

Immigration Law Course Outline

I. Immigration and the Constitution

A. The plenary congressional power over immigration.

1. The Chinese Exclusion Case (p.14 CB) – P argued that there was nothing in the Constitution that gives Congress the power to regulate immigration. Held, as a nation, the U.S. government has the inherent, sovereign power to regulate, through its legislative department, immigration, meaning that it may exclude non-citizens. “To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation...” Non-citizens have only a revocable license to be here. Ct. didn’t specify where in the Constitution this power to exclude comes from. Also, Ct. held that executive and legislative branch decision-making with respect to immigration is conclusive on the judiciary.
2. Ekiu (p.28 CB, not assigned) – For non-citizens, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are* due process of law.” (emphasis added) When it comes to exclusion, the normal rules of procedural due process don’t apply.
3. Fong Yue Ting (not assigned) – Ct. extended the principles of the two cases above from exclusion to deportation.

B. Limits to the plenary congressional power.

1. Procedural due process, Fourteenth Amendment – Issues: Is there a life, liberty, or property interest? If such an interest is at stake, what process is due? Applies to all “persons” within the U.S. – but, for non-citizens at the threshold of initial entry, see Ekiu.
2. Mezei (p.51 CB) – Respondent was a law-abiding LPR for 25 years; he went to Eastern Europe for 19 months to visit his ailing mother; upon return, he was refused re-entry based on confidential information, the disclosure of which would have been prejudicial to the public interest; and he was being detained indefinitely on Ellis Island b/c no other country would take him. Held: (1) This was an exclusion proceeding; respondent, even though he was a returning LPR, was treated as an entering alien. The court didn’t distinguish initial entrants from returning residents, but instead “aliens” at the threshold from aliens inside the country. (2) With respect to due process in an exclusion proceeding, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” (Knauff) (3) The practical effect of denying Mezei admission to the US was detention on Ellis Island for the rest of his life. If exclusion alone doesn’t trigger due process rights, does indefinite detention? Ct. said no.
3. Plasencia (p.59 CB) – Held, an LPR who leaves the country and then returns will be entitled to procedural due process so long as he or she hasn’t been gone for too long. How long is too long and other questions were left unanswered.
4. Zadvydas (p.100 CB) – Two LPRs were being detained indefinitely pending deportation for various criminal violations, and no country would accept them, so they filed a writ of habeas corpus under 28 U.S.C. § 2241. Ct. interpreted § 241(a)(6): An alien ordered removed (1) who’s inadmissible, (2) who’s deportable on certain crime-related grounds, or (3) who has been determined by the AG to be a risk to the community or unlikely to comply with the order of removal, “may be detained beyond the removal period [how long was issue, statute didn’t say] and, if released, shall be subject to certain terms of supervision.” Held, indefinite and potentially permanent detention of deportable aliens is at least constitutionally questionable. Read the statute this way: If, after 6 mos. of detention, the alien establishes

that there's no significant likelihood of removal in the reas. foreseeable future, the Govt. must respond with evidence sufficient to rebut that showing (i.e., show that there's still a significant likelihood of removal in the reas. foreseeable future) or release the alien subject to supervision. Measure reasonableness "primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal"; what counts as the "reas. foreseeable future" shrinks after 6 mos. of detention.

C. Three principles of statutory interpretation.

1. Literal Plain Meaning Rule – Plain-language, even if the result is absurd. Rule has no application if the language is ambiguous.
2. Social Purpose Rule – Ascertain the purpose of the legislation by looking to language, structure of statutory scheme, legislative history, etc.
3. Golden Rule – Intermediate approach. Plain-language, unless doing so would produce an absurd result, in which case ascertain the purpose of the legislation.

II. Immigrant Categories

A. Intro. § 101(a)(15) defines "immigrant" by process of elimination – any non-citizen who can't establish that he or she fits into one of the enumerated non-immigrant classes. The intending immigrant must meet the requirements of one of several categories laid out in §§ 201 & 203 and avoid the various affirmative grounds of inadmissibility. Upon admission, immigrants enjoy more benefits than non-immigrants do (can work, qualify for some govt.-provided benefits), so the admission standards for immigrants are tougher than those provided for non-immigrants. Lawfully admitted immigrants are known as LPRs.

B. Numerical quotas – annual worldwide ceilings and per-country limits.

1. Priority dates – When the WW demand for visas for a particular preference category exceeds the statutory sub-ceiling, it's first-come, first-served, subject to the per-country limits. The date on which the applicant files the relevant document is called his or her priority date. It can take years for priority dates to become current; see July 2003 visa bulletin p.48 CB Supp.
2. Aging out – INS regs provide that, upon most changes in the status of either the petitioner or the beneficiary (age, marital status, the petitioner's naturalization), the beneficiary's application will automatically be treated as an application under the new applicable category with the original priority date. The new applicable category could have a larger backlog, meaning a longer waiting period until the applicant's priority would become current.

C. Immediate relatives. These are the spouses, children (under age-21 and unmarried), and parents of citizens, except that in the case of a parent the citizen son or daughter must be at least 21. § 201(b)(2)(A)(i). Exempt from general quota system, no numerical limit for this category.

D. Family-sponsored preferences. "The emphasis on family unity reflects the shared value that separation entails hardship and a premium on alleviating that hardship."

1. First preference – Unmarried sons and daughters (over age-21) of citizens. § 203(a)(1).
2. 2A – Spouses and children of LPRs. § 203(a)(2)(A).
3. 2B – Unmarried sons and daughters over age-21 of LPRs. § 203(a)(2)(B).
4. Third preference – Married sons and daughters of citizens. § 203(a)(3).
5. Fourth preference – Siblings of over-age-21 citizens. § 203(a)(4).

E. Spouses and children accompanying or following to join. Spouses and children who are accompanying or following to join an immigrant who is within any of the three broad preference categories – family, employment, or diversity – are entitled to the same preference status and to the same place in line as the principle immigrant. The regs stipulate that the spouse or child must

be acquired *before* the principle immigrant's admission as an LPR. Also, note that there is no comparable provision for the spouses and children of immediate relatives. § 203(d).

F. Spouses. To suffice for immigration purposes, a marriage must be legally valid in the jurisdiction in which it took place (parties of marriageable age, ceremony performed by an authorized official, etc.) and factually genuine, meaning that at the inception of the marriage the parties intended to establish a life together.

G. Immigration Marriage Fraud Amendments of 1986 (IMFA).

1. Applies to – Spouses, sons, and daughters who receive LPR status as an IR, family-sponsored second-preference immigrant, or fiancé of U.S. citizen, by virtue of a marriage that's less than two years old. Does not apply to accompanying or following spouses. § 216(g).
2. Conditions subsequent – (1) If within two years of residence, AG finds that marriage was entered for immigration purposes, or has been annulled, AG must terminate LPR status § 216(b)(1). (2) Conditional LPR and spouse must jointly petition the INS for removal of the condition, and both appear at an INS interview within 90 days prior to 2-year anniversary of admission. At hearing, must show that marriage is (a) valid, (b) not annulled, and (c) not entered into fraudulently, and no fee paid for filing the petition. § 216(d).
3. Waivers – If LPR can show: [subsection] (A) extreme hardship would result if removed, (B) entered marriage in good faith and wasn't at fault for failing to meet the petition and interview requirements of § 216(c)(1), OR (C) entered marriage in good faith, was battered and wasn't at fault for failing to meet the petition and interview requirements of § 216(c)(1), then AG may waive the petition and interview and remove the conditional basis of the LPR's status. § 216(c)(4).

H. Definition of child. Under § 101(b)(1), a "child" must be unmarried and under age-21. There are additional restrictions for children born out of wedlock, step-children, and adopted children.

1. Mourillon (p.178 CB) – Held: (1) In order to establish the existence of a sibling relationship for immigration purposes, the petitioner must show that he or she and the beneficiary are, or once were, "children" of a common "parent" within the meaning of §§ 101(b)(1) & -(2). (2) Under U.S. law, a "legitimated" child is one placed in all respects upon the same footing as if begotten and born in wedlock. Acknowledgement means something less than legitimation. But acknowledgement plus marriage of the person's natural parents can be treated as equivalent to legitimation, and acknowledgement alone can be treated as equivalent to legitimation if, under the laws of the country from which the person came, acknowledgement places a child in the same status as a legitimated child. (3) Unlike consanguineous relationships, step-relationships can be terminated by the death or divorce of the parties whose marriage created the step-relationship. Where the parties to the marriage that created the step-relationships have legally separated or the marriage has been terminated by death or divorce, a family relationship must continue to exist as a matter of fact between the step-siblings.
2. Palmer v. Reddy (p.182 CB) – Held, as long as the marriage creating the step-relationships took place before the child turned 18, and the marriage is still intact, a step-relationship will be found even if there's no parent-child relationship in fact.
3. Gur (p.182 CB) – If each of the two purported siblings can identify a time when he or she was the "child" of the common parent, the two will be found to be siblings, even if there was no time period during which both siblings met the child definition for that parent simultaneously.

I. Employment-based preferences.

1. First preference – “Priority workers,” including immigrants with extraordinary skills in certain specified occupations, professors and researchers who are outstanding, executives and managers of multinational companies. § 203(b)(1).
2. Second preference – Professionals with advanced degrees (usu. meaning graduate degrees) and immigrants with exceptional ability in certain fields. § 203(b)(2). Labor certification required. Job offer requirement – but may be waived “in the national interest.”
3. Third preference – Skilled workers, professionals (without advanced degrees), and other workers who can show that their labor is needed in the U.S (“unskilled labor, not of a temporary or seasonal nature, for which qualified workers aren’t available in the U.S.”). § 203(b)(3). Labor certification required.
4. Fourth preference – Miscellaneous. Covers every category of “special immigrant” described in § 101(a)(27), except for those described in subsections (A) and (B). Includes certain religious workers and certain long-term foreign employees of the U.S. govt. § 203(b)(4).
5. Fifth preference – The “Employment creation” preference, which includes immigrant investors. Requirements: must establish a new commercial enterprise in the U.S., invest at least \$1mm (subject to the AG’s discretion to modify the minimum amount in specified ways), and employ at least ten Americans. § 203(b)(5). Conditions subsequent, like the ones with marriage-based immigration (e.g., 2-yr. anniversary check-in). Some say preference creates jobs and improves the country’s balance of trade; others see it as a means for the rich to buy their way in.

J. Diversity preference.

III. Non-Immigrants

- A. General terminology.** Everyone in the world is either a U.S. national or an alien. Almost all U.S. nationals are citizens (i.e., except American Samoa), so more accurate to say U.S. citizens and non-U.S.-citizens. Within the category of non-U.S.-citizens, there are immigrants and non-immigrants. You are presumptively an immigrant unless you affirmatively prove that you fit into one of the non-immigrant categories in the INA. Non-immigrant categories have less stringent requirements than immigrant categories. § 101(a)(15) lays out the numerous categories of non-immigrants. The intending non-immigrant must establish that he or she meets the requirements of one of the categories and avoid the various affirmative grounds of inadmissibility. In fiscal year 1998, the INS admitted more than 30mm non-immigrants, compared to only 660,000 immigrants.
- B. Treaty traders and investors.** E-1, treaty traders; E-2, treaty investors. Have to have a particular treaty. Ordinarily admitted for two years initially, with an unlimited number of possible two-year extensions. Must have an intent to depart upon termination of E-status, but no foreign-residence requirement.
- C. Temporary workers.**
 1. H-1B, temporary workers in specialty occupations – A specialty occupation is one that requires “theoretical and practical application of a body of highly specialized knowledge” and, in the U.S. at least a bachelor’s degree.” § 214(i)(1). Must be coming temporarily to the U.S., but application for LPR status doesn’t negate this. Because of relatively short processing time, applicants for employment-based immigrant preference facing long waiting period seek H-1B visas in order to be able to begin working in the interim. May be admitted for up to 6 years. § 214(g)(4). Employer must file a labor condition application (LCA) with the DOL and pay \$1000 for each petition. H-1B category subject to annual numerical limit, which has varied.

2. O, athletes, entertainers, persons in other arts, the sciences, education, and business – Must have “extraordinary ability ... which has been demonstrated by sustained national or international acclaim.” Members of person’s support staff, too. May be admitted for a period of up to 3 years, with possible one-year extensions. No numerical limit.
3. P – P-1 includes internationally recognized (but not necessarily “extraordinary”) athletes, and members of internationally recognized entertainment groups performing in specific events. P-2 includes artists and entertainers who wish to enter under reciprocal exchange programs. P-3 includes artists or entertainers who would provide programs that are “culturally unique.” P-1 individual athletes may be admitted initially for up to 5 years, and extended for up to 4 additional years, so long as the total stay doesn’t exceed 10 years. All other P-alien may be admitted for up to one year and extended in one-year increments. No numerical limit.
4. H-2A, agricultural workers – Must be coming temporarily to the U.S. and must maintain foreign residence. Employer must file a labor condition application (LCA) with the DOL.
5. H-2B, temporary workers – Must be coming temporarily to the U.S. and must maintain foreign residence. May be admitted initially for up to one year and extended in one-year increments, up to a total stay of 3 years. Employer must file both a labor certification application (note that grant is temporary and advisory) *and* a labor condition application with the DOL.

D. Students.

1. F – The main student category. Foreign residence requirement. May be admitted for “duration of status.” Reflecting national security concerns, EBSVERA (enacted in May 2002) requires educational institutions to record extensive information about each foreign student in an electronic system called SEVIS, which is run by the U.S. govt. Stringent restrictions on employment. F-2 includes spouses and children accompanying or following to join.
2. M – People who intend to enter vocational or other “non-academic” institutions. Must be coming temporarily to the U.S. and must maintain foreign residence.

E. Exchange visitors.

1. J – This category encompasses a broader range of people than F-status does and includes students. Harder to obtain J-status than F-status because the studies must be part of a specific program approved in advance by the State Dept. and the applicant must be sponsored by a U.S. govt. agency, a recognized international agency, or one of various private agencies. Must be coming temporarily to the U.S. and must maintain foreign residence. Maximum duration of stay depends on whether professor, student, etc. (comparable to F-status). But J-status can be more advantageous than F-status because the rules regarding employment are more liberal (both for the principle non-immigrant and for the spouse and children) and many of the exchange visitor programs provide fellowships or other types of funding. The one major hitch: § 212(e), the brain-drain provision, the requirement that the J-visitor return to the country from which he or she came for at least two years before applying for LPR status, an immigrant visa, or a non-immigrant visa under subsections H or L. Hardship waivers available. J-2 includes spouses and children accompanying or following to join.
2. Silverman v. Rogers (p.359 CB) – The court held that the hardship waiver in § 212(e) should be read to be conditioned upon the favorable recommendation of the Sec’y of State *combined with* either the request of an interested govt. agency or the request of the INS Commissioner, if the Commissioner finds exceptional hardship. Because the legislative history of the provision indicated that Congress wanted there to be fewer hardship waivers, the court interpreted the language to provide that both agencies could make a

recommendation, on the assumption that one agency's recommendation to deny a waiver would serve effectively as a veto.

F. Tourists. B-1, non-immigrants who wish to come to the U.S. temporarily for business; B-2, for pleasure (tourists). Must be coming temporarily to the U.S. and must maintain foreign residence. Except for those who enter under the § 217 visa waiver program, may be admitted initially for up to one year and extended in six-month increments.

1. *Healy and Goodchild* (p.365 CB) – Two foreign students were denied admission under the F-1 provision because their school wasn't an approved educational institution. They tried to get in under the general pleasure-travel B-2 provision instead, with their primary purpose still being studying at the school. The court held that B-status isn't a catch-all; it describes a particular class of non-immigrants, and that class, by the language of the statute, doesn't include "one coming for the purpose of study."

G. Fiancés and fiancées. Joi and Marie. K-1, non-citizen fiancé(e) who has met the citizen-petitioner within the two years prior to filing the petition (discretionary waiver available) and who intends to marry the citizen-petitioner within 90 days of admission; K-2, any non-citizen children accompanying or following to join the K-1; K-3, non-citizen spouse who has applied and is waiting for LPR status and visa under immediate-relative provision; K-4, any non-citizen children accompanying or following to join the K-3. Employment allowed with K-status. Under § 214(d), if they don't get married within 3 mos. of admission, the non-citizen becomes removable.

H. Intent to Remain Permanently. B, H, J, and L all require that the person seek to enter "temporarily," and B, F, and J require that the person have a foreign residence "which he has no intention of abandoning." How do you dispel a consular officer's suspicion that you intend to stay here permanently? Could show that you have some type of marital or familial tie to your home country, or some type of career tie. What if you have ties to the U.S.? A job waiting for you in the U.S. – B-2s can't work, so that would disqualify you substantively. Have to compare the links. Past immigration history – if you've applied for an LPR visa or other visa that's similarly consistent with an intent to remain permanently and been denied, then it could be tough for you to show that you only wish to come temporarily. Argue that you have alternative plans in mind, which is OK – you intend to remain only temporarily, but you hope to acquire LPR status some day if the law permits it. Both prongs of your dual intent have to be legal for it to be OK.

IV. Lawyers

A. Legal ethics.

1. ABA Model Code DR 7-102(A) – A lawyer shall not ... (6) participate in the creation or preservation of evidence when he knows it is obvious that the evidence is false [or] (7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." The client's intent is judged at the time the client applies; if the client considers alternative plans before applying, and then decides to apply with the "right" intentions, that arguably shouldn't preclude the lawyer from sending in the application for him. The lawyer may discuss with the client the potential consequences of alternative plans, but should refrain from suggesting or advocating a particular plan that entails some element of illegality.
2. ABA Model Rule 1.2(d) – "[A] lawyer shall not counsel to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent."
3. ABA Model Rule 1.6(a, b) – A lawyer shall not reveal client confidences, except that the lawyer may do so "to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." The rule reflects sensitivity to the trade-off between, on

the one hand, the social benefit of reporting a client and, on the other hand, the personal cost for the lawyer of sabotaging the trust he or she has fostered in other client relationships.

B. Unauthorized practice of law.

1. INS regs define “practice” – to include “the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person.” 8 CFR § 1.1(h)(i). “Preparation” is defined as “the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who doesn’t hold himself out as qualified in legal matters or in immigration and naturalization procedure.” 8 CFR § 1.1(k) (2001).
2. Florida Bar v. Matus (p.428 CB) – Matus was convicted of holding himself out to be an attorney when he wasn’t a licensed member of the Florida Bar. A Florida Bar staff investigator, Torres, found materials advertising immigration-law services in Matus’ office. Also, Matus directly offered to perform services for Torres, including arranging a fraudulent marriage between Torres and a U.S. citizen in order to make Torres an LPR. Matus was enjoined from continuing to practice law.
3. Civil and criminal penalties – § 274C(a)(5) makes it a civil offense, punishable by fine, “to prepare, file, or assist” the filing of any immigration-related application or document “with the knowledge or reckless disregard of the fact that such application or document was falsely made.” See also § 274C(e) (imposing a prison sentence on one who “knowingly and willfully fails to disclose, conceals, or covers up the fact that they have, on behalf of any person and for a fee or other remuneration, prepared or assisted in preparing an [INS] application which was falsely made”); 18 U.S.C. § 1546(a) (making it a crime, punishable by imprisonment, to “knowingly present any [application or document required by the immigration laws] which contains any ... false statement or which fails to contain any basis in law or fact”). These were IIRIRA amendments.
4. Rule 5.5(b) of the ABA Model Rules of Professional Responsibility – prohibits a lawyer from assisting a non-lawyer in the performance of activity that constitutes the unauthorized practice of law. Delegation is OK, so long as “the lawyer maintains a direct relationship w/ his client, supervises the delegated work, and has complete professional responsibility for the work product.” Disciplinary Rule 3-101, Ethical Consideration 3-6.

C. Rules w.r.t. authorization to represent others (applicable to law students) and

inappropriate conduct in representation. (pp. 652-57 CB). There’s a regulation that imposes disciplinary sanctions for “frivolous behavior,” analogous to FRCP Rule 11.

D. Independence of the IJs and members of the BIA. See p.7 Supp. for organizational chart.

1. IJ Van Wyke’s opinion (2001) (p.649 CB) – Case creates some doubt about the judicial independence of IJs. Van Wyke had punished an INS attorney for stalling a proceeding by denying the attorney’s motion to recalendar. Van Wyke’s decision wasn’t given effect, however, because the attorney telephoned the Office of the Chief Immigration Judge and complained, and the CIJ intervened and recalendared the case on its own motion. This kept the case open when it otherwise would have been closed, prevented the INS from having to defend its position legally before the BIA in an appeal, and gave a “procedural tactical advantage to the INS by demonstrating to a respondent, rightly or wrongly, that an INS call to the OCIJ may be enough to undo what the IJ does in open court, while encouraging the INS to continue to seek results from the OCIJ privately that it might not be able to get from the BIA publicly.” Van Wyke recused himself from the case, arguing that the CIJ acted

improperly. The case suggests that non-citizens without counsel could be especially vulnerable.

V. Inadmissibility Grounds

A. Intro. The inadmissibility/exclusion grounds apply to all non-citizens (immigrants and non-immigrants, outside and inside the border) who have not been “admitted” as defined by § 101(a)(13). The non-citizens in the interior to whom the exclusion grounds apply are those who snuck in (§ 212(a)(6)) and those who seek to change/adjust/naturalize status (§§ 248, 245 & 316, respectively). When multiple exclusion grounds apply to the same behavior, have to find some waiver or counter-argument for each one.

B. Grounds related to immigration control.

1. Is present without having been admitted – Inadmissible. § 212(a)(6)(A)(i).
2. Didn't enter at an authorized port of entry – Inadmissible. § 212(a)(6)(A)(i). Subsection (ii) provides exception for battered women and children.
3. Was unlawfully present for a continuous period of between 180 days and 1 year and then voluntarily departed prior to the commencement of removal proceedings – Inadmissible for 3 years after date of departure/removal. § 212(a)(9)(B)(i)(I). Doesn't apply to LPRs. Don't count time under age-18. Detention time during removal proceedings counts as unlawful-presence time, according to the INS. Subsection (iv) allows tolling for up to 120 days if alien was lawfully admitted or paroled, filed a non-frivolous application for extension/change of status before expiration, and didn't work without authorization. Waiver for “extreme hardship” available under § 212(a)(9)(B)(v). Note: If no Notice to Appear has been filed yet, can apply to INS for voluntary departure under § 240B(a). If Notice to Appear has been filed, apply to INS under § 240B(a). If INS agrees, it could either join with non-citizen in motion to IJ to dismiss case, and then the INS could grant voluntary departure, or it could join with the non-citizen in requesting the IJ to grant voluntary departure, which he or she could then do. The point is to try to accept an offer after a Notice to Appear has been filed, because then the non-citizen could avoid the 3-year bar in § 212(a)(9)(B)(i)(I), by not leaving “prior to the commencement of removal proceedings” but instead after.
4. Was unlawfully present for a continuous period of 1 year or more and then departed or was removed – Inadmissible for 10 years after date of departure/removal. § 212(a)(9)(B)(i)(II). Doesn't apply to LPRs. Don't count time under age-18. Detention time during removal proceedings counts as unlawful-presence time, according to the INS. Subsection (iv) allows tolling for up to 120 days if alien was lawfully admitted or paroled, filed a non-frivolous application for extension/change of status before expiration, and didn't work without authorization. Waiver for “extreme hardship” available under § 212(a)(9)(B)(v).
5. Didn't attend all or part of a removal proceeding – Inadmissible for 5 years after “such alien's subsequent departure or removal.” § 212(a)(6)(B).
6. Has been ordered removed upon arrival previously – Inadmissible for 5 years after date of removal. § 212(a)(9)(A)(i). Subsection (iii) provides exception if AG consents to the alien's reapplication for admission.
7. Has been ordered removed upon arrival on at least two previous occasions – Inadmissible for 20 years after last date of removal. § 212(a)(9)(A)(i). Subsection (iii) provides exception if AG consents to the alien's reapplication for admission.
8. Has been ordered removed (not upon arrival) previously – Inadmissible for 10 years after the date of departure/removal. § 212(a)(9)(A)(ii). Subsection (iii) provides exception if AG consents to the alien's reapplication for admission.

9. Has been ordered removed (not upon arrival) on at least two previous occasions – Inadmissible for 20 years after last date of removal. § 212(a)(9)(A)(ii). Subsection (iii) provides exception if AG consents to the alien’s reapplication for admission.
10. Has been ordered removed at any time previously and has been convicted of an aggravated felony – Inadmissible. § 212(a)(9)(A)(i, ii). Subsection (iii) provides exception if AG consents to the alien’s reapplication for admission.
11. Violated term or condition of student visa under F-status – Inadmissible “until the alien has been outside the U.S. for a continuous period of 5 years after the date of the violation.” § 212(a)(6)(G).
12. Is an immigrant and doesn’t possess a valid, unexpired required document when applying for admission – Inadmissible. § 212(a)(7)(A). Waiver available under § 212(k) if immigrant possesses an immigrant visa [doesn’t say valid and unexpired], and didn’t and couldn’t reas. have known that he or she was inadmissible before traveling to the U.S. and applying for admission.
13. Is a non-immigrant and doesn’t possess a valid, unexpired required document when applying for admission – Inadmissible. § 212(a)(7)(B)(i). Waiver available under § 217 (special visa waiver program for non-immigrants from certain countries) and under § 212(d)(4) (“unforeseen emergency in individual cases”).
14. Misrepresentation: by fraud or willfully misrepresenting a material fact, seeks to procure an immigration status – Inadmissible. § 212(a)(6)(C)(i). Waiver for extreme hardship available under § 212(i).
15. Falsely claimed citizenship – Inadmissible. § 212(a)(6)(C). Subsection (II) provides exception for one whose parents are citizens, who permanently resided in the U.S. prior to attaining age-16, and who reas. believes that he or she is a citizen. Waiver for extreme hardship available under § 212(i).

C. Political grounds.

1. Presents a national-security threat – If AG knows or has reas. ground to believe that non-citizen seeks to enter the U.S. (i) to violate any law of espionage, or evade any export law relating to goods, technology, or sensitive info., (ii) to engage in any other unlawful activity, or (iii) to engage in any activity the purpose of which is to oppose, control, or overthrow the U.S. govt. by unlawful means, then non-citizen is inadmissible. § 212(a)(3)(A). It’s not clear what exactly “any other unlawful activity” encompasses; applying the *ejusdem generis* principle (activities that similarly threaten nat’l security) appears to make subsection (iii) redundant.
2. Is a suspected terrorist – Inadmissible. § 212(a)(3)(B).
3. Presents a foreign-policy issue – Under § 212(a)(3)(C), any non-citizen whose entry or proposed activities in the U.S. would have problematic foreign policy consequences is inadmissible. Exceptions for foreign officials and those whose beliefs, statements, and associations would be lawful within the U.S.
4. Note: Special removal procedure for any of the above, except (3)(A)(ii) – Under § 235(c), an immigration officer or IJ who suspects that an arriving non-citizen may be inadmissible on any of the above grounds except (3)(A)(ii) (entering to engage in “other unlawful activity”) is required to order the person removed and report the removal to the AG. If the AG concludes from confidential info that the person is inadmissible on any of those grounds, and that disclosure of the info “would be prejudicial to the public interest, safety, or security,” then the person may be removed without a hearing.
5. Is an immigrant and is or was affiliated with a Communist/totalitarian political party – Inadmissible. § 212(a)(3)(D). Exceptions for involuntary membership and past membership.

The courts and the BIA interpreted the predecessor to this provision to require “meaningful association.”

6. Is a non-immigrant “from a country that is a state sponsor of international terrorism” – § 306(a) of EBSVERA (enacted in May 2002) prohibits the issuance of any non-immigrant visa to any non-citizen who is “from a country that is a state sponsor of international terrorism unless the Secretary of State determines, in consultation with the AG and the heads of other appropriate U.S. agencies, that such alien does not pose a threat to the safety or national security of the U.S.” As of May 2003, the State Dept. has designated the following countries as state sponsors of international terrorism: North Korea, Cuba, Syria, Sudan, Iran, Iraq, and Libya. Applicants from those countries must complete substantial additional paperwork, undergo a security check, and receive a “Visa Condor” clearance before the consular officer is permitted to issue the visa.

D. Criminal grounds.

1. Convicted of or admits to having committed a crime involving moral turpitude – Inadmissible. § 212(a)(2)(A)(i)(I). EXCEPT: Under subsection (ii), not excludible if alien committed only one crime: (I) if crime was committed > 5 years ago *and* applicant was < 18 at the time, OR (II) max. penalty possible for crime was 1 year in prison *and* applicant wasn’t sentenced to > 6 mos. Waiver available under § 212(h) if crime didn’t involve murder or torture.
2. Convicted of or admits to having committed a crime relating to a controlled substance – Inadmissible. § 212(a)(2)(A)(i)(II). Waiver available under § 212(h) if offense was possession of < 30g marijuana.
3. Multiple criminal convictions for which the aggregate sentences to confinement were > 5 years – Inadmissible. § 212(a)(2)(B). Waiver available under § 212(h) if convictions didn’t involve murder or torture.
4. Drug dealer – Inadmissible. § 212(a)(2)(C)(i).
5. Prostitute – Inadmissible. § 212(a)(2)(D)(i). Waiver available under § 212(h).
6. Felon who fled U.S. criminal jurisdiction – Inadmissible. § 212(a)(2)(E). Waiver available under § 212(h) if crime didn’t involve murder or torture.
7. Waiver under § 212(h) – If non-citizen is an LPR, and he or she has committed an aggravated felony since being admitted as an LPR *or* hasn’t lawfully resided continuously in the U.S. for at least 7 years up to the initiation of removal proceedings, then no waiver available. Otherwise, AG discretionary waiver available if: (A - immigrant) crime was prostitution or crime happened over 15 years before the application, person no longer constitutes a threat, and person has been rehabilitated; (B - immigrant) extreme hardship; or (C - alien) battered spouse or child.

E. Economic grounds.

1. Is likely at any time to become a public charge – Inadmissible. § 212(a)(4)(A). Subsection (C) provides an exception for a family-sponsored spouse or child of a citizen who presents an affidavit of support.

F. Health-related grounds.

1. Has “a communicable disease of public health significance” – § 212(a)(1)(A)(i). Waiver available under § 212(g).
2. Non-immunized – § 212(a)(1)(A)(ii). Waiver available under § 212(g).
3. Drug abuser or addict – § 212(a)(1)(A)(iv). No waiver available under § 212(g).

- G. Handy waiver provision in § 212(d)(3).** Waiver available under § 212(d)(3) for non-immigrant visa applicants who are subject to *any* of the exclusion grounds in § 212(a) *except*: (3)(A)(i)(I) (entering to spy or violate export law); (3)(A)(ii) (entering to engage in unlawful activity);

(3)(A)(iii) (entering to do something against the U.S. govt.); (3)(C) (entering would have potentially adverse foreign policy consequences); and (3)(E) (participated in Nazi persecutions of genocide). These waivers are granted fairly liberally, but not automatically.

1. Note that the terrorist exclusion is waivable – Perhaps Congress intended to allow people who commit terrorist acts that coincide with U.S. foreign-policy interests (e.g., assassinating someone like Saddam Hussein) to be admitted. Also, Congress broadened the definition of terrorism so much after 9/11 that perhaps it wanted to leave itself some wiggle room.

VI. Admission Procedure

- A. **Overview.** The admission process comprises up to 4 hurdles that the prospective entrant must clear. (1) Immigrants applying under the second and third employment-based preferences must first obtain labor certification. Employers of certain non-immigrants must apply for labor certification or, in some instances, file labor condition applications. (2) Filing the visa petition with the DHS, limited to certain statuses. (3) Filing the visa application with the appropriate U.S. consulate abroad, limited to certain statuses. (4) Actual admission to the U.S.
- B. **Labor certification.** The requirement of labor certification is designed to curb the displacement of American workers. Employer submits app. to state employment office; app. goes to DOL, where adjudicated by a certifying officer (CO); employer can appeal to Board of Alien Labor Certification Appeals (BALCA). See 20 CFR § 656.21 for what goes into the app. Employer's app. must show: (1) there aren't sufficient workers in the U.S. who are able, willing, qualified, and available in the employer's geographic area; and (2) employment of the alien won't adversely affect the wages and working conditions of U.S. workers similarly employed. § 212(a)(5)(A). Some occupations are categorically "pre-certified" or rejected. See the lists, 20 CFR §§ 656.10-656.11. Employer can't stipulate job requirements that are unduly restrictive, i.e., can't tailor a job opening to someone you want to be admitted. Job requirements are presumptively unduly restrictive if: (1) they aren't normally required for that type of job in the U.S.; (2) they exceed the requirements in the Dictionary of Occupational Titles (DOT); (3) they include a foreign language; (4) they involve a combination of duties; or (5) they require the worker to live on the employer's premises. But employer can demonstrate by documentation that its requirements arise from a business necessity.
 1. Graham (p.195 CB) – Employer applied on behalf of her "Houseworker General/Child Monitor" for labor certification. CO denied her app., finding that the employer's requirement that the employee live in the employer's home was unduly restrictive. Employer wrote letter of rebuttal, arguing business necessity. She argued that she needed someone to screen her doctor-husband's phone calls at night and take full responsibility for her child and household while she traveled w/ her husband and attended to her sick mother. CO issued Final Determination, finding no business-necessity exception. Employer appealed to BALCA. BALCA held: (1) "Business" defined liberally – "the 'business' of running a household or managing one's personal affairs." (2) "To establish the business necessity for a live-on-the-premises requirement for a domestic worker, the employer must demonstrate that the requirement is essential to perform, in a reas. manner, the job duties as described by the employer." Case-by-case evaluation. (3) Employer here didn't provide enough documentation to justify a business-necessity exception. Needed to show the number of days per month she was away from home overnight, how much extra cost would be involved in hiring a child monitor and housekeeper for the particular nights that she and her husband anticipated being away from home, etc.
 2. Information Industries, Inc. (p.200 CB) – BALCA held that in order to establish business necessity, an employer must demonstrate: "(1) that the job requirements bear a reas.

relationship to the occupation in the context of the employer's business and (2) that the requirements are essential to perform, in a reas. manner, the job duties as described by the employer." "Occupation" is more general than "job duties," which relate to the employer specifically. Legomsky thinks the two requirements are redundant.

- C. Visa petitions.** (Generally, a non-citizen needs a visa to get in, but some don't – B-visitors, returning LPRs, refugees.) The U.S. citizen or LPR sponsor files a visa petition in a regional office of the Bureau of Citizenship and Immigration Services (BCIS), within the DHS. In the terminology, a "petitioner" files on behalf of a noncitizen "beneficiary." When a non-citizen seeks admission on the basis of a family relationship, the purpose of the visa petition is to establish that the beneficiary in fact has the claimed relationship. The visa petition filed on behalf of immediate relatives and family-based preference immigrants is known as the I-130, and the one generally for employment-based immigrants is known as the I-140. § 204(a)(1) allows certain battered immigrants to petition on their own behalf.
- D. Visa applications.** Shortly before the applicant's priority date becomes current, a consular officer in the country where the non-citizen resides adjudicates the application. The consular officer determines whether the applicant is (a) eligible and (b) not inadmissible. Under § 222(e) and a State Dept. interim regulation, the latter promulgated post-9/11 as a nat'l security measure, all non-immigrant visa applicants except for those in a few narrowly defined categories are required to appear for a personal interview with a consular officer. If the consular officer approves the application, the officer issues a visa, which is the non-citizen's entry document. No administrative appeal and no judicial review of the decisions of consular officers; many scholars have criticized this "consular absolutism." Once issued, a visa is valid for only a limited time.
- E. Actual admission.** The applicant then travels to the U.S. and presents the visa to a Bureau of Customs and Border Protection inspector at the port of entry. Under a double-check system, the inspector may reexamine the non-citizen to assure that none of the statutory inadmissibility grounds applies. The inspector asks himself whether person is clearly and beyond a doubt entitled to enter. If any doubt, person gets a removal hearing. If no problem, the person gets green card. If person mutters the word asylum or persecution, then gets special interview with asylum officer to see if has credible claim to asylum. If has credible claim, then gets special asylum hearing. Everyone gets finger-printed and photographed (required of all visa non-immigrants except for certain visa-waiver people).
- F. Extending one's non-immigrant status.**
1. Extending one's stay – Under 8 C.F.R. § 214.1(c), a non-immigrant may apply for an extension of his or her current visa. But extensions aren't available to those who have overstayed or otherwise violated the terms of their existing stays, absent "extraordinary circumstances."
- G. Changing to another non-immigrant status.**
1. Change of status, § 248 – Under § 248, certain non-immigrants can *switch to different non-immigrant categories* without having to leave the U.S. to go to the consulate office in their home country. Requirements: (1) Must have been lawfully admitted as a non-immigrant, (2) must be "continuing to maintain that status," (3) must be eligible (certain categories of non-immigrants are ineligible to change to certain other categories), and (4) must obtain the favorable exercise of INS discretion.
- H. Adjusting to LPR-status.**
1. Adjustment of status, § 245 – Under § 245, certain non-immigrants can *become LPRs* without having to leave the U.S. to go to the consulate office in their home country. Slightly more than half of all LPR visas are granted this way. In the deportability context, adjustment can provide affirmative relief from removal and a means of attaining LPR status without

- leaving the U.S. See cancellation of removal, part B; have to file application with the IJ. The IJ's decision whether to order removal (which reflects decision on adjustment of status) is appealable to the BIA, but a BIA decision denying adjustment of status is not appealable.
2. Who can adjust, according to the requirements in subsection (a) – (1) Must apply for adjustment, (2) must be eligible to receive an immigrant visa and must be admissible, and (3) there must be an immigrant visa immediately available at the time application is filed. For third requirement, seems one can't adjust status to immigrant category for which there's a numerical limit and thus a backlog.
 3. Exceptions: who can't adjust – Under § 245(c)(2), a non-citizen who isn't an immediate relative can't adjust if he or she: worked without authorization, is in an unlawful status when applying for adjustment, *or* is at fault in failing to maintain lawful status since entry into the U.S. Under § 245(c)(7), a non-immigrant can't adjust if he or she wants to adjust to employment-based LPR status *and* is in an unlawful non-immigrant status. Under § 245(c)(8), a non-citizen can't adjust if he or she worked without authorization *or* violated the terms of a non-immigrant visa. EXCEPT: Under § 245(k), if the non-immigrant is eligible to receive an immigrant visa under one of the first three employment-based preferences, he or she may adjust notwithstanding all of the above *if* he or she: (1) is, on the date of filing an application for adjustment of status, present pursuant to a lawful admission; and (2) since the time of such lawful admission hasn't, for an aggregate period of more than 180 days, failed to maintain continuously a lawful status, worked without authorization, *or* otherwise violated the terms and conditions of his or her admission.
 4. Limited appeal – No provision for an administrative appeal and, under § 242, no judicial review of denials of adjustment of status.

VII. Deportability Grounds

- A. **“Admission.”** Admission determines whether a non-citizen will be subject to the inadmissibility grounds or the deportability grounds. (No longer “entry.”)
 1. For non-immigrants, what is an “admission?” – Under § 101(a)(13)(A), an “admission” is a “lawful entry of the alien into the U.S. after inspection and authorization by an immigration officer.” For non-immigrants, every new lawful entry into the U.S. constitutes a new admission.
 2. For LPRs, what constitutes an “admission?” – Under § 101(a)(13)(A), an “admission” is a “lawful entry of the alien into the U.S. after inspection and authorization by an immigration officer.” But then there are exceptions in subsection (C): An LPR will *not* be regarded as seeking admission “unless” one of six things is true: (i) has relinquished LPR status; (ii) has left the U.S. for a continuous period of more than 180 days; (iii) has engaged in illegal activity after having departed the U.S.; (iv) has departed from the U.S. during a removal proceeding; (v) has committed a crime covered by § 212(a)(2) (unless granted relief); *or* (vi) is attempting an unauthorized entry. Thus, if there has been a lawful entry, and a returning LPR does *not* fall within any of the exceptions, there will not be a new admission. The law is unclear as to whether the converse is true, i.e., whether an LPR who has made an entry and who falls into one of the exceptions *is* to be regarded as seeking admission. One federal district court has held that in that case the *Fleuti* doctrine determines whether the departure meaningfully interrupted the person's permanent residence in the U.S. In contrast, the BIA has held that a returning LPR who falls into one of the exceptions is to be regarded as seeking admission.
 3. *Fleuti* (p.482 CB) – What if you're an LPR and you decide to take a temporary trip abroad. Upon your return, are you regarded as having made another entry into the U.S.? Held, “it

effectuates congressional purpose to construe the intent exception to section 101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." Factors to consider in inferring such intent: (1) the length of the absence, (2) the purpose of the visit, and (3) whether the alien had to procure any travel documents in order to make the trip ("since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country").

B. Deportable because was inadmissible at time of entry or adjustment. § 237(a)(1)(A). A catch-all that repairs mistaken admission-decisions. Note that § 237(a)(1)(A) (deportable because was inadmissible at time of entry) applies to any entry, not just the most recent one. Waiver available in § 237(a)(H) for non-citizens who entered fraudulently or whose inadmissibility directly results from fraud or misrepresentation. Requirements for waiver: (1) is the spouse, parent, son, or daughter of a citizen or LPR; and (2) was otherwise admissible at the time of admission. (Or is a domestic-violence victim.)

C. Deportability for post-entry conduct related to immigration control.

1. Has overstayed or worked without authorization – Under § 237(a)(1)(B), a non-citizen who is present in the U.S. in violation of the INA or any other U.S. law is deportable.
2. Is an IMFA non-citizen or immigrant investor whose conditional status was terminated – Deportable. § 237(a)(1)(D).

D. Crime-related deportability grounds.

1. Within 5 years after he or she was admitted, was convicted of a crime which involved moral turpitude and for which the sentence was at least 1 year in prison – Deportable. § 237(a)(2)(A)(i). Crimes involving "moral turpitude": involves dishonesty, involves "baseness, vileness, or depravity" (from case law, in the eye of the beholder), theoretically impossible to commit this crime without acting with moral turpitude (ignoring the extreme cases, like mother stealing milk for her starving child). The stipulation that the crime has to have been committed within 5 years after admission reflects the idea that after a while a person becomes more a product of this country than of the country from which he or she came.
2. Has been convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of misconduct – Deportable. § 237(a)(2)(A)(ii). What's constitutes a "single scheme of misconduct?" The First Circuit and the BIA have held that, to constitute a single scheme, the crimes "must take place at one time; there must be no substantial interruption that would allow the participant to dissociate himself from his enterprise and reflect on what he has done." (*Pacheco*) In contrast, the Ninth Circuit has held that there was a single scheme if the crimes "were planned at the same time and executed in accordance with that plan." (*Gonzalez-Sandoval*)
3. Has been convicted of an aggravated felony – Deportable. § 237(a)(2)(A)(iii). See the list of aggravated felonies in § 101(a)(43). For instance, under (F) a crime of violence (other than a political offense) for which the term of imprisonment is at least 1 year is an aggravated felony; "crime of violence" is defined in 18 U.S.C. § 16 as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, OR (b) any other offense that's a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Note that the second-to-last sentence of 101(a)(43) provides that the term "aggravated felony" applies to violations of federal law, state law, and the law of a foreign country "for which the term of imprisonment was completed within 15 years." The implication of that sentence is that if you weren't sentenced to imprisonment at

all in the foreign country, like if you paid a fine instead, then the aggravated felony provision can't be applied to you.

4. Has been convicted of any offense relating to a controlled substance (except possession of < 30g marijuana) – Deportable. § 237(a)(2)(B).

E. Convictions and guilty pleas. Issues with respect to convictions: (1) Did the action that the court took amount to a conviction for removal purposes? (2) Could any subsequent developments, like an expungement or a vacation of the judgment, have erased the conviction? (3) Can the non-citizen withdraw his guilty plea on the grounds that he wasn't aware of the deportation consequences that pleading guilty would entail?

1. Parrino (p.508 CB) – D in a criminal case pled guilty; under the authority of the Federal Rules of Criminal Procedure, he later sought to withdraw his guilty plea on the grounds of “manifest injustice,” because he specifically had asked his attorney whether a guilty plea would make him deportable and his attorney had told him it wouldn't. D's attorney was none other than a former commissioner of the INS, and the law couldn't have been clearer; in other words, D's attorney was a total buffoon. The court wouldn't allow D to withdraw his guilty plea. “Surprise ... which results from erroneous information received from the defendant's own attorney, at least without a clear showing of unprofessional conduct, is not enough.” The court refused to hold that the defendant would be subject to manifest injustice, if held to his plea, merely because he didn't understand or foresee the collateral consequences of his guilty plea.
2. Pozo (p.513 CB) – More sympathetic. Similar facts as in *Parrino*, except that D didn't ask his criminal defense attorney about the possible deportation consequences of his guilty pleas. Held, under “Sixth amendment constitutional standards requiring effective assistance of counsel[,] ... [o]ne who relies on the advice of a legally trained representative when answering criminal charges is entitled to assume that the attorney will provide sufficiently accurate advice to enable the defendant to fully understand and assess the serious legal proceedings in which he's involved.” “Whether counsel adequately represented Pozo in view of the lack of advice concerning possible deportation consequences depends initially on whether counsel had a duty to apprise himself of this aspect of immigration law.” The court remanded the case, ordering the lower court to assess the reasonableness of the attorney's conduct in light of a variety of factors, including “whether the attorney had reason to believe that the area of law in question was relevant to the client and the client's legal problems.”

F. Political and national security grounds.

1. Kulle (p.560 CB) – The court affirmed the deportation of an LPR under INA § 237(a)(4)(D) (“Assisted in Nazi persecution or engaged in genocide”). The INS asserted that Kulle was deportable because, as an instrument of the Nazi regime, he assisted in the persecution of persons on account of their race, religion, national origin, or political opinion. Held: (1) § 237(a)(4)(D) (“the Holtzman Amendment”) doesn't punish individuals for actions previously taken, but “merely ensures that the United States is not a haven for individuals who assisted the Nazis in the brutal persecution and murder of millions of people.” (2) The term “persecution” means (a) incarceration, forced labor, cruel and inhuman treatment, or arbitrary and severe punishment (b) because of one's race, religion, national origin, or political opinion. (3) The word “assisted” in § 212(a)(3)(E) (the exclusion ground to which § 237(a)(4)(D) refers) has been construed liberally, can be inferred from the circumstances.

VIII. Deportation Procedure

A. The usual removal procedure. Within 48 hours of an arrest (7 days for those certified as suspected terrorists), the DHS must decide whether there is prima facie evidence that the non-

citizen is in the U.S. unlawfully. If there is prima facie evidence, the DHS (in particular, the Bureau of Immigration Customs Enforcement, or ICE) issues a Notice to Appear, serves it on the person, and files it with an immigration court. The service of the Notice to Appear marks the official commencement of the removal proceeding and vests jurisdiction in the IJ. Then there is a master calendar hearing, which is similar to a preliminary hearing in the criminal context.

- B. Counsel.** Under § 240(b)(4)(A), the non-citizen has the right to be represented by counsel, but only at his or her expense. Indigent non-citizens might be able to find help through a legal aid organization, although those resources are stretched thin and many indigent non-citizens are forced to go without counsel.
- C. Detention.** Under § 236(a), the gov't. has the discretion to detain a non-citizen during removal proceedings. Release requires a finding that the person will not endanger persons or property and is likely to appear for the removal proceeding. Under § 236(c)(1)(D), however, any non-citizen who is alleged to be inadmissible or deportable on the basis of terrorist activities *must* be detained, pending removal proceedings. Detention is also mandatory for almost anyone who's inadmissible or deportable on crime-related grounds, most arriving passengers, and individuals awaiting the execution of final removal orders.
- D. Evidence and proof.**
1. Evidence – There are a few specific rules to guide IJs in deciding what evidence is admissible in removal hearings, but the formal rules of evidence don't apply. Hearsay evidence is admissible, provided that its admission is “fundamentally fair.”
 2. Burdens and standards of proof – In a removal proceeding, the DHS first has the burden of proving by clear and convincing evidence that the subject of the hearing is a non-citizen. The non-citizen then must prove either admissibility (“clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212,” § 240(c)(2)(A)) or lawful presence pursuant to a prior admission (“clear and convincing,” § 240(c)(2)(B)), including the “time, place, and manner” of his or her entry into the U.S. (§ 291). If non-citizen doesn't sustain that burden, he or she is rebuttably presumed to be present in violation of law and thus deportable under § 237(A)(1)(B). Once it has been established that the non-citizen has been admitted, gov't. has the burden of proving deportability/denaturalization. In *Woodby* (p.701 CB), the S. Ct. held that the standard of proof for the INS in deportation proceedings is “clear, unequivocal, and convincing evidence.” In 1996, Congress changed that standard slightly to “clear and convincing.” § 240(c)(3)(A).
- E. Exceptions to the usual removal procedure.**
1. Expedited removal procedure – See § 235(b)(1). Expedited removal applies to non-citizens upon their arrival; it also may be extended to non-citizens who are present in the U.S. without having been admitted and who are unable to prove continuous physical presence in the U.S. for the immediately preceding two years. If an immigration officer at port of entry “determines” that an arriving non-citizen is inadmissible under either the fraud ground or the improper-documentation ground, the person is ordered removed without further hearing. There is no administrative appeal, except for returning LPRs, admitted refugees, and individuals who have already received asylum. Under § 242, the only judicial review available is for the issues of whether the person is a citizen, whether the person was in fact ordered removed, and whether the person comes within one of the above exceptions (returning LPRs, admitted refugees, and asylees). Because under § 212(a)(9)(A) formal removal at a port of entry renders a person inadmissible for 5 years, non-citizens often strategically withdraw their applications when admission appears unlikely. A 2000 GAO report noted that immigration inspectors might be pressuring genuine refugees or other individuals with meritorious cases to withdraw.

2. Criminal cases – The EOIR established an institutional hearing program in which deportation hearings for incarcerated non-citizens are held in designated state or federal prison facilities. The purpose of completing the removal hearings of imprisoned non-citizens before their release is to permit the DHS to remove them from the United States at the moment of release. See also administrative removal, § 238(b). See also the procedure for sentencing courts ordering removal, § 238(c).
 3. In absentia removal hearings – If non-citizen is a no-show, a removal hearing will be held in absentia. At that hearing, the DHS must prove by clear, unequivocal, and convincing evidence that the required Notice to Appear was provided (or couldn't be provided because the non-citizen hadn't notified the DHS of an address or telephone change) and that the person is deportable. To get the removal order rescinded, the non-citizen must either (a) move to reopen within 180 days, showing "exceptional circumstances," or (b) move to reopen at any time, showing that he or she either didn't receive notice or was in custody and was not at fault in failing to appear. § 240(b), p.841 CB.
 4. Non-citizens reentering after prior removals – § 241(a)(5) expedites the removal of non-citizens who were previously removed or who voluntarily departed, but who then reentered unlawfully. If the DHS finds that the person has reentered unlawfully, the prior removal order is reinstated and the person may be removed without further proceedings.
 5. Removal proceedings for suspected terrorists – Closed hearings are hearings in which the only individuals allowed to be present are the immigration judge, the respondent, counsel for the respondent (presumably), and DHS officials. At least the respondent gets to see the government's evidence and respond to it. Secret evidence proceedings are worse for the respondent in that the respondent doesn't get to see the evidence, and therefore has great difficulty in preparing a defense. Due process and fairness concerns. I'd rather know the evidence against me than not know but have my family and friends in the room with me. In addition, § 502 prescribes a special terrorist court procedure.
 6. Rescission of adjustment of status – § 246 allows the AG to rescind a grant of adjustment of status within 5 years if the person was in fact ineligible for adjustment at the time it was granted. With the person's LPR status having been terminated, the DHS may then initiate removal proceedings on the ground that the person has now overstayed his or her original non-immigrant visa.
- F. Judicial review.** General rule is: Once non-citizen has exhausted all of the administrative channels, he or she has a right to judicial review of an administratively final order of removal. Gaping exceptions to this rule in § 242. A ct. may be able to use habeas corpus to get around some of these limitations.
1. Step 1: Appeal administratively to BIA – Both the non-citizen and the DHS may appeal the decision of the IJ to the BIA. The appellant must file with the IJ within 30 days of the IJ's decision a notice of appeal that summarizes the grounds for appeal. The filing of that notice automatically stays execution of the IJ's decision. The BIA may summarily dismiss an appeal if it "lacks an arguable basis in law or fact."
 2. Petitions for review – § 242(a)(1) says that "[j]udicial review of [an administratively] final order of removal is governed by chapter 158 of title 28 of the U.S. Code." This is the Hobbs Act; the non-citizen files a petition for review in the court of appeals in the circuit in which the removal hearing was held. Must file within 30 days after the administratively final removal order. A motion to reopen or reconsider doesn't toll the clock. The non-citizen also has to file a brief within 40 days after the administrative record "is available"; otherwise, the court must dismiss the case "unless a manifest injustice would result." It's routine practice for non-citizens to couple petition for review with motion for stay of removal pending

- decision. If the court grants the petition, then the reviewing court decides the merits solely on the basis of the administrative record.
3. Limited judicial review for crime-related removal orders – § 242(a)(2)(C) says that “no court shall have jurisdiction to review” a removal order if the person “is removable” on almost any of the crime-related grounds. Cts. have consistently interpreted the section as *not* barring review of whether the person is, in fact, removable – only questions of law and fact when the person has been found to be removable or has conceded the point.
 4. Limited judicial review for denials of discretionary relief – § 242(a)(2)(B) says “[n]otwithstanding any other provision of law, no court shall have jurisdiction to review”... prong 1 lists most of the major affirmative relief provisions available in removal proceedings... and prong 2 says discretionary decisions of the AG that are authorized by Title II of the INA.
 5. Limited judicial review for expedited removal orders – § 242(a)(2)(A) says that cts. lack jurisdiction to review, on the merits, expedited removal orders for arriving non-citizens whom immigration inspectors believe to be inadmissible on documentary or fraud grounds, or for those non-citizens who are present in the U.S., who are unable to prove two years of continuous physical presence, and whom the AG has subjected to expedited removal procedure.
 6. Limited review of AG regulations that limit the eligibility for voluntary departure – § 240B(e).
 7. Limited review of prosecutorial discretion – § 242(g). Note that the removal order itself doesn’t arise from these kinds of decisions or actions and thus isn’t affected by § 242(g).
 8. Limited review of detention decisions – While removal proceedings are pending, the AG has the discretion whether to detain the non-citizen, release him or her on bond, or grant parole without requiring bond. § 236(a). Under § 236(e), “[n]o court may set aside any action or decision of the AG under this section regarding detention or release of any alien or the grant, revocation, or denial of bond or parole.”
 9. Habeas corpus – A ct. may be able get around the above-mentioned limitations on review through other sources of subject-matter jurisdiction, such as habeas corpus.
 10. Other strategies – General federal jurisdiction (28 U.S.C. § 1331). Again, have to see how this interfaces with the above-mentioned limitations on review. Injunctions and class actions. Suppose a large class of non-citizens objects to a widespread DHS practice. Can they band together and bring a class action seeking injunctive or declaratory relief? The S. Ct. hasn’t addressed directly whether the exclusivity of the petition for review would bar that procedure. But in a landmark 1991 decision, *McNary v. Haitian Refugee Center*, the Ct. interpreted an analogous exclusivity provision concerned with the legalization of agricultural workers and held that the district court had jurisdiction to hear the case as a class action, to avoid delay and procedural redundancy. Collateral attack in criminal proceedings. The S. Ct. held in *United States v. Mendoza-Lopez* (1987) that the validity of an underlying removal order may not be attacked collaterally in subsequent criminal proceedings unless the defendant had not earlier been given a meaningful opportunity to seek direct judicial review of the deportation order.
 11. Consolidating reviewable claims – See §§ 242(b)(9), 242(b)(6).

IX. Relief from Deportability

- A. **Two types of relief** – (1) Lasting relief, removal doesn’t take place, and person obtains or retains LPR status. (2) More limited relief, like a temporary stay of the removal order. The relief provisions are like affirmative defenses, defenses for which the non-citizen has the burden of

proof. Note that cancellation of removal (parts A&B) may be granted to only 4,000 individuals per year. § 240A(e)(1).

1. Extremely limited judicial review – § 242(a)(2)(B) bars judicial review of “any judgment regarding the granting of relief” under certain provisions, including cancellation of removal, voluntary departure, and adjustment of status. The same provision also bars judicial review of nearly every other discretionary decision or action of the AG.

B. Cancellation of removal, part A, for LPRs. Under § 240A(a), the AG (really, IJ at removal hearing) may cancel the removal of an LPR who falls within an inadmissibility or deportability ground.

1. Requirements – (1) Must have been a lawfully admitted LPR for at least 5 years (INS and DOJ have held that LPR status doesn't end until there's a final administrative order for removal); (2) must have resided continuously in the U.S. for 7 years after having been admitted in any status (ends with Notice to Appear, § 240A(d)(1)); (3) must not have been convicted of an aggravated felony; and (4) must not implicate the national-security inadmissibility/deportability grounds. In addition to establishing eligibility, the applicant must show that he or she merits the favorable exercise of discretion.

C. Cancellation of removal and/or adjustment to LPR status, part B, for LPRs and non-immigrants. Under § 240A(b), the AG (IJ at removal hearing) may cancel the removal and adjust to LPR status a non-citizen who falls within an inadmissibility or deportability ground. The principal beneficiaries of part B are undocumented migrants.

1. Requirements – (1) Must have been continuously physically present in the U.S. for at least 10 years immediately* preceding the date of application (continuous physical presence defined in § 240A(d)(1, 2), trip abroad for 90 days or trips adding up to aggregate of 180 days ends it; note that anytime there's a bright-line test, there will be an occasional fact situation where the end result just seems wrong, like the family that innocently takes vacations every summer); (2) must have been a person of good moral character during the 10-year period; (3) must not have been convicted of a criminal offense described in § 212(a)(2) or be subject to the falsification-of-documents deportability ground in § 237(a)(3); (4) must establish that removal would result in exceptional and extremely unusual hardship to citizen or LPR spouse, parent, or child (from the conference committee report accompanying IIRIRA: harm must be “substantially beyond that which ordinarily would be expected to result from the alien's deportation”); (5) must not be a J-visitor who hasn't yet completed the 2-year foreign residency requirement under § 212(e); and (6) must not implicate the national-security inadmissibility/deportability grounds. In addition to establishing eligibility, the applicant must show that he or she merits the favorable exercise of discretion.
2. Note for the physical-presence requirement – There appears to be a technical glitch in § 240A(d)(1). If you're served your notice to appear, then how can you then motion for cancellation of removal part B and meet the physical-presence requirement? Specifically, the problem is this: Under (d)(1), physical presence is deemed to end upon service of the notice to appear, whereas subsection (b)(1)(A) of cancellation of removal part B requires physical presence for at least 10 years “immediately preceding the date of such application.” If I could amend the statute, I would strike the word “immediately” from subsection (b)(1)(A).

D. Moving to reopen removal proceedings (coupled with a request for stay of removal). Can do this to apply for cancellation, or if hardship circumstances have changed. If the non-citizen makes out a prima facie case of eligibility (e.g., for cancellation), and the IJ grants motion to reopen, the non-citizen can get an evidentiary hearing at which he or she will have the *opportunity* to prove the facts necessary for cancellation (and possibly a temporary stay of

removal). The decision of the IJ in this reopened proceeding is appealable to the BIA, and, if IJ denies the motion to reopen, that denial is appealable to the BIA. DOJ regs provide that the BIA “has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.” 8 C.F.R. § 3.2(a) (2001). A BIA denial of reopening, and possibly a BIA decision denying cancellation, are reviewable in a U.S. Court of Appeals. Motioning to reopen can stay removal and buy the non-citizen more time in the U.S. (and for that reason have been controversial).

1. *Wang* (p.586 CB) – In a per curiam opinion, the S. Ct. dismissed a Korean couple’s motion to reopen for a claim of suspension (the predecessor to cancellation of removal, part B). Held: (1) Because the couple hadn’t complied with a regulation requiring motions to come with supporting materials (affidavits and other evidence), the BIA was reasonable to deny their motion. The allegations in the motion were conclusory and unsupported. When the Ninth Circuit reversed the BIA, the court “circumvented this aspect of the regulation.” (2) The Ninth Cir., in finding that the couple had alleged a prima facie case of extreme hardship, so that they were at least entitled to a hearing, had “encroached on the authority which the Act confers on the Attorney General and his delegates. . . . The AG and his delegates have the authority to construe ‘extreme hardship’ narrowly should they deem it wise to do so.” The hardship allegations were that the couple’s American-born kids didn’t speak Korean and would lose educational opportunities if forced to leave the U.S.; additionally, if deported, the family would have to liquidate the assets of their dry-cleaning business at a possible loss. According to the S. Ct., this wasn’t enough to warrant an evidentiary hearing. This case raises a thematic question: between a democratically elected Congress, the administrative entities to which Congress has delegated policy-making authority, and the courts, who should have the ultimate authority to decide questions of immigration law.
- E. Registry.** See § 249, a provision which confers a discretionary authority on the AG to award LPR status to certain non-citizens who entered the U.S. before a specified date, now January 1, 1972.
- F. Legalization (a/k/a amnesty).** IRCA (1986), the most ambitious immigration amnesty enacted to date, created 3 different legalization programs: a general legalization plan, a special legalization program for agricultural workers, and a special program for Cubans and Haitians. All three programs were one-time-only opportunities.
- G. Adjustment of status.**
- H. Private bills.** A private bill is a piece of legislation that provides LPR status for a specific individual when existing general provisions wouldn’t. Have to persuade a friendly congressman to go to bat for you.
- I. Deferred action.** The DHS does exercise prosecutorial discretion in unusually compassionate situations. Commissioner Meissner’s memo (2000) about this explains that the source of INS prosecutorial discretion is its limited resources. The memo lists factors to be taken into account (p.615 CB): whether the person is an LPR, the duration of his or her residence, any criminal history, humanitarian concerns, whether there were past immigration violations, how long a bar to future return removal would create, and the person’s role in the community. Note that this is only a temporary remedy, doesn’t grant the non-citizen any status.
- J. Voluntary departure.** A person who receives and accepts a grant of voluntary departure under § 240B leaves “voluntarily”; in exchange, *no formal removal order issues*. What’s in it for the non-citizen? Avoidance of the 10-year bar on admissibility under § 212(a)(9)(A) and avoidance of bond/detention while waiting for removal hearing. Subsections (a) and (b) are differentiated by the timing of the grant. Congress wants to give people an incentive to accept voluntary departure before removal proceeding begins, so that’s why there are tougher requirements for

(b). Also, the provisions encourage aliens who have a reasonable chance of prevailing at a removal hearing to apply for voluntary departure early under subsection (a) anyway, to avoid the risk of losing and running into the harsher consequences of subsection (b) – if don't depart within 60 days, get fine plus 10-year period of ineligibility for voluntary departure, cancellation of removal, change of status, adjustment of status, and registry. No judicial review for decisions under either subsection.

1. Requirements for § 240B, subsection (a) – Alien may apply for voluntary departure either before or during removal proceeding; alien not removable because of an aggravated felony or because of terrorist activity; alien must leave within 120 days of receiving permission for voluntary departure; and alien “may” be required to post bond; immigration judge can grant permission up to 30 days after master calendar hearing (that's the latest, then subsection (a) becomes unavailable).
2. Requirements for subsection (b) – Alien may apply for voluntary departure during removal proceeding; one-year physical presence requirement; five-year good moral character requirement; means and intention to depart requirement; alien not removable because of an aggravated felony or because of terrorist activity; alien can't have been found inadmissible previously because of presence without admission or parole and permitted voluntary departure; any additional regulations; alien must leave within 60 days of receiving permission for voluntary departure; and alien “shall be required” to post bond.

K. Objections to destination. § 241(a)(2) allows non-citizen to designate the country of deportation, unless the chosen country refuses to accept the person. In the latter case, the IJ has the authority to specify the country to which the person will be removed (options laid out in statute).

L. Stays of removal. If the non-citizen needs more time before leaving the U.S., can request the DHS, in its discretion, to grant a temporary stay under 8 C.F.R. § 241.6.

M. Constitutional defenses to removal. All sorts of constitutional defenses to removal – unfair to the U.S.-citizen-children of aliens who are removed, ex post facto punishment, cruel and unusual punishment, estoppel – have been rejected. See pp.627-28 CB.

X. Refugees

A. Refugee procedure. §§ 207 & 209. If applicant is granted refugee status, can normally attain LPR status after 1 year § 209(a)(1). Only 10,000 refugees annually allowed to adjust to LPR status. Refugee status can be revoked before 1 year, if found that non-citizen shouldn't have been granted refugee status.

1. Overseas (offshore) refugee program – § 207.
2. Onshore refugee program – Applicants who are either at U.S. port or interior (non-immigrant visa, overstayed, or undocumented). Only 70,000 grants annually under this program.

B. Asylum procedure. Asylum, § 208. Usually apply for asylum as an affirmative defense after initiation of removal hearing, but also can apply affirmatively for asylum (used to be called “walk-ins”). Remedy consists of the right to stay. Withholding of removal (U.S. statutory term), a/k/a nonrefoulement (international law term), § 241(b)(3). Remedy consists of the right not to be returned to a particular country; the DHS can still send you somewhere else. Asylum hearings are required to be completely confidential. There's no statutory limit on the number of asylum grants that can be made. Some cynics think that asylum is little more than a loophole for illegal immigration.

C. Making a claim. To make out a claim, you have to establish that you meet the definition of “refugee” in § 101(a)(42): you either were persecuted or have a fear of persecution, that's well-

founded, and that's on account of your race, religion, nationality, membership in a particular social group, or political opinion, and you're unable or unwilling to return to your country of nationality or to the country in which you last habitually resided because of persecution or your well-founded fear of persecution. An asylum claim is similar to a negligence claim in tort law in that the elements in some situations overlap conceptually. Aims of asylum law: a vehicle for the protection of human rights, a means of humanitarian relief of suffering.

D. Issue #1: Member of protected class. Actual membership of group vs. imputed membership of group – shouldn't matter, analogous to the imputed political opinion doctrine.

1. Acosta (p.909 CB) – BIA held that being a taxi driver and refusing to participate in guerilla-sponsored work stoppages didn't satisfy the definition of "particular social group" as a ground for persecution in § 101(a)(42). The court applied the statutory interpretation principle of *ejusdem generis* in determining the meaning of "particular social group," finding that the other grounds describe "persecution aimed at an immutable characteristic: a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." BIA further found that neither characteristic of the respondent's alleged social group was immutable.
2. Sanchez-Trujillo (p.911 CB) – The Ninth Cir. held that a group defined as "a class of young, working class, urban males" was not a "particular social group" within the meaning of INA § 101(a)(42). "[T]he phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." There has to be a "voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group." A nuclear family would qualify; a statistical group of males taller than six feet wouldn't. In other words: cohesive (how closely they stick together) and homogeneous (similarity to some degree).
3. Justice Dept., proposed § 208.15(c) – Would make immutability of group membership (BIA, Acosta) one requirement, but would have several other factors weighed and balanced. One of the factors would be whether there's a voluntary associational relationship (Ninth Cir., Sanchez-Trujillo). Also, would provide that when past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either couldn't have changed or was so fundamental to his or her identity that he or she shouldn't have been required to change it.
4. Toboso-Alfonso (p.921 CB) – BIA considered a respondent's claim for withholding of removal; the respondent claimed that homosexuals form a particular social group in Cuba and suffer persecution by the government as a result of their status. INS argued that the "socially deviant behavior, i.e., homosexual activity," was not a basis for finding a social group within the contemplation of the 1980 Refugee Act. BIA found that the Cuban government wasn't persecuting the respondent because of any illicit behavior, but rather because of the mere fact that he was a homosexual. BIA affirmed the IJ's finding that his freedom was threatened within the meaning of the withholding of removal provision (INS had appealed).
5. Imputed political opinion doctrine – Widely accepted.

E. Issue #2: Persecution or well-founded fear. Sub-issues: (1) Was the harm threatened or suffered severe enough to be called persecution? (2) Was the person sufficiently singled out? Some countries – notably, France and Germany – take the position that the persecutor has to be a government actor, as opposed to a private actor. Not the U.S. You don't have to show a subjective fear of persecution if you can show a pattern or practice of persecution of an identifiable group (race, social group, etc.) of which you're a member. Also, criminal

prosecution can be persecution if the punishment imposed is a mere pretext for persecution – e.g., if the punishment is selectively imposed or highly disproportionate to the nature of the offense. Economic devastation (extreme) can rise to the level of persecution; clear from the case law that you don't have to show threat to bodily integrity, bodily harm. If not doing something that's prohibited means giving up something fundamental, then we can argue it's persecution.

1. *Acosta* (p.875 CB) – Asylum claimant was one of the founders of a taxi cooperative in El Salvador. Anti-government guerrillas tried to get him and his co-workers to participate in work stoppages to disrupt transportation services in San Salvador. The guerrillas sent him death threats, killed a few of his co-workers, and even beat him and stole his cab one time. He left El Salvador because of these events. BIA held: Asylum claimant has to establish that “primary” motivation for requesting refuge is fear of persecution, meaning a genuine apprehension or awareness of danger in another country because he or she possesses a belief or characteristic that persecutor seeks to overcome (that is, not because of civil strife or anarchy).
2. *Kasinga* (p.939 CB) – (Layli Miller-Bashir case) Young woman from Togo claimed asylum, alleging persecution on the basis of her membership of a particular social group. She defined her social group as “consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” The parties conceded that FGM can be the basis for asylum; the issue was what the general principle should be for determining whether a given FGM claim qualifies.

F. Issue #3: On account of (“because of”). There must be some sort of causal nexus between the persecution and one of the five protected classes, although it is unclear from the case law what exactly constitutes a sufficient nexus. A but-for relationship is usually enough, i.e., if persecution would not have occurred but for the applicant's race/nationality/social group/etc., he has satisfied this requirement.

1. *Elias-Zacarias* (p.895 CB) – Asylum claimant was a native of Guatemala, and he claimed he had a well-founded fear of persecution because one day some armed guerrillas came to his home, asked his parents and himself to join with them, and threatened to come back when they refused. Two issues: First, whether he expressed an opinion. Second, assuming that his refusal to join the guerrillas was the expression of an opinion, was the persecution he feared on account of that political opinion. S. Ct. held: (1) Can neutrality constitute the expression of a political opinion? Ct. distinguished between someone who's entirely apolitical and someone who affirmatively embraces neutrality. The latter could be a political opinion – but that wasn't this case. (2) Persecution on account of political opinion, within the meaning of the refugee defn. means persecution on account of the *victim's* political opinion, not the persecutor's. Ct. found that respondent had failed to establish any direct or circumstantial evidence of his persecutor's motives.

G. Issue #4: If you fear being persecuted, your fear is well-founded and country-wide.

1. *Fatin* (p.930 CB) – Iranian woman applied for asylum, alleging that she feared persecution on account of her membership of a particular social group, and on the basis of her political opinion. She defined her social group as “the social group of the upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals.” The Third Cir., adopting the immutability test from *Acosta*, held that an alien must establish three elements: (1) must identify a group that constitutes a “particular social group” within the interpretation just discussed, (2) must establish that he or she is a member of that group, and (3) must show that he or she would be persecuted or has a well-founded fear of persecution based on that membership. The court found that the respondent failed to satisfy the third element. She claimed that the Iranian government imposed restrictions on

Muslim women along with severe punishments for non-compliance. But the most that emerged from her testimony was that she would find the requirements to be objectionable and wouldn't observe them if she could avoid doing so. Her testimony didn't show that for her the requirement of wearing the chador or complying with Iran's other gender-specific laws would be so profoundly abhorrent that it could be said she had a well-founded fear of persecution (assuming that threatened non-physical harm could qualify as persecution).

2. *Acosta* (p.875 CB) – BIA held that respondent didn't establish a legitimate fear of persecution from the Salvadoran government (“no basis whatsoever in either his personal experiences or in other external events”) or from the guerrillas (the terrorists were no longer active, plus there was no evidence that the guerrillas' persecution of taxi drivers occurred throughout the country, so maybe he could've avoided persecution by moving to another city).

H. Standards of proof. How likely does it have to be that this claimed persecution will actually take place before an IJ or asylum judge will say that you're eligible for asylum or withholding of removal? Asylum – refugee definition – have to have a “well-founded fear of persecution.” Withholding – “life or freedom would be threatened on account of...” In each case, how convinced do we have to be? *Stevic* – S. Ct. held that standard is “clear probability of persecution,” meaning “more likely than not,” for withholding of removal. *Cardoza-Fonseca* – S. Ct. held that standard for asylum is something less than that for withholding of removal. (Why?? Asylum is discretionary, whereas withholding of removal isn't.) Subsequently, lower courts have held that the standard (“well-founded fear”) for asylum is “reasonable-person.”

1. *Damaize-Job* (p.982 CB) – Damaize was a native and citizen of Nicaragua. He entered without inspection and was apprehended at the border. During his removal proceeding, he applied for asylum (§ 208) and withholding of removal (§ 241(b)(3)). He was a Somocista, or supporter of the Somoza regime, which preceded Nicaragua's Sandanista government, and he was a Miskito Indian. He testified that he had been the subject of persecution by the Sandanista regime. Specifically, he alleged that he was arrested, imprisoned, and tortured for three months, and threatened upon release, and that his uncle and sister were disappeared. He submitted as supporting evidence copies of newspaper articles detailing the persecution of the Miskitos by the Sandanistas. Both the IJ and the BIA rejected his claims, finding insufficient evidence to meet either the “well-founded fear of persecution” standard for asylum or the “clear probability of persecution” standard for withholding of removal. He appealed to the Ninth Cir.

The Ninth Cir. held that an applicant's testimony plus newspaper accounts of the applicant's alleged type of persecution can be sufficient to establish either a clear probability or a well-founded fear of persecution. As to the content of Damaize's allegations regarding persecution, the court refuted the BIA's findings. Next, the court found that the IJ's findings with respect to Damaize's credibility were baseless. Minor discrepancies in dates or typos that are attributable to the applicant's language problems don't undermine the applicant's credibility. Personal choices w.r.t. marriage, children, etc. don't undermine credibility, unless they reflect some inconsistency in a relevant portion of the applicant's testimony. Lastly, Damaize's failure to apply for asylum in any of the counties through which he passed prior to his arrival in the U.S. doesn't undermine the credibility of his persecution claims. Assessing credibility: look for signs of dishonesty and/or inherent improbability or inconsistency in testimony.

The court granted withholding of removal, and reversed and remanded on the asylum claim so that the AG could exercise discretion with respect to that claim.

I. Exceptions. Two types of exceptions: (1) People who don't really need asylum. Firm resettlement – If you're already firmly resettled in another country that's safe, then you don't get admission as a refugee/asylee. (2) People who don't deserve asylum, or who Congress thinks wouldn't make desirable members of society.

1. *Carballe* (p.996 CB) – A young man from Cuba was convicted of robbery in the U.S. During his removal proceeding, he conceded inadmissibility for both lack of valid entry documents and conviction of a crime of moral turpitude, and he requested asylum and withholding of removal. The IJ held that he was ineligible for relief under the exception to the withholding of removal provision (§ 241(b)(3)) as one who had been convicted of a particularly serious crime and who constituted a danger to the community of the U.S. (Same language as in exception to asylum provision.)

On appeal, the applicant argued that the IJ had misinterpreted the language of that exception; the applicant argued that that language amounted to a two-part test. The BIA rejected this argument, holding that the language requires just one factual finding. The language should be read like this: If the applicant has committed a particularly serious crime, meaning a crime indicating that the applicant poses a danger to the community, then the exception applies. The applicant's crimes – armed robberies, with a firearm, felonies, offenses against individuals – were dangerous on their face.

XI. Undocumented Migrants

A. Employer sanctions. Two classes of offenses (substantive and procedural).

1. Hiring violation – Civil offense “to hire, or to recruit or refer for a fee, for employment in the U.S. an alien knowing the alien is a unauthorized alien.” § 274A(a)(1)(A).
2. Continuing employment violation – Civil offense “to continue to employ [an] alien in the U.S. knowing the alien is (or has become) an unauthorized alien...” § 274A(a)(2). The two above clauses were grand-fathered in, do not include pre-1986 hires. “Employment” doesn't include casual, occasional employment like house cleaning. “Knowing” includes constructive knowledge, or deliberate failure to investigate suspicious circumstances.
3. Procedural violation – Civil offense to fail to perform certain paperwork, regardless of whether the person turns out to be undocumented. § 274A(b).

B. Prohibition of immigration-related employment discrimination. The procedure for non-citizen wanting to bring claim: The non-citizen would file charges with the Office of the Special Counsel (OSC) within 180 days of being turned down for the job. The Special Counsel decides, within 120 days after receiving the charge, whether “there is reasonable cause to believe the charge is true.” If there is, and the charges allege “knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity,” the OSC either must file a complaint with an ALJ or notify the charging party. In the latter event, the charging party may initiate a private action with the ALJ. Note that under § 274B(b)(2) one can't bring a claim under 274B if he or she *has already* filed a Title 7 charge based on the same set of facts. (pp.1138-39 CB)

1. Discrimination claim – “It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual [other than an alien not authorized to work] with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment (A) because of such individual's national origin, or (B) in the case of a protected individual ..., because of such individual's citizenship status.” § 274B(a)(1). A “protected individual” is an LPR (unless didn't apply for naturalization within 6 mos. of becoming eligible), seasonal ag worker, refugee, or asylee. § 274B(a)(3). If two employees are equally qualified, employer can prefer the citizen (in hiring only, not discharge) over the non-citizen. § 274B(a)(4). Cannot require

more or different documents than are required by § 274A, or refuse to honor documents that appear reasonable on their face, with an intent to discriminate. § 274B(a)(6). Claims based on “disparate impact” of hiring practice are in doubt – unless there is some proof of “knowing and intentional discrimination.” As a result of President Reagan’s signing statement, the case law has incorporated the requirement that IRCA discrimination claims feature a showing of either “knowing and intentional” discrimination or a “pattern or practice of discriminatory activity.” Note that § 274B applies to all employers with 4 or more employees; Title VII requires 15 employees.

XII. Citizenship

A. How do you become a U.S. citizen?

1. Birth – SEE CHART, p.1197 CB. (a) Jus soli (“right of the land,” born in the U.S.). § 301(a). (b) Jus sanguinis (“right of the blood,” citizenship by inheritance). § 301(g).
2. After birth – Naturalization means the acquisition of citizenship after the time of birth. Requirements for naturalization: (1) Must be over 18, § 334(b). (2) Must be an LPR, § 318. (3) Must have resided continuously as an LPR in U.S. for 5 years prior to filing application, § 316(a)(1). (4) Must have been physically present in the U.S. during the 5 years prior to filing application for periods totaling at least half of that time, § 316(a)(1). (5) Must have resided continuously in the U.S. from the time of filing the application to the time of admission to citizenship, § 316(a)(2). (6) Must be “of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States,” § 316(a)(3). (7) Must have a basic understanding of the English language, § 312(a)(1). (8) Must have a basic understanding of U.S. history and government, § 312(a)(2). (9) Must not be a Communist or anarchist, § 313(a).

- B. Loss of citizenship.** Two ways: (1) Denaturalization (revocation of naturalization – not applicable to citizens by birth). See § 340(a). Illegal procurement of status, no time limit. (2) Expatriation. Voluntary renunciation of U.S. citizenship. Applies to any citizen. Can’t be applied against citizen’s will, though – citizen must intend to relinquish. See § 349.