



The 2019 Annual AILA New England Chapter Advanced Immigration Law Conference is designed to provide accurate and authoritative information with regard to U.S. immigration law. It is distributed with the understanding that this publication, these presentation materials, and any related information are not a substitute for legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Reprint Permission

If you wish permission to reprint any of the materials, please send a note to
Attorney Leslie T. DiTrani at leslie@ditranilaw.com.

TABLE OF CONTENTS

16th Annual AILA New England Conference (2019 Ed.)

Preface

Acknowledgements

Conference Member Biographies

Practice Pointer Articles

Practice Pointers for Effective Client Communication in Complex Immigration Scenarios

By Rebecca Leavitt

This practice pointer discusses several tactics and reminders to employ in client communications, ensuring that clients' needs and ethical responsibilities are best met, and assisting in maintaining a positive attorney-client relationship.

Litigation for Business Immigration Practitioners

By Leslie K. Dellon, American Immigration Council

This AIC Practice Advisory explores the situations in which filing a federal lawsuit may be the best option for clients who have been denied employment-based visas due to USCIS's restrictive definitions and policies. The article reviews the prerequisites for initiating a federal suit, jurisdictional challenges, various causes of action, venue issues, and other practical considerations.

Interagency Panel: Agencies within the Department of Homeland Security

By Anthony Drago, Jr.

This article reviews the mission and purview of the various DHS agencies with which immigration practitioners typically work, and provides practical information about the agencies' recent policy developments and contact information.

Track One: Removal Defense

When One Door Closes, Knock Harder:

Recent Changes to Asylum Law and How to Build a Victorious Asylum Claim

By Nareg Kandilian, Robin Nice, and Anita P. Sharma

This article reviews recent decisions from the BIA, circuit courts, and the Supreme Court that affect affirmative and defensive asylum law, with practical and case strategy tips.

Aggressive Removal Defense, Part 1: Contesting Removability

By Alan Diamante, Aaron Hall, and Rebeca Sánchez-Roig

This article covers removal proceedings step-by-step, with practice pointers for each phase of a case. The supplemental materials include a redacted bond motion, bond hearing practice tips, and copies of and citations to recent cases.

Addendums:

- *Bond Practice Tips*
- *Redacted Motion for Bond Determination*
- *Redacted decision from the Arlington Immigration Court, concerning Honduran women*
- *Redacted decision from the San Francisco Immigration Court, concerning Mexican women*
- *List of Citations of cases referenced during the panel*
- *U.S. v. Raul Soto-Meija*
- *Matter of A-B- guidance from John Lafferty (USCIS) to Asylum Division Staff*
- *Government's Response to Defendant's Motion to Dismiss in U.S. v. Carlos Pedroza-Rocha*
- *Serah Njoki Karingithi v. Whitaker (9th Cir. 2018)*

Challenging Agency Action in State and Federal Court

Moderator: Jeannie Kain, Adriana Lafaille, and Emma Winger

Addendums:

- *Massachusetts court policy concerning writs of habeas corpus*
- *Executive Office Transmittal regarding the amended writ of habeas corpus for persons in ICE custody*
- *Sample habeas corpus form*
- *Supplemental cases and notes*

This article provides a brief summary of when and how to file a case in federal court. This article is accompanied by: (1) Sample Habeas Petition; (2) Executive Office Transmittal 19-3 Regarding the Amended Writ of Habeas Corpus for Persons in ICE Custody; and (3) Massachusetts Court Policy Regarding ICE Habeas Petitions.

Track Two: Business Immigration

To Err is Human: Addressing Mistakes Made in Business Immigration Cases

By Leslie DiTrani, Cyrus D. Mehta, and Stephen Yale-Loehr

This article discusses common ethical dilemmas in the realm of business immigration, attorneys' ethical obligations, and strategies for preventing and responding to ethical challenges.

Employment and Training Opportunities in the F and J Visa Categories

By Elizabeth Goss, David Fosnocht and Dan Berger, with gratitude to a draft article from 2018 by Elise A. Fialkowski, Elizabeth A. Goss, and Lesley N. Salafia

In light of the August 2018 USCIS Policy Memorandum redefining the accrual of unlawful presence for individuals in F, M, and J nonimmigrant status, this article underscores the importance of understanding the specific, limited options for employment authorization available to these visa holders. The authors provide an overview of F-1 student employment options – including on campus employment, Curricular Practice Training, Optional Practical Training, and STEM – as well as an overview of J-1 academic training, J-1 trainees and interns, the J-1 two-year home residence requirement, and J-1 program sponsors. This article also includes a discussion of the definition of “employment” in the immigration context.

Death by a Thousand Memos: The Changing Landscape of USCIS Adjudications in the Wake of "Buy American, Hire American"

By Brian J. Coughlin, Dyann DeVecchio Hilbern, and Julie A. Galvin

This article briefly summarizes the origins and development of recent U.S. policy towards business immigration categories and other well-established immigration programs. It addresses the practical impact of recent USCIS Policy Memoranda including: (1) Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status; (2) Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites; (3) Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens; (4) Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b); and (5) Accrual of Unlawful Presence and F, J, and M Nonimmigrants.

PREFACE

Welcome to the 16th Annual AILA New England Immigration Law Conference. We hope you will enjoy the presentations and material and come away from the conference with a lot of useful information and insights.

Two years into the Trump administration, we continue to experience an onslaught of anti-immigrant policies in the business and humanitarian spheres, negative case law through the Attorney General's self-certifying powers, and intensified and widespread enforcement and removal operations. With daily changes that affect our practices and our clients' lives, it is crucial that we as immigration practitioners stay abreast of legal developments, cultivate our networks to draw on our colleagues' experience and expertise, and be prepared to think creatively when agencies keep moving the goalposts. We hope you are able not only to gain information and skills through this Conference's panels, but also that you strengthen your personal and professional connections and leave the Conference feeling fortified by the knowledge that as challenging as these times are, we are in this together.

Through the AILA NE Annual Conference series, we are able to present some of the finest local and national speakers on topics that are both relevant and timely, as well as original practice pointer articles by our esteemed presenters. As in the past years, we have continued several panels which cover topics that are important to all immigration practitioners, including interagency government updates.

We have been honored to work with a wonderful group of fellow practitioners who took significant time out of their personal and business lives to write and present valuable material. And this conference, as always, would never happen without the great efforts of an extremely dedicated group of conference organizers and committee members. Thank you to Leslie DiTrani and Annelise Araujo, who led the efforts to continue to improve our AILA NE annual conference, and to the wonderful committee who tended to the countless details required for an impactful and seamless conference.

Thank you all.

And thank you to all readers; without your interest and support for this conference, none of this would happen. We welcome you to listen, to question, to network, and to enjoy.

Sara M. Mailander and Robin Nice
Editors
March 2019



ACKNOWLEDGMENTS

AILA New England Chapter would like to thank the following individuals, without whom this Conference would not have been possible:

Conference Co-Chairs

Leslie Ditrani and Audrey Robert-Ramirez

Conference Committee

Annelise Araujo

Emily Barron

Alex Peredo Carroll

Ramey Sylvester

Livia Lungulescu

Stefanie Fisher

John Cayer

Jose Carrasquillo

Ellen Driver

Sarah Allar

Kaitlin O'Connor

Allison Ahern Fillo

Alison Howard-Yilmaz

Rebecca Leavitt

Sara Mailander

Robin Nice

Vivian Ruiz

Julie Gharagouzloo

Abigail Fletes

Meagan Antonellis

Elizabeth Ahmadi

16th Annual AILA New England Immigration Law Conference

Friday, March 1, 2019

AILA Members, Conference Biographies

Ethics Panel

Rebecca Leavitt is an Associate Attorney in Fragomen, Del Rey, Bernsen & Loewy's Boston office, and has over 8 years of experience in the field of Business Immigration. In her current role, she assists large corporations with a wide array of immigrant and nonimmigrant visa matters for professional employees, as well as immigration matters arising out of corporate restructuring. She also is experienced in advising foreign nationals on consular matters and in preparing EB-5 immigrant investor petitions. Rebecca received her J.D. from Roger Williams University School of Law and her B.A. from Queen's University.

Stacy A. L. Best has been a lawyer for more than 20 years. She is an assistant bar counsel in the Massachusetts Office of Bar Counsel, Board of Bar Overseers of the Supreme Judicial Court (BBO) for more than 10 years. At the Office of Bar Counsel, Attorney Best investigated alleged violations of the Rules of Professional Conduct, and litigates all stages of the disciplinary proceedings including all appeals. Ms. Best began her career as a staff attorney in the trial division of the Committee for Public Counsel Services (CPCS). She tried cases at the district and superior court levels representing indigent clients charged with felonies. Attorney Best is also a former clinical instructor at the Criminal Justice Institute at Harvard Law School. Several of her students obtained trial experience while under her direct supervision. Attorney Best is a regular faculty member of Harvard's Trial Advocacy Workshop, a three-week program taught by some of the best lawyers and judges around the country. Ms. Best is a "transplant" who moved from California to go to law school. She is a 1995 graduate of the Boston College School of Law.

Knocking Down the Wall: Administrative Litigation

Gregory Romanovsky started his legal education in Moscow, Russia in 1992, and he received the U.S. law degree (J.D.) from Boston College Law School in 2000. He has practiced U.S. immigration law exclusively since that time, representing clients before the United States Citizenship and Immigration Service, the Executive Office for Immigration Review, the Board of Immigration Appeals, the U.S. District Courts, and the Circuit Courts of Appeals. From 2009 to 2013, Greg served as Chair of the Litigation Committee for the New England Chapter of the American Immigration Lawyers Association. He is now part of the Executive Board for AILA New England.

Besides his work at Romanovsky Law, Greg has been working with the Mayor's Office for the City of Boston to provide free immigration consultations to recent immigrants who cannot afford the services of a private attorney.

A frequent speaker at immigration law conferences and workshops, Greg has been named by Super Lawyers Magazine as a New England Super Lawyer in the field of immigration law.

Ilana Greenstein is the Senior Technical Assistance Attorney for the AILA/AIC Immigration Justice Campaign. Prior to coming to work for AILA in September of 2017, Ilana practiced immigration law with a focus on removal defense and appellate litigation for close to twenty years. In that capacity she appeared regularly before the nation's federal courts, the BIA, the immigration courts and USCIS. Ilana is an adjunct faculty member at Northeastern University School of Law, where she teaches Immigration Law and Practice and Refugee and Asylum Law. She holds a J.D. from Northeastern University School of Law, and a B.A. in Spanish and International Studies from Macalester College. She served on the Board of Directors of the Massachusetts Chapter of the National Lawyers Guild (1996-2002 and 2009-2010), as well as on the AILA Amicus Committee and numerous other national and local AILA committees.

Trina Realmuto is a Directing Attorney at the American Immigration Council. She litigates before the federal courts on issues related to removal defense, government accountability, and the rights of noncitizens. Previously, Trina served as the Litigation Director of the National Immigration Project of the National Lawyers Guild and as a consulting attorney to the Council. In addition, she has worked abroad representing noncitizens applying for visas at U.S. embassies and consulates. With twenty years of experience, Trina has litigated and argued several precedent decisions on behalf of individuals and classes and amicus curiae, written numerous practice advisories, and is a frequent presenter on immigration issues. Trina earned her J.D. from Albany Law School and her B.A. from the University of North Carolina at Chapel Hill.

USCIS, ICE, CBP Interagency Panel

Anthony Drago, Jr., Esq. is a sole practitioner with an office in Boston, MA. He is admitted to the bars in Massachusetts and New York and has been a member of AILA since 1996. Attorney Drago served as an elected Director on AILA's Board of Governors from June, 2011 through May, 2013 and was Chapter Chair of AILA NE from June, 2009 through May, 2010. He currently serves on the AILA national CIS Field-Ops liaison committee and AILA New England Chapter EOIR liaison committee and is a regular speaker at AILA conferences.

Denis C. Riordan, District Director, District 1, USCIS

Bartholomew Cahill, Asst. Special Agent in Charge, ICE, HSI

Todd J. Thurlow, Assistant Field Office Director, ICE, ERO

Michael Manning, Acting Assistant Director, CBP

Eric Geddry, Acting Assistant Port Director, CBP

Winning Against the Odds: Successful Asylum Claims

Robin Nice is an immigration attorney at McHaffey & Nice, LLC in Boston, Massachusetts. Robin received her B.A. from Wellesley College, her Master's Degree in Human Rights from London School of Economics in 2008, and a J.D. from Boston University Law School in 2012. She has practiced immigration law since 2012. At McHaffey & Associates she focuses on asylum cases (both before USCIS and the immigration court) and other forms of humanitarian relief, such as VAWA self-petitions and U-visas.

Elena Noureddine is the detention staff attorney at PAIR, the Political Asylum Immigration Representation Project, a position she has held since 2014. Elena has over 4 years of experience as a legal services attorney representing asylum seekers, unaccompanied minors, and immigrants detained by ICE. She is a recognized expert on asylum law and detention issues. During her tenure, she has expanded PAIR's program capacity to meet the urgent needs of indigent immigrants.

Jason Corral is a staff attorney at the Harvard Immigration and Refugee Clinical Program (HIRC). At HIRC Jason is part of a team of lawyers and legal workers in the Harvard Representation Initiative that provides legal representation to members of the Harvard community including students, faculty and staff. Before working at HIRC Jason served as a member of the immigration team at Greater Boston Legal Services; served as the KIND (Kids In Need of Defense) fellow in Boston, and acted as the supervising attorney at Catholic Charities of Boston. Jason has received acknowledgements from the Fundacion Ritmo Guanaco for his work with immigrant children and The National Immigration Project for his work in the immigrant community of New England following the Michael Bianco Factory raids. In addition to helping immigrants understand the legal pathways to citizenship, Jason is experienced in helping immigrants who face hardships such as fear of persecution, minors that arrive without parents, LGBT issues and victims of violence.

Removal Defense in an Era of Moving Targets

Julio Cortes del Olmo is a Boston immigration attorney and the principal immigration attorney at Del Olmo Law. Attorney del Olmo is a naturalized U.S. Citizen who earned a Masters in Law from Boston College Law School. A native Spanish speaker, he also holds a dual degree in Law and Business Administration from Carlos III University in Madrid, Spain.

Attorney Del Olmo gained extensive international experience working for over 5 years as a Senior Legal Advisor for the European Commission in Spain. He was also a law clerk to the Honorable William G. Young, one of the most respected Federal Judges at the Boston Federal Court in Massachusetts. Only a small number of attorneys each year are accepted to such a prestigious position.

After his clerkship, Attorney Del Olmo started practicing immigration law as Of Counsel to the Law Office of Erinna D. Brodsky, where he acquired experience working in a range of complex family, naturalization and business immigration cases. Attorney Del Olmo is fully committed to offering Pro Bono legal representation to deserving individuals. He currently

provides legal services and support to several public legal services organizations, including the PAIR Project, KIND and Immigration Equality.

Attorney Del Olmo is a member of the Massachusetts State and Federal Bar, an active member of AILA, and since 2014, serves as one of the AILA New Members Division Liaisons.

Rachel M. Self is the founding member of Rachel M. Self, P.C., and appears regularly as a legal analyst for the Fox News Channel and CNN. Attorney Self represents individuals in criminal and immigration matters. She is regularly asked to teach and speak on both criminal and immigration issues. She has taught advanced immigration and crimmigration seminars for the American Immigration Lawyers Association, Massachusetts Continuing Legal Education, Massachusetts Bar Association and the New Hampshire Judicial Education Program. She has also taught at New England Law Boston.

Heather Yountz is a trial and appellate attorney focusing mainly on immigration and criminal defense. After graduating from Northeastern University School of Law in 2007, she clerked for Justice Scott L. Kafker, currently an Associate Justice of the Massachusetts Supreme Judicial Court. She worked as an asylum attorney in the Immigration Unit at Greater Boston Legal Services, then moved to private practice, where she handled a wide range of immigration relief including business, family-based, and human rights cases. Heather Yountz has worked at Demissie & Church since 2015, and she has been involved in several high-profile immigration cases including the class action civil lawsuit filed on behalf of children separated from their parents at the border, the reunification of Angelica Gonzalez-Garcia with her eight-year old daughter, and the Boston challenge to the executive order banning travel from seven Muslim-majority countries. Listed as one of the 2018 Top Women of Law by Massachusetts Lawyers Weekly, Heather Yountz recently returned from Tijuana, where she volunteered with Al Otro Lado to provide legal advice to asylum seekers at the border.

Challenging Agency Action in Federal and State Court

Jeannie Kain is a partner at the immigration law firm of Ramirez & Kain, LLP, and focuses on family-based immigration, crimmigration, waivers, removal defense, asylum and citizenship. Previously, she managed the legal services department of the Irish International Immigrant Center. She has also worked as an immigration law advisor at the Committee for Public Counsel Services, and as an associate at the immigration law firm of Kaplan, O'Sullivan & Friedman. From 2010-2016, she served on the board of the New England Chapter of AILA, including as chapter chair during the 2014-15 term. She currently serves as a local AILA liaison to Immigration and Customs Enforcement, Enforcement and Removal Operations office. Jeannie is a graduate of Northeastern University School of Law and the American University.

Adriana Lafaille is a staff attorney at the ACLU of Massachusetts, where she focuses on immigration detention and immigrants' rights issues. Through AILA New England's Federal Litigation Project, she serves as a mentor for attorneys new to federal habeas litigation. Adriana's cases include *Gordon v. Napolitano*, a mandatory detention class action that has resulted in the release of more than 200 individuals; *Pensamiento v. McDonald*, a district

court case resulting in a ruling that required the government to bear the burden of proof in a § 236(a) bond hearing; and Calderon v. Nielsen, a class action case involving individuals who are seeking lawful status under the 2016 provisional waiver regulations. The Massachusetts Bar Association selected Adriana as the 2015 Access to Justice Rising Star, and Massachusetts Lawyers Weekly recognized her as a 2015 “Up and Coming” Lawyer. Before joining the ACLU of Massachusetts, Adriana clerked for the Hon. Ralph D. Gants on the Supreme Judicial Court of Massachusetts, and for the Hon. Mark L. Wolf in the District of Massachusetts. Adriana graduated from Harvard Law School in 2010 and is a native speaker of Spanish and Portuguese.

Emma Winger is a staff attorney with the Immigration Impact Unit (IIU) of the Massachusetts Committee for Public Counsel Services (CPCS), the Massachusetts public defender agency, where she advises defense counsel about the immigration consequences of criminal dispositions. Before joining the IIU, Ms. Winger was a trial attorney with the Public Defender Division of CPCS. She received a J.D. from Boston College Law School (2008).

Ethical Dilemmas in Business Immigration

Leslie Ditrani of Ditrani Law, LLC, has been practicing immigration law since 1994. She has a broad expertise in business and family immigration matters. Her business experience includes representing Boston area start-ups and entrepreneurs as well as small to mid-size businesses. She has been recognized for her work as one of the Top 50 Women Attorneys in Massachusetts. Professionally, Leslie is an active member of the American Immigration Council (AIC) and AILA. In addition to her work on the AIC National Board of Directors, she is a member of the AIC Governance Committee. As an active AILA member, Leslie has coordinated the annual conference in New England for the last 10 years as well as held leadership positions locally and nationally. Leslie is extensively involved in her local community where she volunteers for the Cambridge CIRC Legal Screening Clinic and supports the Cambridge Mayor’s Immigrant Liaison. Leslie is a graduate of William Smith College, Geneva, New York; and Northeastern University School of Law, Boston, Massachusetts.

Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Partner of Cyrus D. Mehta & Partners PLLC in New York City. Mr. Mehta is a member of AILA’s Administrative Litigation Task Force; AILA’s EB-5 Committee; former chair of AILA’s Ethics Committee; special counsel on immigration matters to the Departmental Disciplinary Committee, Appellate Division, First Department, New York; member of the ABA Commission on Immigration; board member of Volunteers for Legal Services and board member of New York Immigration Coalition. Mr. Mehta is the former chair of the Board of Trustees of the American Immigration Council and former chair of the Committee on Immigration and Nationality Law of the New York City Bar Association. He is a frequent speaker and writer on various immigration-related issues, including on ethics, and is also an adjunct professor of law at Brooklyn Law School, where he teaches a course entitled Immigration and Work. Mr. Mehta received the AILA 2018 Edith Lowenstein Memorial Award for advancing the practice of immigration law and the AILA 2011 Michael Maggio Memorial Award for his outstanding efforts in providing pro bono representation in the immigration field. He has also received two AILA Presidential Commendations in 2010

and 2016. Mr. Mehta is ranked among the most highly regarded lawyers in North America by Who's Who Legal – Corporate Immigration Law 2018 and is also ranked in Chambers USA and Chambers Global 2018 in immigration law, among other rankings.

Stephen Yale-Loehr is co-author of *Immigration Law and Procedure*, the leading immigration law treatise, published by LexisNexis. He also is Professor of Immigration Law Practice at Cornell Law School, and is of counsel at Miller Mayer (<http://www.millermayer.com>) in Ithaca, NY. He is a member of AILA's asylum committee. He graduated from Cornell Law School in 1981 *cum laude*, where he was Editor-in-Chief of the *Cornell International Law Journal*. He received AILA's Elmer Fried award for excellence in teaching in 2001, and AILA's Edith Lowenstein award for excellence in the practice of immigration law in 2004.

Essential Take-Aways on Student Visa Practice

Elizabeth Goss specializes in the representation of physicians, researchers, trainees and students in the higher education and health care fields, securing their temporary and permanent visas. She is nationally recognized for her expertise in representing professors, scientists, and artists under the extraordinary ability, outstanding researcher, and national interest waiver immigrant visa categories. She also has extensive experience representing multinational corporations and entrepreneurial ventures in a wide array of immigration matters. Ms. Goss is an immigration practitioner with in-depth experience providing strategic immigration advice on a variety of complex issues. Liz has served on the NAFSA: International Educators association's national leadership team in various roles over the last 7 years. Over the last year she has focused her efforts on expanding the conversation on immigration at a grassroots level. She has been a featured speaker at town meetings and other non-traditional public forums. She can be found hosting events in her local area to foster community dialogue on immigration.

Dan Berger is a partner at the law firm of Curran, Berger & Kludt in Northampton, MA. He developed his interest in immigration in college, where he studied immigration history and taught English to adult refugees; he continues to volunteer at clinics and on the border. Dan is a graduate of Harvard College and Cornell Law School. Dan is also a founding member of the U.S. Alliance of International Entrepreneurs (usaie.org), an Honorary Fellow of the American Academy of Adoption Attorneys, the Regulatory Practice Coordinator for the National Association of Foreign Student Advisers (NAFSA), and a member of the USCIS Headquarters liaison committee for AILA.

Dan has also maintained an active presence in the field of immigration law through numerous writings. He has been editor for AILA's annual conference handbook since 2000, and edited *Immigration Options for Academics and Researchers*, the *International Adoption Sourcebook*, and the *Diplomatic Visa Guide*. He wrote an Issue Brief for the American Council on Education (ACE) after the 2016 election, and was a co-author on a "Note" on immigration in 2017 for the National Association of College and University Attorneys (NACUA). He has been quoted in various media including the Atlantic Magazine and the Huffington Post.

David Fosnocht is Director of Immigration Practice Resources at NAFSA, and editor of the NAFSA Adviser's Manual. Before joining the NAFSA staff 19 years ago, he was a NAFSA member and associate director of the International Services Office at George Washington University for ten years. Prior to that, David practiced as an immigration attorney in Washington, D.C. He holds a B.A. in Modern Languages from Villanova University and a J.D. from Georgetown University Law Center, and is a member of the California and District of Columbia bars.

Death by a Thousand Memos

Brian Coughlin practiced immigration law for over a decade at other prominent U.S. and global law firms prior to joining Fletcher Tilton. He regularly assists clients in the preparation of employment-based and family-based immigrant visa petitions, applications for U.S. lawful permanent residence, and all categories of nonimmigrant visa petitions. He advises in areas including professional and executive employment strategies, complex labor certification matters, immigrant investor petitions, and immigration concerns for international scientists, researchers, athletes, and entertainers. He represents clients in matters before the U.S. Department of Labor, the U.S. Department of Homeland Security, and U.S. Embassies and Consular posts abroad. His practice encompasses a wide range of industries, including information technology services, management consulting, financial services, insurance, energy, and healthcare.

Brian frequently speaks on business immigration topics at global mobility and HR industry conferences, and has published extensively on immigration-related legislation and trends.

Dyann DelVecchio Hilbern is a partner at Seyfarth Shaw LLP. Dyann provides high-level advising and U.S. immigration portfolio management for corporations, educational institutions, and non-profit organizations. Clients describe her as "passionate about her work and compassionate towards the foreign workers' situations." Dyann is also the manager of the Business Immigration Group's EB1 practice team, which prepares priority green card applications for professionals across a variety of disciplines.

A frequent panelist and trainer, Dyann has co-authored a number of articles on immigration law and is often interviewed by the press on issues relating to immigration. She has been active in the area of immigration law for over thirty years, beginning with a position at Boston's Berklee College of Music. As International Student Advisor, she developed the first program of legal services for the college's large international student community and was more recently honored with an award in recognition of her outstanding contributions to the College.

Dyann is a member of AILA and NAFSA: Association of International Educators. She has served on AILA's Department of Labor Liaison Committee, Vermont Service Center Liaison Committee, and Student and Scholars Committee. Dyann is also a featured member of Seyfarth Shaw's rock band, "Bill Early and The Collections."

Julie Galvin has extensive experience advising a wide variety of clients, ranging from non-profit organizations to multinational corporations, regarding all aspects of employment-based immigration, including non-immigrant visa petitions, labor certification applications, preference-based immigrant visa petitions, and regulatory compliance. She also advises musicians, scholars, and educational institutions, as well as families and individuals.

Prior to joining Chin & Curtis, Julie gained over 10 years of experience as Immigration Counsel for a management-side employment law firm and as an Associate at a boutique immigration law firm, where she worked on employment-based and family-based immigration matters, as well as naturalization applications.

Julie earned her J.D. from the Washington College of Law at American University, located in Washington, D.C., where she served on the American University Law Review and was a student attorney in the International Human Rights Law Clinic, where she gained experience in asylum cases. She earned her B.A. from the University of Vermont, with a major in Philosophy and a minor in French. She is a member of the American Immigration Lawyers Association. Outside the office, Julie enjoys reading, yoga, skiing, and spending time with her family.

Practice Pointers for Effective Client Communication in Complex Immigration Scenarios

By Rebecca Leavitt, Esq.

As immigration practitioners, we are often faced with a myriad of challenging, nuanced, and fast-paced situations impacting our foreign national clientele. As immigration counsel, it is our duty to zealously represent the best interests of our clients in an ever-changing legal environment, ensuring sound legal advice is timely provided.

Immigration practitioners face additional challenges in communicating with clients that stem from the nature our foreign national clientele, urgent needs, and at times, heavy caseloads. Model Rules of Professional Conduct mandate that a lawyer shall:

1. Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
2. **Reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
3. **Keep the client reasonably informed about the status of the matter;**
4. **Promptly comply with reasonable requests for information; and**
5. Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.¹

This practice pointer will lay out several tactics and reminders to employ in client communications, ensuring that clients' needs and ethical responsibilities are best met, and assisting in maintaining a positive attorney-client relationship.

Perhaps the simplest way to maintain a positive attorney-client relationship is through respectful and professional communication. There are many basic tactics that should be employed to ensure an attorney's responsibility of maintaining prompt and informed communication to the client is met.

- Know your audience. When communicating to your client about their objectives, options, and other related issues, it is important to be mindful of how information is presented; understand who the audience is and how your communication will benefit or hurt the client relationship. Where appropriate, determine whether more formal or more casual communication will aid the discussion. As many times the client will come from a different cultural background, use clear, precise and succinct language to convey the appropriate information. Knowing your audience will help in determining the appropriate tone for your professional relationship and will ease the communications necessary to

¹ Model Rule of Professional Conduct, Rule 1.4: Communications

fulfill ethical responsibilities associated with keeping clients informed of their legal challenges and opportunities.

- Check before you send. Confirming that your communication contains accurate information will ensure that your client is properly informed and build trust. Even though case volume may be high, and filing deadlines may be approaching, taking an extra moment to review the substance of your communication is paramount. A simple typo can completely change the intended message. For instance, “Your employee may now begin working” has a completely different meaning than “Your employee may *not* begin working.” This example contains a small typo, however, one letter completely changes the intended message, and carries potential consequences to a both a corporate client and foreign national. In addition to the intended message, a minor inaccuracy in client communication can undermine the relationship, and result in diminished trust.
- Responsiveness. Lawyers are obligated to respond to client requests for information about their case in a reasonable time period. Balancing timely, accurate responses against the demands of a complex caseload is difficult, however simple measures can be taken. First, understand the client’s expectations with respect to response times. When building the relationship, mutually determine these expectations. Second, acknowledge receipt of a client request and, if you cannot accurately respond within the expected timeframe, let the client know and reset an appropriate timeframe. While it takes practice and skill, anticipate and address the next question to avoid multiple follow ups. If you will be away from the office, make sure you have set up an out of office message for both your email and phone inbox. Finally, being proactive in case updates will minimize client requests and enhance trust.

When faced with complex legal issues it is important to not lose sight of very simple yet helpful tactics in communicating with clients. By maintaining clear and consistent communication, setting appropriate expectations, and anticipating client concerns, ethical obligations in client communication are easily satisfied even in the most challenging immigration cases.

Knocking Down the Wall, Administrative Litigation

*Moderator: Greg Romanovsky, AILA NE Past Chapter Chair
H. Ron Klasko, AILA Administrative Litigation Task Force, Chair
Trina Realmuto, AIC Directing Attorney*

While this administration's assault on legal immigration continues, suing the government in federal court remains an efficient (and, sometimes, the only) way of challenging restrictive immigration policies. This panel discusses the most recent immigration litigation developments around the country. The article below is the most recent practice advisory on litigating employment-based cases in federal court, published by the American Immigration Council.

Copyright © American Immigration Council. Reprinted with permission.



PRACTICE ADVISORY¹

August 20, 2018

LITIGATION FOR BUSINESS IMMIGRATION PRACTITIONERS

By Leslie K. Dellon²

I. Introduction

Filing suit can be a powerful tool that can prompt U.S. Citizenship and Immigration Services (USCIS) to issue an approval notice soon after the complaint is filed or lead to a judicial decision holding that USCIS was wrong as a matter of law. This Practice Advisory provides information practitioners need to assess whether a lawsuit in federal court is the right option for a client that has reached its limit with USCIS' overly restrictive interpretations of legal requirements, shifting adjudications standards and general lack of transparency in decision-making.

This Practice Advisory addresses federal court challenges to an erroneous business-related USCIS decision under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201, and/or the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361. The APA is the most commonly used cause of action to overturn an agency decision that is contrary to statutes or regulations, as it provides far-reaching injunctive relief. The Declaratory Judgment Act can be used to obtain a court order stating that a particular action by USCIS violates the applicable law or regulations. The Mandamus and Venue Act can be used to obtain an order requiring USCIS to adjudicate a petition or application that has been pending for an unreasonably long time—but not to order the agency to make a particular decision. The Council has additional advisories—referenced and linked to throughout—which expand upon many of the topics discussed here. Attorneys considering federal litigation for the first time are encouraged to review all the relevant advisories.

II. A Solid Administrative Record is a Litigation Prerequisite

Judicial review under the APA generally is limited to the administrative record that was before the agency when it made its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.

¹ Copyright © 2018 American Immigration Council. Click [here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. Practitioners are strongly encouraged to conduct independent research to determine if there have been subsequent developments in the law since the publication date of this practice advisory.

² The author wishes to acknowledge the contributions of Denyse Sabagh of Duane Morris, LLP, Christina C. Haines of Erickson Immigration Group, and Melissa Crow, former Legal Director of the American Immigration Council, to an earlier version of this Practice Advisory, and Emily Creighton and Mary Kenney, who assisted with editing this update.

402, 414, 420 (1971); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review [in an APA suit] should be the administrative record already in existence, not some new record made initially in the reviewing court.”). There are, however, several exceptions to this rule.³

In most cases, though, the court will decide the legality of USCIS’ decision based on the record before the agency. An attorney cannot supplement that record to strengthen a client’s position during litigation. Thus, a solid record in support of the immigration benefit the client seeks is critical. Practitioners should prepare the petition and supporting evidence with an understanding of the statutory and regulatory requirements for the immigrant or nonimmigrant classification or other benefit.

Additionally, the source of the evidence provided will affect the weight the decision maker gives in assessing veracity. The petitioner must present all relevant facts about the petitioner and the beneficiary (in the petition and supporting documentation, which may include a petitioner letter). The attorney then can discuss the law and apply the statutory and regulatory standards to the facts in a separate attorney letter or memorandum.

Read all Notices of Action thoroughly. When responding to a Request for Evidence (RFE), a Notice of Intent to Deny (NOID) or a Notice of Intent to Revoke (NOIR), practitioners must answer each query, either by providing a complete response or stating why a particular query is unwarranted or irrelevant. If USCIS has made a false assumption in its query, such as asking for evidence of recruitment for the job when the petitioner is a multinational company seeking to transfer a manager from its foreign subsidiary, then identify the agency error and re-direct the agency to the proper standard and the evidence that supports petition approval based on the petitioner’s intended employment of the beneficiary. With gaps in the evidence, a court is more likely to find that USCIS’ decision was reasonable. With a thorough response, a petitioner will have a much stronger foundation for demonstrating to the court that USCIS ignored or mischaracterized the evidence.

³ The primary exceptions to this rule are when there is no administrative record for the court to review or the record is insufficient with respect to the claims in the suit. Such an incomplete record may “frustrate effective judicial review,” *Camp*, 411 U.S. at 142-43, and the court may expand review beyond the record or permit discovery. *See also Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *as corrected by* 867 F.2d 1244 (9th Cir. 1989) (court may inquire outside the record when necessary to explain the agency’s action or when the agency has relied on documents not in the record). Additionally, the Ninth Circuit has recognized the following exceptions: 1) if discovery is necessary to determine whether the agency has considered all relevant factors and has explained its decision; 2) if the agency has relied on documents not in the record; 3) when supplementing the record is necessary to explain technical terms or complex subject matter; or 4) when plaintiffs make a showing of agency bad faith. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

III. Deciding Whether to File a District Court Action

Several factors will influence a client's and attorney's decision about whether to challenge an agency decision in federal court. Initially, it is important to review the agency decision to identify the errors that might be challenged. For all denials, attorneys can compare the reasons USCIS asserted to the requirements in the applicable section(s) of the Immigration and Nationality Act (INA) and regulations. Is the decision based on a legal error? Has USCIS tried to impose a requirement that does not exist? For example, did USCIS violate the statute and regulations when it denied an H-1B petition because the agency erroneously decided that the job offered was not in a specialty occupation because there was no "specifically tailored and titled degree program" typically available to enter the field.⁴ Or, is the issue a factual one? For example, has USCIS erroneously stated that the beneficiary does not have the degree required by the employer for an H-1B specialty occupation when a copy of the beneficiary's diploma was submitted with the petition? Finally, was the decision based upon the exercise of discretion? If so, there may be a jurisdictional bar to the court's review under 8 U.S.C. § 1252(a)(2)(B).⁵

Generally, in a mandamus case, there will be no decision to review since the issue usually is the agency's delay in deciding. In such a case, the primary considerations will be the length of time that the agency has delayed and whether it is outside of the normal processing time.

When reviewing the strength of the record presented to USCIS or the legal errors that the agency may have committed, weigh the likelihood of making "bad law" if the court rules against the client. Remember that when a federal court reviews a denial, the court is not deciding whether USCIS made the best decision or the same decision the court would have reached—only whether USCIS' decision was correct legally and whether it acted reasonably in denying the petition based on the evidence presented.

IV. Factors to Consider Before Filing Suit

A. Exhaustion of administrative remedies

Generally, before seeking federal court review of an agency's decision, a party must exhaust all administrative remedies. Otherwise, the court may find that it has no jurisdiction or otherwise refuse to review the decision. For this reason, lawyers often ask whether they must appeal to USCIS' Administrative Appeals Office (AAO) before filing suit in federal court.

If, as usual, the APA is the basis for challenging a denial of an employment-based visa petition, then the answer is "no." The Supreme Court held in *Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993), that in federal court cases brought under the APA, a plaintiff can be required to exhaust only administrative remedies that are mandated by either a statute or regulation—establishing a major exception to the exhaustion requirement. At least two decisions involving the denial of a

⁴ See *Chung Song Ja Corp. v. USCIS*, 96 F. Supp. 3d 1191, 1198 (W.D. Wash. 2015).

⁵ See Section V(A) *infra*. For additional discussion of this provision, see the Council's Practice Advisory, [Immigration Lawsuits and the APA: The Basics of a District Court Action](#), at 8-10 (June 20, 2013).

nonimmigrant employment-based petition concluded, per *Darby*, that an appeal to the AAO is not a prerequisite because there is no statute or regulation mandating an administrative appeal. See *Ore v. Clinton*, 675 F. Supp. 2d 217, 223-24 (D. Mass. 2009) (L-1A petition denial); *EG Enters. v. DHS*, 467 F. Supp. 2d 728, 732-33 (E.D. Mich. 2006) (H-1B petition denial; USCIS agreed in its cross-motion that exhaustion not required).⁶

In recent years, USCIS is more likely to move to dismiss for lack of a final decision (see § IV(B) *infra*), than to claim that the plaintiff failed to exhaust by not appealing to the AAO. However, if the government raises failure to exhaust, practitioners can explain why exhaustion is not required under *Darby*, relying both on the relevant immigration cases and non-immigration cases within the same circuit that have found that the *Darby* exception applies in similar contexts. See the Council's Practice Advisory, [Failure to Appeal to the AAO: Does It Bar All Federal Court Review of the Case?](#) (Sept. 26, 2016) (explaining in more detail the *Darby* holding and citing both immigration and non-immigration cases from different circuits). While the risk of bypassing the AAO appears quite small, there is at least one unreported decision in which the federal district court concluded that the regulation for appeal of an I-140 denial is mandatory and, therefore, the *Darby* exception did not apply. See *ASP, Inc. v. Holder*, No. 5:12-CV-50-BO, 2012 U.S. Dist. LEXIS 188426, *8 (E.D.N.C. Dec. 11, 2012). The decision appears to be an aberration, and its reasoning has not been followed by other courts.⁷

An appeal to the AAO can delay a case considerably, particularly when the result is that the AAO simply rubberstamps the decision below. Another concern is the AAO may affirm the denial on a different ground that would be more difficult to overcome than the original denial.

Despite these concerns, one practical reason to appeal to the AAO is that—unlike in an APA challenge in federal court—a petitioner *can* supplement the record before the AAO. See 8 C.F.R. § 103.3(a)(1)(iii)(C); AAO Practice Manual § 3.8 (“Appellants may . . . submit a supplemental brief or additional evidence.”). When reviewing a denial, practitioners should consider whether

⁶ See also *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (per *Darby*, no statutory or regulatory mandate requiring administrative appeal of spousal immigrant visa petition denial before filing APA action in federal court); *Mantena v. Hazuda*, No. 17cv5142, 2018 U.S. Dist. LEXIS 132826, *10-11 (S.D.N.Y. Aug. 7, 2018) (citing *Darby*, court denied agency request to dismiss by exercising judicial discretion to require exhaustion, after USCIS' second re-opening of employment-based adjustment application denials while suit pending; “it is hornbook law APA claims are not subject to exhaustion requirements unless specifically required by statute.”)

⁷ *ASP* misapplies *Darby* on two grounds. First, the court disregards permissive language in 8 C.F.R. §§ 103.3(a)(1)(iii)(A) (“may seek judicial review”) and 204.5(n)(2) (“right to appeal”). Second, even assuming the regulation mandated an appeal, *Darby* still provides an exception when, as with the I-140 denial in *ASP*, the agency does not stay its decision pending administrative appeal. *Darby*, 509 U.S. at 153. The district court also cites as authority cases that are distinguishable: *Howell v. INS*, 72 F.3d 288, 293 (2d Cir. 1995) (exhaustion required because plaintiff was in deportation proceedings and could renew her adjustment application before the immigration judge); *Oddo v. Reno*, 17 F. Supp. 2d 529, 531 (E.D. Va. 1998), *aff'd without opinion*, 175 F.3d 1015 (4th Cir. 1999) (*dicta* because plaintiff did exhaust, filing suit only after appeal denied at AAO).

additional evidence would significantly improve the likelihood of prevailing in an administrative appeal or in court if the AAO ultimately dismisses the appeal. *See Matter of _____*, ID# 12521 (AAO Sept. 15, 2015) (record, as supplemented on appeal, “now contains sufficient evidence to overcome the basis” for the L-1B petition denial), AILA Doc. No. 15092101 (posted Sept. 21, 2015). If so, this might be a reason to consider an administrative appeal to the AAO.

B. Final Agency Action

The APA also requires that the challenged agency decision be “final.” 5 U.S.C. § 704; *see also Darby*, 509 U.S. at 144 (distinguishing between doctrines of finality and exhaustion of administrative remedies). A decision is final when a “decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” *Darby*, 509 U.S. at 144 (internal citation omitted). In most cases, a USCIS decision denying a petition (or application) will be a final decision under this standard.

However, several courts have held that the agency’s decision was not “final” when there was a pending administrative appeal. In these family-based immigration cases, the courts refused to apply the *Darby* exception where a party pursued an optional administrative appeal to the Board of Immigration Appeals and then also filed an APA action while the administrative appeal remained pending. *See, e.g., Bangura*, 434 F.3d at 501; *Ma v. Reno*, 114 F.3d 128, 130 (9th Cir. 1997); *Naik v. Renaud*, 947 F. Supp. 2d 464, 472 (D.N.J. 2013), *aff’d*, 575 Fed. Appx. 88 (3d Cir. 2014). Presumably, if the party had only filed suit without taking an administrative appeal, the courts in these cases would not have been able to require exhaustion, per *Darby*, since administrative review was optional. Because the administrative review was underway, however, each court dismissed the suit on the basis that there was not yet a “final” agency decision. Applying the same reasoning, a court would likely find that a USCIS decision on an employment-based petition was not final if an AAO appeal was pending at the time an APA suit was filed.

Unlike USCIS, the Department of Labor (DOL) specifies that a failure to timely request administrative review of a labor certification application denial “constitutes a failure to exhaust administrative remedies.” 20 C.F.R. § 656.24(e)(3). DOL also specifies that a timely-filed appeal to the Board of Alien Labor Certification Appeals (BALCA) of the Certifying Officer’s denial makes the denial non-final. *See* 20 C.F.R. § 656.24(e). *Darby* would not provide an exception because DOL regulations mandate administrative review and non-finality while a timely-filed administrative appeal remains pending.

USCIS sometimes reopens a case that it denied while an appeal of the denial is pending in federal court. The agency then argues that the court lacks jurisdiction because the decision is no longer final so the petitioner cannot seek APA review. In an unpublished decision, one appellate court upheld the district court’s grant of summary judgment to USCIS after USCIS *sua sponte* reopened the H-1B petition denial and issued a request for evidence. *See 6801 Realty Co., LLC v. USCIS*, 719 Fed. Appx. 58, 59, 61 (2d Cir. 2018). The court concluded that by requesting more evidence, the reopening “nullified the prior denial and left nothing for the district court to review.” *Id.* at 60.

A few federal district courts have dismissed for lack of jurisdiction complaints challenging H-1B petition denials on USCIS' motion after USCIS reopened and issued a new RFE. *See Utah Life Real Estate Group, LLC v. USCIS*, 259 F. Supp. 3d 1294, 1296, 1299-1300 (D. Utah 2017) (dismissing suit after USCIS issued second RFE after suit filed, petitioner refused to respond or stipulate to litigation stay, and USCIS denied again); *Net-Inspect, LLC v. USCIS*, No. C14-1514JLR, 2015 U.S. Dist. LEXIS 24951, *3-4, *10-11 (W.D. Wash. March 2, 2015) (USCIS issued third RFE thirty days after suit filed); *True Capital Mgmt. v. DHS*, No. 13-261 JSC, 2013 U.S. Dist. LEXIS 87084, *3-4, *8 (N.D. Cal. June 20, 2013) (USCIS issued second RFE after suit filed).⁸ The *Net-Inspect* court acknowledged that its decision "might very well be different" if the agency was found to be avoiding judicial review through "repeatedly reopening" its decision. 2015 U.S. Dist. LEXIS 24951, *17 n.7.

In *Utah Life*, the court held that the APA's finality requirement was jurisdictional and thus it dismissed for lack of subject matter jurisdiction. For this reason, the court also rejected Utah Life's request that it be permitted to amend its complaint to challenge USCIS' second denial of the H-1B petition. *See Utah Life*, 259 F. Supp. 3d at 1299. In contrast, however, a number of courts have held that the APA's finality requirement is *not* jurisdictional or have left the question open.⁹ For instance, in *6801 Realty*, the federal district court denied USCIS' motion to dismiss for lack of subject matter jurisdiction on the ground that the APA's finality requirement was not jurisdictional. *6801 Realty*, 719 Fed. Appx. at 59 n.1. The appellate court declined to resolve the "open question" in the Second Circuit as to whether the APA's finality requirement is jurisdictional. *Id.* This approach allowed the appellate court to review whether the district court correctly decided, as a matter of law, that the decision was no longer final. Without a final decision, the plaintiff would not have a claim that the APA was intended to protect.¹⁰ The District of Columbia Circuit went further, deciding that pursuant to Supreme Court pronouncements, 5 U.S.C. § 704 is not jurisdictional. *See Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) ("We think the proposition that the review provisions of the APA are not jurisdictional is now firmly established.")¹¹

⁸ *See also Shihuan Cheng v. Baran*, CV 17-2001-RSWL-KSx, 2017 U.S. Dist. LEXIS 122696, *3, *19 (C.D. Cal. Aug. 3, 2017) (USCIS issued RFE two months after an immigrant investor filed suit based on adjudication delay of more than two years. Court dismissed for lack of jurisdiction finding delay not unreasonable and finality lacking.)

⁹ *See, e.g., Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 232 (4th Cir. 2008) (assuming, without deciding, that under Supreme Court precedent for determining whether requirements are jurisdictional, the APA finality rule is not); *Trudeau v. FTC*, 456 F.3d 178, 183-85 (D.C. Cir. 2006) (holding that the APA finality requirement is not jurisdictional); *R.I. Dep't of Env'tl. Mgmt. v. United States*, 304 F.3d 31, 40 (1st Cir. 2002) (same); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) (*dicta*, APA finality requirement not jurisdictional). Not all courts have ruled on the issue yet. *See, e.g., Sharkey v. Quarantillo*, 541 F.3d 75, 87-88 (2d Cir. 2008) (finding it unnecessary to resolve the issue in case presented).

¹⁰ *See* § V(D) *infra*, for more information on standing to sue.

¹¹ Prior to 2006, the District of Columbia Circuit repeatedly concluded that the APA review provisions were jurisdictional. *See id.* However, the court's change in position was cemented by *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). While *Arbaugh* did not involve a cause of action under the APA, the Court made clear that lower courts err when they treat statutory

At least one court has held that USCIS has no authority to decide an issue after it is pending with the federal district court, *see Otero v. Johnson*, No. CIV 16-090-TUC-CKJ, 2016 U.S. Dist. LEXIS 151961, *23-25, *35-38 (D. Ariz. Nov. 2, 2016) (USCIS' regulations did not permit the agency to reopen on its own motion after the court had jurisdiction over the denial of an application to adjust status to lawful permanent resident).¹² *See also Mantena*, 2018 U.S. Dist. LEXIS 132826, *17-18 (citing *Otero*, court found USCIS denials of employment-based adjustment applications final, distinguishing *6801 Realty* because USCIS did not identify issues requiring further development or request additional evidence and circumstances "suspect" due to prior re-openings, followed by denials.)¹³

While USCIS does not always reopen a denial after a plaintiff files a federal action, attorneys need to advise their clients of the possibility that they will be back before the agency. If a court decides to dismiss for lack of finality, attorneys should consider asking the court to retain jurisdiction. If the APA's finality requirement is only a statutory limitation on review, then the court could retain the case so that the client can seek relief without re-filing if the agency upholds the denial.¹⁴

restrictions as jurisdictional where Congress has declined explicitly to identify the restrictions as jurisdictional. *Id.*

¹² Although INA § 242(a)(2)(B)(i) bars judicial review of "any judgment regarding the granting of relief under section ...245," a number of courts have held that this prohibition does not apply when the claims do not rest on the exercise of the agency's discretion. These include constitutional questions, questions of law, or challenges to the agency's failure to comply with procedural requirements. *See Mantena v. Johnson*, 809 F.3d 721, 730 (2d Cir. 2015) (procedural requirements not shielded from review); *Ramalingam v. Johnson*, Civ. No. 13-7416 KM, 2016 U.S. Dist. LEXIS 43003, *10-11 (D.N.J. Mar. 30, 2016) (due process challenge to USCIS procedures not barred from review).

¹³ After denying the motion to dismiss, the court stayed the action because it could not provide relief until USCIS resolved an administrative appeal concerning its revocation of a related immigrant visa petition. The adjustment applicant had relied on that petition to "port" to new employment and to provide an earlier priority date for another approved immigrant visa petition filed by the new employer. (The "priority date" refers to the date an immigrant visa number would be available to her and is crucial given the lengthy backlog the applicant faces to adjust her status due to her nationality and visa category). *See id.* at *5-6, *18.

¹⁴ *See Gracious Ark Church v. United States*, No. CV 12-3990 GAF (SSx), 2013 U.S. Dist. LEXIS 192042, *21 (C.D. Cal. May 15, 2013) (Case stayed pending final agency action after court concluded agency action no longer final; AAO *sua sponte* reopened denials of religious worker and spouse's applications to adjust status to lawful permanent resident while cross-motions for summary judgment pending). The plaintiff may need to file an amended complaint if USCIS asserts new reasons to deny rather than simply affirming its prior decision.

C. Timing

When a civil cause of action against the government is not subject to a separate statute of limitations, the general six-year limitation in 28 U.S.C. § 2401(a) applies. Where the issue has arisen, courts have applied the general limit to the APA, which does not have a statute of limitations, including in the immigration law context. *See Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014); *Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2000).¹⁵

V. Preparing the Complaint

A. Jurisdiction

In an APA case for the review of agency action, subject matter jurisdiction is based on 28 U.S.C. § 1331, the “federal question” statute. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).¹⁶ Although the APA does not confer jurisdiction but instead serves as a cause of action (see Section V(C) *infra*), attorneys often list it in the jurisdictional section of a complaint because it also provides a waiver of sovereign immunity that allows a party to sue the federal government over unlawful agency action for non-monetary damages. *See Bowen*, 487 U.S. at 891-92 (undisputed that Congress intended to expand judicial review of agency action by amending § 702 to eliminate sovereign immunity defense). Such a waiver is necessary for the court to exercise jurisdiction. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) (“[S]overeign immunity is jurisdictional in nature.”).

The APA is not available as a cause of action to the extent that another statute precludes judicial review. *See* 5 U.S.C. § 701(a)(1). Since the INA contains provisions that bar judicial review, attorneys should confirm that the client’s claims do not fall within these provisions. The government most frequently asserts the bar on review of discretionary decisions, 8 U.S.C. § 1252(a)(2)(B)(ii). Importantly, most courts have held that statutory eligibility determinations are not discretionary and thus do not fall within § 1252’s bars to review of discretionary decisions.¹⁷ In most employment-based cases, the statutory eligibility requirements for visa classifications are sufficiently specific to overcome this threshold. *See, e.g., Fogo de Chao (Holdings) Inc. v. USDHS*, 769 F.3d 1127, 1138 (D.C. Cir. 2014) (no jurisdictional bar to challenging L-1B visa classification denial because the criteria for L-1B visa determinations are

¹⁵ However, be aware of an exception that imposes a four-year statute of limitations for suits that arise under a statute adopted after December 1, 1990. 28 U.S.C. § 1658; *see Middleton v. City of Chi.*, 578 F.3d 655, 665 (7th Cir. 2009). While this exception would not apply to the APA, which was enacted before 1990, it is unclear whether § 1658 would apply if the APA-based suit challenged conduct as violating a statute enacted after December 1, 1990. In that case, the prudent practice would be to file within four years when possible.

¹⁶ *See also Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988); *ANA International Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004) (“default rule” that agency actions are reviewable under federal question jurisdiction applies in the immigration context).

¹⁷ For more information on jurisdictional concerns regarding an APA suit, see the Council’s Practice Advisory, [Immigration Lawsuits and the APA: The Basics of a District Court Action](#) (June 20, 2013).

laid out in the statute, including specifically a definition of “specialized knowledge”); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (the statute setting forth eligibility requirements for immigrant investor visas provided meaningful standards to review petition denial). In any case, practitioners should always be prepared for the government to file a motion to dismiss for lack of jurisdiction.

In some cases, the mandamus statute, 28 U.S.C. § 1361, which gives a federal court authority to compel a federal agency or officer to perform a nondiscretionary duty owed to the plaintiff, provides an alternative basis for jurisdiction. *See Sawan v. Chertoff*, 589 F. Supp. 2d 817, 822 (S.D. Tex. 2008); *Kim v. USCIS*, 551 F. Supp. 2d 1258, 1261-62 (D. Colo. 2008); *Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1161 (N.D. Cal. 2007). In cases involving delay, it makes sense to include both an APA and mandamus claim, and then also to include the mandamus statute as a basis for jurisdiction. However, there is “little practical difference” as to whether jurisdiction rests on the federal question statute or mandamus, assuming that the relief requested under the APA and mandamus statute is identical—namely, to compel agency action that has been unreasonably denied. *See Dong*, 513 F. Supp. 2d at 1161-62 (N.D. Cal. 2007) (citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997)).¹⁸

In contrast, the Declaratory Judgment Act, 28 U.S.C. § 2201, is a procedural statute that does not confer jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *see also Fleet Bank, Nat’l Ass’n v. Burke*, 160 F.3d 883, 886 (2d Cir. 1998); *Missouri ex rel. Mo. Highway and Transp. Comm’n v. Cuffley*, 112 F.3d 1332, 1334 (8th Cir. 1997). As such, the Declaratory Judgment Act provides for relief rather than for jurisdiction. The jurisdictional basis for a claim under the Declaratory Judgment Act, as under the APA, is 28 U.S.C. § 1331.

B. Venue: Where to File

APA and mandamus actions arising from employment-based immigration petitions (or applications) must be filed in federal district court. Whether a case is filed in the correct district court depends upon venue—the location over which the court has jurisdiction. Venue for challenging federal agency action is based on 28 U.S.C. § 1391(e), which provides that a suit against the federal government or a federal official acting in his or her official capacity can be brought in any judicial district where (1) a defendant resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or (3) the plaintiff resides if no real property is involved in the action.¹⁹ For a business that is legally able to file suit in its own name, the residence would be its principal place of business. 28 U.S.C. § 1391(c). *See Blacher v. Ridge*, 436 F. Supp. 2d 602, 608 (S.D.N.Y. 2006).

¹⁸ Relief is discussed at Section VI *infra*.

¹⁹ Be aware that even when venue is proper, a court may grant a motion to transfer “in the interest of justice” to any jurisdiction where the suit “might have been brought.” 28 U.S.C. § 1404(a). *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981) (“Congress enacted § 1404(a) to permit change of venue between federal courts.”).

C. Causes of Action

The APA is the most common statutory basis for challenging the denial of an employment-based petition. *See, e.g., Shalom Pentecostal Church v. Acting Sec’y USDHS*, 783 F.3d 156 (3d Cir. 2015) (APA challenge to denial of special immigrant religious worker visa classification); *Spencer Enters., Inc. v. United States*, 345 F.3d 683 (9th Cir. 2003) (APA challenge to denial of immigrant investor visa classification); *Chung Song Ja Corp. v. USCIS*, 96 F. Supp. 3d 1191 (W.D. Wash. 2015) (APA challenge to denial of specialty occupation visa classification); *Perez v. Ashcroft*, 236 F. Supp. 2d 899 (N.D. Ill. 2002) (APA challenge to denial of nonimmigrant religious worker visa classification). The APA creates a “cause of action” because it provides a basis to sue a federal agency where Congress has not provided a basis elsewhere in the law. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997). Specifically, the APA provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702. The APA defines “agency action” to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13).

Although the APA does not explicitly provide for a private right of action, it “permits the court to provide redress for a particular kind of ‘claim.’” *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 188 n.15 (D.C. Cir. 2006). Accordingly, the Supreme Court has repeatedly held that a separate indication of Congressional intent of the right to sue is not necessary. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (finding that a private right of action is not necessary because review is available under the APA).

The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361, may provide an additional cause of action. Congress has given federal district courts the authority to compel a federal officer or employee, including those who work for federal agencies, to carry out a non-discretionary duty clearly owed to the plaintiff, who has no other adequate remedy. *See Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Since mandamus only applies to actions that *must* be performed and do not require the exercise of discretion, courts often describe the duty as “ministerial.” *See Johnson v. Reilly*, 349 F.3d 1149, 1154 (9th Cir. 2003).²⁰

²⁰ Even when an agency is not subject by law or regulation to a specific deadline, the reasonableness requirement of the APA, 5 U.S.C. § 706(1), can be asserted. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189-90 (10th Cir. 1999); *Kim*, 551 F. Supp. 2d at 1263. For more information about mandamus suits, see the Council’s Practice Advisory, [Mandamus Actions: Avoiding Dismissal and Proving the Case](#) (March 8, 2017).

D. Parties

1. Plaintiffs

In all federal court litigation, Article III of the Constitution requires that a plaintiff have standing, or legal capacity, to sue. To this end, a plaintiff must have suffered 1) an “injury in fact,” *i.e.*, harm to a legally protected interest that is “concrete and particularized” and “actual or imminent”; 2) “fairly traceable to” the challenged conduct; and 3) “likely to be redressed” by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). Several courts have held that beneficiaries of employment-based visa petitions satisfy this test. *See, e.g., Shalom Pentecostal Church*, 783 F.3d at 162-63; *Patel v. USCIS*, 732 F.3d 633, 637-38 (6th Cir. 2013); *but see id.* at 642 (Dougherty, Cir. J., dissenting) (arguing that beneficiary failed to show necessary redressability because he could not get an approved I-140 unless the employer first obtained a labor certification from DOL, neither of which were parties).

For APA claims, a plaintiff also must establish that her claim falls within the relevant “zone of interests.” As discussed above, the APA provides that a person who has suffered a “legal wrong” or been “adversely affected or aggrieved by” agency action within the meaning of a relevant statute is entitled to judicial review. 5 U.S.C. § 702. The Supreme Court has interpreted this language to require a showing that the plaintiff’s claim falls within the “zone of interests” that the statute was intended to protect and has suffered injuries “proximately caused” by the alleged statutory violation. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388, 1390 (2014) (internal citation omitted).²¹

To fall within the “zone of interests,” the plaintiff’s claims must be among those the statute “arguably” was intended to protect or regulate—a broader category than those Congress specifically intended to protect. *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Lexmark*, 134 S. Ct. at 1388-89 (internal citations omitted); *see Clarke v. Secs. Indus. Ass’n*, 479 U.S. 388, 399-400 (1987) (“[T]here need be no indication of congressional purpose to benefit the would-be plaintiff”). In the APA context, the test is not “especially demanding,” since the “benefit of any doubt goes to the plaintiff” and the APA has “generous review provisions.” *Lexmark*, 134 S. Ct. at 1389 (internal citations omitted). The zone of interests test would preclude an APA claim “only when a plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be

²¹ Until recently, the “zone of interests” also was considered to be jurisdictional and often was characterized as “prudential standing.” *See Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199, 2210-11 (2012). While explicitly citing to *Match-E-Be-Nash-She-Wish Band* for the application of the zone of interests test in the APA context, the Supreme Court in *Lexmark* rejected the “prudential standing” label. *See Lexmark*, 134 S. Ct. at 1387, 1389. The Court further indicated that the zone of interests test is not jurisdictional since whether a party has a valid cause of action is a question of the court’s “statutory or constitutional power to adjudicate the case” and not of subject matter jurisdiction. *Id.* at 1387 n.4 (emphasis in original, internal citations omitted). Whether analyzed as a jurisdictional or a substantive issue, the test is applied as described above.

assumed that Congress authorized that plaintiff to sue.” *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2210) (internal citation and quotations omitted).

Normally, the plaintiff in a suit challenging the denial of an employment-based visa petition in federal court is the petitioning employer. At the administrative level, a regulation bars an appeal by a beneficiary for purported lack of standing. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B).²² However, this regulation does not apply to the standing analysis in a federal court case and some noncitizen beneficiaries have brought successful challenges to denials of employment-based visa petitions.

Courts that have ruled favorably have held that a beneficiary of an employment-based immigrant visa petition (Form I-140) is within the zone of interests of the applicable sections of the INA and thus has standing to sue to challenge the petition denial. *See Patel v. USCIS*, 732 F.3d at 637 (beneficiary has standing to challenge I-140 denial because his interest in receiving visa places him within the zone of interests); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986) (holding that where DOL has certified that the employment of the foreign worker would have no adverse impact on U.S. workers and the prospective employer had filed the I-140, then the beneficiary has an interest in the visa classification.)²³ *See also Shalom Pentecostal Church*, 783 F.3d at 164 (noting that for various reasons special immigrant religious workers have an even greater interest in the petition than foreign nationals in some of the other employment-based categories). *But see Vemuri v. Napolitano*, 845 F. Supp. 2d 125, 131-32 (D.D.C. 2012) (beneficiary not within the zone of interests because his interests were “inconsistent with” congressional intent in protecting U.S. workers with the labor certification requirement applicable to his employment-based visa category); *Pai v. USCIS*, 810 F. Supp. 2d 102, 107, 111 (D.D.C. 2011) (beneficiary abroad lacked concrete injury because uncertain when/whether could enter the United States to work for the petitioner; not within the zone of interests because Congress intended that the labor certification requirements applicable to her employment-based visa category primarily protect “American labor” and protect employers’ right to hire foreign workers if no qualified/available U.S. workers.)

²² In November 2017, USCIS created a limited exception to its regulatory prohibition against the participation of beneficiaries in administrative proceedings involving petitions filed by employers. *See Matter of V-S-G, Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0149-Matter-of-V-S-G-Inc.-Adopted-Decision.pdf>; *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G, Inc.* (“VSG PM”), PM-602-0152 (Nov. 11, 2017), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0152-Guidance-Beneficiary-Standing-Matter-of-V-S-G.pdf>. USCIS now will give notice of its intent to revoke or notice of revocation of an I-140, if a beneficiary previously submitted a porting request which USCIS “reviewed and favorably adjudicated.” *See VSG PM, id.* at 9, revision to AFM, ch. 20.3(b), (b)(1).

²³ For practitioners in a circuit where the issue of beneficiary standing has not been decided, it may be helpful to draw analogous arguments from cases where the courts have held that beneficiaries of family-based visa petitions are within the “zone of interests.” *See, e.g., Bangura*, 434 F.3d at 499-500; *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998).

With respect to the revocation of a previously-approved employment-based immigrant visa petition (I-140), courts have held that the beneficiary falls within the zone of interests and thus has standing to sue over USCIS' failure to comply with procedural prerequisites for revocation. *See, e.g., Mantena v. Johnson*, 809 F.3d 721, 731-32 (2d Cir. 2015) (I-140 beneficiary who "ported" to new employer has a statutory interest in receiving notice (either to her or her new employer) of USCIS' intent to revoke the petition); *Kurapati v. USBCIS*, 775 F.3d 1255, 1261 (11th Cir. 2014) (per curiam) (beneficiaries of an approved I-140 (not limited to only workers who "port") have standing because of their statutory interest in receiving an immigrant visa) (citing *Patel*, 732 F.3d at 636-38). *See also Musunuru v. Lynch*, 831 F.3d 880, 888, 890-91 (7th Cir. 2016) (beneficiary had standing to raise pre-revocation procedural claims, but only his current employer was entitled to notice).

Reported cases addressing whether beneficiaries of employment-based nonimmigrant petitions have standing are scarce. At least one court found that beneficiaries of H-1B visa petitions have standing because they were within the statute's zone of interests. *Tenrec, Inc. v. USCIS*, No. 3:16-cv-995-SI, 2016 U.S. Dist. LEXIS 129638, *21-22 (D. Or. Sept. 22, 2016) (H-1B petition beneficiaries have constitutional standing and are within the zone of interests because approval gives them "the right to live and work in the United States and imposes obligations such as complying with "extensive regulations" on their conduct; they also have the potential for future employment with a new petitioner). Still another court found that an L-1A petition beneficiary had standing because of the harm he would suffer from a denial of the petition. *Ore*, 675 F. Supp. 2d at 223 (L-1A petition beneficiary had constitutional standing because he would benefit from being able to enter the United States to work, which the petition denial harmed, and the court could redress).

However, other courts have found that beneficiaries of nonimmigrant visa petitions do not have standing. *See, e.g., Commonwealth Utils. Corp. v. Johnson*, 245 F. Supp. 3d 1239, 1255-58 (N. Mar. I. 2017) (CW-1 petition beneficiaries are not within the zone of interests because nothing in the law indicates congressional intent authorizing them to challenge the agency's petition selection process; they have no right to be admitted to this U.S. territory to work temporarily); *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348, 368 (D.D.C.) (H-2A shepherders not within the zone of interests because congressional intent was to protect U.S. workers), *modified*, 31 F.R.D. 3 (D.D.C. 2016);²⁴ *Cost Saver Mgmt., LLC v. Napolitano*, No. CV 10-2105-JST, 2011 U.S. Dist. LEXIS 156096, *11-12 (C.D. Cal. June 7, 2011) (L-1A petition denial did not injure beneficiary outside the United States because only the prospective employer had a legally protected interest in the petition).

²⁴ The district court concluded it was bound by *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014), which held that Congress clearly intended to protect U.S. workers from being adversely affected by the employment of H-2A workers. *Id.* at 368. (The court granted reconsideration as to the plaintiff association's standing to sue on its members' behalf because it had U.S. worker members, specifically lawful permanent residents. *See* 31 F.R.D. at 7-8.) But there were no H-2A worker plaintiffs in *Mendoza*, and their interests are not mutually exclusive of U.S. workers' interests. *See Tenrec*, 2016 U.S. Dist. LEXIS 129638, *25 ("The D.C. Circuit did not, however, find that the INA's H-2A provisions were *only* concerned with American workers.") (Emphasis in original).

A few courts have held that the beneficiary of a labor certification application has standing. *See De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (finding standing where there was no statutory indication that Congress intended to preclude beneficiaries from suing; but affirming petition denials because employers did not comply with DOL review requirements); *Stenographic Machines, Inc. v. Reg'l Adm'r Employment & Training*, 577 F.2d 521, 528 (7th Cir. 1978) (noting that the test is whether plaintiff is within the zone of interests to be *protected or regulated*, and finding that beneficiary satisfied both) (emphasis added).²⁵ In so holding, the Seventh Circuit emphasized that the test could be met by showing that the plaintiff fell within the zone of interests either “protected” or “regulated” by the statute. *Id.* (citing *Data Processing*, 397 U.S. at 153).

Even though a beneficiary may be found to have standing to sue, he or she nevertheless may lose an appeal if the visa category requires continued sponsorship, but the employer (or prospective employer) is no longer committed to hiring the beneficiary. Since an I-140 beneficiary who has “ported” to new employment does not require the petitioning employer’s continued support, the beneficiary’s independent interest in the approved I-140 is easier to establish in these cases.

2. Defendants

The APA specifies that an action seeking mandatory or injunctive relief “shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.” 5 U.S.C. § 702. Accordingly, an APA action would name as a defendant the specific individual within DHS who is authorized to carry out any injunction or other mandatory order of the court. In the case of visa petition denials, this individual usually would be the Director of USCIS.²⁶ Similarly, a mandamus action could name the official with ultimate authority over the action that the suit seeks to compel (such as, for example, the Director of USCIS), as well as the director of the particular office responsible for taking the action. In both types of cases, the defendants are named in their official capacities.

VI. Relief

A. Non-Monetary Damages

A prevailing party in an APA or mandamus action does not receive money damages. The relief sought will depend upon the nature of the claim. If the USCIS denial was wrong as a matter of law, the court can vacate the denial and approve the petition. If the challenge is to USCIS’

²⁵ As these decisions predate *Lexmark*, 134 S. Ct. at 1386-89, they discuss whether the beneficiaries had “prudential standing.” *See* n.21, *supra*. They also predate the current system for permanent employment certification. *See* 20 C.F.R. Part 656. However, the regulatory change in the certification process does not affect whether the beneficiary’s interest falls within the statute’s zone of interests.

²⁶ Some attorneys also name the Director of the Service Center who issued the denial. For further information on who should be named as defendants, see American Immigration Council and National Immigration Project of the National Lawyers Guild Practice Advisory, [Whom To Sue and Whom To Serve in Immigration-Related District Court Litigation](#) (May 13, 2010).

findings of fact or application of the law to the facts, then the court can remand with specific instructions as to how the agency must correct its errors. If mandamus is sought, the complaint should make clear the duty that the court should order USCIS to perform. If applicable, a complaint should include a request for reasonable attorney’s fees under the Equal Access to Justice Act²⁷ and a “catch all” provision, asking the court to order any other relief that the court deems appropriate.

B. Standard of Review

The standard applied by the court can be critical in a case; among other things, it will determine the level of deference that the court gives to the agency’s interpretation of applicable statutes or regulations. While the relevant standard of review can be specified in a complaint, parties most often urge the court to apply a particular standard in their briefs filed in support of summary judgment.

The applicable standard of review under the APA with respect to factual findings and application of the law to the facts depends upon whether agency action is taken after a formal hearing on the record. *See* 5 U.S.C. § 706(2)(E). Since USCIS’ denial of an employment-based petition does not involve a formal hearing, the standard of review should be whether the agency’s decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Under the “arbitrary and capricious” standard, the court reviews whether an agency “articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). *See also Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985, 996-97 (S.D. Ohio 2012) (USCIS made “inexplicable errors” constituting a “litany of incompetence that presents fundamental misreading of the record...” and thus failed to articulate “an untainted, satisfactory explanation for the denial that rationally connected the facts to the decision”).

However, some courts describe the standard as whether an agency’s findings are supported by “substantial evidence”—which is the standard when the agency decision follows a formal hearing on the record. *See* 5 U.S.C. § 706(2)(E); *Family Inc. v. USCIS*, 469 F.3d 1313, 1315-16 (9th Cir. 2006) (USCIS’ finding that the beneficiary was not engaged in primarily managerial duties, and thus not eligible for a multinational manager classification, “is supported by substantial evidence.”)

Some federal circuit courts have held that there is not much difference between these two standards. *See, e.g., ASSE Int’l, Inc. v. Kerry*, 803 F.3d 1059, 1071 (9th Cir. 2015) (defining and comparing the two standards); *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (“the distinction between the substantial evidence test and the arbitrary or capricious test is ‘largely semantic’”) (citations omitted). Under the “substantial evidence” standard, the court is reviewing whether, based on the record before the agency, a reasonable fact finder would be compelled to reach a different result. *See Ursack, Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 958 & n.4 (9th Cir. 2011) (arbitrary

²⁷ *See* Section VI(C) *infra*.

and capricious standard “incorporates” substantial evidence standard, so use substantial evidence standard to review informal agency proceedings); *Family Inc.*, 469 F.3d at 1315. *See also Fogo de Chao (Holdings)*, 769 F.3d at 1147 (substantial evidence standard “not boundless,” but agency not allowed to “close its eyes to on-point and uncontradicted record evidence” without explanation).

When reviewing the agency’s factual findings, a federal court is not acting as a fact finder itself. “[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The ‘entire case’ on review is a question of law.” *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (footnote and citation omitted).

In contrast, a federal court exercises de novo review under the APA over purely legal issues. *See Wagner v. NTSB*, 86 F.3d 928, 930 (9th Cir. 1996). One example of an error of law would be USCIS’s application of an incorrect standard of proof. USCIS is supposed to apply the “preponderance of the evidence” standard of proof in deciding whether a party has submitted sufficient proof of eligibility for the visa classification. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (noting that preponderance of the evidence is the standard of proof in administrative immigration proceedings unless a different standard is specified by law); *see also* USCIS Adjudicator’s Field Manual (AFM), ch. 11.1(c). To satisfy the “preponderance” standard, a petitioner or applicant must show that it is “more likely than not” a claim is true based on “relevant, probative and credible evidence.” *Matter of Chawathe*, 25 I&N Dec. at 376; AFM ch.11.1(c). If USCIS erroneously held a petitioner or applicant to a higher standard, he or she may have a strong basis for arguing that the agency erred as a matter of law and the court would review this issue de novo.

Where the issue involves the interpretation of a statute or regulation, the first step is for the court to consider the statutory or regulatory language. Where the language is plain, the court is bound to implement it as written. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (explaining deference with respect to agency interpretation of a statute); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (explaining deference with respect to agency interpretation of a regulation). Where the language is ambiguous, the court only can defer to the agency’s interpretation if it is reasonable and if such interpretation falls within the authority Congress gave to the agency. *Id.* at 843-44. In general, courts are more deferential to agency interpretations issued through a formal binding rule, such as a regulation or a precedent decision. *See generally United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

In contrast, courts are less deferential to agency actions that are not formal, binding statements of the agency’s interpretation of the law. *See generally Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In such cases, the level of deference depends upon “the thoroughness evident in [the agency’s] consideration [of the issue], the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* *See also Fogo de Chao (Holdings)*, 769 F.3d at 1136 (finding USCIS’ interpretation of its specialized knowledge regulation did not merit deference, in part, because the regulation “largely parrots” the statute).

As noted, courts must consider the consistency of an agency’s position. Where an unexplained, abrupt change in policy has occurred, a court may find the change arbitrary and capricious, and thus not entitled to deference. A new agency policy may be arbitrary and capricious if it represents an abrupt change in an agency’s pattern of decision-making and is adopted without an adequate explanation of its rationale. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (finding that in administrative rulemaking, agency must give adequate reason for changing its position, particularly when affected parties have substantial reliance interests in the prior position); *Davila-Bardales v. INS*, 27 F.3d. 1, 5 (1st Cir. 1994) (holding that BIA’s change of position, even from decisions not formally designated as precedent, which court described as a “zigzag course,” is not permissible where “the agency has failed to explain why it is changing direction...”); *Omni Packaging, Inc. v. USINS*, 733 F. Supp. 500, 504 (D.P.R. 1990) (in denying immigrant visa petition, INS failed to satisfactorily explain why beneficiary was not a manager, when the agency previously approved an initial nonimmigrant petition and extensions as a manager). *See also INS v. Yang*, 519 U.S. 26, 32 (1996) (“If an agency announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned.”). Thus, in reviewing any decisions that apply a new policy, a court will have to consider whether the abrupt policy change was rationally explained.

C. Attorneys’ Fees under the Equal Access to Justice Act

While a request for attorneys’ fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq.*, should be listed in the complaint as part of the relief sought, practitioners must file a separate motion for fees and costs with the court within the statutory deadline (unless the parties settle the fee issue). The following are the general requirements for recovering fees and must be included in the motion:

- A showing that the client is the prevailing party, *i.e.*, that the party was awarded some relief by the court. 28 U.S.C. § 2412(d)(1)(A); *Buckhannon Board of Care & Home Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001).²⁸ Examples would include:
 - Enforceable judgment on the merits.
 - Consent decree enforceable by the court in which the government agrees to stop the alleged illegal activity, even without an admission of guilt or wrongdoing.
 - Order granting mandamus to adjudicate application to adjust status to lawful permanent residence.
- A showing that the client meets the “net worth” requirements. 28 U.S.C. § 2412(d)(2)(B).
 - For an individual, net worth cannot exceed \$2 million when suit filed.

²⁸ While *Buckhannon* did not involve EAJA, it applies to EAJA motions. *See Aronov v. Napolitano*, 562 F.3d 84, 89 (1st Cir. 2009) (en banc) (“*Buckhannon* sets the minimum standards for prevailing party status under the EAJA.”).

- For an owner of an unincorporated business, a partnership or a corporation, with certain exceptions, net worth cannot exceed \$7 million and cannot have more than a maximum 500 employees when suit filed.
- A showing that the government's position, either pre-litigation or during litigation, was not substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (holding that government's position must be reasonably based in law and fact); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (recognizing court's obligation to consider both the underlying agency action and the agency's litigation position).
- A showing that there are no special circumstances to make an award unjust. 28 U.S.C. § 2412(d)(1)(A). The burden of proof is on the government to establish the existence of special circumstances. *United States ex rel. Wall v. Circle C Constr., LLC*, 868 F.3d 466, 471 (6th Cir. 2017).
- A statement that includes the total amount of fees and costs requested, accompanied by an itemized account of the time spent and rates charged. Attorneys must take the time to prepare contemporaneous time records, which describe the work accomplished and the cost incurred. Attorneys also can submit time records for law clerks and paralegals.

Practitioners also need to have a written assignment of fees agreement with the client and, if there are co-counsel, a separate agreement on how the fees will be allocated if awarded by the court or in a settlement agreement. The best practice would be to enter into these agreements at the same time the engagement letter is signed. Without a fee assignment agreement, EAJA fees will belong to the client. *See Astrue v. Ratliff*, 560 U.S. 586, 596-97 (2010). Finally, motions for fees and costs under EAJA must be filed within 30 days of the entry of final judgment. *See* 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G).²⁹

VII. Conclusion

Federal court litigation is an important tool in reaching the goal of more consistent, less restrictive agency decisions. In particular, federal court litigation is an important way to check the agency's misapplication of the law, which happens all too often in immigration cases. Any attorney who would like to discuss the viability of a federal court challenge in an employment-based immigration case may contact the American Immigration Council at clearinghouse@immcouncil.org.

²⁹ For more information on the EAJA requirements, see American Immigration Council and National Immigration Project of the National Lawyers Guild Practice Advisory, [Requesting Attorneys' Fees Under the Equal Access to Justice Act](#) (June 17, 2014).

Interagency Panel – Agencies within the Department of Homeland Security

Anthony Drago, Jr., Esq.

The Homeland Security Act of 2002¹ created the U.S. Department of Homeland Security (DHS). The DHS agencies responsible for implementation and execution of U.S. Immigration law under the Immigration and Nationality Act (INA) remain unchanged. However, the missions of each one: U.S. Citizenship and Immigration Services (CIS); U.S. Immigration and Customs Enforcement (ICE); and U.S. Customs and Border Protection (CBP) have changed drastically under the current administration in Washington, DC, and the changes have been constant. This practice pointer provides a general overview of each government agency represented on the Local Interagency Panel.² The practice pointer will also touch on issues within the purview of each agency affected by the drastic changes in policy being instituted by the current administration.

I. OVERVIEW: U.S. DEPARTMENT OF HOMELAND SECURITY

The creation of DHS involved the merger of 22 government agencies into one cabinet level agency. Understanding the roles and functions of each agency under DHS is essential to an effective immigration practice. Furthermore, adapting to the changing policies within each agency under the Trump administration, while daunting, is essential to survival in the current political climate. In order to effectively represent clients, attorneys must know the specific role of each agency and how that role is constantly being adjusted. By the time attendees of the AILA NE Conference read this article, the practices and policies of each agency will differ in some way from those in existence at the time this article was written. Attendees are reminded that diligent review of the changes being implemented by each agency is critical to effectively represent non-citizens.

II. U.S. CITIZENSHIP AND IMMIGRATION SERVICES (CIS)

The CIS is the agency responsible for adjudication of applications for immigrant and non-immigrant status in the United States. The CIS also adjudicates applications for asylum and ensures the proper operation of the electronic employment verification system known as E-Verify. The CIS Mission Statement noted on its website states:

U.S. Citizenship and Immigration Services administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.

¹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

² The U.S. Department of Justice, the Department of State and the Executive Office for Immigration Review are also engaged in immigration matters, but these agencies are not represented on the interagency panel or discussed in this practice pointer.

The most significant difference in this agency under the current administration is the constant change in adjudication methods and policy, all which seemingly stem from President Trump's "Buy American and Hire American" Executive Order, dated April 18, 2017. The Executive Order states it will create higher wages and employment rates for U.S. workers and protect their economic interests by rigorously enforcing and administering our immigration laws. It also directs DHS, in coordination with other agencies, to advance policies to help ensure H-1B visas are awarded to the most-skilled or highest-paid beneficiaries. Whether the stated purpose of the executive order comes to fruition remains to be seen. Nevertheless, by using policy memos the CIS has seriously altered administration of the INA in many areas.

To say that the CIS is working on a combination of rulemaking, policy memoranda, and operational changes to implement the Buy American and Hire American Executive Order is an understatement. It is abundantly clear that the current administration is using all tools in its power to reduce immigration in this country and to discourage employers from hiring non-U.S. Citizens.

On a national level this agency continues to insulate itself from the general public through use of customer service by phone using call centers rather than permitting direct contact with adjudicators. Direct liaison between AILA and this agency on the national level is non-existent and policy changes under the current administration have been dramatic. Thus, the workload on this agency and the litigation initiated by attorneys based on dubious adjudication policies that diverge from the INA continue to increase.

The CIS continues to use a lockbox system to accept application filings from around the country then distributes its work load between service centers. As noted on the CIS website (www.uscis.gov) the Service Center Operations Directorate (SCOPS) has five service centers that process and adjudicate certain immigration applications and petitions. Service centers do not provide in-person services, conduct interviews, or receive walk-in applications, petitions, or questions. They work only on certain applications or petitions that customers have mailed, filed online, or filed with a USCIS Lockbox. The five service centers are the:

- California Service Center
- Nebraska Service Center
- Potomac Service Center
- Texas Service Center
- Vermont Service Center

In 2001 the National Benefits Center (NBC) was founded in Lee's Summit, Missouri and was originally called the Missouri Service Center (which is why receipt notices from the NBC begin with the letters "MSC"). The NBC's primary mission is to prepare applications for adjudication that require an interview at a USCIS Field Office. Work done by the NBC includes conducting background and security checks and reviewing the evidence an applicant submits to support their eligibility for the benefit. The National Benefits Center (NBC) is not a SCOPS service center.

Prior to October, 2017, local CIS field officers were responsible for adjudication of family based immigrant visa petitions, most non-business based applications to adjust status, applications for

naturalization and other applications which required in person interviews. Effective October 1, 2017, the current administration required the CIS to interview all employment based applications to adjust status and all refugee/asylee relative petitions (Form I-730, Refugee/Asylee Relative Petition) for beneficiaries who are in the United States and are petitioning to join a principal asylee/refugee applicant.³ Because of this policy change local CIS offices have been inundated with thousands of interviews that were not required under the previous administration. Nevertheless, offices within District 1 have managed the additional workload very well. In fact, on a local level the many changes in policy have not altered the manner in which offices within District 1 conduct interviews.

In District 1, the CIS has offices located in Portland, Maine; Bedford, New Hampshire; St. Albans, Vermont; Johnston, Rhode Island; Lawrence, Massachusetts and Boston, Massachusetts. Appointments at these offices can be made through the InfoPass system, but changes in that system are on the horizon. Information on the location and address of each office can be obtained on the CIS website located at www.uscis.gov.

One of the many notable policy changes under the current administration is the CIS policy memorandum that supersedes and rescinds prior guidance on providing deference to prior determinations of eligibility in the adjudication of petitions for extension of nonimmigrant status, including rescinding guidance from 2004 and 2015.⁴ According to the CIS, changes to its policies “drive our benefit and services decisions and ensure that our guidance to USCIS officers who make those decisions reflects our agency’s mission, and strategic vision. These policies also greatly affect our interaction with USCIS’ diverse stakeholder community.” The validity of this commentary is questionable given the clear anti-immigrant policies of the Trump administration.

Updates on new policies initiated by the CIS can be found at:
<https://www.uscis.gov/policymanual/HTML/PolicyManual-Updates.html>

The full policy manual can be found at:
<https://www.uscis.gov/policymanual/HTML/PolicyManual.html>
Policy memos can be found here: <https://www.uscis.gov/legal-resources/policy-memoranda>

The CIS continues to have broad discretion to adjudicate applications and is also bound by the constant changes to its policies as set forth in the President’s Executive Orders and Proclamations. Immigration attorneys are advised to review changes made by this administration on the CIS website and through AILA’s resources in order to keep up with the frenetic pace of change. Immigration attorneys should expect more drastic policy changes from the CIS in the future.

³ See AILA Document No. 17082900. The CIS noted that the change in policy complies with Executive Order 13780, “Protecting the Nation From Foreign Terrorist Entry Into the United States,” and is part of the agency’s comprehensive strategy to further improve the detection and prevention of fraud and further enhance the integrity of the immigration system.

⁴ See AILA Doc. No 17102461.

III. U.S. CUSTOMS & BORDER PROTECTION (CBP)

With more than 60,000 employees, CBP is one of the world's largest law enforcement organizations and is charged with keeping terrorists and their weapons out of the U.S. while facilitating lawful international travel and trade. CBP employees are primarily comprised of former employees from the U.S. Border Patrol, the U.S. Customs Service, the former U.S. Immigration and Naturalization Service, and the U.S. Department of Agriculture.

CBP is responsible for monitoring and controlling all land and air ports of entry to the United States which includes securing and facilitating trade and travel while enforcing U.S. laws and regulations such as immigration, agriculture, and drug laws. CBP has expertise in preventing the introduction of harmful pests into the United States and recognizing and preventing the entry of organisms that could be used for biological warfare or terrorism. CBP is also responsible for the inspection and admission of all foreign nationals seeking to enter the United States, but immigration issues are a small part of the agency's mission. According to its website, the agency's mission is "to safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by enabling legitimate trade and travel."

CBP officers must inspect and admit non-U.S. Citizens in accordance with the statutory requirements under the INA at all ports of entry to this country. CBP Officers have broad powers to determine whether non-U.S. Citizens should be admitted to this country or whether their admission should be denied or deferred pending further investigation. CBP officers are also permitted to arrest and detain non-citizens and to issue Notices to Appear thereby referring individuals to the Immigration Court for removal proceedings.

Non-citizens arriving at U.S. borders are not legally entitled to representation. Therefore, non-citizens can experience a variety of scenarios at U.S. borders in regard to their admissibility to this country. These individuals must prove their admissibility to a CBP officer and need to understand that criminal and immigration history is a critical issue during the admission process.

One current practice of CBP that has garnered national attention is instituting a line of questioning of foreign nationals regarding the use of marijuana. Although medicinal and recreational marijuana use is becoming legalized in many states and countries around the world, violation of the controlled substance act remains a crime under federal law. As such, CBP officers can refuse admission to this country of any non-citizen who admits to using marijuana. Laws regarding this issue will continue to evolve as marijuana use becomes legalized in various states and countries.

CBP has also become more vigilant at the borders in terms of the search of electronic devices of travelers including both U.S. and non-US citizens. The U.S. government reported a major increase in the number of electronic media searches at the border from 4,764 in 2015 to 23,877 in 2016.⁵ Pursuant to its broad authority to inspect and admit all entrants to the U.S. at ports of

⁵ Gillian Flaccus, *Electronic media searches at border crossings raise worry*, Associated Press (Feb. 18, 2017), *available at*

entry, CBP officers may attempt to view content stored on phones, laptops, and other portable electronic devices. On many occasions CBP officers have examined electronic communications, social media postings, and ecommerce activity by obtaining social media identifiers or handle after confiscating electronic devices from a traveler. This practice will most likely continue under the current administration and future administrations. Until such time as the Courts weigh in on the actual rights of travelers seeking to enter the United States it should be expected that in-depth searches of electronic devices at U.S. borders will continue to expand.

The primary port for CBP in the New England area is at Boston Logan International Airport. The CBP office at Logan International Airport, Terminal E in East Boston, MA 02128 can be reached by phone at (617) 568-1810. The CBP office for Boston is located at 10 Causeway Street, Room 603, Boston, MA 02222. For a list of all land, air, and sea ports of entry in the New England area, go to www.cbp.gov.

IV. U.S. Immigration and Customs Enforcement (ICE)

The ICE website describes the agency as follows: “U.S. Immigration and Customs Enforcement (ICE) enforces federal laws governing border control, customs, trade and immigration to promote homeland security and public safety. ICE was created in 2003 through a merger of the investigative and interior enforcement elements of the former U.S. Customs Service and the Immigration and Naturalization Service. ICE now has more than 20,000 employees in more than 400 offices in the United States and 46 foreign countries. The agency has an annual budget of approximately \$6 billion, primarily devoted to three operational directorates – Homeland Security Investigations (HSI), Enforcement and Removal Operations (ERO) and Office of the Principal Legal Advisor (OPLA). A fourth directorate – Management and Administration – supports the three operational branches to advance the ICE mission.”⁶

Immigration related work performed by ICE consists of investigating violations of the INA and enforcing the INA within the borders of our country. ICE is responsible for immigration enforcement actions, including workplace violations, human trafficking and harboring, visa abuse, document fraud, and detention and removal of non-citizens. ICE must coordinate its enforcement efforts with the other immigration related agencies in DHS. Thus, the enforcement activity of ICE intersects with the work of the other DHS agencies on a daily basis.

(A) Homeland Security Investigations (HSI)

<http://bigstory.ap.org/article/6851e00bafad45ee9c312a3ea2e4fb2c/electronic-media-searches-border-crossings-raise-worry>.

⁶ See <https://www.ice.gov/about>.

HSI is responsible for investigating a wide range of domestic and international activities arising from the illegal movement of people and goods into, within and out of the United States. HSI investigations include immigration crimes, human rights violations and human smuggling, smuggling of narcotics, weapons and other types of contraband, financial crimes, cyber-crime and export enforcement issues. In addition to criminal investigations, HSI conducts employment related investigations concerns I-9's and employment of immigrants unauthorized to work in this country. It is important to note that while the function of HSI intersects with many immigration related issues, immigration comprises a small part of the agency's overall mission.

Immigration related investigations performed by HSI are more focused on larger immigration crimes and violations rather than on individual problems attorneys encounter in their day-to-day practice. However, it is important to note that HSI officers have authority to arrest immigrants in this country without authorization and will now uniformly detain such individuals and initiate removal proceedings regardless of whether those individuals are engaged in criminal activity.

HSI is also charged with monitoring the Student and Exchange Visitor Program (SEVP) that manages SEVP-certified schools and nonimmigrant students in F and M status, and their dependents, using the Student and Exchange Visitor Information System (SEVIS). SEVIS is a part of the National Security Investigations Division and acts as a bridge for government organizations that have an interest in information on nonimmigrants whose primary reason for coming to the United States is to be students. Reporting requirements for schools subject to SEVP are made to HSI and the information in SEVIS is accessible to other federal agencies, such as CBP and USCIS. Thus, the work of the DHS agencies intersects in this area since student visa violators must be reported to HSI which in turn would notify ERO and CIS of the situation if and when immigration benefits are sought or when apprehension and removal is appropriate. This agency has become much more diligent over the years in apprehending and seeking to remove students found to be in violation of their student status. Based on the recent change in the definition of "unlawful presence" created by the CIS ⁷, it is anticipated that students who fall out of status will become targets of ICE enforcement quickly after the status violation occurs and is noted in SEVIS.

Based on the enforcement heavy policies of the Trump administration, HSI will continue to be involved in larger scale investigations of fraud and other abuses associated with the programs HSI investigates. Attorneys should expect HSI and the other DHS agencies to share information and coordinate operations targeted at criminal enterprises operating in the United States. Students who violate the terms of their student visa or who are arrested and charged with crimes in the United States should expect HSI to investigate cases vigorously.

HSI's website is located at www.ice.gov. The Boston area HSI office is located at 10 Causeway Street, Room 722 Boston, MA 02222-1054.

(B) Enforcement & Removal Operations (ERO)

⁷ See CIS Policy Memo dated August 9, 2018, available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf>.

ERO enforces the nation’s immigration laws. ERO identifies and apprehends removable aliens, detains these individuals when necessary and removes illegal aliens from the United States. President Trump’s January 25, 2017 Executive Order entitled, “Enhancing Public Safety in the Interior of the United States” changed the enforcement priorities from those followed under the Obama administration. Section five of the Order states:

Sec. 5. Enforcement Priorities. In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:

- (a) Have been convicted of any criminal offense;
- (b) Have been charged with any criminal offense, where such charge has not been resolved;
- (c) Have committed acts that constitute a chargeable criminal offense;
- (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- (e) Have abused any program related to receipt of public benefits;
- (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
- (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.⁸

In addition to the enforcement priorities requiring ERO to arrest and detain non-citizens, ERO officers effectuate the final removal of those ordered removed from this country. ERO transports removable aliens from point to point and manages non-citizens in custody or in an alternative to detention program. Currently, in Massachusetts the agency refuses to transfer its detainees to state courts for criminal proceedings and generally detains all non-citizens found to be in violation of our immigration laws with little to no consideration of individual circumstances. In summary, ERO is an agency that detains and removes individuals from this country without exception or discretion.

In light of the new enforcement priorities, virtually anyone in the United States without legal status is subject to apprehension and detention. In fact, ERO is arresting and detaining non-citizens at an alarming pace. Moreover, ERO officers appear to have no discretion on who to arrest and are no longer allowed to release anyone in violation of the immigration laws. This policy has caused further backlogs in the Immigration Courts and continues to flood Court dockets with bond requests and cases. ERO seems quite content with its role in the removal process and has little regard for individual circumstances of cases that might involve serious

⁸ The full text of the Executive Order can be found at: <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

humanitarian concerns. The many problems with ICE policies regarding detention of children and separation of families in detention are well documented.

Although individuals who are subject to final orders of removal can apply for a stay of removal based on a variety of circumstances, the current reality is that ERO denies most, if not all, stay requests. ERO appears to be operating under an “extraordinary circumstances” policy which requires nothing less than serious and imminent medical issues for a stay to be approved. For individuals on Orders of Supervision, ERO in Burlington, MA has instituted a 30/30 policy which means that when a person reports to ERO pursuant to the terms of the Order of Supervision, they are given 30 days to report back to ERO with an airline ticket confirming their departure from the United States within 30 days from the date they report back. Little to no discretion is authorized allowing deviation from this policy and ERO considers the policy both fair and equitable despite the length of time many of these individuals have been in the United States or the medical, emotional and financial issues with their U.S. Citizen spouses and children. Individuals on Orders of Supervision with criminal convictions should not expect the 30/30 policy to apply and are often taken into custody at their next report date with ERO.

The local ERO office will accept bond payments for detained aliens, as well as stays of removal and/or deferred action requests for aliens who have already been ordered removed. However, as stated above, the new policies and procedures indicate that discretion is utilized very rarely by ERO and most applications for a stay and for deferred action will be denied. Discretion at ERO is a thing of the past.

The Boston Field Office for ERO (covering all of New England) is located at 1000 District Avenue, Burlington, MA 01803. ERO does not detain aliens at this location. Rather, ERO conducts initial processing at this location before transferring aliens subject to detention to various facilities in the Commonwealth. The facilities currently used by ERO to house ICE detainees in Massachusetts are Suffolk County House of Corrections (South Bay), Plymouth County House of Corrections, and Bristol County House of Corrections.

V. CONCLUSION

The immigration functions for each DHS agency discussed in this article are constantly changing. The one exception to the change seems to be the attitude of the Trump administration which is intent on decimating immigration in this country. Decisions on who to arrest and detain are now driven by politics and positive decisions on applications for non-immigrant benefits are eroding under this administration. Although the practice of Immigration Law differs from jurisdiction to jurisdiction based on local leadership, the overriding policy of the Trump administration can be described as nothing other than anti-immigrant.

While each agency represented on the interagency panel has a specific role in the immigration system, they do work together by sharing information to perform their various duties. It is critical to know the role of each agency and how to contact them should an issue arise during the life cycle of a client’s case. Immigration attorneys must be diligent in keeping up with changes in the agencies and adjust their practices to meet the needs of clients in the current political climate.

Until such time as Congress steps in and passes comprehensive immigration reform, further Executive action supporting anti-immigrant policies should be expected.

“When One Door Closes, Knock Harder:
Recent Changes to Asylum Law and How to Build a Victorious Asylum Claim”
Nareg Kandilian, Robin Nice, and Anita P. Sharma

According to the UNHCR, there are over 20 million refugees worldwide fleeing war, persecution, and human rights violations. The American Immigration Counsel reports that, as of March 2018, over 318,000 asylum applications are pending before the asylum offices and over 690,000 open removal cases are before the immigration court, with hundreds of thousands of asylum seekers seeking protection in the U.S. It is very difficult for immigrants to win asylum. The asylum system is incredibly complex and near impossible to navigate pro se.

Study after study show that asylum seekers are five times more likely to win asylum if they have representation, yet there is no right to a free attorney in immigration court though the stakes of deportation are life and death for asylum seekers. Further, national grant rates for asylum seekers are shockingly low. According to the Department of Homeland Security, in FY 2016, the asylum office granted 11,729 (about 28%) asylum applications, and 8,726 were granted by immigration judges. Those that retain counsel fare better than those who do not, although much of the result depends on how well the attorney is able to prepare the case and their client. This is why, now more than ever, it is crucial to prepare your clients for their asylum interview or hearing. Given that there have been harsh, confusing, and constant changes to immigration case law, it is important to understand what has changed and how to adjust your immigration practice and strategy to best serve your client. Below are some recent cases and their impact on case law and procedure.

The purpose of this guide is to provide practitioners with practical tips on how to help clients prepare and win their asylum case. The topics covered include: 1) Recent cases, their holdings, and the impact on asylum jurisprudence; 2) Strategy tips for presenting your clients’ cases; and 3) Techniques for persuading adjudicators that your client’s case meets the asylum eligibility requirements. While asylum cases are difficult, with proper preparation, your client can win his or her case.

Case Name and Citation	Holding and Summary
	Social Group
Matter of A-B- 27 I&N Dec. 316 (A.G. 2018) June 11, 2018	Recent case decision by AG Sessions, who certified the case to himself to issue a precedential decision. In <i>Matter of A-B-</i> , the AG reversed a grant of asylum to a Salvadoran woman who fled more than fifteen years of domestic violence at the hands of her former husband. The AG remanded the case to the immigration judge for an opinion consistent with his finding that the applicant failed to establish membership in a particular social group and the government’s unwillingness or inability to protect her. <i>Matter of A-B-</i> overrules the seminal domestic violence-based asylum case <i>Matter of A-R-C-G-</i> , 26 I&N Dec. 338 (BIA 2014), which held that domestic violence survivors, under the particular social group “ <i>married women in Guatemala who were unable to leave a relationship,</i> ” could receive asylum protection. <i>Matter of A-B-</i> does not alter the particular social group

	<p>framework. An asylum applicant whose protected ground is a particular social group must demonstrate: (1) membership in a particular group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; (2) that her membership in that group is a central reason for her persecution; and (3) that the alleged harm is inflicted by the government of her home country or by persons that the government is unwilling or unable to control.</p> <p><i>A-B-</i> also addresses asylum claims that involve non-state actors and the requirement to prove that a government is unable to unwilling to protect, but the holding is narrow and much of the lengthy decision is deemed dicta.</p> <p>Practice Tip: Practitioners should continue to argue domestic-violence based asylum cases. Practitioners must be sure to clearly define the social group, provide in-depth analysis of the social group, advance alternative social group formulas, such as ‘women who are considered property by their spouse,’ which some asylum officers have granted accepted in post-<i>Matter of A-B-</i> DV cases. Provide a factual analysis and evidence to corroborate your client’s claim, and explore the other protected grounds (race, religion, nationality, political opinion). Be sure to thoroughly address why a government is unable or unwilling to protect the applicant with country conditions reports or even expert testimony. Think creatively about how to demonstrate the government’s inability or unwillingness to protect your client- could the absence of language from Department of State reports about police involvement in domestic violence cases bolster your argument? Are there high rates of domestic violence in the country of origin such that a culture of tolerance is displayed? Is there a disproportionately higher murder rate for women?</p>
<p>Matter of W-Y-C- & H-O-B- 27 I&N Dec. 189 (BIA 2018) January 19, 2018</p>	<p>In a matter concerning a Honduran mother and her minor son who self-identify as within a social group of “Honduran women and girls who cannot sever family ties,” the BIA stated that an “applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate on the record before the immigration judge (IJ) the exact delineation of any proposed particular social group.” The applicant had offered one social group definition to the court and a different version to the BIA. The BIA affirmed the immigration judge’s denial for asylum and withholding of removal holding that it would not consider newly proposed social groups on appeal if those groups were not presented before an IJ.</p> <p>Practice Tip: It is critical to define all possible variations of your client’s social group. Define all possibilities that apply (just be sure <u>not</u> to define the social group by the harm itself). If you have a PSG-based asylum case, be sure to submit a legal memorandum. Also, try to include other protected grounds.</p>
	<p>Well-Founded Fear – Unable or Unwilling Standard</p>

Matter of A-B-	<i>See analysis and practice pointers under ‘Social Group,’ above.</i>
27 I&N Dec. 316 (A.G. 2018) June 11, 2018	
Rosales Justo v. Sessions	The First Circuit reversed a BIA decision in which it conflated the government’s unwillingness and inability to protect the applicant. The IJ had granted the application for asylum, finding that even though police had investigated his son’s murder (evidencing <i>willingness</i> to protect), country conditions reflected that the government was ultimately generally <i>unable</i> to protect the applicant due to documented corruption and impunity. The Board had reversed the IJs decision, finding that the prior police investigation meant that the government was able to protect him.
No. 17-1457 (1 st Cir. 2018)	<p>The First Circuit also held that the BIA committed clear error when it considered the applicant’s failure to make a police report as another adverse factor in assessing whether the applicant demonstrated the government’s inability to protect. The Court reiterated that "the failure by a petitioner to make [a police] report is not necessarily fatal to a petitioner's case [of persecution] if the petitioner can demonstrate that reporting private abuse to government authorities would have been futile." <i>Citing Morales-Morales v. Sessions</i>, 857 F.3d 130, 135 (1st Cir. 2017).</p> <p>Practice Pointer: Remember that you only need to establish that the government is <i>either</i> unable <i>or</i> unwilling to protect your client and be prepared to remind the Department of this fact. If your client failed to go to the police for help, include detailed reasons for why they failed to do so in their affidavit and include country conditions documents about government impunity or inaction.</p>
	Credibility
Matter of J-C-H-F-	The Board dismissed an asylum denial, finding the IJ gave appropriate weight to an applicant’s border interview. In this case, the applicant stated in a border interview (not a credible or reasonable fear interview) that he did not have a fear of persecution or torture, and that he was coming to the U.S. to visit family. When he re-entered six years later, he stated in a second border interview that he did have a fear of persecution or torture. The IJ made an adverse credibility finding due to discrepancies between the border interviews, namely the fact that the applicant failed to state a fear of return at the first interview despite the fact that he had his father had been kidnapped a few weeks before his first entry.
27 I&N Dec. 211 (BIA 2018)	<p>Practice Pointer: If you know your client had a border interview, CFI, or RFI, try to get a record of the interview from the client or through a FOIA request. Prepare a detailed affidavit with your client addressing any actual or perceived inconsistencies and include any explanations for inconsistencies, such as lack of an interpreter or an</p>

	interpreter who spoke in a different dialect.
	Trial Procedure & Process
Matter of E-F-H-L-	In a one-page decision, AG Sessions vacated a 2014 BIA decision in <i>Matter of E-F-H-L-</i> , 26 I&N Dec. 319 (BIA 2014), which held that a respondent applying for asylum and withholding of removal is ordinarily <u>entitled</u> to a full evidentiary hearing. Prior to 2018, the 2014 decision <i>Matter of E-F-H-L-</i> could be used to argue against a denial of asylum or withholding of removal as a matter of law without a full evidentiary hearing.
27 I&N Dec. 226 (A.G. 2018) March 5, 2018	
Matter of Castro-Tum	Recent case decision by AG Sessions, who certified the case to himself to issue a precedential decision. In <i>Matter of Castro-Tum</i> , he held that immigration judges and the BIA may not suspend immigration proceedings indefinitely by administrative closure unless explicitly authorized through regulation or a settlement agreement. <i>Matter of Castro-Tum</i> partially overrules <i>Matter of Avetisyan</i> , 25 I&N Dec. 688 (BIA 2012) and <i>Matter of W-Y-U-</i> , 27 I&N Dec. 17 (BIA 2017). The AG held that regulations do not confer the authority to grant administrative closure, and the authority to take measures “appropriate and necessary for the disposition of ...cases” does not include administrative closure. Docket management authority also does not include this authority. IJs and the BIA can only administratively close a case “where a previous regulation or a previous judicially approved settlement expressly authorizes such an action.”
27 I&N Dec. 271 (A.G. 2018) May 17, 2018	
Matter of L-A-B-R- et al.	In another self-referred case, AG Sessions clarified what constitutes “good cause” to grant a continuance for a collateral matter to be adjudicated by USCIS. An Immigration Judge is authorized to “grant a motion for continuance for good cause shown.” 8 C.F.R. §1003.29 (2017); <i>see also</i> 8 C.F.R. §1240.6 (authorizing an Immigration Judge to “grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application”). In these cases, Immigration Judges granted continuances to provide time for respondents to seek adjudications of collateral matters from other authorities. In this new decisions, the AG held that good cause does not exist when a respondent’s request for a continuance is based on relief through another agency that is speculative or not available in the near future. For example, there is not good cause when a “visa priority date is too remote” (though there is no set rule about how remote is <i>too</i> remote).
27 I&N Dec. 405 (A.G. 2018)	
Mendez-Rojas v. Johnson	In March 2018, the U.S. District Court for the Western District of Washington issued a decision regarding the

<p>2:16-cv-01024-RSM (August 2, 2018)</p>	<p>one-year filing deadline for asylum applications, holding that the government’s failure to provide adequate notice of the one-year deadline constitutes a violation of the immigration statute, the Administrative Procedure Act (APA), and class members’ due process rights under the Fifth Amendment. In addition, the court held that the government’s failure to provide a uniform mechanism through which class members can timely file their asylum applications also violates the immigration statute and the APA.</p> <p>On August 2, 2018, a federal court approved a joint stay agreement that protects class members from denial of their asylum applications because of the one-year deadline while the government pursues its appeal of the court's decision in the case.</p>
<p>Matter of M-S-</p> <p>27 I&N Dec. 476 (A.G. 2018)</p>	<p>The Attorney General referred a BIA decision to himself for review of issues relating to the authority to hold bond hearings for certain individuals screened for expedited removal proceedings, including asylum seekers who pass a CFI. He specifically is looking at whether <i>Matter of X-K-</i>, 23 I&N Dec. 731 (BIA 2005), which held that immigration judges may hold bond hearings for certain aliens screened from expedited removal proceedings under section 235(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1), into removal proceedings under section 240, 8 U.S.C. § 1229a, should be overruled in light of <i>Jennings v. Rodriguez</i>, 138 S. Ct. 830 (2018).</p>
<p>Pereira v. Sessions</p> <p>__ U.S. __, 138 S. Ct. 2105 (2018)</p>	<p>In <i>Pereira v. Sessions</i>, issued in July 2018, the Supreme Court held that a deficient NTA (without the time and date, as required by the statute) was insufficient to trigger the stop-time rule for purposes of cancellation of removal under INA § 240A(b). At the time of the ruling, it appeared clear that service of a deficient NTA could not initiate removal proceedings as to vest the Immigration Judge with jurisdiction, such that the ruling is not limited to stop-time issues related just to cancellation of removal under INA § 240A. Given this important premise, anyone who was handed an insufficient NTA and eventually subjected to “removal proceedings” would have been foreclosed from various forms of relief, not just cancellation of removal for non-lawful permanent residents.</p>
<p>Matter of Bermudez-Cota</p> <p>27 I&N Dec. 441 (BIA 2018)</p>	<p>The BIA distinguished this case from <i>Pereira v. Sessions</i> and found that a notice to appear that does not specify the time and place of an individual's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a) (2012), so long as a notice of hearing specifying this information is later sent to the individual.</p> <p>Practice tip: Practitioners should consider filing a motion to terminate (or to reopen and terminate) under <i>Pereira</i> when their client was issued a deficient NTA, despite the Board’s limiting ruling in <i>Bermudez-Cota</i>. Filing a motion to terminate could preserve clients’ chances at eventual termination in the event of a successful federal appeal challenging the Board’s decision, or lay the necessary groundwork for appeal to federal court.</p>

	Asylum Bars
Matter of Neguise	<p>This is a case where the AG has referred the matter to himself after the BIA addressed the issue in June. In <i>Matter of Neguise</i>, 27 I&N Dec. 347 (BIA 2018), June 28, 2018, the BIA held that asylum applicants who trigger the persecutor of others bar can claim a limited duress defense to the bar (though the applicant was deemed to have not met the duress defense and was denied asylum). The minimum requirements for duress defense to persecutor bar are that the applicant:</p> <ol style="list-style-type: none"> 1. Acted under imminent threat of death or serious bodily injury to himself or others 2. Reasonably believed threatened harm would be carried out unless he acted or refrained from acting 3. Had no reasonably opportunity for escape or otherwise frustrate the threat 4. Did not place himself in a situation where he knew or reasonably should have known there would be forced to act or refrain from acting 5. Knew or reasonably should have known the harm he inflicted was not greater than the threatened harm to himself or others. <p>Practice Tip: If your client triggers the persecutor bar (or any of the terror-related bars), please be sure to do a thorough and careful analysis on your client’s case BEFORE submitting the I-589. Reach out to national experts to discuss the possible triggering of the terrorist bar and the strength of the exceptions (if any). Keep clear and open communications with your client. Your client is not going to overcome this bar unless they trust you and are able to fully cooperate. The key to the exceptions is detail. Draft a through declaration and prepare your client for oral testimony. Preserve the record for appeal! Even if your case does not end well, you want to ensure you made a thorough record to avoid exhaustion problems in the appeal process. Use expert witnesses intelligently. Don’t use them to cover basic or well-established facts. Do use witnesses to educate and persuade adjudicators on difficult or unfamiliar topics.</p>
27 I&N Dec. 481 (A.G. 2018)	
Matter of A-C-M-	<p>In this case the board considered what constitutes material support of a terrorist organization, and found forced labor does constitute material support. Here, the respondent was forced by Salvadoran guerillas to do cooking, cleaning, washing, and other chores. The Board found the material support bar applied. The BIA remanded for the court to consider whether respondent met the requirements for CAT relief, since she was barred from asylum.</p>
27 I&N Dec. 303 (BIA 2018)	

Conclusion:

The trend in asylum case law highlights the importance of working closely with your clients to identify their personal background in the broader context of country conditions. It is abundantly evident that recent case law certified by AG Sessions, such as *Matter of A-B-*, aim to deter claims based on a particular social group (PSG) analysis. As practitioners, we should continue to press forward with these claims to preserve the underlying legal framework. Country considerations such as societal tolerance, corruption, and government practices may be the distinguishing factor in these cases which must be illustrated.

In light of such case law which continues to evolve, it is critical to be transparent with your client regarding changing legal standards and preserving options on appeal. Keys to success will lie in a comprehensive understanding of your client's personal background, country conditions, and familiarity of all prior statements made in the course of any application process and/or to an immigration officer. By remaining informed of relevant case law, you will be able to anticipate government arguments while maintaining the ability to push forward with creative and strategic arguments.

Aggressive Removal Defense, Part 1: Contesting Removability

by Alan Diamante, Aaron Hall, and Rebeca Sánchez-Roig

Alan Diamante is a California State Bar certified specialist in immigration and nationality law. Mr. Diamante earned his Bachelor of Arts in Social Science from the University of California, Berkeley with honors and a Juris Doctor from Loyola Law School, Los Angeles. Among other notable accomplishments, he served as petitioner's counsel in *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054 (9th Cir. 2006) where the Ninth Circuit Court of Appeals ruled that a conviction of domestic battery is not necessarily a deportable offense or a crime involving moral turpitude. Mr. Diamante also served as co-counsel in *Hootkins v. Napolitano*, CV07-05696 (Central District of California 2009), a class action matter, where the court found that the Department of Homeland Security's (DHS) summary revocations of spouse-based petitions of widows was invalid. The publicity behind the *Hootkins v. Napolitano* lawsuit motivated the DHS to change its regulations in 2009, and subsequently triggered a favorable change in the law for immigrant widows by the United States Congress and President Obama. Mr. Diamante was Chair of AILA's Consumer Protection/UPL Committee and continues to be the UPL liaison for AILA's Southern California Chapter.

Aaron Hall is a graduate of the University of Colorado Law School. Mr. Hall is an active member of the American Immigration Lawyers Association (AILA) and has served as the Chair of the Colorado Chapter's New Members Division, the Colorado Chapter's Immigration and Customs Enforcement (ICE) Liaison Committee, and on AILA National's Amicus Committee. Mr. Hall is a member of the Colorado Bar Association (CBA) and served as the Chair of the Immigration Law Section for the 2014-2015 year. In addition, Mr. Hall is a member of the Colorado Criminal Defense Bar, focusing on analyzing the potential for postconviction relief for noncitizen defendants in criminal court and on working with defense counsel to apprise noncitizen defendants of the potential immigration consequences of criminal charges.

Rebeca Sánchez-Roig is the managing partner of Sánchez-Roig Law, P.A. She is a former deputy chief counsel who spent 17 years as a federal prosecutor with the U.S. Department of Homeland Security, Immigration and Customs Enforcement. Ms. Sánchez-Roig represented the United States government in removal proceedings including political asylum, adjustment of status, cancellation of removal, human smuggling, terrorism, persecutors, Russian organized crime, sexual predators, drug traffickers, and other special interest cases. She regularly advises criminal defense attorneys in negotiations, motions to vacate, and pre-trial on the immigration consequences of criminal charges and convictions. Ms. Sánchez-Roig is experienced in immigration through international adoptions and has served as a Victim's Rights Advocate for victims of crimes in Florida.

I. INTRODUCTION

Often immigration attorneys feel that the law works against their clients. However, the Immigration and Nationality Act, the Code of Federal Regulations, and the 5th Amendment of the U.S. Constitution are powerful tools for lawyers to aggressively defend their clients in immigration court.¹ The respondent has the right to challenge the government's charging documents and evidence in support of removability. Identifying these issues and making successful challenges may lead to termination of removal proceedings or eligibility for relief from removal.

¹ Noncitizens in removal proceedings have a constitutional due process rights. See *Reno v. Flores*, 507 U.S. 292 (1993). Respondents are entitled to full and fair hearings on their claims. See *In re: Rodriguez-Carrillo*, 22 I&N Dec. 1031 (BIA 1999).

Practice Pointer: Analyze the Big Picture and be Strategic

Each case is different and an advocate must analyze the facts to determine an endgame. Some respondents may be eligible for relief after being served with an NTA. Others won't be eligible after being served, but may be at a later date. As advocates, lawyers must determine whether it makes sense *not* to challenge the NTA and admit to the allegations and/or charges at the master hearing. Often a strategy requires that a case be terminated or pending for a specific period so the respondent may qualify for relief in the future. For example, a client that was served an NTA just before accruing 10 years of physical presence for purposes of applying for Cancellation of Removal will benefit by having his or her case terminated, forcing DHS to consider re-serving the NTA.²

Another example of a strategic plan is one that requires additional time. For example, a respondent may not be eligible for adjustment at the time the NTA is served but may be eligible for adjustment once his or her U.S. citizen child turns 21, or lawful permanent resident spouse naturalizes sometime in the future. Forcing the DHS to meet its burden may generate the sufficient time needed for the respondent to qualify for relief.³ The same can be said about a client who may need time to seek post-conviction relief in order to terminate proceedings or to qualify for relief. While the IJ will most likely not grant a continuance to pursue collateral relief, forcing the DHS to make its case may buy the respondent the necessary time he or she needs. Making statutory, regulatory and/or constitutional challenges on the record may give a case a longer lifespan and benefit a respondent who merely wants to maximize his or her stay in the U.S. and later become eligible for relief in the future. The U.S. Courts of Appeals have jurisdiction over constitutional questions and questions of law, while lacking jurisdiction over discretionary adjudications and claims relating to noncitizens with certain convictions.⁴ Making strategic challenges on the record at the early stages may be the key to success in any particular case. A challenge of the NTA should be viewed in the context of who has the burden of proof and what needs to be proven.

II. DHS INITIATES REMOVAL PROCEEDINGS

Removal proceedings commence with the issuance, service, and filing of the NTA with the immigration court. The NTA lists the factual allegations against the respondent and the legal basis for initiating removal proceedings. Pursuant to INA § 239, written notice of the NTA shall be given in person and if not practicable, through service by mail.⁵ The burden is always on DHS to follow the U.S. Constitution, the INA and the agencies'

² INA §240A(d) deems the end of continuous physical presence in the U.S. when the alien is served a NTA.

³ See INA §245(a) that requires a petitioning immediate relative to qualify for adjustment of status after being inspected and admitted or paroled into the U.S.

⁴ See *Kucana v. Holder*, 558 U.S. 233, 239 (2010).

⁵ See also 8 C.F.R. §1292.5.

regulations when issuing the NTA. Failing to follow the INA or regulations, which are grounded in notions of due process, give cause for termination of proceedings.

Practice Pointer: Scrutinize the NTA for Facial Defects and Errors in Service

An attorney should analyze the procedure used to issue the NTA and its contents carefully. The INA and the regulations provides for the requirements for proper service and notice for the initiation of removal proceedings. When it benefits the respondent, counsel should consider moving to terminate proceedings by challenging the NTA when its service is not proper or the NTA is deficient in providing the required notices. Spot the issue:

- Make sure that the NTA relates to your client. A name or date of birth might be incorrect;
- Make sure that the NTA was served with all the required notices (e.g., statement that the respondent can be represented by counsel, a list of free legal services providers, provide a written address and telephone number, etc.);
- DHS will allege that certain acts or conduct by the respondent were in violation of the law. Often, DHS allege a fact that is not accurate or a charge without a factual predicate;
- A respondent in removal proceedings must be charged as either inadmissible under INA section 212(a) or deportable under INA section 237(a). Where the respondent was improperly charged as deportable when he or she was actually inadmissible, or vice versa, the court should terminate the proceedings;⁶
- A violation under INA section 239(a) can also be described as a procedural due process violation; and
- Due process requires that ICE give notice to the respondent of the allegations against him and the charges that render the respondent deportable so that the respondent may prepare a defense. Deviation from these rules would make the proceeding manifestly unfair and would violate due process.⁷ “Even in administrative proceedings, fundamental and essential rules of evidence and procedure must be observed.”⁸

III. UNDERSTANDING THE SHIFTING BURDENS OF PROOF IN REMOVAL PROCEEDINGS

DHS Has the Burden of Proving Alienage

Before an IJ can determine a respondent’s inadmissibility or deportability, the government must first prove that the person is in fact an “alien.”⁹ Thus, the government

⁶ See *Matter of R-D-*, 24 I&N Dec. 221 (BIA 2007).

⁷ *Matter of Lam*, 14 I&N Dec. 168 (BIA 1972).

⁸ *Matter of M-*, 6 I & N Dec. 300 (BIA 1954), citing *Svarney v. United States*, 7 F.2d 515 (1925), *Whitfield v. Hanges*, 222 Fed. 745 (1915).

⁹ INA §240(a)(1), 8 U.S.C. §1229a (a)(1).

bears the burden of proving alienage.¹⁰ 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.¹¹ Once alienage is established, the respondent must show time, place, and manner of entry.¹² A respondent unable to sustain this burden is presumed to be in the United States in violation of the law.¹³

DHS must introduce affirmative evidence that the respondent is not a U.S. citizen. This evidence may be the respondent's own statements. If DHS has no affirmative evidence of alienage, the respondent may refuse to answer questions regarding his citizenship, thus frustrating DHS efforts to overcome its burden. Often DHS obtains the documents from a respondent applying for affirmative relief like asylum, adjustment or a non-immigrant visa. DHS may satisfy its burden by presenting a respondent's birth certificate, passport, prior applications for immigrant benefits and statements recorded on Form I-213.¹⁴ Absent proof of alienage, the IJ does not have the authority to conduct removal proceedings. When respondent's attorney admits the factual allegations, and concedes to the charge of removability, DHS is relieved of its burden of proof. When DHS does not have evidence of alienage, it will attempt to establish alienage through statements made by the respondent and recorded on the Form I-213 or through ICE or CBP officer's testimony as to what the respondent told the officer. These statements may have been obtained through means that violate the INA, regulations and the constitutional protections against unreasonable searches and seizures violating the Fourth and Fifth Amendments of the Constitution. Moving to suppress the evidence and requesting an evidentiary hearing may lead to the termination of proceedings.

Practice Pointer: Be Careful About Making Admissions

Absent egregious circumstances, a formal admission made by an attorney acting in his or her professional capacity binds the respondent as a judicial admission.¹⁵

Burden of Proof under INA §212(a) Inadmissibility Grounds

If the respondent is an applicant for admission, the respondent must prove that he or she is "clearly and beyond a doubt entitled to be admitted and is not inadmissible..."¹⁶ If the respondent claims to have been previously admitted, the respondent must provide "clear and convincing evidence" that demonstrates he or she was lawfully present in the U.S. following a lawful admission.¹⁷ Where a respondent is charged as being present in the U.S. without being admitted or paroled, the respondent must produce clear and

¹⁰ *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923).

¹¹ *Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008).

¹² INA §291; 8 U.S.C. §1361.

¹³ *Id.*

¹⁴ The Form I-213 is the form the arresting officer completes regarding the arrestee's personal information, immigration record, and criminal history prior to being placed in removal proceedings.

¹⁵ *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986).

¹⁶ See 8 C.F.R. §§1.2 and 1240.8 (b).

¹⁷ INA §240(c)(2)(B); 8 C.F.R. §1240.8(c).

convincing evidence to establish that he or she was lawfully in the U.S. pursuant to a prior admission and is not admissible as charged.

Lawful permanent residents returning to the United States cannot be regarded as seeking admission, and cannot be charged with inadmissibility under section 212(a) of the Act, unless one of six exceptions apply.¹⁸ The burden is on the government to establish by “clear and convincing” evidence the applicability of one of the exceptions.¹⁹

Burden of Proof under INA §237 Deportability Grounds

In removal proceedings, the government bears the burden of proving by “clear and convincing evidence” that an alien admitted to the U.S. is deportable.²⁰ The Supreme Court has held that the evidence must be “clear, unequivocal and convincing.”²¹

Deportability must also be based “upon reasonable, substantial, and probative evidence.”²² Once the government submits prima facie evidence of deportability, the burden of proof shifts to the respondent to rebut that evidence with proof of the time, place and manner of entry²³ to show that he or she is clearly and beyond a doubt entitled to be admitted to the U.S. and is not inadmissible.²⁴

Where the NTA asserts a criminal ground of inadmissibility or deportability and the respondent holds DHS to its burden of proof by denying the charge(s), DHS must submit evidence of the conviction.

Practice Pointer: Examine the Conviction Documents Carefully

In matters dealing with conviction documents, practitioners should first hold DHS to its burden to produce conviction documents in support of the allegation and charge. Those documents should be scrutinized closely for deficiencies. The INA provides which documents or records shall constitute proof of a criminal conviction.²⁵ After service of the documents, it is advisable to request time to review the documents. In addition, after review, some documents may apparently not relate to the respondent or even prove a conviction under the INA.²⁶ To determine if the criminal conviction falls within a ground of inadmissibility or deportability, look at the statute of conviction and not the respondent’s actual

¹⁸ See INA §101(a)(13)(C); *Matter of Pena*, 26 I&N Dec. 613, 620 (BIA 2015).

¹⁹ *Matter of Rivens*, 25 I&N Dec. 623, 625 (BIA 2011); See *Matter of Huang*, 19 I&N Dec. 749, 754 (BIA 1988) (citing *Woodby v. INS*, 385 U.S. 276, 286 (1966)).

²⁰ INA §240(c)(3)(A), 8 C.F.R. §1240.8(a).

²¹ *Woodby v. INS*, 385 U.S. 276, 277 (1966).

²² INA §240(c)(3)(A), 8 U.S.C. §1229a (c)(3)(A); *Woodby*, 385 U.S. at 282-286. A Notice to Appear is not substantive evidence. *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.D.C. 1969), *cert denied*, 396 U.S. 877.

²³ INA §291; *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991).

²⁴ INA §240(c)(2); 8 C.F.R. §1240.8(c).

²⁵ INA §240(c)(3)(B).

²⁶ The term conviction is defined in INA §101(a)(48)(A). Some criminal statutes, for example, do not require a formal judgment of guilt.

conduct. Each element of the inadmissibility or deportability ground or bar to relief must be satisfied in order for immigration consequences to attach. The conduct is relevant to the discretionary decision after eligibility of relief has been established.

Burden of Proof in Applications for Discretionary Relief

The respondent applying for relief has the burden of establishing that he “satisfies the applicable eligibility requirements, and with respect to any form of relief that is granted in the exercise of discretion, that [he or she] merits a favorable exercise of discretion.”²⁷ In addition, if evidence indicates that grounds for mandatory denial of the application may apply, the noncitizen has “the burden of proving by a preponderance of the evidence that such grounds do not apply.”²⁸ When a noncitizen applies for relief from removal, he or she has the burden of proof to demonstrate eligibility for that relief.²⁹ If the conviction records are inconclusive, there is no burden issue.³⁰

Practice Pointer: It is Important to Determine if there is a Potential Eligibility Issue at the Outset of the Case

Avoid admitting to a criminal allegation and charge when there is a potential issue of eligibility for relief. When dealing with cases that have criminal issues, attacking deportability or inadmissibility and objecting to the documents is crucial if the respondent may not be able to overcome his or her burden of proving eligibility for relief.

Burden of Proof in an In Absentia Removal Hearing

The DHS bears the burden of establishing jurisdiction for removal proceedings by proper issuance of an NTA under section 239(a)(1) of the Act, and the filing of that NTA with the immigration court.³¹ If a respondent fails to appear for a removal hearing, the immigration judge shall order the alien removed *in absentia* if the government establishes by clear, unequivocal, and convincing evidence that: 1) the alien is removable; and 2) 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.³²

Practice Pointer: Attorneys Should Review the Court File

²⁷ INA §240(c)(4)(A).

²⁸ 8 C.F.R. §1240.8(d).

²⁹ See INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A). For many forms of relief, a person is not eligible if he or she has been convicted of specified crimes. For example, LPRs are ineligible for cancellation of removal if they have been convicted of an aggravated felony.

³⁰ *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013).

³¹ INA §239(a); 8 C.F.R. §§1003.14, 1239.1(a); *Matter of G-Y-R-*, 23 I&N Dec. 181, 184 (BIA 2001).

³² INA §240(b)(5); 8 C.F.R. §1003.26(c).

Look for any notice violation and determine if notice was proper and the evidence in support of the order (usually the Form I-213) is probative and reliable. Deficiencies in these documents create doubt and raise due process concerns if there are statutory or regulatory violations.

IV. DENYING CHARGES AT MASTER CALENDAR HEARINGS

The procedural rules for the immigration court are found in INA §240, 8 C.F.R. §1003.12-1003.65, 8 C.F.R. §1240.1-1240.13 and the Immigration Court Practice Manual. The INA, regulations and case law require that the NTA provide notice to the noncitizen of the specific statutory section that was violated by the respondent that renders him or her deportable.³³ In the absence of a specific and appropriate charge, there is no basis to make a finding of deportability.³⁴ Defects in the NTA leave the respondent and immigration judge to guess the government's theories of the allegations and charges, and inhibit the respondent's exercise of her statutory and due process rights.³⁵

Generally, NTAs are not drafted by attorneys but are drafted by DHS agents and officers who may not know the law. Unfortunately, many immigration advocates thoughtlessly admit to the factual allegations and concede removability without attacking the NTA. Some attorneys opine that denying the charges will anger the immigration judge or opposing counsel, or that the attorney is being dishonest with the court. Denying charges is not lying to the immigration court. Rather, it is placing the burden back on the government to prove the charges against the respondent in cases of deportability. There should be no reason to fear the wrath of a government attorney or IJ. Your concern is your client. If the likelihood of success on the claim for relief is not great, and you concede the allegations and charges, there may be severe consequences for waiving the respondent's rights. In addition, if the government cannot meet its burden of proof, the immigration judge should terminate proceedings against the respondent.³⁶

If the NTA is challenged because of inaccurate allegations or incorrect charges, the DHS will be allowed to amend the NTA by preparing and serving a Form I-261.³⁷ When this happens, it is important to analyze the document carefully for potential objections. There is no pressure to plead to the document at the time that it is served, therefore, requesting "attorney prep time" is a reasonable request supported by due process. When there are objections to the NTA, Form I-261, or evidence, the court is likely to set the matter for an evidentiary hearing.

³³ INA §239(a)(1), 240(b)(4)(B), 8 U.S.C. 1229 (a)(1), (b)(4)(B); *see also* 8 C.F.R. § 3.15(b)(3-4), 8 C.F.R. § 240.10(a)(6) (requiring the Immigration Judge to explain the charges in the NTA to the Respondent in nontechnical language); *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).

³⁴ *Matter of Gonzalo-Palacios*, 22 I&N Dec. 434 (BIA 1998), *quoting Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976).

³⁵ *Id.*

³⁶ To avoid annoying an IJ, the advocate should strategize about when to make the motion to terminate. Some attorneys move to terminate prematurely without allowing the government an opportunity to file a lodged charge or documents.

³⁷ 8 C.F.R. §1240.10(e).

Practice Pointer: Examine the NTA Carefully and Read the Statute Section that is Alleged to Have Been Violated

Make sure that the statute is correctly cited in the NTA. Make sure that ICE clarifies which subsection of the INA is being charged as a deportable offense.

Even if the government produces court documents that show your client was convicted of a crime, avoid admitting to allegations that your client was convicted of the predicate offense and put the burden on the government to produce the proper documents that support the allegation and charge. If it is difficult to object to the document since the DHS has apparently met its burden, the advocate may submit to the admission of the document without agreeing to it. It may seem like a waste of time, but In *Matter of Pichardo*,³⁸ the BIA ruled that the government, even though it submitted court documents proving a conviction, failed to meet its burden of proof because the document offered to prove a firearms conviction did not specify that the weapon was a firearm, even though the respondent testified in court that he used a gun.³⁹

V. OBJECTING TO DHS EVIDENCE AND EXAMINATION

In immigration proceedings, the “sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.” It is well settled that the Federal Rules of Evidence are not binding in immigration proceedings, and that evidentiary considerations are more relaxed in immigration court. Due process does not require adherence to judicial rules of evidence unless deviation would make the proceeding fundamentally unfair.

Notwithstanding, the BIA and circuit courts have held that the Federal Rules may provide useful guidance in determining admissibility of evidence. Attorneys in immigration court may use the Federal Rules to object to the admission of evidence, and along with the rules, must explain why the evidence may be unfair, unduly prejudicial, or simply does not meet the burden of proof because it fails to satisfy the basic statutory requirements.

The noncitizen shall have a reasonable opportunity to examine the evidence and present evidence on his behalf. The respondent also has the right to cross-examine witnesses presented by the government.⁴⁰

Practice Pointer: Review the Evidence with the Respondent and Get Ready to Battle by Raising Objections to DHS’s Evidence

The government will generally submit Form I-213 in order to prove alienage and inadmissibility and deportability. The Form I-213 is considered inherently trustworthy and admissible unless it contains incorrect information or information obtained by

³⁸ 21 I&N Dec. 330 (BIA 1996).

³⁹ *Id.* at 335-336.

⁴⁰ INA §240(b)(4)(B), 8 C.F.R §1240.10(a)(4).

coercion or duress. Counsel should therefore carefully review the Form I-213 with the client to look for any mistakes or incorrect information. Where any such mistakes are found, counsel can object to its admission of the evidence and, where appropriate, move the court to subpoena the drafter of the document to testify.

In determining whether to admit the Form I-213 and whether to give it any weight, the IJ will determine if the alleged false information is material. Information contained in the Form I-213 may have been obtained unlawfully and may be subject to a motion to suppress. Inaccurate information, lack of detail, a gap in time between when the information was collected and when the Form I-213 was created, the inability to cross-examine the preparer of the Form I-213, coercion or duress are potential challenges to the Form I-213. In addition, if the source of the information on the Form I-213 is neither the government nor the subject of the report, it cannot be presumed true. If the source is not identifiable or is a juvenile, it may not be reliable.

Practice Pointer: When the Form I-213 Appears to be Unreliable and it is the only Evidence DHS Presents, Ask the Court to Allow Cross-Examination of the Preparer

Documentary evidence can be admitted in removal proceedings only if it is “probative” and its use would be “fundamentally fair.” Challenge evidence on reliability, relevance, and fairness. The respondent has the statutory and due process right to a full and fair hearing, and a reasonable opportunity to present evidence.

Failure of an agency to follow its own rules and regulations has been held to violate due process. Rules promulgated by a federal agency which regulate the rights and interests of others are binding upon the agency. If individuals are entitled to rely on the regulations, then the agency is bound by them, and violation of them is reversible error.

Practice Pointer: Object to DHS Evidence and Seek to Keep it Out of the Record

The most common objections to DHS evidence are fundamental fairness and relevance. Official records must have attestation by the officer and show that the officer has legal custody of the original. A copy must be accompanied by a certification that it is a true copy of the document. If the court is inclined to admit evidence and more preparation is needed to make objections, seek a continuance to prepare a brief.

At an evidentiary or contested removal hearing, the respondent has the ability to object to the government’s evidence and cross-examine government witnesses. The respondent may also introduce evidence and call witnesses to challenge the government’s allegations and/or support claims for relief. Upon conclusion of

both the government and respondent's cases, the immigration judge may immediately enter a ruling on the issue or defer the decision to a later date.

Every contested hearing may be treated as a trial on the specific issues. Preparing for the hearing will allow defense counsel to analyze the law, facts, and evidence, and get a handle on the arguments to be made. Preparing for a contested hearing begins with creating a case or hearing checklist to analyze the law, facts, and evidence in order to develop case theory in support of the motion to exclude evidence, to terminate, or suppress evidence, or prove eligibility for relief.

Practice Pointer: Always be Cognizant of the Potential appeal when preparing for a contesting hearing and consider that a contested hearing is a mini-trial on the contested issue.

- Gather all the required evidence to be ready for the hearing. This might require requesting copies of documents from the government's A-file. In the alternative, making a Freedom of Information Act (FOIA) request of ICE or USCIS may be a better option;
- Locate key documents and interview witnesses:
 - Obtain affidavits of witnesses that may be unable to testify at the hearing;
 - Obtain certified copies of public records where applicable;
- Develop a legally sound and compelling case story based on the evidence;
- Draft a chronology and case summary to keep track of important case facts;
- Make updates as evidence comes to light;
- File a prehearing memorandum of law and facts if possible;
- Carefully select the witnesses and present them in logical order:
 - Prepare the witnesses as to court etiquette, hearing process, and most importantly, for cross-examination;
 - Prepare for a bad or unexpected response from the witness;
- Ask questions that promote the theory;
- Prepare for questions aimed at disproving the theory;
- Questions should be short and in plain English;
- Direct examination questions should prompt the witness to testify about facts supporting the theory of the case:
 - Use a chronological line of inquiry for a witness that will tell a story;
 - Generally, no leading questions unless an officer is the government's witness;
- During cross-examination, use leading questions and attempt to force contradictions, challenge a witness' credibility, suggest answers, put words into a witness' mouth, express doubt, etc. Cross-examination of a government's witness can be fun. Be prepared to impeach a government's CBP or ICE witness by inquiring about the officer's knowledge of the pertinent sections of the INA, regulations or due process; and
- Object as necessary and counter the government's objections in a way that reinforces the respondent's theory of the case.

VI. CREATING THE RECORD YOU WANT TO LITIGATE ON APPEAL

Practitioners in immigration proceedings should always be mindful of making a record for purposes of an appeal ensuring that the respondent's rights are preserved. Several steps can be taken to protect respondent's rights and create the record on appeal making the necessary objections to the NTA, Form I-213, conviction documents, or any other documents that are being utilized by the DHS to overcome its burden of proof.

Practice Pointer: Listen Carefully and Make Objections Against:

- DHS violations of case law, statute, or regulations;
- Due process violations by the IJ for allowing evidence or testimony that is not reliable, relevant, or fair;
- Errors of interpretation.

The following is a summary of what an advocate should do:

- Know and follow the immigration court practice manual;
- Review and challenge the NTA for deficiencies including the matter of service;
- Deny factual allegations and the charge;
- Require DHS to meet its burden of proof by challenging alienage, inadmissibility and removability when applicable;
- File motions to suppress evidence and/or terminate proceedings for violations of due process, INA and regulations;
- Note any action, statement, or conduct that may be improper, hostile, or unfair to the respondent;
- Ensure that any off-the-record conversation with the IJ or DHS counsel is accurately and fully summarized on the record;
- Make a closing statement and reinforce the theory of the case with the evidence and testimony; and
- Never waive appeal unless the case has been granted!

BOND USEFUL TIPS AILA 2018

BOND HEARINGS

1. In Boston, bond hearing scheduled within 3 business days of your written request.
2. Court's decision on bond is usually final.
3. Analysis: danger to community FIRST. Only then, Flight risk. INA §236.
4. Minimum bond amount: \$1500.
5. Bond money is paid to Immigration & Customs Enforcement (DRO) with a certified bank check made payable to US Department of Homeland Security.

IMMIGRATION TERMS OF ART

1. Good moral character
2. Crime of Moral Turpitude
3. Conviction
4. Sentence
5. Aggravated Felony
6. Crime of Violence

HUMANIZE YOUR CLIENT

1. Make them more than just a file on the desk.
2. Contact TAU and find out who is handling the hearing and how they feel about the case (617) 565-3141.
3. Reach out to probation officers and corrections officers and any other law enforcement who could be helpful.
4. Get affidavits and motions for telephonic hearings.
5. When unable to get agreement for assistance, subpoena them (must be done pursuant to Benchbook and local laws).

BOND HEARINGS, CONT'D

1. Evidence:
 - a. Relief available;
 - b. Family members in status (they should attend hearing if possible);
 - c. Ties to the community;
 - d. All criminal history;
 - e. Police reports are necessary;
 - f. Demonstrate that client is not dangerous.
2. Not eligible for a bond hearing:
 - a. Arriving aliens;
 - b. Immigrants convicted of crimes involving moral turpitude or aggravated felony;
 - c. Immigrants with final removal orders.
3. Arriving aliens can ask DHS for bond.

A FEW TIPS ABOUT IMMIGRATION COURT

1. PRACTICE MANUAL: READ IT. USE IT. Knowledge will result in accepted filings and not rejected filings.
2. WHAT IS THE PRACTICE MANUAL?
 1. The Immigration Court Practice Manual went into effect in 2008 and is updated periodically.
 2. A guide for practitioners appearing before the Immigration Courts, the ICPM creates nation-wide uniform standards for practice before the Immigration Courts, such as filings, appearances, submission of evidence, etc.
 3. If you have not already done so, please review and be aware of updates.
http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm

STUDY THE PROPER WAY TO FILE DOCUMENTS

1. Immigration Court Practice Manual Chapter Three
 1. Delivery and Receipt
 2. Service on the Opposing Party
 3. Documents
 4. Filing Fees

WHAT DO YOU MEAN I CAN'T FILE THIS HERE?

1. PLAN AHEAD – Don't wait until the last minute.
 - a. You will probably find yourself needing to scramble, be out the money it cost you to prepare the filing, AND worst of all, you can be the reason your client's case is deemed abandoned and she/he can be ordered deported.

USEFUL PHONE NUMBERS

1. Immigration Court, Boston: (617) 565-3080
2. Immigration Court, Hartford: (860) 240-3881
3. Litigation Unit, Boston: (617) 565-3140
4. Detention and Removal Operations (for posting bonds, orders of supervision, and finding out where your client is detained): (781) 359-7500

USEFUL WEBSITES

1. EOIR: www.usdoj.gov/eoir : Practice Manual, contact information for all courts, application forms and fee list.
2. BIA: www.usdoj.gov/eoir/biainfo.htm : Practice Manual, contact information.
3. AILA: www.aila.org : Practice advisories, daily updates, other advocacy tools.

HELPFUL RESOURCES

1. Kurzban
2. Immigrant Legal Resource Center: <http://www.ilrc.org/crimes>
3. American Immigration Council:
<http://www.legalactioncenter.org/practice-advisories-topic>
4. National Immigration Project:
<http://www.nationalimmigrationproject.org/publications.htm>
5. http://www.justice.gov/civil/docs_forms/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf (dated by a good general overview of proceedings)
6. http://www.justice.gov/eoir/vll/benchbook/resources/Fundamentals_of_Immigration_Law.pdf (dated by a good general overview of proceedings)
7. Join the American Immigration Lawyers' Association (AILA)

Rachel M. Self
Rachel M. Self, P.C.
6 Beacon Street
Suite 825
Boston, MA 02108
(617) 742-0191 – Telephone
(617) 249-0786 – Facsimile
rms@attorneyself.com

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MA**

_____)
In the Matter of:)
)
Mister Nice Guy,) **File No. XXX_XXX_XXX**
)
Respondent)
)
_____)

Immigration Judge

Next hearing: To be determined

DETAINED

RESPONDENT'S MOTION FOR BOND DETERMINATION

Letter from Mikellys Perez, Respondent's niece	30
Letter from Yajaira Toribio, Respondent's friend	31
Letter of Damaris Mercedes Hernandez, Respondent's cousin-in-law	32
Letter from Sharon Coleman, Respondent's wife's coworker	33
Letter from Sharlyn Martinez, Respondent's sister-in-law	34
Letter from Samantha M. Pagliarulo, Respondent's wife's coworker	35
Letter from Jeffrey Marr, Respondent's business associate	36
Letter from Nice House, Respondent's boss	37
Letter from James Clarizia, Respondent's business associate	38
Letter from Cherilyn F. Enos, Human Resources Manager at Respondent's work	39-41
Letter from Jon Barrett, Respondent's business associate	42
Letter from Peter Hill, Respondent's business associate	43
Letter from Tom Spittle, Respondent's business associate	44
Letter from Mary Spittle, Respondent's business associate	45
Letter from Geoffrey H. Richon, Respondent's business associate	46
Letter from Jose Leland, Respondent's business associate	47
Letter from Richard P. Farrar, Respondent's business associate	48
Letter from Carl Thomsen, Respondent's business associate	49

	Letter from Thomas J. Gately II, Respondent's business associate	50
	Letter from Sheldon Knowles, Respondent's business associate	51
	Letter from Toshi Jelmborg, Respondent's business associate	52
	Letter from Scott Russell, Respondent's business associate	53
	Letter from Rick Hackett, Respondent's business associate	54
	Letter from Chris Fogarty, Respondent's business associate	55
	Letter from Dominic Curreri, Respondent's business associate	56
	Letter from Kim S. Phetteplace, Respondent's coworker	57
	Letter from Ralph Sevinor, Respondent's business associate	58
	Letter from Paulo Viana, Odany Funez, Rod McNeil, Jose Sosa, and Santiago Cruz, Respondent's work team	59
	Letter from Glenn F. Thomas, Respondent's former landlord	60
	Letter from Joseph Mitchell, Respondent's business associate	61
	Letter from Jason Mitchell, Respondent's business associate	62
D	Records of Dearest Parello	63-
	Neurology Records	63-72
	Individualized Education Plan of Dearest Guy, Feb. 28, 2017	73-82
E	Dockets and Police Reports, Including:	83-116

	Massachusetts Criminal Offender Record Information (CORI)	83-89
	Salem District Court, 9936CR000307 and supporting police report	90-92
	Salem District Court, 9936CR0401 and supporting police report	93-98
	Salem District Court, 0036CR001608 and supporting police report	99-103
	Salem District Court, 0236CR003502 and supporting police report	104-112
	Peabody District Court, 0486CR000038 and sworn affidavit of Stephen Cote, Private Investigator	113-116
F	Family Photos	117-135
G	Proposed Order	136
H	Certificate of Service	137

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MA**

In the Matter of:)	
)	
)	
Mister Nice Guy,)	File No. XXX_XXX_XXX
)	
Respondent)	
)	
)	
)	

RESPONDENT’S MOTION FOR BOND DETERMINATION

Respondent, through undersigned counsel, respectfully requests this Honorable Court to set a reasonable bond amount and order his release from detention. 8 C.F.R. §§ 103.6(a)(2)(i), 1003.19(a)-(c). Respondent also moves the Court to stay any pending transfers to a detention facility outside the jurisdiction of this Immigration Court.

In support of this Motion, Respondent states the following:

1. Respondent is a native and citizen of the Dominican Republic and a legal permanent resident (LPR) of the United States.
2. Respondent was admitted to the United States as an LPR on November 21, 1989.¹
3. Respondent was transferred to the custody of Immigration & Customs Enforcement (ICE) on or about March 13, 2017. He is currently being held at the Plymouth County House of Corrections, 26 Long Pond Road, Plymouth, Massachusetts, 02360.
4. Respondent has been married to Jerica Smith (“Ms. Smith”), a United States Citizen, since April 19, 2009.²

¹ Respondent’s Legal Permanent Resident Card (attached hereto as part of “Personal Documentation,” Tab B).
² Marriage Certificate of Rafael Guy & Jerica Smith (attached hereto as part of “Personal Documentation,” Tab B).

5. Respondent and his wife have two U.S. Citizen daughters, Dearest Alysha Guy (DOB March 25, 2009),³ and Sweetie Dahlila Guy (DOB August 24, 2013).
6. Pursuant to 8 C.F.R. § 103.6(a)(2)(i) and 1003.19(a)-(c), this Honorable Court may release a detained non-citizen on bond pending the conclusion of his removal proceedings. The Court should grant bond unless there is a finding that the individual is a threat to national security, likely to abscond, or a poor bail risk. *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).
7. The IJ may look to a number of factors, including: (1) whether the Respondent has a fixed address in the United States; (2) the Respondent's length of residence in the United States; (3) the Respondent's family ties in the United States; (4) the Respondent's employment history; (5) the Respondent's record of appearance in Court; (5) the Respondent's criminal record, including extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the Respondent's history of immigration violations; (8) any attempts by the Respondent to flee prosecution or otherwise escape from authorities; and (9) the Respondent's manner of entry to the United States. *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000); *Matter of Drysdale*, 20 I&N Dec. 815, 817 (BIA 1997).
8. The BIA has held that eligibility of relief from removal is also a positive factor in determining whether a Respondent should receive bond. *Matter of Leon-Perez*, 15 I&N Dec. 235 (BIA 1975).
9. In *Castañeda v. Souza* and its accompanying case *Gordon v. Johnson*, the First Circuit Court of Appeals held that a class of immigration detainees with criminal convictions

³ Birth Certificate of Dearest Parello; Birth Certificate of Sweetie Parello (both attached hereto as part of "Personal Documentation," Tab B).

were not subject to mandatory detention and must receive bond hearings. 810 F.3d 15 (1st Cir. 2015) (*en banc*). Each of the detainees in the class had committed crimes that fell under the mandatory detention statute of the INA, but were not taken into ICE custody until years after they had been released from criminal custody. The Court held that the detention mandate requires that the Attorney General take criminal respondents into immigration custody in a timely manner following their release from custody. *See Id.*, at 44. Criminal aliens who are not taken into custody immediately following their release thus have the right to individualized bond hearings.

10. Respondent has a meritorious application for bond. He moved to the United States when he was nine years old, in 1989. He has lived here for twenty-seven years; well over half his life.
11. Respondent has a fixed address where he lives with his family: 29 Sherman Street, Peabody, Massachusetts, 01960.
12. Respondent has worked as a painter for Nice House Painting in Rockport, Massachusetts, since 1999.
13. Respondent does have a criminal history, and cannot dispute that he made several mistakes during his youth. In 1999 he was charged with disturbing the peace. This matter was dismissed on court costs. Another matter in 1999 he was charged with Breaking and Entering and Destruction of Property. This matter was outright dismissed because there was absolutely no probable cause for Mr. Guy to have been charged for these crimes. In 2000 Mr. Guy received a six-month Continuance Without a Finding for possession of Class D. In 2002 he was charged with Possession of a Class B Substance with Intent to Distribute in Salem District Court, School Zone violation and Operating Recklessly. He

pled guilty to the Possession with Intent to Distribute Class B and received a 1-year suspended sentence. In 2004 he was charged with OUI Drugs, OUI Liquor and Possession of Marijuana. He received a guilty finding on the OUI Liquor and to the possession of marijuana. This criminal history is the only factor in his disfavor, and he has had no criminal charges for over 13 years.⁴

14. Respondent completed his suspended sentence on May 17, 2006. He was placed in immigration detention on March 13, 2017, almost seven whole years after completing his probation.

15. In those intervening years, he has married, started a family, held steady employment with the same employer throughout, been promoted at his job, become a homeowner, and continued to develop deep family and community ties in the United States.

16. Respondent now holds the position of lead foreman at his job. His boss, Nice House, states that he is impressed with Respondent's "work ethic, eye for detail, and ability to communicate with fellow employees, general contractors, and customers."⁵ Respondent also has ambitions of starting his own business.⁶

17. Mrs. House, the Human Resources supervisor at his workplace who has known Respondent since 1999, states he "has not engaged in any criminal behavior since [his] initial charge and has systematically rebuilt his life."⁷

18. Many people speak highly about Respondent's contributions to the community. Builder Man, a general contractor who works closely with Respondent, describes him as a "productive member of our society who not only conducts himself responsibly but is the

⁴ Dockets & Police Reports are attached hereto as Tab E.

⁵ Character Letter from Nice House (attached hereto as part of "Character Letters," Tab C).

⁶ Character Letter from XXXXXXXXX (attached hereto as part of "Character Letters," Tab C).

⁷ Character Letter from Mrs. House (attached hereto as part of "Character Letters," Tab C).

conduit for others to have employment.”⁸ Johnny Sparks, an electrical contractor who has hired Respondent, cites Respondent’s “great work ethic in his adopted country and his contribution to society to better his family.”⁹ Jose Smith, who works with Mr. Builder calls Respondent “a contributor and important part of our community.”¹⁰ Paulie Nails, another General Contractor who works with Respondent, states that Respondent is “known all across our work area as a highly valued tradesman.”¹¹

19. Respondent’s brother-in-law, XXXXXX, has a son who sees Respondent as a role model.¹² His thirteen-year-old niece, XXXXXX echoes these sentiments, saying that Respondent is an “awesome male figure” in her life.¹³

20. Respondent’s family depends on him emotionally as well as financially. His older daughter, Dearest, has a developmental disability. She has an abnormally shaped hippocampus, which causes her short-term memory loss and partial seizures.¹⁴ She takes medication for these seizures, and requires both her parents with her in order to manage this condition. She also requires special education, as she is performing far below grade level and is unable to read or write in complete sentences.¹⁵ She is very close to her father and depends on him for love and support.

21. Respondent and his wife, Ms. Guy, have a loving and close relationship and are equal partners in raising their two daughters together. If Respondent is not released, Ms. Guy will suffer hardship at having to care for two young children, one of whom is

⁸ Character Letter from XXX(attached hereto as part of “Character Letters,” Tab C).

⁹ Character Letter from XXX (attached hereto as part of “Character Letters,” Tab C).

¹⁰ Character Letter from XXX (attached hereto as part of “Character Letters,” Tab C).

¹¹ Character Letter from XXXX (attached hereto as part of “Character Letters,” Tab C).

¹² Character Letter from XXXXX (attached hereto as part of “Character Letters,” Tab C).

¹³ Character Letter from XXXXX (attached hereto as part of “Character Letters,” Tab C).

¹⁴ Neurology Records (attached hereto as part of “Dearest Guy Records,” Tab D).

¹⁵ Individualized Education Plan of Dearest Guy, Feb. 28, 2017 (attached hereto as part of “Dearest Guy Records,” Tab D).

developmentally disabled, without her husband's help. As Respondent contributes greatly to emotional and financial well-being of his family, they will suffer extreme hardship if he is not released and allowed to rectify his immigration status.

22. ICE arrested Respondent during a traffic stop while they were looking for someone else who fit his description. It was during this stop that they found out about his criminal charge from 2005. The arresting officer told him that he "looked like a good family man" and that he would let him spend the weekend with his children before arresting him. When the ICE officers came to detain him, Respondent fully cooperated with them.
23. Respondent has demonstrated a host of factors in his favor in accordance with *Patel*. He has resided in the United States since he was nine years old, and entered as a permanent resident. He has deep family ties to the community: namely, a U.S. Citizen wife and two U.S. Citizen children, and a permanent, fixed residence. He has held steady employment for eighteen years. He has never tried to flee prosecution, either for criminal or immigration charges. Numerous business associates, relatives, and friends attest to his upstanding reputation in the community. The only factor in his disfavor is his criminal history, which is more than a decade old.
24. Under *Castañeda* and *Gordon, supra*, Respondent is not subject to mandatory detention. If the Department of Homeland Security continues to detain Respondent without the opportunity for a bond hearing, he will suffer undue prejudice. He will be deprived of liberty without cause, and his ability to promptly and effectively prepare his defense to the charges against him will be delayed.

WHEREFORE, for good cause shown, this Honorable Court should grant Respondent's request, set a bond amount, and order Respondent's release from custody.

Respectfully submitted,
Mister Nice Guy,
By and through counsel:

Rachel M. Self
EOIR No.
BBO No.
Rachel M. Self, P.C.
6 Beacon Street, Suite 825
Boston, MA 02108
Tel: (617) 742-0191
Fax: (617) 742-0194
rms@attorneyself.com

Dated: _____

In the Matters of [REDACTED]

A [REDACTED]

[REDACTED], the Department of Homeland Security (“DHS”) served the respondents with Notices to Appear (“NTA”), charging them with inadmissibility pursuant to section 212(a)(6)(A)(i) of the Act. *See* Exhs. 1-1B. At a master calendar hearing on [REDACTED], the respondents, through counsel, admitted the factual allegations in their respective NTAs and conceded inadmissibility as charged. Accordingly, the Court finds inadmissibility has been established. *See* 8 C.F.R. § 1240.10(c).

On [REDACTED], the respondent filed an Application for Asylum and for Withholding of Removal (“Form I-589”), seeking asylum and withholding of removal under the Act and protection under the CAT. *See* Exh. 2. The rider respondents were listed as a derivative applicants on the respondent’s Form I-589. *See id.* The Court heard the merits of the respondent’s applications for relief on [REDACTED]. For the following reasons, the Court grants the respondents’ applications for asylum.

II. SUMMARY OF THE EVIDENCE

A. Documentary Evidence

- Exhibit 1: NTA for the respondent, served on [REDACTED], filed [REDACTED];
- Exhibit 1A: NTA for the rider respondent, [REDACTED], served on [REDACTED], filed [REDACTED];
- Exhibit 1B: NTA for the rider respondent, [REDACTED], served on [REDACTED], filed [REDACTED];
- Exhibit 2: Form I-589 for the respondent, including rider respondents as derivative applicants, filed [REDACTED];
- Exhibit 3: The respondent’s exhibits in support of the respondent’s Form I-589, including Tabs A-Q, filed [REDACTED].

B. Testimonial Evidence

The Court heard testimony from the respondent on [REDACTED]. The testimony provided in support of the respondent’s applications, although considered by the Court in its entirety, is not fully repeated herein, as it is part of the record. Rather, the claims raised during the testimony are summarized below to the extent they are relevant to the Court’s subsequent analysis.

[REDACTED]

In the Matters of

A

In the Matters of [REDACTED]
[REDACTED];
A [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. LAW, ANALYSIS, AND FINDINGS

A. Credibility and Corroboration

The provisions of the REAL ID Act of 2005 govern cases in which the applicant filed for relief on or after May 11, 2005. *See Matter of S-B-*, 24 I&N Dec. 42, 44 (BIA 2006). The applicant has the burden of proof in any application for relief. INA § 240(c)(4)(A). Her credibility is important and may be determinative. Generally, to be credible, testimony must be detailed, plausible, and consistent; it should satisfactorily explain any material discrepancies or omissions. INA § 240(c)(4)(C). In making a credibility determination, the Immigration Judge considers the totality of the circumstances and all relevant factors. *Id.*; *See also Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). The Court may base a credibility determination on the witness' demeanor, candor, or responsiveness, and the inherent plausibility of her account. INA § 240(c)(4)(C). Other factors include the consistency between written and oral statements, without regard to whether an inconsistency goes to the heart of the applicant's claim. *Id.*; *J-Y-C-*, 24 I&N Dec. at 263-66. An applicant's own testimony, without corroborating evidence, may be sufficient proof to support a fear-based application if that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for her fear of persecution. *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987); 8 C.F.R. § 1208.13(a).

Considering the totality of the circumstances and all relevant factors, the Court finds the respondent credible. Her testimony was candid, detailed, and internally consistent. Additionally,

In the Matters of [REDACTED]
[REDACTED];
A [REDACTED]

her account of what happened in Honduras is plausible and consistent with record evidence. *See* Exh. 2 (Form I-589); 3, Tab D ([REDACTED]'s birth certificate listing [REDACTED] as the father), Tab E (police complaint filed by the respondent), Tab F (Honduran newspaper article documenting [REDACTED]'s escape from prison). Moreover, the DHS conceded that the respondent testified credibly. Accordingly, the Court finds the respondent credible.

B. Asylum

An applicant for asylum must demonstrate that she is a “refugee” within the meaning of INA § 101(a)(42). *See* INA § 208(a). To satisfy the “refugee” definition, the applicant must demonstrate a reasonable probability either that she suffered past persecution or that she has a well-founded fear of future persecution in her country of origin on account of one of the five statutory grounds—race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); 8 C.F.R. § 1208.13(a). The applicant must show that she fears persecution by the government or an agent that the government is unwilling or unable to control. *See Matter of A-B-*, 27 I&N Dec. 316, 317 (A.G. 2018); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000). The applicant also must demonstrate that one of the five statutory asylum grounds was or will be at least one central reason for her persecution. INA § 208(b)(1)(B)(i); *A-B-*, 27 I&N Dec. at 317. Finally, in addition to establishing statutory eligibility, the applicant must demonstrate that a grant of asylum is warranted in the exercise of discretion. INA § 208(b)(1)(A); 8 C.F.R. § 1208.14(a).

1. One Year Deadline

As a threshold issue, the respondent must show by clear and convincing evidence that she applied for asylum within one year of her last arrival to the United States or that she qualifies for an exception to the one-year deadline. 8 C.F.R. § 1208.4(a)(2). Here, the DHS conceded that the Respondent filed her application within one year of her last arrival to the United States. *See* Exhs. 1; 2. The Court therefore finds the respondent’s application timely filed.

2. Past Persecution

To establish a claim for asylum, the applicant must show the harm she suffered or fears she will suffer rises to the level of persecution. Persecution entails harm or suffering inflicted upon an individual to punish her for possessing a belief or characteristic the persecutor seeks to overcome. *See Acosta*, 19 I&N Dec. at 222-23. Persecution includes the “threat of death, torture, or injury to one’s person or freedom.” *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014); *see also Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (“[W]e have expressly held that ‘the threat of death qualifies as persecution.’”) (quoting *Crespin-Valladares*, 632 F.3d at 126).

a. Past Harm

The DHS conceded that the respondent suffered harm rising to the level of persecution, and the Court finds that the respondent has demonstrated that she suffered past persecution. *See Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (“Persecution involves the threat of death,

In the Matters of [REDACTED]

A [REDACTED]

torture, or injury to one's person or freedom.") (internal quotations omitted); *see also Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998) (noting that court must consider events cumulatively).

b. Government Unable or Unwilling to Control

The DHS also conceded that the Honduran police was unable or unwilling to protect the respondent from [REDACTED] and [REDACTED]. Accordingly, the Court finds that the respondent established she suffered harm at the hands of individuals from whom the Honduran government is unwilling or unable to protect her. *See A-B-*, 27 I&N Dec. at 330 (stating that the applicant "bears the burden of showing that . . . [her] home government was 'unable or unwilling to control' the persecutors") (quoting *Matter of W-G-R-*, 26 I&N Dec. 208, 224 & n.8 (BIA 2014)); *see also Acosta*, 19 I&N Dec. at 222; *Mulyani v. Holder*, 771 F.3d 190, 197-98 (4th Cir. 2014).

3. Nexus to a Protected Ground

The respondent must, through direct or circumstantial evidence, prove that a protected ground was or would be "at least one central reason" for the persecution. *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 213 (BIA 2007). The protected ground need not be the sole reason for persecution, but it must have been more than an "incidental, tangential, superficial, or subordinate" reason. *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247 (4th Cir. 2017).

c. Women in Honduras

The Court finds that "women in Honduras" are members of a cognizable particular social group. The Board of Immigration Appeals ("Board" or "BIA") has instructed that the phrase "membership in a particular social group" is "not meant to be a 'catch all' that applies to all persons fearing persecution." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 234-35 (BIA 2014). For a particular social group to be legally cognizable under the Act and thus, constitute a protected ground, the group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *See A-B-*, 27 I&N Dec. at 317; *W-G-R-*, 26 I&N Dec. 208; *Matter of C-A-*, 23 I&N Dec. 951, 959-61 (BIA 2006); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008)). The Court determines whether a proposed particular social group is legally cognizable on a case-by-case basis. *M-E-V-G-*, 26 I&N Dec. at 231; *Acosta*, 19 I&N Dec. at 233. The shared characteristic "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *See M-E-V-G-*, 26 I&N Dec. at 231; *see also Acosta*, 19 I&N Dec. at 233. A group is socially distinct if the society in question perceives or recognizes the proposed group as a group. *M-E-V-G-*, 26 I&N Dec. at 238. A group is particularly defined if it is "discrete," has "definable boundaries," and is not "amorphous, overbroad, diffuse, or subjective," and "provide[s] a clear benchmark for determining who falls within the group." *Id.* at 239. Additionally, the group must exist "independently of the alleged underlying harm." *A-B-*, 27 I&N Dec. at 317.

First, the respondent's particular social group is comprised of members sharing a common immutable characteristic. Members of the group all share "a characteristic that . . . so fundamental to individual identity or conscience that it ought not to be required to be changed"—their sex. *Acosta*, 19 I&N Dec. at 233. A person's sex is fundamental to his or her identity, making it an immutable characteristic as it is generally unchangeable, and is certainly a characteristic that one should not be required to change. The Board went so far as to state as much in *Acosta*, concluding that one's "sex" is a "shared characteristic" on which particular social group membership can be based. *Id.* (stating that "[t]he shared characteristic might be an innate one such as sex, color, [or] kinship ties").

Second, the respondent's particular social group is socially distinct within the society in question. In *M-E-V-G-*, the Board explained that "[a] viable particular social group should be perceived within the given society as a sufficiently distinct group," and that "[t]he members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society." 26 I&N Dec. 227, 238; *see also W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014) (stating that "social distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group"). Through her testimony and documentary evidence, the respondent has established that Honduran society perceives women as sufficiently distinct from society as a whole to qualify as a particular social group. The respondent submitted the 2016 State Department Human Rights Report on Honduras, which states that "[v]iolence against women and impunity for perpetrators continued to be a serious problem" and that "[r]ape was a serious and pervasive societal problem." Exh. 3, Tab G at 41. The report also states that the "UN special rapporteur on violence against women expressed concern that most women in [Honduras] remained marginalized, discriminated against, and at high risk of being subjected to human rights violations." *Id.* at 43. The report further states that the Honduran government "did not effectively enforce" laws governing sexual harassment. *Id.* Finally, the report states that, although women and men have the same legal rights in many respects in Honduras, "many women did not fully enjoy such rights." *Id.* at 44.

The rest of the respondent's country conditions documentation are consistent with the State Department's report. For example, the respondent submitted a 2015 *Irish Times* article, which notes that "Honduras is rapidly becoming one of the most dangerous places on Earth for women" as "the number of violent deaths of women increased by 263.4 per cent" between 2005 and 2013. Exh. 3, Tab J at 134. The other news articles report similar statistics, documenting the pervasive violence against women in Honduras. *Id.*, Tab I (describing the endemic violence against women in Honduras), Tab K (noting that girlfriends and female relatives are considered "valuable possessions" and are targeted for revenge killings); Tab L ("In Honduras, 471 women were killed in 2015—one every 16 hours."). Taken as a whole, the respondent's evidence establishes that cultural and legal norms in Honduras permit widespread violence and discrimination against women. Through this evidence, the respondent has shown that women in Honduras "are set apart, or distinct, from other persons within [Honduras] in some significant way," and are therefore socially distinct. *M-E-V-G-*, 26 I&N Dec. at 238.

Third, the respondent's particular social group is defined with particularity. The Board has explained a group is particularly defined if it has "definable boundaries," and is not "amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 238-39. Further, "[a] particular

social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group,” and “be discrete and have definable boundaries.” *Id.* at 239; *see also W-G-R-*, 26 I&N Dec. at 214. The particularity requirement “clarifies the point . . . that not every ‘immutable characteristic’ is sufficiently precise enough to define a particular social group.” *M-E-V-G-*, 26 I&N Dec. at 239; *see also W-G-R-*, 26 I&N Dec. at 213. The Fourth Circuit similarly explained particularity as the need for a particular social group to “have identifiable boundaries.” *Temu v. Holder*, 740 F.3d 887, 895 (4th Cir. 2014); *see also Zelaya v. Holder*, 668 F.3d 159, 165 (4th Cir. 2012) (stating that a particular social group must “be defined with sufficient particularity to avoid indeterminacy”).

The particular social group of “women in Honduras” is defined with particularity. The boundaries of the group are precise, clearly delineated, and identifiable: women are members and men are not. *See M-E-V-G-*, 26 I&N Dec. at 239; *W-G-R-*, 26 I&N Dec. at 213-14; *Temu*, 740 F.3d at 895; *Zelaya*, 668 F.3d at 165. There is a clear benchmark for determining whether a person in Honduras is a member of the group: whether that person is a woman. *See M-E-V-G-*, 26 I&N Dec. at 238-39; *W-G-R-*, 26 I&N Dec. at 213-14. In *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007), the Board ruled that “affluent Guatemalans” are not members of a cognizable particular social group, holding that “[t]he terms ‘wealthy’ and ‘affluent’ standing alone are too amorphous to provide an adequate benchmark for determining group membership.” Here, by contrast, the term “woman” is not too amorphous to provide such an adequate benchmark, as, in the vast majority of cases, a person either is a woman or is not. In *Temu*, 740 F.3d at 895, the Fourth Circuit commented that the group in *Matter of A-M-E- & J-G-U-*, “affluent Guatemalans,” was not defined with particularity “because the group changes dramatically based on who defines it.” The court stated that “[a]ffluent might include the wealthiest 1% of Guatemalans, or it might include the wealthiest 20%,” and that the group therefore “lacked boundaries that are fixed enough to qualify as a particular social group.” *Id.* The group of “women in Honduras” does not change based on who defines it, and it therefore has boundaries that are fixed enough to meet the particularity requirement.

The particular social group of “women in Honduras” is defined with particularity even though it is large. In *Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008), the Board stated, “While the size of the group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed definition is sufficiently particular or is too amorphous . . . to create a benchmark for determining group membership.” 24 I&N Dec. 579, 585 (BIA 2008) (quotations omitted). Therefore, the “key question” relates not to the size of the group but to whether the group’s definition provides an adequate benchmark for determining which people are members and which people are not. In the respondent’s case, as discussed above, the group’s definition provides such an adequate benchmarks: women are members and men are not.

In addition, the Board has routinely recognized large groups as defined with particularity. Most obviously, the Board has long held that gay and lesbian people in various countries can qualify as members of particular social groups. *See Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (recognizing “homosexuals . . . in Cuba” as members of a particular social group). The Board recently affirmed that “homosexuals in Cuba” are members of a cognizable particular social group because, among other things, the group is defined with particularity. *See*

In the Matters of [REDACTED]

A [REDACTED]

M-E-V-G-, 26 I&N Dec. at 245; *W-G-R-*, 26 I&N Dec. at 219. The Board has never found, in a precedent decision, that a group of gay and lesbian people in a given country is not defined with particularity, even though such groups are sizable. Likewise, the Board has recognized that particular social group membership can be based on clan membership. In particular, in *Matter of H-*, 21 I&N Dec. 337, 343 (BIA 1996), the Board found that members of the Marehan subclan in Somalia are members of a particular social group. The Board later affirmed that the group of “members of the Marehan subclan” is defined with particularity, simply noting that the group is “easily definable.” See *W-G-R-*, 26 I&N Dec. at 219 (stating that the group of “members of the Marehan subclan” is “easily definable and therefore sufficiently particular”).

In *Matter of W-G-R-*, 26 I&N Dec. at 221, the Board found that the proposed group of “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” was not defined with particularity. The Board supported this conclusion by finding “[t]he group as defined lacks particularity because it is too diffuse, as well as being too broad and subjective. As described, the group could include persons of any age, sex, or background.” *Id.* However, the Board’s decision in *Matter of W-G-R-* does not support a finding that the group of “women in Honduras” is not defined with particularity. The Board’s conclusion in *Matter of W-G-R-* that the group in that case was not defined with particularity was based on its finding that the group’s “boundaries” were “not adequately defined” because the respondent had not established that society in El Salvador would “generally agree on who is included” in the group of former gang members. *Id.* at 221. By contrast, the group in this case—women in Honduras—has well-defined boundaries. “[M]embers of society” in Honduras would “generally agree on who [are] included in the group”—women—and who are excluded—men. The boundaries of the group of “women in Honduras” are precise, finite, and objective. Further, the group is not based on some “former association” with an organization, as was the proposed group in *W-G-R-*. Instead, it is based on one’s biological identity, which has a clear and well-defined boundary.

It could be argued that the Board’s decision in *Matter of W-G-R-* stands for the proposition that a group cannot be defined with particularity if it is internally diverse. After all, in ruling that the proposed group of “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” is not defined with particularity, the Board, as noted above, stated that the group “could include persons of any age, sex, or background.” *Id.* at 221. In the Board’s words, the group could include “a person who joined the gang many years ago at a young age but disavowed his membership shortly after initiation without having engaged in any criminal or other gang-related activities” as well as “a long-term, hardened gang member with an extensive criminal record who only recently left the gang.” *Id.* If one accepts the premise that a group cannot be defined with particularity if it is internally diverse, then it could be further argued that the group of “women in Honduras” is not defined with particularity. That group is highly diverse, as it encompasses, for example, women of different ages, races, and levels of education.

However, imposing a requirement that a group cannot be internally diverse to be defined with particularity would run counter to other Board precedent decisions, and would preclude the recognition of particular social groups that are currently commonly accepted. In *Matter of C-A-*, 23 I&N Dec. at 957, the Board stated that it did not “require an element of ‘cohesiveness’ or homogeneity among group members.” See also *S-E-G-*, 24 I&N Dec. at 586 n. 3. A policy that an internally diverse group cannot be defined with particularity would preclude particular social

groups based on sexual orientation. As noted above, the Board has long recognized, and continues to recognize, particular social groups of gay and lesbian people in various countries. *See Toboso-Alfonso*, 20 I&N Dec. at 822-23; *see also M-E-V-G-*, 26 I&N Dec. at 245, (affirming that “homosexuals in Cuba” are members of a cognizable particular social group because, among other things, the group is defined with particularity); *W-G-R-*, 26 I&N Dec. at 219 (affirming that “homosexuals in Cuba” “had sufficient particularity because it was discrete and readily definable”). Groups composed of gay and lesbian people in particular countries are extremely diverse; such a group would include young people and old people, rich people and poor people, people in same-sex romantic relationships and people not in such relationships, people living in cities and people living in rural areas, and so on. Such a policy would also likely preclude particular social groups based on clan membership, as a clan would, in all likelihood, include people from a variety of backgrounds and walks of life. *See H-*, 21 I&N Dec. at 343 (finding that members of the Marehan subclan in Somalia are members of a particular social group); *see also W-G-R-*, 26 I&N Dec. at 219 (affirming that the group in *Matter of H-* is defined with particularity as it is “easily definable”). For the same reason, such a policy would also likely preclude particular social groups based on ethnicity, such as “Filipino[s] of mixed Filipino-Chinese ancestry,” recognized by the Board as a particular social group in *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997). *See also W-G-R-*, 26 I&N Dec. at 219 (stating that the group of “Filipino[s] of mixed Filipino-Chinese ancestry” is defined with particularity as it “ha[s] clear boundaries, and its characteristics ha[ve] commonly accepted definitions”).

Additionally, the respondent’s particular social group exists independent of the harm its members suffer. *See A-B-*, 316 at 334 (“To be cognizable, a particular social group *must* ‘exist independently’ of the harm asserted in an application for asylum or statutory withholding of removal.”) (emphasis in the original) (citing *M-E-V-G-*, 26 I&N Dec. at 236 n.11, 243). The harm the members suffer does not create any of the characteristics they share; rather, very clearly, as discussed below, the characteristics of the members give rise to the harm. Honduran society treats women separately from the rest of society apart from any abuse the women suffer on account of their membership in this particular social group. Finally, the respondent is a member of her particular social group. She is a Honduran woman. For the foregoing reasons, the respondent has established her membership in a cognizable particular social group. The Court must now analyze if the persecution she suffered was on account of her membership in this group.

d. On Account Of

For the respondent to establish that her persecution was on account of a protected ground, she must show the protected ground was “at least one central reason” she was persecuted. *J-B-N- & S-M-*, 24 I&N Dec. at 214; INA § 208(b)(1). The protected ground, however, need not be “the central reason or even a dominant central reason” for [the] persecution.” *Crespin-Valladares*, 632 F.3d at 127; *see also Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015) (“[A] protected ground must be ‘at least one central reason for the feared persecution’ but need not be the only reason.”). Nevertheless, the protected ground cannot be incidental, tangential, superficial, or subordinate to a non-protected reason for harm. *Oliva*, 807 F.3d at 59 (quoting *J-B-N- & S-M-*, 24 I&N Dec. at 214). The persecutors’ motivations are a question of fact, and may be established through testimonial evidence. *Matter of S-P-*, 21 I&N Dec. 486, 490 (BIA 1996).

In the Matters of [REDACTED]

A [REDACTED]

The respondent has demonstrated that her status as a woman was at least one central reason for the harm that [REDACTED] and [REDACTED] inflicted on her. She submitted sufficient circumstantial evidence of [REDACTED] and [REDACTED] motives to establish that her status as a woman was one central reason for the harm she suffered. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (stating that “the [asylum] statute makes motive critical,” and that an applicant “must [therefore] provide some evidence of it, direct or circumstantial”) (stating that “we do not require” “direct proof of [a] persecutor’s motives”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Court therefore finds that the respondent’s membership in the particular social group of “women in Honduras” is “at least one central reason” for the persecution she suffered. *J-B-N- & S-M-*, 24 I&N Dec. at 214.

4. *Presumption of Future Persecution*

Because the respondent established that she experienced past persecution on account of her membership in a protected class at the hands of actors the Honduran government was unable or unwilling to control, she benefits from a rebuttable presumption of future persecution. 8 C.F.R. § 1208.16(b)(1). To overcome this presumption, the DHS bears the burden of demonstrating, by a preponderance of the evidence, that (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in her country of nationality on account of a protected ground; or (2) the applicant could avoid future persecution by relocating to another part of her country of nationality and under the circumstances, it would be reasonable to expect her to do so. 8 C.F.R. § 1208.13(b)(1)(i)(A)-(B); *see also* 8 C.F.R. § 1208.13(b)(3)(ii) (where past persecution is established, internal relocation is presumptively unreasonable); *see also Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008) (remanding a case for failing to shift the burden of proof to the DHS that, by a preponderance of the evidence, relocation was reasonable). The DHS provided no evidence nor made any meaningful attempt to rebut this presumption. Accordingly, the Court finds that the presumption that the respondent has a well-founded fear of future persecution on account of her membership in a particular social group remains un rebutted.

5. *Discretion*

After an applicant establishes her statutory eligibility for asylum, the Court may exercise its discretion to grant or deny asylum. 8 C.F.R. § 1208.14(a); *see also* INA § 208(b)(1)(A); *Cardoza-Fonseca*, 480 U.S. at 427-28; *Pula*, 19 I&N Dec. at 473. A decision to deny asylum as a matter of discretion should be based on the totality of the circumstances. *See Pula*, 19 I&N Dec. at 473. The Fourth Circuit has recognized that discretionary denials of asylum are “exceedingly rare” and require “egregious negative activity by the applicant.” *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008). The Court is not required to “analyze or even list every factor,” but must

In the Matters of [REDACTED]

A [REDACTED]

demonstrate it has “reviewed the record and balanced the *relevant* factors and must discuss the positive or adverse factors” supporting the decision. *Id.* at 511 (citing *Casalena v. INS*, 984 F.2d 105, 107 (4th Cir. 1993) and *Matter of Marin*, 16 I&N Dec. 581, 585 (BIA 1978)) (emphasis in original).

The Court finds that the respondent merits a favorable exercise of discretion. She suffered past persecution and has a well-founded fear of persecution in Honduras on account of a protected ground. She has no known criminal record in the United States or elsewhere. The only negative factor in the respondent’s case is her entry without inspection. *See* Exh. 1. Thus, after considering the totality of the circumstances, the Court will grant her request for asylum in the exercise of discretion.

IV. CONCLUSION

The respondent established that she suffered past persecution on account of her membership in a legally-cognizable particular social group. Additionally, the DHS did not rebut the presumption of future persecution. Moreover, the respondent established that she warrants a favorable exercise of the Court’s discretion. Accordingly, the Court grants her application for asylum. For the same reason, the Court grants the rider respondents’ derivative applications for asylum. Therefore, the Court does not reach the respondent’s applications for withholding of removal under the Act and protection under the CAT. Accordingly, the Court enters the following orders.

ORDERS

It Is Ordered that:

The respondent’s application for asylum under INA § 208 be **GRANTED**.

It Is Further Ordered that:

The rider respondents’ derivative application for asylum pursuant to 8 C.F.R. § 1208.21 be **GRANTED**.

[REDACTED] 1-2018
Date

DNadkarni
Deepali Nadkarni¹
Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals on or before thirty (30) calendar days from the date of service of this decision.

¹ The Immigration Judge formerly assigned to this case has since retired and is unable to complete this case. Pursuant to 8 C.F.R. § 1240.1(b), the signing Immigration Judge has reviewed the record of proceeding and familiarized herself with the record.

4877

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

Matter of

Date: Sept. 13, 2018

File Number:

Respondent

In Removal Proceedings

Charge: Section 212(a)(7)(A)(i)(I), of the Immigration and Nationality Act, as amended, as an immigrant who, at the time of application for admission, was not in possession of a valid entry document as required by the Act

Applications: Asylum, Withholding of Removal, and Protection under the Convention Against Torture

On Behalf of Respondent:

Kelly Engel Wells
Dolores Street Community Services
938 Valencia Street
San Francisco, California 94110

On Behalf of DHS:

Susan Phan
Office of the Chief Counsel
100 Montgomery Street, Suite 200
San Francisco, California 94104

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

On December 13, 2017, the Department of Homeland Security ("DHS") initiated these removal proceedings against Respondent, _____, by filing a Notice to Appear ("NTA") with the San Francisco, California, Immigration Court. Exh. 1. The NTA alleges that Respondent is a native and citizen of Mexico, who applied for admission into the United States at the Nogales, Arizona, Port of Entry on July 10, 2017, and did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document. *Id.* Based on these allegations, DHS charged Respondent with removability under the Immigration and Nationality Act ("INA" or "Act") § 212(a)(7)(A)(i)(I), as amended, as an immigrant who, at the time of application for admission, was not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document as required by the Act. *Id.*

On _____, Respondent admitted the factual allegations in the NTA and conceded the charge of removability but declined to designate a country of removal. Based on her admissions and concession, the Court sustained the charge of removability and directed

Mexico as the country of removal, should removal become necessary. 8 C.F.R. § 1240.10(c), (f). On 2018, Respondent filed a Form I-589, Application for Asylum and for Withholding of Removal ("Form I-589"), applying for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). Exh. 3A.

II. EVIDENCE PRESENTED

The Court has thoroughly reviewed the evidence in the record, even if not explicitly mentioned in this decision. The evidence of record consists of the testimony of Respondent and the following exhibits:

- Exhibit 1: NTA;
- Exhibit 2: Form I-213, Record of Deportable/Inadmissible Alien;
- Exhibit 3: Letters in support of Respondent's Form I-589;
- Exhibit 3A: Form I-589;
- Exhibit 4: 2016 United States Department of State Human Rights Report for Mexico;
- Exhibit 5: Respondent's documentation in support of her Form I-589;
- Exhibit 6: Respondent's amendments to her Form I-589;
- Exhibit 7: Respondent's supplemental documentation;
- Exhibit 8: Respondent's additional supplemental documentation; and
- Exhibit 9: Respondent's additional supplemental documentation.

A. Respondent's Testimony and Declaration

Respondent testified before the Court on August 23, 2018, and submitted two declarations in support of her applications for relief. Exhs. 5 at Tab B, 9 at Tab B. The Court summarizes Respondent's testimony and declarations together below.

1. Background.

Respondent was born on _____, in _____ Mexico. She grew up in Morelos, Mexico with her parents and five siblings. Respondent studied art education and worked as a teacher.

2. Abuse by: _____

From the age of 5, until the age of 22, Respondent's mother, _____, physically and mentally abused Respondent on a daily basis. Beginning when Respondent was approximately five years old, her mother forced her to complete the duties of a servant, including sweeping, mopping, and washing clothing, to teach Respondent how to be a good housewife. Respondent testified that her mother also beat her to make her strong and to prepare her to be a good wife, teaching her how to tolerate a beating by her future husband. She beat Respondent with a belt, cables from a washing machine, a broomstick, and a kitchen spoon. On one occasion, when Respondent told her father about the abuse, Respondent's mother beat her so severely that she was unable to sit or leave her bed the following day. Respondent also testified that her mother taught her that women always needed to obey their husbands and that

once Respondent was married, Respondent would need to ask him for permission to do anything because he was in charge. She also taught Respondent that the husband is the "superior being who can do no wrong," and if a husband beats his wife, it is her fault.

Respondent also testified that when she was nine or ten years old, she was raped during a robbery of her family's home. She told her mother who committed the robbery but not that she was raped; her mother called her a "liar and blamed [Respondent] for not alerting her to the robbery."

3. Abuse by

In 1989, Respondent met her husband, _____ ("Mr. B"). They married in _____ Mexico on _____, 1993. They have one child, _____ ("Ms. R."), born on _____, 1993.

Approximately three months after they married, Mr. B began consistently beating Respondent. On the first occasion, while on a trip to the United States, he slapped her twice across the face and punched her mouth, breaking her two front teeth. When they returned to Mexico, Mr. B continued to abuse her, often after consuming alcohol. Respondent testified that Mr. B abused her because "he felt wounded in his machismo" and told her "you're not going to step on me. I'm the man and you're going to do what I say." She believes he beat her because she was a woman and believed that she was his equal with a right to her own opinions and ideas.

Respondent also testified that on two occasions, Mr. B burned her with cigarettes, leaving permanent scars. During the first incident, in the middle of the night, Mr. B burned Respondent's arm with a cigarette while she slept, demanding that she cook for him. She refused, but he insisted that she must cook for him because it was her job. He dragged her by her hair to the kitchen, stating, "A woman's only job was to shut up and obey her husband." Respondent continued to refuse to cook for him, and in response, Mr. B slapped her. In the second incident, Mr. B burned Respondent's face with a cigarette because she continued to work, despite his orders to quit her job, thus, explicitly disobeying Mr. B and continuing to express that she had a right to work. Respondent testified that he burned her to show her that they were not equals, he was in charge, and to impress these principles upon her since he believed she did not understand them.

Eventually, Respondent quit her job. However, Mr. B abandoned her approximately six months after they married; Respondent and her daughter lived with Respondent's family. Mr. B and Respondent remain married because Respondent's family is Catholic, and her family would disown her if they divorced.

4. Abuse by

In January 1995, Respondent entered the United States and began living in Phoenix, Arizona. Approximately two months later, she met _____ ("Mr. H"), and they began a relationship in May 1995. They have three United States citizen

children together, born [redacted] 1996, born [redacted] 1997, and [redacted] born [redacted] 2004. Shortly after beginning their relationship, Respondent and Mr. H began living together, and Mr. H beat Respondent for the first time because he believed she was having an affair with his friend. However, he did not harm Respondent again until approximately two years later.

Respondent testified that from approximately 1998 until 2016, Mr. H consistently abused her; he also used drugs and abused alcohol often. He beat, raped, and strangled her over the course of their relationship. Mr. H raped her approximately five times per month and beat her approximately three times per month. Respondent testified that she bears physical scars from multiple incidents of his abuse. On one occasion, when Respondent refused to give Mr. H money or sex, he hit her, broke a beer bottle, cut her leg with the bottle, and then raped her. On other occasions when Respondent rejected his sexual advances, Mr. H stated that Respondent was "his woman and had to have sex with him whenever he wanted" before raping Respondent. Mr. H stated that Respondent needed to have sex with him whenever he wanted because she was a woman and thus, "his slave" and required to obey him. On another occasion, in 2004, Respondent entered their home and told Mr. H that his friends should leave. Mr. H warned Respondent that she was not to speak when entering the room and beat Respondent so severely she had a vaginal hemorrhage.

Mr. H often ordered Respondent to quit her job and beat her when he was jealous of her male supervisors. He also demanded she only work with other women and dress as he desired. Respondent testified that when she wore an outfit Mr. H did not approve of, he ripped it off of her. Mr. H also frequently bit Respondent, leaving marks on her neck and arms to show that she was "[his] woman" because others "need[ed] to know it." Respondent also testified that if she resisted due to her belief that they were equal partners, Mr. H harmed her.

Respondent attempted to end her relationship with Mr. H numerous times; however, he refused to leave and would beat and rape her to emphasize his refusal. She believed he mistreated her because she was the mother of his children and he believed he had the power and could do whatever he wanted. In 2015, Respondent moved into a house without Mr. H. Yet, Mr. H found opportunities to physically harm Respondent, often utilizing their children to have contact with her.

In the spring of 2017, Mr. H was removed to his native Guatemala. Shortly thereafter, Respondent was subsequently removed to Mexico, and she returned to her parents' home. She fled Mexico approximately two weeks later because she received menacing phone calls from Mr. H.

5. Criminal History

In 2007, Respondent was arrested for criminal impersonation. She testified that when she went to the Department of Motor Vehicles to renew her Arizona identification, the clerk informed her that a social security number was required for the renewal application. When

Respondent expressed that she did not have a social security number, the clerk threatened to call the police; Respondent became fearful and wrote down a random number. She was ultimately convicted and sentenced to one year of probation.

6. Fear of Returning to Mexico

Respondent fears that if she returns to Mexico, she will be persecuted by both Mr. B and Mr. H.

Respondent testified that approximately two years ago, Mr. B called her requesting information regarding her whereabouts. He expressed his desire to rekindle their relationship, but Respondent refused and told him to leave her alone. Thereafter, Respondent changed her phone number. However, Mr. B continued to contact Respondent through Facebook messages, again seeking information on her whereabouts. Respondent deleted her account to prevent Mr. B from contacting her. Yet, Respondent testified that she heard from her daughter that Mr. B visited her and was aggressive; he threatened to take "revenge" against Respondent for rejecting him and having relationships with other men.

Respondent testified that approximately one week after she was removed to Mexico, Mr. H called her on her cell phone and told Respondent he planned to locate her. Respondent believes Mr. H could find her in Mexico because his entire family resides in Chiapas, Mexico. During a second phone call, Mr. H stated that he already confirmed that Respondent was residing at her parents' home in Mexico, and he would be "coming for [Respondent]." Despite Respondent's repeated pleas to Mr. H to leave her alone, he continued to attempt to acquire information about Respondent's whereabouts through their children. She fled to the United States after she continued to feel fear and distress from Mr. H's menacing phone calls. Respondent testified that if Mr. H harmed her in Mexico she would attempt to report him to the police, but she did not believe they would help her. She believed that he would be able to locate her through their children.

B. Documentary Evidence

Respondent submitted a copy of her marriage certificate to the Court. Exh. 9 at 1. Respondent also submitted her psychological evaluation by Dr. Jane Christmas, a licensed clinical psychologist; Dr. Christmas diagnosed Respondent with post-traumatic stress disorder and major depressive disorder. *Id.* at 7-24. Respondent also submitted letters of support from community members. *See* Exh. 3.

Respondent submitted declarations from her daughter, Ms. R, and her son, , in which they described the abuse Respondent suffered by both of their fathers. Exh. 5 at 20-25. stated that Mr. H called him after Respondent was removed to Mexico seeking information on her location. *Id.* at 21. Ms. R stated that Mr. B is very aggressive and angry with Respondent because she had a relationship with another man. *Id.* at 23. She also stated that both Mr. B and Mr. H are seeking information on Respondent's whereabouts. *Id.* at 23-24. Respondent also submitted a copy of text messages Mr. H sent to Ms. R seeking information regarding Respondent's location. *Id.*

at 39. The record also includes photographic evidence of the injuries Respondent sustained from the abuse by Mr. H . *Id.* at 29–38.

Respondent submitted a letter from Adriana Prieto-Mendoza, a Mexican attorney; Ms. Prieto-Mendoza stated that Mr. H would be able to obtain permanent residency in Mexico because his children with Respondent are Mexican citizens and included copies of Mexican law to support her statement. Exh. 7 at 30–54.

Finally, Respondent submitted documentation of her criminal convictions. *Id.* at Tab A. The record evinces that in 2007, Respondent was convicted of criminal impersonation and was sentenced to one year of probation, and she was convicted of shoplifting and sentenced to pay a fine. *Id.* at 3–25. In 2017, Respondent was convicted for illegal entry in violation of 8 U.S.C. § 1325(a)(2) and sentenced to 150 days of confinement. *Id.* at 27–29.

C. Country Conditions Evidence

Respondent submitted extensive documentary evidence regarding country conditions in Mexico. *See* Exhs. 5 at Tabs G–OO, 7 Tabs D–M. DHS also submitted country conditions evidence. Exh. 4. The Court has comprehensively reviewed all country conditions evidence in the record and discusses the relevant information in the analysis below.

III. ANALYSIS

A. Credibility

A respondent has the burden of proof to establish she is eligible for relief, which she may establish through credible testimony. *See* INA § 240(c)(4). In making a credibility finding under the REAL ID Act, the Court may base its credibility determination on the demeanor, candor, or responsiveness of the applicant; the inherent plausibility of her account; the consistency between her 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. *Id.*

The Court analyzed Respondent's testimony for consistency, detail, specificity, and persuasiveness. Overall, Respondent testified in a consistent, believable, and forthright manner, and DHS conceded that Respondent was credible. Considering the totality of the circumstances, the Court finds that Respondent testified credibly and accords her testimony full evidentiary weight. *Id.*

B. Asylum

To qualify for a grant of asylum, an applicant bears the burden of demonstrating that she meets the statutory definition of a refugee. INA § 208(b)(1)(B)(i). The Act defines the term "refugee" as any person who is outside her country of nationality who is unable or unwilling to return to, and is unable or unwilling to avail herself of the protection of that country because of

past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A).

Respondent argues she is eligible for asylum relief based on the past persecution she suffered at the hands of her mother and her husband and based on an independent well-founded fear of harm by her ex-partner.¹ The Court analyzes Respondent's claims for relief below.

I. Past Persecution

To establish past persecution, an applicant must show that she experienced harm that (1) rises to the level of persecution, (2) was on account of a protected ground, and (3) was committed by the government or forces the government is unable or unwilling to control. *Navas v. INS*, 217 F.3d 646, 655-56 (9th Cir. 2000).

a. *Harm Rising to the Level Necessary to Establish Persecution*

"Persecution" is "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997). Physical violence, such as rape, torture, assault, and beatings, "has consistently been treated as persecution." *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000). In assessing whether an applicant has suffered past persecution, the Court may not consider each individual incident in isolation but must instead evaluate the cumulative effect of the abuse the applicant suffered. *See Krutova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005).

While living in Mexico, Respondent experienced harm by her mother and her husband, Mr. B. *See* Exhs. 5 at Tab B, 9. The Court addresses the harm Respondent suffered by each in turn.

As an initial matter, the Court notes that Respondent was a child at the time of the harm she suffered by her mother, and "age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted . . ." *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) (internal quotation marks omitted). The Court must assess the alleged persecution from the child's perspective, as the "harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution." *Id.* By its common usage, "child abuse" encompasses "any form of cruelty to a child's physical, moral, or mental well-being." *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999) (internal quotation marks omitted); *see also Velazquez-Herrera v. Gonzales*, 446 F.3d 781, 782 (9th Cir. 2006). From the age of 5 until the age of 22, Respondent's mother physically harmed Respondent on a daily basis. She beat Respondent with a belt, cables from a washing machine, a broomstick, and a kitchen spoon. On one occasion, Respondent's mother beat her so severely that she was unable to sit or leave her bed the following day. In addition, Respondent's mother forced her to perform all of the duties of a servant at home, which imposed psychological harm upon Respondent. Considered cumulatively, the Court finds that the physical and mental

¹ The Court does not analyze whether the harm Respondent experienced by Mr. B constitutes past persecution because it occurred in the United States and not in the country of prospective return. *See* INA § 101(a)(42)(A).

abuse of Respondent by her mother constitutes harm rising to the level of persecution. *See Krotova*, 416 F.3d at 1084; *Chand*, 222 F.3d at 1073.

Next, the Court considers the harm Respondent suffered by her husband, Mr. B. Respondent testified that after they married, Mr. B. consistently physically and psychologically abused Respondent during their marriage. He frequently beat her, pulled her hair, slapped her, and on two occasions, burned her with a cigarette, once on her face, leaving permanent scars. He abused her for months before he left her and moved away. The Court finds the harm Respondent suffered by Mr. B. rises to the level of persecution. *See Krotova*, 416 F.3d at 1084; *Chand*, 222 F.3d at 1073.

b. On Account of a Protected Ground

In addition to showing harm rising to the level of persecution, an applicant must show that the persecution was on account of one or more of the protected grounds enumerated in the Act: race, religion, nationality, political opinion, or membership in a particular social group. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1).

Respondent asserts that she was persecuted on account of her membership in numerous particular social groups,² including "women in Mexico." The Court understands Respondent's proposed social group to constitute the particular social group "Mexican females." Accordingly, the Court adopts this refined formulation of the particular social group and addresses each of the three requirements to determine the group's cognizability under the INA below. Respondent also asserts that she was harmed on account of her political opinions, including: (1) that women have the right to pursue a career; (2) men and women have equal rights; and (3) husbands and wives have equal status. The Court understands each of these three political opinions to constitute a feminist political opinion and analyzes the protected ground as such. The Court analyzes each protected ground in turn.

i. Particular Social Group

A "particular social group" must be (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *See Matter of A-B-*, 27 I&N Dec. 316, 319 (AG 2018) (citing *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)). "To be cognizable, a particular social group *must* 'exist independently' of the harm asserted in an application for asylum or statutory withholding of removal." *Id.* (quoting *M-E-V-G-*, 26 I&N Dec. at 236 n.11, 243). The Board of Immigration Appeals ("Board") stated that "[s]ocial groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups." *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006); *see Matter of Acosta*, 19

² Respondent proposed additional particular social groups related to her claim for past persecution including: (1) "direct descendants of _____"; (2) "female children of _____"; (3) "women and girls in Mexico;" and (4) "married women in Mexico." Further, Respondent also proposed additional particular social groups for her claim of well-founded fear of persecution including: (5) "married women in Mexico who are unable to leave their relationship;" (6) "mothers of the children of _____;" and (7) "women in Mexico who are unable to leave their relationship with the father of their children." However, the Court does not address their cognizability at this time.

I&N Dec. 211, 233 (BIA 1985).

First, common and immutable characteristics are those attributes that members of the group "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, 19 I&N Dec. at 233 (listing sex, color, kinship, and shared past experiences as prototypical examples of an immutable characteristic). Respondent's social group, "Mexican females," satisfies the immutability requirement because it is defined by gender and nationality, two innate characteristics that are fundamental to an individual's identity. *Id.*; see also *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (reiterating that "women in a particular country, regardless of ethnicity or clan membership, could form a particular social group"); *Mohammed v. Gonzalez*, 400 F.3d 785, 797 (9th Cir. 2005) ("[G]irls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group . . .").

Second, to be cognizable, the proposed social groups must be sufficiently particular. *M-E-V-G-*, 26 I&N Dec. at 239 ("A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.") (citation omitted); see also *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (en banc). The "particularity" requirement addresses the outer limits of the group's boundaries and requires a determination as to whether the group is sufficiently discrete without being "amorphous, overbroad, diffuse, or subjective;" "not every 'immutable characteristic' is sufficiently precise to define a particular social group." *A-B-*, 27 I&N Dec. at 335 (quoting *M-E-V-G-*, 26 I&N Dec. at 239). Here, the group is sufficiently particular because the membership is limited to a discrete section of Mexican society—female citizens of Mexico—and is thus distinguishable from the rest of society. See *Perdomo*, 611 F.3d at 667, 669 (rejecting the notion that a persecuted group could represent too large a portion of the population to constitute a particular social group); *M-E-V-G-*, 26 I&N Dec. at 239.

Finally, Respondent must demonstrate that the group is socially distinct within Mexico. To establish social distinction, an applicant must show that members of the social group are "set apart, or distinct, from other persons within the society in some significant way," *M-E-V-G-*, 26 I&N Dec. at 238, and that they are "perceived as a group by society." *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014) (emphasis in original). The Board clarified that "a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor." *A-B-*, 27 I&N Dec. at 330 (quoting *M-E-V-G-*, 26 I&N Dec. at 242). Legislation passed to protect a specific group can be evidence that the society in question views members of the particular group as distinct. See *Henriquez-Rivas*, 707 F.3d at 1092. Yet, "a social group may not be defined exclusively by the fact that its members have been subjected to harm." *A-B-*, 27 I&N Dec. at 331 (citing *M-E-V-G-*, 26 I&N Dec. at 238). "[S]ocial groups must be classes recognizable by society at large" rather than "a victim of a particular abuser in highly individualized circumstances." *Id.* at 336 (citing *W-G-R-*, 26 I&N Dec. at 217 (providing that "[t]o have the 'social distinction' necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group"))).

The Court finds the evidence in the record demonstrates that Mexican society views members of the particular social group “Mexican females” to be distinct. *See id.* Notably, country conditions documentation in the record evinces that violence committed against Mexican females is “pandemic,” including femicide and domestic violence. Exh. 5 at 80, 255, 280. The 2017 United States Department of State Human Rights Report for Mexico (“2017 HR Report”) identified that federal law criminalizes femicide and rape, however, impunity for all crimes remained high. *Id.* at 42, 67. Indeed, Respondent’s home state of Morelos is tied for the highest number of rape and femicides. Exh. 7 at 73. Furthermore, in 2015 and 2016, the federal government began utilizing a “gender alert” mechanism to direct local authorities to “take immediate action to combat violence against women by granting victims legal, health, and psychological services and speeding investigations of unsolved cases.” Exh. 5 at 100. The government issued a “gender alert” for Morelos, and a federal agency worked to set in place measures for the security and prevention of violence for women. *Id.*; Exh. 7 at 83. The existence of these efforts demonstrates the government’s recognition of the need for specialized protection for Mexican females and, thus, that Mexican females are viewed as a distinct group from the general population in Mexico. *See* *Henríquez-Rivas*, 707 F.3d at 1092; *Silvestre-Mendoza v. Sessions*, No. 15-71961, 2018 WL 3237505 (9th Cir. July 3, 2018) (unpublished) (the Ninth Circuit remanded to the BIA to consider whether “Guatemalan women” constituted a particular social group because the record appeared to support that it may be “socially distinct”).³

Accordingly, the Court finds that Respondent’s particular social group “Mexican females” is cognizable under the Act. Furthermore, the Court finds that Respondent is a member of the particular social group.

ii. Particular Social Group Nexus

“Applicants must also show that their membership in the particular social group was a central reason for their persecution.” *A-B-*, 27 I&N Dec. at 319; INA § 208(b)(1)(B)(i). A “central reason” is 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.” *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2008). The applicant may provide either direct or circumstantial evidence to establish that the persecutor was or would be motivated by the applicant’s actual or imputed status or belief. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). Proof of motivation may consist of statements made by the persecutor to the victim. *See Sinha v. Holder*, 564 F.3d 1015, 1021–22 (9th Cir. 2009) (providing that attackers’ abusive language showed they were motivated at least in part by a protected ground).

Here, Respondent provided sufficient direct and circumstantial evidence to establish that her membership in the social group of “Mexican females” was at least one central reason for the persecution she suffered by her mother and her husband. Although Respondent’s mother is also a member of the particular social group “Mexican females,” a person may be persecuted by members of her own social group. As the Ninth Circuit explained, “[t]hat a person shares an identity with a persecutor does not . . . foreclose a claim of persecution on account of a protected ground.” *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000). Respondent’s mother consistently

³ Although unpublished decisions are not precedential, they serve as persuasive authority.

beat her, reasoning she was preparing Respondent for her life with her future husband. Exh. 5 at 5. She told Respondent that women needed to obey their husbands, and she beat Respondent because Respondent was female and needed to prepare to be a good wife. *Id.* at 4. Viewing the evidence of record in its totality, and, in particular, her mother's statements, the Court finds that Respondent's membership in her particular social group was at least "one central reason" for her persecution by her mother. INA § 208(b)(1)(B)(i); *Parussimova*, 555 F.3d at 741.

Similarly, Respondent testified that Mr. B frequently abused her because she was a Mexican woman. On one occasion, he awoke Respondent in the middle of the night, intentionally burned her with a cigarette, and demanded that she cook him food, dragging her by the hair to the kitchen and stating that "a woman's only job was to shut up and obey her husband." Exh. 5 at 5. During another occasion of abuse, Mr. B threw Respondent to the floor and said, "You're not going to step on me. I'm the man and you're going to do what I say." *Id.* The record supports that many individuals in Mexico have an endemic perception that women are inferior to men. *See generally id.* The record also includes the declaration of Nancy K. D. Lemon, an expert on domestic violence, in which she opined "gender is one of the main motivating factors, if not the primary factor, for domestic violence. In other words, the socially or culturally constructed and defined identities, roles, and responsibility that are assigned to women, as distinct from those assigned to men, are at the root of domestic violence." *Id.* at 118. In particular, Mr. B's statements in the context of Mexican society are strong evidence that if Respondent were not a woman, he would not have harmed her in this manner. Further, a report from Mexico's interior department, the National Women's Institute, and UN Women stated, "Violence against women and girls . . . is perpetrated, in most cases, to conserve and reproduce the submission and subordination of them derived from relationships of power." *Id.* at 253. As such, in the totality of the circumstances, the Court finds that Respondent's membership in the particular social group "Mexican females" was "at least one central reason" for her persecution by Mr. B. INA § 208(b)(1)(B)(i); *Parussimova*, 555 F.3d at 741.

iii. Political Opinion

To establish that past persecution is on account of political opinion, an asylum applicant must meet two requirements. First, the applicant must demonstrate that she held, or that her persecutors believed she held, a political opinion. *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007). Second, the applicant must show that she was persecuted "because of" this actual or imputed political opinion. *Id.* The Ninth Circuit held that "[a] political opinion encompasses more than electoral politics or formal political ideology or action." *Id.* The factual circumstances of the case alone may at times be sufficient to demonstrate that the persecution was committed on account of a political opinion. *Navas*, 217 F.3d at 657.

Respondent asserts that Mr. B and her mother also persecuted her on account of her feminist political opinion. Respondent expressed her belief in the equality of men and women, including equality in opinions, worth, and support; she also believes that as a woman, she has the right to work. The Court finds Respondent's views constitute a political opinion. *See Ahmed*, 504 F.3d at 1192; *see also Fatim v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (stating there is "little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes").

Next, the Court considers whether Respondent's political opinion was one central reason for the persecution she suffered by her mother and Mr. B. See INA § 208(b)(1)(B)(i); *Navas*, 217 F.3d at 656. Respondent testified that her mother abused her to teach her that women needed to obey their husbands and that husbands were in charge. Respondent also testified that her mother admitted to physically abusing Respondent because she would "answer back." The record indicates that Respondent's mother was not primarily motivated to harm Respondent because of her political opinion. See *Parussimova*, 555 F.3d at 741. Therefore, the Court finds that Respondent's political opinion was not one central reason for the persecution she suffered by her mother. See INA § 208(b)(1)(B)(i). However, the Court finds that Respondent's feminist political opinion was "a reason" for the persecution because Respondent's mother disagreed with Respondent's political opinion and abused Respondent, in part, for disagreeing with her. See INA § 241(b)(3)(A); see *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017) (nexus standard for withholding of removal is the protected ground must have been "a reason" for the persecution).

However, the evidence in the record demonstrates that Respondent's feminist political opinion was one central reason for the persecution by Mr. B. Respondent testified that Mr. B. burned her with a cigarette because she refused to quit her job and disobeyed his instruction to quit. Mr. B. also burned her face with a cigarette to show her that they were not equals, he was in charge, and to impress these principles upon her since he believed she did not understand them. She also testified that he beat her because she believed she had the right to her own opinions and ideas; specifically, Mr. B. beat her when she expressed her opinion that she had a right to work or she refused to cook for him. Based on Mr. B.'s actions and statements, the Court finds that Respondent's political opinion was at least one central reason for the persecution by Mr. B. See INA § 208(b)(1)(B)(i); *Parussimova*, 555 F.3d at 741. Therefore, the Court finds that Mr. B. persecuted Respondent on account of her feminist political opinion. See *Ahmed*, 504 F.3d at 1192.

c. Government Unable or Unwilling to Control Persecutor

Finally, the applicant must demonstrate that the persecution she experienced was inflicted by the government or forces the government was unable or unwilling to control. *Navas*, 217 F.3d at 655–56. Prior unheeded requests for authorities' assistance or showing that a country's laws or customs deprive victims of meaningful recourse to protection may establish governmental inability or unwillingness to protect. See *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073–74 (9th Cir. 2017) (en banc) (providing that where "ample evidence demonstrates that reporting [persecution to police] would have been futile and dangerous," applicants are not required to report their persecutors"); *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010) (holding that "the authorities' response (or lack thereof)" to reports of persecution provides "powerful evidence with respect to the government's willingness or ability to protect" the applicant and noting that authorities' willingness to take a report does not establish they can provide protection). Yet, applicants "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *A-B-*, 27 I&N Dec. at 338. The Ninth Circuit also recognizes that there are significant barriers for children to report abuse. *Bringas-Rodriguez*, 850 F.3d at 1071.

Respondent testified that she did not report the abuse she suffered by her mother or Mr. B to the police because she believed it would be futile and that the police would not help her. *See id.* at 1073–74. Specifically, Respondent mentioned a friend who reported severe abuse by her husband to the police; however, the police merely told Respondent’s friend to “stop gossiping,” instructed Respondent’s friend to return to her house to do her “duties,” and blamed Respondent’s friend for the abuse because she was not doing her chores. *See Afriyie*, 613 F.3d at 931.

The country conditions evidence in the record overwhelmingly establishes that any efforts by Respondent to report the abuse by Mr. B would have been futile. Although “[t]he fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime,” here, the record supports Respondent’s testimony and indicates that the Mexican government is unable or unwilling to control Respondent’s persecutors. *A-B-*, 27 I&N Dec. at 337. The 2017 HR Report states that impunity for human rights abuses in Mexico remained a problem, “with extremely low rates of prosecution for all forms of crimes.” Exh. 5 at 42. Morelos, Respondent’s home state, has the fourth highest murder rate in the country and ranks in the top two for rape. Exh. 7 at 94. Relatedly, police and military were involved in serious human rights abuses and benefitted from the trend of impunity. Exh. 5 at 80, 88. A 2016 report found that nearly one in ten of Mexico’s police officers are unfit for service, and the country faces serious issues of police corruption on both the federal and local level with federal counter corruption efforts continually failing. *Id.* at 308, 312–17.

Furthermore, “Mexican laws do not adequately protect women and girls against domestic and sexual violence.” *Id.* at 269. Although federal laws address domestic violence, federal law does not criminalize spousal abuse, and the “[s]tate and municipal laws addressing domestic violence largely failed to meet the required federal standards and often were unenforced.” *Id.* at 67. Violence against women and domestic violence continue to be some of the most serious human rights abuses in Mexico, with approximately two-thirds of women in Mexico having experienced gender-based violence during their lives. *Id.* at 80, 198. Although the federal government has issued some “gender alerts” to focus efforts on assisting women victims of domestic violence, there has not yet been a noticeable impact. *Id.* at 101, 202. In addition, often, domestic violence victims did not report abuses due to fear of spousal reprisal, stigma, and societal beliefs that abuse did not merit a complaint. *Id.* at 100.

Additionally, in protective services, including police services, bias against women leads to inadequate investigations of abuse, resulting in impunity for abusers. *Id.* at 185–86, 202. In fact, investigations regarding femicide cases revealed that 70% of femicides were committed by intimate partners, and “the majority of [victims] had sought help from government authorities, but that nothing had been done because this type of violence was considered to be a private matter.” *Id.* at 187; *see also id.* at 297. Further, the Mexican government admitted its role in gender issues in the country, citing their “culture deeply rooted in stereotypes, based on the underlying assumption that women are inferior.” *Id.* at 187–88. There “has not been success in changing the cultural patterns that devalue women and consider them disposable.” *Id.* at 251.

Finally, despite efforts on the federal level to combat gendered violence, criminal investigations continue to be ineffective. *See id.* at 192. A common response from police is to not take a report of abuse seriously, similar to the response experienced by Respondent's friend. *Id.* Common responses by police include attempts to convince women not to file a complaint, or in the case where authorities do respond, they negotiate a "reconciliation" between the victim and the abuser. *Id.* Police treat domestic violence reporting as though it was the "normal state of affairs." *Id.* at 258 (internal quotation marks omitted). In addition, Mexican law enforcement authorities are not equipped to respond quickly or to effectively enforce protective orders. *Id.* at 193. The record indicates that "cases of violence against women are not properly investigated, adjudicated or sanctioned." *Id.* at 257.

In light of the evidence in the record, the Court finds that Respondent has shown that reporting the persecution to the authorities would have been futile or would have subjected her to further abuse. *See Bringas-Rodriguez*, 850 F.3d at 1073-74. Thus, the Court finds that Respondent met her burden to show that the government either condoned the actions of private actors or demonstrated a complete helplessness to protect victims like Respondent. *See A-B*, 27 I&N Dec. at 337.

Although the Attorney General stated in *A-B* that "[g]enerally, claims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum," the Attorney General did not foreclose this possibility, and the Court finds that in this particular case, Respondent established that she was persecuted on account of her membership in the particular social group "Mexican females" and her feminist political opinion by actors the Mexican government was unable or unwilling to control. *A-B*, 27 I&N Dec. at 320; *see* INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b).

2. Well-Founded Fear of Future Persecution

Because Respondent has demonstrated that she suffered past persecution in Mexico on account of a protected ground by actors that the government is unable or unwilling to control, she is entitled to a presumption that she has a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1). DHS may overcome this presumption by showing, by a preponderance of the evidence, that (1) there has been a fundamental change in circumstances such that Respondent no longer has a well-founded fear of persecution in Mexico, or (2) Respondent could avoid future persecution by relocating to another part of the country. *See* 8 C.F.R. § 1208.13(b)(1)(i).

a. *Fundamental Change in Circumstances*

The evidence indicates that Respondent no longer has a well-founded fear of persecution by her mother on account of her particular social group of "Mexican females." Respondent's mother abused her during the time she resided at home with her parents. Now, however, Respondent is no longer a child and does not live in her parents' home. Given these facts, Respondent's circumstances have fundamentally changed such that her mother does not remain a

danger to her, and the Court finds that Respondent no longer has a well-founded fear of persecution by her mother on account of a protected ground. 8 C.F.R. § 1208.13(b)(1)(i)(A).

However, Mr. B has continued to contact and harass Respondent, including as recently as two years ago. Mr. B and Respondent's daughter, Ms. R, stated in her declaration that her father continues to ask about Respondent and is angry because Respondent was in a relationship with another man. Exh. 5 at 23. DHS did not present evidence to indicate a fundamental change in circumstances regarding Mr. B. See 8 C.F.R. § 1208.13(b)(1)(i). Therefore, the Court concludes that DHS failed to meet its burden to show that there has been a fundamental change in circumstances such that Respondent no longer has a well-founded fear of persecution by Mr. B on account of a protected ground. 8 C.F.R. § 1208.13(b)(1)(i)(A).

b. Internal Relocation.

In a case in which the applicant has demonstrated past persecution, DHS bears the burden of proving by a preponderance of the evidence that the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality and it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(1)(ii); see also *A-B-*, 27 I&N Dec. at 344-45 (The Court "must consider, consistent with the regulations, whether internal relocation in [the applicant's] home country presents a reasonable alternative before granting asylum."). Generalized information about country conditions is not sufficient to rebut the presumption of a well-founded fear of future persecution. *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002). Rather, DHS must introduce evidence that rebuts the applicant's specific grounds for fearing future persecution on an individualized basis. *Id.*

Here, Respondent testified that her entire family lives on the same piece of land as her parents' home. In addition, Respondent remains married to Mr. B. As recently as two years ago, Mr. B called Respondent seeking information regarding her location; he expressed that he wanted her to live with him again. She refused and changed her phone number. However, Mr. B continued to send her messages through Facebook asking about her whereabouts. Further, DHS has not introduced individualized evidence demonstrating that Respondent could avoid future persecution by relocating to another part of the country. See *Gonzales-Hernandez v. Ashcroft*, 336 F.3d 995, 997-98 (9th Cir. 2003) (holding that the government must introduce evidence that, on an individualized basis, rebuts the applicant's specific grounds for fearing future persecution). Accordingly, the Court finds that DHS failed to meet its burden to show that Respondent could relocate within Mexico and thus, DHS failed to rebut Respondent's presumption of a well-founded fear of future persecution by Mr. B both on account of her particular social group membership and her political opinion. *Id.*; 8 C.F.R. § 1208.13(b)(1)(ii). Therefore, the Court finds Respondent is statutorily eligible for asylum. See INA § 208(b)(1)(A).

c. Independent Well-Founded Fear

In the alternative, even in the absence of past persecution, an applicant may be eligible for asylum based on a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1). An applicant has a well-founded fear of persecution if (1) she fears persecution in the country of

nationality on account of race, religion, nationality, membership in a particular social group, or political opinion, (2) there is a reasonable possibility of suffering such persecution if she were to return to that country; and (3) she is unable or unwilling to return to, or avail herself of the protection of that country because of such fear. See 8 C.F.R. § 1208.13(b)(2)(i). To demonstrate a well-founded fear, the applicant need not prove that persecution is more likely than not; even a ten percent chance of persecution is sufficient to establish that persecution is a reasonable possibility. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987)).

i. Subjectively Genuine and Objectively Reasonable Fear

A well-founded fear of future persecution must be both subjectively genuine and objectively reasonable. *Ahmed*, 504 F.3d at 1191. The subjective test is satisfied by credible testimony that the applicant genuinely fears persecution on account of a statutorily protected ground that is perpetrated by the government or by forces the government is unable or unwilling to control. *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013). The objective component requires “credible, direct, and specific evidence” that the applicant risks persecution in her home country. *Id.*

In the instant case, Respondent credibly testified that she fears her ex-partner, Mr. H [redacted], will locate her and physically harm or kill her in Mexico. A respondent’s credible testimony of fear of harm satisfies the subjective prong for a well-founded fear of persecution. See *id.* Accordingly, the Court finds that Respondent established that her fear is subjectively genuine. See *id.*

Next, the Court considers whether Respondent established through “credible, direct, and specific evidence” that her fear of returning to Mexico is objectively reasonable. See *id.* First, Respondent testified at length regarding the atrocious abuse she endured from 1998 until 2016 during her relationship with Mr. H [redacted] in the United States. Over the course of their relationship, he consistently beat, raped, strangled, and psychologically abused her. Respondent testified that Mr. H [redacted] raped her approximately five times per month and beat her approximately three times per month. The record also includes photographic evidence of the injuries Respondent sustained from the abuse by Mr. H [redacted]. Exh. 5 at 29–38.

In addition, Ms. R [redacted] stated in her declaration that Mr. H [redacted] contacted her and her siblings seeking information regarding Respondent’s location and stated that he was in Chiapas, Mexico. Exh. 5 at 24; see also Exh. 5 at 39 (text messages from Mr. H [redacted] seeking Respondent’s address in Mexico). Furthermore, the record reflects that Mr. H [redacted] will have the ability, if he is not already present in Mexico, to enter Mexico and find and harm Respondent. Mr. H [redacted] as the father of three Mexican citizen children, could self-petition for permanent residency in Mexico, placing him in a position to have access to finding and harming Respondent. See Exh. 7 at Tab B–C. Additionally, Mr. H [redacted] repeatedly beat and raped Respondent when she resisted reconciling with him or attempted to leave him in the past. Therefore, because Mr. H [redacted] has expressed that he will attempt to find Respondent, it is likely that if Respondent again resists Mr. H [redacted] she is at a high risk of harm by him. Considering the totality of the circumstances, the Court finds that Respondent’s fear of future

harm by Mr. H [redacted] is objectively reasonable, and she faces a chance greater than ten percent of persecution occurring upon her return to Mexico. *Al-Harbi*, 242 F.3d at 888.

iii. On Account of a Protected Ground

Respondent asserts that she will suffer persecution by Mr. H [redacted] on account of her membership in the particular social group "Mexican females" and on account of her feminist political opinion. As discussed *supra*, the Court finds Respondent's proposed social group of "Mexican females" to be cognizable and that Respondent is a member of the group. In addition, the Court finds that Respondent holds a feminist political opinion, as discussed *supra*. Accordingly, the Court considers whether either protected ground would be one central reason for the persecution she would face in Mexico. INA § 208(b)(1)(B)(i).

The Court finds that Respondent's membership in the particular social group "Mexican females" would be at least "one central reason" for her future persecution. *Id.* Respondent has an objectively reasonable fear of persecution by Mr. H [redacted]; particularly due to the abuse she suffered in the past. For example, on one occasion when Respondent rejected his sexual advances, Mr. H [redacted] stated that Respondent was "his woman and had to have sex with him whenever he wanted," and thereafter raped Respondent. Exh. 5 at 8. On other occasions, Mr. H [redacted] stated that Respondent needed to have sex with him whenever he wanted because she was a woman and thus, "his slave." *Id.* at 15. Mr. H [redacted] also frequently bit Respondent, leaving marks on her neck and arms to show that she was "[his] woman" because others "need[ed] to know it." *Id.* at 9. These statements establish that Mr. H [redacted] frequently harmed Respondent in the past because she was a woman, and the Court finds that her membership in her particular social group "Mexican females" would be at least one central reason for her future persecution. *See* INA § 208(b)(1)(B)(i).

The Court also finds that Respondent's feminist political opinion would be one central reason for her future persecution, particularly because of her past experiences, which form the basis of her objectively reasonable fear of persecution. *Id.* Respondent testified that Mr. H [redacted] frequently beat and raped her when she resisted his domination of her as the male head of the household. *See* Exh. 5 at 9-10. On one occasion, Mr. H [redacted] beat Respondent so badly that she had a vaginal hemorrhage because she entered their home and told Mr. H [redacted] that his friends should leave; he warned Respondent that she was not permitted to speak when entering the room. He also beat Respondent when she expressed her own opinions, justifying the abuse by stating that she was not allowed to have her own opinions or a say. Mr. H [redacted] also exerted his dominance and control over Respondent by demanding she only work with other women and dress as he desired. If she resisted due to her belief that they were equal partners, Mr. H [redacted] harmed her. Because Respondent's feminist opinion was a focus of Mr. H [redacted]'s abuse in the past, the Court finds that her feminist political opinion would be one central reason for her future persecution. *See* INA § 208(b)(1)(B)(i).

Therefore, the Court finds Respondent would face future persecution on account of both her membership in the particular social group "Mexican females" and her feminist political opinion. *See id.*

iv. Government Unable or Unwilling to Control

Respondent must also establish that the persecution she would suffer will be inflicted by forces the government is unable or unwilling to control. *See Navas*, 217 F.3d at 655-56. The Court finds for the same reasons articulated in Section III.B.1.c. *supra*, the Mexican government would be unable or unwilling to control Mr. H. In addition, the Court notes that Respondent testified that if Mr. H. found her in Mexico and persecuted her, she would try to report it to the police, but she believed it would be futile. She believed the lack of police protection would result in impunity for Mr. H., giving him more power to abuse her in any manner he desired. Accordingly, the Court finds that Respondent met her burden to establish that the persecution she would suffer would be inflicted by actors the government is unable or unwilling to control. *See Navas*, 217 F.3d at 655-56.

v. Internal Relocation

If the applicant failed to demonstrate past persecution, to establish a well-founded fear of persecution, it is the applicant's burden to show that she could not avoid persecution by relocating to another part of the country and it would not be reasonable to expect her to do so. *See A-B-*, 27 I&N Dec. at 344-45; 8 C.F.R. § 1208.13(b)(2)(ii).

Here, Respondent established that she could not avoid persecution by relocating to another part of the country. *See* 8 C.F.R. § 1208.13(b)(2)(ii). Respondent testified that although she believed Mr. H. was removed to his native Guatemala, she believes he is presently in Mexico because his entire family resides in Mexico. Further, Ms. R. stated in her declaration that she spoke with Mr. H. and he stated in was in Chiapas and persists in seeking information regarding Respondent from her. Exh. 5 at 24.

In addition, Respondent stated that approximately one week after she was removed to Mexico, Mr. H. called her on her cell phone and told Respondent he was going to find her. During a second phone call, Mr. H. stated that he already confirmed that Respondent was residing at her parents' home in Mexico, and he would be "coming for [Respondent]." Despite Respondent's repeated pleas to Mr. H. to leave her alone, he continued to attempt to acquire information about Respondent's whereabouts through their children. Respondent fled to the United States after she continued to receive menacing phone calls from Mr. H. Respondent believes Mr. H. would be able to locate her anywhere in Mexico through their children or through their children's school documentation. *See also* Exh. 5 at 194-96 (abusers continue to have a right to obtain information about their children, making it relatively easy for an abuser to locate a woman fleeing his abuse). Indeed, their son stated in his declaration that Mr. H. contacted him seeking information regarding Respondent's location. *Id.* at 21. In addition, as previously noted, Respondent's entire family lives on the same piece of land as her parents' home. Further, country conditions evidence evinces that violence against women is a nationwide problem. *See generally* Exhs. 5, 9.

Because Respondent has established that she is likely to face danger throughout Mexico on account of her membership in a particular social group or political opinion, the Court finds

that she has met her burden of establishing that she cannot internally relocate to avoid persecution and it would not be reasonable for her to do so. Therefore, the Court finds that Respondent established that she has a well-founded fear of persecution and is statutorily eligible for asylum. See INA §§ 101(a)(42)(A), 208(b)(2)(B).

3. Discretion

"Asylum is a discretionary form of relief from removal, and an applicant bears the burden of proving not only statutory eligibility for asylum but that she also merits asylum as a matter of discretion." *A-B-*, 27 I&N Dec. at 345 n.12; see also INA § 240(c)(4)(A)(ii). This determination requires a weighing of both the positive and negative factors presented in Respondent's case. *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139-40 (9th Cir. 2004); *Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987) (*superseded in part by regulation on other grounds as stated in Andriasian v. INS*, 180 F.3d 1033, 1043-44, n.17 (9th Cir. 1999)). To determine whether an asylum applicant merits relief in the exercise of the Court's discretion, the Court must consider the totality of the circumstances including the severity of the past persecution suffered and the likelihood of future persecution. *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007); *Kalubi*, 364 F.3d at 1138. "[D]iscretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Pula*, 19 I&N Dec. at 474. Factors to consider include the applicant's age, health, and ties to the United States, among others. *Id.*

Here, Respondent has many positive equities. Respondent has lived in the United States for approximately 28 years. She is the primary wage earner for her family, has a consistent work history, and owns her own business. Respondent has three United States citizen children, two of whom live in the United States. She actively participates in her children's education. See Exh. 3. Furthermore, Respondent suffered severe past persecution and has a high likelihood of suffering severe persecution should she be removed to Mexico. Additionally, she continues to suffer from post-traumatic stress disorder and major depressive disorder due to the abuse and harm she experienced throughout her life. See Exh. 9 at Tab C. She testified that should she be granted asylum, she would like to continue working on her business and raising her children.

These positive equities must be weighed against Respondent's negative equities; namely, her criminal history. In 2007, Respondent was convicted of criminal impersonation and was sentenced to one year of probation. Exh. 7 at 6-25. Respondent testified that when she attempted to renew her Arizona identification, she was instructed to include a social security number and she wrote down a random number. Respondent was also convicted of shoplifting and sentenced to pay a fine in 2007. *Id.* at 3-4. Finally, in 2017, Respondent was convicted for illegal entry and sentenced to 150 days of confinement. *Id.* at 27-29. While the Court does not condone Respondent's actions, her convictions are for relatively minor and nonviolent crimes. Respondent did not display an intent to defraud anyone, and Respondent's conviction for illegal entry was committed in the context of her attempt to flee Mexico.

Therefore, after carefully reviewing the entire record and weighing the equities in this case, the Court finds that Respondent warrants a favorable exercise of discretion, and the Court grants Respondent asylum in the exercise of discretion. See *A-B-*, 27 I&N Dec. at 345 n.12.

C. Alternative Finding: Withholding of Removal

Withholding of removal requires an applicant to establish that his life or freedom would be threatened in the country of removal because of her race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A); see *Barajas-Romero*, 846 F.3d at 360 (explaining that the nexus requirement for withholding of removal includes weaker motives than the “one central reason” asylum standard). An applicant may prove eligibility for withholding of removal either (1) by establishing a presumption of future persecution based on past persecution that DHS does not rebut, or (2) through an independent showing of a clear probability of future persecution. *INS v. Stevic*, 467 U.S. 407, 429–30 (1984); 8 C.F.R. §§ 1208.16(b)(1)–(2). The Supreme Court defined “clear probability of persecution” to mean that it is “more likely than not” the applicant would be subject to persecution on account of a protected ground if returned to the proposed country of removal. *Cardoza-Fonseca*, 480 U.S. at 429.

For the same reasons elucidated above, considering the entire record, the Court also finds Respondent is statutorily eligible for withholding of removal because it is more likely than not that her life or freedom would be threatened in the future in Mexico because of a protected ground. See INA § 241(b)(3)(A); 8 C.F.R. § 1208.16(b)(2). Accordingly, the Court grants Respondent withholding of removal in the alternative.

D. Alternative Finding: Protection Under the Convention Against Torture

Protection under the CAT is mandatory relief if the requirements are met. 8 C.F.R. § 1208.16(c). The applicant bears the burden of establishing that it is more likely than not she would be tortured by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity if removed to Mexico. *Id.*; *Zheng v. Asheroff*, 332 F.3d 1186, 1194 (9th Cir. 2003). Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes such as intimidation, coercion, punishment, or discrimination, by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, including willful blindness. 8 C.F.R. § 1208.18(a)(1). The Ninth Circuit held that the applicant need only show “awareness” and “willful blindness” on the part of government officials. *Zheng*, 332 F.3d at 1197. Under the Ninth Circuit’s interpretation, “[i]t is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.” *Ornelas-Chavez v. González*, 458 F.3d 1052, 1060 (9th Cir. 2006).

The Court must consider all evidence relevant to the likelihood of future torture, including, but not limited to: past torture inflicted upon the applicant; evidence that she could relocate to another part of Mexico where it is unlikely she will be tortured; gross, flagrant, or mass violations of human rights; and other relevant information regarding conditions in Mexico.

See 8 C.F.R § 1208.16(c)(3).

Respondent believes Mr. B. or Mr. H. will rape or kill her if she returns to Mexico. The evidence in the record corroborates Respondent's fear of torture. First, Respondent credibly testified that she experienced torture in the past by both men. See *Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) (quoting *Nuru v. Gonzales*, 404 F.3d 1207, 1218 (9th Cir. 2005) (the existence of past torture "is ordinarily the principal factor on which [the court must] rely")). Mr. B. beat her numerous times, and he burned her with a cigarette on two occasions. In addition, Mr. H. repeatedly raped and beat Respondent. The Court is satisfied that both Mr. B. and Mr. H. intentionally inflicted severe pain and suffering upon Respondent that rises to the level of torture. See 8 C.F.R § 1208.18(a)(1).

Moreover, Respondent continues to suffer the effects of the torture today. See *Mohammed v. Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005) (stating that evidence of past torture that causes "permanent and continuing harm" may be sufficient to establish eligibility for CAT relief). Respondent suffers from post-traumatic stress disorder and major depressive disorder due to the abuse and harm she experienced throughout her life. See Exh. 9 at Tab C. She continues to think about the abuse she experienced every day and suffers from frequent nightmares of her former partners trying to kill her. *Id.*

Additionally, Mexican females continue to have limited, if any, means to escape violence, particularly in family relationships. Exh. 5 at 181. Mexico continues to display "deep and persistent insensitivity to gender issues," causing widespread gender-based violence throughout society, as well as in domestic relationships. *Id.* The Court previously found that Respondent could not relocate to avoid harm from either Mr. B. or Mr. H. If women attempt to move elsewhere in the country, they are unprotected and there are no guarantees for their safety. *Id.* Based on the combination of all of the above factors, the Court finds that Respondent would not be able to safely relocate in Mexico, contributing to the likelihood that she would more likely than not be tortured if returned to Mexico.

Respondent has also demonstrated that it is more likely than not that she will be tortured with the consent or acquiescence of the Mexican government. See 8 C.F.R. § 1208.18(a)(1). The country-conditions documentation indicates that the Mexican government has made attempts to curb violence against women; for example, it has enacted the gender alert systems intended to protect women. See Exh. 5 at 202. However, the record indicates that the government's actions have had no effect on the current situation in Mexico and laws protecting women are not enforced effectively. *Id.* The Mexican legal system is unresponsive and ineffective, and as discussed above, justice officials are unwilling or unable to protect women from gender-related harms in their homes and elsewhere, despite recent efforts to improve this problem. *Id.* at 181. This is reflected in the few prosecutions or convictions for femicides. *Id.* at 202.

Not only is the Mexican government ineffective in protecting women from sexual violence and torture, but the record contains evidence that the government is aware of and "willfully blind" to such treatment. The Mexican government admitted the country's difficult adjustment from its mentality that women are inferior. *Id.* at 187-88. As previously noted, police often do not seriously consider reports of abuse and commonly negotiate a reconciliation

with abusers, placing the woman reporting the abuse at risk of future harm; police treat domestic violence, including incidents of torture by a partner, as the "normal state of affairs." *See id.* at 192, 258. This culture of violence against women, combined with high levels of impunity for gender-based violence, sufficiently demonstrate a pattern of acquiescence by government officials to the type of violence women like Respondent face. *See id.* at 251, 253.

Based on this evidence, the Court finds that Respondent has established that it is more likely than not that she will be tortured with the acquiescence of the Mexican government upon her return. 8 C.F.R. § 1208.16(c). Accordingly, the Court grants Respondent protection under CAT in the alternative.

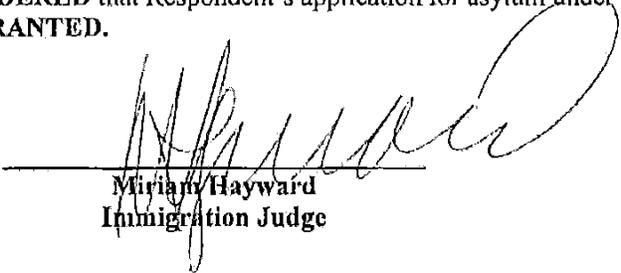
IV. CONCLUSION

The Court finds that Respondent suffered past persecution and has a well-founded fear of persecution on account of her membership in a particular social group and her political opinion. The Court also finds that the Mexican government is unable or unwilling to protect Respondent and that she cannot internally relocate within Mexico. Thus, she is statutorily eligible for asylum, and the Court grants her application in the exercise of its discretion. Finally, the Court finds that Respondent is statutorily eligible for withholding of removal under INA § 241(b)(3) and protection under CAT, and the Court would grant Respondent's applications for such relief in the alternative.

In light of the foregoing, the following order⁴ shall enter:

ORDER

IT IS HEREBY ORDERED that Respondent's application for asylum under INA § 208(a) be and hereby is **GRANTED**.



Miriam Hayward
Immigration Judge

⁴ Pursuant to 8 CFR § 1003.47(i), a copy of the post order instructions and information on the orientation on benefits available to asylees is attached to this decision and hereby served on the parties.

This is a string cite for the district courts that have interpreted *Pereira* in our favor on motions to dismiss criminal prosecutions of illegal reentry cases;

See *United States v. Cruz-Jimenez*, No. A-17-CR-00063, 2018 WL 5779491 at *2 (W.D. Tex. Nov. 2, 2018); see also *United States v. Pedroza-Rocha*, 3:18-CR-1286-DB, Doc. No. 53 (W.D. Tex. Sept. 21, 2018); *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164, 1166 (E.D. Wash. July 26, 2018); *United States v. Armejo-Banda*, 1:18-CR-308-RP, 2018 WL 6201964 (W.D. Tex. Nov. 28, 2018); *United States v. Lopez-Urgel*, 1:18-cr-00310-RP (W.D. Tex. 11/14/2018); *United States v. Rodriguez-Rosa*, 3:18-cr-00079-MMD (Nevada, 12/11/2018); *United States v. Erazo-Diaz*, 4:18-cr-00331-RM (Arizona, 12/4/2018); *United States v. Soto-Mejia*, 2:18-cr-00150-RFB (Nevada, 12/7/2018); *United States v. Robaina-Ortiz*, 3:18-cr-00071-RWG (N. Dakota, 11/7/2018); *United States v. Santiago-Tzul*, 4:18-cr-00521 (S.D. Tex., 12/4/2018); *United States v. Leon-Gonzalez* 3:18-cr-02593-DB (W.D. Tex. 11/20/2018); *United States v. Alfredo Vallardes* 1:17-cr-00156-SS (W.D. Tex. 10/30/2018); *United States v. Zapata-Cortinas* 5:18-cr-00343-OLG (W.D. Tex. 11/20/2018).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAUL SOTO-MEJIA,

Defendant.

Case No. 2:18-cr-00150-RFB-NJK

ORDER

Before the Court is Mr. Soto-Mejia’s Motion to Dismiss [ECF No. 21] the Indictment in this case, for the reasons stated below the Court GRANTS the Motion to Dismiss.

I. Factual Findings

Based upon the record, including the joint stipulation of fact submitted by the parties [ECF No. 41], the Court makes the following factual findings. Mr. Soto-Mejia was encountered by immigration officials on February 7, 2018 in California. On that same day, February 7, the Department of Homeland Security issued a Notice to Appear for Removal Proceedings (NTA) against Soto-Mejia. The Notice to Appear stated that Soto-Mejia was to appear before an immigration judge on a date and time “[t]o be set” and at a place “[t]o be determined.” Soto-Mejia was personally served with the Notice to Appear at 10400 Rancho Road in Adelanto, California, 92401. The Notice to Appear contained allegations and provided a potential legal basis for Soto-Mejia’s removal from the United States. The Notice to Appear was filed with the Immigration Court in Adelanto, California on February 12, 2018.

On February 27, 2018 an order advancing the removal hearing was served on a custodial officer for Soto-Mejia. On February 27, 2018, a letter entitled “Notice of Hearing in Removal Proceedings” addressed to Soto-Mejia at the Adelanto Detention Facility on 10250 Rancho Road

1 in Adelanto, California, 92301 was served on a custodial officer for Soto-Mejia. The letter
2 indicated that a hearing before Immigration Court was scheduled for March 7, 2018 at 1:00 p.m.
3 The Notice of Hearing did not reference the nature or basis of the legal issues or charges for the
4 removal proceedings. The Notice of Hearing also did not reference any particular Notice to
5 Appear.

6 On March 7, 2018, the “Order of the Immigration Judge” indicates that Soto-Mejia
7 appeared at the Immigration Court hearing and that he was ordered removed from the United States
8 to Mexico. Soto-Mejia was deported on March 8, 2018. Subsequently, Soto-Mejia was
9 encountered in the United States again and was ordered removed on March 19, 2018. The March
10 19 Order, as a reinstate of the prior order, derived its authority to order removal from the March 7
11 Order. The Indictment in this case explicitly references and relies upon the March 7 and March
12 19 removal orders as a basis for establishing a violation of 8 U.S.C. § 1326 by Soto-Mejia.

13 14 **II. Legal Standard**

15 Since a prior order of removal is a predicate element of 8 U.S.C. § 1326, a defendant may
16 collaterally attack the underlying removal order. United States v. Ubaldo-Figueroa, 364 F.3d
17 1042, 1047 (9th Cir. 2004). To prevail on such a collateral challenge to a deportation order, the
18 individual must demonstrate that (1) he exhausted any administrative remedies he could have used
19 to challenge the order (or is excused from such exhaustion); (2) the deportation proceedings
20 deprived the individual of judicial review (or is excused from seeking judicial review); (3) the
21 entry of the order was fundamentally unfair. 8 U.S.C. 1326(d); Ramos, 623 F.3d at 680.

22 A removal order is “fundamentally unfair” if (1) an individual’s due process rights were
23 violated by defects in the underlying proceeding, and (2) the individual suffered prejudice as a
24 result. Ubaldo-Figueroa, 364 F.3d at 1048.

25 26 **III. Discussion**

27 The Defendant argues that this case must be dismissed because his criminal prosecution
28 derives from a defective immigration proceeding in which the immigration court did not have

1 jurisdiction to commence removal proceedings against him because the Notice to Appear initiating
2 the proceeding was defective. He argues that the March 7 Order is thus void as the immigration
3 court did not have jurisdiction to issue an order. He further argues that, as the initial March 7,
4 2018 deportation order is void, the subsequent reinstatement removal order of March 19, 2018 is
5 also void as it derived its authority from the March 7 Order. Specifically, Soto-Mejia argues that
6 the initial Notice to Appear that issued in his case did not include a time and location for the
7 proceeding. Relying upon the United States Supreme Court’s recent decision in Pereira v.
8 Sessions, 138 S.Ct. 2105 (2018), Soto-Mejia argues that a notice to appear must contain a location
9 and time for a removal hearing in order to create jurisdiction for the immigration court. Id. at 2110.
10 As the Notice to Appear in this case did not contain such information, the immigration court,
11 according to Soto-Mejia, did not have jurisdiction to issue a removal or deportation order.

12 The government responds with several arguments. First, the government argues that Soto-
13 Mejia waived his argument regarding jurisdiction—claiming that it is personal rather subject
14 matter jurisdiction which is at issue—by not raising a jurisdictional objection in the immigration
15 proceeding and conceding to the immigration court’s jurisdiction by appearing. Second, the
16 government avers that the immigration court’s jurisdiction is determined by the federal regulations
17 and that the Notice to Appear in this case contained the information it must pursuant to those
18 regulations to vest the immigration court with jurisdiction. See 8 C.F.R. §§ 1003.14(a), 1003.15(b)
19 and (c). Third, the government argues that the holding in Pereira is limited to the cases in which a
20 court must determine the validity of a particular notice to appear as it relates to the triggering of
21 the “stop-time rule.” Id. at 2116. Fourth, the government argues that there is no prejudice to Soto-
22 Mejia as any defect was cured by the Notice of Hearing and Soto-Mejia’s participation in the
23 removal proceedings. The Court rejects all of the government’s arguments.

24 **A. The Removal Orders of March 7 and March 19 Violated Due Process As the**
25 **Immigration Court Lacked Subject Matter Jurisdiction**

26 The Court finds that Supreme Court’s holding in Pereira to be applicable and controlling
27 in this case. First, the Court finds pursuant to the plain language of the regulations that the
28 jurisdiction of the immigration court “vests” only “when a charging document is filed with the

1 Immigration Court.” 8 C.F.R. §1003.14. A “Notice to Appear” is such a “charging document.”
2 Id. at § 1003.13. Relying upon the reasoning of Pereira, this Court finds that the definition of a
3 “Notice to Appear” is controlled by statute and not regulation, as the Supreme Court expressly
4 rejected in Pereira the regulation-based interpretation by the Board of Immigration Appeals in
5 Matter of Camarillo, 25 I. & N. Dec. 644 (2011). Pereira, 138 S. Ct. at 2111-14. And, pursuant
6 to Pereira, a Notice to Appear must include the time and location for the hearing. Id. at 2114-17.
7 As the Notice to Appear in this case failed to include the time and location for the hearing, the
8 immigration court did not have jurisdiction to issue its March 7 deportation order.

9 The Court rejects the government’s argument that Soto-Mejia waived his jurisdictional
10 argument by not raising it earlier and by participating in the underlying immigration proceeding.
11 The government’s argument conflates personal jurisdiction with subject matter jurisdiction. Soto-
12 Mejia’s argument is founded upon his assertion that the immigration court lacked subject matter
13 jurisdiction and not personal jurisdiction. Subject matter jurisdiction is a limitation on “federal
14 power” that “cannot be waived” so “a party does not waive the requirement [of subject matter
15 jurisdiction] by failing to challenge jurisdiction early in the proceedings.” Ins. Corp. of Ireland v.
16 Compagnie des Bauxites, 456 U.S. 694, 702-03 (1982). Moreover, the plain language of the
17 regulation establishing the immigration court’s jurisdiction explicitly notes that an immigration
18 court’s authority only “vests” with the filing of a “charging document” and the regulation makes
19 no reference to a waiver exception to this requirement for subject matter jurisdiction. 8 C.F.R. §
20 1003.14(a).

21 The Court also rejects the government’s argument that the holding in Pereira is limited to
22 cases determining the applicability of the stop-time rule. As noted, the Supreme Court’s holding
23 in Pereira was based upon the plain language of the text of 8 C.F.R. §§ 1003.13 and 1003.14 and
24 8 U.S.C. § 1229(a). Pereira, 138 S. Ct. at 2111-13. Section 1003.13 specifies which documents
25 can constitute a “charging document” for immigration proceedings after April 1, 1997. The parties
26 all concede in this case that the only document in this record that is a “charging document” is the
27 Notice to Appear. Id. The Court in Pereira explained that the text of Section 1229(a) lays out the
28 statutory definition of and requirements for a “Notice to Appear” which includes the time and

1 location for the hearing. 138 S. Ct. at 2114. The Supreme Court unambiguously proclaimed: “A
2 *putative notice to appear that fails to designate the specific time or place of the noncitizen’s*
3 *removal proceedings is not a ‘notice to appear under section 1229(a).’” Id. at 2113-14
4 (emphasis added). While the Supreme Court applied this definition to the determination of the
5 applicability of the stop-time rule, the express language of this holding does not suggest any
6 limitation on the Court’s definition of what is and is not a “Notice to Appear” under Section
7 1229(a) with respect to the requirement for the notice to contain a time and location.*

8 There is no basis to assume or conclude that the definition of a “Notice to Appear” under
9 Section 1229(a) would be different without reference to the stop-time rule. That is because the
10 fundamental question that the Supreme Court was answering in Pereira is whether a notice must
11 contain the time and location of the hearing to be a “notice to appear” under Section 1229(a). 138
12 S. Ct. at 2113-17. In answering this foundational question, the Court did not rely upon the stop-
13 time rule to determine the definition of a notice to appear under Section 1229(a). To the contrary,
14 the Court spent considerable time explaining why consideration of the stop-time rule’s “broad
15 reference” to all of the paragraphs of Section 1229(a) did not alter the fact that the essential
16 definition of and requirements for the notice arise in the first paragraph. 138 S. Ct. at 2114 (noting
17 that the “broad reference to §1229(a) is of no consequence, because as even the Government
18 concedes, only paragraph (1) bears on the meaning of a ‘notice to appear’”). This first paragraph
19 requires that the notice contain the time and location for the removal proceeding.

20 The Court is also unpersuaded that a defect in a “Notice to Appear” can be ‘cured’ as the
21 government suggests by the filing and/or serving of the Notice of Hearing on Soto-Mejia. That is
22 because such an argument is contrary to the plain text of the regulation, Section 1003.14(a), which
23 unequivocally states that an immigration court’s jurisdiction only “vests” or arises with the filing
24 of a “charging document.” A Notice of Hearing is not one of the “charging documents” referenced
25 in Section 1003.13. A Notice of Hearing cannot therefore commence an immigration proceeding
26 by subsequently providing a time and location for a removal hearing. Consequently, if the
27 immigration court’s jurisdiction never arose because the Notice to Appear was invalid, then there
28 is no proceeding in which a Notice of Hearing could properly be filed. There is nothing to cure.

1 Moreover, the Court also finds that the Notice of Hearing in this case did not reference a
2 specific Notice to Appear. Indeed, the government conceded and the Court finds that the Notice
3 of Hearing form does not generally, or in this case, reference a prior specific Notice to Appear and
4 it does not contain information about the legal issues or charges which serve as a basis for the
5 removal proceedings. The two documents only common identifying information is the A-file
6 number of the particular person—Soto-Mejia in this case. This means that if an individual had
7 multiple potential charges or legal issues related to his immigration status, the Notice of Hearing
8 could not inform him about which charges were at issue in the upcoming hearing and the Notice
9 of Hearing could be filed months or years after the Notice to Appear. Indeed, this is the very
10 reason that the Supreme Court in Pereira rejected the argument that the “Notice to Appear” did not
11 have to include the time and location of the removal proceeding, because that would defeat the
12 ultimate objective of requiring notice—allowing the person to prepare for the hearing and
13 potentially consult with counsel. 138 S. Ct. at 2114-15. As the Court noted, if there was no
14 requirement for this information “the [g]overnment could serve a document labeled ‘notice to
15 appear’ without listing the time and location of the hearing and then, years down the line, provide
16 that information a day before the removal hearing when it becomes available.” Id. at 2115. Under
17 such an interpretation “a noncitizen theoretically would have had the ‘opportunity to secure
18 counsel,’ but that opportunity will not be meaningful” as the person would not truly have the
19 opportunity to consult with counsel and prepare for the proceeding.” Id. As a Notice of Hearing,
20 like the one here, is not explicitly connected to a particular Notice to Appear and the associated
21 charges, the Court finds that it cannot serve to ‘cure’ a defective Notice to Appear such as in this
22 case.

23 **B. The Defendant Suffered Prejudice¹**

24 The Court further finds that the Soto-Mejia suffered prejudice as a result of the defect in
25 the underlying proceeding. Specifically, he was subjected to removal twice based upon the initial
26

27 ¹ The Court finds that Soto-Mejia is not required to have exhausted any possible administrative remedies,
28 because (a) the Supreme Court decision in Pereira issued after his March 7, 2018 proceeding and (b) defects
as to subject matter jurisdiction may be raised at any time. Compagnie des Bauxites, 456 U.S. at 702-03.

1 March 7 Order which the immigration court did not have jurisdiction to issue. The government's
2 argument that Soto-Mejia was not prejudiced because he "participated" in the removal proceedings
3 misses the point. It is immaterial if he participated in the proceedings. He suffered prejudice by
4 the issuance of the deportation orders because the immigration court lacked jurisdiction to order
5 his removal on March 7, 2018.

6
7 **IV. Conclusion**

8 For the reasons stated, the Court finds that the March 7 and March 19 deportation orders
9 are void due to the immigration court's lack of jurisdiction. As these orders are void, the Court
10 finds that the government cannot establish a predicate element—the prior removal or deportation
11 of Soto-Mejia—of the sole offense in the Indictment. The Indictment in this case must therefore
12 be dismissed.

13 Accordingly,

14 **IT IS HEREBY ORDERED** that the Motion to Dismiss is GRANTED. The Indictment
15 in this case is DISMISSED. The Clerk of Court shall close this case.

16 **IT IS FURTHER ORDERED** that, as this Court has no authority to detain Defendant
17 Soto-Mejia pursuant to this case, he is **ORDERED IMMEDIATELY RELEASED**.

18
19 DATED this 6th day of December, 2018.

20
21 

22 RICHARD F. BOULWARE, II
23 UNITED STATES DISTRICT JUDGE
24
25
26
27
28

From: Lafferty, John L <John.L.Lafferty@uscis.dhs.gov>
Sent: Wednesday, December 19, 2018 11:12 PM
To: RAIO - Asylum HQ; RAIO - Asylum Field Office Managers; RAIO - Asylum Field Office Staff
Cc: RAIO - Executive Leadership; [REDACTED]; [REDACTED]; [REDACTED]
Subject: Today's US DC District Court decision in *Grace v. Whitaker* and impact on CF processing
Attachments: 2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B_Redacted_12-19-201....pdf; 105 Summ Judgmt Order.pdf; 106 Memorandum Opinion.pdf

Asylum Division staff,

On December 17, 2018, the U.S. District Court for the District of Columbia, issued an opinion in *Grace v. Sessions*, No. 18-cv-01853, that impacts the Attorney General's opinion in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and the USCIS Policy Memorandum entitled, "Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*."

While some aspects of *Matter of A-B-* remain binding precedent, certain changes to USCIS policy must immediately take effect as a result of the Court's decision. As such, and as described below, please see the attached USCIS Policy Memorandum with the provisions enjoined by the court redacted.

Effective immediately, with regard to credible fear processing:

- 1) There is no general rule against claims involving domestic violence and gang-related violence as a basis for membership in a particular social group. Each claim must be evaluated on its own merits.
- 2) Asylum officers must determine whether the government in the country of feared persecution is "unable or unwilling to control a persecutor," and cannot use the "condoned" or "complete helplessness" formulation as suggested in *Matter of A-B-*.
- 3) There is no general rule that proposed particular social groups whose definitions involve an inability to leave a domestic relationship are circular and therefore not cognizable. While a particular social group cannot be defined exclusively by the claimed persecution, each particular social group should be evaluated on its own merits. See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014). If the proposed social group definition contains characteristics independent from the feared persecution, the group may be valid. Analysis as to whether a proposed particular social group is cognizable should take into account the independent characteristics presented in each case.
- 4) In evaluating whether the applicant has established a credible fear of persecution, asylum officers cannot require an applicant to formulate or delineate particular social groups. Asylum officers must consider and evaluate possible formulations of particular social groups.
- 5) Asylum officers may not disregard contrary circuit law, and may not limit their analysis to the law of the circuit where the alien is located during the credible fear process.

Attached is the court's Order, which was issued today, December 19, 2018. In addition to the above, the Order prevents defendants from removing any plaintiffs currently in the U.S. without first providing each of them a new credible fear process consistent with the court's Order. The Order also requires DHS to bring back to the U.S. any plaintiff removed pursuant to an ER order and provide each such plaintiff with a new credible fear process consistent with the court's

Order. We will need to coordinate with ICE to make sure that all such plaintiffs receive a new CF process. The Order also orders defendants to provide a status report detailing any steps we have taken to comply with this injunction.

Any questions should be directed through your chain of command to Asylum HQ.

Thank you for your continued hard work and dedication to the mission.

John



U.S. Citizenship
and Immigration
Services

July 11, 2018

PM-602-0162

Policy Memorandum

SUBJECT: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*

Purpose

This policy memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers for determining whether a petitioner is eligible for asylum or refugee status in light of the Attorney General's decision in *Matter of A-B-*. The guidance in this memorandum supersedes all previous guidance dealing specifically with asylum and refugee eligibility that is inconsistent with this guidance.

Scope

This PM applies to and shall be used to guide determinations by all USCIS employees. USCIS personnel are directed to ensure consistent application of the reasoning in *Matter of A-B-* in reasonable fear, credible fear, asylum, and refugee adjudications.

Authority

Sections 101(a)(42), 207, 208, and 235 of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1101(a)(42), 1157, 1158, 1225); Section 451 of the Homeland Security Act of 2002 (6 U.S.C. § 271); Title 8 Code of Federal Regulations (8 C.F.R.) Parts 207, 208, and 235.

I. Background

On June 11, 2018, the Attorney General published *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), which addresses how to adjudicate protection claims based on "membership in a particular social group" and clarifies the substantive elements of eligibility. The purpose of this memorandum is to provide guidance to asylum and refugee officers on the application of this decision while processing reasonable fear, credible fear, asylum, and refugee claims.¹

In the decision, the Attorney General overruled the Board of Immigration Appeals' (BIA) precedent decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), on which the BIA had relied in finding

¹ Although the alien in *Matter of A-B-* claimed asylum and withholding of removal, the Attorney General's decision and this PM apply also to refugee status adjudications and reasonable fear and credible fear determinations. See INA §§ 207(c)(1), 208(b)(1), 101(a)(42)(A), 235(b)(1); 8 C.F.R. § 208.31.

A-B- eligible for asylum. The Attorney General found that, in analyzing the particular social group at issue in *A-R-C-G-*, “married women in Guatemala who are unable to leave their relationship,” the BIA failed to correctly apply the legal standards for a cognizable particular social group set forth in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *aff’d in relevant part and vacated in part on other grounds in Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *cert. denied*, 138 S. Ct. 736 (2018), which require that a group be composed of members who share a common immutable characteristic, be defined with particularity, and be socially distinct within the society in question.

In addition, the Attorney General stressed the requirement that membership in the particular social group must be a central reason for the persecution, and that officers must consider, where applicable and consistent with the regulations, whether internal relocation is reasonably available to avoid future persecution before granting asylum. *See Matter of A-B-*, 27 I&N Dec. at 337-39, 343-45. In cases where the persecutor is a non-government actor, the applicant must show the harm or suffering was inflicted by persons or an organization that his or her home government is unwilling or unable to control, [REDACTED].

Section 103(a) of the INA provides that “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” Further, under 8 C.F.R. §§ 103.10(b) and 1003.1(g), “decisions of the [BIA], and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security” and “shall serve as precedents in all proceedings involving the same issue or issues.” Accordingly, the decision in *Matter of A-B-* was effective immediately and is binding on all USCIS officers. Officers should not cite or rely upon *Matter of A-R-C-G-* in any adjudications going forward. Officers should continue to follow other binding precedents [REDACTED] including *Matter of M-E-V-G-* and *Matter of W-G-R-*, both of which were cited favorably in the Attorney General’s decision.

II. USCIS Officers’ General Duties

To be eligible for asylum or refugee status, the alien must establish in part that he or she was persecuted or has a well-founded fear of persecution on account of one of the protected grounds, is unable or unwilling to avail himself or herself of the protection of his or her country of nationality (or, if stateless, country of last habitual residence), and does not fall within one of the grounds for ineligibility. Second, if eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application.

In *Matter of A-B-*, the Attorney General reaffirmed the duty to determine whether the facts of each case satisfy all the elements for asylum. *Matter of A-B-*, 27 I&N Dec. at 340 (“The respondent must present facts that undergird each of these elements, and the asylum officer, immigration judge, or the Board has the duty to determine whether those facts satisfy all of the legal requirements for asylum.”). The officer must determine the applicant’s credibility in making findings of fact. *Id.* at 341–42. If an asylum application is fatally flawed on one essential ground—“for example, for failure to show membership in a proposed social group”—then a USCIS officer need not examine the remaining elements for asylum. *Id.* at 340.

III. Proving Persecution or a Well-Founded Fear of Persecution Based on Membership in a Particular Social Group

[REDACTED]

Claims based on membership in a particular social group require [REDACTED]: (1) membership in a particular group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; (2) that her membership in that group is a central reason for her persecution; and (3) that the alleged harm is inflicted by the government of her home country or by persons that the government is unwilling or unable to control. INA § 208(b)(1)(B)(i); *Matter of A-B-*, 27 I&N Dec. at 320.

A. Legal Framework for Analysis of Particular Social Group Claims

i. Immutability

The members of a proposed social group must have “a common immutable characteristic.” *Matter of A-B-*, 27 I&N Dec. at 320; *see also Matter of M-E-V-G-*, 26 I&N Dec. at 237-38 (“Our interpretation of the phrase ‘membership in a particular social group’ incorporates the common immutable characteristic standard set forth in *Matter of Acosta*, 19 I&N Dec. [211,] 233 [(BIA 1985)], because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members’ identities or consciences.”).

ii. Particularity

The Attorney General reaffirmed that the particular social group also must be defined with particularity. *Matter of A-B-*, 27 I&N Dec. at 320, 335-36. A group is particular if the “group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.” *Id.* at 330 (citing *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008)). A particular social group must not be “amorphous, overbroad, diffuse, or subjective,” and “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.” *Id.* at 335 (citing *Matter of M-E-V-G-*, 26 I&N Dec. at 239).

[REDACTED]

[REDACTED] Officers must analyze each case on its own merits in the context of the society where the claim arises. [REDACTED]



iii. Social Distinction

The Attorney General also reaffirmed that to satisfy the social distinction requirement, a particular social group “must be perceived as a group by society.” *Id.* at 330. “[I]f the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.” *Id.* (citing *Matter of M-E-V-G-*, 26 I&N Dec. at 238). In other words, “[m]embers of a particular social group will generally understand their own affiliation with that group, as will other people in their country.” *Id.*

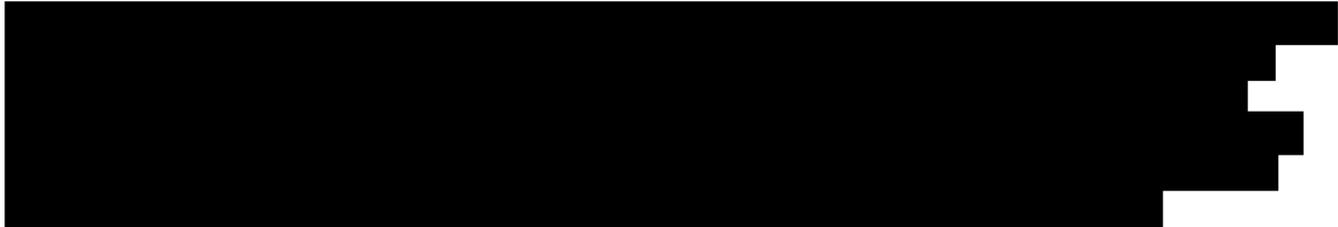


As with all proposed particular social groups, officers should carefully apply the statutory factors to determine whether the group qualifies under the law.

² Asylum officers are reminded that interviews are to be conducted in a nonadversarial manner with the purpose to elicit all relevant and useful information bearing on the applicant’s eligibility for asylum. *See* 8 C.F.R. § 208.9(b).

iv. Defined Independently of the Persecution at Issue

The Attorney General reaffirmed in *Matter of A-B-* that, to be cognizable, a particular social group “must exist independently of the harm asserted.” 27 I&N Dec. at 334; *see also id.* at 335 (“The individuals in the group must share a narrowing characteristic other than their risk of being persecuted” (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005))). This requirement is essential because otherwise, “the definition of the group moots the need to establish actual persecution.” *Id.*



B. Proving Persecution, Nexus, and Internal Relocation

i. Persecution

Applicants must demonstrate past persecution or the requisite likelihood of future persecution.³ The Attorney General observed that “persecution” consists of three elements: (1) it involves “an intent to target a belief or characteristic,” (2) “the level of harm must be severe,” and (3) “the harm or suffering must be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.” *Matter of A-B-*, 27 I&N Dec. at 337 (quotation marks omitted); *see also id.* (observing that “private criminals are more often motivated by greed or vendettas than by an intent to ‘overcome the protected characteristic of the victim’” (quoting *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (alterations omitted))).

³ Persecution is defined as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). As used in section 101(a)(42)(A) of the INA, the word “persecution” “clearly contemplates that harm or suffering must be inflicted upon an individual . . . for possessing a belief or characteristic a persecutor seeks to overcome.” *Id.* at 223, *as modified by Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *see Matter of A-B-*, 27 I&N Dec. at 337 (citing *Matter of Kasinga*). It “does not embrace harm arising out of civil strife or anarchy,” a definition specifically rejected by Congress by excluding the term “displaced persons” from the Senate’s version of the Refugee Act of 1980. *Id.*

In a case where the alleged persecutor is not affiliated with the government, the applicant must show the government is unable or unwilling to protect him or her. *Id.* at 337

[REDACTED]

[REDACTED]

[REDACTED]

ii. Nexus

Membership in the particular social group must also be a central reason for the persecution. Aliens may suffer threats to their lives or freedom, or experience suffering or harm for a number of reasons, including social, economic, family, or personal circumstances. But, as the Attorney General emphasized in *Matter of A-B-*, “the asylum statute does not provide redress for all misfortune.” *Id.* at 318. The asylum statute was not intended as a remedy for “the numerous personal altercations that invariably characterize economic and social relationships.” *Id.* at 322. As such, when a private actor inflicts violence based on a personal relationship with the victim, the victim’s membership in a larger group often will not be “one central reason” for the abuse. *Id.* at 338–39. In a particular case, the evidence may establish that a victim of domestic violence was attacked based solely on her preexisting personal relationship with her abuser. Also, even if the persecutor is a member of the government, there is no governmental nexus if the dispute is a “purely personal matter.” *Id.* at 339 n.10.

iii. Internal Relocation

All officers must also consider whether internal relocation in the alien’s home country presents a reasonable alternative before granting asylum or refugee status. *Id.* at 345 (“Beyond the standards that victims of private violence must meet in proving refugee status in the first instance, they face the

additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible). When the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government."). If an asylum applicant does not show past persecution, then he or she "bear[s] the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or government-sponsored." 8 C.F.R. § 208.13(b)(3)(i). If the asylum applicant does establish past persecution or if the persecutor is a government or is government-sponsored, then the officer must presume that internal relocation is unreasonable "unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." *Id.* § 208.13(b)(3)(ii). In cases where internal relocation presents a reasonable solution, the officer should deny the applicant's claim consistent with the regulations. *Id.* § 208.13(b)(1)(i)(B), (b)(2)(ii).

C. Evaluating Credibility

An officer must also take into account an applicant's overall credibility when adjudicating a reasonable fear, credible fear, asylum, or refugee claim. There is no presumption of credibility for such claims. Rather, the applicant must demonstrate that he or she is credible. A negative credibility determination alone is sufficient to deny an asylum application and, consequently, to issue a negative credible fear or reasonable fear determination. *See* INA §§ 208(b)(1)(B)(iii), 235(b)(1)(B)(v), 241(b)(3)(C).

To determine whether an applicant or a witness is credible, the officer must consider the totality of the circumstances and all relevant factors, including the demeanor, candor, or responsiveness of the applicant; the inherent plausibility of the applicant's account; the consistency between the applicant's written and oral statements; and any inaccuracies or falsehoods in such statements. INA § 208(b)(1)(B)(iii); *see also* *Matter of J-Y-C*, 24 I&N Dec. at 262. Whether the inconsistencies, inaccuracies, or falsehoods go to the heart of the applicant's claim are irrelevant. INA § 208(b)(1)(B)(iii); *see also* *Matter of J-Y-C*, 24 I&N Dec. at 262.

IV. Exercising Discretion

Finally, the Attorney General emphasized in *Matter of A-B-* that asylum is a *discretionary* form of relief from removal. Therefore, once an officer has determined that an applicant is eligible for asylum, he or she must then decide whether to favorably exercise discretion by granting asylum. "[A] favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA." *Id.* at 345 n.12.

In exercising discretion, officers should consider any relevant factor, including but not limited to: "the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and his or her living conditions, safety, and potential for long-term residency there." *Id.* (citing *Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987)). Of particular note, the BIA has held that unlawful entry

“is a proper and relevant discretionary factor” and can even be a “serious adverse factor,” but “should not be considered in such a way that the practical effect is to deny relief in virtually all cases” and that “the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted.” *Pula*, 19 I&N at 473. The BIA has also instructed that “[t]he danger of persecution will outweigh all but the most egregious adverse factors.” *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

Specifically, USCIS personnel may find an applicant’s illegal entry, including any intentional evasion of U.S. authorities, and including any conviction for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion. In particular, “the circumvention of orderly refugee procedures” factor may take into account whether the alien entered the United States without inspection and, if not, whether the applicant had other ways to lawfully enter this country. For example, the applicant might show that the illegal entry was necessary to escape imminent harm and that he or she was thereby prevented from presenting himself or herself at a designated United States POE. An officer should consider whether the applicant demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim that the applicant wished to present to U.S. authorities.

V. Credible Fear and Reasonable Fear Interviews

When aliens who are inadmissible under INA § 212(a)(6)(C) or § 212(a)(7) indicate either an intention to apply for asylum under INA § 208 or a fear of persecution or torture, an asylum officer will conduct a credible fear interview. INA § 235(b)(1)(A)(ii). Credible fear means a “significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.” *Id.* § 235(b)(1)(B)(v).

An asylum officer will conduct a reasonable fear interview when an alien is subject to either, (1) a final administrative removal order under INA § 238(b) or (2) a prior reinstated order of removal, exclusion, or deportation under INA § 241(a)(5), and indicates a fear of persecution or torture. The “reasonable possibility” standard is the same standard required to establish eligibility for asylum (the “well-founded fear” standard). The reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish entitlement in Immigration Court to INA § 241(b)(3) withholding of removal, or withholding or deferral of removal pursuant to the regulations implementing the U.S. obligations under Article 3 of the Convention against Torture.

When conducting a credible fear or reasonable fear interview, an asylum officer must determine what law applies to the applicant’s claim. The asylum officer should apply all applicable precedents of the Attorney General and the BIA, *Matter of E-L-H-*, 23 I&N Dec. 814, 819 (BIA 2005), which are binding on all immigration judges and asylum officers nationwide.



[REDACTED]

[REDACTED]

Matter of A-B-, as discussed above in Section III, explained the standards for “eligibility for asylum under section 208” based on a particular social group. Therefore, if an applicant claims asylum based on membership in a particular social group, then officers must factor the above standards into their determination of whether an applicant has a credible fear or reasonable fear of persecution based on membership in a particular social group. Asylum officers should bear in mind that in considering credible or reasonable fear claims, they must “consider whether the alien’s case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.” 8 C.F.R. § 208.30(a)(4).

VI. Summary

Under current precedent, including *Matter of A-B-*, *Matter of M-E-V-G-*, and *Matter of W-G-R-*, there are at least five basic inquiries that an officer must make in cases involving membership in a particular social group.

First, the officers must consider whether [REDACTED] the applicant is a member of a clearly-defined particular social group, which is composed of members who share a common immutable characteristic, is defined with particularity, is socially distinct within the society in question, and is not defined by the persecution on which the claim is based.

Second, the officer must require the applicant to prove that membership in the group is a central reason for the applicant’s persecution.

Third, if the alleged persecutor is not affiliated with the government, the officer must require the applicant to show that the applicant’s home government is unwilling or unable to protect him or her.

Fourth, the officer must analyze whether internal relocation in the applicant’s home country is possible, would protect the applicant from the feared persecution, and presents a reasonable alternative to a grant of asylum or refugee status.

Fifth, apart from the eligibility standards above, the officer must determine whether the applicant merits a grant of asylum or refugee status in the officer’s discretion.

Of course, the applicant must also satisfy all the other elements of the refugee definition in order to be granted asylum or refugee status. The officer must examine each element separately, even though certain types of evidence may be relevant to several elements. For example, evidence relevant to evaluating social distinction for the purpose of deciding whether a particular social group exists is often also relevant to whether the past or feared harm is “on account of” the applicant’s membership (or imputed membership) in the particular social group. The same evidence might also be relevant to the government’s willingness or ability to protect an applicant from a non-government persecutor. Social attitudes often may affect both an individual persecutor’s motivations and government policies and practice. While there are often facts that are relevant to more than one aspect of the analysis, those facts must be analyzed separately, using the appropriate standard, for each element.



VII. Contact

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Chief Counsel.

VIII. Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law, or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)
GRACE, <i>et al.</i> ,)
)
	Plaintiffs,)
)
	v.)
)
MATTHEW G. WHITAKER, Acting)
Attorney General of the United)
States, <i>et al.</i> ,	No. 1:18-cv-01853 (EGS))
)
	Defendants.)
<hr/>)

ORDER

The Court has considered the parties' cross-motions for summary judgment, the memoranda and exhibits in support thereof, and the briefs in opposition thereto; plaintiffs' motion to consider extra-record evidence, defendants' motion to strike plaintiffs' extra-record evidence, and the memoranda in support or in opposition thereto; oral argument; and the entire record in this action.

Accordingly, and consistent with the accompanying Memorandum Opinion, the Court hereby **GRANTS IN PART** and **DENIES IN PART** plaintiffs' cross-motion for summary judgment, and **GRANTS IN PART** and **DENIES IN PART** defendants' motion for summary judgment.

This Court hereby:

1. **DECLARES** that the following credible fear policies contained in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G.

2018), the USCIS Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-, July 11, 2018 (PM-602-0162) (hereinafter "Policy Memorandum"), and/or the Asylum Division Interim Guidance - Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018) ("Interim Guidance"), and challenged by plaintiffs, are arbitrary, capricious, and in violation of the immigration laws insofar as those policies are applied in credible fear proceedings:

- a. The general rule against credible fear claims relating to domestic and gang violence. See *Matter of A-B-*, 27 I. & N. Dec. at 320 & n.1; Policy Memorandum, ECF No. 100 at 9, 12-13.
- b. The requirement that a noncitizen whose credible fear claim involves non-governmental persecutors "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I. & N. at 337; Policy Memorandum, ECF No. 100 at 5, 9, 13; Interim Guidance.
- c. The Policy Memorandum's rule that domestic violence-based particular social group definitions that include "inability to leave" a relationship are impermissibly circular and therefore not cognizable in credible fear proceedings. Policy Memorandum, ECF No. 100 at 8.
- d. The Policy Memorandum's requirement that, during the credible fear stage, individuals claiming credible fear must delineate or identify any particular social group in order to satisfy credible fear based on the particular social group protected ground. Policy Memorandum, ECF No. 100 at 6, 12.
- e. The Policy Memorandum's directive that asylum officers conducting credible fear interviews should apply federal circuit court case law only "to the extent that those cases are not inconsistent with *Matter of A-B-*." Policy Memorandum, ECF No. 100 at 11.
- f. The Policy Memorandum's directive that asylum officers conducting credible fear interviews should

apply only the case law of "the circuit where the alien is physically located during the credible fear interview." Policy Memorandum, ECF No. 100 at 11-12.

2. **VACATES** each of the credible fear policies specified in paragraphs 1.a. through 1.f. above. Accordingly, the Court **PERMANENTLY ENJOINS** defendants and their agents from applying these policies with respect to credible fear determinations, credible fear interviews, or credible fear review hearings issued or conducted by asylum officers or immigration judges. Defendants shall provide written guidance or instructions to all asylum officers and immigration judges whose duties include issuing or conducting credible fear determinations, credible fear interviews, or credible fear review hearings, communicating that each of the credible fear policies specified in paragraphs 1.a. through 1.f. are vacated and enjoined and therefore shall not be applied to any such credible fear proceedings.
3. **VACATES** the negative credible fear determinations and any expedited removal orders issued to each plaintiff.
4. **PERMANENTLY ENJOINS** defendants from removing any plaintiffs currently in the United States without first providing each of them a new credible fear process consistent with the Court's Memorandum Opinion and free from the unlawful policies enumerated in paragraphs 1.a. through 1.f. above or, in the alternative, full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a. To ensure compliance with this injunction, any new credible fear process provided pursuant to this paragraph shall be accompanied by a written record consistent with 8 U.S.C. § 1225(b)(1)(B)(iii).
5. **FURTHER ORDERS** defendants to bring back into the United States, at no expense to plaintiffs, any plaintiff who has been removed pursuant to an expedited removal order prior to this Order and parole them into the United States, and provide each of them a new credible fear process consistent with the Court's Memorandum Opinion and free from the unlawful policies enumerated in paragraphs 1.a. through 1.f. above or, in the alternative, full immigration court removal proceedings

pursuant to 8 U.S.C. § 1229a. To facilitate such plaintiffs' return to the United States, defendants shall meet and confer with plaintiffs' counsel within 7 days to develop a schedule and plan to carry out this portion of the injunction. To ensure compliance with this injunction, any new credible fear process provided pursuant to this paragraph shall be accompanied by a written record consistent with 8 U.S.C. § 1225(b)(1)(B)(iii). Defendants shall work in good faith to carry out the relief ordered in this paragraph and shall communicate periodically with plaintiffs' counsel until the relief ordered in this paragraph is completed.

6. **FURTHER ORDERS** defendants to provide the plaintiffs, within 10 days of this Order, with a status report detailing any steps defendants have taken to comply with this injunction, including copies of all guidance and instructions sent to asylum officers and immigration judges pursuant to paragraph 2 above. Within 30 days and 60 days of this Order, defendants shall provide plaintiffs with a status report detailing any subsequent steps taken to comply with this injunction in the time period since the last report, including copies of all guidance and instructions sent to asylum officers and immigration judges pursuant to paragraph 2 above during that time frame.

The Court **GRANTS** plaintiffs' cross-motion for summary judgment as to their Administrative Procedure Act, Immigration and Nationality Act, and Refugee Act challenges concerning each of the policies enumerated in paragraphs 1.a. through 1.f. above, and defendants' motion for summary judgment is **DENIED** as to these same claims. The Court **DENIES** plaintiffs' cross-motion for summary judgment as to their challenges concerning nexus and discretion, and defendants' motion for summary judgment is **GRANTED** as to these same claims.

Furthermore, consistent with the accompanying Memorandum Opinion, the Court **GRANTS** plaintiffs' motion to consider extra record evidence with respect to evidence relevant to plaintiffs' contentions that the government deviated from prior policies, as well as evidence relevant to plaintiffs' request for injunctive relief. Accordingly, the following evidence submitted by plaintiffs is admitted into the record, and defendants' motion to strike is **DENIED** with respect to this same evidence: Decl. of Sarah Mujahid ("Mujahid Decl."), ECF No. 10-3, Exs. E-J; Second Decl. of Sarah Mujahid ("Second Mujahid Decl."), ECF No. 64-4, Exs. 1-3; ECF Nos. 12-1 to 12-9 (filed under seal); Mujahid Decl., ECF No. 10-3, Exs. K-Q; Second Mujahid Decl., ECF No. 64-4, Exs. 10-13; Joint Decl. of Shannon Drysdale Walsh, Cecilia Menjivar, and Harry Vanden ("Honduras Decl."), ECF No. 64-6; Joint Decl. of Cecilia Menjivar, Gabriela Torres, and Harry Vanden ("Guatemala Decl."), ECF No. 64-7; Joint Decl. of Cecilia Menjivar and Harry Vanden ("El Salvador Decl."), ECF No. 64-8.

Because the Court has declined to consider plaintiffs' due process claim, the Court **GRANTS** defendants' motion to strike with respect to evidence relating to plaintiffs' due process claim. Accordingly, the Court will not consider the following documents relating to plaintiffs' due process

claim: Second Mujahid Decl., ECF No. 64-4, Exs. 4-7, 8-9, 14-17, and ECF No. 64-5; and Mujahid Decl., ECF No. 10-3, Exs. R-T. Plaintiffs' motion to consider extra-record evidence as to these same documents is **DENIED** without prejudice.

The Court also **GRANTS** defendants' motion to strike with respect to the Decl. of Rebecca Jamil and Decl. of Ethan Nasr, and plaintiffs' evidence motion is **DENIED** as to these same documents.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District
December 19, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRACE, *et al.*,)
)
)
 Plaintiffs,)
)
 v.)
) No. 18-cv-01853 (EGS)
)
 MATTHEW G. WHITAKER,¹ Acting)
 Attorney General of the United)
 States, *et al.*,)
)
)
 Defendants.)

MEMORANDUM OPINION

When Congress passed the Refugee Act in 1980, it made its intentions clear: the purpose was to enforce the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, § 101(a), Pub. L. No. 96-212, 94 Stat. 102 (1980). Years later, Congress amended the immigration laws to provide for expedited removal of those seeking admission to the United States. Under the expedited removal process, an alien could be summarily removed after a preliminary inspection by an immigration officer, so long as the alien did not have a credible fear of persecution by his or her country of origin. In

¹ Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes the current Acting Attorney General as the defendant in this case. "Plaintiffs take no position at this time regarding the identity of the current Acting Attorney General of the United States." Civil Statement, ECF No. 101.

creating this framework, Congress struck a balance between an efficient immigration system and ensuring that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

Seeking an opportunity for asylum, plaintiffs, twelve adults and children, alleged accounts of sexual abuse, kidnappings, and beatings in their home countries during interviews with asylum officers.² These interviews were designed to evaluate whether plaintiffs had a credible fear of persecution by their respective home countries. A credible fear of persecution is defined as a "significant possibility" that the alien "could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v). Although the asylum officers found that plaintiffs' accounts were sincere, the officers denied their claims after applying the standards set forth in a recent precedential immigration decision issued by then-Attorney General, Jefferson B. Sessions, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

Plaintiffs bring this action against the Attorney General alleging violations of, *inter alia*, the Administrative Procedure Act ("APA") and the Immigration and Nationality Act ("INA"),

² Plaintiffs Grace, Carmen, Gio, Gina, Maria, Mina, Nora, and Mona are proceeding under pseudonyms.

arguing that the standards articulated in *Matter of A-B-*, and a subsequent Policy Memorandum issued by the Department of Homeland Security ("DHS") (collectively "credible fear policies"), unlawfully and arbitrarily imposed a heightened standard to their credible fear determinations.

Pending before the Court are: (1) plaintiffs' combined motions for a preliminary injunction and cross-motion for summary judgment; (2) plaintiffs' motion to consider evidence outside the administrative record; (3) the government's motion to strike exhibits supporting plaintiffs' motion for summary judgment; and (4) the government's motion for summary judgment. Upon consideration of the parties' memoranda, the parties' arguments at the motions hearings, the arguments of *amici*,³ the administrative record, the applicable law, and for the reasons discussed below, the Court finds that several of the new credible fear policies, as articulated in *Matter of A-B-* and the Policy Memorandum, violate both the APA and INA. As explained in this Memorandum Opinion, many of these policies are inconsistent with the intent of Congress as articulated in the INA. And because it is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal, the Court finds that those policies are unlawful.

³ The Court appreciates the illuminating analysis provided by the *amici*.

Part I of this Opinion sets forth background information necessary to resolve plaintiffs' claims. In Part II, the Court considers plaintiffs' motion to consider evidence outside the administrative record and denies the motion in part. In Part III, the Court considers the parties' cross-motions for summary judgment. In Part III.A, the Court considers the government's arguments that this case is not justiciable and holds that this Court has jurisdiction to hear plaintiffs' challenges to the credible fear policies. In Part III.B, the Court addresses the legal standards that govern plaintiffs' claims. In Part III.C, the Court turns to the merits of plaintiffs' claims and holds that, with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws. In Part III.D, the Court considers the appropriate form of relief and vacates the unlawful credible fear policies. The Court further permanently enjoins the government from continuing to apply those policies and from removing plaintiffs who are currently in the United States without first providing credible fear determinations consistent with the immigration laws. Finally, the Court orders the government to return to the United States the plaintiffs who were unlawfully deported and to provide them with new credible fear determinations consistent with the immigration laws.

I. Background

Because the claims in this action center on the expedited removal procedures, the Court discusses those procedures, and the related asylum laws, in detail.

A. Statutory and Regulatory Background

1. The Refugee Act

In 1980, Congress passed the Refugee Act, Pub. L. No. 96-212, 94 Stat. 102, which amended the INA, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in sections of 8 U.S.C.). The "motivation for the enactment of the Refugee Act" was the "United Nations Protocol Relating to the Status of Refugees ["Protocol"]," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987), "to which the United States had been bound since 1968," *id.* at 432-33. Congress was clear that its intent in promulgating the Refugee Act was to bring the United States' domestic laws in line with the Protocol. *See id.* at 437 (stating it is "clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]."). The Board of Immigration Appeals ("BIA"), has also recognized that Congress' intent in enacting the Refugee Act was to align domestic refugee law with the United States' obligations under the Protocol, to give statutory meaning to "our national commitment to human rights

and humanitarian concerns," and "to afford a generous standard for protection in cases of doubt." *In Re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1998) (quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144).

The Refugee Act created a statutory procedure for refugees seeking asylum and established the standards for granting such requests; the INA currently governs that procedure. The INA gives the Attorney General discretion to grant asylum to removable aliens. 8 U.S.C. § 1158(b)(1)(A). However, that relief can only be granted if the alien is a "refugee." *Id.* The term "refugee" is defined as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A). "Thus, the 'persecution or well-founded fear of persecution' standard governs the Attorney General's determination [of] whether an alien is eligible for asylum." *Cardoza-Fonseca*, 480 U.S. at 428. To establish refugee status, the alien must show he or she is someone who: (1) has suffered persecution (or has a well-founded fear of persecution) (2) on account of (3) one of five specific protected grounds:

race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. § 1101(a)(42)(A). An alien fearing harm by non-governmental actors is eligible for asylum if the other criteria are met, and the government is "unable or unwilling to control" the persecutor. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985) *overruled on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

2. Expedited Removal Process

Before seeking asylum through the procedures outlined above, however, many aliens are subject to a streamlined removal process called "expedited removal." 8 U.S.C. § 1225. Prior to 1996, every person who sought admission into the United States was entitled to a full hearing before an immigration judge, and had a right to administrative and judicial review. See *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 41 (D.D.C. 1998) (describing prior system for removal). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") amended the INA to provide for a summary removal process for adjudicating the claims of aliens who arrive in the United States without proper documentation. As described in the IIRIRA Conference Report, the purpose of the expedited removal procedure

is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted . . . , while

providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims.

H.R. REP. No. 104-828, at 209-10 (1996) ("Conf. Rep.").

Consistent with that purpose, Congress carved out an exception to the expedited removal process for individuals with a "credible fear of persecution." See 8 U.S.C.

§ 1225(b)(1)(B)(ii). If an alien "indicates either an intention to apply for asylum . . . or a fear of persecution," the alien must be referred for an interview with a U.S. Citizenship and Immigration Services ("USCIS") asylum officer. *Id.*

§ 1225(b)(1)(A)(ii). During this interview, the asylum officer is required to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]" 8 C.F.R. § 208.30(d). The asylum officer must "conduct the interview in a nonadversarial manner." *Id.*

Expediting the removal process, however, risks sending individuals who are potentially eligible for asylum to their respective home countries where they face a real threat, or have a credible fear of persecution. Understanding this risk, Congress intended the credible fear determinations to be governed by a low screening standard. See 142 CONG. REC. S11491-02 ("The credible fear standard . . . is intended to be a low

screening standard for admission into the usual full asylum process"); see also H.R. REP. No. 104-469, pt. 1, at 158 (1996) (stating "there should be no danger that an alien with a genuine asylum claim will be returned to persecution"). A credible fear is defined as a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

If, after a credible fear interview, the asylum officer finds that the alien does have a "credible fear of persecution" the alien is taken out of the expedited removal process and referred to a standard removal hearing before an immigration judge. See 8 U.S.C. § 1225(b)(1)(B)(ii), (v). At that hearing, the alien has the opportunity to develop a full record with respect to his or her asylum claim, and may appeal an adverse decision to the BIA, 8 C.F.R. § 208.30(f), and then, if necessary, to a federal court of appeals, see 8 U.S.C. § 1252(a)-(b).

If the asylum officer renders a negative credible fear determination, the alien may request a review of that determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). The immigration judge's decision is "final and may not be appealed" 8 C.F.R. § 1208.30(g)(2)(iv)(A),

except in limited circumstances. See 8 U.S.C. § 1252(e).

3. Judicial Review

Section 1252 delineates the scope of judicial review of expedited removal orders and limits judicial review of orders issued pursuant to negative credible fear determinations to a few enumerated circumstances. See 8 U.S.C. § 1252(a). The section provides that “no court shall have jurisdiction to review . . . the application of [section 1225(b)(1)] to individual aliens, including the [credible fear] determination made under section 1225(b)(1)(B).” 8 U.S.C.

§ 1252(a)(2)(A)(iii). Moreover, except as provided in section 1252(e), the statute prohibits courts from reviewing: (1) “any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited removal] order;” (2) “a decision by the Attorney General to invoke” the expedited removal regime; and (3) the “procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1).” *Id.* § 1252(a)(2)(A)(i), (ii) & (iv).

Section 1252(e) provides for judicial review of two types of challenges to removal orders pursuant to credible fear determinations. The first is a habeas corpus proceeding limited to reviewing whether the petitioner was erroneously removed because he or she was, among other things, lawfully admitted for

permanent residence, or had previously been granted asylum. 8 U.S.C. § 1252(e)(2)(C). As relevant here, the second proceeding available for judicial review is a systemic challenge to the legality of a “written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement” the expedited removal process. *Id.* § 1252(e)(3)(A)(ii). Jurisdiction to review such a systemic challenge is vested solely in the United States District Court for the District of Columbia. *Id.* § 1252(e)(3)(A).

B. Executive Guidance on Asylum Claims

1. Precedential Decision

The Attorney General has the statutory and regulatory authority to make determinations and rulings with respect to immigration law. *See, e.g.*, 8 U.S.C. § 1103(a)(1). This authority includes the ability to certify cases for his or her review and to issue binding decisions. *See* 8 C.F.R. §§ 1003.1(g)-(h)(1)(ii).

On June 11, 2018, then-Attorney General Sessions did exactly that when he issued a precedential decision in an asylum case, *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). In *Matter of A-B-*, the Attorney General reversed a grant of asylum to a Salvadoran woman who allegedly fled several years of domestic violence at the hands of her then-husband. *Id.* at 321, 346.

The decision began by overruling another case, *Matter of A-R-C-G-*, 27 I. & N. Dec. 388 (BIA 2014). *Id.* at 319. In *A-R-C-G-*, the BIA recognized “married women in Guatemala who are unable to leave their relationship” as a “particular social group” within the meaning of the asylum statute. 27 I. & N. Dec. at 392. The Attorney General’s rationale for overruling *A-R-C-G-* was that it incorrectly applied BIA precedent, “assumed its conclusion and did not perform the necessary legal and factual analysis” because, among other things, the BIA accepted stipulations by DHS that the alien was a member of a qualifying particular social group. *Matter of A-B-*, 27 I. & N. Dec. at 319. In so doing, the Attorney General made clear that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum,” *id.* at 320,⁴ and “[a]ccordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution.” *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)(1)(B)(v)).

The Attorney General next reviewed the history of BIA precedent interpreting the “particular social group” standard and again explained, at length, why *A-R-C-G-* was wrongly

⁴ Although *Matter of A-B-* discusses gang-related violence at length, the applicant in *Matter of A-B-* never claimed gang members had any involvement in her case. *Id.* at 321 (describing persecution related to domestic violence).

decided. In so ruling, the Attorney General articulated legal standards for determining asylum cases based on persecution from non-governmental actors on account of membership in a particular social group, focusing principally on claims by victims of domestic abuse and gang violence. He specifically stated that few claims pertaining to domestic or gang violence by non-governmental actors could qualify for asylum or satisfy the credible fear standard. *See id.* at 320 n.1.

The Attorney General next focused on the specific elements of an asylum claim beginning with the standard for membership in a "particular social group." The Attorney General declared that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required" under asylum laws since "broad swaths of society may be susceptible to victimization." *Id.* at 335.

The Attorney General next examined the persecution requirement, which he described as having three elements: (1) an intent to target a belief or characteristic; (2) severe harm; and (3) suffering inflicted by the government or by persons the government was unable or unwilling to control. *Id.* at 337. With respect to the last element, the Attorney General stated that an alien seeking to establish persecution based on the violent conduct of a private actor may not solely rely on the government's difficulty in controlling the violent behavior. *Id.*

Rather, the alien must show "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." *Id.* (citations and internal quotation marks omitted).

The Attorney General concluded with a discussion of the requirement that an asylum applicant demonstrate that the persecution he or she suffered was on account of a membership in a "particular social group." *Id.* at 338-39. He explained that "[i]f the ill-treatment [claimed by an alien] was motivated by something other than" one of the five statutory grounds for asylum, then the alien "cannot be considered a refugee for purpose of asylum." *Id.* at 338 (citations omitted). He continued to explain that when private actors inflict violence based on personal relationships with a victim, the victim's membership in a particular social group "may well not be 'one central reason' for the abuse." *Id.* Using *Matter of A-R-C-G-* as an example, the Attorney General stated that there was no evidence that the alien was attacked because her husband was aware of, and hostile to, her particular social group: women who were unable to leave their relationship. *Id.* at 338-39. The Attorney General remanded the matter back to the immigration judge for further proceedings consistent with his decision. *Id.* at 346.

2. Policy Memorandum

Two days after the Attorney General issued *Matter of A-B-*, USCIS issued Interim Guidance instructing asylum officers to apply *Matter of A-B-* to credible fear determinations. Asylum Division Interim Guidance -- *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) ("Interim Guidance"), ECF No. 100 at 15-18.⁵ On July 11, 2018, USCIS issued final guidance to asylum officers for use in assessing asylum claims and credible fear determinations in light of *Matter of A-B-*. USCIS Policy Mem., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, July 11, 2018 (PM-602-0162) ("Policy Memorandum"), ECF No. 100 at 4-13.

The Policy Memorandum adopts the standards set forth in *Matter of A-B-* and adds new directives for asylum officers. First, like *Matter of A-B-*, the Policy Memorandum invokes the expedited removal statute. *Id.* at 4 (citing section 8 U.S.C. § 1225 as one source of the Policy Memorandum's authority). The Policy Memorandum further acknowledges that "[a]lthough the alien in *Matter of A-B-* claimed asylum and withholding of removal, the Attorney General's decision and this [Policy Memorandum] apply also to refugee status adjudications and

⁵ When citing electronic filings throughout this Memorandum Opinion, the Court cites to the ECF header page number, not the original page number of the filed docket.

reasonable fear and credible fear determinations." *Id.* n.1 (citations omitted).

The Policy Memorandum also adopts the standard for "persecution" set by *Matter of A-B-*: In cases of alleged persecution by private actors, aliens must demonstrate the "government is unwilling or unable to control" the harm "such that the government either 'condoned the behavior or demonstrated a complete helplessness to protect the victim.'" *Id.* at 5 (citing *Matter of A-B-*, 27 I. & N. Dec. at 337). After explaining the "condoned or complete helplessness" standard, the Policy Memorandum explains that:

In general, in light of the [standards governing persecution by a non-government actor], claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.

Id. at 9 (emphasis in original).

Furthermore, the Policy Memorandum made clear that because *Matter of A-B-* "explained the standards for eligibility for asylum . . . based on a particular social group . . . if an applicant claims asylum based on membership in a particular social group, then officers must factor [the standards explained in *Matter of A-B-*] into their determination of whether an

applicant has a credible fear . . . of persecution.” *Id.* at 12 (citations and internal quotation marks omitted).

The Policy Memorandum includes two additional directives not found in *Matter of A-B-*. First, it instructs asylum officers to apply the “case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*.” *Id.* at 11. Second, although acknowledging that the “relevant federal circuit court is the circuit where the removal proceedings **will take place** if the officer makes a positive credible fear or reasonable fear determination,” the Policy Memorandum instructs asylum officers to “apply precedents of the Board, and, if necessary, the circuit where the alien is **physically located** during the credible fear interview.” *Id.* at 11-12. (emphasis added).

The Policy Memorandum concludes with the directive that “[asylum officers] should be alert that under the standards clarified in *Matter of A-B-*, few gang-based or domestic-violence claims involving particular social groups defined by the members’ vulnerability to harm may . . . pass the ‘significant probability’ test in credible-fear screenings.” *Id.* at 13.

C. Factual and Procedural Background

Each of the plaintiffs, twelve adults and children, came to the United States fleeing violence from Central America and seeking refuge through asylum. Plaintiff Grace fled Guatemala

after having been raped, beaten, and threatened for over twenty years by her partner who disparaged her because of her indigenous heritage. Grace Decl., ECF No. 12-1 ¶ 2.⁶ Her persecutor also beat, sexually assaulted, and threatened to kill several of her children. *Id.* Grace sought help from the local authorities who, with the help of her persecutor, evicted her from her home. *Id.*

Plaintiff Carmen escaped from her country with her young daughter, J.A.C.F., fleeing several years of sexual abuse by her husband, who sexually assaulted, stalked, and threatened her, even after they no longer resided together. Carmen Decl., ECF No. 12-2 ¶ 2. In addition to Carmen's husband's abuse, Carmen and her daughter were targeted by a local gang because they knew she lived alone and did not have the protection of a family. *Id.* ¶ 24. She fled her country of origin out of fear the gang would kill her. *Id.* ¶ 28.

Plaintiff Mina escaped from her country after a gang murdered her father-in-law for helping a family friend escape from the gang. Mina Decl., ECF No. 12-3 ¶ 2. Her husband went to the police, but they did nothing. *Id.* at ¶ 10. While her husband was away in a neighboring town to seek assistance from another police force, members of the gang broke down her door and beat

⁶ The plaintiffs' declarations have been filed under seal.

Mina until she could no longer walk. *Id.* ¶ 15. She sought asylum in this country after finding out she was on a “hit list” compiled by the gang. *Id.* ¶¶ 17-18.

The remaining plaintiffs have similar accounts of abuse either by domestic partners or gang members. Plaintiff Gina fled violence from a politically-connected family who killed her brother, maimed her son, and threatened her with death. Gina Decl., ECF No. 12-4 ¶ 2. Mona fled her country after a gang brutally murdered her long-term partner—a member of a special military force dedicated to combating gangs—and threatened to kill her next. Mona Decl., ECF No. 12-5 ¶ 2. Gio escaped from two rival gangs, one of which broke his arm and threatened to kill him, and the other threatened to murder him after he refused to deal drugs because of his religious convictions. Gio Decl., ECF No. 12-6 ¶ 2. Maria, an orphaned teenage girl, escaped a forced sexual relationship with a gang member who targeted her after her Christian faith led her to stand up to the gang. Maria Decl., ECF No. 12-7 ¶ 2. Nora, a single mother, together with her son, A.B.A., fled an abusive partner and members of his gang who threatened to rape her and kill her and her son if she did not submit to the gang’s sexual advances. Nora Decl., ECF No. 12-8 ¶ 2. Cindy, together with her young child, A.P.A., fled rapes, beatings, and shootings [REDACTED]

[REDACTED]. Cindy Decl., ECF No. 12-9 ¶ 2.⁷

Each plaintiff was given a credible fear determination pursuant to the expedited removal process. Despite finding that the accounts they provided were credible, the asylum officers determined that, in light of *Matter of A-B-*, their claims lacked merit, resulting in a negative credible fear determination. Plaintiffs sought review of the negative credible fear determinations by an immigration judge, but the judge affirmed the asylum officers' findings. Plaintiffs are now subject to final orders of removal or were removed pursuant to such orders prior to commencing this suit.⁸

Facing imminent deportation, plaintiffs filed a motion for preliminary injunction, ECF No. 10, and an emergency motion for stay of removal, ECF No. 11, on August 7, 2018. In their motion for stay of removal, plaintiffs sought emergency relief because two of the plaintiffs, Carmen and her daughter J.A.C.F., were "subject to imminent removal." ECF No. 11 at 1.

The Court granted the motion for emergency relief as to the plaintiffs not yet deported. The parties have since filed cross-

⁷ Each plaintiffs' harrowing accounts were found to be believable during the plaintiffs' credible fear interviews. Oral Arg. Hr'g Tr., ECF No. 102 at 37.

⁸ Since the Court's Order staying plaintiffs' removal, two plaintiffs have moved for the Court to lift the stay and have accordingly been removed. See Mot. to Lift Stay, ECF Nos. 28 (plaintiff Mona), 60 (plaintiff Gio).

motions for summary judgment related to the Attorney General's precedential decision and the Policy Memorandum issued by DHS. Further, plaintiffs have filed an opposed motion to consider evidence outside the administrative record.

II. Motion to Consider Extra Record Evidence

Plaintiffs attach several exhibits to their combined application for a preliminary injunction and cross-motion for summary judgment, see ECF Nos. 10-2 to 10-7, 12-1 to 12-9, 64-3 to 64-8, which were not before the agency at the time it made its decision. These exhibits include: (1) declarations from plaintiffs; (2) declarations from experts pertaining to whether the credible fear policies are new; (3) government training manuals, memoranda, and a government brief; (4) third-party country reports or declarations; (5) various newspaper articles; and (6) public statements from government officials. Pls.' Evid. Mot., ECF No. 66-1 at 7-16. The government moves to strike these exhibits, arguing that judicial review under the APA is limited to the administrative record, which consists of the "materials that were before the agency at the time its decision was made." Defs.' Mot. to Strike, ECF No. 88-1 at 20.

A. Legal Standard

"[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its

decision.'" *Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). This is because, under the APA, the court is confined to reviewing "the whole record or those parts of it cited by a party," 5 U.S.C. § 706, and the administrative record only includes the "materials 'compiled' by the agency that were 'before the agency at the time the decision was made,'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (citations omitted).

Accordingly, when, as here, plaintiffs seek to place before the court additional materials that the agency did not review in making its decision, a court must exclude such material unless plaintiffs "can demonstrate unusual circumstances justifying departure from th[e] general rule." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (citation omitted). Aa court may appropriately consider extra-record materials: (1) if the agency "deliberately or negligently excluded documents that may have been adverse to its decision," (2) if background information is needed to "determine whether the agency considered all of the relevant factors," or (3) if the agency "failed to explain [the] administrative action so as to frustrate judicial review." *Id.*

Plaintiffs make three arguments as to why the Court should

consider their proffered extra-record materials: (1) to evaluate whether the government's challenged policies are an impermissible departure from prior policies; (2) to consider plaintiffs' due process cause of action⁹; and (3) to evaluate plaintiffs' request for permanent injunctive relief. Pls.' Evid. Mot., ECF No. 66-1 at 2-12. The Court considers each argument in turn.

B. Analysis

1. Evidence of Prior Policies

Plaintiffs first argue that the Court should consider evidence of the government's prior policies as relevant to determining whether the policies in *Matter of A-B-* and the subsequent guidance deviated from prior policies without explanation. *Id.* at 8-11. The extra-record materials at issue include government training manuals, memoranda, and a government brief, see Decl. of Sarah Mujahid ("Mujahid Decl."), ECF No. 10-3 Exs. E-J; Second Decl. of Sarah Mujahid ("Second Mujahid Decl."), ECF No. 64-4, Exs. 1-3, and declarations from third parties explaining the policies are new, Decl. of Rebecca Jamil and Ethan Nasr, ECF No. 65-5.

The Court will consider the government training manuals,

⁹ The Court does not reach plaintiffs' due process claims, and therefore will not consider the extra-record evidence related to that claim. See Second Mujahid Decl., ECF No. 64-4, Exs. 4-7; Second Mujahid Decl., ECF No. 64-4, Exs. 8-9; ECF No. 64-5.

memoranda, and government brief, but not the declarations explaining them. Plaintiffs argue that the credible fear policies are departures from prior government policies, which the government changed without explanation. Pls.' Evid. Mot., ECF No. 66-1 at 7-11. The government's response is the credible fear policies are not a departure because they do not articulate any new rules. See Defs.' Mot., ECF No. 57-1 at 17. Whether the credible fear policies are new is clearly an "unresolved factual issue" that the "administrative record, on its own, . . . is not sufficient to resolve." See *United Student Aid Funds, Inc. v. DeVos*, 237 F. Supp. 3d 1, 6 (D.D.C. 2017). The Court cannot analyze this argument without reviewing the prior policies, which are not included in the administrative record. Under these circumstances, it is "appropriate to resort to extra-record information to enable judicial review to become effective." *Id.* at 3 (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)).

The government agrees that "any claim that A-B- or the [Policy Memorandum] breaks with past policies . . . is readily ascertainable by simply reviewing the very 'past policies.'" Defs.' Mot. to Strike, ECF No. 88-1 at 24. However, the government disagrees with the types of documents that are considered past policies. *Id.* According to the government, the only "past policies" at issue are legal decisions issued by the

Attorney General, BIA, or courts of appeals. *Id.* The Court is not persuaded by such a narrow interpretation of the evidence that can be considered as past policies. *See Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 255 (D.D.C. 2005) (finding training manual distributed as informal guidance "at a minimum" reflected the policy of the "Elections Crimes Branch if not the Department of Justice").

Admitting third party-declarations from a retired immigration officer and former immigration judge, on the other hand, are not necessary for the Court in its review. Declarations submitted by third-parties regarding putative policy changes would stretch the limited extra-record exception too far. Accordingly, the Court will not consider these declarations when determining whether the credible fear policies constitute an unexplained change of position.

2. Evidence Supporting Injunctive Relief

The second category of information plaintiffs ask the Court to consider is extra-record evidence in support of their claim that injunctive relief is appropriate. Pls.' Evid. Mot., ECF No. 66-1 at 13-16. The evidence plaintiffs present includes plaintiffs' declarations, ECF Nos. 12-1 to 12-9 (filed under seal); several reports describing the conditions of plaintiffs' native countries, Mujahid Decl., ECF No. 10-3, Exs. K-T; and four United Nations High Commissioner for Refugees ("UNHCR")

reports, Second Mujahid Decl., ECF No. 64-4 Exs. 10-13. The materials also include three declarations regarding humanitarian conditions in the three home countries. Joint Decl. of Shannon Drysdale Walsh, Cecilia Menjívar, and Harry Vanden ("Honduras Decl."), ECF No. 64-6; Joint Decl. of Cecilia Menjívar, Gabriela Torres, and Harry Vanden ("Guatemala Decl."), ECF No. 64-7; Joint Decl. of Cecilia Menjívar and Harry Vanden ("El Salvador Decl."), ECF No. 64-8.

The government argues that the Court need not concern itself with the preliminary injunction analysis because the Court's decision to consolidate the preliminary injunction and summary judgment motions under Rule 65 renders the preliminary injunction moot. Defs.' Mot. to Strike, ECF No. 88-1 at 12 n.1. The Court concurs, but nevertheless must determine if plaintiffs are entitled to a permanent injunction, assuming they prevail on their APA and INA claims. Because plaintiffs request specific injunctive relief with respect to their expedited removal orders and credible fear proceedings, the Court must determine whether plaintiffs are entitled to the injunctive relief sought. See *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 370, n.7 (D.D.C. 2017) ("it will often be necessary for a court to take new evidence to fully evaluate" claims "of irreparable harm . . . and [claims] that the issuance of the injunction is in the public interest.") (citation omitted). Thus, the Court will

consider plaintiffs' declarations, the UNHCR reports, and the country reports only to the extent they are relevant to plaintiffs' request for injunctive relief.¹⁰

In sum, the Court will consider extra-record evidence only to the extent it is relevant to plaintiffs' contentions that the government deviated from prior policies without explanation or to their request for injunctive relief. The Court will not consider any evidence related to plaintiffs' due process claim. Accordingly, the Court will not consider the following documents: (1) evidence related to the opinions of immigration judges and attorneys, Second Mujahid Decl., ECF No. 64-4, Exs. 8-9, 14-17 and ECF No. 64-5; (2) statements of various public officials, Second Mujahid Decl., ECF No. 64-4, Exs. 4-7; and (3) various newspaper articles, Mujahid Decl., ECF No. 10-3, Exs. R-T, and Second Mujahid Decl., ECF No. 64-4, Exs. 14-17.

III. Motion for Summary Judgment

A. Justiciability

The Court next turns to the government's jurisdictional arguments that: (1) the Court lacks jurisdiction to review plaintiffs' challenge to *Matter of A-B-*; and (2) because the Court lacks jurisdiction to review *Matter of A-B-*, the

¹⁰ The Court will not consider three newspaper articles, Mujahid Decl., ECF No. 10-3, Exs. R-T, however, since they are not competent evidence to be considered at summary judgment. See Fed. R. Civ. P. 56(c).

government action purportedly causing plaintiffs' alleged harm, the plaintiffs lack standing to challenge the Policy Memorandum. Federal district courts are courts of limited jurisdiction. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court must therefore resolve any challenge to its jurisdiction before it may proceed to the merits of a claim. See *Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999). The Court addresses each argument in turn.

1. The Court has Jurisdiction under Section 1252(e)(3)

a. Matter of A-B-

The government contends that section 1252 forecloses judicial review of plaintiffs' claims with respect to *Matter of A-B-*. Defs.' Mot., ECF No. 57-1 at 30-34. Plaintiffs argue that the statute plainly provides jurisdiction for this Court to review their claims. Pls.' Mot., ECF No. 64-1 at 26-30. The parties agree that to the extent jurisdiction exists to review a challenge to a policy implementing the expedited removal system, it exists pursuant to subsection (e) of the statute.

Under section 1252(a)(2)(A), no court shall have jurisdiction over "procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1)" except "as provided in subsection [1252](e)." Section 1252(e)(3) vests exclusive jurisdiction in the United States District Court for the District of Columbia to review

"[c]hallenges [to the] validity of the [expedited removal] system." *Id.* § 1252(e)(3)(A). Such systemic challenges include challenges to the constitutionality of any provision of the expedited removal statute or to its implementing regulations. See *id.* § 1252(e)(3)(A)(i). They also include challenges claiming that a given regulation or written policy directive, guideline, or procedure is inconsistent with law. *Id.* § 1252(e)(3)(A)(ii). Systemic challenges must be brought within sixty days of the challenged statute or regulation's implementation. *Id.* § 1252(e)(3)(B); see also *Am. Immigration Lawyers Ass'n*, 18 F. Supp. 2d at 47 (holding that "the 60-day requirement is jurisdictional rather than a traditional limitations period").

Both parties agree that the plain language of section 1252(e)(3) is dispositive. It reads as follows:

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or

written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

8 U.S.C. § 1252(e)(3).

The government first argues that *Matter of A-B-* does not implement section 1225(b), as required by section 1252(e)(3). Defs.' Mot., ECF No. 57-1 at 30-32. Instead, the government contends *Matter of A-B-* was a decision about petitions for asylum under section 1158. *Id.* The government also argues that *Matter of A-B-* is not a written policy directive under the Act, but rather an adjudication that determined the rights and duties of the parties to a dispute. *Id.* at 32.

The government's argument that *Matter of A-B-* does not "implement" section 1225(b) is belied by *Matter of A-B-* itself. Although A-B- sought asylum, the Attorney General's decision went beyond her claims explicitly addressing "the legal standard to determine whether an alien has a credible fear of persecution" under 8 U.S.C. section 1225(b). *Matter of A-B-*, 27 I. & N. Dec. at 320 n.1 (citing standard for credible fear determinations). In the decision, the Attorney General articulated the general rule that claims by aliens pertaining to either domestic violence, like the claim in *Matter of A-B-*, or gang violence, a hypothetical scenario not at issue in *Matter of A-B-*, would likely not satisfy the credible fear determination

standard. *Id.* (citing 8 U.S.C. § 1225(b)). Because the Attorney General cited section 1225(b) and the standard for credible fear determinations when articulating the new general legal standard, the Court finds that *Matter of A-B-* implements section 1225(b) within the meaning of section 1252(e)(3).

The government also argues that, despite *Matter of A-B-'s* explicit invocation of section 1225 and articulation of the credible fear determination standard, *Matter of A-B-* is an "adjudication" not a "policy," and therefore section 1252(e)(3) does not apply. Defs.' Mot., ECF No. 57-1 at 32-34. However, it is well-settled that an "administrative agency can, of course, make legal-policy through rulemaking or by adjudication." *Kidd Commc'ns v. F.C.C.*, 427 F.3d 1, 5 (D.C. Cir. 2005) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947)). Moreover, "[w]hen an agency does [make policy] by adjudication, because it is a policymaking institution unlike a court, its dicta can represent an articulation of its policy, to which it must adhere or adequately explain deviations." *Id.* at 5. *Matter of A-B-* is a sweeping opinion in which the Attorney General made clear that asylum officers must apply the standards set forth to subsequent credible fear determinations. See *NRLB v. Wyman Gordon Co.*, 394 U.S. 759, 765 (1969) ("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.").

Indeed, it is difficult to reconcile the government's argument with the language in *Matter of A-B-*: "When confronted with asylum cases based on purported membership in a particular social group, the Board, *immigration judges*, and *asylum officers* must analyze the requirements as set forth in this opinion, which restates and where appropriate, *elaborates upon*, the requirements [for asylum]." 27 I. & N. Dec. at 319 (emphasis added). This proclamation, coupled with the directive to asylum officers that claims based on domestic or gang-related violence generally would not "satisfy the standard to determine whether an alien has a credible fear of persecution," *id.* at 320 n.1, is clearly a "written policy directive" or "written policy guidance" sufficient to bring *Matter of A-B-* under the ambit of section 1252(e)(3). See *Kidd*, 427 F.3d at 5 (stating agency can "make legal-policy through rulemaking or by adjudication"). Indeed, one court has regarded *Matter of A-B-* as such. See *Moncada v. Sessions*, 2018 WL 4847073 *2 (2d Cir. Oct. 5, 2018) (characterizing *Matter of A-B-* as providing "**substantial new guidance** on the viability of asylum 'claims by aliens pertaining to . . . gang violence'" (emphasis added) (citation omitted)).

The government also argues that because the DHS Secretary, rather than the Attorney General, is responsible for implementing most of the provisions in section 1225, the

Attorney General lacks the requisite authority to implement section 1225. Defs.' Reply, ECF No. 85 at 25. Therefore, the government argues, *Matter of A-B-* cannot be "issued by or under the authority of the Attorney General to implement [section 1225(b)]" as required by the statute. See 8 U.S.C. § 1252(e)(3)(A)(ii). The government fails to acknowledge, however, that the immigration judges who review negative credible fear determinations are also required to apply *Matter of A-B-*. 8 C.F.R. § 1208.30(g)(2); 8 C.F.R. § 103.10(b) (stating decisions of the Attorney General shall be binding on immigration judges). And it is the Attorney General who is responsible for the conduct of immigration judges. See, e.g., 8 U.S.C. § 1101(b)(4) ("An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe."). Therefore, the Attorney General clearly plays a significant role in the credible fear determination process and has the authority to "implement" section 1225.

Finally, the Court recognizes that even if the jurisdictional issue was a close call, which it is not, several principles persuade the Court that jurisdiction exists to hear plaintiffs' claims. First, there is the "familiar proposition that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to

judicial review.” *Bd. of Governors of the Fed. Reserve Sys. v. MCorp. Fin., Inc.*, 502 U.S. 32, 44 (1991) (citations and internal quotation marks omitted). Here, there is no clear and convincing evidence of legislative intent in section 1252 that Congress intended to limit judicial review of the plaintiffs’ claims. To the contrary, Congress has explicitly provided this Court with jurisdiction to review systemic challenges to section 1225(b). See 8 U.S.C. § 1252(e)(3).

Second, there is also a “strong presumption in favor of judicial review of administrative action.” *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). As the Supreme Court has recently explained, “legal lapses and violations occur, and especially so when they have no consequence. That is why [courts have for] so long applied a strong presumption favoring judicial review of administrative action.” *Weyerhaeuser Co. v. United States Fish and Wildlife Servs.*, 586 U.S. __, __ (2018) (slip op., at 11). Plaintiffs challenge the credible fear policies under the APA and therefore this “strong presumption” applies in this case.

Third, statutory ambiguities in immigration laws are resolved in favor of the alien. See *Cardoza-Fonseca*, 480 U.S. at 449. Here, any doubt as to whether 1252(e)(3) applies to plaintiffs’ claims should be resolved in favor of plaintiffs. See *INS v. Errico*, 385 U.S. 214, 225 (1966) (“Even if there were some doubt as to the correct construction of the statute, the

doubt should be resolved in favor of the alien.”).

In view of these three principles, and the foregoing analysis, the Court concludes that section 1252(a)(2)(A) does not eliminate this Court's jurisdiction over plaintiffs' claims, and that section 1252(e)(3) affirmatively grants jurisdiction.

b. Policy Memorandum

The government also argues that the Court lacks jurisdiction to review the Policy Memorandum under section 1252(e) for three reasons. First, according to the government, the Policy Memorandum “primarily addresses the asylum standard” and therefore does not implement section 1225(b) as required by the statute. Defs.' Reply, ECF No. 85 at 30. Second, since the Policy Memorandum “merely explains” *Matter of A-B-*, the government argues, it is not reviewable for the same reasons *Matter of A-B-* is not reviewable. *Id.* Finally, the government argues that sections 1225 and 1252(e)(3) “indicate” that Congress only provided judicial review of agency guidelines, directives, or procedures which create substantive rights as opposed to interpretive documents, like the Policy Memorandum, which merely explain the law to government officials. *Id.* at 31-33.

The Court need not spend much time on the government's first two arguments. First, the Policy Memorandum, entitled “Guidance for Processing Reasonable Fear, Credible Fear, Asylum,

and Refugee Claims in Accordance with *Matter of A-B-*” expressly applies to credible fear interviews and provides guidance to credible fear adjudicators. Policy Memorandum, ECF No. 100 at 4 n.1 (“[T]he Attorney General’s decision and this [Policy Memorandum] apply also to . . . credible fear determinations.”). Furthermore, it expressly invokes section 1225 as the authority for its issuance. *Id.* at 4. The government’s second argument that the Policy Memorandum is not reviewable for the same reasons *Matter of A-B-* is not, is easily dismissed because the Court has already found that *Matter of A-B-* falls within section 1252(e)(3)’s jurisdictional grant. *See supra*, at 27-38.

The government’s third argument is that section 1252(e)(3) only applies when an agency promulgates legislative rules and not interpretive rules. Defs.’ Reply, ECF No. 85 at 30-33. Although not entirely clear, the argument is as follows: (1) the INA provides DHS with significant authority to create legislative rules; (2) Congress barred judicial review of such substantive rules in section 1252(a); (3) therefore Congress must have created a mechanism to review these types of legislative rules, and only legislative rules, in section 1252(e)(3)). *Id.* at 30-31. Folded into this reasoning is also a free-standing argument that because the Policy Memorandum is not a final agency action, it is not reviewable under the APA. *Id.* at 32.

Contrary to the government's assertions, section 1252(e)(3) does not limit its grant of jurisdiction over a "written policy directive, written policy guideline, or written procedure" to only legislative rules or final agency action. Nowhere in the statute did Congress exclude interpretive rules. *Cf.* 5 U.S.C. § 553(b)(3)(A) (stating subsection of statute does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."). Rather, Congress used broader terms such as policy "guidelines," "directives," or "procedures" which do not require notice and comment rulemaking or other strict procedural prerequisites. See 8 U.S.C. § 1252(e)(3). There is no suggestion that Congress limited the application of section 1252(e)(3) to only claims involving legislative rules or final agency action, and this Court will not read requirements into the statute that do not exist. See *Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993) (stating courts have a "duty to refrain from reading a phrase into the statute when Congress has left it out").

In sum, section 1252(a)(2)(A) is not a bar to this Court's jurisdiction because plaintiffs' claims fall well within section 1252(e)(3)'s grant of jurisdiction. Both *Matter of A-B-* and the Policy Memorandum expressly reference credible fear determinations in applying the standards articulated by the Attorney General. Because *Matter of A-B-* and the Policy

Memorandum are written policy directives and guidelines issued by or under the authority of the Attorney General, section 1252(e)(3) applies, and this Court has jurisdiction to hear plaintiffs' challenges to the credible fear policies.

2. Plaintiffs have Standing to Challenge the Policy Memorandum

The government next challenges plaintiffs' standing to bring this suit with respect to their claims against the Policy Memorandum only. Defs.' Mot., ECF No. 57-1 at 35-39. To establish standing, a plaintiff "must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982)). Standing is assessed "upon the facts as they exist at the time the complaint is filed." *Natural Law Party of U.S. v. Fed. Elec. Comm'n*, 111 F. Supp. 2d 33, 41 (D.D.C. 2000).

As a preliminary matter, the government argues that plaintiffs lack standing to challenge any of the policies in the Policy Memorandum that rest on *Matter of A-B-* because the Court does not have jurisdiction to review *Matter of A-B-*. See Defs.'

Mot., ECF No. 57-1 at 35, 37-39. Therefore, the government argues, plaintiffs' injuries would not be redressable or traceable to the Policy Memorandum since they stem from *Matter of A-B-*. This argument fails because the Court has found that it has jurisdiction to review plaintiffs' claims related to *Matter of A-B-* under 1252(e)(3). *See supra*, at 27-38.

The government also argues that because plaintiffs do not have a legally protected interest in the Policy Memorandum—an interpretive document that creates no rights or obligations—plaintiffs do not have an injury in fact. Defs.' Reply, ECF No. 85 at 33. The government's argument misses the point. Plaintiffs do not seek to enforce a right under a prior policy or interpretive guidance. *See* Pls.' Reply, ECF No. 92 at 17-18. Rather, they challenge the validity of their credible fear determinations pursuant to the credible fear policies set forth in *Matter of A-B-* and the Policy Memorandum. Because the credible fear policies impermissibly raise their burden and deny plaintiffs a fair opportunity to seek asylum and escape the persecution they have suffered, plaintiffs argue, the policies violate the APA and immigration laws. *See id.*

The government also argues that even if the Court has jurisdiction, all the claims, with the exception of one, are time-barred and therefore not redressable. Defs.' Mot., ECF No. 57-1 at 39-41. The government argues that none of the policies

are in fact new and each pre-date the sixty days in which plaintiffs are statutorily required to bring their claims. *Id.* at 39-41. The government lists each challenged policy and relies on existing precedent purporting to apply the same standard espoused in the Policy Memorandum prior to its issuance. *See id.* at 39-41. The challenge in accepting this theory of standing is that it would require the Court to also accept the government's theory of the case: that the credible fear policies are not "new." In other words, the government's argument "assumes that its view on the merits of the case will prevail." *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008). This is problematic because "in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (citations omitted).

Whether the credible fear policies differ from the standards articulated in the pre-policy cases cited by the government, and are therefore new, is a contested issue in this case. And when assessing standing, this Court must "be careful not to decide the questions on the merits" either "for or against" plaintiffs, "and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Id.*

Instead, the Court must determine whether an order can redress plaintiffs' injuries in whole or part. *Gutierrez*, 532 F.3d at 925. There is no question that the challenged policies impacted plaintiffs. See Defs.' Mot., ECF No. 57-1 at 28 (stating an "asylum officer reviewed each of [plaintiffs] credible fear claims and found them wanting in light of *Matter of A-B-*"). There is also no question that an order from this Court declaring the policies unlawful and enjoining their use would redress those injuries. See *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) (stating when government actions cause an injury, enjoining that action will usually redress the injury).

Because plaintiffs have demonstrated that they have: (1) suffered an injury; (2) the injury is fairly traceable to the credible fear policies; and (3) action by the Court can redress their injuries, plaintiffs have standing to challenge the Policy Memorandum. Therefore, the Court may proceed to the merits of plaintiffs' claims.

B. Legal Standard for Plaintiffs' Claims

Although both parties have moved for summary judgment, the parties seek review of an administrative decision under the APA. See 5 U.S.C. § 706. Therefore, the standard articulated in Federal Rule of Civil Procedure 56 is inapplicable because the Court has a more limited role in reviewing the administrative

record. *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 160 (D.D.C. 2011) (internal citation omitted). “[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” See *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (internal quotation marks and citations omitted). “Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.” *Wilhelmus*, 796 F. Supp. 2d at 160 (internal citation omitted).

Plaintiffs bring this challenge to the alleged new credible fear policies arguing they violate the APA and INA. Two separate, but overlapping, standards of APA review govern the resolution of plaintiffs’ claims. First, under 5 U.S.C. § 706(2)(a), agency action must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” To survive an arbitrary and capricious challenge, an agency action must be “the product of reasoned decisionmaking.” *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). The reasoned decisionmaking requirement applies to judicial review of agency adjudicatory actions. *Id.* at 75. A court must not uphold an adjudicatory action when the agency’s judgment “was neither adequately explained in its decision nor supported by agency

precedent." *Id.* (citing *Siegel v. SEC*, 592 F.3d 147, 164 (D.C. Cir. 2010)). Thus, review of *Matter of A-B-* requires this Court to determine whether the decision was the product of reasoned decisionmaking. *See id.* at 75.

Second, plaintiffs' claims also require this Court to consider the degree to which the government's interpretation of the various relevant statutory provisions in *Matter of A-B-* is afforded deference. The parties disagree over whether this Court is required to defer to the agency's interpretations of the statutory provisions in this case. "Although balancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws can be a delicate matter," the familiar *Chevron* framework offers guidance. *Id.* at 75 (citing *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006)).

In reviewing an agency's interpretation of a statute it is charged with administering, a court must apply the framework of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997). Under the familiar *Chevron* two-step test, the first step is to ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress.” *Chevron*, 467 U.S. at 842-43. In making that determination, the reviewing court “must first exhaust the ‘traditional tools of statutory construction’ to determine whether Congress has spoken to the precise question at issue.” *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 572 (2000) (citation omitted). The traditional tools of statutory construction include “examination of the statute’s text, legislative history, and structure . . . as well as its purpose.” *Id.* (internal citations omitted). If these tools lead to a clear result, “then Congress has expressed its intention as to the question, and deference is not appropriate.” *Id.*

If a court finds that the statute is silent or ambiguous with respect to a particular issue, then Congress has not spoken clearly on the subject and a court is required to proceed to the second step of the *Chevron* framework. *Chevron*, 467 U.S. at 843. Under *Chevron* step two, a court’s task is to determine if the agency’s approach is “based on a permissible construction of the statute.” *Id.* To make that determination, a court again employs the traditional tools of statutory interpretation, including reviewing the text, structure, and purpose of the statute. See *Troy Corp. v. Browder*, 120 F.3d 277, 285 (D.C. Cir. 1997) (noting that an agency’s interpretation must “be reasonable and consistent with the statutory purpose”). Ultimately, “[n]o matter how it is framed, the question a court faces when

confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *District of Columbia v. Dep't of Labor*, 819 F.3d 444, 459 (D.C. Cir. 2016) (citation omitted).

The scope of review under both the APA's arbitrary and capricious standard and *Chevron* step two are concededly narrow. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency"); see also *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (stating the *Chevron* step two analysis overlaps with arbitrary and capricious review under the APA because under *Chevron* step two a court asks "whether an agency interpretation is 'arbitrary or capricious in substance'"). Although this review is deferential, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making." *Judulang*, 565 U.S. at 53; see also *Daley*, 209 F.3d at 755 (stating that although a court owes deference to agency decisions, courts do not hear cases "merely to rubber stamp agency actions").

With these principles in mind, the Court now turns to plaintiffs' claims that various credible fear policies based on

Matter of A-B-, the Policy Memorandum, or both, are arbitrary and capricious and in violation of the immigration laws.

C. APA and Statutory Claims

Plaintiffs challenge the following alleged new credible fear policies: (1) a general rule against credible fear claims related to domestic or gang-related violence; (2) a heightened standard for persecution involving non-governmental actors; (3) a new rule for the nexus requirement in asylum; (4) a new rule that "particular social group" definitions based on claims of domestic violence are impermissibly circular; (5) the requirements that an alien articulate an exact delineation of the specific "particular social group" at the credible fear determination stage and that asylum officers apply discretionary factors at that stage; and (6) the Policy Memorandum's requirement that adjudicators ignore circuit court precedent that is inconsistent with *Matter of A-B-*, and apply the law of the circuit where the credible fear interview takes place. The Court addresses each challenged policy in turn.

1. The General Rule Foreclosing Domestic Violence and Gang-Related Claims Violates the APA and Immigration Laws

Plaintiffs argue that the credible fear policies establish an unlawful general rule against asylum petitions by aliens with credible fear claims relating to domestic and gang violence.

Pls.' Mot., ECF No. 64-1 at 28.

A threshold issue is whether the *Chevron* framework applies to this issue at all. "Not every agency interpretation of a statute is appropriately analyzed under *Chevron*." *Alabama Educ. Ass'n v. Chao*, 455 F.3d 386, 392 (D.C. Cir. 2006). The government acknowledges that the alleged new credible fear policies are not "entitled to blanket *Chevron* deference." Defs.' Reply, ECF No. 85 at 39 (emphasis in original). Rather, according to the government, the Attorney General is entitled to *Chevron* deference when he "interprets any *ambiguous* statutory terms in the INA." *Id.* (emphasis in original). The government also argues that the Attorney General is entitled to *Chevron* deference to the extent *Matter of A-B-* states "long-standing precedent or interpret[s] prior agency cases or regulations through case-by-case adjudication." *Id.* at 40.

To the extent *Matter of A-B-* was interpreting the "particular social group" requirement in the INA, the *Chevron* framework clearly applies. The Supreme Court has explained that "[i]t is clear that principles of *Chevron* deference are applicable" to the INA because that statute charges the Attorney General with administering and enforcing the statutory scheme. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (quoting 8 U.S.C. §§ 1103(a)(1), 1253(h)). In addition to *Chevron* deference, a court must also afford deference to an agency when it is interpreting its own precedent. *U.S. Telecom Ass'n v.*

F.C.C., 295 F.3d 1326, 1332 (D.C. Cir. 2002) (“We [] defer to an agency’s reasonable interpretation of its own rules and precedents.”).

In this case, the Attorney General interpreted a provision of the INA, a statute that Congress charged the Attorney General with administering. See 8 U.S.C. § 1103(a)(1). *Matter of A-B-* addressed the issue of whether an alien applying for asylum based on domestic violence could establish membership in a “particular social group.” Because the decision interpreted a provision of the INA, the *Chevron* framework applies to *Matter of A-B-*.¹¹ See *Negusie v. Holder*, 555 U.S. 511, 516 (2009) (stating it “is well settled” that principles of *Chevron* deference apply to the Attorney General’s interpretation of the INA).

a. *Chevron* Step One: The Phrase “Particular Social Group” is Ambiguous

The first question within the *Chevron* framework is whether, using the traditional tools of statutory interpretation including evaluating the text, structure, and the overall

¹¹ The Policy Memorandum is not subject to *Chevron* deference. The Supreme Court has warned that agency “[i]nterpretations such as those in opinion letters—like interpretations contained in *policy statements*, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.” *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000). Rather, interpretations contained in such formats “are entitled to respect . . . only to the extent that those interpretations have the power to persuade.” *Id.* (citations omitted).

statutory scheme, as well as employing common sense, Congress has "supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (citation omitted). The interpretive question at hand in this case is the meaning of the term "particular social group."

Under the applicable asylum provision, an "alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status" may be granted asylum at the discretion of the Attorney General if the "Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A)." 8 U.S.C. § 1158. The term "refugee" is defined in section 1101(a)(42)(A) as, among other things, an alien who is unable or unwilling to return to his or her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). At the credible fear stage, an alien needs to show that there is a "significant possibility . . . that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v).

The INA itself does not shed much light on the meaning of the term "particular social group." The phrase "particular social group" was first included in the INA when Congress enacted the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat.

102 (1980). The purpose of the Refugee Act was to protect refugees, i.e., individuals who are unable to protect themselves from persecution in their native country. See *id.* § 101(a) (“The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . humanitarian assistance for their care and maintenance in asylum areas.”). While the legislative history of the Act does not reveal the specific meaning the members of Congress attached to the phrase “particular social group,” the legislative history does make clear that Congress intended “to bring United States refugee law into conformance with the [Protocol], 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968.” *Cardoza-Fonseca*, 480 U.S. at 436-37. Indeed, when Congress accepted the definition of “refugee” it did so “with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.” *Id.* at 437 (citations omitted). It is therefore appropriate to consider what the phrase “particular social group” means under the Protocol. See *id.*

In interpreting the Refugee Act in accordance with the meaning intended by the Protocol, the language in the Act should be read consistently with the United Nations’ interpretation of the refugee standards. See *id.* at 438-39 (relying on UNHCR’s

interpretation in interpreting the Protocol's definition of "well-founded fear"). The UNHCR defined the provisions of the Convention and Protocol in its Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook").¹² *Id.* As the Supreme Court has noted, the UNHCR Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform . . . [and] has been widely considered useful in giving content to the obligations that the protocol establishes." *Id.* at 439 n.22 (citations omitted). The UNHCR Handbook codified the United Nations' interpretation of the term "particular social group" at that time, construing the term expansively. The UNHCR Handbook states that "a 'particular social group' normally comprises persons of similar background, habits, or social status." UNHCR Handbook at Ch. II B(3) (e) ¶ 77.

The clear legislative intent to comply with the Protocol and Congress' election to not change or add qualifications to the U.N.'s definition of "refugee" demonstrates that Congress intended to adopt the U.N.'s interpretation of the word "refugee." Moreover, the UNHCR's classification of "social

¹² Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *available at* <http://www.unhcr.org/4d93528a9.pdf>.

group" in broad terms such as "similar background, habits, or social status" suggests that Congress intended an equally expansive construction of the same term in the Refugee Act. Furthermore, the Refugee Act was enacted to further the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands [and] it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible." *Maharaj v. Gonzales*, 450 F.3d 961, 983 (9th Cir. 2006) (O'Scannlain, J. concurring in part) (citing Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102).

Although the congressional intent was clear that the meaning of "particular social group" should not be read too narrowly, the Court concludes that Congress has not "spoken directly" on the precise question of whether victims of domestic or gang-related persecution fall into the particular social group category. Therefore, the Court proceeds to *Chevron* step two to determine whether the Attorney General's interpretation, which generally precludes domestic violence and gang-related claims at the credible fear stage, is a permissible interpretation of the statute.

b. Chevron Step Two: Precluding Domestic and Gang-Related Claims at the Credible Fear Stage is an Impermissible Reading of the Statute and is Arbitrary and Capricious

As explained above, the second step of the *Chevron* analysis overlaps with the arbitrary and capricious standard of review under the APA. See *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994) (“[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task under the [APA].”). “To survive arbitrary and capricious review, an agency action must be the product of reasoned decisionmaking.” *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012). “Thus, even though arbitrary and capricious review is fundamentally deferential—especially with respect to matters relating to an agency's areas of technical expertise—no deference is owed to an agency action that is based on an agency's purported expertise where the agency's explanation for its action lacks any coherence.” *Id.* at 75 (internal citations and alterations omitted).

Plaintiffs argue that the Attorney General's near-blanket rule against positive credible fear determinations based on domestic violence and gang-related claims is arbitrary and capricious for several reasons. First, they contend that the rule has no basis in immigration law. Pls.' Mot., ECF No. 64-1 at 39-40. Plaintiffs point to several cases in which immigration

judges and circuit courts have recognized asylum petitions based on gang-related or gender-based claims. *See id.* at 38-39 (citing cases). Second, plaintiffs argue that the general prohibition is arbitrary and capricious and contrary to the INA because it constitutes an unexplained change to the long-standing recognition that credible fear determinations must be individualized based on the facts of each case. *Id.* at 40-41.

The government's principal response is straightforward: no such general rule against domestic violence or gang-related claims exists. Defs.' Reply, ECF No. 85 at 44-47. The government emphasizes that the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled. *Id.* at 43. The government also argues that *Matter of A-B-* only required the BIA to assess each element of an asylum claim and not rely on a party's concession that an element is satisfied. *Id.* at 45. Thus, according to the government, the Attorney General simply "eliminated a loophole created by *A-R-C-G-*." *Id.* at 45. The government dismisses the rest of *Matter of A-B-* as mere "comment[ary] on problems typical of gang and domestic violence related claims." *Id.* at 46.

And even if a general rule does exist, the government contends that asylum claims based on "private crime[s]" such as domestic and gang violence have been the center of controversy for decades. Defs.' Reply, ECF No. 85 at 44. Therefore, the

government concludes, that *Matter of A-B-* is a lawful interpretation and restatement of the asylum laws, and is entitled to deference. *Id.* Finally, the government argues that Congress designed the asylum statute as a form of limited relief, not to “provide redress for all misfortune.” *Id.*

The Court is not persuaded that *Matter of A-B-* and the Policy Memorandum do not create a general rule against positive credible fear determinations in cases in which aliens claim a fear of persecution based on domestic or gang-related violence. *Matter of A-B-* mandates that “[w]hen confronted with asylum cases based on purported membership in a particular social group . . . immigration judges, and asylum officers must analyze the requirements as set forth” in the decision. 27 I. & N. Dec. at 319. The precedential decision further explained that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.” *Id.* at 320. *Matter of A-B-* also requires asylum officers to “analyze the requirements as set forth in” *Matter of A-B-* when reviewing asylum related claims including whether such claims “would satisfy the legal standard to determine whether an alien has a credible fear of persecution.” *Id.* at 320 n.1 (citing 8 U.S.C. § 1225(b)). Furthermore, the Policy Memorandum also makes clear that the sweeping statements in *Matter of A-B-* must be applied to credible fear

determinations: "if an applicant claims asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] into their determination of whether an applicant has a credible fear or reasonable fear of persecution." Policy Memorandum, ECF No. 100 at 12 (emphasis added).

Not only does *Matter of A-B-* create a general rule against such claims at the credible fear stage, but the general rule is also not a permissible interpretation of the statute. First, the general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence and gang-related claims. Second, such a general rule runs contrary to the individualized analysis required by the INA. Under the current immigration laws, the credible fear interviewer must prepare a case-specific factually intensive analysis for each alien. See 8 C.F.R. § 208.30(e) (requiring individual analysis including material facts stated by the applicant, and additional facts relied upon by officer). Credible fear determinations, like requests for asylum in general, must be resolved based on the particular facts and circumstances of each case. *Id.*

A general rule that effectively bars the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is

inconsistent with Congress' intent to bring "United States refugee law into conformance with the [Protocol]." *Cardoza-Fonseca*, 480 U.S. at 436-37. The new general rule is thus contrary to the Refugee Act and the INA.¹³ In interpreting "particular social group" in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General has failed to "stay[] within the bounds" of his statutory authority.¹⁴ *District of Columbia v. Dep't of Labor*, 819 F.3d at 449.

The general rule is also arbitrary and capricious because it impermissibly heightens the standard at the credible fear stage. The Attorney General's direction to deny most domestic violence or gang violence claims at the credible fear

¹³ The new rule is also a departure from previous DHS policy. See *Mujahid Decl., Ex. F* ("2017 Credible Fear Training") ("Asylum officers should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted, taking into account the individual circumstances of each case."). It is arbitrary and capricious for that reason as well. *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, *not casually ignored.*") (emphasis added).

¹⁴ The Court also notes that domestic law may supersede international obligations only by express abrogation, *Chew Heong v. United States*, 112 U.S. 536, 538 (1884), or by subsequent legislation that irrevocably conflicts with international obligations, *Reid v. Covert*, 354 U.S. 1, 18 (1957). Congress has not expressed any intention to rescind its international obligations assumed through accession to the 1967 Protocol via the Refugee Act of 1980.

determination stage is fundamentally inconsistent with the threshold screening standard that Congress established: an alien's removal may not be expedited if there is a "significant possibility" that the alien could establish eligibility for asylum. 8 U.S.C. § 1225(b)(1)(B)(v). The relevant provisions require that the asylum officer "conduct the interview in a nonadversarial manner" and "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). As plaintiffs point out, to prevail at a credible fear interview, the alien need only show a "significant possibility" of a one in ten chance of persecution, i.e., a fraction of ten percent. See 8 U.S.C. § 1225(b)(1)(B)(v); *Cardoza-Fonseca*, 480 U.S. at 439-40 (describing a well-founded fear of persecution at asylum stage to be satisfied even when there is a ten percent chance of persecution). The legislative history of the IIRIRA confirms that Congress intended this standard to be a low one. See 142 CONG. REC. S11491-02 ("[t]he credible fear standard . . . is intended to be a low screening standard for admission into the usual full asylum process"). The Attorney General's directive to broadly exclude groups of aliens based on a sweeping policy applied indiscriminately at the credible fear stage, was neither adequately explained nor supported by agency precedent. Accordingly, the general rule against domestic violence and

gang-related claims during a credible fear determination is arbitrary and capricious and violates the immigration laws.

2. Persecution: The "Condoned or Complete Helplessness" Standard Violates the APA and Immigration Laws

Plaintiffs next argue that the government's credible fear policies have heightened the legal requirement for all credible fear claims involving non-governmental persecutors. Pls.' Mot., ECF No. 64-1 at 48.

To be eligible for asylum, an alien must demonstrate either past "persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A). When a private actor, rather than the government itself, is alleged to be the persecutor, the alien must demonstrate "some connection" between the actions of the private actor and "governmental action or inaction." See *Rosales Justo v. Sessions*, 895 F.3d 154, 162 (1st Cir. 2018). To establish this connection, a petitioner must show that the government was either "unwilling or unable" to protect him or her from persecution. See *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009).

Plaintiffs argue that *Matter of A-B-* and the Policy Memorandum set forth a new, heightened standard for government involvement by requiring an alien to "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Matter of A-B-*, 27 I. & N.

Dec. at 337; Policy Memorandum, ECF No. 100 at 9. The government argues that the “condone” or “complete helplessness” standard is not a new definition of persecution; and, in any event, such language does not change the standard. Defs.’ Reply, ECF No. 85 at 55.

a. *Chevron* Step One: The Term “Persecution” is Not Ambiguous¹⁵

Again, the first question under the *Chevron* framework is whether Congress has “supplied a clear and unambiguous answer to the interpretive question at hand.” *Pereira*, 138 S. Ct. at 2113. Here, the interpretive question at hand is whether the word “persecution” in the INA requires a government to condone the persecution or demonstrate a complete helplessness to protect the victim.

The Court concludes that the term “persecution” is not ambiguous and the government’s new interpretation is inconsistent with the INA. The Court is guided by the longstanding principle that Congress is presumed to have incorporated prior administrative and judicial interpretations of language in a statute when it uses the same language in a subsequent enactment. See *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (explaining that “if a word is obviously transplanted

¹⁵ Because the government is interpreting a provision of the INA, the *Chevron* framework applies.

from another legal source, whether the common law or other legislation, it brings the old soil with it"); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (stating Congress is aware of interpretations of a statute and is presumed to adopt them when it re-enacts them without change).

The seminal case on the interpretation of the term "persecution," *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), is dispositive. In *Matter of Acosta*, the BIA recognized that harms could constitute persecution if they were inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Id.* at 222 (citations omitted). The BIA noted that Congress carried forward the term "persecution" from pre-1980 statutes, in which it had a well-settled judicial and administrative meaning: "harm or suffering . . . inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Id.* Applying the basic rule of statutory construction that Congress carries forward established meanings of terms, the BIA adopted the same definition. *Id.* at 223.

The Court agrees with this approach. When Congress uses a term with a settled meaning, its intent is clear for purposes of *Chevron* step one. *cf. B & H Med., LLC v. United States*, 116 Fed. Cl. 671, 685 (2014) (a term with a "judicially settled meaning"

is "not ambiguous" for purposes of deference under *Auer v. Robbins*, 519 U.S. 452 (1997)). As explained in *Matter of Acosta*, Congress adopted the "unable or unwilling" standard when it used the word "persecution" in the Refugee Act. 19 I. & N. Dec. at 222, see also *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (Congress presumed to have incorporated "settled judicial construction" of statutory language through re-enactment). Indeed, the UNHCR Handbook stated that persecution included "serious discriminatory or other offensive acts . . . committed by the local populace . . . if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer *effective* protection." See UNHCR Handbook ¶ 65 (emphasis added). It was clear at the time that the Act was passed by Congress that the "unwilling or unable" standard did not require a showing that the government "condoned" persecution or was "completely helpless" to prevent it. Therefore, the government's interpretation of the term "persecution" to mean the government must condone or demonstrate complete helplessness to help victims of persecution fails at *Chevron* step one.

The government relies on circuit precedent that has used the "condoned" or "complete helplessness" language to support its argument that the standard is not new. Defs.' Reply, ECF No. 85 at 55. There are several problems with the government's argument. First, upon review of the cited cases it is apparent

that, although the word "condone" was used, in actuality, the courts were applying the "unwilling or unable" standard. For example, in *Galina v. INS*, 213 F.3d 955 (7th Cir. 2005), an asylum applicant was abducted and received threatening phone calls in her native country. *Id.* at 957. The applicant's husband called the police to report the threatening phone calls, and after the police located one of the callers, the calls stopped. *Id.* The Court recognized that a finding of persecution ordinarily requires a determination that the government condones the violence or demonstrated a complete helplessness to protect the victims. *Id.* at 958. However, relying on the BIA findings, the Court found that notwithstanding the fact "police might take some action against telephone threats" the applicant would still face persecution if she was sent back to her country of origin because she could have been killed. *Id.* Therefore, the Court ultimately concluded that an applicant can still meet the persecution threshold when the police are unable to provide effective help, but fall short of condoning the persecution. *Id.* at 958. Despite the language it used to describe the standard, the court did not apply the heightened "condoned or complete helplessness" persecution standard pronounced in the credible fear policies here.

Second, and more importantly, under the government's formulation of the persecution standard, no asylum applicant who

received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a non-government actor.¹⁶ See Policy Memorandum, ECF No. 100 at 17 (stating that in the context of credible fear interviews, “[a]gain, the home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution”). That is simply not the law. For example, in *Rosales Justo v. Sessions*, the United States Court of Appeals for the First Circuit held that a petitioner satisfied the “unable or unwilling” standard, even though there was a significant police response to the claimed persecution. 895 F.3d 154, 159 (1st Cir. 2018). The petitioner in *Rosales Justo* fled Mexico after organized crime members murdered his son. *Id.* at 157–58. Critically, the “police took an immediate and active interest in the [petitioner’s] son’s murder.” *Id.* The Court noted that the petitioner “observed seven officers and a forensic team at the scene where [the] body was recovered, the police took statements from [petitioner] and his wife, and an

¹⁶ The Court notes that this persecution requirement applies to all asylum claims not just claims based on membership in a “particular social group” or claims related to domestic or gang-related violence. See *Matter of A-B-*, 27 I. & N. Dec. at 337 (describing elements of persecution). Therefore, such a formulation heightens the standard for every asylum applicant who goes through the credibility determination process.

autopsy was performed.” *Id.* The Court held that, despite the extensive actions taken by the police, the “unwilling or unable” standard was satisfied because although the government was willing to protect the petitioner, the evidence did not show that the government was able to make the petitioner and his family any safer. *Id.* at 164 (reversing BIA’s conclusion that the immigration judge clearly erred in finding that the police were willing but unable to protect family). As *Rosales Justo* illustrates, a requirement that police condone or demonstrate complete helplessness is inconsistent with the current standards under immigration law.¹⁷

Furthermore, the Court need not defer to the government’s interpretation to the extent it is based on an interpretation of court precedent. Indeed, in “case after case, courts have affirmed this fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts.” *Citizens for Responsibility & Ethics in*

¹⁷ This departure is also wholly unexplained. As the Supreme Court has held, “[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA].” See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983). The credible fear policies do not acknowledge a change in the persecution standard and are also arbitrary and capricious for that reason. See *Fox Television Stations, Inc.*, 556 U.S. at 514, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing [its] position.”).

Washington v. Fed. Election Comm'n, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (listing cases). "There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002); see also *Judulang*, 565 U.S. at 52 n.7 (declining to apply *Chevron* framework because the challenged agency policy was not "an interpretation of any statutory language").

To the extent the credible fear policies established a new standard for persecution, it did so in purported reliance on circuit opinions. The Court gives no deference to the government's interpretation of judicial opinions regarding the proper standard for determining the degree to which government action, or inaction, constitutes persecution. *Univ. of Great Falls*, 278 F.3d at 1341. The "unwilling or unable" persecution standard was settled at the time the Refugee Act was codified, and therefore the Attorney General's "condoned" or "complete helplessness" standard is not a permissible construction of the persecution requirement.

3. Nexus: The Credible Fear Policies Do Not Pose a New Standard for the Nexus Requirement

Plaintiffs next argue that the formulation of the nexus requirement articulated in *Matter of A-B*—that when a private actor inflicts violence based on a personal relationship with

the victim, the victim's membership in a larger group may well not be "one central reason" for the abuse—violates the INA, Refugee Act, and APA. The nexus requirement in the INA is that a putative refugee establish that he or she was persecuted "on account of" a protected ground such as a particular social group.¹⁸ See 8 U.S.C. § 1158(b)(1)(B)(i).

The parties agree that the precise interpretive issue is not ambiguous. The parties also endorse the "one central reason" standard and the need to conduct a "mixed-motive" analysis when there is more than one reason for persecution. See Defs.' Mot., 57-1 at 47; Pls.' Mot., ECF No. 64-1 at 53-54. The INA expressly contemplates mixed motives for persecution when it specifies that a protected ground must be "one central reason" for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). Where the parties disagree is whether the credible fear policies deviate from this standard.

With respect to the nexus requirement, the government's reading of *Matter of A-B-* on this issue is reasonable. In *Matter of A-B-*, the Attorney General relies on the "one central reason" standard and provides examples of a criminal gang targeting people because they have money or property or "simply because

¹⁸ Similar to the Attorney General's directives related to the "unwilling or unable" standard, this directive applies to all asylum claims, not just claims related to domestic or gang-related violence.

the gang inflicts violence on those who are nearby.” 27 I. & N. Dec. at 338-39. The decision states that “purely personal” disputes will not meet the nexus requirement. *Id.* at 339 n.10. The Court discerns no distinction between this statement and the statutory “one central reason” standard.

Similarly, the Policy Memorandum states that “when a private actor inflicts violence based on a personal relationship with the victim, the victim’s membership in a larger group often will not be ‘one central reason’ for the abuse.” Policy Memorandum, ECF No. 100 at 9 (citing *Matter of A-B-*, 27 I. & N. Dec. at 338-39). Critically, the Policy Memorandum explains that in “a particular case, the evidence may establish that a victim of domestic violence was attacked **based solely** on her preexisting personal relationship with her abuser.” *Id.* (emphasis added). This statement is no different than the statement of the law in *Matter of A-B-*. Because the government’s interpretation is not inconsistent with the statute, the Court finds the government’s interpretation to be reasonable.

The Court reiterates that, although the nexus standard forecloses cases in which **purely** personal disputes are the impetus for the persecution, it does not preclude a positive credible fear determination simply because there is a personal relationship between the persecutor and the victim, so long as the one central reason for the persecution is a protected

ground. See *Aldana Ramos v. Holder*, 757 F.3d 9, 18–19 (1st Cir. 2014) (recognizing that “multiple motivations [for persecution] can exist, and that the presence of a non-protected motivation does not render an applicant ineligible for refugee status”); *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) (“[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus.”). Indeed, courts have routinely found the nexus requirement satisfied when a personal relationship exists—including cases in which persecutors had a close relationship with the victim. See, e.g., *Bringas-Rodriguez*, 850 F.3d at 1056 (persecution by family members and neighbor on account of applicant’s perceived homosexuality); *Nabulwala v. Gonzalez*, 481 F.3d 1115, 1117–18 (8th Cir. 2007) (applicant’s family sought to violently “change” her sexual orientation).

Matter of A-B- and the Policy Memorandum do not deviate from the “one central reason” standard articulated in the statute or in BIA decisions. See 8 U.S.C. § 1158(b)(1)(B)(i). Therefore, the government did not violate the APA or INA with regards to its interpretation of the nexus requirement.

4. Circularity: The Policy Memorandum’s Interpretation of the Circularity Requirement Violates the APA and Immigration Laws

Plaintiffs argue that the Policy Memorandum establishes a

new rule that “particular social group” definitions based on claims of domestic violence are impermissibly circular and therefore not cognizable as a basis for persecution in a credible fear determination. Pls.’ Mot., ECF No. 64-1 at 56-59. Plaintiffs argue that this new circularity rule is inconsistent with the current legal standard and therefore violates the Refugee Act, INA, and is arbitrary and capricious.¹⁹ *Id.* at 57. The parties agree that the formulation of the anti-circularity rule set forth in *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014)—“that a particular social group cannot be defined exclusively by the claimed persecution”—is correct. See Defs.’ Reply, ECF No. 85 at 62; Pls.’ Reply., ECF No. 92 at 30-31. Accordingly, the Court begins with an explanation of that opinion.

¹⁹ The government contends that plaintiffs’ argument on this issue has evolved from the filing of the complaint to the filing of plaintiffs’ cross-motion for summary judgment. Defs.’ Reply, ECF No. 85 at 61. In plaintiffs’ complaint, they objected to the circularity issue by stating the new credible fear policies erroneously conclude “that groups defined in part by the applicant’s inability to leave the relationship are impermissibly circular.” ECF No. 54 at 24. In their cross-motion for summary judgment, plaintiffs argue that the government’s rule is inconsistent with well-settled law that the circularity standard only applies when the group is defined exclusively by the feared harm. Pls.’ Mot., ECF No. 64-1 at 57. The Court finds that plaintiffs’ complaint was sufficient to meet the notice pleading standard. See *3E Mobile, LLC v. Glob. Cellular, Inc.*, 121 F. Supp. 3d 106, 108 (D.D.C. 2015) (explaining that the notice-pleading standard does not require a plaintiff to “plead facts or law that match every element of a legal theory”).

The question before the BIA in *Matter of M-E-V-G-*, was whether the respondent had established membership in a "particular social group," namely "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs." 26 I. & N. Dec. at 228. The BIA clarified that a person seeking asylum on the ground of membership in a particular social group must show that the group is: (1) composed of members who share an immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *Id.* at 237. In explaining the third element for membership, the BIA confirmed the rule that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm." *Id.* at 242. The BIA explained that for a particular social group to be distinct, "persecutory conduct alone cannot define the group." *Id.*

The BIA provided the instructive example of former employees of an attorney general. *Id.* The BIA noted that such a group may not be valid for asylum purposes because they may not consider themselves a group, or because society may not consider the employees to be meaningfully distinct in society in general. *Id.* The BIA made clear, however, that "such a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would

make such a distinction and consider the shared past experience to be a basis for distinction within that society." *Id.* "Upon their maltreatment," the BIA explained "it is possible these people would experience a sense of 'group' and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way." *Id.* at 243 (recognizing that "[a] social group cannot be defined merely by the fact of persecution or solely by the shared characteristic of facing dangers in retaliation for actions they took against alleged persecutors . . . but that the shared trait of persecution does not disqualify an otherwise valid social group") (citations and internal quotation marks omitted). The BIA further clarified that the "act of persecution by the government may be the catalyst that causes the society to distinguish [a group] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution." *Id.* at 243. Thus, such a group would not be circular because the persecution they faced was not the sole basis for their membership in a particular social group. *Id.*

With this analysis in mind, the Court now focuses on the dispute at issue. Here, plaintiffs do not challenge *Matter of A-B*'s statements with regard to the rule against circularity, but rather challenge the Policy Memorandum's articulation of the

rule. Pls.' Mot., ECF No, 64-1 at 57-58. Specifically, they challenge the Policy Memorandum's mandate that domestic violence-based social groups that include "inability to leave" are not cognizable. *Id.* at 58 (citations and internal quotation marks omitted). The Policy Memorandum states that "married women . . . who are unable to leave their relationship" are a group that would not be sufficiently particular. Policy Memorandum, ECF No. 100 at 6. The Policy Memorandum explained that "even if 'unable to leave' were particular, the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave because that would amount to circularly defining the particular social group by the harm on which the asylum claim is based." *Id.*

The Policy Memorandum's interpretation of the rule against circularity ensures that women unable to leave their relationship will always be circular. This conclusion appears to be based on a misinterpretation of the circularity standard and faulty assumptions about the analysis in *Matter of A-B-*. First, as *Matter of M-E-V-G-* made clear, there cannot be a general rule when it comes to determining whether a group is distinct because "it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society." 26 I. & N. Dec. at 242. Thus, to the extent the Policy

Memorandum imposes a general circularity rule foreclosing such claims without taking into account the independent characteristics presented in each case, the rule is arbitrary, capricious, and contrary to immigration law.

Second, the Policy Memorandum changes the circularity rule as articulated in settled caselaw, which recognizes that if the proposed social group definition contains characteristics independent from the feared persecution, the group is valid under asylum law. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242 (Particular social group may be cognizable if "immutable characteristic of their shared past experience exists independent of the persecution."). Critically, the Policy Memorandum does not provide a reasoned explanation for, let alone acknowledge, the change. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing [its] position."). *Matter of A-B-* criticized the BIA for failing to consider the question of circularity in *Matter of A-R-C-G-* and overruled the decision based on the BIA's reliance on DHS's concession on the issue. 27 I. & N. Dec. at 334-35, 33. Moreover, *Matter of A-B-* suggested only that the social group at issue in *Matter of A-R-C-G-* might be "effectively" circular. *Id.* at 335. The Policy Memorandum's formulation of the circularity

standard goes well beyond the Attorney General's explanation in *Matter of A-B-*. As such, it is unmoored from the analysis in *Matter of M-E-V-G-* and has no basis in *Matter of A-B-*. It is therefore, arbitrary, capricious, and contrary to immigration law.

5. Discretion and Delineation: The Credible Fear Policies Do Not Contain a Discretion Requirement, but the Policy Memorandum's Delineation Requirement is Unlawful

Plaintiffs next argue that the credible fear policies "unlawfully import two aspects of the ordinary removal context into credible fear proceedings." Pls.' Reply, ECF No. 92 at 32. The first alleged requirement is for aliens to delineate the "particular social group" on which they rely at the credible fear stage. *Id.* The second alleged requirement is that asylum adjudicators at the credible fear stage take into account certain discretionary factors when making a fair credibility determination and exercise discretion to deny relief.²⁰ *Id.* at 32-33.

²⁰ These discretionary factors include but are not limited to: "the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and his or her living conditions, safety, and potential for long-term residency there." Policy Memorandum, ECF No. 100 at 10.

The government agrees that a policy which imposes a duty to delineate a particular social group at the credible fear stage would be a violation of existing law. Defs.' Reply, ECF No. 85 at 67. The government also agrees that requiring asylum officers to consider the exercise of discretion at the credible fear stage "would be inconsistent with section 1225(b)(1)(B)(v)." *Id.* at 68. The government, however, argues that no such directives exist. *Id.* at 67-69.

The Court agrees with the government. There is nothing in the credible fear policies that support plaintiffs' arguments that asylum officers are to exercise discretion at the credible fear stage. The Policy Memorandum discusses discretion only in the context of when an alien has established that he or she is eligible for asylum. Policy Memorandum, ECF No. 100 at 5 ("[I]f eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application."). *Matter of A-B-* also discusses the discretionary factors in the context of granting asylum. 27 I. & N. Dec. at 345 n.12 (stating exercising discretion should not be glossed over "solely because an applicant *otherwise meets the burden of proof* for asylum eligibility under the INA") (emphasis added). Eligibility for asylum is not established, nor is an asylum application granted, at the credible fear stage. See 8 U.S.C. § 1225(b)(1)(B)(ii) (stating if an alien receives a positive

credibility determination, he or she shall be detained for "further consideration of the application of asylum"). Since the credible fear policies only direct officers to use discretion once an officer has determined that an applicant is eligible for asylum, they do not direct officers to consider discretionary factors at the credible fear stage. See Policy Memorandum, ECF No. 100 at 10.

The Court also agrees that, with respect to *Matter of A-B-*, the decision does not impose a delineation requirement during a credible fear determination. The decision only requires an applicant seeking asylum to clearly indicate "an exact delineation of any proposed particular social group" when the alien is "on the record and before the immigration judge." 27 I. & N. Dec. at 344. Any delineation requirement therefore would not apply to the credible fear determination which is not on the record before an immigration judge.

The Policy Memorandum, however, goes further than the decision itself and incorporates the delineation requirement into credible fear determinations. Unlike the mandate to use discretion, the Policy Memorandum does not contain a limitation that officers are to apply the delineation requirement to asylum interviews only, as opposed to credible fear interviews. In fact, it does the opposite and explicitly requires asylum officers to apply that requirement to credible fear

determinations. Policy Memorandum, ECF No. 100 at 12. The Policy Memorandum makes clear that "if an applicant claims asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] into their determination of whether an applicant has a credible fear or reasonable fear of persecution." *Id.* at 12. In directing asylum officers to apply *Matter of A-B-* to credible fear determinations, the Policy Memorandum refers back to all the requirements explained by *Matter of A-B-* including the delineation requirement. *See id.* (referring back to section explaining delineation requirement). In light of this clear directive to "factor" in the standards set forth in *Matter of A-B-*, into the "determination of whether an applicant has a credible fear" and its reference to the delineation requirement, it is clear that the Policy Memorandum incorporates that requirement into credible fear determinations. *See id.*²¹

The government argues, that to the extent the Policy Memorandum is ambiguous, the Court should defer to its

²¹ The Policy Memorandum also reiterates that "few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant possibility' test in credible-fear screenings." Policy Memorandum, ECF No. 100 at 10. For this proposition, the Policy Memorandum refers to the "standards clarified in *Matter of A-B-*." *Id.* This requirement for an alien to explain how they fit into a particular social group independent of the harm they allege, further supports the fact that there is a delineation requirement at the credible fear stage.

interpretation as long as it is reasonable. The government cites no authority to support its claim that deference is owed to an agency's interpretations of its policy documents like the Policy Memorandum. However, the Court acknowledges the government's interpretation is "entitled to respect . . . only to the extent that those interpretations have the 'power to persuade.'" "

Christensen v. Harris Cnty, 529 U.S. 576, 587 (2000) (citation omitted). For the reasons stated above, however, such a narrow reading of the Policy Memorandum is not persuasive. Because the Policy Memorandum requires an alien—at the credible fear stage—to present facts that clearly identify the alien's proposed particular social group, contrary to the INA, that policy is arbitrary and capricious.

6. The Policy Memorandum's Requirements Related to Asylum Officer's Application of Circuit Law are Unlawful

Plaintiffs' final argument is that the Policy Memorandum's directives instructing asylum officers to ignore applicable circuit court of appeals decisions is unlawful. Pls.' Mot., ECF No. 64-1 at 63.

The relevant section of the Policy Memorandum reads as follows:

When conducting a credible fear or reasonable fear interview, an asylum officer must determine what law applies to the applicant's claim. The asylum officer should apply all applicable precedents of the Attorney General and the BIA, *Matter of E-L-H-*, 23 I&N Dec.

814, 819 (BIA 2005), which are binding on all immigration judges and asylum officers nationwide. The asylum officer should also apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*. See, e.g., *Matter of Fajardo Espinoza*, 26 I&N Dec. 603, 606 (BIA 2015). The relevant federal circuit court is the circuit where the removal proceedings will take place if the officer makes a positive credible fear determination. See *Matter of Gonzalez*, 16 I&N Dec. 134, 135-36 (BIA 1977); *Matter of Waldei*, 19 I&N Dec. 189 (BIA 1984). But removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview. Because an asylum officer cannot predict with certainty where DHS will file a Notice to appear . . . the asylum officer should faithfully apply precedents of the Board and, if necessary, the circuit where the alien is physically located during the credible fear interview.

Policy Memorandum, ECF No. 100 at 11-12. Plaintiffs make two independent arguments regarding this policy. First, they argue that the Policy Memorandum's directive to disregard circuit law contrary to *Matter of A-B-*, violates the APA, INA, and the separation of powers. Pls.' Mot., ECF No. 64-1 at 64-68. Second, plaintiffs argue that the Policy Memorandum's directive requiring asylum officers to apply the law of the circuit where the alien is physically located during the credible fear interview violates the APA and INA. *Id.* 68-71.

**a. The Policy Memorandum's Directive to Disregard
Contrary Circuit Law Violates *Brand X***

Plaintiffs' first argument is that the Policy Memorandum's directive that asylum officers who process credible fear interviews ignore circuit law contrary to *Matter of A-B-* is unlawful. Pls.' Mot., ECF No. 64-1 at 63-68. Because the policy requires officers to disregard all circuit law regardless of whether the provision at issue is entitled to deference, plaintiffs maintain that the policy exceeds an agency's limited ability to displace circuit precedent on a specific question of law to which an agency decision is entitled to deference. *Id.*

An agency's ability to disregard a court's interpretation of an ambiguous statutory provision in favor of the agency's interpretation stems from the Supreme Court's decision in *Nat'l Cable & Telecomm's Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). At issue in *Brand X* was the proper classification of broadband cable services under Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. *Id.* at 975. The Federal Communications Commission ("Commission") had issued a Declaratory Rule providing that broadband internet service was an "information service" but not a "telecommunication service" under the Act, such that certain regulations would not apply to cable companies that provided broadband service. *Id.* at 989. The circuit court vacated the

Declaratory Rule because a prior circuit court opinion held that a cable modem service was in fact a telecommunications service. *Id.* (citing *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000)). The Supreme Court concluded that the circuit court erred in relying on a prior court's interpretation of the statute without first determining if the Commission's contrary interpretation was reasonable. *Id.* at 982.

The Supreme Court's holding relied on the same principles underlying the *Chevron* deference cases. *Id.* at 982 (stating that the holding in *Brand X* "follows from *Chevron* itself"). The Court reasoned that Congress had delegated to the Commission the authority to enforce the Communications Act, and under the principles espoused in *Chevron*, a reasonable interpretation of an ambiguous provision of the Act is entitled to deference. *Id.* at 981. Therefore, regardless of a circuit court's prior interpretation of a provision, the agency's interpretation is entitled to deference as long as the court's prior construction of the provision does not "follow[] from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. In other words, an agency's interpretation of a provision may override a prior court's interpretation if the agency is entitled to *Chevron* deference and the agency's interpretation is reasonable. If the agency is not entitled to deference or if the agency's interpretation is unreasonable, a

court's prior decision interpreting the same statutory provision controls. See *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012) (citation omitted) (finding that a court decision interpreting a statute overrides the agency's interpretation only if it holds "that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

The government argues that the Policy Memorandum's mandate to ignore circuit law contrary to *Matter of A-B-* is rooted in statute and sanctioned by *Brand X*. Defs.' Reply, ECF No. 85 at 70. Moreover, the government contends that the requirement "simply states the truism that the INA requires all line officers to follow binding decisions of the Attorney General." *Id.* (citing 8 U.S.C. § 1103(a)) ("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The government also argues that plaintiffs have failed to point to any decisions that are inconsistent with *Matter of A-B-*, and therefore any instruction for an officer to apply *Matter of A-B-* notwithstanding prior circuit precedent to the contrary is permissible. The Policy Memorandum, according to the government, "simply require[s] line officers to follow [*Matter of A-B-*] unless and until a circuit court of appeals declares some aspect of it contrary to the plain text of the INA." Defs.' Reply, ECF No. 85 at 72.

The government, again, minimizes the effect of the Policy Memorandum. As an initial matter, *Brand X* would only allow an agency's interpretation to override a prior judicial interpretation if the agency's interpretation is entitled to deference. *Brand X*, 545 U.S. at 982 (stating "agency construction *otherwise entitled to Chevron deference*" may override judicial construction under certain circumstances) (emphasis added). In this case, the government contends that *Matter of A-B-* only interprets one statutory provision: "particular social group." See Defs.' Mot., ECF No. 57-1 at 56 (stating "[t]he language that the Attorney General interpreted in [*Matter of*] *A-B-*, [is] the meaning of the phrase 'particular social group' as part of the asylum standard"). The Policy Memorandum, however, directs officers to ignore federal circuit law to the extent that the law is inconsistent with *Matter of A-B-* in any respect, including *Matter of A-B-*'s persecution standard. The directive requires officers performing credible fear determinations to use *Brand X* as a shield against any prior or future federal circuit court decisions inconsistent with the sweeping proclamations made in *Matter of A-B-* regardless of whether *Brand X* has any application under the circumstances of that case.

There are several problems with such a broad interpretation of *Brand X* to cover guidance from an agency when it is far from

clear that such guidance is entitled to deference. First, a directive to ignore circuit precedent when doing so would violate the principles of *Brand X* itself is clearly unlawful. For example, when a court determines a provision is unambiguous, as courts have done upon evaluating the “unwilling and unable” definition, a court’s interpretation controls when faced with a contrary agency interpretation. *Brand X*, 545 U.S. at 982. The Policy Memorandum directs officers as a rule not to apply circuit law if it is inconsistent with *Matter of A-B-*, without regard to whether a specific provision in *Matter of A-B-* is entitled to deference in the first place. Such a rule runs contrary to *Brand X*.

Second, the government’s argument only squares with the *Brand X* framework if every aspect of *Matter of A-B-* is both entitled to deference and is a reasonable interpretation of a relevant provision of the INA. Indeed, *Brand X* does not disturb any prior judicial opinion that a statute is unambiguous because Congress has spoken to the interpretive question at issue. *Brand X*, 545 U.S. at 982 (“[A] judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”). If a Court does make such a determination, the agency is not free to supplant the Court’s

interpretation for its own under *Brand X*. *Id.*²² Unless an agency's interpretation of a statute is afforded deference, a judicial construction of that provision binds the agency, regardless of whether it is contrary to the agency's view. The Policy Memorandum does not recognize this principle and therefore, the government's reliance on *Brand X* is misplaced. *Cf., e.g., Matter of Marquez Conde*, 27 I. & N. Dec. 251, 255 (BIA 2018) (examining whether the particular statutory question fell within *Brand X*).²³

The government's statutory justification fares no better. It is true that pursuant to 8 U.S.C. § 1103(a), the Attorney General's rulings with respect to questions of law are controlling; and they are binding on all service employees, 8 C.F.R. § 103.3(c). But plaintiffs do not dispute the fact that

²² Any assumption that the entirety of *Matter of A-B-* is entitled to deference also falters in light of the government's characterization of most of the decision as dicta. Defs.' Reply, ECF No. 85 at 44-47. (characterizing *Matter of A-B-* "comment[ary] on problems typical of gang and domestic violence related claims.") According to the government, the only legal effect of *Matter of A-B-* is to overrule *Matter of A-R-C-G-*. Any other self-described dicta would not be entitled to deference under *Chevron* and therefore *Brand X* could not apply. *Brand X*, 545 U.S. at 982 (agency interpretation must at minimum be "otherwise entitled to deference" for it to supersede judicial construction). Simply put, *Brand X* is not a license for agencies to rely on dicta to ignore otherwise binding circuit precedent.

²³ *Matter of A-B-* invokes *Brand X* only as to its interpretation of particular social group. 27 I. & N. Dec. at 327. As the Court has explained above, that interpretation is not entitled to deference.

asylum officers must follow the Attorney General's decisions. The issue is that the Policy Memorandum goes much further than that. Indeed, the government's characterization of the Policy Memorandum's directive to ignore federal law only highlights the flaws in its argument. According to the government, the directive at issue merely instructs officers to listen to the Attorney General. Defs.' Reply, ECF No. 85 at 70. Such a mandate would be consistent with section 1103 and its accompanying regulations. In reality, however, the Policy Memorandum requires officers conducting credible fear interviews to follow the precedent of the relevant circuit only "to the extent that those cases are not inconsistent with *Matter of A-B-*." Policy Memorandum, ECF No. 100 at 11. The statutory and regulatory provisions cited by the government do not justify a blanket mandate to ignore circuit law.

b. The Policy Memorandum's Relevant Circuit Law Policy Violates the APA and INA

Plaintiffs next argue that the Policy Memorandum's directive to asylum officers to apply the law of the "circuit where the alien is physically located during the credible fear interview" violates the immigration laws. Pls.' Mot., ECF No. 64-1, 68-71; Policy Memorandum, ECF No. 100 at 12. Specifically, Plaintiffs argue that this policy conflicts with the low screening standard for credible fear determinations established

by Congress, and therefore violates the APA and INA. Pls.' Reply, ECF No. 92 at 35-36. The credible fear standard, plaintiffs argue, requires an alien to be afforded the benefit of the circuit law most favorable to his or her claim because there is a possibility that the eventual asylum hearing could take place in that circuit. *Id.*

The government responds by arguing that it is hornbook law that the law of the jurisdiction in which the parties are located governs the proceedings. Defs.' Reply, ECF No. 85 at 73. The government cites the standard for credible fear determinations and argues that it contains no requirement that an alien be given the benefit of the most favorable circuit law. *Id.* The government also argues that, to the extent there is any ambiguity, the government's interpretation is entitled to some deference, even if not *Chevron* deference. *Id.* at 74.

This issue turns on an interpretation of 8 U.S.C. § 1225(b)(1)(B)(v), which provides the standard for credible fear determinations. That section explicitly defines a "credible fear of persecution" as follows:

For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

8 U.S.C. § 1225(b)(1)(B)(v). Applicable regulations further explain the manner in which the interviews are to be conducted. Interviews are to be conducted in an “nonadversarial manner” and “separate and apart from the general public.” 8 C.F.R. § 208.30(d). The purpose of the interview is to “elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture[.]” *Id.*

The statute does not speak to which law should be applied during credible fear interviews. *See generally* 8 U.S.C. § 1225(b)(1)(B)(v). However, the Court is not without guidance regarding which law should be applied because Congress explained its legislative purpose in enacting the expedited removal provisions. 142 CONG. REC. S11491-02. When Congress established expedited removal proceedings in 1996, it deliberately established a low screening standard so that “there should be no danger that an alien with a genuine asylum claim will be returned to persecution.” H.R. REP. No. 104-469, pt. 1, at 158. That standard “is a low screening standard for admission into the usual full asylum process” and when Congress adopted the standard it “reject[ed] the higher standard of credibility included in the House bill.” 142 CONG. REC. S11491-02.

In light of the legislative history, the Court finds plaintiffs’ position to be more consistent with the low screening standard that governs credible fear determinations.

The statute does not speak to which law should be applied during the screening, but rather focuses on eligibility at the time of the removal proceedings. 8 U.S.C. § 1225(b)(1)(B)(v). And as the government concedes, these removal proceedings could occur anywhere in the United States. Policy Memorandum, ECF No. 100 at 12. Thus, if there is a disagreement among the circuits on an issue, the alien should get the benefit of that disagreement since, if the removal proceedings are heard in the circuit favorable to the aliens' claim, there would be a significant possibility the alien would prevail on that claim. The government's reading would allow for an alien's deportation, following a negative credible fear determination, even if the alien would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading leads to the exact opposite result intended by Congress.²⁴

The government does not contest that an alien with a possibility of prevailing on his or her asylum claim could be denied during the less stringent credible fear determination, but rather claims that this Court should defer to the

²⁴ The government relies on BIA cases to support its argument that the law of the jurisdiction where the interview takes place controls. See Defs.' Mot., ECF No. 57-1 at 49. These cases address the law that governs the removal proceedings, an irrelevant and undisputed issue.

government's interpretation that this policy is consistent with the statute. Defs.' Reply, ECF No. 85 at 74-75. Under *Skidmore v. Swift & Co.*, the Court will defer to the government's interpretation to the extent it has the power to persuade.²⁵ See 323 U.S. 134, 140, (1944). However, the government's arguments bolster plaintiffs' interpretation more than its own. As the government acknowledges, and the Policy Memorandum explicitly states, "removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview." Policy Memorandum, ECF No. 100 at 12. Since the Policy Memorandum directive would lead to denial of a potentially successful asylum applicant at the credible fear determination, the Court concludes that the directive is therefore inconsistent with the statute. H.R. REP. NO. 104-469 at 158 (explaining that there should be no fear that an alien with a genuine asylum claim would be returned to persecution).²⁶

Because the government's reading could lead to the exact

²⁵ The government cannot claim the more deferential *Auer* deference because *Auer* applies to an agency's interpretation of its own regulations, not to interpretations of policy documents like the Policy Memorandum. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding agencies may resolve ambiguities in regulations).

²⁶ The policy is also a departure from prior DHS policy without a rational explanation for doing so. See Mujahid Decl., Ex. F (DHS training policy explaining that law most favorable to the applicant applies when there is a circuit split).

harm that Congress sought to avoid, it is arbitrary capricious and contrary to law.

* * * * *

In sum, plaintiffs prevail on their APA and statutory claims with respect to the following credible fear policies, which this Court finds are arbitrary and capricious and contrary to law: (1) the general rule against credible fear claims relating to gang-related and domestic violence victims' membership in a "particular social group," as reflected in *Matter of A-B-* and the Policy Memorandum; (2) the heightened "condoned" or "complete helplessness" standard for persecution, as reflected in *Matter of A-B-* and the Policy Memorandum; (3) the circularity standard as reflected in the Policy Memorandum; (4) the delineation requirement at the credible fear stage, as reflected in the Policy Memorandum; and (5) the requirement that adjudicators disregard contrary circuit law and apply only the law of the circuit where the credible fear interview occurs, as reflected in the Policy Memorandum. The Court also finds that neither the Policy Memorandum nor *Matter of A-B-* state an unlawful nexus requirement or require asylum officers to apply discretionary factors at the credible fear stage. The Court now turns to the appropriate remedy.²⁷

²⁷ Because the Court finds that the government has violated the INA and APA, it need not determine whether there was a

D. Relief Sought

Plaintiffs seek an Order enjoining and preventing the government and its officials from applying the new credible fear policies, or any other guidance implementing *Matter of A-B-* in credible fear proceedings. Pls.' Mot., ECF No. 64-1 at 71-72. Plaintiffs also request that the Court vacate any credible fear determinations and removal orders issued to plaintiffs who have not been removed. *Id.* As for plaintiffs that have been removed, plaintiffs request a Court Order directing the government to return the removed plaintiffs to the United States. *Id.* Plaintiffs also seek an Order requiring the government to provide new credible fear proceedings in which asylum adjudicators must apply the correct legal standards for all plaintiffs. *Id.*

The government argues that because section 1252 prevents all equitable relief the Court does not have the authority to order the removed plaintiffs to be returned to the United States. Defs.' Reply, ECF No. 85 at 75-76. The Court addresses each issue in turn.

constitutional violation in this case. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam) (stating courts should be wary of issuing "unnecessary constitutional rulings").

1. Section 1252 Does Not Bar Equitable Relief

a. Section 1252(e)(1)

The government acknowledges that section 1252(e)(3) provides for review of “systemic challenges to the expedited removal system.” Defs.’ Mot., ECF No. 57-1 at 11. However, the government argues 1252(e)(1) limits the scope of the relief that may be granted in such cases. Defs.’ Reply, ECF No. 85 at 75-76. That provision provides that “no court may . . . enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection.” 8 U.S.C. § 1252(e)(1)(a). The government argues that since no other subsequent paragraph of section 1252(e) specifically authorizes equitable relief, this Court cannot issue an injunction in this case. Defs.’ Reply, ECF No. 85 at 75-76.

Plaintiffs counter that section 1252(e)(1) has an exception for “any action . . . specifically authorized in a subsequent paragraph.” Since section 1252(e)(3) clearly authorizes “an action” for systemic challenges, their claims fall within an exception to the proscription of equitable relief. Pls.’ Reply, ECF No. 92 at 38.

This issue turns on what must be “specifically authorized in a subsequent paragraph” of section 1252(e). Plaintiffs argue

the "action" needs to be specifically authorized, and the government argues that it is the "relief." Section 1252(e)(1) states as follows:

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

The government contends that this provision requires that any "*declaratory, injunctive, or other equitable relief*" must be "*specifically authorized in a subsequent paragraph*" of subsection 1252(e) for that relief to be available. Defs.' Reply, ECF No. 85 at 75 (emphasis in original). The more natural reading of the provision, however, is that these forms of relief are prohibited except when a plaintiff brings "any action . . . specifically authorized in a subsequent paragraph." *Id.* § 1252(e)(1)(a). The structure of the statute supports this view. For example, the very next subsection, 1252(e)(1)(b), uses

the same language when referring to an **action**: “[A court may not certify a class] in *any action for which judicial review is authorized under a subsequent paragraph of this subsection.*” *Id.* § 1252(e)(1)(b) (emphasis added).

A later subsection lends further textual support for the view that the term “authorized” modifies the type of action, and not the type of relief. Subsection 1252(e)(4) limits the remedy a court may order when making a determination in habeas corpus proceedings challenging a credible fear determination.²⁸ Under section 1252(e)(2), a petitioner may challenge his or her removal under section 1225, if he or she can prove by a preponderance of the evidence that he or she is in fact in this country legally.²⁹ See 8 U.S.C. § 1252(e)(2)(c). Critically, section 1252(e)(4) limits the type of relief a court may grant if the petitioner is successful: “the court may order no remedy or relief other than to require that the petitioner be provided a hearing.” *Id.* § 1252(e)(4)(B). If section 1252(e)(1)(a) precluded all injunctive and equitable relief, there would be no need for § 1252(e)(4) to specify that the court could order no

²⁸ Habeas corpus proceedings, like challenges to the validity of the system under 1252(e)(3), are “specifically authorized in a subsequent paragraph of [1252(e)].” 8 U.S.C. § 1252(e)(1)(a).

²⁹ To prevail on this type of claim a petitioner must establish that he or she is an “alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158.” 8 U.S.C. § 1252(e)(2).

other form of relief. Furthermore, if the government's reading was correct, there should be a parallel provision in section 1252(e)(3) limiting the relief a prevailing party of a systemic challenge could obtain to only relief specifically authorized by that paragraph.

Indeed, under the government's reading of the statute there could be no remedy for a successful claim under paragraph 1252(e)(3) because that paragraph does not specifically authorize any remedy. However, it does not follow that Congress would have explicitly authorized a plaintiff to bring a suit in the United States District Court for the District of Columbia and provided this Court with exclusive jurisdiction to determine the legality of the challenged agency action, but deprived the Court of any authority to provide *any remedy* (because none are specifically authorized), effectively allowing the unlawful agency action to continue. This Court "should not assume that Congress left such a gap in its scheme." *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 180 (2005) (holding Title IX protected against retaliation in part because "all manner of Title IX violations might go unremedied" if schools could retaliate freely).

An action brought pursuant to section 1252(e)(3) is an action that is "specifically authorized in a subsequent paragraph" of 1252(e). See 8 U.S.C. § 1252(e)(1). And 1252(e)(3)

clearly authorizes "an action" for systemic challenges to written expedited removal policies, including claims concerning whether the challenged policy "is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." *Id.* § 1252(e)(3). Because this case was brought under that systemic challenge provision, the limit imposed on the relief available to a court under 1252(e)(1)(a) does not apply.³⁰

b. Section 1252(f)

The government's argument that section 1252(f) bars injunctive relief fares no better. That provision states in relevant part: "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [sections 1221-1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). The Supreme Court has explained that "Section 1252(f)(1) thus 'prohibits federal courts from granting

³⁰ Plaintiffs also argue that section 1252(e)(1) does not apply to actions brought under section 1252(e)(3). Section 1252(e)(1), by its terms, only applies to an "action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)." Plaintiffs argue that the plain reading of section 1252(e)(3) shows that an action under that provision does not pertain to an individual order of exclusion, but rather "challenges the validity of the system." Pls.' Reply, ECF No. 92 at 12 (citing 8 U.S.C. § 1252(e)(3)). Having found that section 1252(e)(3) is an exception to section 1252(e)(1)'s limitation on remedies, the Court need not reach this argument.

classwide injunctive relief against the operation of §§ 1221-123[2].” *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999)). The Supreme Court has also noted that circuit courts have “held that this provision did not affect its jurisdiction over . . . statutory claims because those claims did not ‘seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes.” *Id.* (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)).

In this case, plaintiffs do not challenge any provisions found in section 1225(b). They do not seek to enjoin the operation of the expedited removal provisions or any relief declaring the statutes unlawful. Rather, they seek to enjoin the government’s violation of those provisions by the implementation of the unlawful credible fear policies. An injunction in this case does not obstruct the operation of section 1225. Rather, it enjoins conduct that violates that provision. Therefore, section 1252(f) poses no bar. See *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) (holding section 1252(f) does not limit a court’s ability to provide injunctive relief when the injunctive relief “enjoins conduct that allegedly violates [the immigration statute]”); see also *Reid v. Donelan*, 22 F. Supp. 3d 84, 90 (D. Mass. 2014) (“[A]n injunction ‘will not prevent the law from

operating in any way, but instead would simply force the government to *comply* with the statute.”) (emphasis in original)).

Finally, during oral argument, the government argued that even if the Court has the authority to issue an injunction in this case, it can only enjoin the policies as applied in plaintiffs’ cases under section 1252(f). See Oral Arg. Hr’g Tr., ECF No. 102 at 63. In other words, according to the government, the Court may declare the new credible fear policies unlawful, but DHS may continue to enforce the policies in all other credible fear interviews. To state this proposition is to refute it. It is the province of the Court to declare what the law is, see *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and the government cites no authority to support the proposition that a Court may declare an action unlawful but have no power to prevent that action from violating the rights of the very people it affects.³¹ To the contrary, such relief is supported by the APA itself. See *Nat’l Min. Ass’n v. U.S. Army Corps of Eng’rs*,

³¹ During oral argument, the government argued for the first time that an injunction in this case was tantamount to class-wide relief, which the parties agree is prohibited under the statute. See Oral Arg. Hr’g Tr., ECF No. 102 at 63; 8 U.S.C. § 1252(e) (1) (b) (prohibiting class certification in actions brought under section 1252(e) (3)). The Court finds this argument unpersuasive. Class-wide relief would entail an Order requiring new credible fear interviews for all similarly situated individuals, and for the government to return to the United States all deported individuals who were affected by the policies at issue in this case. Plaintiffs do not request, and the Court will not order, such relief.

145 F.3d 1399, 1409-10 (D.C. Cir. 1998) ("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated - not that their application to the individual petitioners is proscribed.'"). Moreover section 1252(f) only applies when a plaintiff challenges the legality of immigration laws and not, as here, when a plaintiff seeks to enjoin conduct that violates the immigration laws. In these circumstances, section 1252(f) does not limit the Court's power.

2. The Court Has the Authority to Order the Return of Plaintiffs Unlawfully Removed

Despite the government's suggestion during the emergency stay hearing that the government would return removed plaintiffs should they prevail on the merits, TRO Hr'g Tr., Aug. 9, 2018, ECF No. 23 at 13-14 (explaining that the Department of Justice had previously represented to the Supreme Court that should a Court find a policy that led to a plaintiffs' deportation unlawful the government "would return [plaintiffs] to the United states at no expense to [plaintiffs]"), the government now argues that the Court may not do so, see Defs.' Reply, ECF No. 85 at 78-79.

In support of its argument, the government relies principally on *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir 2009) vacated, 130 S.Ct. 1235, reinstated in amended form, 605 F.3d

1046 (D.C. Cir. 2010). In *Kiyemba*, seventeen Chinese citizens, determined to be enemy combatants, sought habeas petitions in connection with their detention in Guantanamo Bay, Cuba. 555 F.3d at 1024. The petitioners sought release in the United States because they feared persecution if they were returned to China, but had not sought to comply with the immigration laws governing a migrant's entry into the United States. *Id.* After failed attempts to find an appropriate country in which to resettle, the petitioners moved for an order compelling their release into the United States. *Id.* The district court, citing exceptional circumstances, granted the motion. *Id.*

The United States Court of Appeals for the District of Columbia Circuit reversed. The Court began by recognizing that the power to exclude aliens remained in the exclusive power of the political branches. *Id.* at 1025 (citations omitted). As a result, the Court noted, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 1026 (citation and internal quotation marks omitted). The critical question was "what law expressly authorized the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States." *Id.* at 1026 (internal quotation marks omitted).

In this case, the answer to that question is the immigration laws. In fact, *Kiyemba* distinguished Supreme Court cases which “rested on the Supreme Court’s interpretation not of the Constitution, but of a provision in the immigration laws.” *Id.* at 1028. The Court further elaborated on this point with the following explanation:

it would . . . be wrong to assert that, by ordering aliens paroled into the country . . . the Court somehow undermined the plenary authority of the political branches over the entry and admission of aliens. The point is that Congress has set up the framework under which aliens may enter the United States. The Judiciary only possesses the power Congress gives it to review Executive action taken within that framework. Since petitioners have not applied for admission, they are not entitled to invoke that judicial power.

Id. at 1028 n.12.

The critical difference here is that plaintiffs have availed themselves of the “framework under which aliens may enter the United States.” *Id.* Because plaintiffs have done so, this Court “possesses the power Congress gives it to review Executive action taken within that framework.” *Id.* Because the Court finds *Kiyemba* inapposite, the government’s argument that this Court lacks authority to order plaintiffs returned to the United States is unavailing.

It is also clear that injunctive relief is necessary for the Court to fashion an effective remedy in this case. The

credible fear interviews of plaintiffs administered pursuant to the policies in *Matter of A-B-* and the Policy Memorandum were fundamentally flawed. A Court Order solely enjoining these policies is meaningless for the removed plaintiffs who are unable to attend the subsequent interviews to which they are entitled. *See, e.g., Walters v. Reno*, 145 F.3d 1032, 1050-51 (9th Cir. 1998) (“[A]llowing class members to reopen their proceedings is basically meaningless if they are unable to attend the hearings that they were earlier denied.”).

3. Permanent Injunction Factors Require Permanent Injunctive Relief

A plaintiff seeking a permanent injunction must satisfy a four-factor test. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Plaintiffs must demonstrate they have:

(1) suffered an irreparable injury; (2) that traditional legal remedies, such as monetary relief, are inadequate to compensate for that injury; (3) the balance of hardships between the parties warrants equitable relief; and (4) the injunction is not contrary to the public interest. *See Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 695 (D.C. Cir. 2015).

Plaintiffs seek a permanent injunction, arguing that they have been irreparably harmed and that the equities are in their favor. Pls.’ Mot., ECF No. 64-1 at 73-74. The government has not responded to these arguments on the merits, and rests on its

contention that the Court does not have the authority to order such relief. Defs.' Reply, ECF No. 85 at 75-78. Having found that the Court does have the authority to order injunctive relief, *supra*, at 93-104, the Court will explain why that relief is appropriate.

Plaintiffs claim that the credible fear policies this Court has found to be unlawful have caused them irreparable harm. It is undisputed that the unlawful policies were applied to plaintiffs' credible fear determinations and thus caused plaintiffs' applications to be denied. See Defs.' Mot., ECF No. 57-1 at 28 (stating an "asylum officer reviewed each of [plaintiffs] credible fear claims and found them wanting in light of Matter of A-B-"). Indeed, plaintiffs credibly alleged at their credible fear determinations that they feared rape, pervasive domestic violence, beatings, shootings, and death in their countries of origin. Based on plaintiffs' declarations attesting to such harms, they have demonstrated that they have suffered irreparable injuries.³²

The Court need spend little time on the second factor: whether other legal remedies are inadequate. No relief short of enjoining the unlawful credible fear policies in this case could

³² The country reports support the accounts of the Plaintiffs. See Mujahid Decl., ECF No. 10-3, Exs. K-T; Second Mujahid Decl., ECF No. 64-4 Exs. 10-13; Honduras Decl., ECF No. 64-6; Guatemala Decl., ECF No. 64-7; El Salvador Decl., ECF No. 64-8.

provide an adequate remedy. Plaintiffs do not seek monetary compensation. The harm they suffer will continue unless and until they receive a credible fear determination pursuant to the existing immigration laws. Moreover, without an injunction, the plaintiffs previously removed will continue to live in fear every day, and the remaining plaintiffs are at risk of removal.

The last two factors are also straightforward. The balance of the hardships weighs in favor of plaintiffs since the “[g]overnment ‘cannot suffer harm from an injunction that merely ends an unlawful practice.’” *R.I.L-R*, 80 F. Supp. at 191 (citing *Rodriguez*, 715 F.3d at 1145). And the injunction is not contrary to the public interest because, of course, “[t]he public interest is served when administrative agencies comply with their obligations under the APA.” *Id.* (citations omitted). Moreover, as the Supreme Court has stated, “there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm.” *Nken v. Holder*, 556 U.S. 418, 436 (2009). No one seriously questions that plaintiffs face substantial harm if returned to their countries of origin. Under these circumstances, plaintiffs have demonstrated they are entitled to a permanent injunction in this case.

IV. Conclusion

For the foregoing reasons, the Court holds that it has jurisdiction to hear plaintiffs' challenges to the credible fear policies, that it has the authority to order the injunctive relief, and that, with the exception of two policies, the new credible fear policies are arbitrary, capricious, and in violation of the immigration laws.

Accordingly, the Court **GRANTS in PART and DENIES in PART** plaintiffs' cross-motion for summary judgment and motion to consider evidence outside the administrative record. The Court also **GRANTS** plaintiffs' motion for a permanent injunction. The Court further **GRANTS in PART and DENIES in PART** the government's motion for summary judgment and motion to strike.

The Court will issue an appropriate Order consistent with this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
December 17, 2018

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

**UNITED STATES OF AMERICA,
Plaintiff,**

v.

**CARLOS PEDROZA-ROCHA,
Defendant.**

§
§
§
§
§
§
§

EP-18-CR-1286-DB

GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS

The United States of America (the Government) hereby submits this response in opposition to Defendant Carlos Pedroza-Rocha’s “Motion to Dismiss” (“Motion”) (ECF No. 39), filed on August 29, 2018. The Government respectfully requests that the Court deny Defendant’s motion for the reasons set forth below.

I. BACKGROUND

A federal grand jury indicted Defendant on May 9, 2018 for allegedly illegally re-entering the United States in violation of 8 U.S.C. § 1326. ECF No. 7 (Indictment). Specifically, the Indictment alleges that on or about May 7, 2017, Defendant, an alien who had previously been excluded, deported, and removed from the United States on or about January 7, 2016, attempted to enter, entered, and was found in the United States without having previously received express consent to reapply for admission from the United States Attorney General and the Secretary of Homeland Security. *Id.*

Defendant’s immigration history indicates that he was first encountered by immigration officials on March 28, 2003 in El Paso, Texas. Ex. A. On that same day, Defendant was issued a “Notice to Appear” (NTA) before an immigration judge. Ex. B. The NTA informed Defendant that he was ordered to appear before an immigration judge at the El Paso Service Processing

Center. *Id.* The NTA provided the address but did not provide a date and time. *Id.* Instead, the NTA indicated that the hearing would be on “a date to be set” at “a time to be set.” *Id.* On May 23, 2003, the Executive Office of Immigration Review through the Immigration Court in El Paso Texas served a “Notice of Hearing in Removal Proceedings” (NOH) on Defendant on May 23, 2003. Ex. C. The NOH stated the date, time, and location of the removal proceedings stating that Defendant should “take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on May 27, 2003, at 9:00 A.M. at 8915 Montana Avenue El Paso, Texas 79925. *Id.* Defendant attended and participated in the hearing held before the immigration court on May 27, 2003,¹ and Immigration Judge William L. Abbott issued an order of removal on that date (May 27, 2003). Ex. D.

Defendant was thereafter removed on three other occasions—on each occasion the immigration judge’s previous 2003 removal order was reinstated. Defendant’s most recent removal was on January 7, 2016, and forms the basis for the Indictment.

Defendant now seeks to dismiss the Indictment by collaterally attacking the immigration judge’s 2003 removal order. However, Defendant has failed to demonstrate that he exhausted his administrative remedies, was deprived of judicial review, or that entry of the removal order was fundamentally unfair.

II. ARGUMENTS AND AUTHORITIES

“[A]n alien who is being prosecuted under § 1326 can, in some circumstances, assert a challenge to an underlying deportation order.” *United States v. Mendoza-Mata*, 322 F.3d 829, 832 (5th Cir. 2003) (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 (1987)). Congress

¹ On Friday September 7, 2018, The Government received the audiocassette tape recordings of Defendant’s May 27, 2003 immigration hearing demonstrating that Defendant was present at the hearing. The Government can provide a transcript of the audio recording at the Court’s request.

established a three-step process by which a defendant can collaterally attack an underlying deportation order when they have been charged with a § 1326 violation:

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order . . . unless the alien demonstrates that—

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) The entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d)(2005).

Here Defendant's challenge to the instant indictment fails because he has not established any of the requisite elements for collaterally attacking the 2003 removal order.

A. Defendant Has Failed to Exhaust His Administrative Remedies.

First, Defendant failed to exhaust his administrative remedies because he did not appeal the decision of the immigration judge to the Board of Immigration Appeals. *See United States v. Noriega-Carrasco*, 2008 WL 5351837, at *2 (W.D. Tex. Oct. 21, 2008) (Briones, J.) (“In the context of immigration proceedings, exhaustion requires an appeal of the IJ’s decision to the Board of Immigration Appeals (“BIA”). In fact, the 2003 removal order indicates that Defendant waived his right to appeal that order. Ex. D. There is a limited exception to the exhaustion requirement where “administrative remedies are inadequate.” *Id.* (quoting *Goonsuwan v. Ashcroft*, 252 F.2d 383, 389 (5th Cir. 2001)). “This exception is reserved for situations in which exhaustion would be futile, because the agency has no power to resolve in the applicant’s favor.” *Id.* Defendant has not demonstrated that this exception is applicable here. Defendant could have appealed the immigration judge’s order but failed to do so.

Yet, Defendant argues that he was not required to exhaust his administrative remedies here because his administrative immigration proceeding was infected with a fundamental procedural

error and that the proceedings were therefore void because the immigration court did not have jurisdiction over his case. Mot. 6. This argument is closely intertwined with Defendant's argument regarding fundamental fairness and the Government will address these interrelated arguments together in the fundamental fairness section below. *See id.* at 3-6 (setting out Defendant's fundamental unfairness argument).

B. Defendant was Not Deprived of Judicial Review.

The Defendant has also failed to demonstrate that he was improperly deprived of the opportunity for judicial review. As this Court has previously recognized, “[t]o collaterally attack a removal order an alien must show that he was effectively denied the opportunity to appeal.” *Noriega-Carrasco*, 2008 WL 5351837, at *2 (citing *United States v. Palacios-Martinez*, 845 F.2d 89, 91 (5th Cir. 1988)). “A waiver of the right to appeal motivated by a belief that the appeal would be unsuccessful does not constitute such denial.” *Id.* (citing *United States v. Encarnacion-Galvez*, 964 F.2d 402, 409 (5th Cir. 1992)). In a similar case where the defendant waived his right to appeal the immigration judge's removal order, this Court held that the defendant was barred from collaterally attacking his removal order in his criminal proceedings:

The removal order of April 26, 1999, indicated that Defendant waived his right to appeal, and Defendant has not introduced any evidence that shows he was denied this right. Thus, the Court finds that Defendant fails to show he was denied judicial review, and, therefore, he cannot collaterally attack his prior removal order in this criminal proceeding.

Noriega-Carrasco, 2008 WL 5351837, at *2.

C. Entry of the Removal Order Was Not Fundamentally Unfair.

Finally, Defendant has failed to demonstrate that entry of the removal order was fundamentally unfair. “Fundamental fairness is a question of procedure. Removal hearings are civil proceedings, not criminal; therefore, procedural protections accorded an alien in a removal

proceeding are less stringent than those available to a criminal defendant.” *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002). The Supreme Court has held that due process requires that an alien who faces deportation be provided with the following: (1) notice of the charges against him; (2) a hearing before an executive or administrative tribunal; and (3) a fair opportunity to be heard. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98 (1953). “To succeed on the fundamental unfairness prong, a defendant must show that the IJ committed procedural errors that violated his due process rights.” *Noriega-Carrasco*, 2008 WL 5351837, at *3.

Defendant argues that his removal order was fundamentally unfair because he did not receive proper notice.

Section 239 of the Immigration and Nationality Act (INA) requires that an alien in removal proceedings be given written notice of the nature of the proceedings against them as well as the time and place at which the proceedings will be held. 8 U.S.C. § 1229(a)(1)(A)-(G). The INA further specifies that this written notice is referred to throughout Section 239 as “notice to appear.” *Id.* The Fifth Circuit, along with several other circuit courts, has held that this notice specifying the date and time of hearing may be provided in a subsequent Notice of Hearing if not provided in the original NTA. *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009) (“[A]n NTA need not include the specific time and date of a removal hearing in order for the statutory notice requirements to be satisfied; that information may be provided in a subsequent NOH [Notice of Hearing].”; *see also Guamanrrigara v. Holder*, 670 F.3d 404, 410 (2d Cir. 2012) (per curiam); *Popa v Holder*, 571 F.3d 890, 895-96 (9th Cir. 2009); *Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 & n.3 (9th Cir. 2005).

Here, the Defendant was provided with written notice as required by the INA. The Immigration Court provided Defendant with a NOH specifying the date, place, and location of his

hearing. Ex. C. The fact that such notice was not contained in the document labeled “NTA” is of no consequence. By providing such written notice, the Immigration Court fulfilled its responsibility under Department of Justice regulations authorizing the Immigration Courts to “schedul[e] cases and provid[e] notice to the government and the alien of the time, place, and date of hearings.” 8 C.F.R. § 1003.18(a). These regulations specifically contemplate that “[i]f that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing.” 8 C.F.R. § 1003.18(b).

Defendant nevertheless argues that his written notice was insufficient because the NTA did not contain the date and time of the hearing. Defendant relies on the recent Supreme Court case of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) to support his argument. Defendant’s reliance on *Pereira* is problematic for three reasons. First, *Pereira* resolved a narrow question and its holding is not applicable here. Second, the facts in *Pereira* are distinguishable in one critical respect: the alien in *Pereira* did not attend his removal proceedings; and finally, even if *Pereira* was applicable here, *Pereira* did not hold that an alien cannot receive proper notice through a NOH specifying the date and time of the hearing.

In *Pereira* the Supreme Court only considered what it characterized as a “narrow” issue: “Does a ‘notice to appear’ that does not specify the ‘time and place at which the proceedings will be held,’ as required by § 1229(a)(1)(G)(i), trigger the stop-time rule?” *Pereira*, 138 S. Ct. at 2113. However, the high Court’s resolution of this narrow issue is not binding here because, unlike in *Pererira*, there is no question here regarding the proper application of the stop-time rule or whether a statutorily deficient NTA stopped his accrual of continuous physical presence. As the Court specifically stated multiple times, the issue before it was “narrow” and the “dispositive

question” was whether a notice to appear that does not specify the time and place at which proceedings will be held, as required by section 239(a)(1)(G)(i), triggers the “stop-time” rule for purposes of cancellation of removal. *Id.* at 2110, 2113.). These consistent references to the “narrowness” of the issue resolved by the *Pereira* Court, *id.* at 2110, 2113, eliminates any intent on its part to impose the overly-broad holding Defendant now propounds to this Court. *See Matter of German Bermudez-Cota, Respondent*, 27 I. & N. Dec. 441, 443 (BIA 2018) (“[T]he respondent is not seeking cancellation of removal, and the “stop-time” rule is not at issue, so *Pereira* is distinguishable.).

Furthermore, *Pereira* “involved a distinct set of facts.” *See German Bermudez-Cota, Respondent*, 27 I. & N. Dec. 441, 443 (BIA 2018) (similarly recognizing that *Pereira* was inapplicable where the alien attended and participated in his immigration proceedings). The alien in *Pereira* failed to participate in his removal proceedings and the immigration judge ordered him removed in *absentia*. *Pereira*, 138 S. Ct. at 2112. Thus, the alien in that case understandably argued that he had not received the requisite notice to participate in his removal proceedings. *Id.* Here, Defendant participated in his removal proceedings; his argument that he did not receive proper notice even though he actually attended his hearing removal hearing thus factually removes him from *Pereira*’s ambit. In short, his participation in the removal proceedings demonstrates that Defendant was not prejudiced by the defective NTA.

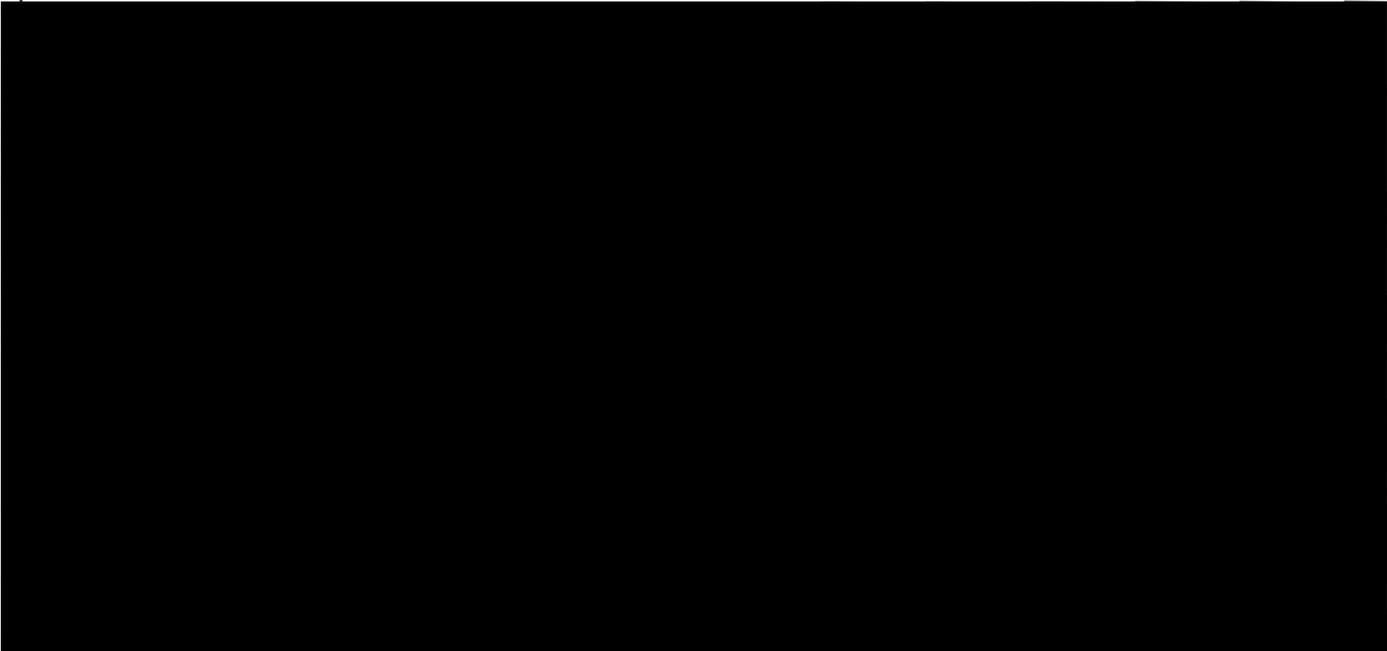
Finally, nothing in the *Pereira* decision seems to suggest that proper notice cannot be provided through a NOH rather than an NTA or in conjunction with an NTA, as held by the Fifth Circuit. The BIA’s recent *Matter of German Bermudez-Cota* decision recently reaffirmed this position:

We agree with the Fifth, Seventh, Eighth, and Ninth Circuits that a two-step notice process is sufficient to meet the statutory notice requirements in section 239(a) of the Act.

U.S. Department of Justice
Immigration and Naturalization Service

Record of Deportable/Inadmissible Alien

Family Name (CAPS) PEDROZA-Rocha, Carlos Javier		First	Middle	Sex M	Hair BLK	Eyes BRO	Complexn MED
Country of Citizenship MEXICO	Passport Number and Country of Issue	File Number Case No: [REDACTED]		Height	Weight	Occupation LABORER	
U.S. Address UNKNOWN				Scars and Marks See Narrative			
Date, Place, Time, and Manner of Last Entry 03/12/2003, 0001, ELP, Without Inspection				Passenger Boarded at		F.B.I. Number NEGATIVE	
Number, Street, City, Province (State) and Country of Permanent Residence [REDACTED] MEXICO				Method of Location/Apprehension CAP 518.2			
Date of Birth [REDACTED]	Age: 20	Date of Action 03/28/2003	Location Code ELP/ELP	At/Near El Paso, Texas		Date/Hour 03/28/2003 0000	
City, Province (State) and Country of Birth [REDACTED] MEXICO	AR <input checked="" type="checkbox"/>	Form: (Type and No.)	Lifted <input type="checkbox"/>	Not Lifted <input type="checkbox"/>		By F M. JACKSON	
NIV Issuing Post and NIV Number	Social Security Account Name			Status at Entry		Status When Found	
Date Visa Issued	Social Security Number			Length of Time Illegally in U.S. 4-30 DAYS			
Immigration Record NEGATIVE			Criminal Record None known				
Name, Address, and Nationality of Spouse (Maiden Name, if Appropriate)						Number and Nationality of Minor Children 1-MEXICO	
Father's Name, Nationality, and Address, if Known Nationality: MEXICO				Mother's Present and Maiden Names, Nationality, and Address, if Known			
Monies Due/Property in U.S. Not in Immediate Possession		Fingerprinted? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	INS Systems Checks See Narrative	Charge Code Words I6A			
Name and Address of (Last)/(Current) U.S. Employer		Type of Employment	Salary	Employed from/to Hr. / / / /			
Narrative (Outline particulars under which alien was located/apprehended. Include details not shown above regarding time, place and manner of last entry, attempted entry, or any other entry, and elements which establish administrative and/or criminal violation. Indicate means and route of travel to interior.)							



F. M. JACKSON
SPECIAL AGENT

Alien has been advised of communication privileges. _____ (Date/Initials)

(Signature and Title of INS Official)

Distribution:
FILE
STATS
I/O

GOVERNMENT
EXHIBIT
A

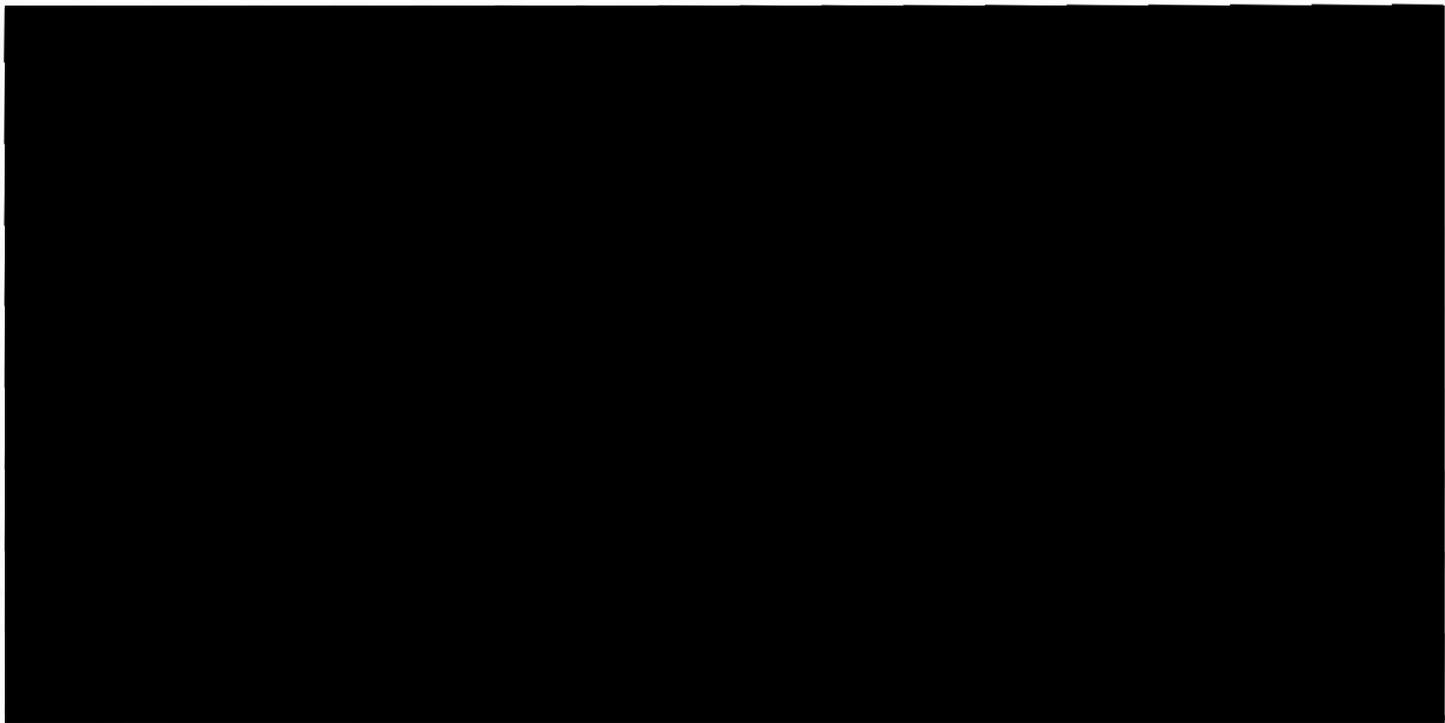
Received: (Subject and Documents) (Report of Interview)

Officer: **F. M. JACKSON**

on: **March 28, 2003**
~~XXXX~~ at **1418** (time)

Disposition: **Warrant of Arrest/Notice to Appear**

Alien's Name PEDROZA-Rocha, Carlos Javier	File Number Case No: [REDACTED]	Date 03/28/2003
---	------------------------------------	---------------------------



Signature <i>F. M. Jackson</i> F M. JACKSON	Title SPECIAL AGENT
--	-------------------------------

U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: [REDACTED]
Case No: [REDACTED]

In the Matter of:

Respondent: Carlos Javier PEDROZA-Rocha currently residing at:
EL PASO SERVICE PROCESSING CENTER 8915 MONTANA AVENUE
EL PASO TEXAS 79925 (915) 225-1941
(Number, street, city state and ZIP code) (Area code and phone number)

- 1. You are an arriving alien.
- 2. You are an alien present in the United States who has not been admitted or paroled.
- 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

- 1) You are not a citizen or national of the United States;
- 2) You are a native of MEXICO and a citizen of MEXICO;
- 3) You arrived in the United States at or near El Paso, Texas, on or about March 12, 2003;
- 4) You were not then admitted or paroled after inspection by an Immigration Officer.

RECEIVED
 DEPARTMENT OF JUSTICE
 EXCLUSIVE OFFICE FOR
 IMMIGRATION REVIEW
 IMMIGRATION COURT
 EL PASO, TEXAS
 03 MAY 15 PM 1:28

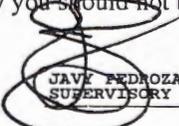
On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

- This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- Section 235(b)(1) order was vacated pursuant to: 8 CFR 208.30(f)(2) 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: El Paso Service Processing Center 8915 Montana Avenue El Paso TEXAS 79925

on a date to be set at a time to be set to show why you should not be removed from the United States based on the charge(s) set forth above.


 JAVIER PEDROZA
 SUPERVISORY SPECIAL AGENT
 (Signature and Title of Issuing Officer)

Date: March 28, 2003 El Paso, Texas
(City and State)



See reverse for important information

6

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
8915 MONTANA AVENUE
EL PASO, TX 79925

RE: PEDROZA-ROCHA, CARLOS JAVIER

FILE: [REDACTED] 6

DATE: May 23, 2003

TO: PEDROZA-ROCHA, CARLOS JAVIER
8915 MONTANA
EL PASO, TX 79925

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on May 27, 2003 at 9:00 A.M. at:

8915 MONTANA AVENUE
EL PASO, TX 79925

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Immigration and Naturalization Service and held for further action. OR (2) Your hearing may be held in your absence under section 240(b) (5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Immigration and Naturalization Service established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT EL PASO, TX THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 703-305-1662. *YOU MUST BRING PHOTO IDENTIFICATION TO ENTER THE BUILDING.*

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [] ALIEN [] ALIEN c/o Custodial Officer [] ALIEN's ATT/REP [] INS
DATE: 5/22/03 BY: COURT STAFF [] V3

Attachments: [] EOIR-33 [] EOIR-28 [] Legal Services List [] Other

CL3



ALIEN NUMBER: [REDACTED]

ALIEN NAME: PEDROZA-ROCHA, CARLOS JAVIE

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ALIEN ALIEN c/o Custodial Officer ALIEN's ATT/REP INS
DATE: 5/27/03 BY: COURT STAFF [Signature]
Attachments: EOIR-33 EOIR-28 Legal Services List Other

Q6

4

8

IMMIGRATION COURT
8915 MONTANA AVENUE
EL PASO, TX 79925

In the Matter of

Case No.: [REDACTED]

PEDROZA-ROCHA, CARLOS JAVIER
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on May 27, 2003.
This memorandum is solely for the convenience of the parties. If the
proceedings should be appealed or reopened, the oral decision will become
the official opinion in the case.

- The respondent was ordered removed from the United States to MEXICO
or in the alternative to
- Respondent's application for voluntary departure was denied and
respondent was ordered removed to
alternative to
- Respondent's application for voluntary departure was granted until
upon posting a bond in the amount of \$ _____
with an alternate order of removal to
- Respondent's application for asylum was () granted () denied
() withdrawn.
- Respondent's application for withholding of removal was () granted
() denied () withdrawn.
- Respondent's application for cancellation of removal under section
240A(a) was () granted () denied () withdrawn.
- Respondent's application for cancellation of removal was () granted
under section 240A(b)(1) () granted under section 240A(b)(2)
() denied () withdrawn. If granted, it was ordered that the
respondent be issued all appropriate documents necessary to give
effect to this order.
- Respondent's application for a waiver under section _____ of the INA was
() granted () denied () withdrawn or () other.
- Respondent's application for adjustment of status under section _____
of the INA was () granted () denied () withdrawn. If granted, it
was ordered that respondent be issued all appropriate documents necessary
to give effect to this order.
- Respondent's status was rescinded under section 246.
- Respondent is admitted to the United States as a _____ until _____.
- As a condition of admission, respondent is to post a \$ _____ bond.
- Respondent knowingly filed a frivolous asylum application after proper
notice.
- Respondent was advised of the limitation on discretionary relief for
failure to appear as ordered in the Immigration Judge's oral decision.
- Proceedings were terminated.
- Other: _____

Date: May 27, 2003

Appeal Waived/Reserved Appeal Due By: _____

[Handwritten Signature]

WILLIAM L. ABBOTT
Immigration Judge



FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERAH NJOKI KARINGITHI,
Petitioner,

v.

MATTHEW G. WHITAKER, Acting
Attorney General,
Respondent.

No. 16-70885

Agency No.
A087-020-992

OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted October 11, 2018
San Francisco, California

Filed January 28, 2019

Before: M. Margaret McKeown, William A. Fletcher,
and Jay S. Bybee, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Immigration

The panel denied Serah Karingithi’s petition for review of the Board of Immigration Appeals’ denial of relief from removal, holding that a notice to appear that does not specify the time and date of an alien’s initial removal hearing vests an immigration judge with jurisdiction over the removal proceedings, so long as a notice of hearing specifying this information is later sent to the alien in a timely manner.

The Supreme Court recently held in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), that a notice to appear lacking the time and date of the hearing before an immigration judge is insufficient to trigger the stop-time rule for purposes of cancellation of removal relief. In light of *Pereira*, Karingithi argued that a notice to appear lacking the time and date of the hearing was insufficient to vest jurisdiction with the immigration court.

The panel rejected this argument. The panel noted that *Pereira* addressed the required contents of a notice to appear in the context of the stop-time rule and the continuous physical presence requirement for cancellation of removal under 8 U.S.C. §§ 1229(a), 1229b, but was not in any way concerned with the immigration court’s jurisdiction. The panel held that *Pereira*’s narrow ruling does not control the analysis of the immigration court’s jurisdiction because, unlike the stop-time rule, the immigration court’s

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

jurisdiction does not hinge on § 1229(a). The panel explained that the issue of immigration court jurisdiction is instead governed by federal immigration regulations, including 8 C.F.R. §§ 1003.13, 1003.14(a), 1003.15(b), which do not require that the charging document include the time and date of the hearing.

The panel noted that its reading of the regulations was consistent with the Board's recent decision in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018), which held that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . so long as a notice of hearing specifying this information is later sent to the alien." The panel also concluded that the Board's decision in *Bermudez-Cota* warranted deference.

Because the charging document in this case satisfied the regulatory requirements, and Karingithi received subsequent timely notices including the time and date of her hearing, the panel held that the immigration judge had jurisdiction over the removal proceedings.

The panel declined to consider Karingithi's argument, in the alternative, that *Pereira* renders her eligible for cancellation of removal, because cancellation relief was a new claim that was not part of the present petition for review.

The panel addressed the merits of Karingithi's petition for review of the denial of asylum and related relief in a contemporaneously filed memorandum disposition.

COUNSEL

Rudy Lieberman (argued), Law Office of Rudy Lieberman, San Francisco, California, for Petitioner.

Greg D. Mack (argued) and Leslie M. McKay, Senior Litigation Counsel; Terri J. Scadron, Assistant Director; Joseph H. Hunt, Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

Lonny Hoffman, Law Foundation Professor of Law, University of Houston Law Center, Houston, Texas, as and for Amicus Curiae.

OPINION

McKEOWN, Circuit Judge:

We consider whether the Immigration Court has jurisdiction over removal proceedings when the initial notice to appear does not specify the time and date of the proceedings, but later notices of hearing include that information. This question is governed by federal immigration regulations, which provide that jurisdiction vests in the Immigration Court when a charging document, such as a notice to appear, is filed. 8 C.F.R. §§ 1003.13, 1003.14(a). The regulations specify the information a notice to appear must contain; however, the time and date of removal proceedings are not specified. 8 C.F.R. § 1003.15(b). Because the charging document in this case satisfied the regulatory requirements, we conclude the Immigration Judge (“IJ”) had jurisdiction over the removal proceedings. This reading is consistent with the recent

interpretation of these regulations by the Board of Immigration Appeals (“BIA” or the “Board”), *see Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018), and the only other court of appeals to reach this issue, *see Hernandez-Perez v. Whitaker*, 911 F.3d 305, 310–15 (6th Cir. 2018). We also note that the petitioner, Serah Njoki Karingithi, had actual notice of the hearings through multiple follow-up notices that provided the date and time of each hearing.

The Supreme Court recently addressed the required contents of a notice to appear in the context of cancellation of removal under 8 U.S.C. §§ 1229(a), 1229b. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). *Pereira* was not in any way concerned with the Immigration Court’s jurisdiction. Rather, the Court considered what information a notice to appear must contain to trigger the stop-time rule, which determines whether a noncitizen has been continuously present in the United States long enough to be eligible for cancellation of removal. *Id.* at 2110; *see also* 8 U.S.C. § 1229b. Unlike the stop-time rule, the Immigration Court’s jurisdiction does not hinge on § 1229(a), so *Pereira*’s narrow ruling does not control our analysis. We conclude that the IJ had jurisdiction over Karingithi’s removal proceedings and that the Board properly denied her petition. We address the merits of Karingithi’s petition for review in a separate memorandum disposition filed contemporaneously with this Opinion.

BACKGROUND

Karingithi, a native of Kenya, entered the United States on July 7, 2006 on a tourist visa. She violated her visa’s terms by remaining in the United States past its six-month limit. On April 3, 2009, the Department of Homeland Security commenced removal proceedings by filing a notice

to appear with the Immigration Court, charging Karingithi with removability under 8 U.S.C. § 1227(a)(1)(B). The notice to appear specified the location of the removal hearing. The date and time were “To Be Set.” The same day, Karingithi was issued a notice of hearing, which provided the date and time of the hearing.

Karingithi conceded removability, but filed with the Immigration Court an application for asylum, withholding of removal, and protection under the Convention Against Torture. In the alternative, she requested voluntary departure. After multiple continuances spanning five years, as well as numerous hearing notices providing the date and time of proceedings, the IJ rejected all four grounds for relief, and ordered Karingithi removed. The BIA affirmed. Karingithi now challenges the IJ’s jurisdiction over her removal proceedings and the BIA’s decision.

ANALYSIS

The Attorney General has promulgated regulations governing removal proceedings, including when jurisdiction vests with the IJ. The relevant regulation, entitled “Jurisdiction and commencement of proceedings,” dictates that “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court.” 8 C.F.R. § 1003.14(a). A charging document is “the written instrument which initiates a proceeding before an Immigration Judge,” and one of the enumerated examples is a notice to appear. 8 C.F.R. § 1003.13.

Because both the regulation and a statutory provision, 8 U.S.C. § 1229(a), list requirements for the contents of a notice to appear, we consider whether their requirements differ, and if so, which authority governs the Immigration

Court’s jurisdiction. According to the regulation, a notice to appear must include specified information, such as “[t]he nature of the proceedings,” “[t]he acts or conduct alleged to be in violation of law,” and “[n]otice that the alien may be represented, at no cost to the government, by counsel or other representative.” 8 C.F.R. § 1003.15(b). Importantly, the regulation does not require that the time and date of proceedings appear in the initial notice. *See id.* Rather, the regulation compels inclusion of such information “*where practicable.*” 8 C.F.R. § 1003.18(b) (emphasis added). When “that information is not contained in the Notice to Appear,” the regulation requires the IJ to “schemul[e] the initial removal hearing and provid[e] notice to the government and the alien of the time, place, and date of hearing.”¹ *Id.*

Section 1229(a) requires that “[i]n removal proceedings . . . written notice (in this section referred to as a ‘notice to appear’) [] be given” to the noncitizen. The statute goes on to specify what information the notice must contain, and it largely mirrors the regulation’s requirements with one significant difference: it requires, without qualification, inclusion of “[t]he time and place at which the proceedings will be held.” 8 U.S.C. § 1229(a)(1)(G)(i). Notably, the statute is silent as to the jurisdiction of the Immigration Court. *See generally* 8 U.S.C. § 1229.

Karingithi argues that if a notice to appear does not state the time for her initial removal hearing, it is not only

¹ *Pereira* appears to discount the relevance of 8 C.F.R. § 1003.18 in the distinct context of eligibility for cancellation of removal. *See Pereira*, 138 S. Ct. at 2111. However, as discussed below, *Pereira*’s narrow holding does not govern the jurisdictional question that we address.

defective under § 1229(a), but also does not vest jurisdiction with the IJ. The flaw in this logic is that the regulations, not § 1229(a), define when jurisdiction vests. Section 1229 says nothing about the Immigration Court’s jurisdiction. And for their part, the regulations make no reference to § 1229(a)’s definition of a “notice to appear.” *See generally* 8 C.F.R. §§ 1003.13–1003.14. If the regulations did not clearly enumerate requirements for the contents of a notice to appear for jurisdictional purposes, we might presume they *sub silentio* incorporated § 1229(a)’s definition. *Cf. Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986) (“The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning.” (internal quotation marks omitted)). But the plain, exhaustive list of requirements in the jurisdictional regulations renders that presumption inapplicable here. Not only does that list not include the time of the hearing, reading such a requirement into the regulations would render meaningless their command that such information need only be included “where practicable.” 8 C.F.R. § 1003.18(b). The regulatory definition, not the one set forth in § 1229(a), governs the Immigration Court’s jurisdiction. A notice to appear need not include time and date information to satisfy this standard. Karingithi’s notice to appear met the regulatory requirements and therefore vested jurisdiction in the IJ.

Pereira does not point to a different conclusion. To begin, *Pereira* dealt with an issue distinct from the jurisdictional question confronting us in this case. At issue was the Attorney General’s statutory authority to cancel removal of “an alien who . . . has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of” her application for relief. 8 U.S.C. § 1229b(b)(1)(A). Under the statute’s

“stop-time rule,” the “period of . . . continuous physical presence” is “deemed to end . . . when the alien is served a notice to appear under section 1229(a).” 8 U.S.C. § 1229b(d)(1). In *Pereira*, the Court acknowledged that it decided only a single, “narrow question”: “If the Government serves a noncitizen with a document that is labeled ‘notice to appear,’ but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule?” *Pereira*, 138 S. Ct. at 2110. The Court held it did not, emphasizing multiple times the narrowness of its ruling. *See, e.g., id.* at 2110, 2113.

Pereira’s analysis hinges on “the intersection” of two statutory provisions: § 1229b(d)(1)’s stop-time rule and § 1229(a)’s definition of a notice to appear. *Id.* at 2110. The stop-time rule is not triggered by *any* “notice to appear”—it requires a “notice to appear *under section 1229(a)*.” 8 U.S.C. § 1229b(d)(1) (emphasis added). *Pereira* treats this statutory cross-reference as crucial: “the word ‘under’ provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by § 1229(a).” *Pereira*, 138 S. Ct. at 2117. There is no “glue” to bind § 1229(a) and the jurisdictional regulations: the regulations do not reference § 1229(a), which itself makes no mention of the IJ’s jurisdiction. *Pereira*’s definition of a “notice to appear *under section 1229(a)*” does not govern the meaning of “notice to appear” under an unrelated regulatory provision.

In short, *Pereira* simply has no application here. The Court never references 8 C.F.R. §§ 1003.13, 1003.14, or 1003.15, nor does the word “jurisdiction” appear in the majority opinion. This silence is hardly surprising, because the only question was whether the petitioner was eligible for cancellation of removal. *Pereira*, 138 S. Ct. at 2112–13.

The Court’s resolution of that “narrow question” cannot be recast into the broad jurisdictional rule Karingithi advocates.

The BIA recently issued a precedential opinion in which it rejected an argument identical to the one advanced by Karingithi. *Bermudez-Cota*, 27 I. & N. Dec. at 442–44. The BIA’s interpretations of its regulations are due “substantial deference,” and should be upheld “so long as the interpretation sensibly conforms to the purpose and wording of the regulations.” *Lezama-Garcia v. Holder*, 666 F.3d 518, 525 (9th Cir. 2011) (internal quotation marks omitted). We therefore defer to the Board’s interpretations of ambiguous regulations unless they are “plainly erroneous,” “inconsistent with the regulation,” or do “not reflect the agency’s fair and considered judgment.” *Id.* (internal quotation marks omitted). *Bermudez-Cota* easily meets this standard and is consistent with our analysis.

In *Bermudez-Cota*, the Board stated that “a notice to appear that does not specify the time and place of an alien’s initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . so long as a notice of hearing specifying this information is later sent to the alien.” *Id.* at 447. Regarding the regulations, the Board emphasized that 8 C.F.R. § 1003.14(a) does not “mandate that the [charging] document specify the time and date of the initial hearing before jurisdiction will vest” and that “8 C.F.R. § 1003.15(b) . . . does not mandate that the time and date of the initial hearing must be included in that document.” *Id.* at 445. The Board also noted that the regulations only require a notice to appear to include the “time, place and date of the initial removal hearing, *where practicable*.” *Id.* at 444 (quoting 8 C.F.R. § 1003.18(b)) (emphasis in original).

The BIA also found *Pereira*'s analysis inapplicable to the Immigration Court's jurisdiction, noting that "the respondent is not seeking cancellation of removal, and the 'stop-time' rule is not at issue, so *Pereira* is distinguishable." *Id.* at 443. The BIA placed significant weight on the fact that, in *Pereira*, "the Court did not purport to invalidate the alien's underlying removal proceedings or suggest that proceedings should be terminated." *Id.*

Recognizing the weakness of her jurisdictional argument, Karingithi urges, in the alternative, that *Pereira* renders her eligible for cancellation of removal. However, cancellation is a new claim that is not part of this petition for review. Karingithi has raised her cancellation claim in a motion to reconsider to the BIA, and she must await its determination. *See Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. 2018) (refusing to consider cancellation claim pending before BIA that had not been raised in initial administrative proceeding); *see also Garcia v. Lynch*, 786 F.3d 789, 792–93 (9th Cir. 2015) (noting that we cannot "reach[] the merits of a legal claim not presented in administrative proceedings below" (internal quotation marks omitted)).

The bottom line is that the Immigration Court had jurisdiction over Karingithi's removal proceedings. And, as in *Bermudez-Cota*, the hearing notices Karingithi received specified the time and date of her removal proceedings. Thus, we do not decide whether jurisdiction would have vested if she had not received this information in a timely fashion.

PETITION DENIED.

Challenging Agency Action in State and Federal Court

Moderator: Jeannie Kain, Esq.

Adriana Lafaille, Esq.

Emma Winger, Esq.

This article provides an overview of when and how to file a case in federal court.

When to File a Federal Suit

Mandamus:

A writ of mandamus is used to compel a federal official to take action that he/she is required to take. 28 USC §1361. In the immigration context, suits seeking a writ of mandamus may be filed when the U.S. Citizenship and Immigration Services (USCIS) or the State Department unreasonably delay action on a pending application for a benefit. Because mandamus is considered an “extraordinary remedy,” *ZigZag, LLC v. Kerry*, No. 14-cv-14118, 2015 WL 1061503, at *3 n.2 (D. Mass. Mar. 10, 2015), a lawsuit should be filed only after inquiries have been made to the agency. More importantly, a mandamus action should not be filed if an application is pending within the normal processing times for such application type. The goal of a mandamus action is to obtain an order from the district court for the agency to adjudicate an application within a certain period of time. Alternatively, USCIS might act on the pending application when served with the mandamus complaint.

Mandamus may also be used in certain circumstances to challenge the denial of a visa or other benefit. But the party seeking mandamus must show that: “(1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available.” *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997); *see also Camilo-Montoya v. United States*, 23 F.3d 394, 394 (1st Cir. 1994) (unpublished table opinion).

Suits relating to naturalization:

A noncitizen whose application for naturalization is not resolved 120 days after his interview may bring suit under 8 USC §1447(b). Section 1447(b) allows the district court to remand the case to USCIS or adjudicate the naturalization application in the first instance. But courts frequently prefer to remand. Federal district courts also have jurisdiction to review denials of naturalization de novo under 8 USC §1421(c).

Habeas corpus petitions:

Habeas corpus is used to challenge the legality of detention. Habeas should generally not be used to challenge the merits of a removal order or raise claims that can be raised in the removal proceeding. If it will not cause long delays, it is advisable to exhaust any administrative remedies by raising the appropriate arguments before the immigration judge (or, in the post-order context,

directly with the Department of Homeland Security (DHS)), but a failure to exhaust should not strip the district court of jurisdiction over a habeas petition.

In *Jennings v. Rodriguez*, 138 S. Ct. 80 (2018), the Supreme Court rejected limiting constructions of certain immigration detention statutes, which had been interpreted by the Ninth Circuit to authorize no-bond detention only for six months. The Court remanded for consideration of the petitioners' due process claims. Following *Jennings*, issues relating to the duration of detention, and other issues, must be litigated as due process rather than statutory violations. But the type of legal claim a client may have may depend on the statutory basis for her or his detention.

- Pre-order detention under 8 USC §1226(a) [INA §236(a)]: Section 1226(a) is the default detention authority that applies to noncitizens in removal proceedings under 8 USC §1229a [INA §240] if they are not subject to mandatory detention or arriving aliens (see below). Noncitizens detained under §1226(a) receive an initial custody determination by DHS and have the right to a custody redetermination (bond hearing) in front of an immigration judge. 8 CFR §§1003.19, 1236.1(d). A noncitizen who has been denied bond may request bond upon a showing of materially changed circumstances. 8 USC §1003.19(e). The Board of Immigration Appeals (BIA) has placed the burden of proof on the noncitizen at bonds hearings. *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009).

Although a noncitizen may not challenge a discretionary bond denial in a habeas, 8 USC §1226(e), he may raise constitutional claims or questions of law. For example, some noncitizens have relied on case law from other areas of civil detention in order to challenge denials of due process, the burden and standard of proof (arguing that it should be on the agency, not the noncitizen), and the lack of periodic review. *See, e.g., Pensamiento v. McDonald*, 315 F. Supp. 3d 684 (D. Mass. 2018) (holding due process required that government bear burden to prove to satisfaction of immigration judge that noncitizen is dangerous or a flight risk), *appeal pending*, 1st Cir. No. 18, 1691.

- Pre-order detention under 8 USC §1226(c) [INA §236(c)] (mandatory detention): Section 1226(c) prohibits the release on bond of certain noncitizens subject to criminal and terrorism-related grounds of removability. It requires the government to take custody of noncitizens subject to these enumerated grounds “when” they are “released” from criminal custody for a predicate offense; it then prohibits the release on bond of certain noncitizens. Under *Matter of Joseph*, 22 I&N Dec. 799, 801 (BIA 1999), a noncitizen may escape §1226(c) and obtain a bond hearing if an immigration judge determines that DHS is “substantially unlikely” to establish the underlying removability charge. Section 1226(c) is the subject of ongoing litigation:

Nielsen v. Preap, argued October 10, 2018 at the Supreme Court, asks the Court to resolve whether §1226(c) mandates detention without bond for noncitizens who were not detained “when . . . released” from the predicate criminal custody. Under a May 2014 injunction in *Gordon v. Johnson* (D. Mass. 13-30146) and covering

Massachusetts detainees, §1226(c) applies only to noncitizens detained “when . . . released” from criminal custody. Thus, anyone in Massachusetts who was out of custody for more than two business days after their release from criminal custody for a §1226(c) predicate offense before being detained by DHS is a *Gordon* class member and entitled to be treated as §1226(a) detainee and to receive an initial custody determination by DHS and a bond hearings. New Hampshire detainees are not covered by the *Gordon* injunction, and may need to separately litigate “when . . . released” issues prior to a decision in *Preap*. For more information, contact alafaille@aclum.org.

Reid v. Donelan (D. Mass. 13-30125) addresses the permissible duration of no-bond detention under §1226(c). The class-wide injunction that provided bond hearings at the six month mark has been vacated following *Jennings*, and the case remains pending at the district court.

Other claims: Noncitizens have also argued that they are not subject to §1226(c) if they were never incarcerated for the predicate crime (and thus were not “released” within the meaning of §1226(c)). Others have challenged the sufficiency of the hearing available under *Matter of Joseph, supra*.

- Pre-order detention under 8 USC §1225(b) [INA §235(b)] (arriving aliens): The government applies §1225(b) to detain noncitizens who arrive at a port of entry and are held pending credible fear proceedings and/or placed in removal proceedings under 8 USC §1229a. These noncitizens may be paroled into the United States, but Immigration Judges do not have jurisdiction over bond hearings for arriving aliens. 8 CFR §1003.19(h)(2)(i)(B). They include those who arrive without documents providing a basis for admission but establish a credible fear of persecution, *id.* §1225(b)(1)(B)(ii), and LPRs and others who present a basis for admission but are determined to be “not clearly and beyond a doubt entitled to be admitted” (for example, returning LPRs with criminal convictions), *id.* §1225(b)(2)(A). In *Jennings*, the Supreme Court determined that §1225(b) governs the detention these noncitizens until the completion of §1229a removal proceedings, and that it does not allow for bond hearings. Following *Jennings*, noncitizens who are challenging the duration of their §1225(b) detention must do so on constitutional rather than statutory grounds.

Note that following *Jennings*, the Attorney General is poised to overrule *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005), which currently provides for bond hearings for “other aliens” described in §1225(b)(1)(A)(iii) (essentially, those who are apprehended near the border shortly after entry, and then pass credible fear). See *Matter of M-G-G-*, 27 I&N Dec. 467 (A.G. 2018). Separately, in *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) a class of asylum applicants who had passed their initial credible-fear review successfully challenged no-parole policies in several jurisdictions, and obtained an order requiring DHS to provide individualized parole determinations.

- Post-order detention under 8 USC §1231(a): Detention of a noncitizen subject to a final order of removal is governed by 8 USC §1231(a). Section §1231(a)(2) requires detention for the first 90 days after a final order (the “removal period”) and §1231(a)(6) then permits further detention beyond that period for broad categories of noncitizens. Note that if judicial review is sought, and removal is stayed by a Court of Appeals (or a stay application to the Court of Appeals remains pending) detention should continue to be governed by the applicable pre-order provision until the stay request or petition for review is denied, see *id.* §1231(a)(1)(B)(ii); *see also Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 n.5 (9th Cir. 2008). But courts and the government frequently are confused about that point.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court determined that detention under §1231(a) is limited to a time reasonably necessary to effectuate removal, and set six months as a guidepost for lower courts. Although DHS is required to conduct its own custody reviews, noncitizens not released by DHS may file habeas petitions under *Zadvydas*. Frequently, the mere filing of a habeas petition can trigger the release of a noncitizen. If a petition provides “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,” the district court should order the government to provide evidence to rebut that showing. *Id.* at 701.

Do not be afraid to file habeas petitions before the six month mark! Note that while six months is a *presumptively* reasonable period, it is not a floor. Noncitizens who have been granted withholding or relief under the Convention Against Torture, or who are unlikely to be deported for other reasons (e.g. Vietnamese individuals who arrived before July 12, 1995, and others whose unique circumstances make removal very unlikely) have a particularly strong claim that the government should be put to its burden well before the six month mark to demonstrate a likelihood of removal. That said, courts are often confused about this, and these habeas petitions should be accompanied by thoughtful legal argument.

Also note that several decisions in the District of Massachusetts have granted habeas relief (release, or a further proceeding to determine custody) on the basis of violations of the post-order custody determination requirements of 8 CFR §241.4. *See, e.g., Calderon Jimenez v. Cronen*, 317 F. Supp. 3d 626 (D. Mass. 2018); *Rombot v. Souza*, 296 F.Supp.3d 383, 388 (D. Mass. 2017).

Using habeas to challenge removal:

Note that a growing number of cases have successfully used habeas corpus to challenge removal. The key for jurisdiction in these cases in the face of 8 USC §1252 has been the unavailability or inadequacy of relief through the ordinary administrative process, and the request that a federal court intervene to do nothing more than ensure that a noncitizen’s legal claim can be meaningfully considered by the deciding agency. Federal courts have thus found they have jurisdiction to stay removal in order to ensure access to the motion to reopen process, *see Devitri v. Cronen*, 290 F.Supp.3d 86, 90 (D. Mass. 2017), or to protect access to the provisional waiver

process, *see Celderon Jimenez v. Nielsen*, No. CV 18-10225-MLW, 2018 WL 4539687 (D. Mass. Sept. 21, 2018), for example. Finally, many judges have been willing to stay removal while they sort out jurisdictional issues.

Preparing and Filing Suit in the U.S. District Court

Once counsel decides to file suit in federal court to seek either a writ of mandamus or habeas corpus relief, the next step in the process is to prepare and file the complaint. Familiarity with the Federal Rules of Civil Procedure, Local Rules of the District Court, and the Federal Rules of Evidence are essential to properly manage the litigation.

In order to file suit in federal district court an attorney must either be admitted to the district court where the action is filed or obtain sponsorship from another attorney who is admitted to that particular court. A sponsoring attorney must file a motion for admission pro hac vice on the non-member's behalf. *See MA District Court Local Rules 83.5.2 and 83.5.3*. Courts charge a fee for an attorney to be admitted to the district court and also charge a fee to file the motion for admission pro hac vice.

The Federal Rules of Civil Procedure requires a pleading to state a claim for relief including a short statement of the grounds for jurisdiction, a short statement of the claim, and a demand for relief. *See F.R.C.P. Rule 8*. Components of a complaint or petition should include some or all of the following sections: (1) a brief introduction to state the basics of the case and the reason for filing the complaint; (2) a statement about jurisdiction and venue which sets forth the statutory basis for the case and why venue in the court where the action is filed is appropriate; (3) the names and locations of all plaintiffs and defendants; (4) a statement of the facts; (5) a short description of the causes of action; and (6) prayers for relief. Particularly if the case involves complex legal issues, it may also be helpful to provide a legal background section that explains the legal issues in the case (but does not necessarily need to argue them fully). It may be useful to attach exhibits to the complaint, particularly key documents such as the decision denying bond to your client, if applicable. Some practitioners include a section demonstrating exhaustion of administrative remedies, but the panelists urge practitioners to consider instead describing proceedings in front of the agency in the facts section, as exhaustion of administrative remedies is not required. In federal court all exhibits must be reviewed carefully and dates of birth and names of minor children must be redacted; you may also wish to redact your client's A number and other information.

Defendants in an immigration related case will vary depending on the type of action filed.

Mandamus:

The proper parties to sue in a mandamus action may include: (1) the U.S. Attorney General; (2) the Secretary of the Department of Homeland Security; and/or (3) the agency with jurisdiction over the application, namely U.S. Citizenship and Immigration Service, which can be either a Service Center or the Field Office where the application is pending. Each defendant should be named as a party to the complaint along with the plaintiff(s).

Habeas Corpus:

In a habeas corpus proceeding the defendants generally should include the Sheriff and Superintendent of the facility where the plaintiff is detained. They may also include the U.S. Attorney General, the Secretary of the Department of Homeland Security, and/or U.S. Immigration and Customs Enforcement, including the Field Office Director with jurisdiction over the plaintiff's custody. Each defendant should be named as a party in the complaint along with the plaintiff(s).

Effective January 1, 2009 the United States District Court for the District of Massachusetts required all attorneys to register with the Court's Case Management/Electronic Case Files (CM/ECF) system and to file new civil cases electronically. *See MA District Court Local Rule 5.4*. All case related fees, including civil case openings (complaints), notices of appeal and motions to appear *pro hac vice*, must be paid by credit card in conjunction with CM/ECF and Pay.gov. *See MA District Court Local Rules 5.4 and 67.4*. In addition to the complaint, to open a case, counsel also must file a Civil Cover Sheet and a Category Form, both of which can be found on the District Court's website. For Massachusetts cases, the court's website can be found at <http://www.mad.uscourts.gov>. Attorneys should review the Local Rules of each district court and all CM/ECF requirements carefully to ensure compliance with the court's practice and procedure.

A well-crafted complaint will allow government attorneys and the court to quickly and easily grasp the basis for the filing and the legal issues associated with the claim. A well-written complaint will further help attorneys manage all negotiations with the government and all hearings before the court throughout the course of the litigation and may also facilitate settlement discussions at an early stage in the litigation.

After Suit is Filed

Once counsel has filed a complaint with the district court, the clerk should issue a case number and assign a district court judge and a magistrate judge. District court processes vary, but for a mandamus, the clerk generally either will generate a summons or file-stamp a pre-prepared summons. Counsel then must serve the summons and complaint on the defendants. Federal Rule of Civil Procedure 4(i) sets forth the manner of service requirements for the summons and complaint in suits against the United States and its agencies and officers. The rule also allows for reasonable time to cure deficiencies in service provided that the United States Attorney or the Attorney General has been served. Fed. R. Civ. P. 4(i)(4). Counsel then must inform the district court that she served the summons and complaint, either by filing an affidavit of service or return of service, both of which require listing the names, positions and addresses of the parties served and the method of service.

For habeas petitions, the petitioner need not effect service. After the petition has been pre-screened by the district court, the court will direct the clerk to effect service. Attorneys from the local U.S. Attorney's Office or the Office of Immigration Litigation (a division within the Civil Division of the U.S. Department of Justice) generally represent the government. If a party, including the government, has legal representation, pleadings must be served on counsel "unless

service upon the party is ordered by the court.” Fed. R. Civ. P. 5(b). All future pleadings after the filing of the complaint must be filed with a certificate of service. Fed. R. Civ. P. 5(d).

After counsel files the complaint, the clerk’s office may provide all parties with written notice of the opportunity to consent to proceed with the case before the magistrate judge rather than the district court. *See generally* 28 USC §636(c); Fed. R. Civ. P. 73. Thus, attorneys may need to make a determination regarding whether to consent to proceed before a magistrate. If either party does not consent, however, the case will proceed before the district court judge.

After the complaint is filed and served in a suit against the United States, a federal agency or a federal officer, or employee in an official capacity, the government has 60 days to either file an answer or a defensive motion. In habeas cases in the District of Massachusetts, the government is typically given 21 days to respond. In mandamus actions, often the mere filing of the complaint will trigger adjudication of the immigration application or petition.

If the case is not resolved shortly after filing, the government’s typical response is to file a motion to dismiss. The most common types of motions to dismiss in immigration cases are those based on a lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)) and/or based on a failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). In both types of motions, the court must accept the factual allegations in the complaint as true.

Most habeas petitions and mandamus actions are resolved without discovery.¹ The court may resolve the case by denying the motion to dismiss and granting habeas corpus at the same time, thereby eliminating the need for any further motion practice. Some cases, however, may go on to discovery and summary judgment or trial. Summary judgment motions are appropriate for cases that raise pure legal issues or where no material facts are in dispute. The moving party must show that “there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. Either party may move for summary judgment on all or part of a claim. The court will view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.

As with any district court filing, when responding to a dispositive motion, it is important to review the Federal Rules of Civil Procedure, the local rules, and the judge’s standing orders to ascertain the due date, formatting requirements (including page limit, font size, and footer contents) and content requirements. Most government attorneys will not oppose, and most

¹ Litigants have the following discovery tools available: (a) the answer to the complaint, Fed. R. Civ. P. 12; (b) initial disclosures, Fed. R. Civ. P. 26; (c) interrogatories, Fed. R. Civ. P. 33; (d) requests for admission, Fed. R. Civ. P. 36; (e) depositions, Fed. R. Civ. P. 30; (f) requests for production/inspection, Fed. R. Civ. P. 34; and (g) third-party subpoenas, Fed. R. Civ. P. 45. Discovery is a two-way street, so counsel must advise that, if the case proceeds to discovery, the plaintiff may have to answer interrogatories, testify in a deposition, and/or submit to a medical/psychological examination (Fed. R. Civ. P. 35). Because there are special concerns attached to representing undocumented plaintiffs, counsel should consider pursuing a protective order in discovery to limit discovery about immigration status and/or foreclose the use in other contexts of information about a client’s immigration status obtained through discovery.

courts will grant, a reasonable request for an extension of time to respond. Most courts require counsel to notice a hearing date to argue the motion. Even if a hearing date is noticed, the court can cancel the hearing and elect to rule on the motion without argument.

Settlement discussions can take place at any time. Attorneys are ethically obligated to inform their clients of any settlement offer and the decision to accept or deny settlement rests exclusively with the client. In some jurisdictions, the government is reluctant to allow its agents to submit to deposition testimony and will attempt to negotiate resolution before discovery. In other jurisdictions, the government may be willing to try its luck at summary judgment. As a general rule, the denial of either a motion to dismiss or a motion for summary judgment filed by the government usually provides a good opportunity to negotiate.

If the district court ultimately resolves all or some of the claims in the noncitizen's favor, attorneys should consider seeking reimbursement of attorney fees and cost. In habeas corpus and mandamus actions, counsel may seek fees under the Equal Access to Justice Act, 28 USC §2412(d) & 5 USC §504 et seq. If the noncitizen loses in district court, she has 60 days after the judgment or order is entered by the district court to file an appeal. Fed. R. App. P. 4(a)(1)(B).



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF THE TRIAL COURT
John Adams Courthouse
One Pemberton Square, Floor 1M
Boston, Massachusetts 02108
617-878-0203

Paula M. Carey
Chief Justice of the Trial Court

Jonathan S. Williams
Court Administrator

Executive Office Transmittal 18-21

To: Judges, Clerks, Registers, Chief Probation Officers, and Chief Court Officers

From: Chief Justice Paula M. Carey *PAC*

cc: Jonathan Williams, Court Administrator, Departmental Chief Justices, Probation Commissioner, Jury Commissioner, Deputy Court Administrators, OCM Directors

Date: November 30, 2018

Re: **Revised language for state writs of habeas corpus issued for individuals in ICE custody**

The United States Immigration and Customs Enforcement (ICE) has requested that, in matters in which state courts issue a writ of habeas corpus for a person held in ICE custody, the writ include language guaranteeing that, upon the conclusion of the state proceeding, the state will return the person to ICE's custody. After careful consideration of ICE's request, the Trial Court has come to the conclusion that ICE's request is consistent with the law and does not run afoul of the Supreme Judicial Court's decision in *Lunn v. Commonwealth*, 477 Mass. 517 (2017). The Trial Court has decided to create a new writ of habeas corpus to reflect transportation practice and to ensure compliance with the law. Staff from the various court departments, in conjunction with the EOTC, worked together to draft the revised language.

A new writs of habeas corpus has been added into MassCourts for use in situations where a person held in ICE custody is being habed into a session. When a party informs the court that a person for whom a writ is to be issued is in ICE custody, a "Habeas Corpus for detainee in the custody of the United States Custom Enforcement" should be issued for that person's presence. To access the form in MassCourts, the court user will enter docket code "HABEICE", and complete all fields to generate the new ICE Habeas Corpus Writ which will now contain the following language:

Business User Guide: MassCourts Process to issue required Writ of Habeas Corpus for Detainee in custody of United States Custom Enforcement (ICE).

- To insure that an individual held in ICE custody at a state facility is transported to a scheduled court event, court users should utilize the **HABEICE** docket entry in MassCourts.
- The **HABEICE** docket code will result in the issuance of a writ of Habeas Corpus that will display specific language regarding the custody status of the United States Custom Enforcement. The writ of habeas corpus will also contain language that indicates if the detainee is to be transported to the court event as a defendant, witness or probationer.
- To obtain the ICE Habeas Corpus, the user should navigate to the case record on which the detainee is scheduled to appear. If the detainee is not the named defendant on the case and is scheduled to appear as a witness; the detainee must be added as a case witness.
 - **Adding Detainee as a Witness:** On the case summary screen, the court user should select "add party" in the party information section to open the party type selection screen. User shall select party type *Witness* to open the party maintenance screen. Search or enter all party information provided for the detainee and click Continue to return to party maintenance screen and click **SAVE** to add detainee as a witness.
- **Schedule the Court Event:** Before initiating the process for obtaining the ICE habeas corpus, the court user shall schedule the court event which will require the appearance of the detainee as a defendant or a witness.
- **Docketing the HABEICE Entry:** After the scheduled event has been added to the MassCourts case, the court user shall navigate to the docket entries section of the case summary screen and click "add docket entry". In the docket entry field add docket code "**HABEICE**" and select tab. Five variable fields

will be display for the user to enter the following:

- The name of the Institution where the party is being detained.
- The party or witness name.
- Select the scheduled event for the detainee to appear.
- Select the County location of the Sheriff who is responsible for arranging transportation of the ICE detainee
- Select the party type of the detainee [defendant, witness or probationer]
- After completion of all variable fields, click **SAVE**.
- **Issuing the ICE Habeas Corpus:** After saving the **HABEICE** docket entry, the court user may select dynamic link "Docket Notice Generation" or select "Continue" at the bottom of the docket maintenance screen. Either action will open notice generation screen for user to select "notice" to access the party selection screen for user to indicate the party name that will display on the Habeas Corpus document.
- **Printing and saving the completed ICE Habeas Corpus:** After selecting the party, the completed ICE Habeas Corpus form will display. Two copies of the form will print, one to be forwarded to the Institution and one for the court file. Court user to print the form and then select the green "SAVE FORM" box.
- **ICE Habeas Corpus Smart Form:** The ICE Habeas Corpus form is produced in MassCourts as a smart form and will be auto-imaged to the MassCourts case record. No additional scanning is necessary. The court user should retain a signed or executed copy for the case file and transmit a signed copied to the Institution presently holding the detainee in custody.

HABEAS CORPUS FOR DETAINEE IN THE CUSTODY OF THE UNITED STATES CUSTOM ENFORCEMENT INSTITUTION'S COPY		DOCKET NUMBER	Trial Court of Massachusetts 
DEFENDANT - DETAINEE NAME		COURT NAME & ADDRESS	
SAMPLE			
DOB	GENDER	SSN	PCF NUMBER
NAME & ADDRESS OF INSTITUTION		NEXT EVENT DATE & TIME	
		AAAAAAAAAA DEFENDANT-DETAINEE MUST APPEAR AT ABOVE COURT ON THIS DATE AND TIME	
TO THE OFFICIAL IN CHARGE OF THE INSTITUTION NAMED ABOVE: You are hereby ORDERED to bring the defendant - detainee named above, who is presently in your custody, before this court on the date and time noted above for the event indicated. If the defendant - detainee is transferred from your facility prior to the appearance date, please transmit this writ with the defendant - detainee to the new facility. If the defendant - detainee is released from custody prior to the appearance date, please notify the court immediately. FURTHER ORDER OF THE COURT: The defendant - detainee shall be returned to ICE immediately after the conclusion of the above referenced hearing or if the defendant - detainee is taken into custody following the hearing, immediately after the defendant - detainee is released from that custody, by the state, county or local entity having custody of the defendant - detainee at that time. The Sheriff shall make the necessary arrangements, including but not limited to providing transportation, to insure the presence in court for the above-referenced hearing and his or her return to ICE's custody at the conclusion of the state's custody. ADDITIONAL ORDERS OF THE COURT:			
TESTE OF FIRST JUSTICE		DATE ISSUED	SIGNATURE OF CLERK-MAGISTRATE / ASST. CLERK
WITNESS:			X
RETURN OF SERVICE			
I certify that: <input type="checkbox"/> I have produced the defendant-detainee named above in court as ordered. <input type="checkbox"/> I am unable to produce the defendant-detainee and I am returning this writ to the court because:			
DATE OF RETURN	SIGNATURE OF PERSON MAKING RETURN		TITLE OF PERSON MAKING RETURN
	X		X

HABEAS CORPUS FOR DETAINEE IN THE CUSTODY OF THE UNITED STATES CUSTOM ENFORCEMENT COURT COPY		DOCKET NUMBER	Trial Court of Massachusetts
DEFENDANT - DETAINEE NAME		<div style="text-align: center; font-size: 2em; font-weight: bold;">SAMPLE</div>	
DOB	GENDER		
NAME & ADDRESS OF INSTITUTION		COURT NAME & ADDRESS	
		NEXT EVENT DATE & TIME	
		AAAAAAAAAAAAAA DEFENDANT-DETAINEE MUST APPEAR AT ABOVE COURT ON THIS DATE AND TIME	
TO THE OFFICIAL IN CHARGE OF THE INSTITUTION NAMED ABOVE: You are hereby ORDERED to bring the defendant - detainee named above, who is presently in your custody, before this court on the date and time noted above for the event indicated. If the defendant - detainee is transferred from your facility prior to the appearance date, please transmit this writ with the defendant - detainee to the new facility. If the defendant - detainee is released from custody prior to the appearance date, please notify the court immediately. FURTHER ORDER OF THE COURT: The defendant - detainee shall be returned to ICE immediately after the conclusion of the above referenced hearing or if the defendant - detainee is taken into custody following the hearing, immediately after the defendant - detainee is released from that custody, by the state, county or local entity having custody of the defendant - detainee at that time. The Sheriff shall make the necessary arrangements, including but not limited to providing transportation, to insure the presence in court for the above-referenced hearing and his or her return to ICE's custody at the conclusion of the state's custody. ADDITIONAL ORDERS OF THE COURT: 			
TESTE OF FIRST JUSTICE		DATE ISSUED	SIGNATURE OF CLERK-MAGISTRATE / ASST. CLERK
WITNESS:			X
RETURN OF SERVICE			
I certify that: <input type="checkbox"/> I have produced the defendant-detainee named above in court as ordered. <input type="checkbox"/> I am unable to produce the defendant-detainee and I am returning this writ to the court because:			
DATE OF RETURN	SIGNATURE OF PERSON MAKING RETURN		TITLE OF PERSON MAKING RETURN
	X		X

Amended Writ of Habeas Corpus for Persons in ICE Custody

Authored by: Kevin Buckley

Publish: 1/15/2019 10:34:00 AM

Last update: 1/15/2019 12:54:43 PM

Executive Office Transmittal 19-3 Regarding the Amended Writ of Habeas Corpus for Persons in ICE Custody

To: Judges, Clerk Magistrates, Registers, Chief Probation Officers, and Chief Court Officers

Executive Office Transmittal 19-3

From: Chief Justice of the Trial Court Paula M. Carey and Court Administrator Jonathan S. Williams

January 15, 2019

As a follow-up to [Executive Office Transmittal 18-21](#), titled “Habeas Corpus for detainee in the custody of the United States Custom Enforcement,” a writ of habeas corpus has been added to MassCourts for use in situations where a person in the custody of the United States Immigration and Customs Enforcement (ICE) is being “habed” into a session. This Transmittal provides additional guidance regarding the procedure to be followed in such a situation.

- The new writ of habeas corpus for a detainee in ICE’s custody requires the Court to designate a county sheriff to transport the detainee to and from court. At present, ICE does not have a facility in Massachusetts where it houses detainees in its custody; rather, ICE has entered into agreements with the Sheriffs of Suffolk, Plymouth, and Bristol Counties whereby those sheriffs house detainees in ICE’s custody.

Accordingly, when issuing a writ of habeas corpus for a detainee in ICE’s custody, the Court should order the Sheriff who is housing the detainee to transport the detainee to and from court. The Suffolk, Plymouth, and Bristol County Sheriffs have acknowledged their understanding that, pursuant to the new writ of habeas corpus for a detainee in ICE’s custody, they will be ordered to transport ICE detainees in their physical custody to and from court.

The parties to the matter in which the ICE detainee's presence is requested are responsible for informing the court where the detainee is being held.

- The court issuing the writ of habeas corpus for a person in ICE's custody should make a photocopy of the "institution's copy" and fax the photocopy to ICE's Massachusetts Field Office at the following fax number: (781) 359-7589. A directive that a photocopy of the writ should be faxed to ICE's Massachusetts Field Office has been added to the writ.

HABEAS CORPUS FOR DETAINEE IN THE CUSTODY OF THE UNITED STATES CUSTOM ENFORCEMENT <i>INSTITUTION'S COPY</i>	DOCKET NUMBER 1653CR999888	Trial Court of Massachusetts District Court Department 
--	--	--

DEFENDANT - DETAINEE NAME JOE TEST				COURT NAME & ADDRESS Woburn District Court 30 Pleasant Street Woburn, MA 01801 (781)935-4000	
DOB 01/01/1970	GENDER Male	SSN 123-45-6789	PCF NUMBER		

NAME & ADDRESS OF INSTITUTION MCI - Cedar Junction (at Walpole) Route 1A PO Box 100 South Walpole, MA 02071				NEXT EVENT DATE & TIME 04/15/2017 09:35 AM Bench Trial (CR)	
				AAAAAAAAAAAA DEFENDANT-DETAINEE MUST APPEAR AT ABOVE COURT ON THIS DATE AND TIME	

TO THE OFFICIAL IN CHARGE OF THE INSTITUTION NAMED ABOVE:

You are hereby ORDERED to facilitate the transfer of the defendant - detainee named above, who is presently in your custody, before this court on the date and time noted above for the event indicated.

If the defendant - detainee is transferred from your facility prior to the appearance date, please transmit this writ with the defendant - detainee to the new facility. If the defendant - detainee is released from custody prior to the appearance date, please notify the court immediately.

FURTHER ORDER OF THE COURT:

The defendant - detainee shall be returned to ICE immediately after the conclusion of the above referenced hearing or if the defendant - detainee is taken into custody following the hearing, immediately after the defendant - detainee is released from that custody, by the state, county or local entity having custody of the defendant - detainee at that time.

The Middlesex County Sheriff shall make the necessary arrangements, including but not limited to providing transportation, to insure the defendant's presence in court for the above-referenced hearing and his or her return to ICE's custody at the conclusion of the state's custody.

ADDITIONAL ORDERS OF THE COURT:

THIS IS A TEST.

Immediately upon issuance of this document, the Clerk shall fax a photocopy of this Habeas Corpus writ to ICE's Massachusetts Field Office at the following fax number: (781)-359-7589

TESTE OF FIRST JUSTICE WITNESS: Hon. Marianne C Hinkle	DATE ISSUED 12/14/2018	SIGNATURE OF CLERK-MAGISTRATE / ASST. CLERK X
--	----------------------------------	---

RETURN OF SERVICE

I certify that:

- I have produced the defendant-detainee named above in court as ordered.
- I am unable to produce the defendant-detainee and I am returning this writ to the court because:

DATE OF RETURN	SIGNATURE OF PERSON MAKING RETURN X	TITLE OF PERSON MAKING RETURN X
----------------	---	---

HABEAS CORPUS FOR DETAINEE IN THE CUSTODY OF THE UNITED STATES CUSTOM ENFORCEMENT COURT COPY		DOCKET NUMBER 1653CR999888	Trial Court of Massachusetts District Court Department 
---	--	--------------------------------------	--

DEFENDANT - DETAINEE NAME JOE TEST				COURT NAME & ADDRESS Woburn District Court 30 Pleasant Street Woburn, MA01801 (781)935-4000	
DOB 01/01/1970	GENDER Male	SSN 123-45-6789	PCF NUMBER		

NAME & ADDRESS OF INSTITUTION MCI - Cedar Junction (at Walpole) Route 1A PO Box 100 South Walpole, MA 02071				NEXT EVENT DATE & TIME 04/15/2017 09:35 AM Bench Trial (CR)	
				^^^^^^^^^^^ DEFENDANT-DETAINEE MUST APPEAR AT ABOVE COURT ON THIS DATE AND TIME	

TO THE OFFICIAL IN CHARGE OF THE INSTITUTION NAMED ABOVE:

You are hereby ORDERED to facilitate the transfer of the defendant - detainee named above, who is presently in your custody, before this court on the date and time noted above for the event indicated.

If the defendant - detainee is transferred from your facility prior to the appearance date, please transmit this writ with the defendant - detainee to the new facility. If the defendant - detainee is released from custody prior to the appearance date, please notify the court immediately.

FURTHER ORDER OF THE COURT:

The defendant - detainee shall be returned to ICE immediately after the conclusion of the above referenced hearing or if the defendant - detainee is taken into custody following the hearing, immediately after the defendant - detainee is released from that custody, by the state, county or local entity having custody of the defendant - detainee at that time.

The Middlesex County Sheriff shall make the necessary arrangements, including but not limited to providing transportation, to insure the defendant's presence in court for the above-referenced hearing and his or her return to ICE's custody at the conclusion of the state's custody.

ADDITIONAL ORDERS OF THE COURT:

THIS IS A TEST.

Immediately upon issuance of this document, the Clerk shall fax a photocopy of this Habeas Corpus writ to ICE's Massachusetts Field Office at the following fax number: (781)-359-7589

TESTE OF FIRST JUSTICE WITNESS: Hon. Marianne C Hinkle	DATE ISSUED 12/14/2018	SIGNATURE OF CLERK-MAGISTRATE / ASST. CLERK X
--	----------------------------------	---

RETURN OF SERVICE

I certify that:

- I have produced the defendant-detainee named above in court as ordered.
- I am unable to produce the defendant-detainee and I am returning this writ to the court because:

DATE OF RETURN	SIGNATURE OF PERSON MAKING RETURN X	TITLE OF PERSON MAKING RETURN X
----------------	---	---

Challenging Agency Action in Federal and State Court

Supplemental Cases and Notes

By Adriana Lafaille, Emma Winger, and Jeannie Kain

I. Habeas

“Our recent decisions have reasoned from the premise that habeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes.”

Hensley v. Mun. Court, San Jose Milpitas Jud. Dist., 411 U.S. 345, 349-50 (1973)
(internal quotations and citations omitted).

Challenges to detention – overview

- Pre-order detention
 - 8 U.S.C. § 1226(a)
 - 8 U.S.C. § 1226(c)
 - 8 U.S.C. § 1225(b)
- Post-order detention
 - 8 U.S.C. § 1231 and 8 C.F.R. §§ 241.4, 241.13
- Detention in withholding-only proceedings: *Guerra v. Shanahan*, 810 F.3d 59 (2d Cir. 2016); but see *de Souza Neto v. Smith*, 272 F. Supp. 3d 228 (D. Mass. 2017)
- Note: *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)

Challenges to pre-order detention under § 1226(a)

- Caution: 8 U.S.C. § 1226(e)
- Improper burden of proof: *Pensamiento v. McDonald*, 315 F.Supp.3d 684 (D. Mass. 2018); *Diaz-Ortiz*, 18-cv-12600-PBS and *Doe v. Smith*, 18-cv-12266-PBS (argued 1/25/18)
- Denial of bond based on criminal arrest: *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993 (N.D. Cal. 2018)
- Failure to account for ability to pay and consider non-money alternatives: *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017)
- Improper reliance on deterrence of others: *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015)
- Other legal errors: *Zabaleta v. Decker*, 331 F. Supp. 3d 67 (S.D.N.Y. 2018)
- Redetention: *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1196–97 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018); *Zabaleta v. Decker*, 331 F. Supp. 3d 67 (S.D.N.Y. 2018); *Matter of Sugay*, 17 I. & N. Dec. 637, 640 (B.I.A. 1981)
- Mandatory detention under 8 C.F.R. § 1003.19(h)(2)(i)(C): *Torosyan v. Nielsen*, No. 218CV5873PSGSK, 2018 WL 5784708 (C.D. Cal. Sept. 27, 2018)

- Automatic stay under 8 C.F.R. 1003.19(i)(2): *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004)
- Periodic review: *Vallejo v. Decker*, No. 18-CV-5649, 2018 WL 3738947, at *5 n.6 (S.D.N.Y. Aug. 7, 2018)
- Watch for: *Matter of M-S-*, 27 I&N Dec. 476 (A.G. 2018) regarding possible overruling of *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005)

Challenges to pre-order detention under § 1226(c)

- *Gordon v. Napolitano*, 13-30146 (D. Mass.)
- *Reid v. Donelan*, 13-30125 (D. Mass)
- *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)
- “When released” and “released” issues: *Nielsen v. Preap*, SCOTUS 16-1363 (argued Oct. 10, 2018)
- Prolonged detention & burden of proof:
 - *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)
 - *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016)
 - *Sajous v. Decker*, No. 18-cv-2447, 2018 WL 2357266 (S.D.N.Y. May 23, 2018)

Challenges to pre-order detention under § 1225(b)

- *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)
- No-parole policy & failure to follow 2009 directive: *Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y. 2017); *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018)
- Improper consideration of deterrence: *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110 (D.D.C. 2018)
- Prolonged detention & burden of proof: *Bermudez Paiz v. Decker*, No. 18-cv-4759, 2018 WL 6928794 (S.D.N.Y. Dec. 27, 2018); *Pierre v. Doll*, No. 3:17-cv-1507, 2018 WL 5315203; (M.D. Pa. Oct. 26, 2018); *Lett v. Decker*, --- F.Supp.3d ---, 2018 WL 4931544 (S.D.N.Y. Oct. 10, 2018)

Challenges to post-order detention under § 1231(a): statutory framework

- 8 U.S.C. § 1231(a)(2) – removal period
- 8 U.S.C. § 1231(a)(6) – after removal period
- 8 C.F.R. § 241.4 – post-order custody regs
- 8 C.F.R. § 241.13 – PO CR after finding of no SLRRFF

Challenges to post-order detention under § 1231(a):

Zadvydas v. Davis, 533 U.S. 678 (2001) framework

- 6 months presumptively reasonable
- “After” 6 months, if noncitizen provides “good reason to believe” no SLRRFF...
- ...gov’t must provide evidence sufficient to rebut that showing.
- As detention gets longer, RFF gets shorter

Does Zadvydas allow pre-six month challenges to § 1231(a) detention?

- YES!
- Be undeterred by bad case law

CLAIMS:

- Impossibility of removal
- Award of CAT/WOR
- Detention otherwise not reasonably related to legitimate purposes of detention: Ragbir v. Sessions, No. 18-cv-236, 2018 WL 623557 (S.D.N.Y. Jan. 29, 2018)

Other challenges to post-order detention under § 1231(a):

- Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011)
- POCHR violations: Calderon Jimenez v. Cronen, 317 F. Supp. 3d 626 (D. Mass. 2018); Rombot v. Souza, 296 F.Supp.3d 383 (D. Mass. 2017); You v. Nielsen, 321 F. Supp. 3d 451, 463 (S.D.N.Y. 2018); but see Doe v. Smith, No. 18-cv-11363, 2018 WL 4696748 (D. Mass. Oct. 1, 2018)
 - When is the removal period over? See 8 U.S.C. § 1231(a)(1)(B); but see Rodriguez-Guardado v. Smith, 271 F. Supp. 3d 331, 334 (D. Mass. 2017) and de Souza Neto v. Smith, No. 17-cv-11979, 2017 WL 6337464 (D. Mass. Oct. 16, 2017) regarding extensions of the removal period under 8 U.S.C. § 1231(a)(1)(C).

Habeas to challenge removal

- Watch for jurisdictional bars at 8 U.S.C. § 1252(b)(9) and (g)
- Suspension clause: Compere v. Nielsen, No. 18-cv-1036, 2019 WL 332193 (D.N.H. Jan. 24, 2019); Calderon Jimenez v. Nielsen, 334 F. Supp. 3d 370 (D. Mass. 2018); Devitri v. Cronen, 289 F. Supp. 3d 287 (D. Mass. 2018); see also Osorio-Martinez v. Attorney Gen. United States of Am., 893 F.3d 153 (3d Cir. 2018); but see Hamama v. Adducci, -- F.3d --, Nos. 17-2171, 18-1233, 2018 WL 6722734 (6th Cir. Dec. 20, 2018).
- Flag: Third country removal issues

Parts of a habeas petition

- Intro
- Parties
- Jurisdiction and venue
- Exhaustion
- Facts
- Legal background (sometimes)
- Claims for relief
- Request for oral argument
- Prayer for Relief
- A note about citation and exhibits

Nuts and bolts of habeas litigation:

- Exhaustion – appeal to BIA?
- Filing your petition
- Service
- Emergency relief
- Motions to dismiss
- Hearings
- Discovery
- If your client is released during litigation, is the case moot?

II. Other Federal Claims

APA Review

- 5 U.S.C. §§ 701-706
- § 706(2)(A) allows court to set aside action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”

Mandamus

- 28 U.S.C. § 1361
- Making an “outside normal processing time” case inquiry
- Changes to USCIS processing times
- What if processing times are high for everyone? Haus v. Nielsen, 2018 WL 1035870 (N.D. Ill. Feb. 23, 2018)

Naturalizations delays

- Pre-interview delays
- 8 U.S.C. § 1447(b)

III. ICE Courthouse Arrests

The issues: Is it legal? Even if illegal, can anything be done?

- Case: Justice Cypher Decision, Matter of C. Doe, SJ-2018-0119 (Sept. 18, 2018), available at <https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/C.Doe-single-justice-decision.pdf>

IV. Criminal Prosecution for Interfering with ICE

<https://www.bostonglobe.com/metro/2018/12/01/newton-judge-role-reportedly-examined-after-immigrant-evades-ice/Mshdn3gIIPZhVA7mZ9fa3M/story.html>

- Statutes:
 - 18 U.S.C. § 1505 (Obstruction of proceedings before departments, agencies, and committees)

- 18 U.S.C. § 111 (impeding federal officers)
- 18 U.S.C. §§ 2, 3, 4 (aiding and abetting, accessory after the fact, misprision)
- 8 U.S.C. §1324 (harboring aliens)

V. Lunn and Reality

The issue: *Lunn v. Commonwealth*, 477 Mass. 517, 78 N.E.3d 1143 (2017)

VI. ICE Custody with Criminal Court

The issue: <https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/Habeing-defendants-from-ICE-January-2019-FINAL-with-attachments.pdf>

- Cases (all D. Mass.):
 - Pensamiento v. McDonald, No. 18-10475-PBS
 - Doe v. Tompkins, No. 18-12266-PBS
 - Ramirez v. Tompkins, No. 1:18-cv-12452-PBS
 - Alvarez Figueroa v. McDonald, No. 18-10097-PBS

VII. 287(g) and Arrest Authority

The issue: *Lunn v. INA 287(g)*

- Case: *Rivas v. Hodgson*, No. SJ-2017-323 (Mass.)

To Err is Human: Addressing Mistakes Made in Business Immigration Cases

By Leslie DiTrani, Cyrus D. Mehta, and Stephen Yale-Loehr*

Introduction

All attorneys make mistakes.¹ This is especially true in business immigration law, which is always in a state of flux. Business immigration has become especially prone to attack under the Trump administration, whose new mission is to protect U.S. workers under the Buy American and Hire American executive order,² not to welcome immigrants. An attorney who fails to keep abreast of the latest trends that result in adverse decisions can also be perceived by the client to have made a mistake when the client receives a denial.

This article first addresses the ethical bases for competence. It then discusses common mistakes in H-1B and labor certification cases, what to do when documentation does not turn out as anticipated, and how to deal with missed deadlines and incorrectly filed applications.

1. Ethical Basis for Competence

A brief overview of the ethical rules can help the lawyer competently and diligently represent clients, and thus minimize mistakes. Rule 1.1 of American Bar Association's Model Rules of Professional Conduct (Model Rule) imposes a duty of competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.³

Comment 1 to Rule 1.1 further states, “[i]n many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.”⁴ While the baseline for competence is that of a general practitioner, we posit that for a lawyer to be competent in business immigration, or for that matter any area of immigration law, the lawyer must have developed expertise in his or her area of specialization. As immigration law has been attracting lawyers from other fields, it is worth noting that an inexperienced lawyer is not prohibited from handling a novel matter, provided he or she can gain

* The authors thank Sophia Genovese, an Associate at Cyrus D. Mehta & Partners PLLC and Eleyteria Diakopoulos, a student at Brooklyn Law School, for their assistance.

¹ See, e.g., Cyrus D. Mehta & Anastasia Tonello, *Dealing with Mistakes and How to Avoid them in the Practice of Immigration Law*, AILA's 16th Annual NY CLE Handbook 28 (2013).

² Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 21, 2017), available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/>.

³ Model Rule of Professional Conduct 1.1 (2016).

⁴ *Id.* at Comment 1; see also 8 CFR §1003.102 (“Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”).

competence through necessary study or by associating with a lawyer of established competence in the field.⁵

Model Rule 1.3 requires that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” The duty of diligence is closely related to the duty of competence, and a violation of one often results in the violation of the other.

2. Legal Malpractice Liability

A lawyer is more likely to face malpractice liability, even for an isolated mistake, rather than professional discipline. While violation of an ethical rule should not in itself give rise to malpractice liability, a breach of such a rule could be used as evidence of a breach of an applicable standard of conduct. To establish that a lawyer was negligent in a malpractice case, the plaintiff must: 1) prove that an attorney-client relationship existed; 2) establish the standard of care in the community, which is established through expert witness testimony; and 3) provide that the client would have succeeded in the underlying matter “but for” the defendant attorney’s negligence.⁶ While it may not always be clear when the attorney-client relationship was established (and indeed the perception of the “client” may conflict with that of the attorney), the “but for” standard is a high bar and should put the brakes on frivolous law suits.

3. Common Mistakes in the H-1B and PERM Contexts

While a comprehensive catalogue of every potential mistake that can occur in immigration practice is beyond the scope of this article, we discuss some commonly encountered mistakes below to alert readers to them and thus endeavor to prevent them from happening.

In the business immigration arena, the potential for mistakes are immense. Indeed, the PERM labor certification process is so hyper-technical and time sensitive that even the best of attorneys can commit an error. If the attorney neglects to file the PERM within 180 days from the first advertisement, or files within 30 days of an advertisement (except one of the three for professional positions), the application will be denied.⁷ Such a denial may have devastating effects for a noncitizen who is about to start the sixth year of his or her H-1B status, since the filing of a new PERM in the sixth year will preclude the extension of the H-1B status beyond the sixth year under § 106(a) of the American Competitiveness in the Twenty-first Century Act of 2000.⁸ In other business areas too, the timely filing of an H-1B petition to be considered under the lottery for that fiscal year can be a high stakes game. If there is any error in the filing, such as an unsigned form or incorrect payment, it can result in a rejection and the petitioner will not be counted in the H-1B cap for the relevant fiscal year, and will have to wait for the following year.

In some cases, when a mistake has occurred, the lawyer should do whatever it takes to remedy the mistake. It would also be prudent to eat the costs if a re-filing can ameliorate the situation. Given that the employer must pay for all costs relating to a labor certification,⁹ it remains an

⁵ Comment 2 to Rule 1.1. *See also* parallel DHS disciplinary rule at 8 CFR §1003.102(o).

⁶ *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428 (2007).

⁷ 20 CFR §656.17(e).

⁸ USCIS Final Rule, *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 Fed. Reg. 82398 (Nov. 18, 2016, effective Jan. 17, 2017); *see also* 8 CFR §214.2(h)(13)(iii)(E).

⁹ 20 CFR §656.12(b).

open question whether the attorney can cover the costs of a labor certification as they relate to advertisements and recruitment. The prohibition, however, regarding reimbursing the employer for the costs relating to a labor certification, including attorney fees, apply to the alien and not to the attorney, and so it may be defensible if the attorney who made the error when preparing the PERM application covers the cost on behalf of the employer.¹⁰

There are also situations when the attorney may be responsible for the mistake of another, such as a credential evaluation agency. For example, if the attorney requests an evaluation from a professor, it is important to ensure that he or she is an official in a college who has authority to grant college level training or experience.¹¹ If the attorney fails to ensure this, U.S. Citizenship and Immigration Services (USCIS) will not recognize the evaluation, which in turn may jeopardize the H-1B petition. It is thus incumbent upon the attorney to ensure that the credential evaluation precisely meets one of the criteria in 8 CFR § 214.2(h)(4)(iii)(D) and not rely on the credential evaluation agency to do so. On the other hand, the attorney should not be faulted if the USCIS rejects a professor's subjective expert opinion on whether a position qualifies as a specialty occupation. So long as the attorney took reasonable care to ensure that the professor was qualified to render an expert opinion, the attorney can hardly be blamed if the USCIS disregards the opinion.¹²

Similarly, when the government changes its policy, as it did on March 31, 2017,¹³ by suddenly treating entry-level computer programmers unfavorably, an attorney ought not be blamed for failing to advise the employer about the risks of selecting this occupation. By contrast, an undetected mistake can explode after many years, thus magnifying the harm to the client. Assume, for an example, that an H-1B petition is selected under the master's cap in the FY 2013 H-1B lottery, but five years later and after a few extensions, USCIS discovers that the beneficiary graduated from a for-profit graduate school and should not have been selected in the master's cap in the first place. USCIS then denies the current H-1B extension request and revokes the prior H-1B petitions. It is debatable whether the attorney would be found to have violated either an ethical rule or be guilty of malpractice. The attorney can argue that USCIS did not question the master's degree five years ago. Even if the degree was from a for-profit university, it may have passed muster under §101(a) of the Higher Education Act of 1965 as the university must have been either a "public or other non-profit institution." A for-profit university could have arguably still been "public" under the law of the state if it awarded scholarships to low income students or accepted veterans. One could also argue that there was no way for the USCIS to prove whether the beneficiary was accepted under the master's or the regular cap. Of course, if the argument is unsuccessful, as evidenced by unpublished non-precedential decisions

¹⁰ FAQs on Final Rule to Reduce the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity (May 17, 2007), *available at* https://www.foreignlaborcert.doleta.gov/pdf/fraud_faqs_07-13-07.pdf.

¹¹ 8 CFR §214.2(h)(4)(iii)(D).

¹² In *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012), the Administrative Appeals Office (AAO) held that uncontroverted testimony of an expert is reliable, relevant, and probative as to the specific facts in issue.

¹³ See <https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf>.

of USCIS's Administrative Appeals Office,¹⁴ the client will have to qualify under a new H-1B cap and the beneficiary will no longer be able to work for the employer or even remain in the United States. The problem will likely be obviated if the beneficiary is selected under a new H-1B cap. If not, other alternative visa strategies should be considered on behalf of the beneficiary.

The bottom line is that a business immigration attorney must develop a high level of expertise, be proactive, and anticipate pitfalls that might trap the client even in the future. If a mistake occurs, even if the attorney may not have been found to have violated Rule 1.1, he or she could still be susceptible to malpractice liability. In such an instance, the attorney as defendant must be prepared to use an expert witness, and the side that prevails is based on whose expert witness was more convincing.

*Suppiah v. Kalish*¹⁵ highlights the importance of expert testimony in a malpractice action. In this case, the defendant lawyer filed a petition for a new H-1B visa instead of an extension because, he believed, the latter option was not possible since plaintiff could not establish that he had been continuously employed during his H-1B validity period.¹⁶ The plaintiff argued that the lawyer committed legal malpractice by not seeking to extend his status because securing a new visa required him to travel to Sri Lanka for consular processing, a country he deemed too dangerous to travel to. The plaintiff, having refused to travel to Sri Lanka, thus fell out of status and was terminated from his position.¹⁷ The lawyer moved for summary judgment and submitted plaintiff's employer's records as conclusive evidence that plaintiff's employment was terminated, and so extending the visa was not possible.¹⁸ The lawyer also argued that the plaintiff was responsible for the failure of the renewal strategy because he failed to maintain a current passport that would allow him to travel abroad for the visa. In opposition to the motion, plaintiff submitted an affidavit from an immigration law expert that opined that the lawyer had committed malpractice because he failed to take the position that plaintiff was benched, rather than terminated, for sixteen months, and was therefore continuously employed, thus allowing for an extension petition.

¹⁴ See, e.g., *Matter of C-C-C-, LLC*, ID# 394629, at 4 (AAO July 28, 2017) (finding that "the Petitioner provide[d] no evidence to demonstrate that the Beneficiary was approved under the regular H-1B Cap as asserted"); *Matter of R-, Inc.*, ID# 390599, at 4 (AAO May 11, 2017) (noting that "it was the Petitioner's affirmative choice to select the Master's Cap exemption and the regulations generally do not permit H-1B petitioners to claim eligibility under alternative grounds"); *Matter of S-S-0-, Inc.*, ID# 96174, at 3 (AAO Apr. 25, 2017) (similarly finding that the Petitioner could not argue on alternative grounds by citing to 8 CFR §214.2(h)(8)(ii)(B), which provides, "[p]etitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied").

¹⁵ 76 A.D. 3d 829, 832 (1st Dep't 2011).

¹⁶ 8 CFR §214.1(c)(4) ("An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status"); 8 CFR §214.2(h)(11)(iii)(A)(1) (a petition is subject to revocation if "[t]he beneficiary is no longer employed by the petitioner in the capacity specified in the petition").

¹⁷ *Suppiah v. Kalish*, *supra* note 15, at 830-31.

¹⁸ *Id.* at 831.

Although the dissent highlighted that the expert provided no basis in law to support either of these suggestions, the court nevertheless determined that the burden of proof rested with the defendant and he thus should have provided expert testimony that explained why an extension petition was not possible.¹⁹ The lawyer's lack of expert testimony was decisive in the denial of his motion for summary judgment even though the lawyer's strategy was not unethical and was probably within the standard of care for business immigration lawyers. Regardless of how strongly an immigration lawyer believes his or her strategy is supported by the law, given the complexity of the issues, the lawyer must use an expert witness when sued by a client for malpractice.

4. When Documentation Does Not Turn Out as Anticipated

Sometimes documents do not turn out the way you want. For example, the corporate structure may not match what the client told you in the initial consultation, such that there is no affiliate relationship for an L-1. Or perhaps the company cannot prove to the satisfaction of USCIS that it has the ability to pay the beneficiary's wage.

If possible, set up systems to minimize the likelihood that such mistakes occur in the first place. For example, consider a two-stage engagement letter that starts with a flat fee for a few hours of work to verify that a petition is possible and that the petitioner has the necessary documents. If you and the client clear the first step, the second step of preparing and filing the petition can begin. If the case does not progress to the second stage, at least you have been paid for your initial work on the case and have a clean breaking point.

Another example: some E-2 clients either cannot settle on an ownership or corporate structure or change the structure halfway through your preparation of the petition. To help prevent this, specify the ownership/corporate structure in the engagement letter and state that you will charge extra if the ownership/corporate structure changes.

When documentation does not turn out as anticipated, it is often not because you made a mistake, but because the client cannot or will not produce the information that you think is necessary for an approval. In such situations, you have several choices:

First, you can refuse to file the petition.

Second, you can warn the client that without the necessary documentation, USCIS is likely to deny the case. That way, if the client instructs you to file the case anyway, at least they have been forewarned.

Third, you can file the case, hope that USCIS will issue a request for evidence (RFE), and that the client will be able to produce the evidence by that time. However, this approach has problems. USCIS interprets *Matter of Katigbak*²⁰ for the proposition that a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date if the petitioner becomes eligible based on a new set of facts.²¹

USCIS has applied *Katigbak* in a variety of contexts. For example, in *Matter of Izummi*,²² an EB-5 case, the immigration agency held that a petitioner may not make a material change to the

¹⁹ *Id.* at 834.

²⁰ 14 I&N Dec. 45 (INS Regional Comm'r 1971).

²¹ *Id.* at 49.

²² 22 I&N Dec. 169 (INS Assoc. Comm'r for Examinations 1998).

petition in an effort to make a deficient petition conform to immigration requirements.²³ USCIS has interpreted *Izummi* broadly to deny petitions that were arguably deficient at the time of filing.

Fourth, you can file the petition and hope for the best. That seldom works, however. Moreover, even if the petition is initially approved, USCIS might later revoke the approval or deny an extension if it discovers that the initial documentation was faulty.²⁴

5. Missed Deadlines and Incorrectly Filed Applications

As time goes by, it seems that the practice of immigration law is increasingly becoming a landscape of minefields, gotchas, and traps for the unwary. From the first days of law school we have known the commandment “thou shalt never miss a deadline,” but we may not have appreciated how easily a deadline can be missed when an otherwise timely filed petition is delivered to the wrong Service Center or Lockbox. With USCIS constantly changing filing locations, shifting work among Service Centers, and separating premium processing from regular processing, to name a few ways to confuse us and our staff, an incorrectly filed application could happen to anyone. This practice pointer seeks to guide practitioners in coping with, responding to, and – hopefully – fixing the situation when an application is incorrectly filed or a deadline is missed.

For incorrect filings, we start from the premise that you have filed something in the wrong place and that the correct filing location was published. Missed deadlines are just that – deadlines that occur through inattention, mistake, or because an incorrect filing led to a delay in getting the application to the right place. What to do next? Do you have to:

1. Tell the client?
2. Redo the work at no charge?
3. Absorb the out of pocket expenses?
4. Notify your malpractice carrier?

Does it make any difference if the mistake was caused by the mistake of a third party such as a courier or delivery service?

Types of Mistakes

Before answering these questions, let us categorize the mistake from least to most consequential.

1. Filed in the wrong place with no negative impact except for lost time.
2. Missed deadline where there is time to redo things, such as:

²³ *Id.* at 175.

²⁴ See USCIS, Policy Memorandum PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* (Oct. 23, 2017), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf> (last visited Feb. 27, 2018). For a summary and analysis of this policy change, see Cyrus Mehta, *The Empire Strikes Back – USCIS Rescinds Deference To Prior Approvals In Extension Requests* (Oct. 30, 2017), available at <http://blog.cyrusmehta.com/2017/10/the-empire-strikes-back-uscis-rescinds-deference-to-prior-approvals-in-extension-requests.html> (last visited Feb. 27, 2018).

- a. Failure to file an I-140 within 180 days of PERM approval where there is plenty of H-1B time remaining, or
 - b. Failure to file a PERM application prior to recruitment timing out where there is time to redo the application.
3. Incorrect filing or missed deadline where there is not enough time to redo things.

Types of Remediation

1. *Always tell the client*

Even a seemingly inconsequential mistake in this area impacts something, and you will reap benefits from being candid.

2. *Manage who is responsible for quality control*

It is all too easy to have things fall through the cracks when your practice gets busy. And when there are multiple attorneys and paralegals working on a matter, it is easier for mistakes to be made. It is critical to develop and maintain a system of accountability. Learn from your mistakes. What system, process, or workflow in your office failed or was not implemented to prevent the mistake from happening?

3. *Do not charge for the extra work to fix it*

This is another cardinal rule. You made the mistake, and your client will be much more forgiving if you bear the cost.

4. *Absorb the expense*

It is sometimes a good idea not only to redo the work for free, but to also pay any additional costs or filing fees. Collateral damages are more difficult. Suppose an employee is out of work for a period of time because of your mistake, or even worse – he or she has to return home and loses the opportunity to live and work in the U.S. We do not think it is useful to discuss whether any individual mistake constitutes malpractice, but it would seem appropriate to notify your insurance carrier where the damages could begin to mount.

5. *Apply for discretionary relief from USCIS*

Where there is not time to redo something, this may be your only option. See the discussion below.

6. *Do extra work for the client at no charge to help rebuild the relationship*

Every client interaction is an opportunity to build the relationship. Think creatively about what may make amends for the error.

7. *Have the client work with a different attorney where the relationship has reached the point that the client has lost confidence*

When confidence is gone, it's best to step aside and help the client transition to another attorney who can handle the matter. It is in your best interest to develop a relationship with a trusted colleague you can refer such matters to. At least then, your old client and their new attorney won't be trash-talking you.

8. *The courier service will not bear responsibility*

It is certainly possible that a delivery error or delay can be the cause of a missed deadline, and if so, you should point that out in your remediation efforts. However, it is very unlikely that you will be able to shift responsibility for any damages to the courier. Their liability is typically limited to a refund of the courier fee, which they'll happily give you.

Preventive Measures

1. If possible, build in time for mistakes to happen. Set deadlines earlier.
2. Use the track FedEx email to be sure the filing is delivered (this is time consuming but it can be helpful).
3. Use a tickler system for receipts so you can follow up (there is no receipt with a request for evidence, so you will have to check those manually).
4. Set time aside for thorough docket review and management.
5. Have one person responsible for tracking deadlines and ensuring compliance.

How to Fix It

Missed status filing deadlines are potentially catastrophic, but there is a saving provision at 8 CFR §214.1(c)(4) that can be very helpful. Failure to file a request for extension of stay or change of status prior to the expiration of a prior status may be excused in the Service's discretion where it is demonstrated at the time of filing that:

- (a) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
- (b) The alien has not otherwise violated his or her nonimmigrant status;
- (c) The alien remains a bona fide nonimmigrant; and
- (d) The alien is not the subject of deportation or removal proceedings.

By its terms, this provision applies only to extensions of stay but in practice it can be applied to requests for change of status. Thankfully we do not have to rely on it often, but anecdotal experience shows that the Service is reasonably generous in applying this provision to repair law firm mistakes. We have also seen it used to fix multiple errors by well-meaning employers who attempted to file H-1B petitions without knowing what they were doing. In every instance, a *mea culpa* statement is necessary and the beneficiary has to be shown to be blameless. In our experience, the language stating that the beneficiary has not *otherwise* violated his or her status means that the Service will countenance continued employment for the petitioning employer while the request is being adjudicated. It should not be necessary to take the employee off the payroll in such a situation.

Unfortunately, the Department of Labor has no such provision. If a deadline is missed in the PERM context there is nothing more to do but start over.

Conclusion

To err is human, and to receive a favorable decision under 8 CFR §214.1(c)(4) can approach the divine. But reaching out to USCIS is not the only option. Be candid about your mistakes. Look for remediation strategies that minimize their damage. Rebuild your relationship with the client.

Understand what went wrong and take affirmative steps to ensure that it does not happen again.
Sometimes that is the best we can do.

Employment and Training Opportunities in the F and J Visa Categories

By Elizabeth Goss, David Fosnocht and Dan Berger

with gratitude to a draft article from last year by Elise A. Fialkowski, Elizabeth A. Goss, and Lesley N. Salafia

INTRODUCTION

With the August 2018 release of a policy memorandum¹ redefining the accrual of unlawful presence for individuals in F, M, and J nonimmigrant status, the stakes surrounding the appropriate use and understanding of work authorization for these statuses have only increased. Students and exchange visitors do have an array of employment authorization available to them in specific, limited circumstances. An immigration practitioner working with employers and employees alike must have a basic understanding of F-1 work authorization (on-campus employment, CPT, Pre- and Post-Completion OPT, STEM OPT) and J-1 options and limitations (intern and trainee categories, the 2-year home residence requirement, and finding a sponsoring organization) in order to effectively advise clients in an increasingly treacherous atmosphere. In closing, we discuss the definition of employment and permissible activities that are not considered employment to provide perspective on what F-1 and J-1 visa holders can do without work authorization.

See also this recent article from the AILA Annual Conference, F-1 Employment Issues: STEM, CPT and Impact of Unaccredited and For Profit Schools on H-1B Petitions.²

F-1 STUDENT EMPLOYMENT OPTIONS³

F-1 students have a variety of employment options available to them during and after completion of their studies, including on-campus employment, curricular practical training (CPT), and optional practical training (OPT).

On Campus Employment

F-1 students are generally able to work at jobs on campus, subject to specific limitations on hours, in employment that will not displace U.S. residents.⁴ The “employer” can be an entity other than the academic institution that sponsors the F-1 student, so long as the employer provides services to students on campus. On-campus bookstores and food providers are common

¹ USCIS Policy Memorandum PM-602-1060.1, “Accrual of Unlawful Presence and F, J, and M Nonimmigrants” (August 9, 2018), published on AILA InfoNet at Doc. No. 18081000 (posted August 10, 2018), updating the USCIS Adjudicator’s Field Manual at AFM 40.9.2(b)(1)(E)(iii). The Department of State also updated its Foreign Affairs Manual at 9 FAM 302.11-3 Individuals Unlawfully Present - INA 212(a)(9)(B) in accordance with USCIS Policy Memorandum PM-602-1060.1.

² *Immigration Practice Pointers* (2018–19 Ed.), AILA Education and Resources, <http://agora.aila.org>.

³ For an excellent treatment of F-1 visa options, refer to the “F-1 Foreign Student Issues for Employers” Webinar and associated materials, available on AILA AGORA, recorded 9/12/2017, SKU AS2017-09-12-DL.

⁴ 8 CFR §214.2(f)(9)(i).

examples of on-campus employment by an entity other than the academic institution. Commercial employers located on-site on campus must provide direct student services.⁵

While the definition of what locations constitute the “campus” or “school’s premises” can become complicated for urban campuses or institutions who lease space within larger buildings, generally space leased by and under the control of the institution will constitute the premises. The institution’s Designated School Office (DSO) should have an understanding of the space considered by the institution to serve as its premises.

On-campus employment is limited to 20 hours per week while school is in session and full-time during academic breaks when school is not in session. The student’s I-20 does not need to be annotated for standard on-campus employment by a DSO, although the DSO may need to provide an approval letter for purposes of obtaining a social security number. On-campus employment must cease once the F-1 student has completed the course of study.

On-Campus Employment at an Off-Campus Location

Under the on-campus employment regulations, F-1 students may work at an “off-campus location which is educationally affiliated with the school” when the employment is an integral part of the student’s educational program.⁶ “[T]he educational affiliation must be associated with the school’s established curriculum or related to contractually funded research projects at the post-graduate level.”⁷ Wages may be paid by the academic institution or by the qualifying affiliated employer.

To qualify under this provision, the off-campus location must have an affiliation agreement, contract or other sort of qualifying agreement with the F-1 sponsoring institution. Research laboratories are a popular employment source under this provision. The same limitations on hour up to 20 hours per week while school is in session and full-time when school is not in session apply to on-campus employment at an off-campus location.

There are also procedures for obtaining off-campus employment authorization upon a demonstration of severe economic hardship caused by unforeseen circumstances beyond the student’s control, such as loss of a parent’s income or substantial currency fluctuations in the student’s home country.⁸ The student must first be certified by the school’s DSO through issuance of an I-20, file an I-765 and be issued an Employment Authorization Document prior to commencing employment under the severe economic hardship provision.⁹

Curricular Practical Training (CPT)

⁵ 8 CFR §214.2(f)(9)(i). The example given in the regulations states that a construction company would not constitute on-campus employment because, while in the process of constructing a school building, it does not provide direct student services.

⁶ 8 CFR §214.2(f)(9)(i).

⁷ 8 CFR §214.2(f)(9)(i).

⁸ 8 CFR §214.2(f)(9)(ii)(C).

⁹ 8 CFR §214.2(f)(9)(ii)(F).

As suggested by its name, Curricular Practical Training must be an “integral part of an established curriculum and directly related to the student’s major area of study.” Many schools require that the student be enrolled in a credit-bearing course to engage in CPT. Generally, students must be enrolled for one academic year full-time before being eligible for CPT, though an exception exists for graduate students enrolled in a program that requires immediate curricular training for all students in the program. A student may engage in part-time CPT (less than 20 hours per week) as much as desired without affecting OPT eligibility. If a student, however, engages in more than 20 hours per week of CPT for more than one year in aggregate, the student loses all OPT eligibility.¹⁰ To receive work authorization, a student need only have a new I-20 issued by their DSO. Upon issuance, the student is work authorized for the dates indicated on the I-20.

Optional Practical Training (OPT)

There are two general types of Optional Practical Training: pre-completion and post-completion. OPT employment must be directly related to the major field of study. Similar to CPT, students must have been lawfully enrolled on a full-time basis at an SEVP-approved school for one full academic year before being eligible for OPT.¹¹ This enrollment can include time on a study abroad, students who have been reinstated to F-1 status after falling out of status, and students who have studied full-time in a status other than F-1 (e.g. H-4).¹² In order to be work authorized, the Employment Authorization Document, I-766, must be obtained.

Pre-completion OPT applies before the student’s program end date. It uses OPT time on a pro-rated basis. For example, 6 months of 20 hours/week pre-completion OPT would use 3 months of eligibility for OPT. Pre-completion OPT is generally limited to 20 hours per week, except for breaks and vacations, when full-time work is permitted.¹³ Importantly, the 2-year STEM OPT extension can only be granted for students in post-completion OPT, so students should not use all their OPT as pre-completion OPT if they are eligible for a STEM OPT extension.¹⁴

Post-completion OPT has the same basic requirements, except that full time work is permitted (though not required). From a timing perspective, the I-765 application can be submitted to USCIS no earlier than 90 days before the program end date and no later than 60 days after the program end date. The application must be submitted within 30 days of the DSO’s recommendation in the SEVIS system and on the I-20.¹⁵ F-1 students in a post-completion OPT

¹⁰ 8 CFR §214.2(f)(10)(i). Note, however, that a number of denials of change of status from F-1 to H-1B have been reported, where USCIS counted full-time CPT and OPT in the aggregate. Under that interpretation, for example: a student who used 3 months of full-time CPT would be eligible for only 9 months of OPT at the same educational level; a student who used 12 months of OPT would be eligible for no CPT during subsequent studies at the same educational level.

¹¹ 8 CFR §214.2(f)(10).

¹² 8 CFR §214.2(f)(10). Each of these alternate scenarios has complications which are outside the scope of this practice advisory to discuss.

¹³ 8 CFR §214.2(f)(10)(ii)(A)(1)-(2).

¹⁴ 8 CFR §214.2(f)(10)(ii)(C).

¹⁵ 8 CFR §214.2(f)(11)(i)(B)(2).

period are limited to 90 days of aggregate unemployment.¹⁶ The period of unemployment begins counting upon approval of the EAD. Exceeding the unemployment period is considered a violation of status. OPT is available for 12 months total. A student in F-1 OPT can engage in paid or unpaid work, can be a self-employed business owner, and can transfer employers with relative ease.

STEM OPT

A 24-month extension of OPT is available for those individuals whose field of study is on the qualifying list of CIP codes provided by ICE.¹⁷ STEM OPT has several additional requirements beyond what is required for OPT, including the following:

- The student and employer must complete a Form I-983 training plan which is submitted to the DSO for a review of general completeness, and the employer and student are required to review the training plan several times during the 2-year period.¹⁸
- In order to qualify, the employer must be enrolled in E-Verify.¹⁹
- The employment must be paid employment;
- The company cannot be a sole proprietorship, as the employer must have sufficient resources and personnel to provide appropriate training.²⁰
- The employer must agree to DHS site visits, which effectively prohibits employers from employing students at third-party client sites or worksites because employers can't agree to site visits on behalf of their clients.²¹

Unlike standard OPT, a STEM OPT applicant can apply to renew the EAD 90 days in advance of the expiration and receives an automatic 180-day extension of work authorization while the EAD renewal application is pending.²² A student has an aggregate of 150 days of unemployment for the entire three year period of OPT and STEM OPT.²³

J-1 EXCHANGE VISITOR EMPLOYMENT OPTIONS

J-1 Students and Academic Training

J-1 students are permitted to engage in academic training, providing them with work authorization during or after completion of the program in certain circumstances. To qualify, the J-1 student must be primarily in the United States to study rather than work, must participate in training that is directly related to the field of study listed on the DS-2019, and must get written

¹⁶ 8 CFR §214.2(f)(10)(ii)(D).

¹⁷ 8 CFR §214.2(f)(10)(ii)(C)(2). See STEM-Designated Degree Program List (2012), available at <https://www.ice.gov/sites/default/files/documents/Document/2014/stem-list.pdf>.

¹⁸ 8 CFR §214.2(f)(10)(ii)(C)(7).

¹⁹ 8 CFR §214.2(f)(10)(ii)(C)(5).

²⁰ 8 CFR §214.2(f)(10)(ii)(C)(10)(i).

²¹ 8 CFR §214.2(f)(10)(ii)(C)(11).

²² 8 CFR §274a.12(b)(6)(iv).

²³ 8 CFR §214.2(f)(10)(ii)(D).

approval from the Responsible Officer (RO).²⁴ Students can engage in paid or unpaid academic training before or after completion of their studies,²⁵ but training must always comply with labor laws and students must have adequate financial support. The student can only begin the training after approval by the RO, and the training must begin no later than 30 days after completion of studies.²⁶ J-1 Students must obtain a letter of recommendation from the student's academic dean or advisor and the RO must make a written determination of whether the training is warranted, along with time limitations.²⁷

Academic training is limited to 18 months maximum for undergraduate and pre-doctoral programs, but can be obtained for as long as 36 months maximum for post-doctoral training.²⁸ Academic training cannot extend longer than the period of the J-1 course of study in the United States, however, so if, for example, a program of study is only 15 months long, the maximum allowable amount academic training is only 15 months.²⁹ In addition, any time of academic training used at the same educational level, whether full-time or part-time or pre- or post-completion of studies, counts against the allowable maximum.³⁰ Thus, an undergraduate J-1 student who engaged in 12 months of part-time academic training prior to completion of their studies only has 6 months of academic training remaining after they complete their studies.

Trainees and Interns

J-1 trainees and interns are exchange visitors participating in a structured program to enhance the exchange visitor's skills in their academic or occupational field and to improve the participant's knowledge of U.S. techniques, methodologies or expertise.³¹ The regulations regarding trainees and interns include specific requirements to ensure that both "trainees and interns receive hands-on experience in their specific fields of study/expertise and that they do not merely participate in work programs."³² The regulations are clear that training and intern programs "must not be used as a substitute for ordinary employment or work purposes nor may they be used under any circumstances to displace American workers."³³

J-1 sponsors must provide training and internship programs only in the occupational category or categories for which the Department of State has designated them as sponsors. Available fields include: agriculture, forestry and fishing; arts and culture; construction and building trades; education, social sciences, library science, counseling and social services; health related

²⁴ 22 CFR §62.23(f)(3).

²⁵ 22 CFR §62.23 (f)(1)-(2).

²⁶ 22 CFR §62.23 (f)(2)(ii).

²⁷ 22 CFR §62.23(f)(5).

²⁸ 22 CFR §62.23(f)(4).

²⁹ *Id.*

³⁰ 22 CFR §62.23(f)(4).

³¹ See 22 CFR §62.22. Note that this category does not include college and university students engaged in academic training, see 22 CFR §62.23 ("College and University Students"), or persons engaged in graduate medical education or training, see 22 CFR §62.27 ("Alien Physicians"). Accordingly, this section only addresses trainees and interns as set forth at 22 CFR §62.22.

³² 22 CFR §62.22 (a).

³³ 22 CFR §62.22 (b)(1)(ii).

occupations; hospitality and tourism; information media and communications; management, business, commerce and finance; public administration and law; and the sciences, engineering, architecture, mathematics, and industrial occupations.³⁴

J-1 sponsors must also ensure that trainees and interns meet program requirements. Trainees must have either: (1) a degree or professional certificate from a post-secondary academic institution outside the United States and at least one year of prior related work experience in their occupational field acquired outside of the United States; or (2) five years of work experience in their occupational field acquired outside the United States.³⁵ Interns must either: (1) be currently enrolled full-time and pursuing studies at a degree or certificate-granting post-secondary academic institution outside the United States; or (2) have graduated from such an institution no more than 12 months prior to their exchange visitor “begin” date reflected on Form DS-2019.³⁶

The length of a trainee’s stay normally may not exceed 18 months and an intern normally cannot exceed 12 months.³⁷ To ensure that trainees and interns are sufficiently fluent in English to benefit from and comprehend the training, the regulations require that their English skills be verified by a recognized English language test, signed documentation from an academic institution or English school, or through a documented interview.³⁸

Sponsors may engage third parties (including, for example, host organizations, partners, local businesses, academic institutions, and other foreign or domestic agents) to assist them in the conduct of their designated training and internship programs.³⁹ A written agreement is required.⁴⁰ Sponsors must fully complete and secure signatures on Form DS-7002, Training/Internship Placement Plan for each trainee and intern before issuing a Form DS-2019.⁴¹

Sponsors must ensure that trainees and interns have sufficient finances to support themselves for their entire stay including housing and living expenses. Sponsors must also ensure that the training programs expose the participants to American techniques, methodologies, and technology to expand upon the participant’s existing knowledge and skills; and the programs must not duplicate prior work experience or training received elsewhere.⁴² The regulations prohibit sponsors from placing trainees or interns in unskilled or casual labor positions, in positions that require or involve child or elder care, or in any kind of position that involves patient care or contact. In addition, sponsors cannot place trainees or interns in positions that involve more than 20 percent clerical work.⁴³

“Double-Dipping” on the J-1

³⁴ 22 CFR §62.22 (c).

³⁵ 22 CFR §62.4 (c).

³⁶ 22 CFR §62.4(h)(7).

³⁷ 22 CFR §62.22 (k).

³⁸ 22 CFR §62.22 (d).

³⁹ 22 CFR §62.22 (g).

⁴⁰ *Id.*

⁴¹ 22 CFR §62.22 (e).

⁴² 22 CFR §62.22 (e).

⁴³ 22 CFR §62.22 (j).

The purpose of the J-1 category is to “increase mutual understanding between the people of the United States and the people of other countries by means of education and cultural exchanges.” While many view the J-1 classification as an optional employment classification, it is important to remember in principle that the purpose of J-1 is exchange rather than employment. In the furtherance of genuine exchange, some J-1 participant categories within the J-1 regulations mandate that the J-1 participant hold a position or experience abroad. Examples include the “Summer Work and Travel” and “Intern” categories, which specifically require that the J-1 visitor be either currently enrolled or recently graduated from an academic institution outside of the U.S. Likewise, the J-1 “Trainee” category requires the J-1 participant to have acquired either the designated post-secondary degree plus one year of experience or five years of experience from a source outside of the U.S.

While not all J-1 categories have explicit requirements regarding positions abroad, the principle of exchange can be seen in other J-1 categories as well. Many ROs, under pressure and increased scrutiny from the U.S. Department of State, have decided that a foreign national who does not possess his or her most recent degree and/or experience from abroad does not constitute an “exchange” participant and is not eligible for a J-1 program. This in effect limits opportunities for current F-1 students to change to the J-1 nonimmigrant classification upon completion of their F-1 program.

The impact is also felt in the J-1 “Trainee” category. Even when it can be shown that a qualifying post-secondary degree and/or experience was gained abroad, ROs are often hesitant to accept a foreign national currently studying or working in the U.S. into a J-1 Trainee program. Ultimately such decisions are within the J-1 Sponsor’s discretion.

2-Year Home Residence Requirement

The two year home residence requirement of INA Section 212(e) applies in three situations: when (1) the exchange visitor was financed, directly or indirectly, by the United States or a foreign country’s government;⁴⁴ (2) the exchange visitor is engaged in a field which is designated by the exchange visitor’s government as being in short supply in that country;⁴⁵ or (3) the exchange visitor has come to the United States to receive graduate medical education or training through ECFMG. Such graduate medical training is beyond the scope of this article. The spouse or child, admitted as a J-2 nonimmigrant, is generally subject to the return residence requirement if the J-1 is subject.

⁴⁴ Note that not all government financing will result in the return residence requirement. Government financing that does not come directly to the exchange visitor will not subject the visitor to Section 212(e) if it was not provided for the purpose of bringing the exchange visitor to the United States to participate in the program. The institution, for example, may receive general funds that are not earmarked for the exchange visitor. Such funds should not subject the visitor to the return residence requirement. An exchange visitor who has received a Fulbright grant is considered to have received U.S. government funds and will be subject to the two-year return residence requirement. Even Fulbright awards for short term J-1s have subjected participants to the return residence requirement.

⁴⁵ The current skills list, by country, can be found at: <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/skill-list-by-country.html>.

If the visa holder is subject to the return residence requirement, they are not eligible to apply for an immigrant visa or permanent residence, or for an H-1B or L-1 nonimmigrant visa, unless they have either: (1) resided and been physically present in the country of their nationality or last residence for an aggregate of at least two years following departure from the United States; or (2) obtained a waiver of the two year return residence requirement. It is important to note that while a J-1 holder subject to the return residence requirement may not change status in the United States, they are not barred from obtaining other nonimmigrant visas apart from the H-1B and L-1. Those subject to the return residence requirement can, for example, obtain a visa and return as an O-1 extraordinary ability alien. Obtaining the O-1 visa does not rid the holder of the two-year home residency requirement so a waiver or fulfillment of the two-year home residency requirement is still necessary to be eligible for permanent residence or an H-1B or L-1 visa. The O-1 may be useful as a bridge to a waiver option, or in fulfilling the two years incrementally. The two-year return residence requirement can be fulfilled through several return trips to the home country.

Several waiver options are available including: (1) a waiver through a “no-objection” statement by the exchange visitor’s home country indicating in writing that it does not object if the exchange visitor does not return to the country for the two-year period; (2) an exceptional hardship waiver where the two year return residence requirement would impose an “exceptional hardship” to the exchange visitor’s spouse or child who is a United States citizen or lawful resident alien; (3) a persecution waiver where the exchange visitor cannot return as they would be subject to persecution on account of race, religion or political opinion; or (4) an interested government agency waiver where a United States government entity is willing and able to show that the exchange visitor’s departure would be clearly detrimental to a program or interest of that agency.⁴⁶

Finding a J-1 Sponsor

There are several J-1 program sponsors that work with host companies to issue DS-2019s for interns and trainees. A list of approved sponsors is available on the Department of State website.⁴⁷ As J-1 sponsors can only provide training in the occupational category or categories for which the Department of State has designated them a sponsor, often the initial inquiry involves whether the sponsor has been designated for the relevant field of training. While many sponsors have been designated for several fields of training, some are specialized. The American Immigration Council, for example, has an excellent J-1 trainee and intern program for many fields but AIC does not sponsor J-1s for agricultural occupations.⁴⁸ The Worldwide Farmers Exchange, by contrast, sponsors Viticulture and Enology interns and trainees.⁴⁹

⁴⁶ See INA, Section 212(e). A full discussion of waivers is beyond the scope of this article. For an excellent summary and guidance regarding Section 212(e) waivers, refer to the **J-1 Waiver Essentials CLE**, recorded December 19, 2017, and available on AILA AGORA, SKU WS2017-12-19-DL.

⁴⁷ See <https://j1visa.state.gov/sponsors/> (last visited February 12, 2018).

⁴⁸ <https://exchange.americanimmigrationcouncil.org/am-i-eligible> (listing eligible fields) (last visited February 12, 2018).

⁴⁹ <https://worldwidefarmers.org/wine-program/going-to-the-us> (last visited February 12, 2018).

There are also several other J-1 trainee and intern programs.⁵⁰ While each program must meet at least the requirements set forth in the J-1 regulations, each sponsor may impose additional requirements, often to assure the integrity of their program. Programs may vary, for example, and impose additional requirements regarding the age of participants, the size of host company, and the date of establishment of the host company. It is often advisable to carefully review each program sponsor's website for specific requirements. Of course, ease and timing of processing, as well as a sponsor's reputation should also be considered.

PERMISSIBLE ACTIVITIES BEYOND “EMPLOYMENT”

The F-1 and J-1 student classifications do not contemplate work authorization beyond the delineated options discussed above. As mentioned in the introduction, unauthorized work has dire consequences, including triggering unlawful presence accrual and required reporting to DHS by the DSO.⁵¹

That being said, many F-1 students and their employers reach out for clarification on activities related to entrepreneurship, internships and non-educational opportunities. It is essential to identify key issues for students trying to avail themselves of experiential opportunities outside of the classroom. In addition, for those students looking to invest in or start a business there are certain identifiable characteristics of activities that help determine which activities may be permissible.

What is Employment?

Unfortunately, there are no clear-cut legal definitions of employment and work under immigration law. What is clearly laid out in the regulations is that any person engaged in activities that constitute employment or work not authorized by the act or attorney general is “unauthorized” and in violation of status.⁵² The question then turns on what activities constitute employment. Employment is broadly defined in immigration law as “any service or labor performed by an employee for an employer within the United States.”⁵³ The Fair Labor Standards Act (FLSA) provides a more detailed statement concluding employment or work is established through time spent “in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”⁵⁴ An employee is defined as “an individual who provides services or labor for an employer for wages or other remuneration.”⁵⁵ Employment, thus, is broadly expanded out into what constitutes work and can cover a broad range of activities. Violations of status occur when activities result in a benefit for a person's own or another entity.

⁵⁰ See, e.g. <https://www.ciee.org/in-the-usa/research-training/intern-professional-training> (last visited February 12, 2018).

⁵¹ <https://studyinthestates.dhs.gov/working-in-the-united-states>

⁵² 8 CFR §274a.1(a).

⁵³ 8 CFR §274a.1(h).

⁵⁴ 29 CFR §785.7.

⁵⁵ 8 CFR §274a.1(f). Remuneration could cover anything that has value, including money, equity, and stocks.

Production, creation, invention, design are often authorized activities inherent to status. Engaging in these activities could result in a violation of status if the activities are not otherwise inherent to the client's status. A good way to distinguish activities is to consider the passive and active nature of these events. For example, a graduate student may be engaging in academic pursuits that result in a patent. The creation of the patent is inherent to status. However, the commercialization of that patent involves activities that require work authorization to perform, such as signing licensing contracts and receiving royalties. The violation occurs even when the activities are conducted online from the U.S. for an entity or organization abroad. Since the work occurs on U.S. soil, USCIS would see any such activities as work and require authorization.

For student entrepreneurs, an investment in the U.S. could be passive or active. A passive investment will likely not require work authorization. Purchasing an equity stake in a company and having no control or contact with that entity outside of ownership, would not require any activity beyond purchasing the ownership stake. In *Matter of Bhakhta* the court considered whether an alien's ownership and operation of a motel constituted unauthorized employment.⁵⁶ The court stated that "[e]ntrepreneurial investors do not compete with American labor, and in many cases actually provide jobs for Americans," concluding that the alien's activities were not unauthorized employment. Accepting an ownership stake in a company, however, in exchange for an idea or advice involves activities of the individual and would be considered employment or work.⁵⁷ In *Wettasinghe*, an F-1 student purchased a fleet of ice cream trucks, but instead of removing himself completely from his investment, the student provided "assistance" to the business through purchasing products and filling in for absentee employees. The court deemed these day-to-day running of the business activities to be employment and in violation of his student status.⁵⁸

Here are several examples of situations where the need for work authorization may not be clear:

1. **Planning vs. Operating a Business:** Some planning activities are generally not considered to be employment (and therefore permissible without specific authorization), such as the following: conducting market research; scoping out and even purchasing physical space for your business; registering a business under your name; securing any necessary business licensing; preliminary meetings with potential clients or employees/contractors. In contrast, F and J visa holders are not permitted to develop products and services, or permitted to work for a business that is registered online or outside the U.S. (including a family business) without valid work authorization.
2. **Passive vs. Active Income:** International students must not actively be involved in making money in any way while in the U.S. in student status without authorization (CPT, OPT, Academic Training). Passive income (dividends, interest received, capital gains, etc.) may be permissible.
3. **Volunteering:** Volunteering is defined as "service for a public agency for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation."⁵⁹ The DOL prohibits an international student from choosing to be unpaid

⁵⁶ *Matter of Bhakhta v INS*, 6767 F.2d 771 (1981).

⁵⁷ *Wettasinghe v. United States Department of Justice, Immigration & Naturalization Service*, 702 F.2d 641 (U.S. App. 1983).

⁵⁸ *Id.*

⁵⁹ 29 CFR §553.101.

for work that would otherwise be paid to someone else.⁶⁰ This is true even if payment occurs at a later time—in other words, an international student can't volunteer until work authorization is approved.

F-1 students can, however, own and operate a business using pre- and post-completion OPT.

F-1 Students and Entrepreneurship

In general, international students in F-1 status are forbidden from engaging in business. The law does not expressly forbid F-1 students from establishing a business because preliminary business planning is not considered engagement. Permissible activities may include the following:

- Background research or development for the company or product;
- Naming the company;
- Obtaining an employer identification number;
- Registering a trade mark or trade name;
- Seeking business advice;
- Researching logistical issues for a specific field;
- Choosing the appropriate corporate structure;
- Obtaining business licenses and permits; and
- Understanding employer responsibilities including financial and accounting.

All of these activities could potentially be done prior to a student securing work authorization so long as they are not generating revenue at the time or in the future.

Once the business is established, however, international students are not permitted to operate their own business, engage in business, or receive revenue, compensation or salary. Working for a for-profit company without receiving pay cannot be considered volunteering, and is therefore forbidden for F-1 visa holders, as discussed above. Many students will then transition to pre- or post-completion OPT. The OPT Policy Guidance from 2010 states the following:

Self-employed business owner. A student on OPT may start a business and be self-employed. The student must be able to prove that he or she has the proper business licenses and is actively engaged in a business related to the student's degree program.⁶¹

STEM OPT, however, does not allow for self-employed business owners to continue working on STEM OPT because of the need for a bona fide employer-employee relationship.⁶²

CONCLUSION

⁶⁰ <http://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp>.

⁶¹ SEVP Policy Memorandum, "Policy Guidance 1004-03 – Update to Optional Practical Training" (April 23, 2010), published on AILA InfoNet at Doc. No. 10042761 (posted April 23, 2010).

⁶² 81 FR 13079 par. 517, 523, published on AILA InfoNet at Doc. No. 16030901 (posted March 11, 2016).

While several employment options exist for F-1 and J-1 visa holders and their employers, these options are nuanced and must be carefully navigated to avoid substantial issues for the nonimmigrant and employer alike.

Death by a Thousand Memos: The Changing Landscape of USCIS Adjudications in the Wake of "Buy American, Hire American"

By Brian J. Coughlin, Dyann DelVecchio Hilbern, and Julie A. Galvin

According to a recent report from the National Foundation for American Policy, there has been a 41% increase in denials of H-1B nonimmigrant petitions by U.S. Citizenship & Immigration Services (USCIS) between the 3rd and 4th quarter of FY 2017, and a similar spike in Requests for Evidence (RFEs). As a percentage of completed cases, the issuance rate for RFEs was approximately 69% for the 4th quarter of FY 2017, as compared with only 23% for the 3rd quarter, resulting in a net increase of 46%.¹ L-1B denials were also up during this time period, by approximately one-third.²

That same report attributed this surge in USCIS scrutiny to the general anti-immigration sentiment of the present administration, noting that, despite this highly active period of agency enforcement, there has been no corresponding introduction of improved policies to better facilitate the hiring of high-skilled international professionals.³ Employment-based immigration programs are clearly being restricted, and at unprecedented levels, as USCIS shifts from its role as a benefits granting institution to an enforcement agency.

This article briefly summarizes the origins and development of recent U.S. policy towards business immigration categories, and other well-established immigration programs, from the White House to its day-to-day application.

1] 'Buy American, Hire American,' and its directive to U.S. Administrative Agencies

On April 18, 2017, President Trump signed Executive Order 13788, or, "Buy American and Hire American." In general, the Order is intended to incentivize the purchase of goods manufactured in the U.S., and to prioritize the hiring of U.S. workers over foreign nationals.⁴

The Order proposes to achieve the latter goal through rigorous enforcement and administration of existing employment-based immigration rules, and the creation of new rules to more effectively protect the interests of U.S. workers—with a specific focus on the H-1B nonimmigrant category.

"Buy American and Hire American," or "BAHA," calls upon the Departments of Homeland Security, State, Labor, and Justice to propose new, protectionist rules. Over the past two years, Homeland Security, through its sub-agency USCIS, has been especially active in implementing such changes through a series of Policy Memoranda, each discussed below.

¹ *H-1B Denials and Requests for Evidence Increase Under the Trump Administration*, NFAP Policy Brief (July 2018), <https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf>.

² *Id.* at 6.

³ *Id.* at 3.

⁴ Exec. Order No. 13788, 82 Fed. Reg. 18837 – 18839 (Apr. 21, 2017).

2] **USCIS Policy Memorandum: 'Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status'**

In the wake of BAHA, USCIS's first major policy shift was the cancellation of the agency practice of affording deference to its own, prior decisions, in adjudicating petitions for extension of nonimmigrant status.⁵ In a prior Policy Memorandum, USCIS had directed its case adjudicators, when reviewing petition extensions involving the same parties and underlying facts as the initial nonimmigrant petition, to defer to prior determinations of eligibility.⁶ In recent years, USCIS had restated this policy to explicitly apply to the L-1B category, in deciding whether a petitioning employer had demonstrated sufficient employer-specific 'specialized knowledge' as pertaining to the sponsored employee and proposed U.S. position.⁷

Through the October 2017 "end of deference" memo, USCIS has reversed its policy of showing deference to prior petitions, noting that the burden of proof should remain on the petitioner, and not USCIS, even where the petitioner is merely seeking a "straightforward" extension of an individual's previously approved nonimmigrant status.⁸

Practical Impact

Through the rescission of its longstanding deference policy, USCIS has rendered nonimmigrant petition adjudications unpredictable in the extreme. Employers can no longer assume that an employee's extension of status processing will be a matter of routine—even where the employee has been approved once, or even several, times in the past in a particular nonimmigrant category. Taken in conjunction with the directive of BAHA requiring administrative agencies to more rigorously apply the rule of law in administering employment-based immigration categories, the elimination of deference to prior decisions has created ample opportunity for USCIS adjudicators to issue a much higher volume of Requests for Evidence, and question the merit of employers' nonimmigrant sponsorship, regardless of past approvals.

This "end of deference" memo, and the related increase in RFEs and Denials, has created the need for a wholesale re-setting of expectations for petitioning clients and for foreign national beneficiaries and their families.

3] **USCIS Policy Memorandum: 'Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites'**

Under existing law, and where a sponsored employee will be placed off-site at the premises of an end-client, a petitioning employer has long been required to provide a detailed itinerary⁹, as well

⁵ USCIS Memorandum, PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status*, (Oct. 23, 2017).

⁶ USCIS Interoffice Memorandum, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, (Apr. 23, 2004).

⁷ USCIS Memorandum, PM-602-0111, *L-1B Adjudications Policy*, (Aug. 17, 2015).

⁸ PM-602-0151, *supra* at 3.

⁹ 8 CFR §214.2(h)(2)(i)(B).

as a copy of the contract¹⁰ with the end-client, as proof of the ‘specialty occupation’ employment, as defined for H-1B purposes.

The recent USCIS policy guidance¹¹ in this regard is a restatement of these preexisting rules. The USCIS press release accompanying this Policy Memorandum explicitly noted that the agency guidance was intended to align with the directive of BAHA, in protecting the interests of U.S. workers against “petitioners who circumvent the worker protections outlined in the nation’s immigration laws.”¹²

Practical Impact

While this USCIS guidance is purportedly aimed at eliminating fraud and other abuses of the H-1B program, it is clearly focused on a particular type of petitioner (i.e., any employer that places its workers at the location of an end-client for long-term assignments). As with the recent guidance announcing its non-deference to prior case approvals, USCIS appears to have released this Policy Memorandum in prelude to its significant increase in the issuance of Requests for Evidence and Denials. However, this Memorandum pertaining to contracts and itineraries is especially focused on industries—such as IT services, management consulting, etc.—which require employers to place professional employees on the premises of end-clients.

4] USCIS Policy Memorandum: 'Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens'

When first introduced, this Memorandum confirmed that USCIS would commence removal proceedings if, upon denial of an application requesting nonimmigrant status in the U.S., the individual applicant was unlawfully present in the U.S. as a result of said denial.¹³ As with prior agency announcements, this change did not stem from any new law, but rather represented a shift in USCIS enforcement priorities. Upon the initial release of the Memorandum, USCIS indicated that it would issue an NTA¹⁴ to virtually *any* individual whose request for an immigration benefit—such as an extension of a nonimmigrant stay or adjustment of status—was denied, and whose underlying status had expired.

USCIS has since clarified that this initiative does not presently extend to employer-sponsored cases, as confirmed during a recent stakeholders’ teleconference centering on the new NTA policy.¹⁵ As part of this discussion, USCIS confirmed that I-129 petitions (including requests for

¹⁰ *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

¹¹ USCIS Memorandum, PM-602-0157, *Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites*, (Feb. 22, 2018).

¹² USCIS News Release, *USCIS Strengthens Protections to Combat H-1B Abuses* (Feb. 22, 2018), www.uscis.gov/news/news-releases/uscis-strengthens-protections-combat-h-1b-abuses.

¹³ USCIS Memorandum, PM-602-0050.1, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, (Jun. 28, 2018).

¹⁴ A Notice to Appear, Form I-862, is a charging document that is issued to foreign nationals, placing them in “removal” proceedings and directing them to appear before an immigration judge.

¹⁵ “Highlights from September 27, 2018 USCIS Teleconference on Notices to Appear (NTAs) Policy Memorandum” (Sept. 27, 2018), AILA Doc. No. 18100200.

H-1B and L-1 nonimmigrant status) were excluded from the agency's implementation of the new NTA Policy Memorandum. The agency reserves the right to revisit matters in the future. USCIS has the authority—and now has a framework—to expand its application of the new policy in the context of employment-based petition denials, leading to the issuance NTAs and subsequent removal proceedings for sponsored nonimmigrant employees.

Despite its present non-applicability to employment-based petitions, the new policy represents a significant restatement of the rules surrounding NTAs. The most recent prior USCIS guidance regarding NTA issuance was issued in 2011.¹⁶ In that guidance, the agency noted that it would issue NTAs in two types of cases: (1) when required by law, and (2) where a finding of fraud was made, with a statement of findings substantiating fraud. The policy guidance from 2011 did not previously include cases in which, “upon issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States.”¹⁷ This latter provision is newly introduced with the revised guidance, and, if implemented, would effect monumental changes to current procedure.

Practical Impact

While USCIS has long had the authority to issue NTAs and initiate removal proceedings, the agency has typically exercised its discretion to do so only in serious cases that met the Department of Homeland Security's enforcement priorities, especially regarding individuals who posed criminal and national security threats. USCIS rarely, if ever, issued an NTA after the denial of an employment-based petition or application for benefits, when a petitioner or applicant had no history of fraud, criminal activity or immigration violations.

The new memorandum limits USCIS case adjudicators' ability to exercise discretion in choosing whether to issue an NTA. Specifically, when adjudicating an individual's application for immigration benefits, adjudicators will not be permitted to overlook instances where: “fraud, misrepresentation, or evidence of abuse of public benefit programs is part of the record,” where the foreign national has been charged with a criminal offense and the case has not been resolved, or where he or she is under investigation for any crime.¹⁸

5] USCIS Policy Memorandum: 'Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)'

To further underscore the agency's authority to issue a negative decision, in July 2018 USCIS published additional new guidance to give its adjudicators more discretion to deny applications, petitions or other requests without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID).¹⁹ Specifically, USCIS has delivered the new policy as a means to discourage

¹⁶ USCIS Memorandum, PM-602-0050, *Revised Guidance for the Referral of Cases and Issuance of notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, (Nov. 7, 2011).

¹⁷ PM-602-0050.1, *supra* at 7.

¹⁸ PM-602-0050.1, *supra* at 5.

¹⁹ USCIS Memorandum, PM-602-0163, *Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)*, (Jun. 28, 2018).

“frivolous or substantially incomplete filings,” (commonly called “placeholder” filings), but not to punish “innocent mistakes or misunderstandings of evidentiary requirements.”²⁰

Essentially, USCIS may now issue a denial where initial evidence is missing from an application or petition, or where that evidence fails to establish eligibility for the immigration benefit requested. Under the new guidance, adjudicators will continue to issue “statutory denials”—cases when an applicant applies for a benefit that is no longer offered, or where the applicant does not have the family relationship necessary to support a family-based application—without requesting additional evidence. However, the agency is now granted the additional leeway to reject applications that could be completed by additional evidence, but where the applicant has not provided the initial evidence necessary to establish eligibility.

Practical Impact

With this new policy, USCIS has rescinded a policy that was established in a 2013 Policy Memorandum.²¹ The previous policy had directed adjudicators to request additional evidence unless there were no way that additional evidence could “fix” the defective application or petition. In practice, that earlier guidance had limited adjudicators’ ability to deny applications outright without first issuing an RFE or NOID and giving the petitioner or applicant an opportunity to provide more evidence to prove the case, except in instances of statutory denials.

This new guidance applies to all applications, petitions and requests that USCIS received after the stated September 11, 2018 effective date (except for Deferred Action for Childhood Arrivals adjudications, which are not subject to the policy). But, while the memorandum empowers adjudicators to deny a matter in cases which lack sufficient “initial” evidence, it is still not entirely clear how the agency will interpret that term.

6] USCIS Policy Memorandum: 'Accrual of Unlawful Presence and F, J, and M Nonimmigrants'

Ordinarily, foreign students holding F-1 nonimmigrant status, J-1 exchange visitors, and M-1 vocational students are admitted to the U.S. for their “duration of status” (D/S). Under prior USCIS policy, this period of authorized status was converted to “unlawful presence,” as defined by law²², on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed, whichever came first.²³ Thus, barring such a finding or ruling, a person who was admitted “D/S” could remain in the U.S. virtually indefinitely, without accruing any unlawful presence.

²⁰ *Id.* at 2.

²¹ USCIS Memorandum, PM-602-0085, *Requests for Evidence and Notices of Intent to Deny*, (Jun. 3, 2013).

²² INA §212(a)(9)(B).

²³ INS Memorandum, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*, (Jun. 17, 1997). *And, see:* USCIS Memorandum, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, (May 6, 2009).

With its August 2018 Policy Memorandum²⁴, USCIS has completely rewritten the rules in this regard. Now, an F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status on or after August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR §214.2);
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).²⁵

This restated process for deciding when a person has begun to accumulate unlawful presence is, of course, critical in determining whether he or she might be subject to a bar to reentering the U.S. Specifically, individuals with more than 180 days of accrued unlawful presence are subject to a 3-year bar which is automatically triggered upon departure from the U.S., and one year or more of unlawful presence will result in a 10-year bar upon departure from the U.S.²⁶

Practical Impact

As a result of the recent guidance, a nonimmigrant in F, J, or M status in the U.S. must be extremely careful in ensuring that he or she preserves status by remaining engaged in the course of study or other activities that underlie the approved period of admission. And even while remaining vigilant, a person might undertake “unauthorized activity,” triggering the accrual of unlawful presence, without even realizing that he or she has done so.

Such a troubling outcome is especially foreseeable in the context of an F-1 student’s post-graduate Optional Practical Training (OPT) employment, which must be somehow related to the degree earned. A student might be approved for such employment, ordinarily authorized for one year, by the university’s Designated School Official (DSO). If, however, USCIS were to determine that the employment was not sufficiently linked to the course of study (for example, during the adjudication of an employer’s future petition to change the student’s nonimmigrant status to H-1B), the student’s entire period spent pursuing OPT could, under the new guidance, be construed as “unauthorized activity”, subjecting the student to a bar to reentry. In addition, a technical violation that may have been fixed by filing an application for a reinstatement of status or through a SEVIS fix may now trigger unlawful presence. There are a myriad of other “technical violations” that could trigger the latent accrual of unlawful presence.

²⁴ USCIS Memorandum, PM-602-1060.1, *Accrual of Unlawful Presence and F, J, and M Nonimmigrants*, (Aug. 9, 2018).

²⁵ *Id.* at 4.

²⁶ INA §212(a)(9)(B)(i)(I)-(II).

7] Conclusion

The implementation of BAHA, and the generally restrictive immigration policies of the Trump administration, are not limited to Policy Memoranda only. USCIS is actively pursuing other means to increase its breadth of discretion in processing requests for immigration benefits, while also increasing the burden upon applicants in proving eligibility. For example, in October 2018, USCIS posted a Notice of Proposed Rulemaking²⁷, related to the public charge ground of admissibility to the U.S., under INA Sec. 212(a)(4). Under the present rules, a person is considered to be a public charge if he or she is dependent upon the government for subsistence. The proposed rule would expand the ways in which a person's acceptance of public benefits might be used to define that applicant as a public charge.

If enacted into regulation, this broadening of the criteria for public charge will likely have the same effect as the Policy Memoranda outlined previously: creating unpredictability and steeper, more complex hurdles for a petitioner or applicant to overcome in obtaining a desired immigration status, while at the same time offering USCIS more discretion to refuse the benefits it is charged with administering.

²⁷ 83 Fed. Reg. 51114 – 51296 (Oct. 10, 2018).