

The Shifting Burdens of Immigration Law

This outline was created by Immigration Judge Hank Ipema and is currently maintained by OCIJ.

The outline is an effort to highlight burdens of proof, including common presumptions, faced by Immigration Judges. For example: The Government bears the burden to establish alienage by clear, unequivocal, and convincing evidence. Burdens of proof should be distinguished from standards of proof. This outline does not attempt to list or describe the various standards of proof such as well-founded fear for asylum or exceptional and extremely unusual hardship for cancellation of removal for nonpermanent residents.

I.	ALIENAGE	<u>2</u>
II.	REMOVAL PROCEEDINGS.....	<u>3</u>
A.	DEPORTABLE ALIENS	<u>3</u>
B.	ARRIVING ALIENS	<u>3</u>
C.	ALIENS PRESENT IN THE UNITED STATES WITHOUT BEING ADMITTED OR PAROLED.....	<u>4</u>
D.	<i>IN ABSENTIA</i> REMOVAL HEARING	<u>4</u>
III.	DEPORTATION AND EXCLUSION PROCEEDINGS	<u>5</u>
A.	DEPORTATION PROCEEDINGS	<u>5</u>
i.	<i>In General</i>	<u>5</u>
ii.	<i>In absentia</i> deportation hearing	<u>5</u>
a.	Pre-Imm. Act of 1990 (OSCs served prior to June 13, 1992)	<u>5</u>
b.	Post-Imm. Act of 1990.....	<u>5</u>
B.	EXCLUSION PROCEEDINGS.....	<u>5</u>
i.	<i>In General</i>	<u>5</u>
ii.	<i>In absentia</i> exclusion hearing	<u>6</u>
IV.	RELIEF FROM REMOVAL	<u>6</u>
A.	IN GENERAL	<u>6</u>
i.	<i>Proving The Existence Of a Disqualifying Criminal Offense</i>	<u>7</u>
B.	SPECIAL RELIEF PROVISIONS	<u>8</u>
i.	<i>Asylum</i>	<u>8</u>
ii.	<i>Withholding of Removal</i>	<u>10</u>
iv.	<i>Termination of Asylum/Withholding of Removal</i>	<u>11</u>
v.	<i>Withholding/Deferral of Removal under the Convention Against Torture</i>	<u>11</u>
vi.	<i>Section 203 of NACARA</i>	<u>12</u>
vii.	<i>I-130 Filed by Petitioner with Sexual Abuse of Minor Conviction</i>	<u>12</u>
viii.	<i>Post-Conclusion Voluntary Departure</i>	<u>12</u>
V.	EVIDENTIARY PRESUMPTIONS	<u>13</u>
A.	PRESUMPTION OF REGULARITY	<u>13</u>
B.	SIMILARITY OF NAMES	<u>13</u>
C.	REFUSAL BY ALIEN TO TESTIFY.....	<u>13</u>
D.	OATH REQUIREMENT AS TO ASYLUM APPLICATION	<u>14</u>
E.	COMPETENCY	<u>14</u>
F.	MOTION TO SUPPRESS	<u>15</u>
G.	MOTION TO REOPEN	<u>15</u>
H.	PARTICULAR CHARGES.....	<u>16</u>
i.	<i>National Security-Related Provisions</i>	<u>16</u>
ii.	<i>Termination of Conditional Permanent Resident Status under INA § 216.</i>	<u>16</u>
iii.	<i>Firearm Offenses</i>	<u>16</u>
VI.	DETENTION HEARINGS.....	<u>17</u>
A.	CUSTODY REDETERMINATION PROCEEDINGS	<u>17</u>
B.	CIVIL DETENTION (<i>CASAS</i>) PROCEEDINGS.....	<u>17</u>
C.	UNREASONABLE MANDATORY DETENTION (<i>DIOP</i>) HEARINGS.....	<u>18</u>
D.	PROLONGED DETENTION DURING REMOVAL PROCEEDINGS	<u>18</u>
E.	<i>FRANCO</i> HEARINGS	<u>18</u>
F.	CONTINUED (POST ORDER OF REMOVAL) DETENTION HEARINGS	<u>19</u>
G.	DETENTION REVIEW HEARINGS.....	<u>19</u>

VII. SPECIAL PROCEEDINGS.....	<u>19</u>
A. RESCISSION PROCEEDINGS	<u>19</u>
B. CREDIBLE FEAR PROCEEDINGS.....	<u>19</u>
C. REASONABLE FEAR PROCEEDINGS	<u>20</u>
D. CLAIMED STATUS PROCEEDINGS	<u>20</u>
E. ATTORNEY DISCIPLINARY PROCEEDINGS	<u>20</u>

I. Alienage

The Government bears the burden of proving alienage. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) (“It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. It is true that the burden of proving alienage rests upon the Government.”)

Evidence of alienage must be established by clear and convincing evidence. 8 C.F.R. 1240.8(c); *see also Matter of Amaya-Castro*, 21 I&N Dec. 583, 588 (BIA 1996) (pre-IIRIRA case) (“[T]he respondent’s admission that he was born in Honduras is clear, unequivocal, and convincing evidence that shifts to him the burden of showing the time, place, and manner of his entry under section 291 of the Act.”); *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 354 (BIA 1996) (pre-IIRIRA case) (“The burden of proof in deportation proceedings does not shift to the alien to show time, place, and manner of entry under section 291 of the Act, until after the respondent’s alienage has been established by clear, unequivocal, and convincing evidence.” (citing *Woodby v. INS*, 385 U.S. 276 (1966), and *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995))).

“In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to come forward with evidence to substantiate his citizenship claim.” *Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008); *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001); *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977) (same for deportation proceedings). A person presumed to be an alien bears the burden of proving a claim to United States citizenship by a preponderance of credible evidence. *See De Brown v. Department of Justice*, 18 F.3d 774, 777-78 (9th Cir. 1994); *De Vargas v. Brownell*, 251 F.2d 869, 870 (5th Cir. 1958); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 332 (BIA 1969) (finding a preponderance of credible evidence is necessary to overcome the presumption of alienage which attaches by reason of foreign birth).

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.* This burden and presumption is applicable to any charge of deportability which brings into question the time, place, and manner of entry. *See Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984). *Contra Iran v. INS*, 656 F.2d 469 (9th Cir. 1981) (holding that the presumption only applies in cases involving illegal entry). 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 Government and not considered confidential by the Attorney General. INA § 291.

II. Removal Proceedings

A. Deportable Aliens

A respondent charged with deportability shall be found to be removable if the Government proves by clear and convincing evidence that the respondent is deportable as charged. INA § 240(c)(3)(A); 8 C.F.R. §§ 1003.26(c) (same burden for *in absentia* removal hearing); 1240.8(a). No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. INA § 240(c)(3)(A). See *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (holding that the “clear and convincing evidence” standard requires an “abiding conviction” on the part of the fact-finder that the truth of a fact is “highly probable”); *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1989) (holding that when something has to be proved by clear and convincing evidence, the proof must demonstrate that it is highly probably true); Black’s Law Dictionary 172 (6th ed. 1991) (Evidence is “clear and convincing” if it indicates that the truth of the fact to be proved is highly probable or reasonably certain.).

When the respondent is charged with removability based upon a criminal conviction, the Government must prove that the conviction is a removable offense when considering both the statutory elements of the crime and other factors that are not elements but affect the classification of the criminal conviction.¹ *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). “[W]hen a court vacates an alien's conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.” *Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (citing *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003)). If the respondent provides evidence to demonstrate that the conviction that might render him or her removable has been vacated by a court of competent jurisdiction, the Government must show by clear and convincing evidence that the conviction was vacated solely for reasons that do not invalidate the conviction for removal purposes. *Id.* at 269.; see also *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006); *Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006).

B. Arriving Aliens

In proceedings commenced upon a respondent’s arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2); 8 C.F.R. § 1240.8(b).

A returning lawful permanent resident who seeks to enter the United States is not ordinarily considered an applicant for admission. INA § 101(a)(13). However, to establish that a returning lawful permanent resident alien is to be treated as an applicant for admission (and thus that the grounds of inadmissibility apply), the burden of proof is on the Government. The Board of Immigration Appeals has held that the

¹ This outline does not address the processes by which an Immigration Judge analyzes the effect of a criminal conviction upon a respondent’s immigration status, removability, or eligibility for relief from removal. These complex processes, commonly known as the categorical and modified categorical approaches, are the subject of extensive published decisions and learned secondary sources. See *Mathis United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Taylor v. United States*, 495 U.S. 575 (1990).

Government must prove by clear and convincing evidence that one of the six exceptions to the general rule for lawful permanent residents in INA § 101(a)(13)(C) applies. INA § 101(a)(13)(C); *Matter of Pena*, 26 I&N Dec. 619 (BIA 2015); *Matter of Guzman Martinez*, 25 I&N Dec. 845 (BIA 2012); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011); *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988) (the Government bears the ultimate burden of showing a respondent abandoned his or her lawful permanent resident status); *Matter of Kane*, 15 I&N Dec. 258 (BIA 1975) (same); *but see Vartelas v. Holder*, 132 S. Ct. 1479, 1481 (2012) (lawful permanent residents who have committed a crime involving moral turpitude pre-IIRIRA are not subject to the requirements at INA § 101(a)(13)(C) and may, under the *Fleuti* doctrine, reenter the United States after brief trips abroad without applying for admission). However, the Sixth Circuit has stated that the Government actually has the burden of proving by clear, *unequivocal*, and convincing evidence that the returning lawful permanent resident is inadmissible, a higher standard than clear and convincing. *Ward v. Holder*, 733 F.3d 601 (6th Cir. 2013) (citing *Addington v. Texas*, 441 U.S. 418 (1966)). In *Ward v. Holder*, the Sixth Circuit cited to First, Fifth, and Ninth Circuit cases in support of its holding, *id.*, although the Ninth Circuit has held that there is no difference between the “clear and convincing” and the “clear, unequivocal, and convincing” standards. *Mondaca-Vega v. Holder*, 718 F.3d 1075 (9th Cir. 2013); *see also Centurion v. Holder*, 755 F.3d 115, 119 (2d Cir. 2014).

When the Government paroles a returning LPR for prosecution, it need not have all the evidence to sustain its burden of proving that the alien is an applicant for admission at that time but may ordinarily rely on the results of a subsequent prosecution to meet that burden in later removal proceedings. *Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012).

C. Aliens present in the United States without being admitted or paroled

In the case of a respondent charged as being present in the United States without being admitted or paroled, the Government must first establish the alienage of the respondent. If the Government establishes foreign birth, a presumption of alienage arises. *See Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008) *modified on other grounds by Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2); 8 C.F.R. § 1240.8(c).

D. *In absentia* removal hearing

In any removal proceeding before an Immigration Judge in which the alien fails to appear, the Immigration Judge shall order the alien removed *in absentia* if: (1) the Government establishes by clear, unequivocal, and convincing evidence that the alien is removable; and (2) the Government establishes by clear, unequivocal, and convincing evidence that written notice of the time and place of proceedings and written notice of the consequences of failure to appear were provided to the alien or the alien’s counsel of record. INA § 240(b)(5); 8 C.F.R. § 1003.26(c).

The Government bears the burden of establishing jurisdiction for removal proceedings by proper issuance of a Notice to Appear under section 239(a)(1) of the Act and the filing of that NTA with the Immigration

Court. 8 C.F.R. §§ 1003.14, 1239.1(a); *Kohli v. Gonzalez*, 473 F.3d 1061 (9th Cir. 2007); *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001); *see also* 8 C.F.R. § 103.8(c)(2) and *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013) (regarding service on those who lack mental competency); *Matter of Amaya*, 21 I&N Dec. 583, 585 (BIA 1996) (notice of hearing is adequate for a minor where there is clear, unequivocal, and convincing evidence that notice is served on “the person or persons who are most likely to be responsible for ensuring that [the minor] alien appears before the Immigration Court at the scheduled time.”).

III. Deportation and Exclusion Proceedings

A. Deportation Proceedings

i. In General

The Government has the burden of proving that the alien is deportable by evidence which is clear, unequivocal, and convincing. 8 C.F.R. § 1240.46(a); *Woodby v. INS*, 385 U.S. 276, 286 (1966).

ii. *In absentia* deportation hearing

a. Pre-Imm. Act of 1990 (OSCs served prior to June 13, 1992)

“If any alien has been given a reasonable opportunity to be present at a proceeding under [section 242 of the Act], and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present.” INA § 242(b) (1988). “No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.” INA § 242(b)(4) (1988).

b. Post-Imm. Act of 1990

In any deportation proceeding before an Immigration Judge in which the respondent fails to appear, the Immigration Judge shall order the respondent deported in absentia if: (1) the Government establishes by clear, unequivocal and convincing evidence that the respondent is deportable; and (2) the Immigration Judge is satisfied that the written notice of the time and place of the proceedings and written notice of the consequences of failure to appear as set forth in section 242(b)(c) of the Act were provided to the respondent in person or were provided to the respondent or the respondent’s counsel of record, if any, by certified mail. 8 C.F.R. § 1003.26(b).

B. Exclusion Proceedings

i. In General

The burden of proof in exclusion proceedings is on the applicant to show to the satisfaction of the Attorney General that he or she 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 Government 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).

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 Government. *Matter of Kane*, 15 I&N Dec. 258 (BIA 1975). The Government's 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).

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 affected 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).

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 Rivero-Diaz*, 12 I&N Dec. 475, 476 (BIA 1967) (citing *Matter of M-*, 3 I&N Dec. 777 (BIA 1949)). 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 Government asserts that he lost that status, the Government 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.*

ii. *In absentia* exclusion hearing

In any exclusion proceeding before an Immigration Judge in which the applicant fails to appear, the Immigration Judge shall conduct an *in absentia* hearing if the Immigration Judge is satisfied that notice of the time and place of the proceedings was provided to the applicant on the record at a prior hearing or by written notice to the applicant or to the applicant's counsel of record on the charging document or at the most recent address in the Record of Proceeding. 8 C.F.R. § 1003.26(a).

IV. Relief from Removal

A. In General

The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that, if discretionary, 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. 8 C.F.R. § 1240.8(d).

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

There is no catch-all definition of the term “preponderance of the evidence.” Generally, however, when something is to be established by a preponderance of evidence it is sufficient that the proof only establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1989).

The “REAL ID Act of 2005” applies to applications for relief filed on or after May 11, 2005. Pursuant to the REAL ID Act, an alien applying for relief or protection from removal has the burden of proof to establish that the alien (i) satisfies the applicable eligibility requirements; and (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion. INA § 240(c)(4)(A). Under the REAL ID Act, to sustain his or her burden:

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant’s application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant’s burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

INA § 240(c)(4)(B); see *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009) *declined to afford deference by Almanza-Arenas v. Holder*, 771 F.3d 1184 (9th Cir. 2014) (*reh'g en banc granted sub nom. Almanza-Arenas v. Lynch*, 785 F.3d 366 (9th Cir. 2015)).

i. Proving The Existence Of a Disqualifying Criminal Offense

The circuits are split regarding whether an inconclusive record of disqualifying criminal conviction can satisfy an alien’s burden to establish eligibility for relief. In the Third, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits, an inconclusive record is insufficient to satisfy a noncitizen’s burden of establishing

eligibility for relief. See *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017); *Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017); *Le v. Lynch*, 819 F.3d 98 (5th Cir. 2016); *Syblis v. Att’y Gen. of U.S.*, 763 F.3d 348 (3d Cir. 2014); *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011).

In the First Circuit, however, “the question of the allocation of the burden of proof when the complete record of conviction is present does not come into play.” *Sauceda v. Lynch*, 819 F.3d 526, 534 (1st Cir. 2016). Whether an alien was “convicted of” a disqualifying offense is a legal question determined by the analysis articulated in *Moncrieffe v. Holder*, 133 S. Ct. 1678, 185 L.Ed.2d 727 (2013). *Sauceda*, 819 F.3d at 535. See also *Martinez v. Mukasey*, 551 F.3d 113, 121-22 (2d Cir. 2008)(holding that under the categorical approach, an inconclusive record of conviction satisfies an immigrants burden to demonstrate that he has not be convicted of a disqualifying offense).

B. Special Relief Provisions

i. Asylum

The alien has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act. INA § 208(b)(1)(B)(i); 8 C.F.R. §§ 1208.13(a), 1240.11(c)(3)(iii), 1240.49(c)(4)(iii).

The “REAL ID Act of 2005,” which applies to applications for relief filed on or after May 11, 2005, provides:

The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant’s burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

INA § 208(b)(1)(B)(ii).

An applicant for asylum, withholding of removal, or protection under the Convention Against Torture, is ordinarily entitled to a merits hearing on the application without having to first establish prima facie eligibility for such relief. See *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014).

The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. *Matter of L-A-C-*, 26 I&N Dec. 516, 518 (BIA 2015). The fact that the applicant previously established a credible fear of persecution does not relieve the alien of the additional burden of establishing eligibility for asylum. 8 C.F.R. § 1208.13(a).

With respect to information provided in the application, the information provided in an asylum application filed on or after January 4, 1995, 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. § 1208.3(c)(1). The applicant's signature on the asylum application establishes a presumption that the applicant is aware of the contents of the application. 8 C.F.R. § 1208.3(c)(2).

With respect to the requirement in section 208(a)(2)(B) of the Act that the alien demonstrate by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States, the applicant has the burden of proving: (A) By clear and convincing evidence that the asylum application has been filed within 1 year of the date of the alien's arrival in the United States, or (B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline based on changed circumstances or extraordinary circumstances. 8 C.F.R. § 1208.4(a)(2); *Matter of F-P-R-*, 24 I&N Dec. 681 (BIA 2008).

A frivolousness finding, unlike a determination in regard to eligibility for a particular form of relief which is governed by 8 C.F.R. § 1240.8(d), is a preemptive determination which, once made, forever bars an alien from any benefit under the Act, except for withholding of removal. INA § 208(d)(6); 8 C.F.R. § 1208.20. Because of the severe consequences that flow from a frivolousness finding, the preponderance of the evidence must support an Immigration Judge's finding that the respondent knowingly and deliberately fabricated material elements of the claim. *Id.*; *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007); *see also Matter of X-M-C-*, 25 I&N Dec. 322 (BIA 2010) (a determination that an asylum submitted a frivolous application can be made without a final decision on the merits of the application, including after the withdrawal of the application); *Matter of B-Y-*, 25 I&N Dec. 236 (BIA 2010) (clarifying and expanding on *Matter of Y-L-*). Under the regulation, plausible explanations offered by the respondent must be considered in the ultimate determination whether the preponderance of the evidence supports a frivolousness finding. *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007).

An applicant who is found to have established past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. The presumption can be rebutted if the Government proves by a preponderance of the evidence a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution or that the applicant could avoid future persecution by relocating to another part of the alien's country and, under all the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(1); *see also Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012). If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded. 8 C.F.R. § 1208.13(b)(1); *see Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008); *Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998).

If the Government rebuts the presumption, the asylum application will be denied unless the applicant demonstrates compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or the applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country. 8 C.F.R. § 1208.13(b)(1)(iii).

For the purposes of determining the reasonableness of internal relocation for 8 C.F.R. § 1208.13(b)(1)(i), (b)(1)(ii), and (b)(2), in cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored. 8 C.F.R. § 1208.13(b)(3)(i). In cases in

which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Government establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.13(b)(3)(ii); *see Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012).

If the evidence indicates that a mandatory denial ground may apply, the applicant shall have the burden of proving by a preponderance of the evidence that he or she did not so act. 8 C.F.R. § 1240.8(d); *see* 8 C.F.R. § 1208.13(c)(2)(ii). With respect to the mandatory denial ground of firm resettlement, the framework for making firm resettlement determinations focuses exclusively on the existence of an offer of permanent resettlement and allows for the consideration of direct and indirect evidence. The Department of Homeland Security has the initial burden to make a prima facie showing of an offer of firm resettlement by presenting direct evidence of an alien's ability to stay in a country indefinitely; when direct evidence is unavailable, indirect evidence may be used if it has a sufficient level of clarity and force to establish that the alien is able to permanently reside in the country. An asylum applicant can rebut evidence of an offer of firm resettlement by showing by a preponderance of the evidence that such an offer has not been made or that the applicant's circumstances would render him or her ineligible for such an offer of permanent residence. Evidence that permanent resident status is available to an alien under the law of the country of proposed resettlement may be sufficient to establish a prima facie showing of an offer of firm resettlement, and a determination of firm resettlement is not contingent on whether the alien applies for that status. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011); *Cf. Maharaj v. Gonzales*, 450 F.3d 961, 968-69 (9th Cir. 2006) (en banc) (once the Government presents evidence of an offer of some type of permanent resettlement, the burden shifts to the applicant to show that the nature of his stay and ties were too tenuous, or the conditions of his residence too restricted, for him to be firmly resettled) (recounting the history of the firm resettlement doctrine). A finding of firm resettlement is a factual determination reviewed for substantial evidence. *Id.* at 967.

ii. Withholding of Removal

The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of a protected ground. INA § 241(b)(3); 8 C.F.R. § 1208.16(b).

Section 241(b)(3)(C) of the Act incorporates the standard at section 208(b)(1)(B)(ii) of the Act (added by the REAL ID Act of 2005 and applicable to applications filed on or after May 11, 2005), which states:

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

INA § 208(b)(1)(B)(ii).

If the applicant is determined to have suffered past persecution on account of a protected ground, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. The presumption may be rebutted if the Government proves by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on a protected ground or that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.16(b)(1); *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008). If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm. 8 C.F.R. § 1208.16(b)(1)(iii).

For the purposes of determining the reasonableness of internal relocation for 8 C.F.R. § 1208.16(b)(1) and (b)(2), in cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored. 8 C.F.R. § 1208.16(b)(3)(i). In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Government establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.16(b)(3)(ii).

If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. 8 C.F.R. § 1208.16(d)(2).

iv. Termination of Asylum/Withholding of Removal

The Government must establish, by a preponderance of evidence, one or more of the grounds set forth in 8 C.F.R. § 1208.24(a) or (b). 8 C.F.R. § 1208.24(f); see *Matter of A-S-J-*, 25 I&N Dec. 893 (BIA 2012). Impeachment evidence alone is insufficient for the Government to meet its burden. *Urooj v. Holder*, 734 F.3d 1075, 1078 (9th Cir. 2013).

To terminate a grant of asylum pursuant to 8 C.F.R. § 1208.24 (2013), the Department of Homeland Security must establish, by a preponderance of the evidence, that (1) there was fraud in the alien's asylum application and (2) the fraud was such that the alien was not eligible for asylum at the time it was granted; however, proof that the alien knew of the fraud in the application is not required in order to satisfy the first criterion. *Matter of P-S-H-*, 26 I&N Dec. 329 (BIA 2014).

v. Withholding/Deferral of Removal under the Convention Against Torture

The burden of proof is on the applicant for withholding of removal under the Convention Against Torture to establish that it is more likely than not that he or she would be tortured, as defined in 8 C.F.R. § 1208.18(a), if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2).

If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. 8 C.F.R. § 1208.16(d)(2).

With respect to deferral of removal under the Convention Against Torture, an alien who: has been ordered removed; has been found under 8 C.F.R. § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3), the alien shall be granted deferral of removal to the country where he or she is more likely than not to be tortured. 8 C.F.R. § 1208.17(a).

In properly instituted proceedings at the request of the Government to terminate deferral of removal status, the burden remains on the applicant to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred. 8 C.F.R. § 1208.17(d)(3); *see also Matter of C-C-I-*, 26 I&N Dec. 375 (BIA 2014).

vi. Section 203 of NACARA

The burden of proof is on the applicant to establish by a preponderance of the evidence that he or she is eligible for suspension of deportation or special rule cancellation of removal and that discretion should be exercised to grant relief. 8 C.F.R. § 1240.64(a).

Qualified Salvadoran and Guatemalan applicants for special rule suspension or cancellation are presumed to have established the requisite extreme hardship, and the burden of proof shall be on the Government to establish that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States. The presumption shall be rebutted if the evidence in the record establishes that it is more likely than not that neither the applicant nor a qualified relative would suffer the requisite hardship if the applicant were deported. 8 C.F.R. § 1240.64(d).

vii. I-130 Filed by Petitioner with Sexual Abuse of Minor Conviction

When filing a visa petition for an alien, the petitioner has the burden of proving eligibility to so petition. *Matter of Introcaso*, 26 I&N Dec. 304, 307 (BIA 2014). Pursuant to the Adam Walsh Act, an individual who has been convicted of a specified offense against a minor is not eligible to file an alien relative petition. *Id.* The petitioner has the burden to prove that he or she has not been convicted of a specified offense or that, if he or she has, he or she poses no risk to the beneficiary. *Id.*

viii. Post-Conclusion Voluntary Departure

In addition to the statutory elements, the alien has the burden to show that he or she merits voluntary departure in the exercise of discretion. *See* INA § 240B(b)(1); *Matter of Arguelles*, 22 I&N Dec. 811, 815-16, 819 (BIA 1999).

V. Evidentiary Presumptions

A. Presumption of Regularity

The Board 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 or applicant's burden to overcome this presumption.

B. 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 or her. See *Corona-Palomera v. INS*, 661 F.2d 814 (9th Cir. 1981); *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).

C. Refusal by Alien to Testify

Refusal to testify without legal justification concerning matters of alienage, time and place of entry, and lack of proper documents, justifies the drawing of unfavorable inferences. *Matter of Pang*, 11 I&N Dec. 489 (BIA 1966); *Matter of R-S-*, 7 I&N Dec. 271 (BIA 1956) (finding the respondent's refusal to testify "reliable, substantial and probative evidence supporting a finding that the respondent is deportable"); *Matter of P-*, 7 I&N Dec. 133 (BIA 1956); *Matter of B-*, 5 I&N Dec. 738 (BIA 1954). It is proper to draw an unfavorable inference from refusal to answer pertinent questions after a prima facie case of deportability has been established 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).

"Deportation proceedings are civil proceedings, and in such proceedings an immigration judge may draw an adverse inference from a defendant's silence in response to questioning." *United States v. Solano-Godines*, 120 F.3d 957, 962 (9th Cir. 1997) (citing *United States v. Alderete-Deras*, 743 F.2d 645, 647 (9th Cir. 1984), and *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923)); see also *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978) ("Petitioners' decision to remain mute during the deportability phase of the hearing was an appropriate exercise of their Fifth Amendment privilege, but by doing so they do not shield themselves from the drawing of adverse inferences that they are not legally in this country and their silence cannot be relied upon to carry forward their duty to rebut the Government's Prima facie case.")

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 J-*, 8 I&N Dec. 568 (BIA 1960); *Matter of O-*, 6 I&N Dec. 246 (BIA 1954). 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 by clear, unequivocal, and convincing evidence. *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991). A record should clearly show that an alien was called upon to give testimony, that there was a refusal to testify, and the ground of the refusal. *Matter of J-*, 8

I&N Dec. 568 (BIA 1960).

With respect to relief, where an alien refused to answer the questions of a congressional committee on the grounds that the answers might incriminate him, the Board 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).

With respect to applicants for discretionary relief, 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). 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). In asserting his Fifth Amendment privilege against self-incrimination and 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, and 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).

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 Li*, 15 I&N Dec. 514 (BIA 1975); *Matter of Mariani*, 11 I&N Dec. 210 (BIA 1965) (same); *Matter of DeLucia*, 11 I&N Dec. 565 (BIA 1966) (same for registry under section 249 of the Act).

D. Oath Requirement as to Asylum Application

When applying for asylum and related relief, the applicant must be questioned under oath, at a minimum, as to the truth of the contents of the application for relief. *Matter of E-F-H-L*, 26 I&N Dec. 319, 322 (BIA 2014); *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989).

E. Competency

Aliens in immigration proceedings are presumed to be competent and, if there are no indicia of incompetency in a case, no further inquiry regarding competency is required. In cases involving aliens with issues of mental competency, Immigration Judges will need to consider whether there is good cause to believe that the alien lacks sufficient competency to proceed without safeguards. *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

Case law is rapidly changing as to the actions that the Immigration Courts must take when a respondent is found to be incompetent or potentially incompetent. *See, e.g., Franco-Gonzalez v. Holder, infra.*

F. Motion to Suppress

In a claim that evidence was allegedly obtained in violation of due process, the burden is on the respondent to establish a prima facie case of illegality before the Government 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).

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); *see also Espinoza v. INS*, 45 F.3d 308 (9th Cir. 1995).

G. Motion to Reopen

In seeking to reopen removal proceedings, the burden is upon the moving party to establish that reopening is warranted. What must be proven and the standard of proof varies depending upon the basis for the motion. *Compare Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (alien who has already had hearing on merits of relief bears “heavy burden” of showing new evidence “would likely change the result in the case”) *with Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998) (alien who is motioning for previously unavailable relief need present sufficient evidence to show “a reasonable likelihood of success on the merits.”) and *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996) (same).

An alien seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. Where the respondent presented no evidence to prove that his conviction was not vacated solely for immigration purposes, he failed to meet his burden of showing that his motion to reopen should be granted. *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007); *but see Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006).

In order to reopen proceedings to apply for asylum and withholding of removal based on changed country conditions, an alien must meet the requirements in INA § 240(c)(7)(C)(ii) and 8 C.F.R. § 1003.23(b)(4)(i); specifically, for an alien who is awaiting physical removal to “the country to which removal has been ordered,” the alien must show that the proffered evidence is material and was not available at the prior hearing, reflects changed country conditions arising in the country of nationality, and supports a prima facie case for the underlying relief sought. *Matter of J-G-*, 26 I&N Dec. 161, 169 (BIA 2013). Although the regulations would prohibit a motion to reopen that relies solely on a change in personal circumstances, the regulations do not prohibit a motion to reopen based on evidence of changed country conditions that are relevant in light of the petitioner's changed circumstances. *Chandra v. Holder*, 751 F.3d 1034 (9th Cir. 2014) (citing *Shu Han Liu v. Holder*, 718 F.3d 706, 707 (7th Cir. 2013); *Yu Yun Zhang v. Holder*, 702 F.3d 878, 879–80 (6th Cir. 2012); *Jiang v. U.S. Att’y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009)).

In order to rescind an order entered *in absentia* in removal, deportation, or exclusion proceedings, a motion to reopen must be filed within 180 days after the date of the order of removal, deportation, or exclusion if the alien demonstrates that the failure to appear was because of exceptional circumstances, or at any time if the alien demonstrates that he or she did not receive notice or was in federal or state custody and the failure to appear was through no fault of the alien. 8 C.F.R. § 1003.23(b)(4)(ii)-(iii); *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013).

H. Particular Charges

i. National Security-Related Provisions

As used in the national security-related provisions of the Act, “reasonable grounds” is substantially less stringent than preponderance of the evidence. *Matter of A-H-*, 23 I&N Dec. 774, 789 (A.G. 2005) (citing *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (noting that “probable cause” is a less demanding standard than “preponderance of the evidence”) and *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] decision.”)). The “reasonable grounds for regarding” standard is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security. *Id.* (citations omitted).

ii. Termination of Conditional Permanent Resident Status under INA § 216.

Section 216(b)(2) of the Act states that the Government bears the burden of demonstrating “by a preponderance of the evidence” that a condition for termination described in section 216(b)(1)(A) of the Act is met. *See also Matter of Lemhammad*, 20 I&N Dec. 316, 320 (BIA 1991).

The Board notes that in order to be eligible for a waiver under section 216(c)(4)(B) of the Act, the respondent must demonstrate by a preponderance of the evidence that her marriage was entered into in good faith. The proper burden is that of demonstrating the claimed relationship by a preponderance of the evidence. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997) (citing *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988) and *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965)).

iii. Firearm Offenses

In removal proceedings, the antique firearm exception in 18 U.S.C. § 921(a)(3) (2006) is an affirmative defense that must be sufficiently raised by an alien charged under section 237(a)(2)(C) of the Immigration and Nationality Act, as an alien who has been convicted of an offense involving a firearm. Where the Department of Homeland Security has presented evidence that an alien has been convicted of an offense involving a firearm, it has met its burden of presenting clear and convincing evidence of deportability, and the burden then shifts to the respondent to show that the weapon was, in fact, antique. *See Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010); *but see United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014) (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 185 L.Ed.2d 727 (2013) and holding that the antique firearm exception is not an affirmative defense, but rather, is an element of the statute of conviction).

VI. Detention Hearings

A. Custody Redetermination Proceedings

In a custody redetermination under section 236(a) of the Act, an alien must establish to the satisfaction of the Immigration Judge that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999); *Matter of Ellis*, 20 I&N Dec. 641 (1993); *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of Noble*, 21 I&N Dec. 672 (BIA 1997); *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994).

Only if an alien demonstrates that he does not pose a danger to the community should an Immigration Judge continue to a determination regarding the extent of flight risk posed by the alien. *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009).

A respondent may make a subsequent application for bond redetermination. *Matter of Uluocha*, 20 I&N Dec. 133 (BIA 1989). Such requests should be considered on the merits. However, such a request must be in writing and must demonstrate materially changed circumstances warranting redetermination of the prior decision. 8 C.F.R. § 1003.19(e) (requiring showing that circumstances have changed materially since the prior bond redetermination).

It would seem that the Immigration Court has no bond/custody redetermination authority over those aliens defined in section 236(c)(1) of the Act unless the exception at section 236(c)(2) applies. 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 an immediate family member of such witness. The alien must also 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. *But see Diop* and *Rodriguez* hearings, *infra*.

However, an alien may request a hearing before an Immigration Judge to contest the Government's determination that he or she is subject to mandatory detention under section 236(c)(1) of the Act. *See* 8 C.F.R. § 1003.19(h)(1)(ii), (2)(ii). In *Matter of Joseph*, 22 I&N Dec. 799, 805 (BIA 1999), the Board held that an alien who wishes to avoid the reach of section 236(c) was required to show that the Government was "substantially unlikely to establish" the charges that rendered the alien subject to mandatory detention.

B. Civil Detention (*Casas*) Proceedings

In the Ninth Circuit, aliens facing prolonged detention under INA § 236(a) pending judicial review of a final order of removal that is subject to a judicial stay are entitled to a bond hearing before a neutral Immigration Judge to contest the necessity of their continued detention. *See Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). The Government must prove by clear and convincing evidence that continued detention is justified because the alien is a flight risk or danger to the community. *See id.* at 951; *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011). While endorsing the factors set forth in *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006), the Ninth Circuit noted that criminal

history alone will not always be sufficient to justify denial of bond on the basis of dangerousness and that the recency and severity of the offenses must be considered. *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011).

In the Ninth Circuit, aliens who are facing prolonged detention under INA § 241(a)(6) pending review of a collateral attack on the final order are also entitled to an individualized bond hearing before an immigration judge. *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011). Such aliens are entitled to release on bond unless the Government establishes by clear and convincing evidence that the alien is a flight risk or danger to the community. *Id.*; *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011).

C. Unreasonable Mandatory Detention (*Diop*) Hearings

In the Third Circuit, criminal aliens subject to mandatory detention under INA § 236(c) who have been detained beyond a “reasonable” time, are entitled to individualized bond hearings in which the Government has the burden to establish that detention is still necessary to ensure the alien’s presence at removal proceedings or to prevent risk of danger to the community. *Diop v. ICE*, 656 F.3d 221 (3d Cir. 2011); *see also Leslie v. Att’y Gen. of United States*, 678 F.3d 265 (3d Cir. 2012).

In *Sopo v. Us. Att’y Gen.*, 825 F.3d 1199 (2016), the Eleventh Circuit, held that criminal aliens subject to mandatory detention under INA § 236(c) who have been detained beyond a “reasonable” time are entitled to individualized bond hearings. Those detained under section 236(c) must be given a bond hearing under the same parameters as individuals who receive a bond hearing under section 236(a), which requires the alien to demonstrate that he is not a flight risk or danger to others. *Sopo*, 825 F.3d at 1220.

D. Prolonged Detention During Removal Proceedings

The Supreme Court rejected the conclusion in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), that non-citizens within the Ninth Circuit detained for over six months under section 236(c) or 235(b) of the Act must be provided with an individualized bond hearing before an Immigration Judge. *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). *See also Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *cert. granted, judgment vacated*, No. 15-1205, 2018 WL 1143819 (U.S. Mar. 5, 2018).

E. *Franco* Hearings

In California, Washington, and Arizona, those individuals who have been in the Government’s custody for removal proceedings; have been identified by or to medical personnel, the Government, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent for self-representation; and, who lack counsel, are members of the *Franco* class. *See Franco-Gonzalez v. Holder*, CV 10-02211 DMG DTBX, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013). The class is divided into two sub-classes. *Id.* Based on the individual’s classification, either as sub-class one, two, or both, certain safeguards are to be adopted by the Immigration Courts. *Id.* *Franco* sub-class one includes the class members who have a serious mental disorder or defect that renders them incompetent to represent themselves. *Id.* *Franco* sub-class one members must be afforded Qualified Representative(s) to represent them during all phases of their immigration proceedings, including appeals and/or custody

hearings. *Id.* *Franco* sub-class two includes the class members who have been detained for more than six months. *Id.* The sub-class two members must be given a bond hearing before the Immigration Judge. *Id.* At the bond/custody redetermination hearing before an immigration judge, the Government has the burden to show by clear and convincing evidence that the alien’s ongoing detention is justified based on danger to the community or flight risk. *See Franco*, Partial Judgment and Permanent Injunction.

F. Continued (Post Order of Removal) Detention Hearings

For aliens who are subject to a final order of removal, subject to mandatory detention under INA § 241(a)(6), and detained in excess of six months, once they prove that there is good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must demonstrate that continued detention is necessary to fulfill the purpose of the detention statute. *Clark v. Suarez Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

G. Detention Review Hearings

In order to classify the respondent as a “specially dangerous” alien, the Government has the burden of proving by clear and convincing evidence the following three criteria: (1) the alien has previously committed one or more crimes of violence as defined in 18 U.S.C. § 16; (2) due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and (3) no conditions of release can reasonably be expected to ensure the safety of the public. 8 C.F.R. §§ 1241.14(f)(1), 1241.14(i)(1). The clear and convincing standard requires proof that is more substantial than a mere preponderance of the evidence, but less than proof beyond a reasonable doubt. *Id.* The proof must be clear and convincing, but it need not be unequivocal. *See Addington v. Texas*, 441 U.S. 418, 432 (1979).

VII. Special Proceedings

A. Rescission Proceedings

The burden of proof in rescission proceedings is on the Government to establish rescission 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); *Rodrigues v. INS*, 389 F.2d 129 (3d Cir. 1968).

B. Credible Fear Proceedings

Upon review of the asylum officer’s negative credible fear determination, if the Immigration Judge concurs with the determination of the asylum officer, the case shall be returned to the Service for removal of the alien. 8 C.F.R. § 1208.30(g)(2)(iv). If the Immigration Judge finds that the alien, other than an alien stowaway, possesses a credible fear of persecution or torture, the immigration judge shall vacate the order of the asylum officer issued on Form I-860 and the Government may commence removal

proceedings under section 240 of the Act, in which the alien may file asylum and withholding applications. 8 C.F.R. § 1208.30(g)(2)(iv)(B); *see also In re X-K-*, 23 I&N Dec. 731, 733 (BIA 2005). If the Immigration Judge finds that a stowaway possesses a credible fear of persecution or torture, the alien shall be allowed to file an application for asylum and withholding before the Immigration Judge in accordance with 8 C.F.R. § 1208.4(b)(3)(iii). 8 C.F.R. § 1208.30(g)(2)(iv)(C).

C. Reasonable Fear Proceedings

Upon the Immigration Judge's review of the asylum officer's negative reasonable fear determination, if the Immigration Judge concurs, the Immigration Judge shall return the case to the Service for removal of the alien. 8 C.F.R. § 1208.31(g). No appeal to the Board of Immigration Appeals shall lie from the Immigration Judge's determination. If an immigration court in the Ninth Circuit's jurisdiction conducted the reasonable fear review, the alien may appeal the Immigration Judge's decision to the Ninth Circuit Court of Appeals by filing a petition for review within 30 calendar days. *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017).

If the Immigration Judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit Form I-589, and the Immigration Judge shall consider only the application for withholding of removal under § 1208.16 and shall determine whether the removal must be withheld or deferred. 8 C.F.R. § 1208.31(g)(2)(i). The parties may appeal the withholding determination to the Board. 8 C.F.R. § 1208.31(g)(2)(ii).

D. Claimed Status Proceedings

When an alien who is claiming under oath or under penalty of perjury to be a lawful permanent resident, refugee, asylee, or U.S. citizen is ordered removed pursuant to section 235(b)(1) of the Act, the case will be referred to an Immigration Judge for review. 8 C.F.R. § 1235.3(b)(5)(iv). If the Immigration Judge determines that the alien has never been admitted as a lawful permanent resident or as a refugee, has never been granted asylum status, or is not a U.S. citizen, the order issued by the officer will be affirmed and the Government will remove the alien. *Id.* There is no appeal from that decision. *Id.* If the Immigration Judge determines that the alien was once admitted as a lawful permanent resident or refugee, or was granted asylum status, or is a U.S. citizen, and such status has not been terminated by final administrative action, the Immigration Judge will terminate proceedings and vacate the expedited removal order. *Id.* The Government may then initiate removal proceedings against an alien, but not against a person determined to be a U.S. citizen. *Id.*

E. Attorney Disciplinary Proceedings

Where disciplinary proceedings are based on a final order of suspension or disbarment, the order creates a rebuttable presumption that reciprocal disciplinary sanctions should follow, which can be rebutted only if the attorney demonstrates by clear and convincing evidence that the underlying disciplinary proceeding resulted in a deprivation of due process, that there was an infirmity of proof establishing the misconduct, or that discipline would result in a grave injustice. *Matter of Salomon*, 25 I&N Dec. 559 (BIA 2011); *Matter of Kronegold*, 25 I&N Dec. 157 (BIA 2010).