CHAPTER 1

REMEDIES AND STRATEGIES FOR PERMANENT RESIDENT CLIENTS

This chapter includes:

§ 1.1 Introduction

To be an effective immigration advocate, it is essential to have a thorough understanding of the laws affecting your clients. This manual is designed to give practitioners that understanding with respect to **Lawful Permanent Residents**[1] who have been charged with being removable.

This manual is designed as a "how to" manual; it contains detailed explanations of the grounds of removal LPRs are most likely to face, when they do and don't apply, the remedies for each, and the practicalities of working with clients to elicit the evidence necessary to successfully defend their cases.

Although the primary focus of this book is on the remedies available for LPR clients who have been found removable, we wish to emphasize from the outset that the first line of defense in many cases involving LPR clients will be to deny the allegations in the Notice to Appear (NTA) and move for termination of the proceedings. This is a tactic to use in a number of situations; for example, where the government bears the burden of proof, or when there is a question about the legality of the arrest, or when there is an argument to be made that your client does not fall within the inadmissibility or deportability grounds charged in the NTA.[2]

Finally, but very importantly, don't forget that some of your LPR clients may actually turn out to be U.S. citizens by operation of law, and this possibility should always be explored when representing LPR clients in removal proceedings.

[1] In this manual, we will refer to Lawful Permanent Residents in the following ways: lawful permanent residents, LPRs, permanent residents, or green card holders.
[2] These issues will be discussed in more detail in Chapters 2 and 3.

§ 1.2 How to Use This Manual

Our goal in writing this manual has been to provide practitioners with an easy, practical way to find information that is specific and relevant to the situations faced by their LPR clients. **Chapter 1** provides a framework for analyzing cases, and therefore should be read first. Each chapter is described below:

Chapter 1: This chapter contains a general discussion of what the grounds of deportability and inadmissibility are, where they are found in the Immigration and Nationality Act (INA)[3] and when each of those grounds may apply to LPRs. Next, we focus on the burden of proof, how it differs depending on whether your client is charged with being inadmissible or deportable, the particular rules for LPRs, and the burden of proof when an LPR is seeking relief from removal. We also discuss evidentiary rules and suppression of evidence, how to decide whether or not to concede removability, and how to go about analyzing cases.

Chapter 2: The subject of Chapter 2 is the criminal grounds of inadmissibility and deportability, which are the most common grounds alleged for removal of LPRs. This chapter provides an in-depth analysis of these grounds, the differences between them, and when they apply. It also includes an analysis of how the terms "conviction" and "sentence" are defined under the Immigration and Nationality Act (INA), the documents that can be produced to prove that a conviction exists, the categorical approach (how to analyze whether a conviction triggers a removal ground), the effect of post-conviction relief and appeals, federal v. state definitions of crimes, etc. Chapter 2 provides useful tools for successfully arguing against the removal of LPRs with criminal records.

Chapter 3: This chapter covers the non-criminal grounds of inadmissibility and deportability that are applicable to LPR clients, such as a false claim to U.S. citizenship and unlawful voting, deportability for being inadmissible at the time of admission, smuggling, use of false documents, and abandonment of residence. Chapter 3 analyzes each of these grounds, when they apply, and how to argue against them. In addition, Chapter 3 covers the specific waivers applicable to the smuggling, misrepresentation, and document fraud inadmissibility and deportability grounds.

Chapter 4 analyzes the remedy of Cancellation of Removal for Permanent Residents under INA § 240A(a), including the types of grounds that can be waived, an in-depth discussion of each of the eligibility requirements, the burden of proof, bars to relief, and the evidence required to prove your client merits a favorable exercise of discretion.

Chapter 5 discusses relief under former § 212(c), the predecessor to Cancellation of Removal for Permanent Residents. It includes a brief history of § 212(c), including the effect of amendments made by the Immigration Act of 1990 (IMMACT 90)[4] and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),[5] followed by an explanation of who is still eligible for § 212(c) under the Supreme Court's rulings in *INS v. St. Cyr*[6] and *Judulang v. Holder*.[7]

[3] 8 USC § 1101, *et. seq*.
[4] PL 101-649, effective November 29, 1990.
[5] PL104-132, effective April 24, 1996.
[6] 533 U.S. 289 (2001).
[7] 565 U.S. 42 (2011).

Chapter 6 provides a thorough discussion of the § 212(h) waiver for criminal grounds of removal, the eligibility requirements, the special restrictions for LPRs and when they apply, and the evidentiary requirements for the waiver.

Chapter 7 contains an in-depth comparison of the § 212(h) waiver and Cancellation of Removal under § 240A(a), the benefits and drawbacks of each remedy, and how to analyze which of these remedies to pursue for your client. It also contains examples to illustrate the kinds of situations in which a comparison of these two remedies is likely to come up.

Chapter 8 covers other potential remedies for LPR clients facing removal, including waivers under § 237(a)(1)(H), adjustment of status and naturalization as remedies, etc. You should be familiar with **Chapters 2–6** before reading Chapter 8.

Chapter 9 is devoted to detention, including the rules for mandatory detention under § 236(c), the differences between pre- and post-removal hearing detention, and challenges to your client's detention.

Chapter 10 discusses techniques for working with clients to obtain the most effective evidence to defend their cases, what types of evidence are most likely to be relevant to their cases, and how to obtain and present different kinds of evidence.

§ 1.3 Which Permanent Residents Are Subject to the Grounds of Inadmissibility and Which Are Subject to the Grounds of Deportability

A. General Rules for Noncitizens

Generally speaking, the terms "admission" and "admitted" are defined in INA § 101(a)(13). This section was added to the Immigration and Nationality Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[8] INA § 101(a)(13)(A) defines admission as "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer." Those who have been admitted are subject to the grounds of deportability. In contrast, those who have not been admitted are considered "applicants for admission" and are subject to the grounds of inadmissibility.

The grounds of inadmissibility are found at INA § 212(a), and the grounds of deportability are found at INA § 237(a). Though they are similar, they are not identical. The differences between them can have a serious effect on your LPR client's eligibility for relief from deportation.

The following people are subject to the grounds of inadmissibility:

- Noncitizens who entered without inspection
- Applicants for admission at the border, such as nonimmigrant visa holders, those eligible for a visa waiver, and immigrant visa holders arriving for the first time[9]
- Applicants for adjustment of status
- Parolees; see INA § 101(a)(13)(B)

[8] Pub. L. 104-128, enacted 9/30/96; effective 4/1/97.

[9] A person with an immigrant visa from a U.S. Consulate abroad does not become a lawful permanent resident until and unless he or she is admitted at a U.S. border while the immigrant visa is valid, and within six months of the date the visa was granted. See 22 CFR §§ 42.72-42.64(b).

- Alien crewmen; see INA § 101(a)(13)(B)
- ***Lawful permanent residents, including conditional residents, who are returning from a trip outside the U.S. and fall within § 101(a)(13)(C)***

The following people are subject to the grounds of deportability:

- Nonimmigrant visa holders within the United States following an admission
- People admitted as visa waiver entrants
- Visa holder and visa waiver overstays in the United States
- Refugees
- ***Lawful permanent residents, including conditional residents,*** **except** ***those who are returning from a trip outside the U.S. and fall within INA § 101(a)(13)(C)***

B. The Special Rules Governing Admission of Returning Lawful Permanent Residents under § 101(a)(13)(C)

Usually, LPRs are not considered to be making a new application for admission each time they return from a trip abroad. Most of the time, therefore, they are subject to the grounds of deportability rather than the grounds of inadmissibility.

However, there are circumstances in which an LPR will be considered an applicant for admission upon return from a trip abroad. These circumstances are described in INA § 101(a)(13)(C) and listed below:

- Where the person has abandoned or relinquished lawful permanent resident/LPR status [INA § 101(a)(13)(C)(i)]
- Where the person has been absent from the U.S. for more than 180 consecutive days [INA § 101(a)(13)(C)(ii)]
- Where the person has engaged in illegal activity after having left the U.S. [INA § 101(a)(13)(C)(iii)]
- Where the person left the U.S. while proceedings to remove him or her from the U.S. were pending [INA § 101(a)(13)(C)(iv)]
- Where the person has committed an offense described in INA § 212(a)(2) [INA § 101(a)(13)(C)(v)] (criminal grounds of inadmissibility) unless the person has been granted relief under INA § 212(h) or 240A(a)
- Where the person attempts to enter without inspection or has not been admitted to the U.S. after inspection [INA § 101(a)(13)(C)(vi)]

The government bears the burden of proving by clear and convincing evidence that a lawful permanent resident who returns from a trip abroad comes within one of the above exceptions, and therefore is seeking a new admission under § 101(a)(13)(C). *Matter of Rivens*, 25 I&N Dec. 623, 625-26 (BIA 2011).

A lawful permanent resident who is held to be seeking a new admission can be refused admission if she comes within a ground of inadmissibility.

> **Example 1:** Marc is a permanent resident. In 2009 he travels to France for two weeks to attend a conference and then returns to the United States. He is suffering from infectious tuberculosis, which is considered a disease of public health significance that makes him

inadmissible under INA 212(a)(1)(A). As a returning permanent resident, Marc is deemed not to be "seeking admission" at the U.S. border. Therefore, although the DHS discovers that he is inadmissible for infectious TB, it cannot charge him with being inadmissible and place him in removal proceedings as a person "seeking admission," because his illness is not one of the categories listed in § 101(a)(13)(C) that causes him to be an "applicant for admission." Marc should be able to lawfully re-enter the United States, though he may be quarantined because of his illness.

Legally, Marc has not made a new admission. His illness is *not* one of the circumstances that would cause the government to treat him as an arriving alien.

Example 2: What if Marc takes another trip and stays outside the United States for 190 days? In that case, when he returns he will be "seeking admission," for having been absent for more than 180 days under INA § 101(a)(13)(C)(ii). The DHS can bring him into removal proceedings and charge him with being inadmissible for his TB in addition to charging him with abandonment of his residence. Marc might or might not meet the requirements for a discretionary medical waiver or for cancellation of removal.

PRACTICE TIP: If the only reason that a permanent resident comes within § 101(a)(13)(C) is one or more criminal convictions from before April 1, 1997, a different rule may apply. See discussion in **Subsection C**, below, and **Chapter 6**, **§ 6.5**.

Date of Admission. It is important to understand what the date is of an LPR's admission, because specific immigration provisions apply depending upon that date. This question arises in a few contexts. A non-citizen is deportable if convicted of one crime involving moral turpitude carrying a potential one-year sentence that was committed within five years after admission to the United States. The date of admission can also make a difference in whether a permanent resident is eligible for certain forms of relief, such as LPR Cancellation of Removal under INA § 240A(a) and eligibility for a waiver of inadmissibility under INA § 212(h). See **Chapters 4** and **5** for information on this issue in the context of eligibility for these two forms of relief.[10]

For those who immigrated through consular processing, the admission date is the date they arrived in the U.S. for the first time with their immigrant visas.

For those who adjusted status to become LPRs, there was some controversy as to what date counted as the date of admission. The BIA had held that the date of adjustment counts as the admission date, even if the person had previously been admitted as a nonimmigrant visa holder. See *In re Shanu*, 23 I&N Dec. 754 (BIA 2005); see also *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999). Most courts of appeal disagreed with the BIA, however, and held that adjustment of status only counts as an admission when the person previously entered without inspection. See *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), *Shivaraman v. Ashcroft*, 360 F. 3d 1142 (9th Cir. 2004) and *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005). The BIA subsequently modified its position on this issue in *Matter of Alyazji*,[11] in which it defined the "date of admission" for

[10] This controversy is also relevant for purposes of finding deportability under INA § 237(a)(2)(A)(i). See Chapters 2, and 5.
[11] 25 I&N Dec. 397 (2011).

triggering the deportability ground for a crime of moral turpitude with a potential sentence of one year committed within five years of admission,[12] as the "the date of the admission by virtue of which the alien was present in the United States *when he committed his crime*."[13] See further discussion on this issue at **Chapter 2**, **§ 2.6**.

> **Example:** James came to the U.S. in H-1B status on July 1, 2008, and subsequently adjusted his status to lawful permanent resident on September 1, 2013. On July 15, 2014, he committed embezzlement, under a statute that is a crime of moral turpitude that carries a potential sentence of a year or more. He was convicted of this offense on September 15, 2014. Is he deportable for conviction of a crime of moral turpitude with a potential sentence of at least one year that was committed within five years of admission, under INA § 237(a)(2)(A)(1)?
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> No. Under *Matter of Alyazji*, James' admission date is the date he last arrived with his H-1B visa, July 1, 2005. His offense was committed on July 15, 2011, more than six years later. He is therefore not deportable under INA § 237(a)(2)(A)(1).

C. LPR Travel and Convictions from before April 1, 1997: The *Fleuti* Exception

Before IIRIRA came into effect on April 1, 1997, there were different rules governing when a lawful permanent resident returning from a trip abroad made an **entry** (just as IIRIRA created special rules for when a returning lawful permanent resident is seeking admission). Entry is a term of art with a long history of judicial interpretation.

Before 1997, the definition of "entry" included a presumption that all lawful permanent residents are seeking re-entry to the United States upon return from a trip abroad. In *Rosenberg v. Fleuti*,[14] the Supreme Court created an important exception. It stated that permanent residents can rebut the presumption that they are making an entry upon return from a trip abroad if they establish that the trip was brief, casual and innocent and not a meaningful departure interrupting their residency. In contrast, the statutory definition of admission in INA § 101(a)(13), effective April 1, 1997, presumes that returning lawful permanent residents are not seeking admission unless they come within one of the six exceptions.[15] These exceptions do not look exclusively at the character of the absence, but also look to the character of the behavior on the part of the resident. The 1997 statutory definition of admission replaced the statutory language defining entry in the Act.[16]

In *Vartelas v. Holder*, 566 U.S. 257 (2012), the Supreme Court held that the former *Fleuti* standard still applies if the only convictions that would cause a returning LPR to come within INA § 101(a)(13)(C) occurred before April 1, 1997, the date that § 101(a)(13) was enacted. The Court determined that applying § 101(a)(13) to a conviction from before its enactment would retroactively impose a "new disability" on the conviction. Before enactment of § 101(a)(13), a permanent resident with this conviction could travel briefly outside the U.S. without relinquishing his or her lawful status; after enactment of § 101(a)(13), the person could not. *Vartelas*, at 266. The Court noted that where a new disability is imposed, the principle against retroactive

[12] INA § 237(a)(2)(A)(i).
[13] *Matter of Alyazji*, at 406 [emphasis added]; see also Chapter 2, § 2.6.
[14] *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).
[15] See INA § 101(a)(13(C).
[16] IIRIRA § 301(a), amending INA § 101(a)(13), 8 USC § 1101(a)(13).

legislation instructs that "courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity." *Vartelas* at 1486. The Court found that Congress did not unambiguously instruct retroactivity in enacting § 101(a)(13)(C). Therefore, in order to avoid an improper retroactive penalty, the Court held that if a permanent resident travels outside the U.S. now while inadmissible solely due to a pre-April 1, 1997 conviction, authorities must employ the *Fleuti* definition of "entry" rather than § 101(a)(13)(C) upon the person's return. Under the *Fleuti* doctrine, as long as the LPR's absence from the U.S. was "brief, casual, and innocent," she is deemed not to be making a new entry upon her return.

> **Example:** In 1995, Rinsing was convicted of an offense that made him inadmissible under the moral turpitude ground. In 2016, Rinsing took a three-week trip outside the U.S. to visit relatives. Under INA § 101(a)(13)(C), a permanent resident who is inadmissible for crimes is deemed to be seeking a new admission upon his return from a trip abroad, and may not re-enter the U.S. unless he receives a waiver of inadmissibility such as § 212(h). Is Rinsing seeking a new admission?
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> No. The only reason that Rinsing would come within § 101(a)(13)(C) is his conviction from before April 1, 1997. Therefore, under *Vartelas* we must apply the *Fleuti* definition of entry rather than § 101(a)(13). Rinsing's return from a short trip to visit family is not a new entry under *Fleuti*, because his absence from the U.S. was "brief, casual, and innocent" and not meaningfully interruptive of his residence. Therefore, he is not deemed to be seeking a new admission. He can re-enter the U.S. despite being inadmissible for crimes. He does not need to seek a waiver of inadmissibility.

For further information on *Vartelas*, see online Practice Advisory[17] and **Chapter 6**, **§ 6.5**.

§ 1.4 Burdens of Proof

Burden of proof is a complex and confusing subject, largely because the burden of proof shifts depending on the status of the person involved, and the situation he or she is faced with. The following is a brief synopsis of the differing burdens of proof, which are dealt with in more detail in subsequent chapters in the context of specific grounds of removability and specific forms of relief from removal.

A. The Burden of Proof of Alienage Falls on the Government

For noncitizens found within the United States without being admitted or paroled, the government bears the burden of proving alienage. 8 CFR § 1240.8(c); see also *Murphy v. INS* 54 F.3d 605 (9th Cir. 1995).[18] The evidence required to prove alienage is not specified by regulation. Even if

[17] See Vargas et al., "*Vartelas v. Holder*: Implications for LPRs" (April 5, 2012) at www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Vartelas_Practice_Advisory.pdf.

[18] Holding that the burden of proving alienage always remains on the government because it is a jurisdictional matter.

the person has submitted an application for relief from removal, the information in that application cannot be held to be an admission of alienage. 8 CFR § 1240.11(e).[19]

Once alienage has been established, the noncitizen must prove by clear and convincing evidence that he or she is lawfully in the U.S. pursuant to a prior admission, or is clearly and beyond a doubt entitled to be admitted to the U.S. and is not inadmissible as charged. 8 CFR § 1240.8(c).[20] For noncitizens in removal proceedings, once alienage has been established, the burden of proof shifts to the noncitizen to show the time, place, and manner of entry. INA § 291; see also *Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984).

B. The Burden of Proof under the Inadmissibility Grounds in INA § 212(a)

1. General rules for noncitizens

Under INA § 240(c)(2), noncitizens who are subject to the grounds of inadmissibility, which includes those who are applying for adjustment of status under § 245, bear the burden of proving either:

1. that they are "clearly and beyond doubt entitled to be admitted and not inadmissible under section 212" or,
2. by clear and convincing evidence, that they are lawfully present in the U.S. pursuant to a prior admission.

2. Lawful permanent residents and the burden of proof under the inadmissibility grounds

Despite the general rule governing the burden of proof for those deemed "applicants for admission" under IIRIRA, permanent residents who are subject to the grounds of inadmissibility as arriving aliens have more rights than other noncitizens. For example, under INA § 235(b)(2), a returning resident charged as an "arriving alien" has the right to a removal hearing under INA § 240.

Furthermore, in *Kwong Hai Chew v. Colding*,[21] and *Landon v. Plasencia*,[22] the U.S. Supreme Court held that LPRs returning from a trip abroad are entitled to due process protections, meaning that they have the right to a full and fair hearing and the right to confront the evidence against them. See *Landon v. Plasencia.* In addition, the Supreme Court has held that if a returning lawful permanent resident is to be deprived of his status, the government may only do so in a proceeding in which the government is both the moving party *and* bears the burden of proof. *Kwong Hai Chew v. Colding*. No statutory scheme invented by Congress can override these constitutional protections.

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[19] Except for asylum and withholding applications filed before USCIS (affirmative applications) on or after January 4, 1995. *Defensive* applications (first filed before EOIR) cannot be used to establish alienage.
[20] *Murphy v. INS*, above; see also *Lopez-Chavez v. INS*, 259 F.3d 1176 (9th Cir. 2001).
[21] 344 U.S. 590 (1953).
[22] 459 U.S. 21 (1982).

C. The Burden of Proof under the Deportability Grounds in INA § 237

For noncitizens who are subject to the grounds of deportability, *the government* bears the burden of proving, *by clear and convincing evidence*, that the noncitizen is deportable. INA § 240(c)(3)(A); 8 CFR § 1240.8(a). "No decision on deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." *Kwong Hai Chew v. Colding*, INA § 240(c)(3)(A). In addition, INA § 240(c)(3)(B) contains specific rules governing the type of evidence required to prove the existence of criminal convictions. The government bears the burden of proving both (1) the existence of a criminal conviction; and (2) that the conviction triggers a ground of deportability or inadmissibility. These rules, and case law governing the establishment of deportability based on a criminal conviction, are covered in **Chapter 2**.

Under the Supreme Court case, *Woodby v. INS*, 385 U.S. 276 (1966), the standard for proving deportability was deemed to be clear, *unequivocal*, and convincing evidence. It's not clear whether there is a difference between "clear and convincing" and "clear, unequivocal and convincing," but since the *Woodby* decision is constitutionally based, it should be the required standard of proof.

In any event, there are some interesting examples of how the standard of proof for deportability has been applied in practice. In *Matter of Vivas*,[23] the BIA held that where the government has made a *prima facie case* for deportability, the noncitizen may be required to submit evidence that rebuts the government's case if the evidence in question is within the noncitizen's knowledge and control. In *Matter of Vivas*, the respondent was a permanent resident who supposedly obtained his residence through a U.S. citizen spouse. However, the government produced a witness claiming that the birth certificate alleged to belong to the respondent's spouse was actually the witness's, and that she had never met him. Under these circumstances, the BIA affirmed the immigration court's decision finding the respondent deportable. Similarly, in *Matter of Guevara*,[24] the BIA affirmed that once the government submits *prima facie* evidence of deportability, the burden of proof shifts to the respondent to rebut that evidence.

Matter of Guevara also held, however, that the government cannot meet its burden of proof *solely* based on the respondent's assertion of his Fifth Amendment right to remain silent. In other words, where a noncitizen is subject to the deportability grounds, the government has to have submitted clear and convincing, credible proof of deportability, which the noncitizen then has the burden of rebutting, before the noncitizen's silence can be used against him. *Matter of Guevara*; see also *Matter of Carillo*, 17 I&N Dec. 30 (BIA 1979).

Where the basis for a charge of deportability is a criminal conviction, the government still bears the burden of proof but the analysis is somewhat more complex. Basically, if a statute is truly "divisible" in that it lists at least one crime that triggers a deportation ground and a separate crime that does not, then the government has the burden to show that the respondent was convicted of the deportable offense. See discussion of convictions and the categorical approach at **Chapter 2**, **§§ 2.4**–**2.6**.

[23] 16 I&N Dec. 68 (BIA 1977).
[24] 20 I&N Dec. 238 (BIA 1991).

D. The Burden of Proof in Applications for Discretionary Relief

Burden of proof also comes up in the context of applications for relief from removal. If the government successfully establishes deportability or inadmissibility for a permanent resident, the next step in the removal hearing process is to determine if your client may be eligible for some form of relief from removal, and if so to apply for that relief.

The burden of proof for determining eligibility for relief from removal is quite different from the burdens of proof for establishing deportability or inadmissibility, and these should not be confused.

Under INA § 240(c)(4)(A):

> An alien applying for relief or protection from removal has the burden of proof to establish that the alien---
>
> (i) satisfies the applicable eligibility requirements; and
>
> (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

In addition, the applicant must submit information or documentation to support the application, as required by law, regulation, or the instructions in the application form. § 240(c)(4)(B). Where the immigration judge determines that the applicant provide evidence that corroborates otherwise credible testimony, that evidence *must* be provided unless the applicant shows he or she does not have it and cannot reasonably obtain it. § 240(c)(4)(B).

Furthermore, 8 CFR § 1240.8(d) states that a noncitizen:

> … shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

What this means in the context of different applications for relief from removal has been the subject of some controversy, and case law is still being developed on this issue. It is clear that the immigrant must prove certain factual issues, such as the basis for his fear of persecution in an asylum case, or the family relationship in a family visa case. But courts are split as to whether the immigrant must present proof as to the legal question of whether a conviction under a "divisible" statute is a bar to relief, under the categorical approach. A more detailed discussion of divisible statutes and the burden of proof can be found in **Chapter 2**, **§ 2.5** on the categorical approach.

§ 1.5 Evidentiary Considerations; Motions to Suppress

A. General Rules of Evidence in Removal Proceedings

Although the federal rules of evidence are not applicable to removal proceedings,[25] nevertheless the evidence submitted by the government to establish the inadmissibility or deportability of

[25] *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983); *Dor v. District Director, INS*, 891 F.2d 997, 1003 (2nd Cir. 1989).

permanent residents must comport with due process. *Landon v. Plasencia*, above. In other words, it is only admissible if it is probative and its admission would not be fundamentally unfair. *Saidane v. INS*, 129 F.3d 1063 (9th Cir. 1997).

In *Saidane*, the government made no effort to call an available witness and relied instead on that witness's damaging hearsay affidavit, and the Ninth Circuit Court of Appeals held that the presentation of hearsay evidence was fundamentally unfair. Similarly, in *Cunanan v. INS*,[26] the Ninth Circuit held that "the government must make a reasonable effort … to afford the alien a reasonable opportunity to confront the witnesses against him or her. This duty is not satisfied where the government effectively shifts the burden of producing its witness onto the alien." *Cunanan v. INS.* In other words, the government may not use an affidavit from an absent witness unless it first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing. See *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005).

Practitioners should be aware, however, that Form I-213[27] is considered presumptively reliable and admissible in removal proceedings without giving the immigrant the opportunity to cross-examine the document's author, at least when the noncitizen has put forth no evidence to contradict or impeach the statements in the report. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); see also *Felzerek v. INS*, 75 F.3d 112 (2nd Cir. 1996) and *Kim v. Holder*, 560 F.3d 833 (8th Cir. 2009). Nevertheless, where the admission of the I-213 would be fundamentally unfair, it can be challenged. For example, in *Murphy v. INS*,[28] a finding of deportability was reversed where the BIA's determination was based on an inaccurate I-213 for which information was provided by a biased INS informant. In another example, the Fifth Circuit reversed a finding of alien smuggling where the person allegedly smuggled had already been deported, and the government was relying on his hearsay testimony, which was given in Spanish but which INS agents had written down in English. The court found that the respondent was entitled to cross examine the INS agent on his ability to speak Spanish fluently before the statement could be relied upon. *Hernandez-Garza v. INS*, 882 F.2d 945, 947-48 (5th Cir. 1989).

PRACTICE TIP: The information in Form I-213 must show an individualized basis for finding that the person charged is an "alien." Since ICE agents are often sloppy when preparing I-213s, practitioners should always ask to examine them before pleading to the Notice to Appear.

When someone is allegedly removable based on a criminal conviction, only certain documents can be admitted into evidence to prove the conviction.[29] Furthermore, establishing the existence of a conviction, by itself, does not necessarily establish that a noncitizen falls within a particular inadmissibility or deportability ground. This is a very complex issue that is discussed extensively in **Chapter 2**.

[26] 856 F.2d 1373 (9th Cir. 1988).
[27] Form I-213 is the "Record of Deportable Alien" used by immigration officials as the basis for the Notice to Appear.
[28] 54 F.3d 605 (9th Cir. 1995).
[29] See INA § 240(c)(3)(B).

B. The Exclusionary Rule in the Immigration Context

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

The exclusionary rule provides that evidence seized during an unlawful search cannot constitute proof against the victim of the search, and this prohibition extends to indirect as well as to direct products of such invasions, including verbal evidence. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *United States v. Crews*, 445 U.S. 463 (1980). However, in *INS v. Lopez-Mendoza*, above, the Supreme Court held that the exclusionary rule does not apply in civil deportation proceedings except in the case of "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." 468 U.S. 1032, 1050-51 (1984). The Court noted that its conclusion about the lack of application of the exclusionary rule in deportation proceedings might change "if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." *INS v. Lopez-Mendoza.*

The BIA came to a similar conclusion in *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980), finding that a violation of the Fourth Amendment would not necessarily lead to the conclusion that admitting the resulting evidence was fundamentally unfair. However, the Fifth Amendment's due process clause can be invoked to suppress evidence where it is obtained through egregious misconduct by enforcement officers that interfere with the fundamental fairness of a proceeding. *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980). The conduct is egregious when the government agents committed the violation deliberately, or by conduct that a reasonable officer would have known to be in violation of the Constitution. *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994). In *Orhorhaghe*, an INS officer's conduct was found egregious because he targeted Orhorhaghe based on his "Nigerian-sounding name," unlawfully entering his apartment without consent. In *Matter of Garcia*, the respondent only admitted alienage after INS officers led him to believe that he had no rights and that his deportation was inevitable, in addition to denying him access to counsel. Where the conduct is egregious, the evidence must be suppressed regardless of its probative value. *Orhorhaghe*, at 502. Other circuits have slightly different standards for egregiousness. See, e.g., *Oliva-Ramos v. Attorney General*, 694 F.3d 259 (3rd Cir. 2012) *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2nd Cir. 2006).

Cases in which evidence was suppressed for egregious conduct include *Matter of Garcia*, above, *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977) [noncitizen admitted alienage after warrantless nighttime arrest at home and 4 hours of detention], *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) [noncitizen stopped solely based on his Hispanic appearance]; *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008) [ICE agents pushed their way into a home after respondent came to the door; no arrest or search warrant, and no consent to enter], and *Bong Youn*

Choy v. Barber,[30] 279 F.2d 642 (9th Cir. 1960) [admission made after seven hours of threats of deportation or prosecution].

Note that a person's identity is not something that can be suppressed, even if the government's conduct has been egregious. See *USA v. Toro-Gudino*, 376 F.3d 997 (9th Cir. 2004).[31] This is very unfortunate, because ICE can use a person's name to find independent evidence of alienage apart from any egregious Fourth Amendment violation, such as the filing of a visa petition for that person. If ICE is able to establish alienage based on evidence that is not the result of an illegal search, a suppression motion will not be of any use. However, the Second Circuit in *Pretzantzin v. Holder* found that independent evidence can be suppressed if it was only obtained on the basis of information gained during an egregious Fourth Amendment violation. In *Pretzantzin*, ICE conducted a warrantless nighttime raid, and based on the names given at arrest, obtained Pretzantzin's birth certificate from the Guatemalan embassy. The Court found that although identity cannot be suppressed for the purpose of determining jurisdiction, the government had failed to show that the birth certificates were "independent evidence of alienage." 736 F.3d 641 (2nd Cir. 2013).

C. Suppression and Termination Based on Regulatory Violations

Practitioners should consider filing suppression motions whenever the government has engaged in unlawful practices. Even where the government's conduct is not "egregious," suppression of evidence is still possible under the administrative exclusionary rule where DHS violates regulations promulgated for the noncitizen's benefit, and the noncitizen suffers prejudice. *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328 (BIA 1980). See also *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979); *United States v. Lombera-Camorlinga*, 170 F.3d 1241 (9th Cir. 1999), and *Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008).

INA § 287 and 8 CFR § 287 describe the power of immigration officers. Under 8 CFR § 287.3(a), a noncitizen arrested without a warrant must be examined by someone *other than the arresting officer*, unless no other qualified officer is available and the taking of the noncitizen before another qualified officer would cause unnecessary delay. *Hernandez-Guadarrama*, above, at 674.[32] Under 8 CFR § 287.3(c), once DHS officers arrest someone and put him or her in proceedings under §§ 238 or 240 of the Act, they must do the following:

- advise the person of the reasons for his or her arrest
- advise the person of his or her right to counsel
- provide the person with a list of available free legal services, and
- advise the person that any statements he or she makes may be used against him or her at the hearing.

[30] A government petition for rehearing has been filed in this case.
[31] See also *U.S. v. Navarro-Diaz*, 420 F.3d 581 (6th Cir. 2005) *Gutierrez-Berdin v. Holder*, 618 F.3d 647 (7th Cir. 2010), *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010), *U.S. v. Ortiz-Hernandez*, 427 F.3d 567 (9th Cir. 2005); and *U.S. v. Garcia-Beltran*, 398 F.3d 864 (9th Cir. 2004).
[32] Nevertheless, where the noncitizen's rights were not prejudiced by examination by the arresting officer, the evidence will not be suppressed. *Martinez-Camargo v. INS*, 292 F.3d 487 (7th Cir. 2002).

In *Garcia-Flores*, the examining officer failed to notify the noncitizen of the reasons for her arrest and that she had a right to be represented by counsel in violation of 8 CFR § 287.3(c). In analyzing the case, the BIA adopted a 2-prong test for determine whether the deportation proceedings against her should be invalidated:

1. the regulation must serve a purpose of benefit to the alien, and
2. the proceeding will be found unlawful only if the violation prejudiced the alien's interests.[33]

The BIA found that 8 CFR § 287.3(c) was intended to benefit the alien, and remanded the case to the immigration court for a finding on prejudice. *Garcia-Flores*, above. "Prejudice" in this context, does not mean that someone has to prove they would have won their case but for the violation of the regulation; it only requires a showing that the violation could *potentially* have affected the outcome of the proceedings. *Garcia-Flores*, see also *United States v. Calderon-Medina*, above.

Even though the BIA did not automatically find prejudice in *Garcia-Flores*, it noted that "where compliance with the regulation is mandated by the Constitution, prejudice may be presumed," and that "where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency, it can be deemed prejudicial." This is important language to use when challenging the legality of a client's arrest and the admission of any statements made as a result of that arrest.[34]

D. How to Conduct a Suppression Hearing

If you think that your client's arrest was illegal, or that the government's evidence is otherwise tainted by constitutional or regulatory violations, you can file a motion to suppress the illegally obtained evidence. Remember that if you are alleging that evidence should be suppressed, you must show not only that there was an egregious Fourth Amendment violation, but also that your client was prejudiced by the illegality, so that admission of the evidence would violate due process.

If you are going to move to suppress the evidence, the first step is that you must deny the allegations in the Notice to Appear or other charging document at a master calendar hearing. Second, you must file a written motion to suppress, supported by a detailed declaration or affidavit from your client describing the circumstances of the arrest.[35] If your client is alleging an illegal arrest, his or her statements must be specific rather than conclusory or based on conjecture. *Matter of Wong*, 13 I&N Dec. 820 (BIA 1971).

In your motion, cite to every fact in your client's declaration that demonstrates either a constitutional or regulatory violation and explain why it constitutes a violation of your client's rights. Also explain either why the violation should be presumed to be prejudicial or why it was

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[33] This test was adapted from *United States v. Calderon-Medina*, above, at 532.
[34] See also *Leslie v. Attorney General of the U.S.*, 611 F.3d 171 (3d Cir. 2020) [finding a due process violation where an immigration judge failed to notify the noncitizen of free legal services available, as required, and holding that the noncitizen was not required to show prejudice].
[35] See further information at *Motions to Suppress: Protecting the Constitutional Rights of Immigrants in Removal Proceedings* (ILRC) at www.ilrc.org/publications/motions-suppress.

in fact prejudicial. *Garcia-Flores*, above. The respondent has the burden of establishing a *prima facie* case of illegality. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988), citing *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975). Once a *prima facie* case has been established, the burden shifts to the government to show that the manner in which it obtained the evidence was justified. *Id.*

If your motion to exclude evidence is based on the government's failure to produce a witness, your motion must address how the government failed to make reasonable efforts to produce the witness in person, and how that failure makes the use of the evidence fundamentally unfair, in violation of your client's due process rights. See *Hernandez Guadarrama v. Ashcroft*,[36] see also *Saidane v. INS*, 129 F.3d 1063 (9th Cir. 1997).

PRACTICE TIP: To effectively suppress evidence of alienage, you must challenge the allegations in the Notice to Appear, and help your client assert his or her Fifth Amendment right against self-incrimination at the hearing by avoiding any admission of alienage. He or she should disclose only his or her name; no place of birth, and no other details.

You must instruct your client to assert his or her Fifth Amendment right against self-incrimination at the hearing. This can be a very intimidating process, and the client must be well-prepared to resist answering questions from the immigration judge or ICE attorney about his or her place of birth at the hearing. Any admissions will be used against your client, including statements made in visa petitions and other affirmative applications to USCIS.[37]

For a comprehensive discussion, see *Motions to Suppress: Protecting the Rights of Immigrants in Removal Proceedings* (2016, www.ilrc.org/publications).

§ 1.6 When and Whether to Concede Removability

If there is a question about the legality of your client's arrest, or the fundamental fairness of the government's evidence against him or her, then obviously y*ou do not want to concede removability*, because you may be able to suppress the evidence obtained against your client and get the removal proceedings terminated.

However, this is not the only time that you would want to deny the allegations in the NTA. In fact, when you are representing a permanent resident who is being charged with a ground of deportability, *you should not concede deportability, or admit any facts that can be contested.* The government bears the burden of proving by clear and convincing evidence that your client falls within the alleged ground/s of deportability.

This is particularly true when the ground of deportability charged is a criminal conviction. The government has the burden to produce qualifying documents that show that your client was convicted of the alleged offense. In addition, it is the government's burden to prove that the offense your client was convicted of actually falls within the particular ground of deportation charged. The area of crimes and immigration is technical and fast-changing, and one must not

[36] *Hernandez Guadarrama v. Ashcroft*, 394 F.3d at 681.
[37] However, statements made in applications for relief from removal (i.e., defensive applications) *cannot* be considered a concession of alienage or deportability in any case where someone does not admit alienage or deportability, except for asylum applications filed on or after January 4, 1995. 8 CFR § 1240.11(e).

simply assume that there is no defense. See **Chapter 2**. In addition, non-criminal grounds of deportability, such as false claims to U.S. citizenship, may be successfully challenged. See **Chapter 3**.

Since the government must prove deportability by clear and convincing evidence, it rarely makes sense to concede deportability, even if your client is eligible for some form of relief from removal. Furthermore, if you make a mistake and concede removability incorrectly, when your client has a defense to the charge, your client may be bound by your error. See, e.g., *Perez-Mejia v. Holder*, 641 F.3d 1143 (9th Cir. 2011). Therefore, *do not* concede removability unless you are absolutely certain that your client is deportable and that nothing is to be gained by putting the government to its burden of proof.

> **Example 1:** In 2017, ICE issued a Notice to Appear (NTA) alleging that on June 1, 2008, John adjusted status to permanent residence, and on June 1, 2011, John was convicted of felony burglary. The NTA charges that John is deportable under INA § 237(a)(2), because the burglary conviction is a crime involving moral turpitude with a potential sentence of at least a year, and John committed the offense within five years of admission.[38] Should you admit the allegations and concede deportability?
>
> No. Regarding the factual allegations, it is possible that the government will not be able to obtain the conviction record for a variety of reasons, which means that proceedings must be ended. But if John were simply to admit the conviction, this would relieve the government of that burden. Regarding the charge of deportability, deciding whether a particular conviction triggers a deportation ground can involve a detailed analysis comparing the elements of the offense to the technical definition of the removal ground, using the categorical approach. Depending on the statute and interpretative case law, it may be that as a matter of law, *no* conviction under the statute ever is a CIMT. Or, it may be that the burglary statute is "divisible" as a crime involving moral turpitude (it sets out some offenses that involve moral turpitude, and some that do not) and that John's official record of conviction does not prove of which offense he was convicted. John should not concede that he is deportable, because the government might not be able to meet its burden of proof on this issue. It is especially critical to decline to admit and concede if John is not eligible for any relief from removal.
>
> **Example 2:** Let's say instead that John has been a permanent resident for 10 years and he is eligible for LPR cancellation of removal.[39] Since he is eligible for relief and has a good case, why not concede deportability and just apply for cancellation?
>
> There are at least two good reasons not to do this. First, a grant of cancellation of removal is never guaranteed. Second, if cancellation of removal is granted once, it can never be granted again, meaning that if John is found deportable for some other reason any time in the future, he will be ineligible to apply for cancellation of removal again, no matter how strong his equities are.[40]

[38] INA § 237(a)(2)(A)(i)(I); see also Chapter 2.
[39] See Chapter 4 on LPR Cancellation of Removal.
[40] INA § 240A(a); see Chapter 4.

Some practitioners worry that they will irritate the immigration judge by contesting deportability, so that the judge will be less likely to grant discretionary relief. This is especially true if, in the practitioner's opinion, the government could make its case that the person is deportable. But absent very special circumstances, admitting and conceding still is not recommended. Declining to concede should be the norm where the government has the burden of proof, and we can make it more "normal" by repeatedly doing so in court. In fact, doing so need not be provocative. One may simply say, "Your honor, we would like to put the government to its burden of proof. We decline to admit the allegations in the Notice to Appear or to concede deportability." Moreover, you and your client will be grateful that you did this if it turns out the government either cannot or simply does not obtain the required proof of deportability, or if you later discover a legal argument or beneficial new case of which you were not aware at the master calendar.

For a more comprehensive discussion of strategy, see the ILRC manual *Removal Defense* (2015, www.ilrc.org).

As we have seen in **§ 1.4**, **Subsection B.2**, even if a permanent resident is charged with a ground of inadmissibility, he or she has the right to due process, meaning that if he or she is to be deprived of LPR status, the government may only do so in a proceeding in which the government is the both moving party *and* bears the burden of proof. *Kwong Hai Chew v. Colding*, above. Therefore, regardless of whether your client is charged with an inadmissibility ground as a returning resident or is charged with a deportability ground, it is wise not to concede the charges, and to put the government to its burden of proof, unless doing so would be an exercise in futility, *and* your client is eligible for some form of relief, or your client is (lawfully) detained and has no relief available to him and just wants to get out of custody and go back home.[41]

§ 1.7 Analyzing Your Client's Case

When representing a lawful permanent resident charged with being removable, or any noncitizen client for that matter, it's a good idea to analyze each case in a logical, consistent way. It's also a very good idea to consult the Immigration Court Practice Manual, which came into effect July 1, 2008, and is frequently updated, to make sure you are complying with all the procedural requirements necessary.[42] It would be tragic to lose your case because of missing a deadline!

In analyzing your client's case, it may be helpful to ask yourself the following questions:

1. Is the client potentially a U.S. citizen by operation of law, and if so, what do I need in order to prove this?
2. How did the client come to the attention of DHS?
3. Is there any way to challenge the arrest and/or the government's evidence? (Question your client closely about the circumstances of his or her arrest. If you see a potential challenge to the arrest or evidence, do not concede removability, and consider a motion to suppress).

[41] See Chapter 9 for detailed information on detention and representing the detained client.
[42] Available at: www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm or www.usdoj.gov/eoir/.

4. What is the client charged with? Is it a ground of deportability or a ground of inadmissibility?
5. Who bears the burden of proof?
6. Can the charges be challenged, and how? (Even if you do not see a way to challenge the charges at this point, put the government to its burden of proof by declining to concede. The government might make an error, or you may discover a defense at a later time.)
7. Is the client eligible for relief from removal if the charges are sustained?
8. What relief, and what are the requirements?
9. What is my client's burden of proof on eligibility and how can I help her meet it?
10. What is my client's burden of proof on discretion and how can we show that she merits a favorable exercise of discretion?
11. What evidence do we need to establish eligibility for relief?
12. What kinds of documents would be useful to establish both eligibility and that your client merits the relief sought?
13. Who will potential witnesses be, and what will their testimony offer?
14. What are the client's equities, and what are his or her weak points?
15. How can I best present the evidence in this case?
16. How can I best refute the government's position?
17. How can I best prepare my client and witnesses for direct examination?
18. How can I best prepare my client and witnesses for cross-examination?

By going through these questions logically and systematically, you are less likely to overlook what may turn out to be an important issue. The contents of this book should help you to answer these questions when representing lawful permanent residents charged with being removable.

§ 1.8 A Word on Judicial Review

The remedies discussed in this book are for the most part discretionary remedies. Because IIRIRA eliminated judicial review over discretionary determinations, federal courts may not have jurisdiction to review the denial of your case if the BIA denies your case on discretionary grounds.

Nevertheless, the REAL ID Act,[43] passed by Congress on May 11, 2005, amended the INA to provide that none of IIRIRA's restrictions on judicial review can eliminate the courts' power to review constitutional claims or questions of law. See INA § 242(a)(2)(D); see, e.g., *Jean v. Gonzales*, 435 F.3d 475 (4th Cir. 2006); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005).

[43] Sec. 106(a)(1)(A)(iii), Title I, REAL ID Act of 2005, Pub. L. No. 109-13, codified at INA § 242(a)(2)(D).

"Constitutional claims" refer to claims that your client's constitutional rights have been violated. See, e.g., *Chen v. Dept. of Justice*, 471 F.3d 315, (2d Cir. 2006). As noted in **§ 1.5** above, noncitizens in removal proceedings have a Fifth Amendment right to due process of law. Therefore, where your client has a claim that she has been deprived of a fundamentally fair hearing by judicial misconduct, or by the ineffective assistance of former counsel, this is a constitutional claim that you can raise on appeal. While a full discussion of due process is beyond the scope of this manual, it is important to be aware of the possibility of raising constitutional issues on appeal.

Since the REAL ID Act, there has been much litigation seeking to determine what is a "question of law," and thus reviewable in federal court.[44] A "question of law" generally includes statutory and regulatory interpretation. In some circuits, it also includes the application of law to the facts. See, e.g., *Padmore v. Holder*, 609 F.3d 62 (2nd Cir. 2010); *Chen v. Dept. of Justice*, 471 F.3d 315, (2d Cir. 2006). Examples of such questions include fact-finding which is flawed by an error of law, such as where an IJ states that her decision was based on the petitioner's failure to testify to some pertinent fact when the record of the hearing reveals unambiguously that the petitioner *did* testify to that fact, or where a discretionary decision is argued to be an abuse of discretion because it was made without rational justification or based on a legally erroneous standard. *Chen*, 471 F.3d at 330-331.

Questions of law also include situations in which the BIA violates its own procedures and regulations.[45] For example, in *Padmore v. Holder*, the court held "when the BIA engages in fact-finding in contravention of 8 CFR § 1003.1(d)(3)(iv), it commits an error of law, which we have jurisdiction to correct." 609 F.3d at 65.

Therefore, do not assume that because the remedy you are seeking is discretionary, you have no recourse in the Court of Appeals. Carefully review the record for evidence of legal error by the IJ or BIA, and/or violations of administrative regulations and procedure, in addition to asserting, where appropriate, constitutional claims in support of your appeal. Of course, always remember to review the decisions of the court of appeal in your jurisdiction to determine how it has ruled on these issues, as the case law is continually evolving.

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[44] Compare *Al Ramahi v. Holder*, 725 F.3d 1133 (9th Cir. 2013) (holding that whether a situation constitutes "changed or exceptional circumstances" for purposes of the one-year asylum bar is a question of law and thus reviewable), with *Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006) (holding that the determination of whether a situation is "changed or exception circumstances" is an unreviewable exercise of discretion); and *Diallo v. Gonzales*, 447 F.3d 1274 (10th Cir. 2006) (same).

[45] See *Padmore v. Holder* (above) and *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).

Chapter 1