to be provided in the reopened proceedings. Respondent has failed to submit supporting affidavits or other documentary evidence. INA § 240(c)(6)(B) (1997); 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has failed to offer new evidence which is material and was not available and could not have been discovered or presented at an earlier hearing. 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has failed to establish*prima facie* eligibility for the relief sought. INS v. Abudu, 485 U.S. 94 (1988); 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has failed to submit the appropriate application and supporting documents to prove this claim. 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent has failed to show that the Motion to Reopen should be granted in the exercise of discretion. INS v. Rios-Pineda, 471 U.S. 444 (1985); 8 C.F.R. § 3.23 (b)(3) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

mtr.2c

_____
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. INA § 240 (c)(6)(B) (1997); 8 C.F.R. § 3.23 (b)(3) (1998). A motion to reopen must also make a prima facie showing that the alien is eligible for the relief sought in the reopened proceedings.*See* INS v. Abudu, 485 U.S. 94, 97 (1988); INS v. Wang, 450 U.S. 139, 141 (1981) (per curiam).

In his/her motion, respondent requests that his/her application for asylum and withholding of removal under §§ 208 and 241 (b)(3) of the INA be reinstated. An Immigration Judge may not grant a motion to reopen to allow an alien to apply for previously available relief unless the alien's request is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered. 8 C.F.R. § 3.23 (b)(4)(i) (1998). The motion must also show that such evidence is material and was not available and would not have been discovered or presented at the previous proceedings. INA § 240 (c)(6)(C)(ii) (1997). Respondent has not shown that new circumstances exist.

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

_____

U.S. Immigration Judge

mtr.2d-1

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Respondent has filed a motion to reopen to apply for asylum. Respondent has not demonstrated by clear and convincing evidence that the application has been filed within one year after the date of his/her arrival in the United States. INA § 208 (a)(2)(B) (1997). The one-year period shall be calculated from the date of the alien's last arrival in the United States but no earlier than April 1, 1997. 8 C.F.R. § 208.4 (a)(2) (1998). Respondent has also failed to show either the existence of changed circumstances which materially affect his/her eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the requisite one-year period. INA § 208 (a)(2)(D) (1997); 8 C.F.R. § 208.4 (a)(4) and (5) (1998). The term "extraordinary circumstances" is defined as "events or factors beyond the alien's control that caused the failure to meet the 1-year deadline." 8 C.F.R. § 208.4 (a)(5) (1998).

Extraordinary circumstances includes: (1) serious illness or disability, (2) legal disability, (3) ineffective assistance of counsel, (4) maintaining Temporary Protected Status until a reasonable period before the filing of the asylum application, and (5) the application was submitted prior to the expiration of the one-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter. 8 C.F.R. § 208.4 (a)(5) (1998). Respondent has failed to demonstrate any of the above extraordinary circumstances.

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:
mtr.2d-2

_____
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:)
)
*) IN REMOVAL PROCEEDINGS
RESPONDENT)

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen removal proceedings, any opposition of the Service, and upon reviewing the Record of Proceedings in this matter, the Court finds that:

____ Respondent is making an application for relief that could have been made at an earlier hearing. A motion to reopen filed for the purpose of providing respondent with an opportunity to make such an application shall not be granted because respondent's rights to make such application were fully explained to him/her and he/she was afforded the opportunity to do so, and new circumstances have not arisen since the prior hearing. 8 C.F.R. § 3.23 (b)(3) (1998).

____ Respondent is making an application for relief that he/she withdrew at an earlier hearing. A motion to reopen filed for the purpose of providing respondent with an opportunity to make an application that he/she could have made at an earlier hearing shall not be granted because respondent's rights to make such application were fully explained to him and he/she was afforded the opportunity to do so, and new circumstances have not arisen since the prior hearing. 8 C.F.R. § 3.23 (b)(3) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

_____

mtr.2e

U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

The granting of a motion to reopen lies within the discretion of the Immigration Judge. INS v. Doherty, 504 U.S. 314, 322 (1992). For such a motion to be granted, an alien must demonstrate that the evidence that he seeks to offer is material, was previously unavailable, and not capable of discovery or presentation during the earlier proceedings. 8 C.F.R. § 3.23 (b)(3) (1998). An alien must also demonstrate *prima facie* eligibility for the relief sought. *See* INS v. Wang, 450 U.S. 139, 141 (1981) (per curiam); Matter of Tuakoi, 19 I&N Dec. 341, 343 (BIA 1985).

Prima facie eligibility for adjustment of status under Public Law 101-167 ("Lautenberg Amendment") is demonstrated by the submission of evidence meeting the requirements for substantive relief. Aliens are eligible to apply if: (1) they are nationals of an independent state of the former Soviet Union, Latvia, Lithuania,Vietnam, Laos, or Cambodia, and (2) they were inspected and granted parole into the United States between August 15, 1988 and September 30, 1997, after being denied refugee status. *See* Public Law 104-319, Title I, § 101(2) (b), Oct. 19, 1996, 110 Stat. 3865.

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

_____ Respondent has not established *prima facie* eligibility for adjustment of status under the Lautenberg Amendment. _____

_____

_____

_____ Respondent is statutorily barred from adjustment. Respondent failed to voluntarily depart. Because respondent failed to depart and did not receive an extension of the

departure date, a final order of removal was entered. An alien who fails to report at the time and place ordered for removal, after a final order has been entered, is ineligible for adjustment for a period of ten years after the scheduled date of departure. 8 C.F.R. § 240.26 (a) (1998). Respondent was given oral and written notice of the limitations that would apply if she/he did not depart as ordered.

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.2f

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.:*

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

Respondent has remained beyond the voluntary departure period. Respondent is subject to a civil penalty of not less than $1,000 and not more than $5,000, and is ineligible for a period of 10 years for any further relief under INA §§ 240A, 240B, 245, 248, and 249 (1997). INA § 240B (d) (1997); 8 C.F.R. § 240.26 (a) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that*

Date:

_____

U.S. Immigration Judge

mtr.2g

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. INA § 240 (c)(6)(B) (1997); 8 C.F.R. § 3.23 (b)(3) (1998).

Following an *in absentia* order, proceedings shall be reopened if the alien establishes that he/she failed to appear because: (1) he/she was in state or federal custody and his/her failure to appear was through no fault of his/her own; (2) he/she did not receive notice of the proceedings; or (3) his/her failure to appear was due to exceptional circumstances. INA § 240 (b)(5)(C) (1997); 8 C.F.R. § 3.23 (b)(4)(ii) (1998).

Respondent claims that the INS failed to properly serve the Notice to Appear. Service by mail is sufficient if there is proof of attempted delivery to the last address provided by the alien. INA § 239 (c) (1997); 8 C.F.R. § 3.26 (d) (1998). The evidence shows that the Notice to Appear was properly served upon respondent.

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

_____

U.S. Immigration Judge

mtr.2j

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. INA § 240 (c)(6)(B) (1997); 8 C.F.R. § 3.23 (b)(3) (1998).

An *in absentia* order may be rescinded if an alien establishes that he/she failed to appear because: (1) he/she was in state or federal custody and his/her failure to appear was through no fault of his/her own; (2) he/she did not receive notice of the proceedings; or (3) his/her failure to appear was due to exceptional circumstances. INA § 240 (b)(5)(C) (1997); 8 C.F.R. § 3.23 (b)(4)(ii) (1998).

The Notice to Appear shall be given in person to the alien, or if personal service is not practical, written notice shall be sent by mail to the alien or his/her counsel of record. *See* INA § 239 (a)(1) and (a)(2)(A) (1997).

A motion to reopen based on exceptional circumstances must be filed within 180 days of the date of the final administrative order of removal. INA § 240 (b)(5)(C) (1997); 8 C.F.R. § 3.23 (b)(4)(ii) (1998). The term "exceptional circumstances" means a serious illness of the alien, a serious illness or the death of an immediate relative, but does not include less compelling circumstances beyond the control of the alien. INA § 240 (e)(1) (1997). An Immigration Judge must examine the totality of the circumstances to determine whether exceptional circumstances exist. Matter of W-F-, Int. Dec. 3288 (BIA 1996).

If an alien was provided oral notice of the time and place of the proceedings and of the consequences of a failure to appear, he or she shall be ineligible for relief under INA §§ 240A, 240B, 245, 248, or 249 for a period of ten years after the date of the entry of the *in absentia* order. INA § 240 (c)(7) (1997). This rule shall not apply if the alien's failure to appear was due to exceptional circumstances. Id.

Upon considering respondent's motion to reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

____ Respondent received personal service of the notice of the hearing because such notice was contained in the Notice to Appear. INA § 239 (a)(1)(G)(i) (1997).

____ Respondent received personal service of the notice of change in time or place of proceedings because respondent was previously present before the Court. INA § 239 (a)(2)(A) (1997).

____ Respondent's counsel received proper notice. INA § 239 (a)(1) and (a)(2)(A) (1997).

____ Respondent received proper notice of the scheduled hearing because there is sufficient proof of attempted delivery of such notice to respondent's last known address. INA § 239 (c) (1997); 8 C.F.R. § 3.26 (d) (1998).

____ Respondent failed to file the motion to reopen based upon exceptional circumstances within 180 days of the *in absentia* order of removal. INA § 240 (b)(5)(C)(i) (1997); 8 C.F.R. § 3.23 (b)(4)(ii) (1998).

____ Respondent failed to show that his or her failure to appear was due to exceptional circumstance. INA § 240 (b)(5)(C) (1997); 8 C.F.R. § 3.23 (b) (1998).

____ Respondent failed to articulate any reasons for his or her absence.

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.2k

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. INA § 240 (c)(6)(B) (1997); 8 C.F.R. § 3.23 (b)(3) (1998).

An *in absentia* order may be rescinded if an alien establishes that he/she failed to appear because: (1) he/she was in state or federal custody and his/her failure to appear was through no fault of his/her own; (2) he/she did not receive notice of the proceedings; or (3) his/her failure to appear was due to exceptional circumstances. INA § 240 (b)(5)(C) (1997); 8 C.F.R. § 3.23 (b)(4)(ii) (1998).

A motion to reopen based on exceptional circumstances must be filed within 180 days of the date of the order of removal. INA § 240 (b)(5)(C) (1997); 8 C.F.R. § 3.23 (b)(4)(ii) (1998). The term "exceptional circumstances" means a serious illness of the alien, a serious illness or the death of an immediate relative, but does not include less compelling circumstances beyond the control of the alien. INA § 240 (e)(1) (1997). An Immigration Judge must examine the totality of the circumstances to determine whether exceptional circumstances exist. Matter of W-F-, Int. Dec. 3288 (BIA 1996).

When an alien makes a claim of improper representation, he must show ineffective assistance pursuant to Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). Matter of Rivera-Claros, Int. Dec. 3296 (BIA 1996). Pursuant to Lozada, the motion to reopen must include: (1) an affidavit by the respondent detailing the agreement entered into with former counsel; (2) evidence that counsel has been informed of the allegations leveled against him and that he has been afforded the opportunity to respond; and (3) information whether a complaint has been filed with the appropriate disciplinary authorities. Lozada, *supra*, at 639. The alien must also demonstrate actual prejudice. Id. at 638.

Upon considering respondent's motion to reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

____ Respondent failed to file the motion to reopen based upon exceptional circumstance within 180 days of the *in absentia* order. INA § 240 (b)(5)(C)(i) (1997); 8 C.F.R. § 3.23 (b)(4)(ii) (1998).

____ Respondent has failed to produce an affidavit detailing his or her agreement with former counsel.

____ Respondent has failed to show that prior counsel was informed of the allegations against him or her and that counsel has been afforded the opportunity to respond.

____ Respondent failed to show that he or she filed a complaint with the State Bar or another appropriate disciplinary authority.

____ Respondent failed to demonstrate actual prejudice.

_____

_____

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.2l

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

For a motion to reopen to be granted, an alien must state new facts that he/she intends to establish, supported by affidavits or other evidentiary materials, and why these facts are material and were not available and could not have been discovered or presented during the prior hearings. INA § 240 (c)(6)(B) (1997); 8 C.F.R. § 3.23 (b)(3) (1998). A motion to reopen must also make a *prima facie* showing that an alien is eligible for the relief sought in the reopened proceedings. 8 C.F.R. § 3.23 (b)(3) (1998); *see* INS v. Abudu, 485 U.S. 94, 97 (1988); INS v. Wang, 450 U.S. 139, 141 (1981) (per curiam).

When an alien alleges a claim of ineffective assistance of counsel, he/she must show the proceedings were so fundamentally unfair that he/she was denied due process. Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). The motion to reopen must include: (1) an affidavit by the respondent detailing the agreement entered into with former counsel; (2) evidence that counsel has been informed of the allegations leveled against him/her and that he/she has been afforded the opportunity to respond; and (3) information whether a complaint has been filed with the appropriate disciplinary authorities. Id. at 639. The alien must also demonstrate actual prejudice. Id. at 638.

Upon considering respondent's motion to reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

____ Respondent has failed to produce an affidavit detailing his/her agreement with former counsel.

____ Respondent has failed to show that prior counsel was informed of the allegations against him/her and that counsel has been afforded the opportunity to respond.

____ Respondent failed to show that he/she filed a complaint with the State Bar or another appropriate disciplinary authority.

____ Respondent failed to demonstrate actual prejudice.

_____

_____

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.2m

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:)
)
*) IN REMOVAL PROCEEDINGS
RESPONDENT)

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's Motion to Reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

_____ A party must file a motion to reopen within 90 days of the date of the final administrative order of removal. INA § 240 (c)(6)(C)(i) (1997); 8 C.F.R. § 3.23 (b)(1) (1998). Respondent filed the motion to reopen after the effective deadline.

_____ A party may file only one motion to reopen. INA § 240 (c)(6)(A) (1997); 8 C.F.R. § 3.23 (b)(1) (1998). Respondent previously filed a motion to reopen.

_____ Respondent may file only one motion to rescind an order entered*in absentia*. 8 C.F.R. § 3.23 (b)(4)(i) and (ii) (1998).

_____ Respondent has not established any of the exceptions to the time and numerical limitations set forth in 8 C.F.R. § 3.23 (c)(2) (1998):

_____ Respondent has not filed the motion to reopen based on exceptional circumstances within 180 days after the date of the order of removal. 8 C.F.R. § 3.23 (b)(4)(ii) (1998).

_____ Respondent has not demonstrated that he or she did not receive notice or that he or she was in federal or state custody and the failure to appear was through no fault of the respondent. 8 C.F.R. § 3.23 (b)(4)(ii) (1998).

_____ In applying or reapplying for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which removal has been ordered, the respondent has failed to show such evidence is material and was

not available and could not have been discovered or presented at the previous hearing. 8 C.F.R. § 3.23 (b)(4)(i) (1998).

_____ Respondent's motion to reopen has not been agreed upon by all parties and jointly filed. 8 C.F.R. § 3.23 (c)(2) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.2n

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Respondent requests reopening to apply for cancellation of removal under INA § 240A. Respondent is ineligible for such relief because:

_____ The Notice to Appear was served upon respondent prior to obtaining the requisite period of continuous physical presence. INA § 240A (d) (1997); 8 C.F.R. § 3.23 (b)(3) (1998).

_____ Prior to obtaining the requisite period of continuous physical presence, respondent committed a criminal offense referred to in INA § 212 (a)(2) that renders him/her inadmissible under INA § 212 (a)(2) or removable under INA § 237 (a)(2) or (a)(4). INA § 240A (d) (1997); 8 C.F.R. § 3.23 (b)(3) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date:

_____

U.S. Immigration Judge

mtr.2o

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
*(city)

FILE NO.: *

IN THE MATTER OF:	)	
	)	
*	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:
*

ON BEHALF OF THE SERVICE:

Assistant District Counsel
*(city)

ORDER AND SUMMARY DECISION OF THE IMMIGRATION JUDGE

Upon considering respondent's motion to reopen, any opposition from the Service, and the Record of Proceedings, the Court finds that:

The original asylum application was denied based upon a finding that it was frivolous. Therefore, the alien is ineligible to file a motion to reopen or reconsider, or for a stay of deportation. 8 C.F.R. § 3.23 (b)(4)(i) (1998).

Therefore, it is ordered that respondent's Motion to Reopen be DENIED.

IT IS FURTHER ORDERED that *

Date: _____

U.S. Immigration Judge

mtr.2p