Case No. 12-72800

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YESENIA MARISOL MALDONADO LOPEZ,
Petitioner

v.

ERIC H. HOLDER JR., UNITED STATES ATTORNEY GENERAL,
Respondent

OPENING BRIEF IN SUPPORT OF PETITION FOR REVIEW

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JURISDICTIONAL STATEMENT

This is an appeal from the Board of Immigration Appeals' ("BIA's") dismissal of Petitioner Yesenia Marisol Maldonado Lopez's ("Ms. Maldonado's") appeal from the Immigration Judge's ("IJ's") denial of a petition for withholding of removal under § 241(b)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(b)(3), and for protection under the Convention Against Torture ("CAT"). This Court has jurisdiction over this appeal under 8 U.S.C. § 1252. *Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011) ("We have jurisdiction to review final agency orders of removal, including reinstatement orders, pursuant to . . . 8 U.S.C. § 1252(a)(1)."). Ms. Maldonado gave notice of her appeal to the BIA on April 30, 2012. Certified Administrative Record ("AR") 102. The BIA dismissed Ms. Maldonado's appeal in a decision dated August 22, 2012. AR 3-4. On August 30, 2012, Ms. Maldonado timely filed a Petition for Review with this Court. *See* 8 U.S.C. § 1252(b)(1).

This Court is the proper venue for this appeal because the IJ's and BIA's decisions occurred within this Circuit. *See* 8 U.S.C. § 1252(b)(2).

ISSUES PRESENTED FOR REVIEW

(1) Did the Agency err in promulgating and applying regulations which deny Ms. Maldonado the opportunity to apply for asylum even though the INA explicitly grants "any alien . . . irrespective of such alien's status" that opportunity?

(2) Did the BIA and IJ err in concluding that (i) a forced sexual and marital relationship between a lesbian girl and a man more than 50 years her senior that was intended to "cure" the child's sexual orientation, and (ii) the girl's subsequent violent assault on account of her sexual orientation, did not constitute past persecution?

(3) Did the BIA and IJ err in concluding, notwithstanding the evidence set forth above as well as the evidence of country conditions in El Salvador, that it was unlikely that Ms. Maldonado would be subjected to persecution or torture in the future if returned to El Salvador?

Attached to this Brief is an Addendum containing the decisions on appeal, as well as an Addendum containing the full text of the pertinent federal statutes and regulations.

STATEMENT OF THE CASE

Yesenia Marisol Maldonado Lopez, a lesbian and citizen of El Salvador, AR 3; AR 93, first entered the United States in 2006 after enduring a forced marriage and sexual relationship in El Salvador with a man more than 50 years her senior. *See* AR 295-96. She voluntarily returned to El Salvador in 2009 to arrange continuing care for the children she bore as a result of that relationship. AR 155. In 2010, she reentered the United States, was placed in expedited removal proceedings, and, on April 6, 2010, was removed to El Salvador pursuant to a removal order. AR 312. At that time, Ms. Maldonado did not apply for asylum because she did not understand the asylum process; as she explained to the IJ, she "didn't have any help." AR 159. After Ms. Maldonado returned to El Salvador, she experienced renewed violence due to her sexual orientation. *See, e.g.*, AR 161-63. On March 3, 2011, she was assaulted by a group of four women in her hometown in El Salvador; during the attack, the women called her homophobic slurs. AR 161-63. The police did not apprehend the attackers. AR 165; AR 323. Approximately five months later, on August 18, 2011, Ms. Maldonado was arrested near San Manuel, Texas. AR 242. After she was detained, Border Patrol executed paperwork for reinstatement of the prior order of removal under 8 U.S.C. § 1231 and removal under 8 U.S.C. § 1229(a).

At that time, Ms. Maldonado explained that she feared she would be persecuted if she returned to El Salvador. Immigration officials referred her to an Asylum Officer for a "reasonable fear" determination. AR 312. On November 7, 2011, Ms. Maldonado met with the Asylum Officer, who found that she was credible and reasonably feared persecution in El Salvador. AR 311. On the basis of this finding, immigration officials referred Ms. Maldonado's claim to an IJ on February 9, 2012. AR 330-31; AR 309-27.

Despite the Asylum Officer's determination that Ms. Maldonado credibly and reasonably feared persecution in El Salvador, the IJ concluded that Ms. Maldonado was prohibited from applying for asylum because she was subject to a prior order of removal that had been effectuated approximately two years earlier. AR 129-30. The IJ thus considered only whether Ms. Maldonado was entitled to withholding of removal. On April 13, 2012, the IJ (like the Asylum Officer) found Ms. Maldonado credible, AR 118; AR 171, but denied her request for withholding of removal and protection under CAT, AR 111. The IJ specifically found that Ms. Maldonado's experiences in El Salvador did not rise to the level of past persecution and that she had not shown that it was more likely than not that she would face future persecution or torture. AR 123-25.

Ms. Maldonado appealed to the BIA on April 30, 2012. AR 102. On August 22, 2012, the BIA affirmed the IJ's order, without addressing Ms.

Maldonado's claim that she was entitled to asylum, and dismissed the appeal, rejecting her claim that (in the alternative) she should be granted withholding of removal or protection under CAT. AR 3-4. In affirming the IJ's order, the BIA found that Ms. Maldonado's forced marriage at the age of 14 to a 68-year-old man who subsequently drugged, raped, and impregnated her did not constitute past persecution, because Ms. Maldonado "remained married" and "had two children" (one of which was conceived in rape) with the man. *See* AR 4. Ms. Maldonado then filed a timely Petition for Review with this Court on August 30, 2012. On February 28, 2013, this Court granted Ms. Maldonado's motion to proceed in forma pauperis and motion for a stay of removal pending review. Dkt. 16.

STATEMENT OF FACTS

Yesenia Marisol Maldonado Lopez was born on January 12, 1982 in the town of Chalchuapa, El Salvador. AR 177, 295. She lived there until she fled to the United States in 2006 at the age of 24. AR 89. Throughout her childhood, she felt different from other girls, in part due to her masculine mannerisms. AR 153. Ms. Maldonado eventually came to realize she is a lesbian. AR 319-20.

Ms. Maldonado was raised in a conservative Catholic home and community where discussion of homosexuality was taboo. AR 156. Because of her parents' strict religious views, she avoided telling them that she is a lesbian, but she believes they knew anyway. AR 157-58, 321-22. As Ms. Maldonado explained, her parents "didn't accept [her]," as her mannerisms were "very boyish." AR 153. Her parents accordingly took steps to force her to "change [her] mannerisms and change the way [she] was." AR 153. Ms. Maldonado likewise attempted to hide her true sexual identity from her small community, which was equally hostile to homosexuality. AR 157-58. But Ms. Maldonado's masculine appearance and mannerisms frequently led to derisive speculation and commentary. AR 158.

In response to their own misgivings about her sexual orientation and pressure from the community, Ms. Maldonado's parents sought to cure her of her sexual orientation. AR 153; AR 321. In 1996, when she was just 14 years old, they arranged for her to enter into a common law marriage and sexual relationship

with a 68-year-old family acquaintance, Cristobol de Jesus Pineda Huezo, who was 54 years her senior. AR 153; AR 179; AR 296; AR 321. According to Ms. Maldonado, her parents believed that having a relationship with Pineda would change her "mannerisms and change the way [she] was" and stop the community from gossiping about Ms. Maldonado's sexual orientation. AR 153; AR 312. Her parents also required her to begin living with Pineda as his common law wife. AR 153-54.

As a result of this forced relationship with Pineda, Ms. Maldonado became pregnant and gave birth to a daughter on July 29, 1997, when she was 15 years old. AR 296. Shortly thereafter, Ms. Maldonado left Pineda's home, returned to her family, and began a romantic relationship with a female friend. AR 312; AR 321-22. Because Ms. Maldonado's daughter lived with Pineda, however, Ms. Maldonado maintained contact with him. AR 312, 322. On one occasion in 2000, Ms. Maldonado went to visit her daughter only to discover that her daughter was not at Pineda's home as she had been led to believe. AR 322. Pineda then drugged Ms. Maldonado – leaving her unable to remember the details of the evening – and raped her. AR 312-13; AR 322. Her second child, a son, was conceived as a result of that rape and was born on May 6, 2001. AR 184.

Ms. Maldonado's forced sexual relationship with Pineda did nothing to diminish her feelings of ostracism from her community. Residents of her small

town continued to talk about lesbians in pejorative terms – claiming, for instance, that "lesbians should not even be born." AR 323; *see also* AR 157-58. Sexual minorities were also repeatedly murdered in her community. AR 324.

As a result, in August 2006, Ms. Maldonado left El Salvador for the United States. AR 152. She lived and worked in California until June 2009, when she voluntarily returned to El Salvador because Pineda was dying and she needed to make arrangements for the care of her children. AR 154-55. Upon her return to El Salvador, Ms. Maldonado's ostracism from her family and community continued; her family continually pressured her to marry another man, and she experienced continuing hostility from the community on account of her sexual orientation. AR 156-58.

Pineda died in December 2009 at the age of 81. AR 179. Approximately two months later, after having arranged for her two children to live with her sister, Ms. Maldonado left El Salvador for the United States. AR 155-56; AR 160. She was apprehended at the border in Laredo, Texas, placed in expedited removal proceedings, and deported to El Salvador under an order of removal on April 6, 2010. AR 159; AR 312. Although she expressed fear of harm if she was removed to El Salvador, she did not seek asylum at that time because she did not know she could and did not have any resources to do so. AR 159.

Following her removal to El Salvador in April 2010, Ms. Maldonado returned to her hometown and worked as a craftsperson. AR 159-61; AR 166-67. Approximately 11 months later, on March 3, 2011, four women assaulted her while she was on her way home from the market. AR 161. A woman she did not know approached her and asked to talk to her, and then led her to a dark alley where three other women were waiting to attack her. AR 161-62. As the women punched and kicked her, they called her "lesbian" and shouted vulgarities at her. AR 162-63. They also told her it was shameful for her to be there and that she should leave El Salvador and return to the United States. AR 313; AR 322. Ms. Maldonado did not recognize the women, but she believes they were sent by a male neighbor whose romantic advances she had spurned. AR 313; AR 323. Her attackers left her on the ground where a passerby found her and helped her get to the hospital. AR 163-65. Ms. Maldonado spent six to eight hours in the hospital that evening, during which time she gave a statement to the police. AR 165. The police never contacted her after she left the hospital and did not apprehend her attackers. AR 165, 323.

Fearing similar attacks from community members, Ms. Maldonado moved in with her sister and began saving money to return to the United States. AR 161. Ms. Maldonado then reentered the United States and was apprehended on August 18, 2011. AR 242. She explained to immigration officials that she feared being

attacked and murdered if she were to return to El Salvador, so the officials referred her for a reasonable fear interview. AR 312. At the interview, Ms. Maldonado testified regarding her personal history and sexual orientation, her prior immigration history, and her reasons for coming to the United States. AR 315-27.

Ms. Maldonado also testified about her fear of returning to El Salvador. She stated that, in addition to the psychological harm and social isolation she was subjected to as a lesbian in El Salvador – including being drugged and raped as a child by the 68-year-old man who her family forced her to marry, AR 321-22 – she continues to fear physical harm from individuals in her home country who do not accept lesbians. AR 323-24. She further testified that individuals in her hometown have killed several sexual minorities and have even cut their heads off and thrown them into a nearby lake. AR 324. On the basis of her testimony, the Asylum Officer determined that Ms. Maldonado was credible and had a reasonable fear of persecution, and referred her to an IJ. AR 311, 330. Once in court, she applied for asylum and explained that she feared returning to El Salvador because of her sexual orientation. She specifically identified her 2011 assault as a principal basis of her persecution claim. AR 299 ("I was beaten[] and threatened [on] March 3, 2011 [by] several wom[e]n and was not protected by authorities in my country because I am gay.").

At the hearing before the IJ, the IJ asked Ms. Maldonado questions based on the record from the reasonable fear determination and other materials submitted by Ms. Maldonado. Ms. Maldonado expressed her fear of returning to El Salvador, and testified that gay and lesbian friends in El Salvador had been harmed and even killed. AR 168-69. The IJ did not, however, specifically inquire about many of the events that Ms. Maldonado discussed in her reasonable fear interview, and as a pro se applicant, she neglected to mention them. For example, at the reasonable fear interview, Ms. Maldonado provided several key details about her marriage to Pineda, including that she was drugged and raped by Pineda and that her second child was a result of that rape. AR 322.

Although he failed to elicit a complete version of Ms. Maldonado's claim, the IJ did conclude that her testimony was credible. AR 118. He nevertheless denied her request for withholding of removal on the grounds that (i) a single assault did not qualify as past persecution, (ii) Ms. Maldonado was not sure of the attackers' motivations, (iii) the police were responsive in taking her statement, and (iv) the government did not consent or acquiesce to her assault. AR 123-24. The IJ's decision omitted Ms. Maldonado's forced "curative" marriage to Pineda from the past persecution analysis. AR 123.

On appeal, the BIA affirmed the IJ's decision and dismissed Ms. Maldonado's appeal. AR 3-4. The BIA held that the record did not show that Ms.

Maldonado had suffered past persecution, nor did it show that it was more likely than not that Ms. Maldonado would be persecuted upon her return to El Salvador because she is a lesbian. AR 4. It characterized her assault in March 2011 as "minor" and said that her "arranged" marriage to Pineda was not persecution because it lasted "for about 13 years, until his death in 2009." AR 4. The BIA, like the IJ, did not acknowledge Pineda's rape of Ms. Maldonado in 2000. Although it noted that Ms. Maldonado contended that she should have been permitted to apply for asylum, AR 3, the BIA did not address this argument on the merits.

SUMMARY OF THE ARGUMENT

Ms. Maldonado, a lesbian and citizen of El Salvador, is entitled to relief both because (i) the Agency regulations misinterpret the immigration statutes to preclude Ms. Maldonado from applying for asylum and (ii) the BIA erred in holding that Ms. Maldonado was not subject to past persecution or at risk of future persecution or torture, and was therefore not entitled to withholding of removal.

The INA explicitly provides that "any" alien, regardless of his or her immigration status, is eligible to apply for asylum. INA § 208(a), 8 U.S.C. § 1158(a). A separate provision of the INA broadly prohibits "relief" for aliens whose prior orders of removal are "reinstated." INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). Agency regulations interpret that prohibition on "relief" to trump 8 U.S.C. § 1158(a)'s grant of asylum eligibility to "any" alien, and thereby categorically prohibit individuals subject to reinstatement orders from applying for asylum. But that interpretation is contrary to the plain meaning of the INA and traditional canons of statutory interpretation. And it would read out of the statute provisions which explicitly contemplate the filing of successive asylum applications.

Even if the statutory scheme was ambiguous, the Agency's existing consideration of the question is not entitled to deference under *Chevron*. The Agency does not consider the asylum bar reflected in its regulations to be

discretionary, but rather an outcome compelled by statute. This, in itself, precludes deference.

In addition, the Agency erred in denying Ms. Maldonado withholding of removal and protection under the Convention Against Torture. The IJ concluded that Ms. Maldonado suffered no past persecution and is not at risk of future persecution based on the treatment of sexual minorities in El Salvador, and the BIA agreed. But as a 14-year-old child, Ms. Maldonado was forced into a "marriage" with a 68-year-old man who raped her, drugged her, and impregnated her twice, all because her family wanted to "cure" her of being a lesbian. Ms. Maldonado was later savagely beaten on the streets of El Salvador by a gang of women because she is a lesbian. The BIA nevertheless concluded that Ms. Maldonado had not suffered past persecution in part because she "had two children" in the course of her "arranged" marriage to the 68-year-old man who raped her.

That conclusion is both factually and legally flawed. The cumulative effect of these events plainly shows that Ms. Maldonado has been subject to past persecution. Moreover, given this past persecution, the Agency should have afforded Ms. Maldonado a rebuttable presumption that she would face future persecution. Its failure to accurately assess her past persecution led to subsequent

errors in its consideration of her claims for withholding of removal and protection under CAT.

ARGUMENT

I. THE AGENCY'S REGULATIONS ERRONEOUSLY DEPRIVE MS. MALDONADO OF THE OPPORTUNITY TO APPLY FOR ASYLUM.

The regulatory scheme that the BIA and IJ are bound to apply denies Ms. Maldonado the opportunity to apply for asylum. *See* 8 C.F.R. § 241.8(e); *id.* § 208.31.[1] These regulations are inconsistent with the asylum statute, INA § 208(a), 8 U.S.C. § 1158(a), which explicitly provides that "any alien," regardless of his or her immigration status, may apply for asylum. *See also* INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States").[2] Although the BIA is not authorized to overrule agency regulations, *see Matter of Akram*, 25 I. & N. Dec. 874, 880 (BIA 2012), this Court reviews such regulations under the same standard as it reviews decisions of the BIA. Under that standard, these regulations cannot stand.

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[1] 8 C.F.R. § 241.8(e) provides that aliens who are subject to prior orders of removal shall be considered for withholding of removal when they express a reasonable fear of persecution or torture. 8 C.F.R. § 208.31 outlines the process by which such aliens are then considered for withholding of removal, and confirms that the immigration judge shall give "full consideration of the request for withholding of removal only." The regulations set forth no process by which an alien subject to a prior order of removal may apply or be considered for asylum.

[2] The IJ concluded that Ms. Maldonado's prior order of removal limited the forms of relief for which she was eligible to withholding of removal only (under either the INA or CAT). *See* AR 129-30. In her appeal from the IJ's decision, Ms. Maldonado argued that the IJ erred in denying her an opportunity to apply for asylum notwithstanding her previous removal order. *See* AR 49-57. The BIA did not address this argument in its decision. *See* AR 3-4.

A. Standard of Review

Issues of law, including questions of statutory interpretation and construction, are reviewed de novo. *Padash v. INS*, 358 F.3d 1161, 1168 (9th Cir. 2004); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187 (9th Cir. 2001).

In reviewing the validity of agency regulations, the Court applies the two-part test set forth in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the Court first asks whether Congress has directly spoken to the precise question at issue. *See id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the statute is silent or ambiguous with respect to the specific issue, the Court moves to the second step of the *Chevron* test and asks whether the regulations promulgated by the agency are based on a permissible construction of the statute. *See id.* at 843. If so, the Court must defer to the agency. *See Rust v. Sullivan*, 500 U.S. 173, 184 (1991).

The Court employs traditional tools of statutory construction at step one of *Chevron*. *See Socop-Gonzalez*, 272 F.3d at 1187 ("If a court, in employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." (citing *Chevron*, 467 U.S. at 843 n.9)). Canons of statutory construction demand

that "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The Court looks to the plain language, context, legislative intent, and purpose of the statutes, with the goal of interpreting sections of an act as a coherent whole. *Padash*, 358 F.3d at 1169-70; *see Watt v. Alaska*, 451 U.S. 259, 265-66 (1981). Traditional canons of interpretation require the Court to interpret, whenever possible, multiple statutory provisions so as not to conflict with each other. *California v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000). If a conflict is unavoidable, the Court must reconcile the provisions while giving effect to each as much as possible. *POM Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1175 (9th Cir. 2012).

If, after using these tools of statutory construction, the Court concludes that the statute is not ambiguous, the Court need not defer to the agency's interpretation. Indeed, the Court "may not accept an interpretation clearly contrary to the plain meaning of a statute's text." *Federiso v. Holder*, 605 F.3d 695, 697 (9th Cir. 2010); *see also Nijjar v. Holder*, 689 F.3d 1077, 1083 (9th Cir. 2012) (where Congress has directly spoken to the precise question at issue and its intent is obvious, "that is the end of the matter" and *Chevron* deference does not apply).

Furthermore, even if the Court finds the statute ambiguous, it still need not defer to the Agency. First, the Agency did not acknowledge that the statute could be interpreted as *not* barring asylum eligibility. "Deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." *Gila River Indian Cmty. v. United States*, --- F.3d ---, 2013 WL 2171652, at *7 (9th Cir. May 20, 2013) (internal quotation marks omitted). Second, even if the Agency believed the statute was ambiguous, its resolution of that ambiguity was not reasonable, because it failed to account for canons of statutory construction, applicable international law, and relevant policy considerations.

B. The Agency's Interpretation Contradicts Unambiguous Provisions of the INA.

The INA does not preclude individuals subject to reinstatement orders from applying for asylum. To the contrary, the INA unambiguously gives all aliens the right to apply for asylum, except for limited classes of individuals delineated in the asylum statute.

The asylum statute contains a comprehensive scheme for determining when individuals are eligible to apply for asylum. INA § 208, 8 U.S.C. § 1158. First, the statute creates a general rule that any alien may apply for asylum: "*Any alien* who is physically present in the United States or who arrives in the United States . . . , *irrespective of such alien's status*, may apply for asylum." 8 U.S.C.

§ 1158(a)(1) (emphasis added). Second, the statute provides limited exceptions to the eligibility to apply for asylum. *Id.* § 1158(a)(2).[3] Finally, the statute creates a separate category of individuals eligible to apply for asylum, but who are made substantively ineligible to be granted that status. *Id.* § 1158(b)(2).[4]

The statute does not prohibit asylum applications by aliens who are inadmissible or deportable, who have previously been removed from the United States, or who have reentered the United States illegally. *See, e.g.*, *Matter of F-P-R*, 24 I. & N. Dec. 681, 685 (BIA 2008) (finding applicant met burden for asylum despite illegal reentry). Indeed, conceding deportability is a prerequisite to filing a defensive asylum application. *See, e.g.*, *Wang v. INS*, 352 F.3d 1250, 1253 (9th Cir. 2003).

The government's position is that § 1158(a)'s unambiguous rule permitting an asylum application by Ms. Maldonado is trumped by the reinstatement of removal provision, which bars certain aliens from "apply[ing] for any relief." INA § 241(a)(5), 8 U.S.C. § 1231(a)(5). That provision states:

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[3] Individuals are barred from applying for asylum under § 1158(a)(2) if they are subject to a "Safe Third Country" Agreement; if they file their asylum applications more than one year after their last arrival; or if they previously applied for asylum but were denied (unless they are able to demonstrate changed circumstances).

[4] Section 1158(b)(2) prohibits, *inter alia*, a grant of asylum to anyone who has persecuted others, been convicted of a serious crime, or who is a danger to national security. No one claims that Ms. Maldonado falls into any of those categories.

> 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.

Id. (emphasis added).

Although the reinstatement provision purports to bar "any relief" to aliens subject to prior orders of removal, neither that provision nor any other provision of the INA defines "relief," and there is no fixed, consistent use of that term in the INA. For example, the government concedes that "relief" as used in § 1231(a)(5) does not encompass withholding of removal, *cf.* 8 C.F.R. § 208.2(c)(2)(i), even though withholding of removal would likely be a form of relief from deportation in ordinary parlance[5] and is commonly referred to as "relief" by the BIA in published decisions. *See, e.g.*, *Matter of E-A-*, 26 I. & N. Dec. 1, *1 (BIA 2012) (referring to "relief pursuant to sections 208(b)(2)(A)(iii) and 241(b)(3)(B)(iii) of the Act"); *Matter of G-K-*, 26 I. & N. Dec. 88, *89 (BIA 2013) (referring to "respondent's requests for relief from removal" including withholding and protection from torture). The inconsistent uses of "relief" throughout the INA and by the Agency therefore preclude the term from bearing the kind of substantial weight the

[5] Black's Law Dictionary broadly defines "relief" as "[t]he redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court. — Also termed remedy." Black's Law Dictionary (9th ed. 2009).

government claims for it.[6] As a result, it cannot be said that the reference to "relief" in § 1231(a)(5) is so specific as to bar asylum eligibility, particularly in the face of conflicting statutory provisions which appear to expressly permit it.

Nevertheless, Agency regulations issued pursuant to § 1231(a)(5) implicitly treat asylum as a type of "relief" and thus prohibit any alien subject to an order of reinstatement from seeking asylum. AR 83; AR 310; AR 330; *see also* 8 C.F.R. § 241.8(a) and (e) (aliens subject to prior orders of removal "shall be removed . . . by reinstating the prior order," except that an alien "express[ing] a fear of returning" to their home country may be referred for a reasonable-fear-of-persecution determination under 8 C.F.R. § 208.31); *see also id.* § 208.31(e) (if an asylum officer determines that an alien subject to a prior order of removal has a reasonable fear of persecution, he may refer the alien to an immigration judge "for full consideration of the request for withholding of removal only"). An IJ is thus

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[6] If anything, the INA as a whole suggests that Congress commonly differentiates between protection-based relief such as asylum and withholding, and other forms of humanitarian-based relief granted as an act of grace by statutory law, with no foundation in international law obligations. For instance, there is no federal court jurisdiction over any relief that is discretionary by statute, except for asylum. 8 U.S.C. § 1252(a)(2)(B)(ii); *Morales v. Gonzales*, 478 F.3d 972, 979-80 (9th Cir. 2007), *abrogated on other grounds by Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010). Other statutes likewise distinguish asylum from other forms of relief. *See, e.g.*, 8 U.S.C. § 1229a(b)(7) (*in absentia* removal order triggers ineligibility for discretionary relief except for asylum); 8 U.S.C. § 1229a(c)(7)(C) (deadline for motions to reopen inapplicable to claims for asylum or withholding of removal due to changed country conditions).

barred by regulation from considering an application for asylum by an alien, such as Ms. Maldonado, whose prior order of removal is reinstated under § 1231(a)(5). *See* 8 C.F.R. § 208.2(c)(2)(i) (aliens subject to reinstated removal orders may only apply for withholding of removal); *id.* § 208.2(c)(3)(i) ("[t]he scope of review in proceedings conducted pursuant to paragraph (c)(2) . . . shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal").

Section 1231(a)(5) must be interpreted in light of the overall statutory scheme and cannot be read in isolation. *See Chen v. Mukasey*, 524 F.3d 1028, 1031-32 (9th Cir. 2008); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). Reading § 1231(a)(5) to prohibit *all* asylum applications by aliens subject to prior orders of removal – as the Department of Homeland Security ("DHS") apparently does – would render that provision flatly inconsistent with § 1158(a)'s broad grant of the right to apply for asylum. That sort of statutory inconsistency is necessarily disfavored.

DHS's reading of § 1231(a)(5) to prohibit asylum applications by aliens subject to removal orders also renders that provision inconsistent with § 1158(a)(2)(C), which governs the filing of an asylum application by an alien who "has previously applied for asylum and had such application denied." Under that provision, an alien whose prior asylum application was denied may apply again if

the alien "demonstrates . . . the existence of changed circumstances which materially affect the applicant's eligibility for asylum." 8 U.S.C. § 1158(a)(2)(D). The previous denial would (in the absence of other relief) trigger an order of removal or of voluntary departure as a matter of course. *See Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433 (BIA 2008) (requiring entry of removal order where asylum was denied); *see also Matter of Chamizo*, 13 I. & N. Dec. 435, 438 (BIA 1969). But upon reentry, orders of removal and of voluntary departure are subject to reinstatement under § 1231(a)(5). *See Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 496 n.14 (9th Cir. 2007) (en banc). As a result, those individuals who "previously applied for asylum and had such application denied" under § 1158(a)(2)(C) would, in fact, be prohibited from applying for asylum under DHS's interpretation of § 1231(a)(5) – even though § 1158(a)(2)(C) expressly authorizes a second asylum application premised on changed circumstances. That express contradiction in terms is untenable. *Cf. Bona v. Gonzales*, 425 F.3d 663, 670 (9th Cir. 2005) (invalidating regulation that excluded parolees from applying for adjustment of status because it directly conflicted with a provision of the INA and created "absurd results when viewed in light of the larger statutory scheme").

Furthermore, § 1231(a)(5)'s generalized prohibition on "relief" cannot be read to trump § 1158(a)'s specific rules governing asylum eligibility. Traditional canons of statutory construction demand that "[h]owever inclusive may be the

general language of a statute, it will not be held to apply to a matter *specifically* dealt with in another part of the enactment." *MacEvoy*, 322 U.S. at 107 (emphasis added); *see also Radzanower*, 426 U.S. at 153. Where two conflicting statutes, one general and one specific, cover the same ground, the specific will be interpreted to qualify and provide exceptions to the general. *United States v. Gallenardo*, 579 F.3d 1076, 1085 (9th Cir. 2009); *United States v. Navarro*, 160 F.3d 1254, 1256-57 (9th Cir. 1998). Section 1231(a)(5)'s broad prohibition on "relief" to aliens subject to prior orders of removal thus does not and cannot trump § 1158(a)(1)'s specific eligibility rules for one *particular* form of relief afforded to aliens – namely, asylum. Under the plain text of the statute, the provisions of § 1158 govern asylum eligibility; the regulations are to the contrary and must be invalidated.

C. Congress Intended Aliens Subject to Prior Orders of Removal to Be Eligible to Apply for Asylum.

Legislative history supports Ms. Maldonado's contention that Congress intended her to be eligible to apply for asylum. The asylum statute, INA § 208(a), 8 U.S.C. § 1158(a), effectuates a chief objective of the asylum statutory scheme – to address "the urgent needs of persons subject to persecution in their homelands," Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980), and thus "to provide a haven for refugees and asylum-seekers . . . unable or unwilling to return to their home country because of persecution," CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES 6 (2006). Consistent with this

objective, § 1158(a) authorizes a process for aliens fearing persecution to be heard before being removed from the United States, and confirms that all aliens have a right to apply for asylum. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990) ("It is undisputed that all aliens possess [the right to apply for asylum] under the Act."); *see also Gonzales v. Reno*, 212 F.3d 1338, 1347 (11th Cir. 2000) ("Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: '[a]ny alien . . . may apply for asylum.'").

When Congress enacted the reinstatement of removal provision, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), in 1996, it simultaneously made comprehensive amendments to the asylum statute, INA § 208, 8 U.S.C. § 1158. The legislature reworded the prior § 1158(a) (now § 1158(a)(1)) but retained the language extending asylum eligibility to "any alien" "irrespective of such alien's status." *See* 8 U.S.C. § 1158(a) (1992), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 604, 110 Stat. 3009-690 (1996). At the same time, Congress expanded the grounds of ineligibility for asylum, adding the enumerated exceptions to the general eligibility to apply for asylum in § 1158(a)(2) and the prohibition on granting asylum to certain categories of aliens in § 1158(b)(2).[7] Notably, however, Congress did not

[7] The IIRIRA added both (i) the changed-circumstances exception to the bar against successive asylum applications and (ii) § 1231(a)(5)'s prohibition on "relief" from prior orders of removal. In doing so simultaneously, Congress

exclude aliens subject to prior orders of removal from asylum eligibility.

Section 1231(a)(5) does not purport to repeal, amend, or modify § 1158(a)(1) in any fashion. It does not include any "notwithstanding" clause that would suggest it is intended to trump other statutory provisions – unlike § 1158, which applies "irrespective of such alien's status." Had Congress in 1996 intended a prior order of removal to prohibit an application by a first-time asylum applicant, it could have said as much. The fact that Congress was focused on, and took steps to narrow, the asylum statute at the time it enacted § 1231(a)(5) thus demonstrates an intent to maintain asylum eligibility for aliens subject to reinstatement of a removal order. Section 1231(a)(5) should not now be used by the Agency to constrain such eligibility since, having decided that "any alien" may apply for asylum, "Congress has charged [DHS] . . .with facilitation, not hindrance, of that legislative goal." *Gonzales*, 212 F.3d at 1352.

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obviously saw no inconsistency between them, and understood that § 1231(a)(5)'s prohibition on "relief" did not eliminate the ability of aliens to apply for asylum based on circumstances arising after the "original date" of the prior order of removal. Moreover, the legislative history of the IIRIRA shows that Congress expressly intended the changed circumstances exception to provide a safe harbor for truly legitimate asylum claims that would otherwise be subject to the IIRIRA's stringent new measures for preventing meritless applications. *See* 104 CONG. REC. S11, 839-40 (1996).

D. Asylum Availability Is Consistent with the United States' Obligations Under International Law.

Interpreting the reinstatement of removal provision, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), to permit Ms. Maldonado to apply for asylum is also consistent with the United States' obligations under international law. Federal law "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 64 (1804). This is particularly relevant with respect to asylum, given that Congress expressly enacted the asylum statute in order to conform federal law to the United Nations' *Protocol Relating to the Status of Refugees*, Nov. 1, 1968, 19 U.S.T. 6223 (hereinafter the "Protocol"), which the United States adopted in 1968. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424, 436-37 (1987); *INS v. Stevic*, 467 U.S. 407, 425 (1984).

It is true that the withholding statute, § 1231(a)(5), prevents the return of an individual to a country where they would likely be persecuted – one of the chief aims of the Protocol. But that is not the only requirement of the Protocol. For instance, the Protocol also requires the United States to provide documented refugees or asylees with various benefits, including the right to travel internationally. Protocol art. 1, 19 U.S.T. 6223 (adopting Convention Relating to the Status of Refugees art. 28). Although federal regulations permit "refugee travel documents" to be provided to aliens granted asylum or refugee status, 8

C.F.R. § 223.1, they do not extend similar benefits to individuals who are recognized as refugees through a grant of withholding of removal under 8 U.S.C. § 1231(b)(3). Instead, if an individual is granted withholding of removal protection under § 1231(b)(3), she is not permitted to travel abroad. In that circumstance, any departure from the United States thereafter constitutes a self-deportation. 8 C.F.R. § 241.7.

As a result, an alien who would otherwise qualify for asylum in the United States, but who is limited to withholding of removal because of a prior order of removal, is effectively denied the protections of the Protocol. The Agency regulations that mandate that result are accordingly premised on an interpretation of United States law that does not comport with the country's obligations to asylees under international law, in contravention of *Charming Betsy*. *See* 6 U.S. (2 Cranch) at 64. Here, moreover, there is an alternative interpretation of the INA – mandated by the plain language of § 1158(a) – that necessarily gives such aliens, including Ms. Maldonado, the right to apply for and obtain asylum, and thereby receive the benefits that asylees are entitled to under the Protocol.

E. The Rule of Lenity Confirms that Ms. Maldonado Should Be Permitted to Apply for Asylum.

To the extent the relationship between the asylum statute, INA § 208, 8 U.S.C. § 1158, and the reinstatement of removal provision, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), is ambiguous, any ambiguity should be resolved in Ms.

Maldonado's favor, in light of the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449. This is especially true in the asylum context, since removal is "a harsh measure . . . all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Id.* Since Congress has protected an alien's right to seek and ability to obtain asylum regardless of immigration status, that protection should not be constrained any more than is clearly necessary under the statute. *Costello v. INS*, 376 U.S. 120, 128 (1964) ("Since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the word used." (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))).

F. Even If the INA Is Ambiguous, DHS's Interpretation of § 1231(a)(5) Is Not Entitled to *Chevron* Deference Because DHS Does Not Believe It Has the Discretion to Permit Asylum Applications by Aliens Subject to Prior Orders of Removal.

Even if the relationship between the asylum statute, INA § 208, 8 U.S.C. § 1158 and the reinstatement of removal provision, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), is ambiguous, this Court need not defer to the Agency. "Deference to an agency's interpretation of a statute is not appropriate when the agency

wrongly believes that interpretation is compelled by Congress." *Gila River Indian Cmty.*, --- F.3d ---, 2013 WL 2171652, at *7 (internal quotation marks omitted).

The regulations that prohibit Ms. Maldonado from applying for asylum were enacted pursuant to the provisions of § 1231(a)(5). The Agency's issuing releases offer no indication that it has considered how or why § 1231(a)(5)'s putative prohibition on "relief" to aliens subject to prior orders of removal should trump § 1158's specific authorization of asylum eligibility to "any" alien, rather than vice versa. *See also* 8 C.F.R. §§ 208.13, 208.16, 241.8; 62 Fed. Reg. 444, 451 (Jan. 3, 1997); 62 Fed. Reg. 10,312, 10,326, 10,379 (Mar. 6, 1997) (interim rule discussing 8 U.S.C. § 1231(a)(3) and § 1231(a)(5)); 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999) (interim rule enacting CAT and stating without analysis that aliens with reinstated removal orders are ineligible for asylum). Nor did the BIA's decision in Ms. Maldonado's appeal give any consideration to the relationship between § 1158 and § 1231(a)(5). To the contrary, the BIA considers itself bound by DHS regulations and to have "no authority to declare [those] regulations to be invalid." *Matter of Akram*, 25 I. & N. Dec. at 880.

Critically, the Agency has already admitted that there are statutory exceptions to § 1231(a)(5)'s purportedly broad prohibition on "relief" to aliens subject to prior orders of removal. As discussed above, regulations permit an alien who (like Ms. Maldonado) has a reasonable fear of persecution to apply for

withholding of removal. *See* 8 C.F.R. § 241.8(e); 8 C.F.R. § 208.31. DHS has explicitly stated that these regulations give effect to a specific statutory provision, namely INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), that prohibits removal of an alien to any country where the alien's life or freedom would be threatened and thereby creates an exception to § 1231(a)(5)'s seemingly broad prohibition on "relief." *See* 8 C.F.R. § 241.8(e); *see also* 62 Fed. Reg. 10,378, 10,379 (implementing exception for withholding of removal pursuant to INA § 241(b)(3)). The Agency offers no explanation for its failure to provide a similar exception for asylum in light of § 1158.

The inescapable conclusion is that the regulatory framework propounded by DHS is premised on the incorrect belief that the unavailability of asylum to aliens like Ms. Maldonado was compelled by Congress. In these circumstances, even if the Court determines that the statute is ambiguous, it should not defer to the Agency's resolution of that ambiguity. Instead, the Court should remand the matter to the BIA so that it may exercise its discretion to interpret the interplay of § 1158 and § 1231(a)(5) in the first instance. *See Negusie v. Holder*, 555 U.S. 511, 523 (2009) ("Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." (citations and internal quotation marks omitted)); *see also INS v.*

Orlando Ventura, 537 U.S. 12, 17 (2002) (per curiam) (the ordinary remand rule applies where an agency "can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides").

G. Any Resolution by the Agency of Any Ambiguity in § 1231(a)(5) Was Unreasonable.

In all events, to the extent that the Agency has, in fact, addressed the interplay between the asylum statute, INA § 208, 8 U.S.C. § 1158, and the reinstatement of removal provision, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), in concluding that aliens subject to prior orders of removal may not apply for asylum, its interpretation is plainly unreasonable. *See Chevron*, 467 U.S. at 844. As set forth above, the Agency's explanations for the regulations that prohibit Ms. Maldonado from applying for asylum fail to consider the conflict created by its reading of § 1231(a)(5) and § 1158. The Agency failed to consider § 1231(a)(5)'s generalized prohibition on "relief" in light of § 1158's specific authorization that "any" alien may apply for asylum, "regardless of status," and its specific, detailed rules for individuals previously denied asylum. 8 U.S.C. § 1158(a). Nor did it

consider Congress's intent in enacting these provisions, nor how any interpretation should give effect to the United States' obligations under international law.[8]

Nor did the Agency consider the adverse effect of this rule on legitimate asylum-seekers. Even if Ms. Maldonado is ultimately granted relief in the form of withholding of removal, she will never be able to petition for her children to join her as derivatives. *See Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005) (asylees, unlike those who receive withholding of removal, are entitled to derivative benefits). Nor could she travel abroad to see them, even in a third country. *Compare* 8 C.F.R. § 223.1(b) (granting right to asylees), *with id.* § 241.8 (any departure from United States executes her removal order). Ms. Maldonado will never be able to apply for permanent residence. *Cf. id.* § 245.1(d)(1); *id.* § 209.2(a)(1) (granting right to asylees). She will need to periodically request work authorization, *see id.* § 274a.12(a)(10); *id.* § 208.7, and will be subject in perpetuity to periodic check-ins with immigration officials, *see id.* § 241.4(b)(3), *id.* § 241.5.

The regulatory resolution of any statutory ambiguity failed to account for any of these considerations. Even if the statute is ambiguous – with the Agency

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[8] In ruling on Ms. Maldonado's petition, the BIA considered itself to be bound by agency regulations with no authority to ignore them or declare them invalid. *Akram*, 25 I. & N. Dec. at 880. Its decision rejecting Ms. Maldonado's argument that she should be permitted to apply for asylum was accordingly just as unreasonable as DHS's regulatory interpretation.

thereby authorized to issue regulations to fill in gaps in the statute – any regulations must be "reasonable in light of the legislature's revealed design." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995). Because the Agency's resolution of any ambiguity here gives little consideration to the statute's overall design, it is unreasonable. *See, e.g.*, *Zheng v. Gonzales*, 422 F.3d 98, 120 (3d Cir. 2005) ("Given Congress's intent as expressed in the language, structure, and legislative history . . . the regulation's effect . . . does not harmonize with the plain language of the statute, its origin, and purpose." (citations omitted)).

II. THE AGENCY ERRED IN DENYING MS. MALDONADO PROTECTION ON THE BASIS THAT HER FORCED MARRIAGE, RAPE, AND VIOLENT ASSAULT DID NOT CONSTITUTE PAST PERSECUTION.

The Agency also erred in concluding that Ms. Maldonado was not subject to past persecution, and this determination led to an erroneous denial of her application for withholding of removal and protection under CAT. In testimony that both the Asylum Officer and the IJ found credible, *see* AR 313; AR 118,[9] Ms. Maldonado explained that she was forced by her family into a marital and sexual

[9] "In the absence of an adverse credibility determination," the petitioner's "statements must be taken as true." *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1171 (9th Cir. 2006) (citing *Navas v. INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000)). Here, the IJ explicitly stated on the record that he accepted what Ms. Maldonado told him as true. AR 171 ("I'm sure that you've been telling me absolutely the truth.").

relationship[10] – when she was only a 14-year-old child – with Cristobol de Jesus Pineda Huezo, a 68-year-old friend of her parents, as part of her family's attempt to "cure" her of her sexual orientation. AR 320-22; AR 314. This man then impregnated his 14-year-old "bride," who gave birth to her first child at age 15. AR 320-22; AR 314. After Ms. Maldonado, then 15 or 16 years old, returned to her family and began a romantic relationship with a female friend, Pineda drugged and raped her, leaving her pregnant with her second child, AR 322; AR 312-13 – an issue that the IJ completely failed to address, despite promising early in the hearing that "we'll talk more about [your forced marriage] in a moment," AR 154. In light of these undisputed facts, the BIA's conclusion that Ms. Maldonado did not suffer past persecution because she and Pineda "remained married . . . until his death in 2009" and "had two children together" is both factually and legally flawed. *See* AR 4. The BIA further erred in concluding that, taken cumulatively, Ms. Maldonado's forced marriage and her beating at the hands of four women who execrated her sexual orientation did not establish past persecution.

A. Standard of Review

Because the BIA purported to conduct an independent review of the IJ's findings, the Court reviews the BIA's decision. *See Mendoza-Pablo v. Holder*,

[10] At a hearing before the IJ, Ms. Maldonado explained that there was no marriage ceremony and that she and Pineda were in a common-law relationship. AR 153-54.

667 F.3d 1308, 1312 (9th Cir. 2012) (citing *Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003); 8 U.S.C. § 1252(a)(1)). Although the IJ's or BIA's factual findings are generally reviewed for substantial evidence, *see, e.g.*, *Arbid v. Holder*, 700 F.3d 379, 385-86 (9th Cir. 2012) (per curiam), the Court reviews de novo both "purely legal questions" and "mixed questions of law and fact requiring [it] to exercise judgment about legal principles," *Mendoza-Pablo*, 667 F.3d at 1312 (quoting *United States v. Ramos*, 623 F.3d 672, 679 (9th Cir. 2010)). Here, the Court should review the BIA's determination regarding whether the experiences Ms. Maldonado endured rise to the level of persecution. Even if, standing on its own, Ms. Maldonado's forced sexual relationship with Pineda (which included rape and forcible impregnation) did not constitute past persecution, that forced relationship, coupled with the subsequent beating she suffered at the hands of four women who attacked her because she is a lesbian, plainly does.

"The elements of an application for withholding of removal are essentially the same as that of asylum, except the burden of proof is higher." *Ali v. Holder*, 637 F.3d 1025, 1029 n.2 (9th Cir. 2011). To obtain withholding of removal under § 1231(b)(3), an applicant must establish that it is more likely than not that her "life or freedom would be threatened in that country because of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); *see Delgado v. Holder*, 648 F.3d 1095, 1100-01 (9th Cir.

2011). Withholding of removal is not discretionary: "[t]he Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the [ ] protected grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation marks omitted). A showing of past persecution entitles an alien to a presumption of eligibility for withholding of removal. *Ali*, 637 F.3d at 1029 n.2; *see also* 8 C.F.R. § 208.13(b)(1) (an alien who has suffered past persecution is presumed to have a well-founded fear of persecution).

B. Maldonado Was Persecuted When Her Family Forced Her at the Age of 14 to Marry a 68-Year-Old Man in an Attempt to "Cure" Her Homosexuality.

A lesbian can be persecuted by actions designed to "cure" her. *See Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997). Similarly, both forced marriage and rape can themselves constitute persecution. Accordingly, the forced marriage of a lesbian – and in particular a lesbian *adolescent* who cannot legally consent or even effectively resist[11] – to a much older man who repeatedly has sex with her and impregnates her, all in an effort to "cure" her of her homosexuality, necessarily constitutes persecution. In concluding that Ms. Maldonado's forced marriage was not persecution because she "remained married" and because she

[11] El Salvador criminalizes intercourse with a minor younger than 15 years of age. *See* Republic of El Salvador Penal Code, Art. 159, *available at* http://www.oas.org/dil/esp/Codigo_Penal_El_Salvador.pdf.

gave birth to two children after being repeatedly raped by Pineda, AR 4, the BIA, like the IJ, both mischaracterized the undisputed facts and misapplied clearly established legal principles.

As this Court has recognized, actions designed to "cure" a person of her homosexuality can constitute persecution. *See Pitcherskaia*, 118 F.3d at 646 (BIA erred in requiring the petitioner to prove that her persecutors intended to harm her, rather than to "treat or cure the supposed illness"). It is undisputed that, as the IJ explicitly found, AR 93, Ms. Maldonado's sexual orientation makes her a member of an established particular social group. *See Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) ("[W]e affirm that all alien homosexuals are members of a 'particular social group.'"); *see also Bromfield v. Mukasey*, 543 F.3d 1071, 1076 (9th Cir. 2008). And Ms. Maldonado's testimony, which was found credible by both the Asylum Officer and the IJ, AR 118; AR 313, demonstrates that she was forced into a sexual and familial relationship intended to cure her of her sexual orientation. As she explained, her parents made her have a sexual relationship with the 68-year-old Pineda because "they didn't accept [her]" since her "mannerisms were very boyish." AR 153. "[W]hen I was 14 years old they made me be with a person," she explained, "and they thought that by doing that I was going to change my mannerisms and change the way I was." AR 153. As the IJ explained in his oral decision, Ms. Maldonado's parents arranged the relationship with Pineda "in

part in an effort to assist the Respondent to overcome what her parents perceived as a problem." AR 88. The Agency committed legal error in failing to recognize that this "arranged" relationship was a form of persecution.

As courts have regularly recognized, the fact that Ms. Maldonado was forced into a familial and sexual relationship equivalent to marriage in order to change her sexual orientation is relevant to establishing past persecution. *See, e.g., Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *cert. granted and judgment vacated on procedural grounds by Keisler v. Gao*, 552 U.S. 801 (2007); *see also Chen v. U.S. Dep't of Justice*, 175 F. App'x 492, 493 (2d Cir. 2006) (unpublished) ("[A] person may win asylum on the basis of a well-founded fear of forced marriage where he or she establishes a nexus between the persecution she fears and the particular social group to which she belongs." (internal quotation marks omitted)); *Himanje v. Gonzales*, 184 F. App'x 105, 107 (2d Cir. 2006) (same); *Yi Meng Tang v. Gonzales*, 200 F. App'x 68, 70 (2d Cir. 2006) (same). Even the Department of Homeland Security's own materials recognize that the forced marriage of a lesbian to change her sexual orientation constitutes persecution.[12] As the Agency training guide explains in its section on forced marriage, "[s]ocietal and cultural restrictions

[12] *See* USCIS Training Module, Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims, 19, 23 (2012), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf (hereinafter "Training Module").

that require [LGBTI individuals] to marry individuals in contravention of their sexual orientation may violate their fundamental right to marry and may rise to the level of persecution. For instance, *a lesbian who has no physical or emotional attraction to men and is forced to marry a man may experience this as persecution*." Training Module at 23 (emphasis added); *see id.* at 47 ("Examples of harm that LGBTI applicants may have faced or fear and that may rise to level of persecution include: . . . forced marriage . . . .").[13]

Notably, the Agency's decision ignores that Ms. Maldonado was raped. Circuit precedent is clear that rape can constitute persecution. *See, e.g.*, *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996). For example, in *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000), *overruled on other grounds* by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc), this Court concluded that a Mexican gay man suffered past persecution when he was raped on account of his sexual orientation, *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1072 (9th Cir. 2004) (rape on account of political opinion constituted persecution); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (same).

Just as it ignored that Ms. Maldonado was raped, the Agency's conclusion

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[13] The USCIS's materials echo the reasoning offered in the U.N. High Commissioner for Refugees' *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, ¶ 13 (2008), *available at* http://www.unhcr.org/refworld/pdfid/48abd5660.pdf.

that Ms. Maldonado was merely involved in an "arranged" marriage ignored the relevance of Ms. Maldonado's young age. As the Agency should have recognized, the horror of the sexual and familial relationship forced upon Ms. Maldonado is magnified by the fact that she was forced into this "marriage" and the resulting pregnancies when she was only 14 years old. As this Court (like other courts) has recognized repeatedly, "[a]ge can be a critical factor . . . and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution." *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007); *see Zhang v. Gonzales*, 408 F.3d 1239, 1247 (9th Cir. 2005) ("[T]he harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution." (quoting U.S. Dep't of Justice, Immigration & Naturalization Service, *Policy and Procedural Memorandum: Guidelines for Children's Asylum Claims* 14 (Dec. 10, 1998), *available at* 1998 WL 34032561)); *see also Castro-Martinez v. Holder*, 674 F.3d 1073, 1081 (9th Cir. 2011) ("We have never held that any victim, let alone a child, is obligated to report a sexual assault to the authorities, and we do not do so now."); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 569-70 (7th Cir. 2008).

In short, the BIA's decision – like the IJ's – ignored the startling facts that, beginning when she was only 14 years old, Ms. Maldonado was forcibly subjected to repeated rape and impregnation, all as part of her family's attempt to "change

the way [she] was." AR 153; AR 320-21. The BIA's decision nowhere acknowledges that Ms. Maldonado was only a child when she was shipped off to be sexually "cured" by her parents' 68-year-old friend. Similarly, the BIA omitted any recognition of Ms. Maldonado's credible testimony during her reasonable fear interview that Pineda in fact drugged her in order to rape her – and that that rape resulted in her second pregnancy and child. AR 322. Instead, bafflingly, the BIA relied on the existence of Ms. Maldonado's two children with Pineda as evidence that her forced marriage did *not* constitute persecution.[14] But that is logically and legally unsupportable.

Through her uncontradicted testimony that she was forced into marriage and repeatedly raped and impregnated by Pineda as part of her family's efforts to "fix" her lesbianism, Ms. Maldonado more than met the requirement that the "petitioner alleging persecution must present some evidence, direct or circumstantial, of the persecutor's motive." *Kebede*, 366 F.3d at 812 (quoting *Lopez-Galarza*, 99 F.3d at 959). In concluding that Ms. Maldonado's forced marriage and sexual relationship

[14] The BIA also relied on the fact that "the applicant remained married to her husband for about 13 years, until his death in 2009." AR 4. As a threshold matter, Ms. Maldonado testified that her forced familial and sexual relationship was a common law relationship. AR 153-54. More importantly, however, Ms. Maldonado repeatedly fled from Pineda, first "rebell[ing] against him" and returning to her parents' house after the birth of her daughter, AR 322, and then fleeing to the United States in 2006, AR 324-25. She never returned to be with Pineda, but returned to El Salvador in 2009 only because Pineda was dying and she needed to arrange for the care of her children. AR 154-55.

did not constitute persecution, all because Ms. Maldonado bore two children and "remained married" to Pineda, the BIA mischaracterized the undisputed facts elicited from Ms. Maldonado's credible testimony and misapplied the law.

C. The Beating Ms. Maldonado Suffered at the Hands of Four Women Who Attacked Her Because of Her Sexual Orientation Constitutes Past Persecution.

Even if the BIA did not err in concluding that Ms. Maldonado did not suffer persecution when, as a child, she was forced into a sexual and familial relationship with a man 54 years her senior in order to "cure" her mannerisms and orientation, the BIA erred in agreeing with the IJ that that forced marriage, taken cumulatively with the subsequent violent assault Ms. Maldonado suffered in El Salvador because of her orientation, did not constitute past persecution. *See* AR 4.

On March 3, 2011, less than a year after she had returned to El Salvador, Ms. Maldonado was savagely attacked by a group of women motivated by their animosity toward Ms. Maldonado's sexual orientation. The beating resulted in hospitalization. AR 164. As the women punched and kicked Ms. Maldonado, they called her "lesbian" and shouted vulgarities at her. AR 162-63. They also told her it was shameful for her to be there and that she should leave El Salvador and return to the United States. AR 313; AR 322. Remarkably, the IJ concluded that Ms. Maldonado could not explain her attackers' motives even though he never asked her to do so. In fact, Ms. Maldonado's credible and uncontroverted testimony

demonstrates that the assault *was*, in fact, motivated by her status as a lesbian. AR 322-23. As Ms. Maldonado explained to the Asylum Officer, she believes that the women were sent by a man who lived near her, and whose advances she had rejected. AR 312; AR 323. Because she rejected that man, and because people in her neighborhood have "never seen her with a man," Ms. Maldonado's sexual orientation was understood in her community and made her a target. AR 323. Her assault accordingly constitutes past persecution on account of her sexual orientation.

Despite this evidence, both the BIA and the IJ concluded that the assault, together with Ms. Maldonado's forced sexual and familial relationship with Pineda, did not constitute past persecution. AR 4; AR 93. That decision was apparently based on the fact that Ms. Maldonado had suffered only one discriminatory beating and had not been subjected to more physical violence before leaving El Salvador. The BIA's decision in that regard mischaracterizes Ms. Maldonado's life following the assault and, as a result, is not supported by substantial evidence.

In concluding that Ms. Maldonado had not suffered past persecution, the BIA observed that Ms. Maldonado "sustained only minor injuries, and after the assault continued her daily activities in El Salvador for 4 months without again being harmed." AR 4. The fact that a victim suffers only "minor injuries" as the

result of a violent assault hardly means that the victim has not been violently assaulted. And although a single incident of physical harm may not inevitably rise to the level of persecution, "[p]hysical harm has consistently been treated as persecution." *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007).

The BIA ignored the obvious reason why Ms. Maldonado's assault was "isolated": Shortly after the beating, Ms. Maldonado sought to protect herself from further physical harm by moving in with her sister, AR 165-67, and shortly thereafter, she left El Salvador for the United States, AR 167. Although Ms. Maldonado continued to operate her business following the assault, the BIA's supposition that the assault was effectively a non-event is incorrect.[15]

In determining whether an applicant has suffered past persecution, a factfinder must consider the cumulative effect of victimization suffered over a period of years. *See Ahmed*, 504 F.3d at 1194; *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (noting that cumulative effect of several instances of violence

[15] In reaching its decision that Ms. Maldonado did not suffer past persecution, the BIA also relied on case law that does not support its conclusion. In particular, the BIA cited *Gu v. Gonzales*, 454 F.3d 1014, 1019, 1021 (9th Cir. 2006), for the principle that "brief detention and beatings do not compel finding of past persecution." AR 4. *Gu* does *not* support the BIA's conclusion that Ms. Maldonado was not subject to past persecution. Instead, *Gu* concerns when the *Circuit Court* should substitute its judgment for the judgment of the BIA. *See Gu*, 454 F.3d at 1020-21. *Gu* does not stand for the proposition that a young woman does not suffer past persecution when she is violently assaulted because of her sexual orientation.

and harassment compelled finding of persecution). The BIA failed to do so here, because it both mischaracterized the assault on Ms. Maldonado and misunderstood Ms. Maldonado's forced child-marriage. Taken as a whole, the circumstances and experiences faced by Ms. Maldonado in El Salvador compel the conclusion that she has suffered persecution in her home country on account of her status as a lesbian. *See Chand v. INS*, 222 F.3d 1066, 1074 (9th Cir. 2000) (although individually not persecution, cumulative effect of injuries "clearly rises to the level of persecution").

D. The El Salvadoran Government Is Unwilling or Unable to Prevent Persecution of Ms. Maldonado.

Neither the BIA nor the IJ adequately considered whether the El Salvadoran government is unable or unwilling to protect Ms. Maldonado from the harm she experienced or other sexual-orientation based violence. Although never acknowledged by either the BIA or IJ, the record confirms that the El Salvadoran government regularly fails to take reasonable steps to prevent or respond to the type of persecution Ms. Maldonado faced in her home country.

The record shows that prominent religious institutions, including the Archbishop of El Salvador, and faith-based social service organizations in El Salvador refer to sexual minorities as "dirt," "garbage," "sick," and "perverted." AR 220-21. High-profile community leaders have instructed parents to ostracize their gay children and not to report attacks against homosexuals to the authorities.

AR 220-21. The BIA ignored this evidence, as well as the well-documented evidence of extreme violence against LGBT individuals in El Salvador. Victims of such hate crimes have been dismembered, impaled, and bludgeoned. AR 222-25. Others have been subjected to torture and suffocation. AR 222-25. Like the perpetrators of the assault on Ms. Maldonado, none of the perpetrators of these hate crimes have been apprehended or punished by government authorities. AR 222-25. Indeed, the record includes evidence of abuse by police officers specifically directed at lesbians, including instances involving police rape of those women. AR 226; AR 260. By contrast, the record contains scant evidence that the El Salvadoran government has taken concrete steps to prevent or respond to the discrimination and violence regularly lodged against lesbians in that country.

III. THE BIA AND IJ ERRED IN CONCLUDING THAT THERE WAS NOT A REASONABLE LIKELIHOOD THAT MS. MALDONADO WOULD BE SUBJECTED TO PERSECUTION OR TORTURE IN THE FUTURE.

The Agency's failure to consider Ms. Maldonado's past persecution led to further errors in its assessment of the risk of persecution and torture that she faces in the future. Based on the past persecution discussed above, Ms. Maldonado should have been afforded a presumption of future persecution. *See Wakkary v. Holder*, 558 F.3d 1049, 1063 n.10 (9th Cir. 2009); *see also* 8 C.F.R. § 208.13(b)(1); *id.* § 208.16(b)(1). But even if the Court did not conclude that Ms.

Maldonado suffered past persecution in El Salvador, the record demonstrates a clear probability of persecution if she is returned to El Salvador.

An alien can establish an objective risk of future persecution through two routes: (i) by showing that she "will be singled out individually," or (ii) by establishing a "systematic pattern or practice of persecution against the group to which [she] belongs in [her] home country." *Wakkary*, 558 F.3d at 1060; *see* 8 C.F.R. §§ 208.13(b)(2)(iii), 208.16(b)(2). As discussed in detail above, there is a systematic pattern of persecution of lesbian women in El Salvador. Ms. Maldonado accordingly faces an objective risk of future persecution and is entitled to withholding of removal.

The Agency's consideration of Ms. Maldonado's request for protection under the Convention Against Torture, *see* 8 C.F.R. §§ 208.16-208.18, is similarly flawed. First, the persecution described above rises to the level of torture, and therefore it is likely that Ms. Maldonado will be tortured in the future. *See, e.g.*, *Nuru v. Gonzales*, 404 F.3d 1207, 1217-18 (9th Cir. 2005). In disregarding the undisputed evidence that Ms. Maldonado was raped and impregnated as a child, the BIA improperly ignored evidence of past torture – the existence of which "is ordinarily the principal factor on which [the court relies]." *See Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) (internal citation and quotation marks omitted). Second, even if this Court disregards those past experiences, Ms. Maldonado has

presented evidence establishing substantial grounds for concluding that she would be in danger of being subjected to torture in El Salvador if she is forced to return to that country. *See Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) (noting that such evidence includes "(but [is] not limited to) evidence of 'past torture inflicted upon the applicant'; 'gross, flagrant or mass violations of human rights within the country of removal'; and '[o]ther relevant information regarding conditions in the country of removal.'" (citing 8 C.F.R. § 208.16(c)(3))).

In its decision, the BIA ignored the copious additional evidence that Ms. Maldonado presented regarding the gross, flagrant, and mass violations of human rights against sexual minorities in El Salvador. *See, e.g.*, Ana Luisa Gomes Lima, *Human Rights Situation of Lesbian, Gay, Bisexual and Transgender Persons in El Salvador: Shadow Report Submitted to the United Nations Human Rights Committee* (Oct. 2010), at AR 217-34; Juan, *Raped and Tortured in El Salvador, Juan Flees Abuse and Finds Angels in America*, San Diego Gay and Lesbian News, Nov. 3, 2011, at AR 235-37; Alliance for Sexual Diversity LGBT, *Acts of Systemization of Aggression to the Lesbian, Gay, Bisexual and Transgender Community of El Salvador* (2009), at AR 204-16. It also did not evaluate evidence of country conditions. Instead, it affirmed the IJ's reliance on the State Department Report to the exclusion of all other evidence of country conditions, including multiple news reports and an October 2010 report submitted to the

United Nations Human Rights Committee. *See* AR 3-4; AR 196-238. The BIA's narrow review of the evidence in the record was error.[16] But even if it was not, the State Department Country Report for El Salvador itself – which the BIA *did* review – acknowledges that official and societal discrimination on the basis of sexual orientation is "widespread." AR 3-4; AR 260.

Instead of considering the record evidence of widespread violence against LGBT individuals and the complete failure to police such crimes by government authorities in El Salvador, the IJ noted that the El Salvadoran government recently recognized a gay-rights organization and that the San Salvador municipality had authorized a gay pride parade. AR 94. But those events do nothing to undermine the compelling record evidence in this case – there is still widespread unchecked and unpunished violence against sexual minorities throughout El Salvador. *See Bromfield*, 543 F.3d at 1077-79 (holding that widespread, targeted violence against

[16] Although this Court has observed that State Department country condition reports are often the "most appropriate and perhaps best resource for information on political situations in foreign nations," *Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008), the Court has also held that "a State Department report on country conditions, standing alone, is not sufficient to rebut the presumption of future persecution when a petitioner has established past persecution." *Kamalyan v. Holder*, 620 F.3d 1054, 1057 (9th Cir. 2010) (citing *Garcia-Martinez*, 371 F.3d at 1074). "Chronic overreliance" by IJs on State Department reports to the exclusion of other evidence has been criticized by other circuits as well. *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (citing decisions of First, Seventh, and Ninth Circuits); *Diallo v. Ashcroft*, 381 F.3d 687, 700 (7th Cir. 2004) ("We have recently launched harsh criticism on immigration judges' over-reliance on State Department Asylum and Country Reports . . . .").

homosexuals and criminalization of homosexual conduct established a pattern or practice of persecution in Jamaica and remanding the case for a determination of whether future persecution was more likely than not).

CONCLUSION

For the foregoing reasons, the BIA's decision denying Ms. Maldonado withholding of removal and protection under CAT, the IJ's decision denying Ms. Maldonado the opportunity to apply for asylum, and the order that Ms. Maldonado be removed to El Salvador should be reversed.

Dated: May 30, 2013

Respectfully submitted,

/s/ Matthew L. McGinnis

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DETENTION STATUS

Pursuant to Ninth Circuit Rule 28-2.4, Petitioner states that she was released from ICE custody at the Eloy, Arizona Detention Center pursuant to an Order of Supervision dated January 24, 2013. Petitioner is in compliance with the terms of the Order of Supervision. Petitioner has not moved the BIA to reopen and has not applied for an adjustment of status.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Petitioner states she is not aware of any pending related cases before this Court.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,563 words (as determined this day by our computerized word macro) excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2010 version 14.0 in 14-point font, Times New Roman type style.

Dated: May 30, 2013

/s/ Emily J. Derr
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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2013, I have electronically filed the Petitioner's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will automatically send an e-mail notification of such filing to the attorneys of record who are registered CM/ECF users.

/s/ Emily J. Derr
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ADDENDUM TO PETITIONER'S OPENING BRIEF

Pursuant to Ninth Circuit Rule 28-2.7, attached are copies of the orders being challenged:

TAB

Decision of the Board of Immigration Appeals Dismissing Petitioner's Appeal (Aug. 22, 2012) ..... A

Decision of the Immigration Judge denying withholding of removal and protection under the Convention Against Torture and reinstating previous removal order (Apr. 13, 2012) ..... B

TAB A

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A200 595 716 - Eloy, AZ

Date: AUG 22 2012

In re: YESENIA MARISOL MALDONADO LOPEZ

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Keren Zwick, Esquire

ON BEHALF OF DHS: David C. Whipple
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

In his decision dated April 13, 2012, the Immigration Judge found the applicant, a native and citizen of El Salvador, subject to removal, and denied the application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and protection under the United States Convention Against Torture (CAT). We will dismiss the appeal.

On appeal, the applicant argues that the Immigration Judge denied her a fair hearing by failing to develop the record regarding the persecution she suffered, based on her sexual orientation, and by failing to consider the evidence she submitted in support of her claim. She also contends that the Immigration Judge erred in concluding that she did not suffer past persecution or fear future harm in El Salvador. In addition, the applicant asserts that despite the fact that she was previously removed, she should be allowed to apply for asylum.

We do not find these arguments advanced by the applicant on appeal to be persuasive. We first reject the applicant's claim that the Immigration Judge did not afford her a fair hearing. To establish a due process violation, an alien must show that she was deprived of liberty without due process of law, and that the asserted error caused substantial prejudice. In *Shoaira v. Ashcroft,* 377 F.3d 837 (8th Cir. 2004), the Court noted that due process requires that hearings be conducted in a fair enough fashion for one to determine that the BIA's decision was based on reasonable, substantial, and probative evidence. It further held that in order for a hearing to be fair, an Immigration Judge must allow a reasonable opportunity to examine the evidence and present witnesses. *Id.*

The applicant, who appeared *pro se,* asserts that the Immigration Judge consistently failed to inquire about the central reasons that she feared returning to El Salvador, and thus deprived her of a fair hearing. We find that contrary to the applicant's claim, the transcript of the applicant's hearing demonstrates that the Immigration Judge asked the applicant numerous questions on this topic. *See, e.g.* Tr. at 23-24, 26-28, 31-33, 38-39. We note that with regard to country conditions, the Immigration Judge cited to the State Department Country Reports (Exh, 3 at 15-18), regarding the

treatment of members of the LGBT community in El Salvador (I.J. at 13-14). *See Lanza v. Ashcroft,* 389 F.3d 917, 924-35 (9th Cir. 2004) (DOS reports are the most appropriate and perhaps the best resource for information on the political situations in foreign nations). We agree with his conclusion that the evidence did not support the applicant's claim that she more likely than not would be persecuted on account of her membership in a particular social group, namely lesbians in El Salvador (I.J. at 12, 14). To show substantial prejudice, an alien must show the alleged due process violation would have affected the outcome of the case. *See Avila v. Attorney General*, 560 F.3d 1281 (11th Cir. 2009). We do not agree that the applicant has made this showing.

In addition, we do not agree that the incidents the applicant claims happened to her in El Salvador constituted past persecution, considered cumulatively. These included the rejection by her parents because of her sexual orientation, the fact that her parents arranged a marriage for her to an older man, and the fact that she allegedly suffered a beating at the hands of four women. *See* Applicant's appeal brief at 19-20.

We note that the record reflects that the applicant remained married to her husband for about 13 years, until his death in 2009, and they had two children together. We conclude that this arranged marriage was not past persecution. We also find that the applicant did not experience past persecution as a result of the aforementioned assault she allegedly suffered, as she sustained only minor injuries, and after the assault continued her daily activities in El Salvador for 4 months without again being harmed (I.J. at 12-13; Tr. at 31-32, 36-37). *See Gu v. Gonzales*, 454 F.3d 1016, 1019, 1021 (9th Cir. 2006) (brief detention and beatings do not compel finding of past persecution); *Prasad v. INS,* 47 F.3d 336, 339 (9th Cir. 1995) (concluding that persecution is an extreme concept and does not include every sort of treatment society regards as offensive).

We agree with the Immigration Judge's finding that the applicant failed to meet her burden of proof to establish that she suffered past persecution, or it is more likely than not that she would be persecuted on account of a protected ground if returned to El Salvador (I.J. at 14). *See* 8 C.F.R. § 1208.18(a); *INS v. Stevic,* 467 U.S. 407 (1984); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). Moreover, we affirm the Immigration Judge's finding that the applicant did not establish that it is "more likely than not" that she would be tortured by or with the acquiescence (including the concept of wilful blindness) of the authorities in El Salvador. *See* 8 C.F.R. §§ 1208.16(c) and 1208.18(a)(1) (I.J. at 14-15).

ORDER: The appeal is dismissed.

FOR THE BOARD

TAB B

IMMIGRATION COURT
1705 E. HANNA RD.
ELOY, AZ 85131

In the Matter of: Case No: A200-595-716

MALDONADO LOPEZ, YESENIA MARISOL

Applicant IN WITHHOLDING-ONLY PROCEEDINGS

On Behalf of the Applicant On Behalf of the DHS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Apr 13, 2012 and is issued solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

ORDER: It is hereby ordered that the applicant's request for:

[✓] 1. Withholding of Removal under INA 241(b)(3) is:
[ ] Granted
[ ] Withdrawn
[✓] Denied

[✓] 2. Withholding of Removal under the Convention Against Torture is:
[ ] Granted
[ ] Withdrawn
[✓] Denied

[ ] 3. Deferral of Removal under the Convention Against Torture is granted.

Date: Apr 13, 2012

RICHARD A. PHELPS
Immigration Judge

APPEAL: NO APPEAL
APPEAL DUE BY: TODAY: 5/14/2012

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [✓] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [✓] DHS
DATE: 4/13/2012 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28 [✓] Legal Services List [ ] Other

Q5

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ELOY, ARIZONA

File: A200-595-716 April 13, 2012

In the Matter of

YESENIA MARISOL MALDONADO LOPEZ	IN WITHHOLDING ONLY PROCEEDINGS
APPLICANT	

CHARGES:

APPLICATIONS: Withholding of removal pursuant to INA Section 241(b)(3); withholding of removal pursuant to Article III of the Convention Against Torture

ON BEHALF OF APPLICANT: PRO SE

ON BEHALF OF DHS: DAVID C. WHIPPLE, ESQUIRE

ORAL DECISION OF THE IMMIGRATION JUDGE

PROCEDURAL HISTORY

These proceedings were initiated by the filing of a notice of referral to Immigration Judge by the Department of Homeland Security (Exhibit 1). That document dated February 9, 2012, indicates that the Respondent is subject to removal from the United States but that as a result of an interview with a

Department of Homeland Security asylum officer it has been determined by that officer to have a reasonable fear of persecution or torture if returned to El Salvador. Consequently, the matter was referred to this Court for determination in accordance with 8 C.F.R. Section 1208.31(e).

RELIEF

The Respondent applied for relief from removal in the forms of withholding of removal pursuant to INA Section 241(b)(3) and withholding of removal pursuant to Article III of the Convention Against Torture. Prior to admission of the application, the Respondent was given an opportunity to make any necessary corrections and then swore before the Court that the application is true and correct to the best of your knowledge (Exhibit 2).

Burden of Proof:

Because the Respondent initially filed her applications for relief after May 11, 2005, the REAL ID Act of 2005 codified at INA Sections 208(b) and 240(c)(4)(C) governs these proceedings. Matter of J-Y-C-, 24 I&N Dec. 260, 262 (BIA 2007); Matter of S-B-, 24 I&N Dec. 42, 45 (BIA 2006). The Respondent has the burden of proof on the applications for relief. INA Sections 240(c)(4)(A), 208(b)(1)(B)(ii).

Withholding of removal pursuant to INA Section 241(b)(3):

A claim for withholding of removal is factually

related to an asylum claim but the applicant bears a heavier burden of proof to merit relief. For withholding of removal the applicant must demonstrate that if returned to her country her life or freedom *would* be threatened on account of her race, religion, nationality, membership in a particular social group, or political opinion. INA Section 241(b)(3). To make this showing, the applicant must establish a "clear probability" of persecution meaning that it is "more likely than not" that she will be subject to persecution on account of a protected ground if returned to the country from which she seeks withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

The Board of Immigration Appeals has defined "persecution" as "either a threat to the life or freedom of or the infliction of suffering or harm upon those who differ in a way regarded as offensive." Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985) overruled on other grounds by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). In addition, "persecution is used in INA Section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome." Id. 223. It may be manifested in many forms including physical, economic, and emotional harm. See Knezvic v. Ashcroft, 367 F.3d 1206, 1211 (9th Cir. 2004). Various forms of physical violence including rape, torture, assault, and beatings amount to

persecution. See Chand v. INS, 222 F.3d 1066, 1073-74 (9th Cir. 2000). Persecution would also include other serious violations of human rights based on one of the five reasons. Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 51, 1992.

Violence or discrimination inflicted by private parties does not constitute persecution if it is not condoned by the state and if the state takes reasonable steps to prevent and respond to it. See Gomes v. Gonzales, 429 F.3d 1264, 1267 (9th Cir. 2005), Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995).

If the applicant is determined to have suffered past persecution in the proposed country of removal on account of a protected ground, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. That presumption may be rebutted if a preponderance of the evidence establish either that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be so threatened or that the applicant could reasonably avoid a future threat to her life or freedom by relocating to another part of the proposed country of removal. 8 C.F.R. Section 1208.16(b)(1) and (3).

Where past persecution has not been established, it is the applicant's burden to establish that relocation would not be

reasonable. However, where past persecution has been established or where the persecutor is a government or government sponsored entity it is presumed that relocation would not be reasonable. That presumption may be rebutted if a preponderance of the evidence establishes that under all the circumstances it would be reasonable for the applicant to relocate. 8 C.F.R. Section 1208.16(b)(3)(i) and (ii).

Once an alien has established that she qualifies for withholding of removal, relief is mandatory. INA Section 241(b)(3)(A).

Withholding of Removal under the Convention Against Torture:

The applicant for withholding of removal under the Convention Against Torture bears the burden of proving that it is "more likely than not" that she would be tortured if removed to the proposed country of removal. 8 C.F.R. Section 1208.16(c)(2). In making that assessment, all evidence relevant to the possibility of future torture is considered including, but not limited to, evidence of past torture inflicted on the applicant, evidence that the applicant could relocate within the country of removal where she is not likely to be tortured, evidence of gross, flagrant, or mass violations of human rights within the country of removal, and relevant information regarding current country conditions. 8 C.F.R. Section 1208.18(c)(3).

"Torture" is defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. Section 1208.18(a)(1), Matter of Y-L-, A-G-, R-S-R, 23 I&N Dec. 270, 280 (A.G. 2002). "The Convention applies only to torture that occurs in the context of governmental authority excluding torture that occurs as a wholly private act that applies to torture inflicted under color of law." Message from the President of the United States transmitting the Convention Against Torture and other cruel, inhumane, or degrading treatment or punishment, Senate Treaty doc number 100-20 at 4, 1988.

"Acquiescence" does not require that the public official have actual knowledge of, or willfully accept the torture. Rather, it requires only that the public official have an awareness of private torture which includes willful blindness to the act and "thereafter breach his or her legal responsibility to intervene to prevent such activity." Zheng v. Ashcroft, 332 F3.d 1186 (9th Cir. 2003), 8 C.F.R. Section 1208.18(a)(1) and (7). For an act to constitute torture it must be directed against a person. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions unless such sanctions defeat the purpose of the Convention Against Torture. 8 C.F.R. Section 1208.18(a)(3).

The severe pain or suffering must have been specifically intended. That is, the actor must have intended the actual consequences of his conduct as distinguished from the act that causes these consequences. Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008).

ANALYSIS AND FINDINGS

All the evidence of record has been considered individually and collectively regardless of whether specifically mentioned in the text of this decision.

Credibility:

The Respondent was the sole witness to testify during her Individual hearing. Upon careful consideration of all the facts of record individually and cumulatively, the Court concludes that the Respondent testified credibly in all material respects.

Respondent's claim:

The Respondent is a 30-year-old female, native and citizen of El Salvador, who was born and raised in the small town of Chalchuapa in that country. At a young age the Respondent realized that she manifested more masculine mannerisms than feminine. She testified that her family, her parents specifically, were somewhat concerned about her generally masculine mannerisms and in part in an effort to assist the Respondent to overcome what her parents perceived as a problem and in part because her parents were traditional, they

arranged a marriage for the Respondent when she was 15 years old to a gentleman (Cristobal) who was approximately 43 years her senior. The Respondent and Cristobal married in 1996, and the Respondent's first child was born the following year. The Respondent has two children ages 14 and 10, both of whom continue to reside in El Salvador. The Respondent's marriage to Cristobal continued uneventfully until his death in 2009.

The Respondent first departed El Salvador and came to the United States in the summer of 2006. The Respondent testified that she left El Salvador in August of 2006 because of problems with her family because of her sexual orientation. However, the Respondent testified that none of her family members were aware of her sexual orientation and indeed continues to be unaware of her sexual orientation. Additionally, the Respondent was unable to identify any specific problems that she had with her family that was related to her sexual orientation that would have motivated her to depart El Salvador in August of 2006. The Respondent remained in the United States without having been admitted after inspection or paroled by an Immigration officer until she returned to El Salvador on June 1, 2009, to care for her children as a result of news that she had received that her husband, Cristobal, was on his death bed. The Respondent testified that her mother was sick at the time and unable to take care of the Respondent's children and that no one else was available to do so. The

Respondent returned to El Salvador and Cristobal passed away on December 28, 2009.

The Respondent decided in March of 2010 to return to the United States. The Respondent testified that she continued to have problems with her family and that her mother wanted the Respondent to have a good life, be happy, and to be married, and that she encouraged the Respondent to remarry after the death of Cristobal. That encouragement by her mother made the Respondent feel uncomfortable. Additionally, the Respondent testified that the people in town talk badly about homosexuals and that also made her uncomfortable. The Respondent testified that no one in town aside from her discreet sexual partners was aware of her sexual orientation. The Respondent left her children with her sister and returned to the United States in March of 2010, entering again without having being admitted or paroled after inspection by an Immigration officer. The Respondent was apprehended by border patrol and on April 6, 2010, removed from the United States to El Salvador. The Respondent testified that she told border patrol authorities that she feared return to that country. However, she testified that she did not apply for asylum because she lacked familial support to do so.

The Respondent returned to El Salvador by air, arriving at the capital in San Salvador. The Respondent testified that she decided to go back to her home town because there was a house available for her to reside in there, made

available to her by a family member and because that's where her children were. The Respondent returned to her home town of Chalchuapa, picked up her children, and established residence in the home made available to her. The Respondent started her own business doing artwork and indigo. She testified that she had a shop in the house as well as a place at the town market to sell her goods. The Respondent visited the market daily from Tuesday through Sunday, sometimes coming home after dark.

On March 3, 2011, while returning home after dark from the market the Respondent testified that she was accosted by four women. One of the women stopped her while she was walking on the street or sidewalk and told the Respondent that she wanted to talk to her. She led the Respondent off the street or sidewalk and she and three other women started hitting the Respondent. During the assault the women used several vulgarities including calling the Respondent lesbian. The Respondent does not know who her assailants were nor has she testified as to what their motivation may have been beyond the potential motivation suggested by their use of the word lesbian among several other vulgarities while they were assaulting the Respondent. Her assailants left the Respondent laying on the ground and women who were returning home from church and passing by came to the Respondent's aid. One of the women called the Respondent's neighbor who had transportation. The neighbor came and picked up the Respondent and took her to the hospital. The

Respondent also called her sister who works for the police and her sister came to the hospital. Apparently the sister called the police while the Respondent was being transported to the hospital since the police responded to the hospital and, there, talked to the Respondent about what happened. They took her statement in order to make a report. However, the Respondent was unable to identify her assailants. The police asked the Respondent to let them know if she obtained additional information regarding the identity of her assailants to assist them in their investigation.

The Respondent stayed in the hospital approximately six to eight hours and from that point resided with her sister. However, she continued to operate the shop at her home and continued to take items to the market for sale daily (except Monday). The Respondent continued in her daily activities until she departed El Salvador on July 20, 2011, experiencing no additional harm of any kind. The Respondent testified that she left El Salvador in July of 2011 because of the incident where the women hit her, notwithstanding that that incident was four months prior and notwithstanding the support she obtained from the police when she made her report. The Respondent entered the United States illegally on August 16, 2011, for the third time.

The Respondent testified that she fears that if she returns to El Salvador that she would be subject to discrimination and threats because of her sexual orientation.

The Respondent testified that she fears that something bad could happen to her because of things she's heard involving other homosexuals in El Salvador.

Withholding of removal pursuant to INA Section 241(b)(3):

The Respondent's claim is based on her fear of likely persecution if returned to El Salvador because of her sexual orientation.

Particular social group:

The Court finds that the Respondent is a member of the particular social group of lesbian women in El Salvador. See Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005).

Past persecution:

Last noted, the Respondent was assaulted by a small group of unknown women on March 3, 2011. During the assault the women used several vulgarities including calling the Respondent a lesbian. However, the Respondent does not know who her assailants were or precisely what their motivation was. Although the Respondent remained in El Salvador for another four months following the assault, continuing her daily activities without change, she was not again harmed. When she reported the incident to police the police were supportive, coming to the hospital to take her statement. However, the police were hampered in their ability to investigate because the Respondent could not identify her assailants. The police encouraged the

Respondent to let them know if she obtained any additional information regarding the identity of her assailants.

The Court finds that the assault of the Respondent by unknown persons was not done with government consent or acquiescence or by persons that the government either could not control or chose not to control. Consequently, the Court finds that the Respondent has not been subjected to past persecution.

Future persecution:

The evidence of current country conditions included in the record establishes that societal discrimination exists against women, persons with disabilities, lesbian, gay, bisexual, and transgender persons (LGBT), and indigenous people in El Salvador. However, the Secretariat for Social Inclusion created in June 2009 by President Funes who named the First Lady, Vanda Pignato, as Secretary, made efforts to overcome traditional bias in all these areas. In January, the new administration approved the legal registration application filed in August 2009 by the Gay Rights NGO (nongovernmental organization) Entre Amigos. LGBT right supporters held one gay pride march for which the municipality of San Salvador provided authorization as well as police security.

Persons from the LGBT community stated that the National Civilian Police and the office of the Attorney General ridiculed them when they reported cases of violence against LGBT persons. The government responded to these abuses primarily

through the Office of the Ombudsman for Human Rights which reported and publicized specific cases of violence and discrimination against sexual minorities. As noted, the Respondent's experience when she reported her assault to the local police in her hometown was very supportive.

The evidence does not support the Respondent's claim that she would more likely than not be persecuted based on her membership in a particular social group by or at the instigation of or acquiescence of a public official acting in an official capacity. Consequently, the Court concludes that the Respondent has failed to meet her burden of establishing a likelihood of persecution if returned to El Salvador and her application for withholding of removal pursuant to INA Section 241(b)(3) must be denied.

Withholding of Removal under the Convention Against Torture:

As detailed above, there is no evidence that the fear of harm that the Respondent has voiced is based on government involvement, instigation, or acquiescence. Consequently, this Court must conclude that the Respondent has failed to meet her burden of establishing a likelihood of torture if returned to El Salvador and her application for withholding of removal pursuant to Article III of the Convention Against Torture must be denied.

ORDERS

IT IS HEREBY ORDERED that the Respondent's application

for withholding of removal under Section 241(b)(3) of the Act to El Salvador be denied.

IT IS FURTHER ORDERED that the Respondent's request for withholding of removal to El Salvador under the Convention Against Torture be denied.

RICHARD A. PHELPS
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE RICHARD A. PHELPS, in the matter of:

YESENIA MARISOL MALDONADO LOPEZ

A200-595-716

ELOY, ARIZONA

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Christy Davis

CHRISTY DAVIS (Transcriber)

YORK STENOGRAPHIC SERVICES, Inc.

May 21, 2012

(Completion Date)

ced/jma

ADDENDUM TO PETITIONER'S OPENING BRIEF

Pursuant to Ninth Circuit Rule 28-2.7, attached are copies of the pertinent statutes and regulations referenced in Petitioner's Opening Brief:

TAB

INA § 208, 8 U.S.C. § 1158 1

INA § 241, 8 U.S.C. § 1231 2

8 C.F.R. § 208.31 3

8 C.F.R. § 241.8 4

TAB 1

Effective: June 1, 2009

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part I. Selection System
§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of Title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

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

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact 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.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

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

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of Title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b) of this section, the Attorney General--

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) of this section does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that--

(A) the alien no longer meets the conditions described in subsection (b)(1) of this section owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) of this section;

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, reli-

gion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section [FN1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to

asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall--

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that--

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection 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.

(e) Commonwealth of the Northern Mariana Islands

The provisions of this section and section 1159(b) of this title shall apply to persons physically present in the Commonwealth of the Northern Mariana Islands or arriving in the Commonwealth (whether or not at a designated port of arrival and including persons who are brought to the Commonwealth after having been interdicted in international or United States waters) only on or after January 1, 2014.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 1, § 208, as added Mar. 17, 1980, Pub.L. 96-212, Title II, § 201(b), 94 Stat. 105; amended Nov. 29, 1990, Pub.L. 101-649, Title V, § 515(a)(1), 104 Stat. 5053; Sept. 13, 1994, Pub.L. 103-322, Title XIII, § 130005(b), 108 Stat. 2028; Apr. 24, 1996, Pub.L. 104-132, Title IV, § 421(a), 110 Stat. 1270; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title VI, § 604(a), 110 Stat. 3009-690; Oct. 26, 2001, Pub.L. 107-56, Title IV, § 411(b)(2), 115 Stat. 348; Aug. 6, 2002, Pub.L. 107-208, § 4, 116 Stat. 928; May 11, 2005, Pub.L. 109-13, Div. B, Title I, § 101(a), (b), 119 Stat. 302, 303; May 8, 2008, Pub.L. 110-229, Title VII, § 702(j)(4), 122 Stat. 866; Dec. 23, 2008, Pub.L. 110-457, Title II, § 235(d)(7), 122 Stat. 5080.)

[FN1] So in original. Probably should be “sections”.

2008 Acts. Amendments by Pub.L. 110-457, § 235, shall take effect on the date that is 90 days after December 23, 2008, and shall apply to all aliens in the United States in pending proceedings before the Department of Homeland Security or the Executive Office for Immigration Review, or related administrative or Federal appeals on December 23, 2008, see Pub.L. 110-457, Title II, § 235(h), which is classified to 8 U.S.C.A. § 1232(h).

2005 Acts. Pub.L. 109-13, Div. B, Title I, § 101(h)(1), (2), May 11, 2005, 119 Stat. 305, provided that:

"(1) The amendments made by paragraphs (1) and (2) of subsection (a) [amending subsec. (b)(1)(A) of this section] shall take effect as if enacted on March 1, 2003.

"(2) The amendments made by subsections (a)(3), (b), (c), and (d) [amending subsec. (b)(1)(B), (2)(A)(v) of this section and 8 U.S.C.A. §§ 1229a and 1231] shall take effect on the date of the enactment of this division [May 11, 2005] and shall apply to applications for asylum, withholding, or other relief from removal made on or after such date."

2002 Acts. Amendments by Pub.L. 107-208 effective Aug. 6, 2002 and applicable to alien beneficiaries of certain petitions for classification under 8 U.S.C.A. § 1154 approved before Aug. 6, 2002, see Pub.L. 107-208, § 8, set out as a note under 8 U.S.C.A. § 1151.

Current through P.L. 113-9 (excluding P.L. 113-4) approved 5-1-13

END OF DOCUMENT

TAB 2

Effective:[See Notes]

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

§ 1231. 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) of Title 42 and paragraph (2) [FN1], the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. 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 [FN2] 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 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) [FN3] 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

(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) [FN4] 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 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 At-

torney 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.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 4, § 241, as added and amended Sept. 30, 1996, Pub.L. 104-208, Div. C, Title III, §§ 305(a)(3), 306(a)(1), 328(a)(1), 110 Stat. 3009-598, 3009-607, 3009-630; Nov. 2, 2002, Pub.L. 107-273, Div. C, Title I, § 11014, 116 Stat. 1824; May 11, 2005, Pub.L. 109-13, Div. B, Title I, § 101(c), 119 Stat. 304; Jan. 5, 2006, Pub.L. 109-162, Title XI, § 1196(a), (b), 119 Stat. 3130.)

[FN1] So in original. Probably should be “subparagraph (B)”.

[FN2] So in original. Probably should be followed by a closing parenthesis.

[FN3] So in original. Probably should be subsection “(e)”.

[FN4] So in original. Probably should be “1225(b)(1)”.

2006 Acts. Pub.L. 109-162, § 1196(d), as added Pub.L. 109-271, § 8(n)(6), Aug. 12, 2006, 120 Stat. 768, provided that: “The amendments made by subsections (a) and (b) [amending this section] shall take effect on October 1, 2006.”

Current through P.L. 113-9 (excluding P.L. 113-4) approved 5-1-13

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TAB 3

Effective: November 28, 2011

Code of Federal Regulations Currentness
Title 8. Aliens and Nationality
Chapter I. Department of Homeland Security (Refs & Annos)
Subchapter B. Immigration Regulations
Part 208. Procedures for Asylum and Withholding of Removal (Refs & Annos)
Subpart B. Credible Fear of Persecution

§ 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. USCIS has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) Interview and procedure. The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section

241(b)(3)(B) of the Act shall not be considered.

(d) Authority. Asylum officers conducting screening determinations under this section shall have the authority described in § 208.9(c).

(e) Referral to Immigration Judge. If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I–863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) Removal of aliens with no reasonable fear of persecution or torture. If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I–898, Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien shall indicate whether he or she desires such review.

(g) Review by immigration judge. The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Form I–863. The record of determination, including copies of the Form I–863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Form I–863 with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to the Service for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit Form I–589, Application for Asylum and Withholding of Removal.

(i) The immigration judge shall consider only the alien's application for withholding of removal under § 208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies to the Board of Immigration Appeals. If the alien or the Service appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under § 208.16.

[64 FR 8493, Feb. 19, 1999; 64 FR 13881, March 23, 1999; 76 FR 53785, Aug. 29, 2011]

SOURCE: 62 FR 10337, March 6, 1997; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003; 74 FR 55736, Oct. 28, 2009, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; 8

CFR part 2.

8 C. F. R. § 208.31, 8 CFR § 208.31

Current through May 23, 2013; 78 FR 31358

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TAB 4

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 8. Aliens and Nationality
Chapter I. Department of Homeland Security (Refs & Annos)
Subchapter B. Immigration Regulations
Part 241. Apprehension and Detention of Aliens Ordered Removed (Refs & Annos)
Subpart A. Post-Hearing Detention and Removal

§ 241.8 Reinstatement of removal orders.

(a) Applicability. An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

(1) Whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.

(2) The identity of the alien, i.e., whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.

(3) Whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

(b) Notice. If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

(d) Exception for applicants for benefits under section 902 of HRIFA or sections 202 or 203 of NACARA. If an alien who is otherwise subject to this section has applied for adjustment of status under either section 902 of Division A of Public Law 105–277, the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), or section 202 of Public Law 105–100, the Nicaraguan Adjustment and Central American Relief Act (NACARA), the provisions of section 241(a)(5) of the Immigration and National-

ity Act shall not apply. The immigration officer may not reinstate the prior order in accordance with this section unless and until a final decision to deny the application for adjustment has been made. If the application for adjustment of status is granted, the prior order shall be rendered moot.

(e) Exception for withholding of removal. If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to § 208.31 of this chapter.

(f) Execution of reinstated order. Execution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part.

[64 FR 8495, Feb. 19, 1999; 66 FR 29451, May 31, 2001]

SOURCE: 62 FR 10378, March 6, 1997; 65 FR 80294, Dec. 21, 2000; 66 FR 29451, May 31, 2001; 67 FR 19511, April 22, 2002; 68 FR 4367, Jan. 29, 2003; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003; 70 FR 67089, Nov. 4, 2005, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1228, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4); Pub.L. 107–296, 116 Stat. 2135 (6 U.S.C. 101, et seq.); 8 CFR part 2.

8 C. F. R. § 241.8, 8 CFR § 241.8

Current through May 23, 2013; 78 FR 31358

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