No.

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

CESAR ALCARAZ-ENRIQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals may conclusively presume an applicant's testimony is credible and true whenever an immigration judge or the Board of Immigration Appeals adjudicates a withholding of removal application without making an explicit adverse credibility determination.

RELATED PROCEEDING

United States Court of Appeals (9th Cir.):

Alcaraz-Enriquez v. *Barr*, No. 15-71553 (Nov. 22, 2019)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is not published in the Federal Reporter but is reprinted at 727 Fed. Appx. 260. The order of the court of appeals denying rehearing (App., *infra*, 5a) is unreported. The decisions of the Board of Immigration Appeals (App., *infra*, 6a-9a) and the immigration judge (App., *infra*, 10a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2018. A petition for panel rehearing was de-

nied on November 22, 2019 (App., *infra*, 5a). On February 11, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 23a-73a.

STATEMENT

A. Legal Framework

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien who is subject to removal generally may not be removed "to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). This so-called "withholding of removal" restriction does not apply, however, "if the Attorney General decides that * * * the alien, having been convicted by a final judgment of a particularly serious crime[,] is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B).

An alien who applies for withholding of removal bears the burden of proving his eligibility for that form of protection from removal. 8 U.S.C. 1229a(c)(4); 8 U.S.C. 1231(b)(3)(C); 8 C.F.R. 1208.16(b) and (d)(2). The applicant's entitlement to protection is evaluated in the first instance by an immigration judge (IJ). 8 U.S.C. 1229a(a)(1) and (c)(4). The IJ is charged with "determin[ing] whether or not the [applicant's] testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the

applicant's burden of proof." 8 U.S.C. 1229a(c)(4)(B). "In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record." *Ibid.* The statute further provides that the IJ should consider the "totality of the circumstances" in making a credibility determination, and that "[t]here is no presumption of credibility," with one exception: "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. 1229a(c)(4)(C).

2. An alien who has been denied withholding of removal and has been ordered removed by an IJ may appeal to the Board of Immigration Appeals (Board or BIA). See 8 C.F.R. 1003.1(b). If the Board affirms the IJ's decision, the alien may file a "petition for review" in the court of appeals for the judicial circuit in which the IJ completed the proceedings. 8 U.S.C. 1252(b)(2); see 8 U.S.C. 1252(a)(1). The INA provides that on petition for review, the court of appeals must treat "the administrative findings of fact [as] conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B).

B. Facts And Procedural History

1. Respondent, a native and citizen of Mexico, entered the United States for the first time in 1986 or 1987. See App., *infra*, 16a-17a; Administrative Record 705. He was previously removed in 2001, 2005, and 2007. App., *infra*, 17a-18a. During his previous periods in the United States, respondent was convicted of multiple crimes. Of particular relevance here, respondent was convicted in 1999 of inflicting corporal injury on a spouse or cohabitant in violation of Cal. Penal Code § 273.5(a) (West 1999), and received a sentence of two

years' imprisonment. App., *infra* 11a-12a, 14a-15a. He was also convicted of possession of a controlled substance in violation of Cal. Health & Safety Code § 11377 (West 1999). App., *infra*, 11a-12a.

2. a. Respondent again attempted to enter the United States unlawfully in December 2013. App., *infra*, 11a. Respondent was detained, and in proceedings before an IJ he conceded that he was removable under 8 U.S.C. 1182(a)(2)(A)(i)(II) because of his prior conviction for possession of a controlled substance. App., *infra*, 11a. Respondent contended, however, that he was entitled to withholding of removal, based on allegations that he had previously been assaulted by police in Mexico and that he would be subject to abuse if he was returned to Mexico. *Id.* at 11a, 18a-21a.[1]

The IJ determined that respondent was not eligible for withholding of removal in light of respondent's prior conviction for inflicting corporal injury on a spouse or cohabitant. App., *infra*, 12a-15a. In making that determination, the IJ considered a probation report created in connection with that earlier conviction, which contained witnesses' descriptions of how respondent had repeatedly beaten his girlfriend, dragged her back into a residence when she attempted to flee, thrown her

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[1] Respondent also sought asylum and protection under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See App., *infra*, 15a-22a. The IJ denied relief and protection on those grounds, *id.* at 12a, 15a-22a, and the Board affirmed, *id.* at 8a-9a. Respondent did not seek review of his asylum claim before the court of appeals, and the court denied respondent's petition for review with respect to his CAT claim. *Id.* at 3a-4a. Accordingly, respondent's requests for asylum and CAT protection are not at issue here.

against a staircase, kicked her in the legs and head, and forced her to engage in sex acts against her will. *Id.* at 12a-14a. The IJ also considered more generally the fact that the charged crime was inherently serious, with the prosecution being required to prove that the defendant willfully inflicted harm on the victim, resulting in a traumatic condition. *Id.* at 14a-15a. Against those considerations, the IJ weighed respondent's testimony during the removal proceedings about the circumstances of the earlier conviction, in which respondent acknowledged hitting his girlfriend but downplayed the seriousness of the assault and claimed that it had been prompted by his belief that she was hitting his minor daughter. *Id.* at 14a. Based on his assessment of respondent's testimony and the other evidence, the IJ found that the offense qualified as a "particularly serious crime" under Section 1231(b)(3)(B)(ii), and showed that respondent presents "a danger to the community of the United States" for purposes of that provision. 8 U.S.C. 1231(b)(3)(B)(ii); see App., *infra*, 14a-15a.

b. The Board affirmed. App., *infra*, 6a-9a. It held that the IJ had "properly considered all evidence of record in assessing the seriousness of the respondent's conviction [for inflicting corporal injury,] including weighing and comparing the respondent's testimony at the hearing and the probation officer's report issued during the time of his conviction." *Id.* at 8a. The Board observed that "[i]n weighing the evidence of record, the [IJ] was not required to adopt the respondent's version of events over other plausible alternatives," and held that "respondent did not satisfy his burden of establishing that his conviction for corporal injury under section 273.5(A) was not for a particularly serious crime." *Ibid.*

c. The court of appeals granted respondent's petition for review in part, remanding to the Board for reconsideration of his claim for withholding of removal. See App., *infra*, 1a-4a.

The court of appeals held that under its decisions in *Ernesto Navas* v. *INS*, 217 F.3d 646 (9th Cir. 2000), and *Kalubi* v. *Ashcroft*, 364 F.3d 1134 (9th Cir. 2004), "[w]here the BIA does not make an explicit adverse credibility finding, [the court] must assume that [the petitioner's] factual contentions are true." App., *infra*, 2a (citation omitted; brackets in original). Applying that precedent here, the court held that "the BIA erred when it credited the probation report over [respondent's] testimony without making an explicit adverse credibility finding as to [respondent]." *Id.* at 3a. The court also held that "[t]he BIA's failure to give [respondent] an opportunity to confront" the "witnesses whose testimony was embodied in the probation report * * * was error." *Ibid.* Accordingly, it remanded to the Board for reconsideration of respondent's claim for withholding of removal. *Ibid.*

d. The government filed a petition for panel rehearing, asking the panel to hold that petition while the en banc court of appeals considered the government's petition for rehearing en banc in *Ming Dai* v. *Sessions*, 884 F.3d 858 (9th Cir. 2018), which the court had decided on the same day as this case. See App., *infra*, 5a. The court denied the petition for rehearing en banc in *Ming Dai* in October 2019, with ten active judges dissenting from the denial of rehearing en banc and indicating that they would have revisited the court of appeals' precedent requiring that the court treat an alien's testimony as true unless the IJ has made an express adverse credibility finding. See *Ming Dai* v. *Barr*,

940 F.3d 1143, 1149-1150 (9th Cir. 2019) (Callahan, J., dissenting from denial of rehearing en banc, joined by Bybee, Bea, M. Smith, Ikuta, Bennett, R. Nelson, Bade, Collins, and Lee, JJ.) ("[I]n denying en banc review, we have condoned a decision by a three-judge panel that takes the extraordinary position of holding that, absent an explicit adverse credibility ruling, an IJ must take as true an asylum applicant's testimony that supports a claim for asylum, even in the face of other testimony from the applicant that would undermine an asylum claim." "The panel's holding is contrary to the statute, our own precedent, and the rulings of our sister circuits."); *id.* at 1158 (Collins, J., dissenting from denial of rehearing en banc, joined by Bybee, Bea, Ikuta, Bennett, R. Nelson, and Bade, JJ.) ("The panel majority's reaffirmation of [the Ninth Circuit's] unwarranted 'deemed-credible' rule * * * perpetuates a regime in which—unlike other circuits—this court misreads the evidentiary record in asylum cases through the truth-distorting lens of counterfactual conclusive presumptions.").

The panel in this case subsequently denied the government's petition for panel rehearing, noting that the petition for rehearing en banc in *Ming Dai* had "squarely presented a question bearing on the merits of this case" but had "failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration and was thus denied." App., *infra*, 5a.

ARGUMENT

This petition for a writ of certiorari presents the same question as the petition in *Barr* v. *Ming Dai*, No. ___, which the government is filing concurrently with the petition in this case. As in *Ming Dai*, the Ninth Circuit here applied a rigid evidentiary presumption

grounded in circuit precedent to override the findings of the IJ and the Board about the credibility and persuasiveness of the alien's testimony in removal proceedings. See App., *infra*, 2a-3a; Pet. at 8-10, *Barr* v. *Ming Dai*, No. ___ (filed Mar. 20, 2020). For the reasons explained in the government's petition for a writ of certiorari in *Ming Dai*, see Pet. at 13-27, *Ming Dai*, *supra* (No. ___), the Ninth Circuit's judge-made rule is inconsistent with the plain text of the INA and conflicts with decisions of this Court and other courts of appeals. The government's petition in *Ming Dai* presents a suitable vehicle in which to address that question. The Court therefore should hold the petition in this case pending the disposition in *Ming Dai*, then dispose of it as appropriate in light of that disposition—just as the court of appeals did with the government's petition for rehearing, see App., *infra*, 5a.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's consideration of the petition in *Barr* v. *Ming Dai*, No. ___(filed Mar. 20, 2020), and any further proceedings in this Court, and then disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

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MARCH 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-71553
Agency No. A 75-191-250

CESAR ALCARAZ-ENRIQUEZ, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL, RESPONDENT

Argued and Submitted: Feb. 15, 2018
San Francisco, California
[Filed: Mar. 9, 2018]

On Petition for Review of an Order
of the Board of Immigration Appeals

MEMORANDUM[*]

Before: BEA and N.R. SMITH, Circuit Judges, and NYE[**], District Judge.

Petitioner Cesar Alcaraz-Enriquez ("Alcaraz"), a native and citizen of Mexico, petitions for review of the order of the Board of Immigration Appeals ("BIA"), which

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable David Nye, District Judge for the U.S. District Court for the District of Idaho, sitting by designation.

denied his applications for withholding of removal and deferral of removal under the Convention Against Torture ("CAT"). We have jurisdiction under 8 U.S.C. § 1252. We grant the petition as to his claim for withholding of removal only and remand to the BIA for reconsideration of that claim.[1]

1. We have jurisdiction to consider Alcaraz's petition. Although we lack jurisdiction "to evaluate discretionary decisions by the Attorney General," 8 U.S.C. § 1252(a)(2)(B)(ii), we retain jurisdiction to review "questions of law raised upon a petition for review," § 1252(a)(2)(D). *See Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010). The specific question here—whether the BIA relied on improper evidence in reaching its determination—is a "question of law" that this court has jurisdiction to review. *Id.* We review legal questions de novo. *Pirir-Boc v. Holder*, 750 F.3d 1077, 1081 (9th Cir. 2014).

2. The BIA erred when it concluded that Alcaraz was convicted of a "particularly serious crime" and thus barred from seeking withholding of removal. The BIA's "particularly serious crime" determination was based, at least in part, on a probation report, which directly contradicts Alcaraz's testimony. This was error for two reasons.

First, we have repeatedly held that "[w]here the BIA does not make an explicit adverse credibility finding, [the court] must assume that [the petitioner's] factual contentions are true." *Anaya-Ortiz*, 594 F.3d at 679 (quoting *Navas v. INS*, 217 F.3d 646, 652 n.3 (9th Cir.

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[1] In light of this disposition, Petitioner's motion to stay removal is granted.

2000)); *see also Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("Testimony must be accepted as true in the absence of an explicit adverse credibility finding."). Here, the BIA erred when it credited the probation report over Alcaraz's testimony without making an explicit adverse credibility finding as to Alcaraz.

Second, Congress has specifically provided that an alien in removal proceedings must be given "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government. . . ." 8 U.S.C. § 1229a(b)(4)(B); *see, e.g., Saidane v. INS*, 129 F.3d 1063, 1066 (9th Cir. 1997) (holding that petitioner was denied due process in a deportation proceeding when the government "did not make a good faith effort to afford the alien a reasonable opportunity to confront and to cross-examine the witness against him"). Here, Alcaraz was never given any sort of opportunity to cross-examine the witnesses whose testimony was embodied in the probation report, and upon which testimony the BIA ultimately relied in denying his petition. The BIA's failure to give Alcaraz an opportunity to confront such witnesses against him was error.

3. Alcaraz's petition as to his application for deferral of removal under CAT fails. As the Immigration Judge[2] ("IJ") observed, although Alcaraz "has shown that he had been subjected to past harm by the police," he failed to show that "the harm he suffered is tantamount to torture." *See In re J-E-*, 23 I. & N. Dec. 291, 298 (BIA 2002) (finding that because "the act must be

[2] Where the BIA adopts and affirms an IJ's decision with further reasoning, this court reviews both the decision of the IJ and the BIA. *See Kwong v. Holder*, 671 F.3d 872, 876 (9th Cir. 2011).

specifically intended to inflict severe physical or mental pain or suffering," certain "rough and deplorable treatment, such as police brutality, does *not* amount to torture"). Alcaraz failed to prove that the BIA's finding that he suffered only from police mistreatment, and not "torture," was unsupported by substantial evidence.

For the foregoing reasons, we grant the petition as to Alcaraz's claim for withholding of removal and remand to the BIA. However, we deny his petition for deferral of removal under CAT.

Each party shall bear their own costs.

PETITION FOR REVIEW GRANTED IN PART, DENIED IN PART; REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-71553
Agency No. A075-191-250

CESAR ALCARAZ-ENRIQUEZ, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL, RESPONDENT

[Filed: Nov. 22, 2019]

ORDER

Before: BEA and N.R. SMITH, Circuit Judges, and NYE[*], District Judge.

This appeal was held in abeyance pending resolution of the government's petition for rehearing en banc (and, if applicable, any en banc proceedings) in the case of *Dai v. Sessions*, 884 F.3d 858 (9th Cir. 2018), which squarely presented a question bearing on the merits of this case. The government's petition in that case failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration and was thus denied.

Accordingly, the Respondent's petition for panel rehearing is denied.

[*] The Honorable David C. Nye, United States District Judge for the District of Idaho, sitting by designation.

APPENDIX C

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 20530

Date: [Apr. 24, 2015]

File: A075 191 250—San Francisco, CA

In re: CESAR ALCARAZ-ENRIQUEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert B. Jobe, Esquire

ON BEHALF OF DHS: Stephen A. Johnston
Senior Attorney

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's decision dated December 5, 2014, denying his applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and for protection under the Convention Against Torture ("CAT"), 8 C.F.R. §§ 1208.16(c), 1208.18. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties

have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application for relief was filed after May 11, 2005, and is thus subject to the statutory amendments made by the REAL ID Act of 2005. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994).

We affirm the Immigration Judge's determination that the respondent is barred from withholding of removal and protection under the CAT based on his conviction for a "particularly serious crime" (I.J. at 3-5). Section 241(b)(3)(B)(ii) of the Act; *see also* 8 C.F.R. § 1208.16(d)(2) (providing that an "alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community"); *Matter of N-A-M-,* 24 I&N Dec. 336, 342 (BIA 2007), *aff'd, N-A-M- v. Holder,* 587 F.3d 1052 (10th Cir. 2009), *cert. denied,* 131 S. Ct. 898 (2011); *Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982).

The respondent was convicted on September 29, 1999, of a felony conviction for inflicting corporal injury on a spouse or cohabitant, in violation of section 273.5(A) of the California Penal Code, for which he was sentenced to 2 years in state prison (Exh. 2). The Immigration Judge properly examined the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction to determine that the crime was particularly serious (I.J. at 2-5). *Matter of N-A-M-*, *supra*, at 342; *Matter of Frentescu*, *supra*, at 247. The Immigration Judge's findings of fact on this issue have not been shown to be clearly erroneous.

The Immigration Judge properly considered all evidence of record in assessing the seriousness of the respondent's conviction, including weighing and comparing the respondent's testimony at the hearing and the probation officer's report issued during the time of his conviction (I.J. at 4-5; Exh. 10). In weighing the evidence of record, the Immigration Judge was not required to adopt the respondent's version of events over other plausible alternatives. *See Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011). The respondent did not satisfy his burden of establishing that his conviction for corporal injury under section 273.5(A) was not for a particularly serious crime. *See* 8 C.F.R. § 1240.8(d) (providing that an applicant for relief from removal has the burden of proving by a preponderance of the evidence that a ground for mandatory denial of an application does not apply). Because the respondent has been convicted of a particularly serious crime, he is ineligible for withholding of removal under both the Act and the CAT.

The Immigration Judge also properly denied the respondent's CAT claim (I.J. at 6-11). We are not persuaded by the applicant's arguments on appeal that the Immigration Judge's findings of fact regarding country conditions and the likelihood of what would likely happen if the respondent is returned to Mexico are clearly erroneous. *See Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *see also Madrigal v. Holder*, 716 F.3d 499, 503 (9th Cir. 2013). Based on those findings, we affirm the Immigration Judge's denial of the respondent's CAT claim.

Specifically, the evidence does not show that the respondent would more likely than not be tortured by anyone in Mexico by or with the consent or acquiescence of a government official. *See Garcia-Milian v. Holder*, 755 F.3d 1026 (9th Cir. 2014); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010). The record does not reflect that mentally ill individuals are intentionally harmed by government officials or with the acquiescence of such officials. Neither does the record reflect that jails and mental institutions deliberately or intentionally "inflict severe physical or mental pain or suffering" onto mentally ill patients. *Villegas v. Mukasey*, 523 F.3d 984, 988-89 (9th Cir. 2008) (citation omitted). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ ILLEGIBLE
For the Board

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

File A075-191-250

IN THE MATTER OF CESAR ALCARAZ-ENRIQUEZ,
RESPONDENT

Dec. 5, 2014

IN REMOVAL PROCEEDINGS

CHARGES:	Section 212(a)(2)(A)(i)(II) — conviction for a controlled substance violation.
APPLICATIONS:	Withholding of removal and relief under the Convention Against Torture.

ON BEHALF OF RESPONDENT:

HELIODORO MORENO JR.
Law Offices of Robert B Jobe
550 Kearny Street #200
San Francisco, California 94108

ON BEHALF OF DHS:

STEPHEN A. JOHNSTON
Assistant Chief Counsel
630 Samson Street
San Francisco, California 94111

ORAL DISCUSSION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico.

Department of Homeland Security has brought these removal proceedings pursuant to the authority contained in Section 240 of the Immigration and Nationality Act. Proceedings were commenced with the filing of the Notice to Appear dated April 21, 2014, and supplemented by an additional charge dated April 28, 2014.

Respondent admits as alleged in the Notice to Appear that he is a native and citizen of Mexico, that he attempted to enter United States at San Ysidro, California port of entry on or about December 23, 2013 by walking at a fast pace near a vehicle at vehicle lane two, and that he was paroled into the United States at the time for a criminal prosecution. That on September 29, 1999 he was convicted in Superior Court for Santa Clara County for the violation of California Health and Safety Code Section 11377, possession of a controlled substance.

Respondent concedes that he is removable pursuant to Section 212(a)(2)(A)(i)(II), a conviction for a controlled substance violation.

In lieu of an order of removal respondent is seeking withholding of removal and relief under the Convention Against Torture He prepared and filed a Form I-589, which is in the record as Exhibit 3

1999 conviction for inflicting corporal injury, in violation-e of California Penal Code Section 273.5A

The respondent was convicted on September 29, 1999 for inflicting corporal injury on a spouse or a cohabitant, in violation of California Penal Code Section 273 5A

See Exhibit 2. For this conviction the respondent received a sentence of two years

Based upon the respondent's conviction the Court finds the respondent was convicted of an aggravated felony as defined under INA Section 101(a)(43)(F). See Banuelos-Ayon v. Holder, 611 F.3d 1080 (9th Cir. 2010), Matter of Ramirez, 25 I&N Dec. 203 (BIA 2010). As a consequence the respondent is ineligible for consideration of asylum. See INA Section 208(b)(2)(B)(i).

At issue before the Court is whether respondent's conviction constitutes a particularly serious crime as a bar for withholding of removal under Section 241(b)(3)

The Government introduced into the record as Exhibit 2 the probation report at Exhibit 2. Under Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982) the Court considers the following factors in its determination of whether a conviction constitutes a particularly serious crime These factors are (1) the nature of the conviction, (2) the circumstances and underlying facts of the conviction, (3) the type of sentence imposed, and (4) whether the type and circumstances of the crimes indicate the alien would be a danger to the community. As an initial matter the respondent challenges the propriety of the Court's consideration of the probation report at Exhibit 2 Recently the Board has stated in Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007) the Court may examine all reliable information and is not limited to the record of conviction Thus the probation report may be considered by the Court

According to the probation report the respondent was with his girlfriend on the evening of July 8, 1999. She had been with the respondent for approximately

three years and has a daughter by the respondent. The victim was with the respondent the previous evening at his residence, and approximately 11:00 p.m on the evening of July 8 wanted to leave. But the respondent locked her in the bedroom, preventing her departure. At some point in the evening victim was able to get out of the residence, but the defendant followed her and dragged her back into the house In the process he threatened to stab her and dispose of her body in a dumpster.

The next morning the victim's sister attempted to contact her, but the respondent answered the phone and hung up. He then proceeded to hit the victim, leaving bruises on her arms and legs and back, at which point the victim began begging for her life and the respondent stopped hitting her

At 5:00 p m in the afternoon the victim was eating in the kitchen, at which point she told the respondent that she wanted to leave. He became angry, grabbed her by the arms, dragged her to the living room, picked her up by the waist and threw her against the stairs He then proceeded to kick her in the legs and thighs, and at one point kicked her in the head The respondent's mother attempted to intervene, at which point he struck the victim two more times in the stomach Finally, the mother was able to help the victim leave and drove the victim home. Later the victim informed the police that the respondent forced her to have sex several times on the evening of July 8th.

On the evening of July 8, approximately 10:00 p.m., officers arrested the respondent as he was attempting to flee the residence. At that time he had in his possession a small quantity of methamphetamine.

In the respondent's statement to the officers he admitted to having an argument with the victim and that he did in fact chase after her when she attempted to leave and grabbed her by the arm. According to the respondent, the victim was about to hit him when he punched her once on the face. He also admitted to preventing her from leaving the house, but in the process of stopping her ~~the~~ respondent fell and hit her head against the stairs He denied hitting the victim that hard. Although he admitted to being angry, he did not lose his temper.

In the victim's statement, the victim stated that she received many bumps and bruises and some bleeding, that her jaw was dislocated from the respondent's blow, that she was forced to have sex during the assault, and that she is emotionally affected by the incident, and that she is fearful of the respondent.

~~In~~ During the merits hearing, respondent admitted hitting his girlfriend, but not in the manner as described in the report. He testified that he was upset and hit her first in the face. However, the reason for the respondent being upset with his girlfriend is that he believed that his girlfriend was hitting his daughter. There is no mention in the probation report of the respondent's allegation that the victim was hitting his daughter. Nevertheless, the respondent pled nolo contendere to the crime and was sentenced to two years.

The Court finds that the respondent was convicted of a particularly serious crime In making this finding the Court finds that the nature of the conviction, domestic violence, is serious, and that the elements of the crime include the willful infliction upon a person who is a cohabitant or mother of their child upon a cohabitant or

mother of their child, and that corporal injury results in a traumatic condition. Thus the elements in and of themselves are serious, the facts and circumstances surrounding the conviction involve the use of force and violence, upon which the victim received multiple injuries, both physically and emotionally. The sentencing Court further found the crime serious in that it imposed a two-year period of incarceration Finally, in the probation officer's evaluation, the officer found several risk factors present, in that the probation officer found the defendant's extreme focus on the victim, previous threats, substance abuse, knowledge of the victim's whereabouts, the respondent's minimization of his actions, and his attitude that appears to condone violence against his girlfriend. Given these risk factors found by the probation officer in his evaluation, he found him an appropriate candidate for incarceration. Similarly, the Court finds that these risk factors are also indicative of the respondent's danger to the community Therefore, the Court finds the respondent was convicted of a particularly serious crime, and thus ineligible for consideration of withholding of removal under INA Section 241(b)(3)

Remaining before the Court is deferral under the Convention Against Torture.

STATEMENT OF THE LAW

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. Severe pain or suffering must be inflicted on the applicant of third person for such purposes as (1) for obtaining information or confession, (2) for punishing for an act committed or suspected of having committed, (3) for intimidation or coercion, or (4) for

any reason based on discrimination of any kind In addition, in order to constitute torture the act must be directed against a person in the offender's custody or physical control, or the pain or suffering must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity. Acquiescence requires a public official have prior awareness of the activity and thereafter breaches his or her legal responsibility to intervene to prevent such activity. Torture is an extreme form of cruel and inhumane treatment and does not include pain or suffering arising from lawful sanctions Lawful sanctions do not include sanctions that defeat the object and purpose of the Torture Convention

ANALYSIS

Respondent is a 35-year-old single male, native and citizen of Mexico. He is the father of a daughter He was born in Galeana, Michoacán, Mexico on April 14, 1979. His parents, Moises and Celia, are separated His father is a lawful permanent resident residing in Tracy, California, his mother, a United States citizen, living in San Jose, California

Respondent has three siblings, Wendy, a lawful permanent resident residing in Tracy, Cindy, a United States citizen born in San Jose, and Alexis, also born in the United States, also living in San Jose He has a child, Angelina, who is approximately 12 years old ~~Here~~ Her whereabouts are unknown given that the mother has a protective order against the respondent

Respondent first entered the United States in either 1986 or 1987 at the age of 8. He completed the eleventh grade. He departed the United States at the age of 15

or 16 on an emergency when his aunt passed away. He was out of the country for two weeks

The respondent was deported in 2001, remained in a drug rehab program for approximately two years outside the country. He returned two and a half years later. He was next deported in approximately 2005. He remained outside the country but returned in either 2007 or 2008 His last entry was in December of 2013.

In high school the respondent had problems due to his limited knowledge of English, and once in high school problems grew in his association with friends who had a negative influence upon him. It was during high school that he began dating Esmeralda, the victim of his domestic violence conviction They had a child, Angelina, born May 8, 1998

While in prison the respondent experienced severe depression and attempted suicide by slicing his wrist with a razor blade. He was taken to a facility where he was confined to his bed for his own safety There he was also given medication and placed in a program for approximately three months.

After the three months respondent was returned to prison or he served out his time and was deported in 2001.

Respondent resided at his aunt's home in Tijuana and stayed also at a rehabilitation program for approximately two years There at the rehabilitation program he received counseling and a prescription. According to the respondent, he had no problems during this period of time.

Respondent returned to United States approximately 2004 where he first went to live with his mom.

Later he moved and lived with his sister Wendy. Wendy began noticing the respondent~~, observed the respondent~~ acting erratically She saw and heard the respondent speak and laugh to himself, stare off and heard voices. As a result, Wendy took the respondent to the Santa Clara County Mental Health Center in San Jose. There he was diagnosed as paranoid schizophrenia. The respondent then received monthly counseling and medication. Respondent improved with the therapy and medication.

In 2007 the respondent was again deported to Mexico. It was this time the family decided to rent an apartment for the respondent instead of placing him in a residential rehab center The apartment was in Tijuana. In addition to the apartment, the family also subsidized the respondent's living.

In 2013 respondent became embroiled in an altercation with a neighbor in his apartment complex. The altercation resulted in a fight where the local police were called and the respondent was taken into custody where he spent two days in the local jail. Upon his release the respondent returned to his apartment, but found that the apartment was locked and he was unable to gain entrance. The police were once again called and took him into custody. According to the respondent the police began hitting him with batons, accused him of being a drug addict. They then placed him in their patrol car to take him to the local jail

Prior to arriving at the jail the respondent was taken to an unknown location where there were approximately five police officers waiting, where he was beaten with a baton, pepper sprayed, and Tasered The respondent then was taken to the local jail where he was he~~a~~ld for

approximately three to four months. The respondent eventually pled guilty to assault and given probation.

After being released from jail the respondent stayed in a rehabilitation facility until his father went to Mexico to rent another apartment. The father lived with his son in the new apartment for about a month. It was during this period of time the father took the respondent to a psychologist for treatment. The psychologist diagnosed the respondent as having paranoid type disorder corresponding to schizophrenia

In December the respondent left his apartment and disappeared The family became concerned, searching for him in hospitals, morgues, and other locations. The family also posted fliers and reported his disappearance. They were unable to find him, and in fact the family had believed the respondent was dead.

On February 2014 the respondent's mother received a surprise phone call from the respondent, who told her that he was in Immigration custody in San Diego.

According to respondent, he had left his apartment, gone to the Tijuana town center, where he became disoriented and lost. He then wandered around until eventually appearing at the San Ysidro port of entry and walked toward the border through the vehicle only entrance where he was then taken into custody.

In order to establish eligibility for deferral under the Convention Against Torture, the respondent bears the burden of establishing more likely than not that he would be tortured if returned to the country of removal In assessing whether the respondent has satisfied his burden, the Court must consider all evidence relevant to the possibility of future torture, including evidence of

past torture inflicted upon the applicant, evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured, evidence of gross, flagrant, or mass violations of human rights within the country of removal, or other relevant information on conditions in the country of removal.

Now according to the respondent he was beaten while in police custody. He was beaten and Tasered while in police custody. The Court finds the respondent was credible as far as testifying to the harm he suffered while in the custody of the police. As the Government properly points out, rough and deplorable treatment such as police brutality does not amount to torture Matter of J-E-, 23 I&N Dec. 291, 298 (BIA 2002), overruled in part on other grounds, Azanor v Ashcroft 364 F 3d 1013 (9th Cir. 2004). To meet the legal definition of torture the mistreatment must cause severe mental pain or suffering, must be intentionally inflicted, and must be for a proscribed purpose. 8 C.F.R. Section 1208.18(a)(1). However, the police subjected him to severe beating, pepper spraying, and Tasering is some evidence of past harm inflicted on him. Further, the respondent's mental condition is relevant to the Court's consideration of whether or not the respondent would be tortured if returned to his home country

The State Department Report at Exhibit 5A found that there was widespread human rights abuse in mental institutions and care facilities across the country Further, abuses against persons with disabilities include lack of access to justice, the use of physical and chemical restraints, physical and sexual abuse, disappearance, and illegal adoptions. Many of Mexico's institutions are filthy, leaving people to walk around in ragged

clothing on barren floors covered with urine and feces. The picture that the State Department Reports paint is of poor conditions that exist in its mental health institutions.

However, it has not been shown that these institutions were intended to inflict harm upon the respondent or any of its patients. See In re J-E-, 23 I&N Dec 291 (BIA 2002).

In sum, the respondent has shown that he had been subjected to past harm by the police while in their custody The Court cannot find the harm he suffered is tantamount to torture There is some evidence of gross, flagrant, or mass violations of human rights within the country, as evidenced by the State Department Report. However, the State Department Report also points out that the Mexican government is seeking to address the abuses within its mental institutions. Finally, there is no evidence that the authorities intentionally or deliberately create and maintain its facilities such as the jails and mental institutions in order to inflict torture upon its inmates and patients, and specifically the respondent.

Therefore, the Court finds the respondent has not carried his burden of showing more likely than not that the Mexican government and its agents seek to torture the respondent if returned to Mexico, or in the alternative would acquiesce in his harm

ORDERS

IT IS HEREBY ORDERED the respondent's application for asylum is denied.

IT IS HEREBY ORDERED the respondent's application for withholding of removal under Section 241(b)(3) is denied.

IT IS HEREBY ORDERED the respondent's application for relief under the Convention Against Torture is denied.

IT IS HEREBY ORDERED the respondent be removed from the United States to Mexico based upon the charge contained in the Notice to Appear and the additional charge

Please see the next page for electronic signature

MICHAEL J. YAMAGUCHI
Immigration Judge

//s//

Immigration Judge MICHAEL J. YAMAGUCHI

yamagucm on Jan. 21, 2015 at 1:29 AM GMT

APPENDIX D

1. 8 U.S.C. 1229a provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of

witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written

notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or

addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

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

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is

the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

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

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or

witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to

apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

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[1] So in original.

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

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[2] So in original. A closing parenthesis probably should appear.

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

2. 8 U.S.C. 1231 provide:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment.

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[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B).".

Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request

[3] So in original. Probably should be followed by a closing parenthesis.

to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with

the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)—

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States,

an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien—

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

(c) Removal of aliens arriving at port of entry

(1) Vessels and aircraft

An alien arriving at a port of entry of the United States who is ordered removed either without a hearing under section 1225(b)(1) or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival shall

be removed immediately on a vessel or aircraft owned by the owner of the vessel or aircraft on which the alien arrived in the United States, unless—

(A) it is impracticable to remove the alien on one of those vessels or aircraft within a reasonable time, or

(B) the alien is a stowaway—

(i) who has been ordered removed in accordance with section 1225(a)(1) of this title,

(ii) who has requested asylum, and

(iii) whose application has not been adjudicated or whose asylum application has been denied but who has not exhausted all appeal rights.

(2) Stay of removal

(A) In general

The Attorney General may stay the removal of an alien under this subsection if the Attorney General decides that—

(i) immediate removal is not practicable or proper; or

(ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or of any State.

(B) Payment of detention costs

During the period an alien is detained because of a stay of removal under subparagraph (A)(ii),

the Attorney General may pay from the appropriation "Immigration and Naturalization Service—Salaries and Expenses"—

(i) the cost of maintenance of the alien; and

(ii) a witness fee of $1 a day.

(C) Release during stay

The Attorney General may release an alien whose removal is stayed under subparagraph (A)(ii) on—

(i) the alien's filing a bond of at least $500 with security approved by the Attorney General;

(ii) condition that the alien appear when required as a witness and for removal; and

(iii) other conditions the Attorney General may prescribe.

(3) Costs of detention and maintenance pending removal

(A) In general

Except as provided in subparagraph (B) and subsection (d),[4] of this section, an owner of a vessel or aircraft bringing an alien to the United States shall pay the costs of detaining and maintaining the alien—

(i) while the alien is detained under subsection (d)(1) of this section, and

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[4] So in original. Probably should be subsection "(e)".

(ii) in the case of an alien who is a stowaway, while the alien is being detained pursuant to—

(I) subsection (d)(2)(A) or (d)(2)(B)(i) of this section,

(II) subsection (d)(2)(B)(ii) or (iii) of this section for the period of time reasonably necessary for the owner to arrange for repatriation or removal of the stowaway, including obtaining necessary travel documents, but not to extend beyond the date on which it is ascertained that such travel documents cannot be obtained from the country to which the stowaway is to be returned, or

(III) section 1225(b)(1)(B)(ii) of this title, for a period not to exceed 15 days (excluding Saturdays, Sundays, and holidays) commencing on the first such day which begins on the earlier of 72 hours after the time of the initial presentation of the stowaway for inspection or at the time the stowaway is determined to have a credible fear of persecution.

(B) Nonapplication

Subparagraph (A) shall not apply if—

(i) the alien is a crewmember;

(ii) the alien has an immigrant visa;

(iii) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States and applies for admission not later than

120 days after the date the visa or documentation was issued;

(iv) the alien has a reentry permit and applies for admission not later than 120 days after the date of the alien's last inspection and admission;

(v)(I) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States or a reentry permit;

(II) the alien applies for admission more than 120 days after the date the visa or documentation was issued or after the date of the last inspection and admission under the reentry permit; and

(III) the owner of the vessel or aircraft satisfies the Attorney General that the existence of the condition relating to inadmissibility could not have been discovered by exercising reasonable care before the alien boarded the vessel or aircraft; or

(vi) the individual claims to be a national of the United States and has a United States passport.

(d) Requirements of persons providing transportation

(1) Removal at time of arrival

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States shall—

(A) receive an alien back on the vessel or aircraft or another vessel or aircraft owned or operated by the same interests if the alien is ordered removed under this part; and

(B) take the alien to the foreign country to which the alien is ordered removed.

(2) Alien stowaways

An owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft arriving in the United States with an alien stowaway—

(A) shall detain the alien on board the vessel or aircraft, or at such place as the Attorney General shall designate, until completion of the inspection of the alien by an immigration officer;

(B) may not permit the stowaway to land in the United States, except pursuant to regulations of the Attorney General temporarily—

(i) for medical treatment,

(ii) for detention of the stowaway by the Attorney General, or

(iii) for departure or removal of the stowaway; and

(C) if ordered by an immigration officer, shall remove the stowaway on the vessel or aircraft or on another vessel or aircraft.

The Attorney General shall grant a timely request to remove the stowaway under subparagraph (C) on a vessel or aircraft other than that on which the stowaway arrived if the requester has obtained any travel documents necessary for departure or repatriation of

the stowaway and removal of the stowaway will not be unreasonably delayed.

(3) Removal upon order

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel, aircraft, or other transportation line shall comply with an order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be removed under this chapter.

(e) Payment of expenses of removal

(1) Costs of removal at time of arrival

In the case of an alien who is a stowaway or who is ordered removed either without a hearing under section 1225(a)(1)[5] or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival, the owner of the vessel or aircraft (if any) on which the alien arrived in the United States shall pay the transportation cost of removing the alien. If removal is on a vessel or aircraft not owned by the owner of the vessel or aircraft on which the alien arrived in the United States, the Attorney General may—

(A) pay the cost from the appropriation "Immigration and Naturalization Service—Salaries and Expenses"; and

(B) recover the amount of the cost in a civil action from the owner, agent, or consignee of the

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[5] So in original. Probably should be "1225(b)(1)".

vessel or aircraft (if any) on which the alien arrived in the United States.

(2) Costs of removal to port of removal for aliens admitted or permitted to land

In the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien to the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(3) Costs of removal from port of removal for aliens admitted or permitted to land

(A) Through appropriation

Except as provided in subparagraph (B), in the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien from the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(B) Through owner

(i) In general

In the case of an alien described in clause (ii), the cost of removal of the alien from the port of removal may be charged to any owner of the vessel, aircraft, or other transportation line by which the alien came to the United States.

(ii) Aliens described

An alien described in this clause is an alien who—

(I) is admitted to the United States (other than lawfully admitted for permanent residence) and is ordered removed within 5 years of the date of admission based on a ground that existed before or at the time of admission, or

(II) is an alien crewman permitted to land temporarily under section 1282 of this title and is ordered removed within 5 years of the date of landing.

(C) Costs of removal of certain aliens granted voluntary departure

In the case of an alien who has been granted voluntary departure under section 1229c of this title and who is financially unable to depart at the alien's own expense and whose removal the Attorney General deems to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(f) Aliens requiring personal care during removal

(1) In general

If the Attorney General believes that an alien being removed requires personal care because of the alien's mental or physical condition, the Attorney General may employ a suitable person for that purpose who shall accompany and care for the alien until the alien arrives at the final destination.

(2) Costs

The costs of providing the service described in paragraph (1) shall be defrayed in the same manner

as the expense of removing the accompanied alien is defrayed under this section.

(g) Places of detention

(1) In general

The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation "Immigration and Naturalization Service—Salaries and Expenses", without regard to section 6101 of title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.

(2) Detention facilities of the Immigration and Naturalization Service

Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.

(h) Statutory construction

Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(i) Incarceration

(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General—

(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of the undocumented criminal alien; or

(B) take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.

(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.

(3) For purposes of this subsection, the term "undocumented criminal alien" means an alien who—

(A) has been convicted of a felony or two or more misdemeanors; and

(B)(i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;

(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or

(iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status.

(4)(A) In carrying out paragraph (1), the Attorney General shall give priority to the Federal incarceration of undocumented criminal aliens who have committed aggravated felonies.

(B) The Attorney General shall ensure that undocumented criminal aliens incarcerated in Federal facilities pursuant to this subsection are held in facilities which provide a level of security appropriate to the crimes for which they were convicted.

(5) There are authorized to be appropriated to carry out this subsection—

(A) $750,000,000 for fiscal year 2006;

(B) $850,000,000 for fiscal year 2007; and

(C) $950,000,000 for each of the fiscal years 2008 through 2011.

(6) Amounts appropriated pursuant to the authorization of appropriations in paragraph (5) that are distributed to a State or political subdivision of a State, including a municipality, may be used only for correctional purposes.

3. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by rea-

son of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall

transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of

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[1] See References in Text note below.

the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(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.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner 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 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(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.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien 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 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other

than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.