Comparison of Fifth and Ninth Circuit
Immigration Case Law

I. Criminal Issues:

A. Categorical and Modified Categorical Approach:

1. Analysis:

a. Both the Fifth and Ninth Circuits have adopted the approach articulated in *Taylor v. United States*, 495 U.S. 575 (1990), and elucidated in *Descamps v. United States*, 133 S. Ct. 2276 (2013). First, the Court compares the elements of the statute of conviction to the generic definition contained in the INA. *See Mathis v. United States*, 136 S. Ct. 2243, 2245–46 (2016). A statute of conviction is a categorical match when its elements are the same as, or narrower than, those of the generic definition. *Descamps*, 133 S. Ct. at 2281-82. If the statute of conviction is not a categorical match, the Court then looks to whether the statute of conviction is divisible, "set[ting] out one or more elements of the offense in the alternative[,]" at least one of which matches the generic definition. *Id.* at 2281. Only in the event that the statute is divisible, and one of its divisible sections matches the generic definition, may the Court then proceed to the second step, the modified categorical approach. *Mathis*, 133 S. Ct. at 2245–46.

2. Circumstance-Specific Approach:

a. Both the Fifth and Ninth Circuits follow the circumstance-specific approach articulated in *Nijhawan v. Holder*, 557 U.S. 29 (2009). The Court may look beyond the *Shepard* documents to determine, for example, when a conviction involving fraud or deceit resulted in a loss to the victim of more than $10,000 and would therefore constitute an aggravated felony under INA § 101(a)(43)(M)(i). *United States v. Mendoza*, 783 F.3d 278, 281 (5th Cir. 2015); *Fuentes v. Lynch*, 788 F.3d 1177, 1179 (9th Cir. 2015).

B. Divisibility: A divisible statute is one that "sets out one or more elements of the offense in the alternative" thereby defining multiple crimes. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2245–46 (2016). The Fifth Circuit applies *Mathis* to determine whether alternative statutory terms are elements or means. *Gomez-Perez v. Lynch*, 829 F.3d 323, 327-28 (5th Cir. 2016). Where state law does not definitively resolve the means-elements inquiry, the Fifth Circuit looks to the record of conviction "for the sole and limited purpose of determining whether the listed items are elements of the offense." *See Ibanez-Beltran v. Lynch*, — F. App'x — , 2017 WL 113916

(5th Cir. 2017). Where an indictment lists all of the terms of an overbroad statute, but the plea agreement and judgement of conviction treat the alternatives in the indictment as alternative elements (by listing only one), the Fifth Circuit has concluded that a statute of conviction is divisible. *Id*. ("The plea agreement, judgment, and instructions are enough, without settled state law to the contrary, to hold [that a statute of conviction] is divisible.").

C. Aggravated Felonies:

1. INA § 101(a)(43)(A), Sexual Abuse of a Minor:

a. Not defined in the Act or by the Supreme Court, the Fifth and Ninth Circuits have adopted nearly identical generic definitions. *See Sanchez-Avalos v. Holder*, 693 F.3d 1101, 1016 (9th Cir. 2012) ("A state crime may qualify as the federal generic offense of 'sexual abuse of a minor' if: (1) the conduct prohibited by the criminal statute is sexual, (2) the statute protects a minor, and (3) the statute requires abuse. A criminal statute includes the element of 'abuse' if it expressly prohibits conduct that causes 'physical or psychological harm in light of the age of the victim in question.'"); *Contreras v. Holder*, 754 F.3d 286, 294 (5th Cir. 2014) ("Sexual abuse of a minor" under [the Act] has three elements: (1) the conduct must involve a "child;" (2) the conduct must be "sexual" in nature; and (3) the sexual conduct must be abusive.") (internal quotation marks and citation omitted).

i. Note that the Fifth Circuit has adopted a broader reading of the term "abusive." *See United States v. Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009) (holding that only sexual conduct involving children under the age of 14 is *per se* abusive); *United States v. Zavala-Sustaita*, 214 F.3d 601, 604-05 (5th Cir. 2000) (finding that a sexual act does not require physical contact with a minor to be abusive, since psychological harm may occur even without such contact and can be equally abusive.)

ii. The Supreme Court is considering what the generic definition of sexual abuse of a minor is. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 368 (Oct. 28, 2016) (No. 16-54).

2. INA § 101(a)(43)(B), Drug Trafficking:

a. Both the Fifth and Ninth Circuits apply *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), in holding that a controlled substance offense is an aggravated felony if it (1) includes an element of illicit trafficking or (2) would be a felony

drug trafficking crime under federal law. *See Sarmientos v. Holder*, 742 F.3d 624, 628 (5th Cir. 2014); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1039 (9th Cir. 2014).

3. **INA § 101(a)(43)(F), Crime of Violence:** 18 U.S.C. § 16(b) defines a crime of violence as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004).

a. In the **Ninth Circuit**, crimes involving the reckless use of force do not qualify as crimes of violence. *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1162 (9th Cir. 2006).

b. In the **Fifth Circuit**, the relevant question for determining whether a crime is categorically a crime of violence is whether the crime inherently involves a substantial risk that *intentional physical force* may be used in the commission of the crime. *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 465 (5th Cir. 2006).

i. Note: In the sentencing enhancement context, **the Fifth Circuit** has recently determined that recklessness *can be* sufficient. *See United States v. Sanchez-Espinal*, 762 F.3d 425, 431 (5th Cir. 2014) (holding that N.Y. Penal Law § 215.52(1)—aggravated criminal contempt—constituted an aggravated felony under the Sentencing Guidelines because it "'naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing [the] offense,' . . . even when the resulting injury is committed recklessly rather than intentionally").

c. The Supreme Court is considering whether 18 U.S.C. § 16(b) is unconstitutionally vague. *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (Sept. 29, 2016) (No. 15-1498).

4. **INA § 101(a)(43)(G), Theft, Burglary, Receipt of Stolen Property:** Generically defined as "the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 184 (2007) (internal quotation marks and citation omitted). Adopted and applied similarly by both the Fifth and Ninth Circuits. *See United States v. Alvarado-Pineda*, 774 F.3d 1198, 1202 (9th Cir. 2014); *Nolos v. Holder*, 611 F.3d 279, 285 (5th Cir. 2010).

D. **Crimes Involving Moral Turpitude:** "Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind." *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006); *Morales-Garcia v. Holder*, 567 F.3d 1058, 1062 (9th Cir. 2009) (defining a CIMT as a crime "involving conduct that is inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general.") (citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) (en banc).

1. **Assault:** Similarly defined by both the Fifth and Ninth Circuits. *See Esparza-Rodriguez v. Holder*, 699 F.3d 821, 824 (5th Cir. 2012) (to rise to the level of a CIMT, an assault statute must require (1) specific intent, meaning the actus reus must be accompanied by "the evil intent, depraved or vicious motive, or corrupt mind associated with moral turpitude," and (2) "a meaningful level of harm, which must be more than mere offensive touching."); *Ceron v. Holder*, 747 F.3d 773, 784 (9th Cir. 2014) (en banc) (to rise to the level of a CIMT, an assault must involve reprehensible conduct and something more than general criminal intent).

a. The **Fifth Circuit** does not always require an aggravating element. *Esparza-Rodriguez*, 699 F.3d at 824. Accordingly, the Fifth Circuit has upheld the BIA's determination "'that an intentional assault that is intended to and does cause more than a *de minimis* level of physical harm'" constitutes a CIMT, even where an aggravating element is lacking. *Id.* (quoting *Mustafaj v. Holder*, 369 F. App'x 163, 169 (2d Cir. 2010) (unpublished)).

b. The **Ninth Circuit** has implied that an analysis of aggravating factors is necessary only to the extent that it affects the mental state required for a conviction—irrelevant in the context of a general intent crime. *See Ceron*, 747 F.3d at 783.

2. **Theft:** Similarly defined by both the Fifth and Ninth Circuits. *See Salgado v. Gonzales*, 169 F. App'x 373, 373 (5th Cir. 2006) (unpublished) (in order to be a CIMT, requires the intent to permanently deprive; theft of services will fall within the generic definition); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir.

2009) (in order to be a CIMT, an offense must involve permanent deprivation).

3. **Fraud:** Similarly defined by both the Fifth and Ninth Circuits. *See Nino v. Holder*, 690 F.3d 691, 696 (5th Cir. 2012) (fraud offenses with intent to harm or defraud as a required element are categorical crimes involving moral turpitude) (addressing Texas Penal Code § 32.51); *Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1028 (9th Cir. 2014) (same).

E. **Vacated Convictions:** Convictions vacated on the basis of procedural or substantive defects are not valid convictions for purposes of immigration proceedings. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

1. The **Ninth Circuit** has adopted this holding. *Nath v. Gonzales*, 467 F.3d 1185, 1187-89 (9th Cir. 2006)**.**

2. The **Fifth Circuit** has held that a conviction vacated on any grounds remains a conviction under INA § 101(a)(48)(A), contradicting *Pickering*. *Renteria-Gonzales v. INS*, 322 F.3d 804, 812-13 (5th Cir. 2002). However, the DHS has announced it will not seek to uphold decisions made pursuant to *Renteria* but rather would request remand to the BIA for a ruling in accord with *Pickering*. *Gaona-Romero v. Gonzales*, 497 F.3d 694, 694 (5th Cir. 2007). Thus, *Pickering* will still apply as a practical matter in the Fifth Circuit.

II. Motions to Reopen:

A. **Departure Bar:** "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 exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or 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. § 1003.2(d); *see also* 8 C.F.R. § 1003.23(b)(1).

1. Read in the **Ninth Circuit** to not preclude an alien from pursuing a motion to reopen filed in accordance with the time, numerical, and content limitations added by IIRIRA. *Toor v. Lynch*, 789F.3d 1055 (9th Cir. 2015).

2. Read in the **Fifth Circuit** as unlawful as applied to timely filed motions to reopen because the Act "unambiguously gives aliens a right to file a motion to reopen regardless of whether they have left the United States," *Garcia-Carias v. Holder*, 697 F.3d 257, 263 (5th Cir. 2012), but *lawful* as to sua sponte motions to reopen, specifically where respondent failed to timely file his motion to reopen, *Ovalles v. Holder*, 577 F.3d 288, 297-98 (5th Cir. 2009). *See also Toora v. Holder*, 603 F.3d 282, 286 (5th Cir. 2010) (citing, with approval, *Singh v. Gonzalez*, 412 F.3d 1117, 1121 (9th

Cir. 2005), and finding that the departure bar applies when an alien departs the United States after removal proceedings are initiated but before the actual proceedings conclude and the immigration judge enters an order of removal based on the plain language of the regulation).

a. Note: The **Fifth Circuit** has held, outside the context of the departure bar, that requests for equitable tolling are essentially requests for sua sponte reopening over which the court lacks jurisdiction. *See Ramos-Borilla v. Mukasey*, 543 F.3d 216, 219 (5th Cir. 2008).

B. Orders of Removal In Absentia:

1. Exceptional Circumstances:

a. No reason to evade or delay:

i. In the **Ninth Circuit**, there is a line of cases recognizing exceptional circumstances where an alien has no reason to delay or evade the hearing. *See Chete Juarez v. Ashcroft*, 376 F.3d 944, 948 (9th Cir. 2004) (holding that petitioner established exceptional circumstances because she appeared at all scheduled hearings but the last, of which she had no actual notice; she had prevailed on appeal before the BIA; and she had no reason to delay or evade the hearing); *Singh v. INS*, 295 F.3d 1037, 1039-40 (9th Cir. 2002) (holding that petitioner established exceptional circumstances where he arrived late to his hearing based on a misunderstanding, and had "no possible reason to try to delay the hearing" because he was eligible for adjustment of status).

ii. The **Fifth Circuit** does not appear to recognize this factor in determining whether a respondent has demonstrated exceptional circumstances.

b. Ineffective Assistance of Counsel: Both the Fifth and Ninth Circuits agree that ineffective assistance of counsel qualifies as an exceptional circumstance provided that the requirements of *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), are complied with. *See Reyes v. Ashcroft*, 358 F.3d 592, 596-97 (9th Cir. 2004) (stating that ineffective assistance of counsel qualifies as an exceptional circumstance, but denying relief because petitioner failed to comply with the procedural prerequisites of *Matter of Lozada*); *Guillen v. Holder*, 397 F. App'x 30, 32 (5th Cir. 2010) (unpublished) (holding that, although erroneous advise from counsel regarding the time of the hearing could constitute exceptional circumstances, alien failed to

sufficiently comply with *Lozada* in order to warrant reopening).

i. Note: the **Ninth Circuit** and **Fifth Circuits** appear to differ on how to treat erroneous information or advice from a paralegal or secretary. *See Lo v. Ashcroft*, 341 F.3d 934, 939 (9th Cir. 2003) (holding that counsel's secretary's statement that hearing was on wrong day constituted ineffective assistance, which was an exceptional circumstance); *Fajardo v. INS*, 300 F.3d 1018, 1022 n.8 (9th Cir. 2002) (suggesting to BIA on remand that "it [would be] difficult to imagine" how the paralegal's failure to inform the petitioner "of her need to appear at her deportation hearing would not constitute an exceptional circumstance"); *Carrera v. Holder*, 312 F. App'x 593, 594 (5th Cir. 2009) (unpublished) (paralegal's failure to properly file motion for change of venue, where alien had been previously advised of his hearing and the consequences for failure to attend, did not constitute exceptional circumstances).

c. **IJ Still on Bench**: Both the Fifth and Ninth Circuits agree that an arrival after a respondent's originally-scheduled hearing but while the IJ is still on the bench does not constitute a failure to appear. *See Alarcon-Chavez v. Gonzales*, 403 F.3d 343, 346 (5th Cir. 2005) (holding that an alien's arrival to hearing 20 minutes late was not a "failure to attend": alien made a "fully understandable mistake" of taking wrong exit off busy interstate, IJ was across the hall when alien arrived, and alien promptly filed his motion to reopen); *Perez v. Mukasey*, 516 F.3d 770, 774-75 (9th Cir. 2008) (alien did not "fail to appear," since he was merely late for his hearing due to mechanical problems with his car and arrived in the courtroom while IJ was still on the bench).

d. **Failure to Appear Due to Illness:**

i. The **Ninth Circuit** has found that illness does not necessarily constitute exceptional circumstances. *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891-92 (9th Cir. 2002) (severe asthma attack not an exceptional circumstance).

ii. The **Fifth Circuit** appears to require some corroboration as well as due diligence in filing a motion to reopen. *See Singh v. Holder*, 559 F. App'x 272, 273 (5th Cir. 2014) (unpublished) (alien's illness, without any corroborating evidence

or notice to the Court of his inability to attend, did not constitute exceptional circumstances).

e. Other Fifth Circuit Denials:

i. The **Fifth Circuit** has found that car trouble combined with failure to notify the Court of an alien's inability to appear did not constitute exceptional circumstances, *Magdaleno de Morales v. INS*, 116 F.3d 145, 146 (5th Cir. 1997), and held that an alien's mistaken assumption that his motion for change of venue has been granted was "neither exceptional nor beyond [his] control," *Jimenez-Padilla v. Holder*, 552 F. App'x 365, 367 (5th Cir. 2014) (unpublished).

2. Notice:

a. Returned Undeliverable: Similarly applied by both the Fifth and Ninth Circuits. *See Gomez-Palacios v. Holder*, 560 F.3d 354, 362 (5th Cir. 2009) (holding that where notice is sent to the most recent address provided and is returned to the court as undeliverable, the alien must demonstrate that the failure to receive notice was not due to his neglect of his address obligations); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (recognizing the alien's statutory obligation to inform the court of his current address); *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (holding that the IJ and BIA must consider the evidence submitted by the alien of non-delivery or improper delivery of the notice in determining whether notice was properly served); *Maknojiya v. Gonzales*, 432 F.3d 588, 589-90 (5th Cir. 2005) (recognizing the same).

b. Notice to Counsel:

i. The **Ninth Circuit** has held that service of a hearing notice on an alien's counsel, and not on the alien himself, is a sufficient means of providing notice of the time and location of removal proceedings, *see Al Mutarreb v. Holder*, 561 F.3d 1023, 1028 n.6 (9th Cir. 2009), but that "serving a hearing notice on an alien, but not on the alien's counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court," *see Hamazaspyan v. Holder*, 590 F.3d 744 (9th Cir. 2009).

ii. The **Fifth Circuit** recognizes the former rule, but has not explicitly held as to the latter. *See Jimenez-Vasquez v. Holder*, 558 F. App'x 491, 492 (5th Cir. 2014) (unpublished) (finding that respondent was properly served after the Court sent hearing notice

to counsel of record, even though respondent did not sign the Form E-28).

3. Equitable Tolling:

a. Both Fifth and Ninth Circuits recognize that equitable tolling applies to the timeliness requirement of motions to reopen. *See Oliveira v. Gonzales*, 127 F. App'x 720, 723 (5th Cir. 2005) (unpublished) (citation omitted); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 824 (9th Cir. 2011).

i. The **Ninth Circuit** applies a due diligence standard. *See Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (holding that equitable tolling is available "when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error").

ii. The **Fifth Circuit** has adopted a "rare and exceptional circumstances" standard. *Oliveira*, 127 F. App'x at 723 (unpublished) ("[E]quitable tolling will be warranted only in 'rare and exceptional circumstances.'") (internal citation omitted).

III. Ineffective Assistance of Counsel Claims: *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), provides for three procedural requirements for an alien to file a motion to reopen or reconsider based on ineffective assistance of counsel.

A. The **Ninth Circuit** has adopted these requirements but is "flexible" in its application of them and requires only substantial compliance. *See Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008) (concluding that "the *Lozada* factors are not rigidly applied, especially where their purpose is fully served by other means"); *Fong Yang Lo v. Ashcroft*, 341 F.3d 934, 937, n.4 (9th Cir. 2003) ("[W]e seldom reject ineffective assistance of counsel claims *solely* on the basis of *Lozada* deficiencies.").

B. The **Fifth Circuit** requires "strict compliance" with the *Lozada* requirements. *See Hernandez-Ortez v. Holder*, 741 F.3d 644, 647 (5th Cir. 2014) (explicitly rejecting the Ninth Circuit's flexible approach in applying the *Lozada* requirements and affirming the BIA's dismissal of the alien's motion where he failed to present evidence that he informed counsel of the charge).

IV. Due Process Claims:

A. "Apparent eligibility": An IJ is required by regulation to advise an alien of his apparent eligibility for immigration relief during removal proceedings. *See* 8 C.F.R. § 1240.11(a)(2).

1. Similarly applied in Fifth and Ninth Circuits, giving limited weight to the requirements of the regulation in certain circumstances. *See Khawam v. INS*, 49 F.3d 728, 729 (5th Cir. 1995) (neglecting to find a due process violation where the alien was "clearly not

eligible" for the purported relief; IJ thus did not err in failing to inform him of the existence of the waiver); *United States v. Lopez-Velasquez*, 629 F.3d 894, 899 (9th Cir. 2010) (no due process violation where there was no "reasonable possibility" that alien was eligible for relief at the time of his hearing).

a. Note: Unpublished Fifth Circuit cases consistently find no due process violation for failure to advise alien of apparent eligibility for relief. *See Mazariegos-Diaz v. Gonzales*, 162 F. App'x 388, 388 (5th Cir. 2006) (unpublished) (finding that IJ had no duty to inform alien of his eligibility for asylum after IJ asked the alien, through counsel, whether there were any refugee issues, and the attorney replied that there were not).

B. **Notice of Hearing:** Both the Ninth and the Fifth Circuits similarly hold that hearing notices written in the English language and sent to non-English speakers provide sufficient notice of hearing and do not constitute a violation of due process. *See Khan v. Ashcroft*, 374 F.3d 825, 829-30 (9th Cir. 2004) (holding that a second notice in English was sufficient to advise petitioner of his hearing when petitioner had earlier appeared in response to a notice in English but reserving the question whether due process requires the government to provide translation at a master calendar hearing); *Ojeda-Calderon v. Holder*, 726 F.3d 669, 675 (5th Cir. 2013) ("Due process allows notice of a hearing to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required.")

C. **Exclusionary Rule:** The exclusionary rule, although not generally applicable in immigration proceedings, may apply in this context where the Fourth Amendment violation is egregious. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984).

1. The **Ninth** Circuit has determined that "[a] Fourth Amendment violation is egregious if evidence is obtained by deliberate violations of the Fourth Amendment or by conduct a reasonable officer should have known is in violation of the Constitution." *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008).

2. The **Fifth** Circuit has made no such determination. *See Santos v. Holder*, 506 F. App'x 263, 264-65 (5th Cir. 2013) (unpublished) (declining to address whether racial or ethnic profiling constitutes per se egregious conduct); *Gonzalez-Reyes v. Holder*, 313 F. App'x 690, 695 (5th Cir. 2009) (unpublished) (finding that, as of 2009, the Fifth Circuit has "never reversed, based on a finding of egregious violation of an alien's constitutional rights, an IJ's admitting into evidence an alien's statements"), 696 (distinguishing the Ninth Circuit's findings of egregious violations in various contexts to hold that allegations of coercion and failure

to provide *Miranda* warnings do not constitute egregious violations).

V. Continuances: Both the Fifth and Ninth Circuits recognize that there is no abuse of discretion in denying a continuance when the alien has no meaningful relief available to him at the time he seeks the continuance. *See Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) (no abuse of discretion in denying continuance on grounds of allowing for release of regulations under CSPA and adjudication of father's labor certification application where alien had already been granted six-month continuance and father's application had not been approved at time of hearing, such that "no immediate relief was available"); *Singh v. Holder*, 548 F. App'x 421, 423 (9th Cir. 2013) (unpublished) (finding that the IJ did not abuse discretion in denying alien's motion for continuance, given that, due to prior finding that alien had filed a frivolous asylum application, alien had "no meaningful relief available to him"); *Ahmed v. Gonzales*, 447 F.3d 433, 435 (5th Cir. 2006) ("[T]he slim prospect of relief from removal based on the mere possibility that [respondent] might, at some later date, be granted a labor certification that would, in turn, only enable an employment-based visa petition is too speculative to establish the requisite 'good cause' for the granting of a continuance."); *Fajemisiu v. Holder*, 392 F. App'x 287, 288 (5th Cir. 2010) (unpublished) (finding that the alien showed no abuse of discretion where the IJ's denial of a continuance was based on the his determination that the government's denial of the alien's first I-130 petition on grounds of marriage fraud was, therefore, evidence that the pending I-130 petition was not likely to be approved).

- **A.** The **Ninth Circuit** has adopted a multi-factor test for assessing an IJ's denial of a continuance. *See Cui v. Mukasey*, 538 F.3d 1289, 1292 (9th Cir. 2008) ("When evaluating an IJ's denial of a motion for continuance we consider a number of factors—including, for example, (1) the importance of the evidence, (2) the unreasonableness of the immigrant's conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted.").
- **B.** The **Fifth Circuit** does not appear to have adopted this test.

VI. Waivers:

- **A. Former INA § 212(c):** Allows certain long-time permanent residents to obtain a discretionary waiver for certain criminal grounds of excludability and deportability. It remains available to aliens "who entered into plea agreements with the expectation that they would be eligible for such relief." *INS v. St. Cyr*, 533 U.S. 289, 321 (2001); *see also Zheng v. Holder*, 644 F.3d 829, 833 (9th Cir. 2011) (relief under § 212(c) remains available for aliens "who pled guilty to crimes prior to the repeal could still apply for § 212(c) relief if they would have been eligible at the time of their plea").
  - **1. Retroactivity:** Although both the Fifth and Ninth Circuits have previously held that an alien must demonstrate reasonable reliance on pre-IIRIRA law to establish impermissible retroactivity of the

statute, see *Anderson v. Gonzales*, 497 F.3d 927, 942 (9th Cir. 2007) and *Carranza-de Salinas v. Holder*, 477 F.3d 200, 205 (5th Cir. 2012), each Circuit has interpreted differently the Supreme Court's holding that "[a]lthough not a necessary predicate for invoking the antiretroactivity principle, the likelihood of reliance on prior law strengthens the case." *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012).

a. In the **Ninth Circuit**, the *Vartelas* standard has been adopted, "evidence regarding reliance is not required to prove that a new law is impermissibly retroactive," and the relevant analysis focuses solely on whether IIRIRA—and its effective repeal of § 212(c) relief—"impermissibly attaches new legal consequences to events completed before its enactment." *Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1113 (9th Cir. 2013) (internal quotation marks and citation omitted).

b. The **Fifth Circuit** has *recognized* the holding *Vartelas* but still appears to hold that a respondent needs to show a "likelihood of reliance on prior law" in order to "invoke the presumption against retroactive application." *Carranza-De Salinas v. Holder*, 700 F.3d 768, 769, 773 (5th Cir. 2012) (internal quotation marks and citation omitted).

B. **INA § 212(h):** Waiver of inadmissibility for spouses, parents, and children of USCs or LPRs who can demonstrate extreme hardship.

1. Both the Ninth and Fifth Circuits agree that only noncitizens who entered into the United States as LPRs and were subsequently convicted of an aggravated felony are barred from eligibility to apply for the waiver. *See Martinez v. Mukasey*, 519 F.3d 532, 542 (5th Cir. 2008) (alien convicted of an aggravated felony after his post-entry adjustment of status to that of a lawful permanent resident remained eligible to apply for adjustment of status); *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1049 (9th Cir. 2014) (holding the same and citing *Martinez*).

a. The **Fifth Circuit** has held that an alien who is inadmissible under INA § 212(a)(2)(A)(i)(II) for having been convicted of two separate offenses of possession 30 grams or less of marijuana but has already received a INA § 212(h) waiver relating to the first offense is not eligible for a second waiver. *See Rana v. Holder*, 654 F.3d 547, 550 (5th Cir. 2011).

b. The **Ninth Circuit** has not addressed this issue through any published or unpublished case law.

VII. **False Claim to United States Citizenship:** INA § 237(a)(3)(D)(i) provides that any alien who falsely represents, or has falsely represented, himself to be a citizen

of the United States for any purpose or benefit under the Act (including section 274A) or any Federal or State law is deportable.

A. Similarly applied by both the Ninth and Fifth Circuits. *See Theodros v. Gonzales*, 490 F.3d 396, 401 (5th Cir. 2007) (a false representation of United States citizenship for the purpose of obtaining employment from a private employer is considered to be done for a "purpose or benefit" under the Act); *United States v. Karaouni*, 379 F.3d 1139, 1143 (9th Cir. 2004) (implicitly recognizing that employment is a "purpose or benefit" but finding evidence insufficient where alien had only indicated he was a "citizen *or* national" of the United States on the Form I-9).

VIII. Cancellation of Removal:

A. INA § 240A(a), LPR Cancellation:

1. The Supreme Court has squarely held that each alien must satisfy on his or her own the statutory requirements for continuous physical presence, without imputing a parent's LPR status or years of continuous residence. *Holder v. Martinez*, 132 S. Ct. 2011, 2021 (2012) (overruling *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005)).

B. INA § 240A(b), Non-LPR Cancellation:

1. **Hardship:** Similarly applied in both Circuits, finding that the court lacks jurisdiction to review the agency's "exceptional and extremely unusual hardship" determination or a denial of cancellation in the exercise of discretion. *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 (9th Cir. 2003); *Sung v. Keisler*, 505 F.3d 372, 377 (5th Cir. 2007).

2. **Good Moral Character:**

a. **Time period required**: Similarly addressed in both Circuits, holding that the ten-year period is "calculated backwards from the date on which the cancellation of removal application is finally resolved by the IJ or the BIA." *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1162 (9th Cir. 2009); *Rodriguez-Avalos v. Holder*, 780 F.3d 308, 320 (5th Cir. 2015) ("[W]e conclude that the BIA and IJ reasonably calculated the ten-year GMC period as the ten year preceding final adjudication of [the alien's] claim.")

b. **False Testimony**: Both Circuits find that "[f]or a witness's false testimony to preclude a finding of good moral character, the testimony must have been made orally and under oath, and the witness must have had a subjective intent to deceive for the purpose of obtaining immigration benefits." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001); *see also Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975, 977 (5th Cir. 2007).

IX. Asylum:

A. Credibility: INA § 240(c)(4)(C) provides that, considering the totality of circumstances, and all relevant factors, the Court may base its credibility finding on the demeanor, candor, or responsiveness of the applicant, the inherent plausibility of his account, the consistency between his written and oral statements, the internal consistency of each such statement, the internal consistency of such statements with other evidence of record, any inaccuracies or falsehoods in such statements, or any other relevant factor.

1. Generally: Both the Fifth and Ninth Circuits have found that an IJ must provide "specific" and "cogent" reasons for an adverse credibility determination. *See Mwembie v. Gonzales*, 443 F.3d 405, 410 (5th Cir. 2006) (stating that an adverse credibility finding must be "supported by specific, cogent reasons and not based upon speculation or conjecture."); *Ren v. Holder*, 648 F.3d 1079, 1085 (9th Cir. 2011) (stating that the IJ must provide "specific and cogent reasons" in support of an adverse credibility determination).

a. However, the **Fifth Circuit** appears to hold the respondent to a much higher standard than does the **Ninth Circuit.** *See Wang v. Holder*, 569 F.3d 531, 539 (5th Cir. 2009) (requiring that a record *compel* belief in a respondent's story).

2. Inconsistencies: Both the Fifth and Ninth Circuits agree that any inconsistency *may* form the basis of an adverse credibility finding. *Ren v. Holder*, 648 F.3d 1079, 1084 (9th Cir. 2011) (holding that inconsistencies no longer need to go to the heart of an applicant's claim to support an adverse credibility determination); *Wang*, 569 F.3d at 538 (stating that the Court "may rely on *any* inconsistency or omission in making an adverse credibility determination as long as the 'totality of the circumstances' establishes that an asylum applicant is not credible.").

a. However, the **Ninth Circuit** requires that the respondent be confronted with any perceived inconsistencies and be given an opportunity to explain them. *Ren*, 648 F.3d at 1092 n.14 (citing *Campos-Sanchez v. INS*, 164 F.3d 448 (9th Cir. 1998)); *Shrestha*, 590 F.3d at 1044 (citing *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091 (9th Cir. 2009)). Additionally, an IJ in the Ninth Circuit should consider and address, as necessary or otherwise appropriate, relevant evidence that tends to contravene a conclusion that a given factor undermines credibility. *Shrestha*, 590 F.3d at 1044.

b. The **Fifth Circuit** has not adopted these standards. *See Alvarado-Rivas v. Holder*, 547 F. App'x 630, 631 (5th Cir. 2013) (unpublished) (declining to "impose a rule that an immigration judge must give an applicant an opportunity to explain any perceived discrepancies before making an adverse credibility determination.").

3. **Necessity of Corroborative Evidence:**

a. In the **Ninth Circuit**, credible testimony alone may be sufficient for a respondent to meet his burden of proof and corroboration is generally required only in the event that credibility is in dispute. *See Ladha v. INS*, 215 F.3d 889, 899–901 (9th Cir. 2000), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009); *see also Lai v. Holder*, 773 F.3d 966, 975 (9th Cir. 2014) (finding that "an otherwise credible applicant" must be provided "notice and an opportunity to either produce the evidence or explain why it is unavailable").

b. In the **Fifth Circuit**, an applicant's credible testimony is sufficient to meet his burden of proving his claim *only if corroboration is not reasonably available to the applicant*. *Rui Yang v. Holder*, 664 F.3d 580, 587 (5th Cir. 2011) (stating that "the BIA need not [even] make a credibility determination when it determines that corroborating evidence is reasonably available to the applicant but was not submitted.").

B. Definition of Persecution: Both the Fifth and Ninth Circuit apply similar definitions of harm rising to the level of persecution. *See Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007) (describing persecution as an "extreme concept that does not include every sort of treatment our society regards as offensive"); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (defining persecution as an "extreme concept" and one that does not include "every sort of treatment our society regards as offensive").

1. **Chinese Coercive Population Control Cases:**

a. The **Fifth Circuit** has held that abortion is "forced" and, as a result, rises to the level of persecution when voluntarily undergone based on the threat of a physically compelled abortion later during pregnancy. *Zhu v. Gonzales*, 493 F.3d 588, 597-99 (5th Cir. 2007).

b. The **Ninth Circuit** has not addressed this issue through any published or unpublished case law.

C. Nexus: Both the Fifth and Ninth Circuits require that a protected ground be one central reason for the persecution in post-REAL ID Act cases. *See Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009) ("[A]lthough a statutorily protected ground need not be the only reason for harm, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm."); *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009) (defining a "central reason" as a "reason of primary importance to the persecutors, one that is essential to their decision to act. In other

words, a motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist.").

D. Protected Grounds:

1. Political Opinion:

a. In the **Ninth Circuit**, a respondent can establish a political opinion by showing (1) affirmative political beliefs; (2) "political neutrality in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces"; or (3) an imputed political opinion. *Sangha v. INS*, 103 F.3d 1482, 1488-90 (9th Cir. 1997).

b. The **Fifth Circuit** has not adopted this standard and appears to only consider as relevant affirmative political beliefs. *See Ontunez–Tursios v. Ashcroft*, 303 F.3d 341, 348–51 (5th Cir. 2002) ("In order to gain asylum because of persecution due to political opinion, the alien must first show that his persecutors' actions were motivated by his, the alien's, political opinions.").

2. Particular Social Group:

a. Family:

i. In the **Ninth Circuit**, family is consistently held to constitute a cognizable social group. *See Lin v. Ashcroft*, 377 F.3d 1014, 1029 (9th Cir. 2004) (stating that "family membership is a sufficiently strong and discernible bond" that its members should not be required to change it); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) ("[A] prototypical example of a 'particular social group' would consist of the immediate members of a certain family").

ii. In the **Fifth Circuit**, particular social group claims based on family are consistently denied. *See Demiraj v. Holder*, 631 F.3d 194, 199 (5th Cir. 2011), *opinion vacated on other grounds, appeal dismissed by* No. 08-60991, 2012 WL 2051799 (5th Cir. May 31, 2012) (asking that a respondent prove that distant members have been systematically targeted "as would be the case if, for example, a persecutor sought to terminate a line of dynastic succession").