IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES

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Chapter 1: Immigration Law in Context: Exploring the Foundations of Constitutional Power and Immigration Controls from Criminal Penalties to Employer Sanctions

Page 1 (§ 1.01[A]): Add the following to the last paragraph:

From 2000 to 2014, the number of foreign students in the United States grew 72%. There are almost 900,000 foreign students currently in the United States. About half come from China (accounting for 31% of all foreign students), India, and South Korea. From 2013-2014, "[t]he Middle East and North Africa was the fastest growing region of origin for international students in the U.S., increasing by 20 percent." http://www.usnews.com/education/best-colleges/articles/2014/11/17/number-of-international-college-students-continues-to-climb

NAFSA: Association of International Educators has useful tools on its website that help calculate the economic benefit of foreign students studying in the United States. For the academic year 2014-2015 NAFSA reported that nearly 975,000 foreign students generated an estimated $30 billion dollars for the U.S. economy. The website estimates that this student population generated 373,381 jobs related to the presence of the foreign students. See http://www.nafsa.org/Explore_International_Education/Impact/Data_And_Statistics/NAFSA_International_Student_Economic_Value_Tool/#stateData.

The Institute of International Education's Open Doors report for 2015 stated that the number of international students grew 10% in 2014-2015. The report lists India, China and Brazil as the leaders in sending countries. The information is available at http://www.iie.org/en/Who-We-Are/News-and-Events/Press-Center/Press-Releases/2015/2015-11-16-Open-Doors-Data#.V3MSpo-cE5s.

Page 4 (§ 1.01[C][1]) Add the following to the last paragraph:

In 2014, 416,456 people immigrated in one of the immediate relative categories. Of this total, spouses of U.S. citizens represented 238,852. The remaining immediate relatives were parents of an adult U.S. citizen (116,387) and unmarried minor children of U.S. citizens (61,217). All together, immediate relatives represented 41% of all new permanent immigrants and spouses were 23.5% of this total. The total number of spouses continued to decline from prior years. For detailed tables and information about where these immigrants initially settle in the United States, see
https://www.dhs.gov/sites/default/files/publications/LPR%20Flow%20Report%202014_508.pdf.

In 2013, 248,332 people obtained lawful permanent resident status through marriage to a U.S. citizen. That is a slight decline from 2011 and 2012. According to USCIS, this is the result of

delays in processing. The number of employment-based grants of permanent residents, on the other hand, increased in 2013.
http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf (see table 2).

Page 6 (§ 1.01[C][1]): Add the following to the end of the family law subsection:

Immigration law is part of family life and should be an area of law that family law practitioners become more knowledgeable about.

The most recent numbers indicate that in fiscal year 2014, 238,852 people immigrated through marriage to a U.S. citizen. See https://www.dhs.gov/sites/default/files/publications/LPR%20Flow%20Report%202014_508.pdf

As discussed in Chapters 3 and 4, the federal government now recognizes same-sex marriages that are valid in the place of formation as a basis for immigration sponsorship. *See generally* http://www.uscis.gov/family/same-sex-marriages.

Since 2003, the Office of Refugee Resettlement has cared for more than 190,000 unaccompanied children. The number of unaccompanied children referred to the program each year was generally in the range of 6,000 to 7,000 until fiscal year (FY) 2012. Those numbers increased from 13,625 in FY 2012 to 24,668 in FY 2013 and 57,496 in FY 2014. In FY 2015, 33,726 unaccompanied children were placed in ORR's care. care. See*See* statement by Mark Greenberg, Acting Assistant Secretary, Administration for Children and Families, U.S. Department of Health and Human Services, before the Senate Committee on Homeland Security and Governmental Affairs (Jan. 28, 2016), at http://www.acf.hhs.gov/programs/olab/resource/testimony-from-mark-greenberg-on-unaccompanied-children-0.

In 2013 the number of unaccompanied immigrant children doubled from the prior year, increasing to 24,000 apprehensions. In 2014 the number was dramatically higher: approximately 68,000 unaccompanied children were apprehended and placed into removal proceedings. http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0. Compare this to an average of 7,000 – 8,000 for the first nine years of the program. https://www.acf.hhs.gov/sites/default/files/orr/fact_sheet.pdf. "The children come primarily from Guatemala, El Salvador and Honduras. In FY2014, approximately three-quarters of all children referred were over 14 years of age, and two-thirds were boys. Countries of origin of youth referred to the program were as follows in FY2014: Honduras (34%); Guatemala (32%); El Salvador (29%); Mexico (less than 2%), and Other Countries (less than 3%). Over the years, the breakdown per country of origin has remained relatively constant." *Id.*

Many of these children are seeking to join a parent or parents who is living in the United States. Some of these parents may have a form of temporary protected status but have been unable to petition for their children to come and live in the United States. As the text explains, Congress has been spending more on the apprehension and detention of these children. In June 2014, President Obama unsuccessfully sought more than $2 billion dollars to fund the costs associated

with unaccompanied minors. Julia Preston, *Obama to Seek Funds to Stem Border Crossings and Speed Deportations*, N.Y. Times, June 28, 2014, http://www.nytimes.com/2014/06/29/us/obama-to-seek-funds-to-stem-border-crossings-and-speed-deportations.html.

The sharp decline in Fiscal Year 2015 was largely due to interdictions made by the government of Mexico. Approximately 70,000 children were apprehended and deported to Central America that year. The federal government has reportedly sought to strengthen Mexico's ability to apprehend and deport children as part of its Frontera Sur (Sothern Border) program. For a critical report questioning Mexico's ability to care for and adequately address refugee claims for this population, see Closed Doors: Mexico's Failure to Protect Refugee and Migrant Children, March 31, 2016, available at https://www.hrw.org/report/2016/03/31/closed-doors/mexicos-failure-protect-central-american-refugee-and-migrant-children. As of the end of May 2016, the United States had apprehended approximately 40,000 more children from the region since the beginning of October 2016. See https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.

This book explores the rights of people at the border in Chapter 2 and specifically addresses relief for children in Chapter 7, where we discuss Special Immigrant Juvenile Status (SIJS), which is a path to permanent residence for children who have been abused, abandoned or neglected by one or both parents. We also have a new problem in the supplement for Chapter 8 where we explore both asylum and SIJS. Attorneys who regularly represent children in family court proceedings should become familiar with how immigration law will impact their clients.

Page 9 (§ 1.01[C][4]): Add the following to the end of the subsection concerning criminal prosecution and defense:

In 2013, criminal prosecutions for illegal reentry after an order of removal or for misdemeanors for unlawful entry continued at a high pace. *See* Transactional Records Access Clearinghouse, Syracuse University, *Southern District of Texas Leading in Record Year for Immigration Prosecutions* (May 10, 2013), http://trac.syr.edu/immigration/reports/318/ (suggesting that more than 100,000 criminal immigration prosecutions would be held in 2013). A large number of convictions are plea bargains, and a significant number are for the crime of unlawful entry. Transactional Records Access Clearinghouse, Syracuse University, *Changes in Criminal Enforcement of Immigration Laws* (May 13, 2014), http://trac.syr.edu/immigration/reports/354/.

Page 13 (§ 1.01[C][5]): Update Figure 4 as follows:

Appeals to federal courts challenging BIA decisions increased 11 percent to 7,035 in fiscal year 2012. The total number of appeals in federal courts in 2012 was 57,501. *See* http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-courts-of-appeals.aspx. In fiscal year 2013, appeals challenging BIA decisions rose three percent to 7,225. The total number of appeals in federal courts in 2013 was 56,475. *See* http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-courts-of-appeals.aspx.
In fiscal year 2014, appeals challenging BIA decisions fell by 17%, yet still accounted for 86% of all administrative agency appeals in the federal courts. *See* http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2014.

Page 58 (§ 1.02[B][2]): Add the following at the top of page 58, just before Problem 1-2:

The Immigration and Customs Enforcement web pages include a chart providing guidance on fines and a flow chart that describes the typical enforcement investigation. This website reports that for a first tier offense, over 50% of the fines are $1,900. *See* http://www.ice.gov/factsheets/i9-inspection.

The agency does not report aggregate fine data. ICE press releases report some employer sanctions cases. For example, in June 2015, an orchard in the Seattle area was fined over $2 million dollars due to faulty I-9 verification procedures. *See* https://www.ice.gov/news/releases/washington-apple-orchard-fined-millions-following-ice-audit.

For a report on the use of employer sanctions, see Andorra Bruno, "Immigration-Related Worksite Enforcement: Performance Measures" Congressional Research Service (Aug. 7, 2013). Here is a chart on the overall use of sanctions from that report:

Table 1. Final Orders and Administrative Fines, FY1999-FY2012

Fiscal Year	Number of Final Orders Issued	Administrative Fines Imposed
1999	215	$1,674,672
2000	312	$3,337,472
2001	297	$2,037,509
2002	91	$485,128
2003	52	$289,814
2004	10	$90,249
2005	10	$455,870
2006	0	$0
2007	2	$26,560
2008	18	$675,209
2009	52	$1,033,291
2010	237	$6,956,026
2011	385	$10,463,988
2012	495	$12,475,575

The same report show a significant recent increase in people being charged criminally for employment-related violations. In fiscal year 2012, 520 people were criminally charged.

Page 58 (§ 1.02[B][2]): Add the following after note 6:

7. Don't Overdo It. Employers cannot play it safe and demand more or different documents. In 2015, the Department of Justice's Office of Anti-discrimination for Immigration Related Employment settled a case of over-documenting workers with three cab companies in Nevada. The companies had required foreign-born workers to provide additional documentation. The Department of Justice obtained a $445,000 penalty for violating INA § 274B.

The violations were described in an interview with Law 360: "The errors cited by the government were the result of complex regulations regarding verification of work authorization, and not an intent to discriminate against applicants for employment at the company. . . . There was no finding by the government that anyone affected by the clerical errors during this process was denied employment." Kelly Knaub, *Vegas Cab Cos. Settle Citizenship Discrimination Claims*, Law360, Oct. 21, 2015, http://www.law360.com/articles/716536/vegas-cab-cos-settle-citizenship-discrimination-claims.

Page 65 (§ 1.02[B][2]): Add the following to Note 2 concerning back pay and state employment law:

The Second Circuit followed *Hoffman Plastics* in rejecting back pay for undocumented workers, but it remanded the case to the NLRB to determine if a conditional reinstatement order could be made for those workers who now could satisfy the employment verification requirements of the immigration law. *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013).

Page 65 (§ 1.02[B][2]): Add new Note 3:

In June 2015, the Appellate Division for the Second Judicial Department of New York granted Cesar Adrian Vargas a license to practice law. In a unanimous opinion, the court addressed whether Vargas, a recipient of Deferred Action for Childhood Arrivals (DACA), satisfied the requisite standard of good character and general fitness for admission to the bar. The court held that Vargas' "undocumented immigration status, in and of itself, does not reflect adversely upon his general fitness to practice law." *Matter of the Application of Cesar Adrian Vargas for Admission to the Bar of the States of New York*, 2015 N.Y. App. Div. LEXIS 4587 (N.Y. App. Div. June 3, 2015). *See* http://www.nytimes.com/reuters/2015/06/04/world/americas/04reuters-new-york-immigrant.html?_r=0; *see also* http://www.cnn.com/2014/01/02/justice/california-immigrant-lawyer/ (discussing undocumented-foreign-national Sergio Garcia's admission to the California state bar in January of 2014).

Vargas is limited to DACA recipients. The California Supreme Court's decision in *In re Garcia*, 58 Cal. 4th 440 (Cal. 2014), which held that Sergio Garcia may be admitted to the California bar notwithstanding his lack of immigration status, is not so limited – Garcia was not a DACA recipient. How can the holding in *Garcia* be reconciled with federal law that prohibits the employment of an undocumented immigrant?

Page 98 (§ 1.02[B][2]): Add the following to Note 2 concerning whether the Arizona employer sanctions law is being enforced:

As of July 1, 2014, only two employers have been sanctioned and reported on the Arizona State Attorney General's website.

AZ Central reports that the law has been enforced three times since 2008, with the third case pending. http://archive.azcentral.com/business/news/articles/20131102arizona-employer-sanctions-law-seldom-used.html. The Arizona Attorney General's website updated its link:

https://www.azag.gov/legal-az-workers-act/court-orders. There have been no new court orders added to the government site as of June 2016.

Given the vehemence with which Arizona sought special sanctions and pursued Supreme Court litigation to secure the authority to have its own sanction program, is it surprising that little enforcement is reported?

Page 102 (§1.02[B]): Add to end of Note 9:

DHS provides a webinar explaining the E-Verify program, its purpose, how to enroll, *et cetera*, at http://www.uscis.gov/e-verify/e-verify-webinar-demand-entire-video.

Page 111 (*Arizona v. United States)*:
In the second full paragraph the Court cites *Padilla v. Kentucky*. Note that the full citation is 559 U.S. 356.

Page 119 (second full paragraph in Note 1): change link to: http://topics.nytimes.com/top/reference/timestopics/people/a/joseph_m_arpaio/index.html?8qa

Add to second paragraph in Note 1 reporting on the U.S. Department of Justice suit against Sheriff Arpaio:
In June 2015, the federal district court denied several defense motions for summary judgment and found that Sheriff Arpaio could be estopped from denying that his office used unconstitutional racially motivated stops in conducting traffic sweeps that stopped people who appeared Latino. Order of Roslyn O. Silver, Senior United States District Judge, June 15, 2015, No. CV-12-00981-PHX-ROS.

In July 2015 Judge Silver granted several dispositive motions against Arpaio. The case was settled in September 2015 when the Maricopa County government agreed to an injunction.

The Department of Justice joined in another suit brought by the ACLU against Sheriff Arpaio and the county. Ortega-Melendez v. Arpaio, No. CV-07-2513-PHX-GMS (Ariz. Dist. Ct. filed originally in 2007). The legal documents can be found on the ACLU website at https://www.aclu.org/cases/ortega-melendres-et-al-v-arpaio-et-al.

In a 162-page order in a related case, Federal District Judge Snow found Sheriff Arpaio and other members of the Maricopa county sheriff's office in civil contempt for continuing to arrest and hold immigrants without any charges and without authority to act for ICE. See Order of May 13, 2016, available at https://www.aclu.org/legal-document/ortega-melendres-et-al-v-arpaio-et-al-2016-order. The next stage of the case will consider additional remedies for the contempt citations and past civil rights violations.

In the fall of 2013, the Ninth Circuit upheld the federal district court's injunction of one of the key provisions of Arizona's S.B. 1070 statute. *Valle Del Sol Inc. V. Whiting*, 732 F.3d 1006 (9th Cir. 2013). The Supreme Court had already found section 5(c) to be preempted in *Arizona v United States*, 567 U.S.___, 132 S. Ct. 2492 (2012), reprinted in relevant part on page 102 above.

This suit addressed Subsection A of Section 5 of S.B. 1070, which stated:

Section 5.
A. It is unlawful for a person who is in violation of a criminal offense to:
1. Transport or move or attempt to transport or move an alien in this state, in furtherance of the illegal presence of the alien in the United States, in a means of transportation if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
2. Conceal, harbor or shield or attempt to conceal, harbor or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
3. Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such coming to, entering or residing in this state is or will be in violation of law.

The Ninth Circuit affirmed the lower court's injunction on two grounds. First, it found that the statute was void for vagueness because the phrase "[i]t is unlawful for a person who is *in violation of a criminal offense*" was unintelligible because an offense is an action and one cannot be in violation of an action. *Valle Del Sol Inc. v Whiting*, 732 F3d 1006, 1013 (9th Cir. 2013).

Second, and very similar to the holdings in the related litigation, the Ninth Circuit found that Arizona's attempts to criminalize immigration violations were preempted by federal immigration law. The decision closely mirrored the Supreme Court's reasoning in finding field preemption due to the scope of the INA provision on harboring in 8 U.S.C. § 1324 and also conflict preemption.

Update to Note 3. In November 2014, DHS announced new enforcement priorities in a detailed memorandum shared with state and local government officials. Memorandum from DHS Secretary Jeh Johnson to DHS officials, Secure Communities (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.
In general, DHS Secretary Jeh Johnson is using three enforcement priorities--national security, border security, and public safety--to clarify how the DHS components will direct agency resources. The ICE FAQs released with the memorandum instruct local law enforcement about when to seek ICE enforcement in areas such as criminal prosecutions involving driving under the influence, domestic violence, identity theft, and national security concerns. *See* https://www.ice.gov/immigrationAction/faqs.

Page 122 (§ 1.02[C]): Add new Notes 9, 10, 11, and 12:

9. States and Local Governments Resisting ICE Immigration Detainers. In the past few years a number of local governments and some states have begun to allow local law enforcement to resist or question ICE immigration detainers. The basic policy motivation behind these initiatives is to prevent noncitizens with minor arrests or convictions from detention and possible deportation. For examples of some of these provisions, see Christopher Lasch, *The Faulty Legal*

Reasoning Behind ICE Detainers (Dec. 2013), http://www.immigrationpolicy.org/sites/default/files/docs/lasch_on_detainers.pdf; Christopher Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 Wake Forest J. L. & Pol'y 281 (2013).

10. Use of Fraudulent Documents: An Ongoing Offense? In *United States v. Tavarez-Levario*, 788 F.3d 433 (5th Cir. 2015), the Fifth Circuit addressed whether the use of fraudulent immigration documents constitutes a "continuous" or "ongoing" offense for statute of limitations purposes. The government argued that the offense continues as long as the defendant continues to live and work in the United States based on the fraudulent document(s). The court disagreed: "Even a crime that naturally occurs in a single, finite incident can produce prolonged benefits to an offender; this does not mean that the statute of limitations refrains from running until all benefits of the criminal act dissipate." *Id.* at 440. The Fifth Circuit revised the decision and issued its final decision that the indictment must be dismissed in June 2015. 2015 U.S. App. LEXIS 23096 (5th Cir. June 12, 2015).

11. Conflict and Field Preemption in Ongoing Arizona Litigation. In a well-written decision authored by U.S. District Judge David G. Campbell, the United States District Court for the District of Arizona in *Puente Arizona v. Arpaio*, 76 F. Supp. 3d 833 (D. Ariz. 2015), granted a preliminary injunction, suspending the enforcement of two Arizona identity theft laws because federal law preempted the state laws. Rebutting the state's contention that the preemption analysis did not apply because the laws did not discriminate against immigrants, the court looked to the title of the identity theft laws (the "Legal Arizona Workers' Act" and "Employment of Unauthorized Aliens") and the legislative history: "Senator O'Halleran stated that people convicted under the identity theft law would be encouraged to 'self-deport' instead of serving long prison sentences … [Senator] Burns supported [the bill] because it would show that Arizona was tough on illegal immigration … [Representative] Pearce … made clear that [the bill] was designed to address the problem of illegal immigration." *Id*. at 855. The court held that notwithstanding the laws' facial neutrality, "a primary purpose and effect of the identity theft laws is to impose criminal penalties on unauthorized aliens who seek or engage in unauthorized employment." *Id*.. Citing *Arizona*, the court explained that the field of unauthorized-alien employment has not been preempted by Congress; however, it concluded that "the narrower field [of] … unauthorized-alien fraud in seeking employment … has been heavily and comprehensively regulated by Congress," and held that "Congress has occupied the field." *Id.* at 856.

Addressing conflict preemption, the court explained that with respect to obtaining employment through the use of fraudulent documents, the Arizona identity theft laws impose a criminal penalty – creating a felony punishable by over five years in prison. Federal law, however, allows for civil, immigration, *or* criminal consequences – the criminal sanction being for a prison sentence of five years or less. The court explained: "The overlapping penalties created by the Arizona identity theft statutes, which 'layer additional penalties atop federal law,' likely result in conflict preemption." *Id*. at 858 (citing *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1267 (11th Cir. 2012)).

However, in 2016, a three-judge panel of the Ninth Circuit reversed the finding of preemption, dissolved the preliminary injunction, and remanded the case to the district court to resolve whether the "as applied" challenges to the use of the Arizona identity theft statutes could be sustained. *Puente Arizona v. Arpaio*, 2016 U.S. App. LEXIS 7895 (9th Cir. May 2, 2016).

12. City of Hazleton, PA. In *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2015), the court addressed a Hazleton, Pennsylvania ordinance that made lawful immigration status a condition precedent to leasing a residential property. Citing *Arizona*, the court held that these housing provisions were field-preempted. The court reasoned that the housing provisions interfered with federal executive branch's exclusive power of removal, and therefore were also conflict-preempted.

State Power to Seek Injunction of Federal Immigration Policies

As we have seen at the end of Chapter One, at least since 2007 state governments have attempted to exert independent control of immigration issues such as employer sanctions, housing limitations, and efforts to create state enforcement of federal immigration laws. In the most recent tussle between the states and the federal government, 26 states, led by Texas, challenged the creation of a new prosecutorial discretion policy. President Obama had warned Congress that if it could not enact immigration reform, he would instruct the Department of Homeland Security to grant temporary protection from removal and work authorization to certain broad classes of people who had resided for long periods within the United States.

In the following case, the U.S. Court of Appeals for the Fifth Circuit upheld the district court's injunction of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). First, the Fifth Circuit held that the states have special expanded standing to challenge the executive action under Article III of the Constitution and under the Administrative Procedure Act (APA). According to the court, Texas has standing under Article III because of the financial burden the state would suffer should DAPA go into effect, and under the APA because this same financial interest falls within the "zone of interests" protected or regulated by the INA. Second, the appeals court sustained the lower court's preliminary injunction because it concluded that the states met their burden of showing a likelihood of success on the merits of their claim that DAPA's "grant of lawful presence and accompanying eligibility for benefits" is a substantive rule under the APA, requiring notice and comment rulemaking.

DAPA does not, in fact, grant "lawful presence," as that term is used in immigration law. Like DACA, DAPA is a form of prosecutorial discretion that would defer deportation for certain unauthorized foreign nationals. It is not a grant of legal status, but would provide temporary employment authorization on a discretionary basis to qualifying applicants. More information about DAPA is at https://www.uscis.gov/immigrationaction.

The U.S. Supreme Court granted the writ of certiorari and heard oral argument on April 18, 2016. On June 23, 2016, the Supreme Court issued a one-line order stating "The judgment is

affirmed by an equally divided Court." 579 U.S. __, 2016 U.S. LEXIS 4057 (No. 15-674 June 23, 2016).

In effect, this means that the lower court's preliminary injunction of the expanded DACA and the new DAPA programs remains in place and the litigation may continue in the federal district court. Excerpted here is part of the Fifth Circuit opinion.

Texas v. United States

809 F.3d 134 (5th Cir. 2015).

Opinion

JERRY E. SMITH, Circuit Judge:

The United States appeals a preliminary injunction, pending trial, forbidding implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"). Twenty-six states (the "states") challenged DAPA under the Administrative Procedure Act ("APA") and the Take Care Clause of the Constitution;[1] in an impressive and thorough Memorandum Opinion and Order issued February 16, 2015, the district court enjoined the program on the ground that the states are likely to succeed on their claim that DAPA is subject to the APA's procedural requirements. *Texas v. United States*, 86 F.Supp.3d 591, 677 (S.D.Tex.2015).

The government appealed and moved to stay the injunction pending resolution of the merits. After extensive briefing and more than two hours of oral argument, a motions panel denied the stay after determining that the appeal was unlikely to succeed on its merits. *Texas v. United States*, 787 F.3d 733, 743 (5th Cir.2015). Reviewing the district court's order for abuse of discretion, we affirm the preliminary injunction because the states have standing; they have established a substantial likelihood of success on the merits of their procedural and substantive APA claims; and they have satisfied the other elements required for an injunction.

I.

A.

In June 2012, the Department of Homeland Security ("DHS") implemented the Deferred Action for Childhood Arrivals program ("DACA"). In the DACA Memo to agency heads, the DHS Secretary "set[ ] forth how, in the exercise of ... prosecutorial discretion, [DHS] should enforce the Nation's immigration laws against certain young people" and listed five "criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion."

[1] (n.3 in original) We find it unnecessary, at this early stage of the proceedings, to address or decide the challenge based on the Take Care Clause. [Ed. Note: The Supreme Court requested briefing on this issue in the grant of the writ of certiorari; however, the final order did not address this issue.]

The Secretary further instructed that "[n]o individual should receive deferred action ... unless they [*sic*] first pass a background check and requests for relief ... are to be decided on a case by case basis." Although stating that "[f]or individuals who are granted deferred action ..., [U.S. Citizenship and Immigration Services ('USCIS')] shall accept applications to determine whether these individuals qualify for work authorization," the DACA Memo purported to "confer[ ] no substantive right, immigration status or pathway to citizenship." At least 1.2 million persons qualify for DACA, and approximately 636,000 applications were approved through 2014. Dist. Ct. Op., 86 F.Supp.3d at 609.

In November 2014, by what is termed the "DAPA Memo," DHS expanded DACA by making millions more persons eligible for the program and extending "[t]he period for which DACA and the accompanying employment authorization is granted ... to three-year increments, rather than the current two-year increments." The Secretary also "direct[ed] USCIS to establish a process, similar to DACA," known as DAPA, which applies to "individuals who ... have, [as of November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident" and meet five additional criteria. The Secretary stated that, although "[d]eferred action does not confer any form of legal status in this country, much less citizenship [,] it [does] mean[ ] that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States." Of the approximately 11.3 million illegal aliens in the United States, 4.3 million would be eligible for lawful presence pursuant to DAPA. Dist. Ct. Op., 86 F.Supp.3d at 612 n. 11, 670.

…

As for state benefits, although "[a] State may provide that an alien who is *not lawfully present* in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a)," § 1621(d), Texas has chosen not to issue driver's licenses to unlawfully present aliens. Texas maintains that documentation confirming lawful presence pursuant to DAPA would allow otherwise ineligible aliens to become eligible for state-subsidized driver's licenses. Likewise, certain unemployment compensation "[b]enefits are not payable based on services performed by an alien unless the alien ... was *lawfully present* for purposes of performing the services...." Texas contends that DAPA recipients would also become eligible for unemployment insurance.

B.

The states sued to prevent DAPA's implementation on three grounds. First, they asserted that DAPA violated the procedural requirements of the APA as a substantive rule that did not undergo the requisite notice-and-comment rulemaking. *See* 5 U.S.C. § 553. Second, the states claimed that DHS lacked the authority to implement the program even if it followed the correct rulemaking process, such that DAPA was substantively unlawful under the APA. *See* 5 U.S.C. § 706(2)(A)–(C). Third, the states urged that DAPA was an abrogation of the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

The district court held that Texas has standing. It concluded that the state would suffer a financial injury by having to issue driver's licenses to DAPA beneficiaries at a loss. Dist. Ct. Op., 86 F.Supp.3d at 616–23. Alternatively, the court relied on a new theory it called "abdication

standing": Texas had standing because the United States has exclusive authority over immigration but has refused to act in that area. *Id.* at 636–43. The court also considered but ultimately did not accept the notions that Texas could sue as *parens patriae* on behalf of citizens facing economic competition from DAPA beneficiaries and that the state had standing based on the losses it suffers generally from illegal immigration. *Id.* at 625–36.

The court temporarily enjoined DAPA's implementation after determining that Texas had shown a substantial likelihood of success on its claim that the program must undergo notice and comment. *Id.* at 677. Despite full briefing, the court did not rule on the "Plaintiffs' likelihood of success on their *substantive* APA claim or their constitutional claims under the Take Care Clause/separation of powers doctrine." *Id.* On appeal, the United States maintains that the states do not have standing or a right to judicial review and, alternatively, that DAPA is exempt from the notice-and-comment requirements. The government also contends that the injunction, including its nationwide scope, is improper as a matter of law.

…

III.

The government claims the states lack standing to challenge DAPA. As we will analyze, however, their standing is plain, based on the driver's-license rationale, so we need not address the other possible grounds for standing.

…

A.

We begin by considering whether the states are entitled to "special solicitude" in our standing inquiry under *Massachusetts v. EPA.* They are.

The Court held that Massachusetts had standing to contest the EPA's decision not to regulate greenhouse-gas emissions from new motor vehicles, which allegedly contributed to a rise in sea levels and a loss of the state's coastal land. *Massachusetts v. EPA*, 549 U.S. at 526, 127 S. Ct. 1438. "It is of considerable relevance that the party seeking review here is a sovereign State and not ... a private individual" because "States are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518, 127 S. Ct. 1438.

…

In enacting the APA, Congress intended for those "suffering legal wrong because of agency action" to have judicial recourse, and the states fall well within that definition. …

… DAPA would have a major effect on the states' fiscs, causing millions of dollars of losses in Texas alone, and at least in Texas, the causal chain is especially direct: DAPA would enable beneficiaries to apply for driver's licenses, and many would do so, resulting in Texas's injury.

…

Therefore, the states are entitled to "special solicitude" in the standing inquiry. We stress that our decision is limited to these facts. In particular, the direct, substantial pressure directed at the states and the fact that they have surrendered some of their control over immigration to the federal government mean this case is sufficiently similar to *Massachusetts v. EPA*, but pressure to change state law may not be enough—by itself—in other situations.

B.

At least one state—Texas—has satisfied the first standing requirement by demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries. Under current state law, licenses issued to beneficiaries would necessarily be at a financial loss. The Department of Public Safety "shall issue" a license to a qualified applicant. TEX. TRANSP. CODE § 521.181. A noncitizen "must present ... documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." *Id.* § 521.142(a).

If permitted to go into effect, DAPA would enable at least 500,000 illegal aliens in Texas to satisfy that requirement with proof of lawful presence or employment authorization. Texas subsidizes its licenses and would lose a minimum of $130.89 on each one it issued to a DAPA beneficiary. Even a modest estimate would put the loss at "several million dollars." Dist. Ct. Op., 86 F.Supp.3d at 617.

Instead of disputing those figures, the United States claims that the costs would be offset by other benefits to the state. It theorizes that, because DAPA beneficiaries would be eligible for licenses, they would register their vehicles, generating income for the state, and buy auto insurance, reducing the expenses associated with uninsured motorists. The government suggests employment authorization would lead to increased tax revenue and decreased reliance on social services.

Even if the government is correct, that does not negate Texas's injury, because we consider only those offsetting benefits that are of the same type and arise from the same transaction as the costs. "Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant. Standing is recognized to complain that some particular aspect of the relationship is unlawful and has caused injury." "Our standing analysis is not an accounting exercise...."

…

Here, none of the benefits the government identifies is sufficiently connected to the costs to qualify as an offset. The only benefits that are conceivably relevant are the increase in vehicle registration and the decrease in uninsured motorists, but even those are based on the independent decisions of DAPA beneficiaries and are not a direct result of the issuance of licenses. Analogously, the Third Circuit held that sports leagues had standing to challenge New Jersey's decision to license sports gambling, explaining that damage to the leagues' reputations was a cognizable injury despite evidence that more people would have watched sports had betting been

allowed. *NCAA*, 730 F.3d at 222–24. The diminished public perception of the leagues and the greater interest in sports were attributable to the licensing plan but did not arise out of the same transaction and so could not be compared.

In the instant case, the states have alleged an injury, and the government predicts that the later decisions of DAPA beneficiaries would produce offsetting benefits. Weighing those costs and benefits is precisely the type of "accounting exercise," *id.* at 223, in which we cannot engage. Texas has shown injury.

…

IV.

Because the states are suing under the APA, they "must satisfy not only Article III's standing requirements, but an additional test: The interest [they] assert[ ] must be 'arguably within the zone of interests to be protected or regulated by the statute' that [they] say[ ] was violated." That "test ... 'is not meant to be especially demanding' " and is applied "in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.' "

…

Contrary to the government's assertion, Texas satisfies the zone-of-interests test not on account of a generalized grievance but instead as a result of the same injury that gives it Article III standing—Congress has explicitly allowed states to deny public benefits to illegal aliens. Relying on that guarantee, Texas seeks to participate in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes.

V.

The government maintains that judicial review is precluded even if the states are proper plaintiffs. "Any person 'adversely affected or aggrieved' by agency action ... is entitled to 'judicial review thereof,' as long as the action is a 'final agency action for which there is no other adequate remedy in a court.' "[82] "But before any review at all may be had, a party must first clear the hurdle of 5 U.S.C. § 701(a). That section provides that the chapter on judicial review 'applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.' " *Chaney*, 470 U.S. at 828, 105 S. Ct. 1649.

"[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and we will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.' " The " 'strong presumption' favoring judicial review of administrative action ... is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining, LLC v. EEOC,* —— U.S. ——, 135 S. Ct. 1645, 1651, 191 L.Ed.2d 607 (2015).

Establishing unreviewability is a "heavy burden," and "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351, 104 S. Ct. 2450, 81 L.Ed.2d 270 (1984). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345, 104 S. Ct. 2450.

The United States relies on 8 U.S.C. § 1252(g) for the proposition that the INA expressly prohibits judicial review. But the government's broad reading is contrary to *Reno v. American–Arab Anti–Discrimination Committee ("AAADC")*, 525 U.S. 471, 482, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999), in which the Court rejected "the unexamined assumption that § 1252(g) covers the universe of deportation claims—that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.' " The Court emphasized that § 1252(g) is not "a general jurisdictional limitation," but rather "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.' "

None of those actions is at issue here—the states' claims do not arise from the Secretary's "decision or action ... to commence proceedings, adjudicate cases, or execute removal orders against any alien," § 1252(g); instead, they stem from his decision to grant lawful presence to millions of illegal aliens on a class-wide basis. Further, the states are not bringing a "cause or claim by or on behalf of any alien"—they assert their own right to the APA's procedural protections. *Id.* Congress has expressly limited or precluded judicial review of many immigration decisions, including some that are made in the Secretary's "sole and unreviewable discretion," but DAPA is not one of them.

Judicial review of DAPA is consistent with the protections Congress affords to states that decline to provide public benefits to illegal aliens. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," but, through § 1621, Congress has sought to protect states from "bear[ing] many of the consequences of unlawful immigration." Texas avails itself of some of those protections through Section 521.142(a) of the Texas Transportation Code, which allows the state to avoid the costs of issuing driver's licenses to illegal aliens.

If 500,000 unlawfully present aliens residing in Texas were reclassified as lawfully present pursuant to DAPA, they would become eligible for driver's licenses at a subsidized fee. Congress did not intend to make immune from judicial review an agency action that reclassifies millions of illegal aliens in a way that imposes substantial costs on states that have relied on the protections conferred by § 1621.

…

A.

Title 5 § 701(a)(2) "preclude[s] judicial review of certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.' " *Lincoln v. Vigil,* 508 U.S. 182, 191, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) (citation omitted). For example, "an agency's decision not to institute enforcement proceedings [is] presumptively unreviewable under § 701(a)(2)." *Id.* (citation omitted). Likewise, "[t]here is no judicial review of agency action 'where statutes [granting agency discretion] are drawn in such broad terms that in a given case there is no law to apply,' " such as "[t]he allocation of funds from a lump-sum appropriation." *Vigil,* 508 U.S. at 192, 113 S.Ct. 2024.

1.

The Secretary has broad discretion to "decide whether it makes sense to pursue removal at all" and urges that deferred action—a grant of "lawful presence" and subsequent eligibility for otherwise unavailable benefits—is a presumptively unreviewable exercise of prosecutorial discretion. "The general exception to reviewability provided by § 701(a)(2) for action 'committed to agency discretion' remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise." Where, however, "an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers."

Part of DAPA involves the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deems to be low-priority illegal aliens. But importantly, the states have not challenged the priority levels he has established, and neither the preliminary injunction nor compliance with the APA requires the Secretary to remove any alien or to alter his enforcement priorities.

Deferred action, however, is much more than nonenforcement: It would affirmatively confer "lawful presence" and associated benefits on a class of unlawfully present aliens. Though revocable, that change in designation would trigger (as we have already explained) eligibility for federal benefits—for example, under title II and XVIII of the Social Security Act—and state benefits—for example, driver's licenses and unemployment insurance—that would not otherwise be available to illegal aliens.

The United States maintains that DAPA is presumptively unreviewable prosecutorial discretion because " 'lawful presence' is not a status and is not something that the alien can legally enforce; the agency can alter or revoke it at any time." The government further contends that "[e]very decision under [DAPA] to defer enforcement action against an alien necessarily entails allowing the individual to be lawfully present.... Deferred action under DAPA and 'lawful presence' during that limited period are thus two sides of the same coin."

Revocability, however, is not the touchstone for whether agency is action is reviewable. Likewise, to be reviewable agency action, DAPA need not directly confer public benefits—removing a categorical bar on receipt of those benefits and thereby making a class of persons

newly eligible for them "provides a focus for judicial review." *Chaney*, 470 U.S. at 832, 105 S.Ct. 1649.

Moreover, if deferred action meant only nonprosecution, it would not necessarily result in lawful presence. "[A]lthough prosecutorial discretion is broad, it is not 'unfettered.' " Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change. Regardless of whether the Secretary has the authority to offer lawful presence and employment authorization in exchange for participation in DAPA, his doing so is not shielded from judicial review as an act of prosecutorial discretion.

…

Under DAPA, "[d]eferred action ... means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States," a change in designation that confers eligibility for substantial federal and state benefits on a class of otherwise ineligible aliens. Thus, DAPA "provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers."

2.

"The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." In *Perales*, 903 F.2d at 1051, we held that the INS's decision *not* to grant pre-hearing voluntary departures and work authorizations to a group of aliens was committed to agency discretion because "[t]here are no statutory standards for the court to apply.... There is nothing in the [INA] expressly providing for the grant of employment authorization or pre-hearing voluntary departure to [the plaintiff class of aliens]." Although we stated that "the agency's decision to grant voluntary departure and work authorization has been committed to agency discretion by law," *id.* at 1045, that case involved a challenge to the *denial* of voluntary departure and work authorization.

Under those facts, *Perales* faithfully applied *Chaney*'s presumption against judicial review of agency inaction "because there are no meaningful standards against which to judge the agency's exercise of discretion." *Id.* at 1047. But where there is affirmative agency action—as with DAPA's issuance of lawful presence and employment authorization—and in light of the INA's intricate regulatory scheme for changing immigration classifications and issuing employment authorization, "[t]he action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Chaney*, 470 U.S. at 832, 105 S.Ct. 1649.

The United States asserts that 8 C.F.R. § 274a.12(c)(14), rather than DAPA, makes aliens granted deferred action eligible for work authorizations. But if DAPA's deferred-action program must be subjected to notice-and-comment, then work authorizations may not be validly issued pursuant to that subsection until that process has been completed and aliens have been "granted

deferred action." § 274a.12(c)(14).

Moreover, the government's limitless reading of that subsection—allowing for the issuance of employment authorizations to any class of illegal aliens whom DHS declines to remove—is beyond the scope of what the INA can reasonably be interpreted to authorize, as we will explain. And even assuming, *arguendo,* that the government does have that power, Texas is also injured by the grant of lawful presence itself, which makes DAPA recipients newly eligible for state-subsidized driver's licenses. As an affirmative agency action with meaningful standards against which to judge it, DAPA is not an unreviewable "agency action ... committed to agency discretion by law." § 701(a)(2).

B.

The government urges that this case is not justiciable even though " 'a federal court's 'obligation' ' to hear and decide cases within its jurisdiction is 'virtually unflagging.' '' We decline to depart from that well-established principle. And in invoking our jurisdiction, the states do not demand that the federal government "control immigration and ... pay for the consequences of federal immigration policy" or "prevent illegal immigration."

Neither the preliminary injunction nor compliance with the APA requires the Secretary to enforce the immigration laws or change his priorities for removal, which have expressly not been challenged. Nor have the states "merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible to participate in [a benefits program]." *Diaz,* 426 U.S. at 84, 96 S.Ct. 1883. DAPA was enjoined because the states seek an opportunity to be heard through notice and comment, not to have the judiciary formulate or rewrite immigration policy. "Consultation between federal and state officials is an important feature of the immigration system," and the notice-and-comment process, which "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making," facilitates that communication.

At its core, this case is about the Secretary's decision to change the immigration classification of millions of illegal aliens on a class-wide basis. The states properly maintain that DAPA's grant of lawful presence and accompanying eligibility for benefits is a substantive rule that must go through notice and comment, before it imposes substantial costs on them, and that DAPA is substantively contrary to law. The federal courts are fully capable of adjudicating those disputes.

VI.

Because the interests that Texas seeks to protect are within the INA's zone of interests, and judicial review is available, we address whether Texas has established a substantial likelihood of success on its claim that DAPA must be submitted for notice and comment. The United States urges that DAPA is exempt as an "interpretative rule[ ], general statement[ ] of policy, or rule [ ] of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). "In contrast, if a rule is 'substantive,' the exemption is inapplicable, and the full panoply of notice-and-comment requirements must be adhered to scrupulously. The 'APA's notice and comment exemptions must be narrowly construed.' "

A.

The government advances the notion that DAPA is exempt from notice and comment as a policy statement. We evaluate two criteria to distinguish policy statements from substantive rules: whether the rule (1) "impose[s] any rights and obligations" and (2) "genuinely leaves the agency and its decision-makers free to exercise discretion." There is some overlap in the analysis of those prongs "because '[i]f a statement denies the decisionmaker discretion in the area of its coverage ... then the statement is binding, and creates rights or obligations.' " "While mindful but suspicious of the agency's own characterization, we ... focus[ ] primarily on whether the rule has binding effect on agency discretion or severely restricts it." "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *Gen. Elec.*, 290 F.3d at 383 (citation omitted).

Although the DAPA Memo facially purports to confer discretion, the district court determined that "[n]othing about DAPA '*genuinely* leaves the agency and its [employees] free to exercise discretion,' " a factual finding that we review for clear error. That finding was partly informed by analysis of the implementation of DACA, the precursor to DAPA.

Like the DAPA Memo, the DACA Memo instructed agencies to review applications on a case-by-case basis and exercise discretion, but the district court found that those statements were "merely pretext" because only about 5% of the 723,000 applications accepted for evaluation had been denied, and "[d]espite a request by the [district] [c]ourt, the [g]overnment's counsel did not provide the number, if any, of requests that were denied [for discretionary reasons] even though the applicant met the DACA criteria...." The finding of pretext was also based on a declaration by Kenneth Palinkas, the president of the union representing the USCIS employees processing the DACA applications, that "DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria"; DACA's Operating Procedures, which "contain[ ] nearly 150 pages of specific instructions for granting or denying deferred action"; and some mandatory language in the DAPA Memo itself. In denying the government's motion for a stay of the injunction, the district court further noted that the President had made public statements suggesting that in reviewing applications pursuant to DAPA, DHS officials who "don't follow the policy" will face "consequences," and "they've got a problem."

The DACA and DAPA Memos purport to grant discretion, but a rule can be binding if it is "applied by the agency in a way that indicates it is binding," and there was evidence from DACA's implementation that DAPA's discretionary language was pretextual. For a number of reasons, any extrapolation from DACA must be done carefully.

First, DACA involved issuing benefits to self-selecting applicants, and persons who expected to be denied relief would seem unlikely to apply. But the issue of self-selection is partially mitigated by the finding that "the [g]overnment has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances)." Dist. Ct. Op., 86 F.Supp.3d at 663 (footnote omitted).

Second, DACA and DAPA are not identical: Eligibility for DACA was restricted to a younger

and less numerous population, which suggests that DACA applicants are less likely to have backgrounds that would warrant a discretionary denial. Further, the DAPA Memo contains additional discretionary criteria: Applicants must not be "an enforcement priority as reflected in the [Prioritization Memo]; and [must] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." DAPA Memo at 4. But despite those differences, there are important similarities: The Secretary "direct[ed] USCIS to *establish a process, similar to DACA*, for exercising prosecutorial discretion," *id.* (emphasis added), and there was evidence that the DACA application process *itself* did not allow for discretion, regardless of the rates of approval and denial.

Instead of relying solely on the lack of evidence that any DACA application had been denied for discretionary reasons, the district court found pretext for additional reasons. It observed that "the 'Operating Procedures' for implementation of DACA contains nearly 150 pages of specific instructions for granting or denying deferred action to applicants" and that "[d]enials are recorded in a 'check the box' standardized form, for which USCIS personnel are provided templates. Certain denials of DAPA must be sent to a supervisor for approval[, and] there is no option for granting DAPA to an individual who does not meet each criterion." Dist. Ct. Op., 86 F.Supp.3d at 669 (footnotes omitted). The finding was also based on the declaration from Palinkas that, as with DACA, the DAPA application process itself would preclude discretion: "[R]outing DAPA applications through service centers instead of field offices ... created an application process that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers" and "prevents officers from conducting case-by-case investigations, undermines officers' abilities to detect fraud and national-security risks, and ensures that applications will be rubber-stamped." *See id.* at 609–10 (citing that declaration).

…

Reviewing for clear error, we conclude that the states have established a substantial likelihood that DAPA would not genuinely leave the agency and its employees free to exercise discretion.

B.

A binding rule is not required to undergo notice and comment if it is one "of agency organization, procedure, or practice." § 553(b)(A). "[T]he substantial impact test is the primary means by which [we] look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation." "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." DAPA undoubtedly meets that test—conferring lawful presence on 500,000 illegal aliens residing in Texas forces the state to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes.

The District of Columbia Circuit applies a more intricate test for distinguishing between procedural and substantive rules. The court first looks at the " 'effect on those interests ultimately at stake in the agency proceeding.' Hence, agency rules that impose 'derivative,' 'incidental,' or 'mechanical' burdens upon regulated individuals are considered procedural, rather than substantive."

Further, "a procedural rule generally may not 'encode [ ] a substantive value judgment or put[ ] a stamp of approval or disapproval on a given type of behavior,' " but "the fact that the agency's decision was based on a value judgment about procedural efficiency does not convert the resulting rule into a substantive one." "A corollary to this principle is that rules are generally considered procedural so long as they do not 'change the *substantive standards* by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide."

Applying those considerations to DAPA yields the same result as does our substantial-impact test. Although the burden imposed on Texas is derivative of conferring lawful presence on beneficiaries, DAPA establishes " 'the *substantive standards* by which the [agency] evaluates applications' which seek a benefit that the agency [purportedly] has the power to provide"—a critical fact requiring notice and comment.

Thus, DAPA is analogous to "the rules [that] changed the substantive criteria for [evaluating station allotment counter-proposals]" in *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C.Cir.1989) (per curiam), holding that notice and comment was required. In contrast, the court in *JEM Broadcasting*, 22 F.3d at 327, observed that "[t]he critical fact here, however, is that the 'hard look' rules did not change the *substantive standards* by which the FCC evaluates license applications," such that the rules were procedural. Further, receipt of DAPA benefits implies a "stamp of approval" from the government and "encodes a substantive value judgment," such that the program cannot be considered procedural. *Am. Hosp.*, 834 F.2d at 1047.

C.

Section 553(a)(2) exempts rules from notice and comment "to the extent that there is involved ... a matter relating to ... public property, loans, grants, benefits, or contracts." To avoid "carv[ing] the heart out of the notice provisions of Section 553", the courts construe the public-benefits exception very narrowly as applying only to agency action that "clearly and directly relate[s] to 'benefits' as that word is used in section 553(a)(2)."

DAPA does not "clearly and directly" relate to public benefits as that term is used in § 553(a)(2). That subsection suggests that "rulemaking requirements for agencies managing benefit programs are ... voluntarily imposed," but USCIS—the agency tasked with evaluating DAPA applications—is not an agency managing benefit programs. Persons who meet the DAPA criteria do not directly receive the kind of public benefit that has been recognized, or was likely to have been included, under this exception.

In summary, the states have established a substantial likelihood of success on the merits of their procedural claim. We proceed to address whether, in addition to that likelihood on the merits, the states make the same showing on their substantive APA claim.

VII.

A "reviewing court shall ... hold unlawful and set aside agency action ... found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] (C)

in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Although the district court enjoined DAPA solely on the basis of the procedural APA claim, "it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court's judgment on any grounds supported by the record." Therefore, as an alternate and additional ground for affirming the injunction, we address this substantive issue, which was fully briefed in the district court.

Assuming *arguendo* that *Chevron* applies, we first "ask whether Congress has 'directly addressed the precise question at issue.' " It has. "Federal governance of immigration and alien status is extensive and complex." *Arizona v. United States*, 132 S.Ct. at 2499. The limited ways in which illegal aliens can lawfully reside in the United States reflect Congress's concern that "aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates," 8 U.S.C. § 1601(3), and that "[i]t is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy," § 1601(5).

In specific and detailed provisions, the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present and confers eligibility for "discretionary relief allowing [aliens in deportation proceedings] to remain in the country." Congress has also identified narrow classes of aliens eligible for deferred action, including certain petitioners for immigration status under the Violence Against Women Act of 1994, immediate family members of lawful permanent residents ("LPRs") killed by terrorism, and immediate family members of LPRs killed in combat and granted posthumous citizenship. Entirely absent from those specific classes is the group of 4.3 million illegal aliens who would be eligible for lawful presence under DAPA were it not enjoined. *See* DAPA Memo at 4.

Congress has enacted an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status: In general, an applicant must (i) have a U.S. citizen child who is at least twenty-one years old, (ii) leave the United States, (iii) wait ten years, and then (iv) obtain one of the limited number of family-preference visas from a United States consulate. Although DAPA does not confer the full panoply of benefits that a visa gives, DAPA would allow illegal aliens to receive the benefits of lawful presence solely on account of their children's immigration status without complying with any of the requirements, enumerated above, that Congress has deliberately imposed. DAPA requires only that prospective beneficiaries "have ... a son or daughter who is a U.S. citizen or lawful permanent resident"—without regard to the age of the child—and there is no need to leave the United States or wait ten years or obtain a visa. Further, the INA does not contain a family-sponsorship process for parents of an LPR child, but DAPA allows a parent to derive lawful presence from his child's LPR status.

The INA authorizes cancellation of removal and adjustment of status if, *inter alia*, "the alien has been physically present in the United States for a continuous period of *not less than 10 years* immediately preceding the date of such application" and if "removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(A) (emphasis added). Although LPR status is more substantial than is lawful presence,

1229b(b)(1) is the most specific delegation of authority to the Secretary to change the immigration classification of removable aliens that meet only the DAPA criteria and do not fit within the specific categories set forth in § 1229b(b)(2)–(6).

Instead of a ten-year physical-presence period, DAPA grants lawful presence to persons who "have continuously resided in the United States since before January 1, 2010," and there is no requirement that removal would result in exceptional and extremely unusual hardship. DAPA Memo at 4. Although the Secretary has discretion to make immigration decisions based on humanitarian grounds, that discretion is conferred only for particular family relationships and specific forms of relief—none of which includes granting lawful presence, on the basis of a child's immigration status, to the class of aliens that would be eligible for DAPA.

The INA also specifies classes of aliens eligible and ineligible for work authorization, including those "eligible for work authorization and deferred action"—with no mention of the class of persons whom DAPA would make eligible for work authorization. Congress " 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law,' " in part by "establishing an extensive 'employment verification system,' designed to deny employment to aliens who ... are not *lawfully present* in the United States."

The INA's careful employment-authorization scheme "protect[s] against the displacement of workers in the United States," and a "primary purpose in restricting immigration is to preserve jobs for American workers." DAPA would dramatically increase the number of aliens eligible for work authorization, thereby undermining Congress's stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country.

DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." DAPA undoubtedly implicates "question[s] of deep 'economic and political significance' that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly." But assuming *arguendo* that *Chevron* applies and that Congress has not directly addressed the precise question at hand, we would still strike down DAPA as an unreasonable interpretation that is "manifestly contrary" to the INA. *See Mayo Found.*, 562 U.S. at 53, 131 S.Ct. 704.

…

For the authority to implement DAPA, the government relies in part on 8 U.S.C. § 1324a(h)(3), a provision that does not mention lawful presence or deferred action, and that is listed as a "[m]iscellaneous" definitional provision expressly limited to § 1324a, a section concerning the "Unlawful employment of aliens"—an exceedingly unlikely place to find authorization for DAPA. Likewise, the broad grants of authority in 6 U.S.C. § 202(5), 8 U.S.C. § 1103(a)(3), and 8 U.S.C. § 1103(g)(2) cannot reasonably be construed as assigning "decisions of vast 'economic and political significance,' " such as DAPA, to an agency.

The interpretation of those provisions that the Secretary advances would allow him to grant lawful presence and work authorization to any illegal alien in the United States—an untenable position in light of the INA's intricate system of immigration classifications and employment eligibility. Even with "special deference" to the Secretary, the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization.

Presumably because DAPA is not authorized by statute, the United States posits that its authority is grounded in historical practice, but that "does not, by itself, create power," and in any event, previous deferred-action programs are not analogous to DAPA. "[M]ost ... discretionary deferrals have been done on a country-specific basis, usually in response to war, civil unrest, or natural disasters," but DAPA is not such a program. Likewise, many of the previous programs were bridges from one legal status to another, whereas DAPA awards lawful presence to persons who have never had a legal status and may never receive one.

Although the "Family Fairness" program did grant voluntary departure to family members of legalized aliens while they "wait[ed] for a visa preference number to become available for family members," that program was interstitial to a statutory legalization scheme. DAPA is far from interstitial: Congress has repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ("DREAM Act"), features of which closely resemble DACA and DAPA.

Historical practice that is so far afield from the challenged program sheds no light on the Secretary's authority to implement DAPA. Indeed, as the district court recognized, the President explicitly stated that "it was the failure of Congress to enact such a program that prompted him ... to 'change the law.' " At oral argument, and despite being given several opportunities, the attorney for the United States was unable to reconcile that remark with the position that the government now takes. …

…

Through the INA's specific and intricate provisions, "Congress has 'directly addressed the precise question at issue.' " *Mayo Found.,* 562 U.S. at 52, 131 S.Ct. 704. As we have indicated, the INA prescribes how parents may derive an immigration classification on the basis of their child's status and which classes of aliens can achieve deferred action and eligibility for work authorization. DAPA is foreclosed by Congress's careful plan; the program is "manifestly contrary to the statute" and therefore was properly enjoined.

VIII.

The states have satisfied the other requirements for a preliminary injunction. They have demonstrated "a substantial threat of irreparable injury if the injunction is not issued." *Sepulvado,* 729 F.3d at 417 (quoting *Byrum,* 566 F.3d at 445). DAPA beneficiaries would be eligible for driver's licenses and other benefits, and a substantial number of the more than four million potential beneficiaries—many of whom live in the plaintiff states—would take advantage of that opportunity. The district court found that retracting those benefits would be "substantially difficult—if not impossible," Dist. Ct. Op., 86 F.Supp.3d at 673, and the government has given

us no reason to doubt that finding.

The states have shown "that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted." *Sepulvado*, 729 F.3d at 417 (quoting *Byrum*, 566 F.3d at 445). The states have alleged a concrete threatened injury in the form of millions of dollars of losses. …

…

Although the United States cites the public interest in maintaining separation of powers and federalism by avoiding judicial and state interference with a legitimate executive function, there is an obvious difference: The interest the government has identified can be effectively vindicated after a trial on the merits. The interest the states have identified cannot be, given the difficulty of restoring the *status quo ante* if DAPA were to be implemented. The public interest easily favors an injunction.

IX.

The government claims that the nationwide scope of the injunction is an abuse of discretion and requests that it be confined to Texas or the plaintiff states. But the Constitution requires "an *uniform* Rule of Naturalization"; Congress has instructed that "the immigration laws of the United States should be enforced vigorously and *uniformly* "; and the Supreme Court has described immigration policy as "a comprehensive and *unified* system." Partial implementation of DAPA would "detract [ ] from the 'integrated scheme of regulation' created by Congress," and there is a substantial likelihood that a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states.

Furthermore, the Constitution vests the District Court with "the judicial Power of the United States." That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction.

"We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' " *Util. Air*, 134 S.Ct. at 2444 (citation omitted). Agency announcements to the contrary are "greet[ed] ... with a measure of skepticism." *Id.*

The district court did not err and most assuredly did not abuse its discretion. The order granting the preliminary injunction is AFFIRMED.

KING, Circuit Judge, **dissenting**:

Although there are approximately 11.3 million removable aliens in this country today, for the last several years Congress has provided the Department of Homeland Security (DHS) with only enough resources to remove approximately 400,000 of those aliens per year. Recognizing DHS's congressionally granted prosecutorial discretion to set removal enforcement priorities, Congress

has exhorted DHS to use those resources to "mak[e] our country safer." In response, DHS has focused on removing "those who represent threats to national security, public safety, and border security." The DAPA Memorandum at issue here focuses on a subset of removable aliens who are unlikely to be removed unless and until more resources are made available by Congress: those who are the parents of United States citizens or legal permanent residents, who have resided in the United States for at least the last five years, who lack a criminal record, and who are not otherwise removal priorities as determined by DHS. The DAPA Memorandum has three primary objectives for these aliens: (1) to permit them to be lawfully employed and thereby enhance their ability to be self-sufficient, a goal of United States immigration law since this country's earliest immigration statutes; (2) to encourage them to come out of the shadows and to identify themselves and where they live, DHS's prime law enforcement objective; and (3) to maintain flexibility so that if Congress is able to make more resources for removal available, DHS will be able to respond.

Plaintiffs do not challenge DHS's ability to allow the aliens subject to the DAPA Memorandum—up to 4.3 million, some estimate—to remain in this country indefinitely. Indeed, Plaintiffs admit that such removal decisions are well within DHS's prosecutorial discretion. Rather, Plaintiffs complain of the consequences of DHS's decision to use its decades-long practice of granting "deferred action" to these individuals, specifically that these "illegal aliens" may temporarily work lawfully for a living and may also eventually become eligible for some public benefits. Plaintiffs contend that these consequences and benefits must be struck down even while the decision to allow the "illegal aliens" to remain stands. But Plaintiffs' challenge cannot be so easily bifurcated. For the benefits of which Plaintiffs complain are not conferred by the DAPA Memorandum—the only policy being challenged in this case—but are inexorably tied to DHS's deferred action decisions by a host of unchallenged, preexisting statutes and notice-and-comment regulations enacted by Congresses and administrations long past. Deferred action decisions, such as those contemplated by the DAPA Memorandum, are quintessential exercises of prosecutorial discretion. As the Supreme Court put it sixteen years ago, "[a]t each stage [of the removal process] the Executive has discretion to abandon the endeavor, [including by] engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience."[3] Because all parties agree that an exercise of prosecutorial discretion itself is unreviewable, this case should be dismissed on justiciability grounds.

Even if this case were justiciable, the preliminary injunction, issued by the district court, is a mistake. If the Memorandum is implemented in the truly discretionary, case-by-case manner it contemplates, it is not subject to the APA's notice-and-comment requirements, and the injunction cannot stand. Although the very face of the Memorandum makes clear that it must be applied with such discretion, the district court concluded on its own—prior to DAPA's implementation, based on improper burden-shifting, and without seeing the need even to hold an evidentiary hearing—that the Memorandum is a sham, a mere "pretext" for the Executive's plan "not [to] enforce the immigration laws as to over four million illegal aliens." *Texas v. United States,* 86 F.Supp.3d 591, 638 (S.D.Tex.2015) [hereinafter Dist. Ct. Op.]. That conclusion is clearly erroneous. The majority affirms and goes one step further today. It holds, in the alternative, that the Memorandum is contrary to the INA and substantively violates the APA. These conclusions are wrong. The district court expressly declined to reach this issue without

further development, *id.* at 677, and the limited briefing we have before us is unhelpful and unpersuasive. For these reasons … I dissent.

Notes:

1. One of the concerns in the Fifth Circuit's opinion is that it calls into question other forms of discretionary grants of work authorization found in 8 C.F.R. § 274a.12. The Fifth Circuit's opinion states that granting work authorization without express authority in the INA exceeds the agency authority. There are many categories of people who are granted deferred action status by the DHS and traditionally these people have been able to see work authorization under the longstanding regulations.

2. For an on-line symposium debating some of the issues presented in this litigation both before and after the Supreme Court ruling see http://www.scotusblog.com/case-files/cases/united-states-v-texas/.

3. Unlike the media coverage, the lawsuit does not truly address the power of the President to use executive discretion to confer work authorization nor to grant reprieve from removal proceedings. The litigation technically is a review of a preliminary injunction and findings about APA procedural requirements.

Chapter 2: Immigration Power: Finding the Dividing Lines

Page 125-26 (§ 2.01[B][1]): Replace the current paragraph with the following paragraph:

On a typical day in fiscal year 2014, the agency processed 1,206,234 passengers and pedestrians, 70,334 truck, rail and sea containers, and 1,333 apprehensions for illegal entry. *See* U.S. Customs and Border Protection, *On a Typical Day in Fiscal Year 2014, CBP, available at* http://www.cbp.gov/newsroom/stats/typical-day-fy2014.

Page 127 (§ 2.01[B][1]): Replace the link under the chart with the following link:

http://www.cbp.gov/newsroom/stats/previous-year/national-workload-stats.

Pages 128-49 (§ 2.01[B] and [C]): Various pages in this section discuss the I-94 card. At the time the book was drafted, the I-94 was a paper card. Now, however, it is electronic. *See* http://www.cbp.gov/travel/international-visitors/i-94-instructions. Noncitizens who need to prove their legal-visitor status—to employers, schools/universities or government agencies—can access their CBP arrival/departure record information online at https://i94.cbp.dhs.gov/I94/request.html.

CBP inspectors may make errors in the electronic entry record. Attorneys and clients may have to return to the point of inspection and apply for formal corrections to the I-94 entry records. As we will see in Chapter 3, the individual who enters with a nonimmigrant visa has to prove both lawful entry and maintenance of status to change, extend or adjust status. While it may not seem important, the admissions process and these new electronic records are of vital importance to individuals.

Page 131 (§ 2.01 PROBLEM 2-1: ESSENTIAL MATERIALS): Insert these additional materials to the essential materials.

In re Pena, 26 I. & N. Dec. 613 (B.I.A. 2015).

INA § 101(a)(13); 8 U.S.C. § 1101(a)(13)

8 C.F.R. § 1.2 Definition of "arriving alien"

Page 132 (NOTES AND QUESTIONS) Insert the following after Note 1:

In this recent case, the Board of Immigration Appeals, a division of the Department of Justice, issued a precedent decision that binds immigration courts and is usually viewed as controlling administrative authority by the immigration agencies within the Department of Homeland Security. The case contains a discussion of when a lawful permanent resident can be deemed to be making an "entry." How might Joseph Brown in Problem 2.1 use this authority?

IN RE PENA

26 I. & N. Dec. 613 (B.I.A. 2015)

COLE, Board Member:

In a decision dated November 14, 2011, an Immigration Judge found the respondent inadmissible under sections 212(a)(6)(C)(i), (ii)(I), and (7)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6)(C)(i), (ii)(I), and (7)(A)(i)(I) (2006), and ordered him removed from the United States. The respondent has appealed from that decision. The appeal will be sustained and the record will be remanded to the Immigration Judge.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of the Dominican Republic. The record reflects that he was married to a United States citizen who filed a visa petition on his behalf. Based on the September 9, 1996, approval of the visa petition, the respondent filed an application for adjustment of status on December 1, 1999. He indicated on his application that he had no prior arrests. However, at an interview in connection with his application, the Government notified the respondent that its records showed that he had been charged with passport fraud by the Department of State passport office on December 28, 1998. The respondent was asked to provide documentation regarding the final disposition of these charges, which he submitted. On June 5, 2000, the respondent's application for adjustment of status was granted and he was accorded lawful permanent resident status.

On May 24, 2010, the respondent sought to reenter the United States after a trip abroad. At that time he gave a sworn statement in an interview with immigration officials. When asked whether he had ever been arrested, the respondent first replied that he had been arrested in 1998 for applying for a United States passport using the birth certificate and Social Security card of another person. When asked why he indicated that he had never been arrested on his adjustment of status application, the respondent said he thought he had not been arrested in relation to the passport application because he had voluntarily appeared at the passport office after learning from his wife that he was being investigated. He stated that he was fingerprinted at the office and released. He further explained that he was neither charged with nor convicted of passport fraud or any other offense.

After the respondent's interview on May 24, 2010, the Department of Homeland Security ("DHS") issued a notice to appear charging the respondent as inadmissible based on his alleged fraud and prior ineligibility for adjustment of status. [Editors Note: The DHS began regular removal proceedings – not expedited removal under § 235.] …[T] he Immigration Judge found that the respondent made a false claim to United States citizenship by knowingly purchasing an illegally obtained birth certificate and Social Security card and that he did not disclose his arrest in this regard in his adjustment of status application.

Based on these findings, the Immigration Judge concluded that the respondent's permanent resident status was unlawfully obtained and that he could therefore be deemed an "arriving alien" and charged under section 212(a) of the Act. He then found the respondent inadmissible as

charged. The Immigration Judge further found the respondent ineligible for relief from removal and ordered him removed from the United States.

II. ISSUE

The threshold issue in this case is whether the respondent, who was granted lawful permanent resident status, can be charged in removal proceedings under section 212(a) of the Act as an arriving alien seeking admission, since he does not fall within any of the exceptions listed in section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C) (2012), which allow for an alien lawfully admitted for permanent residence to be regarded as seeking admission to the United States.

We must resolve the question whether a returning lawful permanent resident can be treated as an arriving alien based on an allegation that he acquired his status unlawfully. We conclude that an alien returning to the United States who has been granted lawful permanent resident status cannot be regarded as seeking admission and may not be charged with inadmissibility under section 212(a) of the Act if he does not fall within any of the exceptions in section 101(a)(13)(C) of the Act.

III. ANALYSIS

The respondent argues that he has not been properly charged and that these proceedings should have been terminated. He first contends that he should not have been charged as an arriving alien when he returned to the United States because his eligibility for adjustment of status had not been determined at the time of his return. He asserts that if the DHS suspected he was inadmissible at the time he adjusted his status, he should have been allowed to enter as a returning resident and charged with a ground of deportability in section 237(a) of the Act, 8 U.S.C. § 1227(a) (2012).

. . .

A. Returning Lawful Permanent Residents as Arriving Aliens

In deciding whether the respondent is an arriving alien, we examine the language of the statute to determine whether Congress expressed a plain and unambiguous intent that aliens in the respondent's circumstances should be considered applicants for admission under section 101(a)(13)(C) of the Act. . . .

The plain language of section 101(a)(13)(C) indicates that an alien who does not fall within one of the statutory exceptions and who presents a colorable claim to lawful permanent resident status is not to be treated as seeking an admission and should not be regarded as an arriving alien. *See also Matter of Huang*, 19 I&N Dec. 749, 754 (BIA 1988) (stating that the Government has the burden to show that an alien should be deprived of his lawful permanent resident status if he has a colorable claim to returning resident status).

In addition to the plain language of the statute, we find further support for our position in our case law interpreting the "*Fleuti* doctrine," which predated section 101(a)(13)(C) of the Act. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). For example, in *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976), we addressed whether a lawful permanent resident's attempted return constituted an "entry" where her original admission for permanent residence was unlawful because it involved a false claim. In that case, we had to decide first whether the proper forum in which to adjudicate

the lawfulness of an original admission was a deportation proceeding or an exclusion proceeding. We held that the alien was not making an entry within the meaning of the Act and, therefore, that the proper forum for adjudicating the lawfulness of her original admission was a deportation proceeding.….

. . .Our decision in *Rangel* comported with the Supreme Court's recognition of the constitutional right of due process that is owed to lawful permanent residents. *See Landon v. Plasencia*, 459 U.S. 21, 30−32 (1982) (citing *Chew v. Colding*, 344 U.S. 590 (1953)).

Prior to the 1996 enactment of section 101(a)(13)(C) of the Act, the proper forum for determining whether a lawful permanent resident had unlawfully obtained his status would have been a deportation proceeding, rather than an exclusion proceeding, unless he was making an "entry." Applying the same rationale to the current law, an alien in the respondent's circumstances should be charged under section 237(a) of the Act, rather than section 212(a), unless he can be regarded as seeking an admission under section 101(a)(13)(C).

In light of the plain statutory language of section 101(a)(13)(C) of the Act and the above-mentioned decisions of the Supreme Court and the Board, we believe that the long-established principles regarding the constitutional rights of lawful permanent residents are equally applicable to returning lawful permanent residents today as they were in the past. . . . Therefore, we conclude that a returning lawful permanent resident who does not fall within one of the exceptions in section 101(a)(13)(C) of the Act cannot be regarded as seeking admission to the United States.

B. Application to Respondent

The Immigration Judge found that the respondent was never "lawfully admitted" as a permanent resident because he had obtained his status through fraud. . . .the Immigration Judge adjudicated the issue of the lawfulness of the respondent's status and found that it had been fraudulently obtained. He therefore found that the respondent was never a lawful permanent resident and thus could be treated as an "arriving alien."

The question whether a returning lawful permanent resident can be regarded as an arriving alien and charged under section 212(a) of the Act was not before us in *Matter of Koloamatangi* because the alien, who was suspected of having procured his status by fraud, was charged with deportability under section 237(a) of the Act. He was therefore afforded the due process owed to him as one who "was facially and procedurally in lawful permanent resident status." *Matter of Koloamatangi*, 23 I&N Dec. at 549. His ineligibility for the relief he sought was determined after the Immigration Judge resolved the issue of the unlawfulness of his permanent resident status, not prior to the commencement of proceedings. *See id*.; *see also Matter of Wong*, 14 I&N Dec. 12 (BIA 1972). We therefore conclude that *Matter of Koloamatangi* is not controlling in this case.

Because the respondent is a lawful permanent resident who does not fall within one of the exceptions in section 101(a)(13)(C) of the Act, he should not have been regarded as seeking admission to the United States. Therefore, he cannot be charged under section 212(a) of the Act, notwithstanding any questions regarding the lawfulness of his status. However, the DHS is not precluded from charging an alien such as the respondent under section 237(a) of the Act. The

grounds of deportability contain a provision that is clearly applicable to an alien who allegedly obtained his lawful permanent resident status through fraud or misrepresentations. *See* section 237(a)(1)(A) of the Act (providing that "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable"); *see also* section 212(a)(6)(C) of the Act.

…

IV. CONCLUSION

We conclude that the respondent, a lawful permanent resident who does not fall within one of the exceptions in section 101(a)(13)(C) of the Act, cannot be regarded as an arriving alien. Therefore, the charges brought by the DHS under section 212(a) of the Act should not have been sustained. Accordingly, we will sustain the respondent's appeal and remand the record to give the DHS an opportunity to properly charge him under section 237(a) of the Act. If necessary, the Immigration Judge may then determine whether the respondent lawfully obtained his permanent resident status and allow him to apply for any relief from removal for which he may be eligible.

…

DISSENTING OPINION: Roger A. Pauley, Board Member

I believe that the respondent was properly charged under section 212(a) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a) (2012). As an ostensible returning lawful permanent resident, he did not need to be charged under section 237(a) of the Act, 8 U.S.C. § 1227(a) (2012), because the Immigration Judge found at his removal proceeding that he was never lawfully admitted for permanent residence.

…

The majority explains that such a person must be charged under section 237(a) of the Act because he does not fall into any of the six enumerated categories at section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C) (2012), allowing for a returning lawful permanent resident to be charged as an applicant for admission. I disagree.

The majority's position embodies a stark violation of the bedrock principle of statutory construction that a term, in this case "lawfully admitted for permanent residence," appearing in the same statute should be given an identical construction and not be accorded two different meanings.

In that regard, we have consistently held, and the courts of appeals have uniformly endorsed our interpretation, that the phrase "lawfully admitted for permanent residence" means that the alien must have been in substantive compliance with the immigration laws. …

Significantly, Congress chose to use the same term in section 101(a)(13)(C) of the Act, which is applicable to returning lawful permanent residents, demonstrating that Congress intended that only lawful permanent residents with valid status are subject to its regime. It would have been easy for Congress to preface section 101(a)(13)(C) of the Act with language asserting the

construction that the majority would engraft on that section, such as that an alien "admitted for lawful permanent residence, *whether or not such status was rightly conferred*," shall not be regarded as seeking admission unless one or more of the six enumerated exceptions applies. However, by using the very term it defined in section 101(a)(20) of the Act (indeed, the same subsection!), Congress clearly expressed its intent that the definition therein applies. …

. . .

Fortunately, not much damage will result from the majority's erroneous decision. As the majority opinion observes, the Department of Homeland Security ("DHS") may charge a returning lawful permanent resident who it believes has wrongly obtained his or her status as having been inadmissible at the time of adjustment of status. *See* section 237(a)(1)(A) of the Act. If such charge is upheld, *Matter of Koloamatangi* will apply to render the alien ineligible for relief to the extent relief is sought based on lawful permanent resident status. However, the majority decision does have a modicum of practical import because an alien charged under section 237(a) (as opposed to section 212(a)) may seek a waiver of deportability under section 237(a)(1)(H) of the Act, if he or she is subject to removal as having been inadmissible at the time of admission because of fraud. That section contains more generous provisions allowing for such a waiver than does the comparable provision at section 212(i) of the Act.
To the extent that the majority confers an advantage on the class of lawful permanent residents who wrongly obtained their status—as compared to the class of lawful permanent residents who obtained their status rightfully but are charged as applicants for admission under section 101(a)(13)(C)—I find it an unlikely expression of congressional intent. The former class, which includes the respondent in this case, generally represents a less deserving group inasmuch as they ordinarily will have obtained their status by fraud or other wrongful means. …

[Editors' Note: We will further explore the issues of inadmissibility, removability and eligibility for waivers in Chapters 5, 6 and 7.]

Page 133 (§ 2.01 Note 2) Add the following after the final paragraph in Note 2:

Even U.S. citizens have a diminished expectation of privacy at the border. While some courts feel that all searches as seizures at the border regarding laptops and other electronic devices must adhere to a standard of reasonableness, others disagree and feel that it is within the border patrol officers' rights to search and seize anything at the border. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). See the discussion of expectations at the border below in the materials surrounding Problem 2-6.

Page 140 (§ 2.01[C]): This part of chapter two discusses the power of the DHS to use expedited removal at the border, and includes an excerpt from *Meng Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003). In that case, the Ninth Circuit Court affirmed a district court rejection of habeas jurisdiction to challenge an expedited removal order even where the individual alleged the removal was based on an erroneous legal determination. Ms. Li had a valid tourist visa when she sought admission but the border official thought she was actually entering to accept a temporary position. The case was later vacated as moot because the

court believed that Ms. Li was no longer subject to the effects of the expedited removal order because more than five years had passed since her exclusion.

The Ninth Circuit has revisited the issue and held that a limited scope of review of an expedited removal is possible. In *Smith v. CBP*, 741 F.3d 1016 (9th Cir. 2014), the court held that a court may review whether a CBP officer is acting within his or her statutory and regulatory authority. Robert Pauw, who represented Mr. Smith, brought a habeas challenge to the use of expedited removal where a Canadian sought admission as a tourist. The plaintiff argued that Canadians are not subject to expedited removal under 8 C.F.R. § 235.3(b)(2)(i). While the Ninth Circuit agreed that they could review this issue, the panel concluded that Mr. Smith was not seeking admission as a bona fide tourist because he had professional photographic equipment and other material with him that evidenced an intent to work in the United States. The case is discussed in more depth at 19 Bender's Immigration Bulletin 199 (Feb. 15, 2014).

By contrast, see *Shunaula v. Holder*, 732 F.3d 143 (2d Cir. 2013). In that case the court held that it lacked jurisdiction to hear a noncitizen's due process challenge to his 1997 expedited removal order.

For an interesting blog on this issue, see David A. Isaacson, *Can Some Returning Nonimmigrants Challenge an Expedited Removal Order in Court? How Recent Case Law May Provide a Window of Opportunity* (Mar. 5, 2011), http://www.cyrusmehta.com/news.aspx?SubIdx=ocyrus201135115520.

The latest statistics from DHS indicate that expedited removal orders accounted for 163,000, or 39 percent, of all removals in fiscal year 2012. DHS, Immigration Enforcement Actions: 2012, http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf. This document also contains a lot of good statistics on other enforcement actions, such as the number of detentions and removals.

Page 153 [§ 2.01[D][1]): Add the following after the "Expedited Removal Process Under the 1996 Act" Chart:

In two cases federal district courts have continued to reject challenges to expedited removal proceedings. In *M.S.P.C. v. U.S. Customs & Border Prot.* 60 F. Supp. 3d 1156; 2014 U.S. Dist. LEXIS 164782 (D.N.M. 2014), the federal district court rejected the argument of a woman who was apprehended within nine miles of the border. The woman, a citizen of El Salvador, objected to the constitutionality of using expedited removal procedures, as she had entered the United States. The district court rejected that argument, holding that Congress had constitutionally limited a newly arriving person to the procedures controlled by the executive branch and that she had insufficient ties to the United States to warrant greater due process protection.

Similarly, in *Rodriguez v. U.S. Customs & Border Prot.*, 2014 U.S. Dist. LEXIS 131872 (W.D. La. Sept. 18, 2014), the district court ruled that Mr. Rodriguez could not seek a stay of his removal and a review of his expedited removal order in regular removal proceedings.

Counsel in both cases are pursuing appellate review of the constitutional analysis rejecting the due process challenges.

Page 155 (§ 2.02): Add after the paragraph starting with "While judicial review of the border…"

Recently, people have been acting out against these stops and questioning their constitutionality. The following videos highlight people who are refusing to answer questions or comply with Border Patrol requests: https://www.youtube.com/watch?v=hk0Uhrkb-Vg, https://www.youtube.com/watch?v=1Ea_VMY0UnA, and https://www.youtube.com/watch?v=FFjrPnaWenc.

Page 155 (§ 2.02): Add before the paragraph starting with "Earlier in the chapter you met…"

A federal district court recently ruled that absent a reasonable and articulable suspicion, the officers at the border cannot seize and search electronic devices. *United States v. Saboonchi*, 990 F. Supp. 2d 536 (D. Md. 2014). This modifies the rule previously followed that all items were subject to search and seizure at the border because the importance of the protection of national security outweighed any citizen's (or noncitizen's) right to privacy.

Page 188 (§ 2.02): Add the following at the end of Note 3, just before Note 4:

In *In re Pena*, 26 I. & N. Dec. 613 (B.I.A. 2015), discussed above in Problem 2-1, a returning lawful permanent resident was inappropriately treated as an "arriving alien" and inappropriate charged with inadmissibility grounds instead of deportation grounds. The BIA primarily relied on statutory interpretation but the constitutional due process rights of Mr. Pena also factored into the BIA's decision.

Pages 210-34 (§ 2.04): This section discusses how far into the territorial United States Border Patrol officers can act. For a recent case on this issue, see *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668 (6th Cir. 2013). In that case a group of individuals alleged that they were illegally stopped, searched, and/or detained by Border Patrol officers in Ohio based upon their Hispanic appearance, race and ethnicity. The court of appeals rejected the government's sovereign immunity claim and allowed the case to go forward.

Page 232 (§ 2.04[A]): Note 4 discusses the detention of children. This issue has become even more pressing as the number of unaccompanied children crossing the U.S-Mexico border from Central America has skyrocketed. Between October 2013 and June 2014, over 50,000 unaccompanied children have been apprehended on the U.S.-Mexican border. Fernanda Santos, *Border Centers Struggle to Handle Onslaught of Young Migrants*, N.Y. Times, June 18, 2014, http://www.nytimes.com/2014/06/19/us/border-centers-struggle-to-handle-onslaught-of-children-crossers.html. A June 20, 2014 White House fact sheet on the U.S. government's response to the crisis is at http://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-unaccompanied-children-central-america. Among other things the administration announced that it is opening additional detention facilities. For a critique of this approach, see http://www.humanrightsfirst.org/press-release/response-surge-unaccompanied-minors-and-families-us-mexican-border-must-reflect.

The CBP reported that in fiscal year 2014, the agency apprehended 66,000 unaccompanied minors, primarily from Central America, and nearly 67,000 adults with very young children.

Children are not subject to regular expedited removal under INA § 235(b); 8 U.S.C. § 1225(b), but instead are taken into custody and turned over to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services for detention. Adults traveling with their children can be subjected to expedited removal, but only after an opportunity to make a claim for protection and to request a credible fear interview. The federal government opened several "family detention centers" to detain the parents and young children as a part of the inspection process. *See, e.g.*, Julia Preston, *Hope and Despair as Families Languish in Texas Immigration Centers*, N.Y. Times, June 14, 2015, http://www.nytimes.com/2015/06/15/us/texas-detention-center-takes-toll-on-immigrants-languishing-there.html

Stephen Manning has produced a detailed and illustrated narrative reporting on the experiences of lawyers and students who volunteered to provide legal assistance to detain women and children. *See* https://innovationlawlab.org/the-artesia-report/.

Attorneys who volunteer at the detention centers have found that one of their first challenges is trying to establish the scope and role of attorneys in the context of expedited removal adjudication and the narrow scope of inquiry in immigration proceedings to review a credible fear determination.

On July 7, 2016, the Ninth Circuit reaffirmed the twenty-year-old settlement in *Reno v. Flores*, finding that the federal government may not detain children except as required under the conditions of the settlement. The ruling applies to children who might have been arrested with a parent. The Ninth Circuit did not order the wholesale release of the parents, however, creating a difficult challenge for DHS to secure the safe release of children if they are unwilling to release a parent. *Flores v. Lynch*, July 7, 2016 link to opinion: https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf.

In Chapter 6, we will discuss some of the special immigration procedures initiated in response to the influx of children and the release of thousands of adults with children who were admitted into the United States but placed in regular removal proceedings under INA§ 240; 8 U.S.C. § 1229a. In Chapter 7 we visit some of the forms of relief available to children, in particular, a path to permanent residence called "special immigrant juvenile status." In Chapter 8 we explore asylum and other humanitarian protections.

Page 232 (§ 2.04[A]): Add a new note 5:

5. When is Mandatory Detention Limited? As we have seen, Congress appeared to mandate detention for several classes of noncitizens in INA § 236; 8 U.S.C. § 1226(c). On its face, the statute appears to deprive immigrant detainees of a right to a bond hearing. Litigants have chipped away at the statutory rigidity and have found successful arguments that ensure a right to a bond hearing before an immigration judge.

On June 20, 2016, the Supreme Court granted a writ of certiorari to review a class action that mandated bond hearings and required a case-by-case assessment of flight risk and dangerousness to authorize continued detention. *Jennings v. Rodriguez*, No. 15-1204, review of *Rodriguez v Robbins*, 804 F.3d 1060 (9th Cir. 2015). In this litigation the Ninth Circuit found that noncitizens

are presumptively entitled to bond review after six months of detention, and that if incarceration continued after twelve more months, the individual should be presumptively entitled to bond review and consideration of alternatives to detention every six months. The Ninth Circuit opinion described the issue as one of great importance and noted that for ten years the court had considered many challenges to detention in civil immigration proceedings. The Ninth Circuit cited statistics to note that approximately 429,000 noncitizens a year are detained and that roughly 33,000 individuals are in immigration detention on any given day. 804 F.3d at 1065.

The Ninth Circuit opinion provides a useful historical and legal summary of the litigation challenging immigration detention. An excerpt follows:

> **Rodriguez v. Robbins**, 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, June 20, 2016.
>
> A. Civil Detention
> "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755 (1987). Civil detention violates the Due Process Clause except "in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." Zadvydas, 533 U.S. at 690 (citations omitted). Consistent with these principles, the Supreme Court has—outside of the immigration context—found civil detention constitutional without any individualized showing of need only when faced with the unique exigencies of global war or domestic insurrection. See Ludecke v. Watkins, 335 U.S. 160 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Moyer v. Peabody, 212 U.S. 78(1909). And even in those extreme circumstances, the Court's decisions have been widely criticized. … In all contexts apart from immigration and military detention, the Court has found that the Constitution requires some individualized process and a judicial or administrative finding that a legitimate governmental interest justifies detention of the person in question.
> Accordingly, the state may detain a criminal defendant found incapable of standing trial, but only for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [the] capacity [to stand trial] in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). At all times, the individual's "commitment must be justified by progress toward that goal." *Id.* … Further, although the state may detain sexually dangerous individuals even after they have completed their criminal sentences, such confinement must "take[] place pursuant to proper procedures and evidentiary

standards." *Kansas v. Hendricks*, 521 U.S. 346, 357(1997). To "justify indefinite involuntary commitment," the state must prove both "dangerousness" and "some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* at 358 (collecting cases).

Similarly, the Court has held that pretrial detention of individuals charged with "the most serious of crimes" is constitutional only because, under the Bail Reform Act, an "arrestee is entitled to a prompt detention hearing" to determine whether his confinement is necessary to prevent danger to the community. *Salerno*, 481 U.S. at 747. Further, "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id.; see also Schall v. Martin*, 467 U.S. 253, 263 (1984) (upholding a statute that "permits a brief pretrial detention based on a finding of a 'serious risk' that an arrested juvenile may commit a crime before his return date").

In addition, the Court has held that incarceration of individuals held in civil contempt is consistent with due process only where the contemnor receives adequate procedural protections and the court makes specific findings as to the individual's ability to comply with the court order. *See Turner v. Rogers*, 564 U.S. 431 (2011). If compliance is impossible—for instance, if the individual lacks the financial resources to pay court-ordered child support—then contempt sanctions do not serve their purpose of coercing compliance and therefore violate the Due Process Clause. *See id.*

Early cases upholding immigration detention policies were a product of their time. *See Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952) (McCarthy Era deportation of communists); *Ludecke v. Watkins*, 335 U.S. 160, 68 S. Ct. 1429, 92 L. Ed. 1881 (1948) (removal of German enemy aliens during World War II); *Wong Wing v. United States*, 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896) (Chinese exclusion). Yet even these cases recognized some limits on detention of non-citizens pending removal. Such detention may not be punitive—Congress may not, for example, impose sentences of "imprisonment at hard labor" on non-citizens awaiting deportation, *Wong Wing*, 163 U.S. at 235—and it must be supported by a legitimate regulatory purpose. Under these principles, the Court authorized the "detention or temporary confinement" of Chinese-born non-citizens "pending the inquiry into their true character, and while arrangements were being made for their deportation." *Id.* The Court also upheld executive detention of enemy aliens after the cessation of active hostilities because deportation is "hardly practicable" in the midst of war, and enemy aliens' "potency for mischief" continues "even when the guns are silent." *Ludecke*, 335 U.S. at 166. Similarly, the Court approved detention of communists to limit their "opportunities to

hurt the United States during the pendency of deportation proceedings." *Carlson*, 342 U.S. at 538. The Court recognized, however, that "purpose to injure could not be imputed generally to all aliens subject to deportation." *Id.* at 538. Rather, if the Attorney General wished to exercise his discretion to deny bail, he was required to do so at a hearing, the results of which were subject to judicial review. *Id.* at 543.

More recently, the Supreme Court has drawn on decades of civil detention jurisprudence to hold that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. Although the state has legitimate interests in "ensuring the appearance of aliens at future immigration proceedings" and "protecting the community," post—removal period detention does not uniformly "'bear[] [a] reasonable relation to the purpose for which the individual [was] committed.'" *Id.* (second and third alterations in original) (quoting *Jackson*, 406 U.S. at 738). To avoid constitutional concerns, the Court construed 8 U.S.C. § 1231(a)(6), the statute governing post—removal period detention, to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689. Detention beyond that point requires "strong procedural protections" and a finding that the non-citizen is "specially dangerous." *Id.* at 691.

Soon after *Zadvydas*, the Court rejected a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. *Demore*, 538 U.S. at 517-18. While affirming its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," *id.* at 526, the Court emphasized that detention under§ 1226(c) was constitutionally permissible because it has "a definite termination point" and typically "lasts for less than . . . 90 days," *id.*at 529.

Since *Zadvydas* and *Demore*, our court has "grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing."… As we recognized… "prolonged detention without adequate procedural protections would raise serious constitutional concerns."…*see also Rodriguez II*, 715 F.3d at 1144 (discussing "the constitutional concerns raised by prolonged mandatory detention"); *Singh*, 638 F.3d at 1208 ("The private interest here—freedom from prolonged detention—is unquestionably substantial."); *Diouf II*, 634 F.3d at 1085 ("When the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater

procedural safeguards are therefore required.") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335(1976)). We have therefore held that non-citizens detained pursuant to § 1226(a) and § 1231(a)(6) are entitled to bond hearings before an IJ when detention becomes prolonged.

While the government falsely equates the bond hearing requirement to mandated release from detention or facial invalidation of a general detention statute, our precedents make clear that there is a distinction "between detention being authorized and being necessary as to any particular person." *Casas*, 535 F.3d at 949. Bond hearings do not restrict the government's legitimate authority to detain inadmissible or deportable non-citizens; rather, they merely require the government to "justify denial of bond" with clear and convincing "evidence that an alien is a flight risk or danger to the community." *Singh*, 638 F.3d at 1203. And, in the end, the government is required only to establish that it has a legitimate interest reasonably related to continued detention; the discretion to release a non-citizen on bond or other conditions remains soundly in the judgment of the immigration judges the Department of Justice employs.

Prior decisions have also clarified that detention becomes "prolonged" at the six-month mark. In *Zadvydas*, the Supreme Court recognized six months as a "presumptively reasonable period of detention." 533 U.S. at 701. By way of background, the Court noted that in 1996, Congress had "shorten[ed] the removal period from six months to 90 days." *Id.* at 698. The Court then explained:

> While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months.

Consequently, for the sake of uniform administration in the federal courts, we recognize that period. … (citation omitted); *see also Clark v. Martinez*, 543 U.S. 371, 386 (2005) (applying "the 6—month presumptive detention period" the Supreme Court "prescribed in *Zadvydas*"); *cf. Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-79 (9th Cir. 2006) (discussing the Patriot Act's requirement that "detention of suspected terrorists or other threats to national security" be reviewed "at six month intervals"). Following *Zadvydas*, we have defined detention as "prolonged" when "it has lasted six months and is expected to continue more than minimally beyond six months." *Diouf II*, 634

> F.3d at 1092 n.13. At that point, we have explained, "the private interests at stake are profound," and "the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial." *Id.* at 1092.

The Ninth Circuit affirmed the requirement of bond hearings and the requirement that immigration judges must consider less restrictive alternatives. The case was initially remanded to the lower court, but now with the grant of certiorari the litigation will move to the Supreme Court.

Chapter 3: Nonimmigrant Visas and Maintaining Status in the United States

General Note: The U.S. Department of State (DOS) has created a new electronic version of the Foreign Affairs Manual (FAM). The new FAM is at https://fam.state.gov/default.aspx#. A crosswalk exists at that website to allow users to go from old FAM cites to new FAM cites. We have not updated FAM citations in Chapter 3. We recommend that you use the DOS' crosswalk to find the current citation.

Page 250 (§ 3.01[A]): Change the following:

See 8 C.F.R. §§ 214.2(h)(16), (e)(4), (l)(16), (o)(13), (p)(15); 22 C.F.R. § 214.15.

To read instead:

See 8 C.F.R. §§ 214.2(h)(16), (e)(5), (l)(16), (o)(13), (p)(15).

Page 250 (§ 3.01[A][5]): Change the following in the middle of the page:

Paragraph (F)(1) reads:

"…who is a bona fide student qualified to pursue as full courts of stayed and who week to enter …"

To read instead:

"…who is a bona fide student qualified to pursue a full course of study and seeks to enter …"

Page 252 (§ 3.01[B]): Change the following in the middle of the page:

"With very few exceptions, a nonimmigrant will receive a new I-94 form every time he or she enters the country."

To read instead:

"Although the CBP now maintains all I-94 forms online, with very few exceptions, a nonimmigrant will still receive a new I-94 form every time he or she enters the country. It is now up to the foreign national to check the CBP website at http://www.cbp.gov/ for a copy of that document."

Page 255 (§ 3.02[A][1]): Under the Visa Waiver Program (VWP), a noncitizen from an approved participating nation may travel to the United States to engage in B-2 or B-1 activities for up to ninety days without a visa. Since publication, the list of countries that can participate in

the VWP has changed. For a current list of participating countries and additional information about VWP go to: http://travel.state.gov/content/visas/english/visit/visa-waiver-program.html.

Any person seeking to use the VWP to travel to the United States must first apply for authorization through the Electronic System for Travel Authorization (ESTA). ESTA is an automated web-based system used by the Department of Homeland Security to determine an individual's eligibility to travel to the United States without a visa for tourism or business. For more information go to https://esta.cbp.dhs.gov/esta/.

Page 257 (§ 3.02[B]): Delete "Most students are limited to a total of 12-month postgraduate training; however, in science and technology fields, Congress have authorized stays up to 29 months." In its place, insert the following: "Most students are limited to a total of 12 months of postgraduate training. In May 2016, a revised STEM optional practical training program took effect. Under the new regulations, F-1 students with qualifying STEM degrees can hold OPT for up to 36 months (i.e., an initial period of 12 months plus 24 months of STEM OPT).

Page 258 (§ 3.02[B][1]): Add the following to the end of the introductory paragraph about F-1 students:

According to U.S. Immigration and Customs Enforcement (ICE), in February 2015, the total number of active nonimmigrant students in the U.S. in F-1 and M-1 and their dependents exceeded 1.13 million. This figure represents a 3% increase in admission since January 2014. *See* ICE, General Summary Quarterly Report, "SEVIS by the Numbers" (Feb 2015), at http://www.ice.gov/sites/default/files/documents/Document/2015/by-the-numbers.pdf.

Change "an additional 17 months of OPT" in the final paragraph to "an additional 24 months of OPT."

Page 261 (§ 3.02[C]): This subsection contains information about various nonimmigrant visa categories that allow foreign nationals to work in the United States (i.e., H-1B, L-1, TN, etc.). As you read about these categories, consider how the increasing numbers of foreign national students in the United States may affect demand on H-1B numbers and the hiring practices of U.S. employers seeking qualified candidates to fill positions that may be in short supply in the local U.S. work force.

Page 261 (§ 3.02[C][1]): Add the following at the bottom of the page, at the end of the paragraph about H-1B workers:

All H-1B spouses and accompanying children hold H-4 designation. Effective May 26, 2015, certain H-4 spouses may apply for employment authorization. 80 Fed. Reg. 10,284 (Feb. 25, 2015). Accompanying children are not allowed to work in this status.

Page 262 (§ 3.02[C][2]): At the end of the paragraph about H-2A and H-2B workers, add:

See also La. Forestry Ass'n v. Sec'y U.S. Dep't of Labor, 745 F.3d 653 (3d Cir. 2014).

Page 270 (§ 3.02[H][2]): For additional information about U visas, see National Employment Law Project, *U Visas for Victims of Workplace Crime: A Practice Manual*, at http://www.nelp.org/site/publications?issue=immigrants_and_work.

Page 286 (§ 3.03[B][3]): At the top of the page, delete the paragraph beginning "The countries that participate in the VWP as of the fall of 2012 include: …" and replace with the following paragraph:

The countries that participate in the VWP as of the fall of 2015 include: Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man). https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html.

Page 286 (§ 3.03[B][3]): After the paragraph that starts "Read 8 C.F.R. §217.2(a) for definition …", insert the following new paragraph:

In December 2015, the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 was signed into law as part of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2988. This law establishes new eligibility requirements for VWP travel, including travel restrictions. Among other requirements, all VWP travelers had to have an electronic passport to travel to the U.S. by April 1, 2016. In addition, travelers who have been to Iran, Iraq, Libya, Somalia, Sudan, Syria, or Yemen on or after March 1, 2011 (with limited exceptions) or who are nationals of these countries are no longer eligible for VWP travel to the U.S. The new law exempts travelers preforming military service in the armed forces of a VWP country or performing official duties in a full time capacity in the employment of a VWP country government. DHS may also waive exclusion from the VWP program if it would be in the national security or law enforcement interests of the U.S. See generally https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program.

Page 289 (§ 3.03[B]): After the section on domestic or household servants, add the following:

SAME SEX COUPLES

On June 26, 2013, the U.S. Supreme Court overturned Section 3 of the Defense of Marriage Act. *United States v. Windsor*, 2013 U.S. LEXIS 4921 (2013). The Court held that restricting the interpretation of "marriage" and "spouse" to apply only to heterosexual couples violated the equal protection clause. After *Windsor* the Obama administration took steps quickly to ensure that federal government benefits were implemented for same sex couples. For example, same sex couples are now treated as heterosexual couples are treated when applying for immigration benefits.

Same sex spouses and their children are now eligible for nonimmigrant visa derivative status such as H-4 and L-2 status. Similarly, a U.S. citizen or lawful permanent resident in a same sex marriage may file a Form I-130 immigrant petition for alien relative on behalf of his or her same sex spouse. See Chapter 4 for further discussion.

The Supreme Court took *United States v Windsor* one step further when it issued its decision in *Obergefell v. Hodges*, 2015 U.S. LEXIS 4250 on June 26, 2015. In *Obergefell*, the Supreme Court essentially nullified any ban on same-sex marriage in the United States.

Consider what this change means for Manuel's partner, Carlos, in Problem 3-1 on page 274.

Page 318 (§ 3.03[C]): Renumber subsection "[2] Deemed Export Compliance" as "[3] Deemed Export Compliance" and add the following just before it:

[2] Moving to a New Job Site and the LCA Requirement

On April 9, 2015, the USCIS Administrative Appeals Office (AAO) issued a precedent decision: *In re Simeo Solutions LLC,* 26 I. & N. Dec. 542 (AAO 2015). The USCIS followed this decision with a policy memo issued on May 21, 2015, concerning job site changes for H-1B visa holders. http://www.uscis.gov/news/alerts/uscis-draft-guidance-when-file-amended-h-1b-petition-after-simeio-solutions-decision. According to *Simeo,* an employer must now file an amended H-1B petition with the USCIS when a new LCA is required due to a change in the H-1B employee's worksite. The decision stated:

1) When H-1B employees change their place of employment to a worksite location that requires employers to certify a new LCA, this change may affect the employee's eligibility for H-1B; it is therefore a material change for purposes of 8 C.F.R. §§214.2(h)(2)(i)(E) and (11)(i)(A) (2014).

2) When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA.

An amended petition would not be required if the H-1B employee was moving to a new location within the same metropolitan statistical area (MSA) or "area of intended employment" defined at 20 C.F.R. §655.715, and the previously certified LCA was posted at the new work location.

This decision and the subsequent policy memo represent a change in USCIS position. Before *Simeo,* an H-1B employee could change job sites without filing an amended H-1B petition as long as a new LCA was obtained before the employee changed worksites and as long as the change in worksite was the only change to the previously approved employment.

Why would a change to the worksite only be considered a material change in the terms and conditions of employment sufficient to require an amended petition? What about "roving employees" or temporary assignment? See 8 C.F.R. §§ 655.715 and 735 for references to short term placement and non-worksite location requirements.

What happens to the foreign national's status in the United States if he or she moves to a new work site before a new LCA and amended petition can be filed with the USCIS? Or without ever notifying the USCIS of the move?

Page 322 (§ 3.03[D][2]): Change the following in the last paragraph:

"… U.S. employers can file their petitions with the USCIS during the first two weeks of April …"

To read:

"the first five business days of April …"
Change:

"…the USCIS randomly selects and notifies …"

To read:

"… the USCIS conducts a computer generated random lottery to select the petitions that will be processed and notifies …"

Page 323 (§ 3.03[D][2]): Add the following to the end of the paragraph that starts "What do …" :

"What kind of action can an employee or new hire do when a lottery is announced?"

Page 324 (§ 3.03[D][2]): Chart 1 should be updated as follows:

2012: On June 12, 2012, the USCIS announced that all available H1B cap numbers for FY2013 had been distributed.

2013: For the first time since 2008, the USCIS reached the statutory limit of 65,000 H1B cap petitions for fiscal year 2014 within the first week of the filing period (April 1-6, 2013). The advance degree exemption (i.e., H 1B cap cases filed for U.S. advanced degree holders) was also reached during this period. On April 7, 2013, the USCIS used a computer-generated random selection process (a/k/a "lottery") to select the petitions that would be adjudicated. Petitions not selected during the lottery process were returned. The final tally of petitions received was approximately 124,000.

2014: The filing window for fiscal year 2015 opened on April 1, 2014. On April 7, 2014, the USCIS announced that sufficient H-1B cap petitions had been received during the preceding week to meet the statutory limit of 65,000 for standard cap cases and 20,000 for advanced degree exempt cases. Due to the number of petitions received, it took the USCIS longer than anticipated to complete the data entry required to conduct the "lottery." The lottery was conducted on April 10, 2014. As of June 27, 2014, the USCIS was still returning petitions to U.S. employers that had

not been selected for adjudication through the lottery process. This year, the USCIS estimated that approximately 172,000 petitions had been received during the first four days of April.

2015: In anticipation of another lottery, the USCIS announced that premium processing would be suspended for all H-1B cap subject cases so the necessary data entry could be completed for the computer generated lottery process. When the filing window closed on April 7, the USCIS had received 266,000 petitions from U.S. employers.

2016: Similar to the preceding year, the USCIS announced that premium processing would be suspended for all H-1B cap cases so that necessary data entry could be completed for the computer generated lottery process. When the filing window closed on April 7, 2016, the USCIS has received nearly 233,000 H-1B petitions, including petitions filed for the advanced degree exemption. On July 8, 2016, the Service announced that it had returned all non-selected petitions to U.S. employers. https://www.uscis.gov/news/alerts/uscis-returns-unselected-fiscal-year-2017-h-1b-cap-subject-petitions.

For a useful chart listing the number of H-1B petitions filed each year, see U.S. Chamber of Commerce, "H-1B Petition Data FY1992-Present," https://web.archive.org/web/20160222174414/http://immigration.uschamber.com/uploads/sites/400/USCC-USCIS-H1B-petition-data-and-cap-dates-FY92-FY16_2.pdf.

Page 331 (§ 3.03[G]): Add the following just before the paragraph that starts "As you start the next problem,…"

What if Ed held E-3 classification instead of H-1B? Would Sherry be eligible to work in the United States as his accompanying spouse? What nonimmigrant visa classification would she hold in the United States?

Page 331 (§ 3.03[G]): Add the following new Note 3 just before subsection H:

3. H-4 Work Authorization. In May 2014, the Department of Homeland Security proposed to extend work authorization to certain H-4 spouses of H-1B principal nonimmigrant visa holders. 79 Fed. Reg. 26,886 (May 12, 2014). Work authorization would be limited to H-4 spouses of H-1B nonimmigrants whose employers have started the permanent resident process for them. For example, an H-4 spouse would be eligible for work authorization if the H-1B principal nonimmigrant was the beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140) or had been granted an extension of his or her authorized period of H-1B stay in the United States under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as amended by the 21st Century Department of Justice Appropriations Authorization Act. The new regulations were published on February 25, 2015. 80 Fed. Reg. 10,284 (Feb. 25, 2015). The USCIS received the first applications on May 26, 2015.

How would this change affect Sherry Kit, Ed's fiancée from Sydney?

Page 345 (§ 3.03[H]): Add the following at the end of Note 1:

In November 2014, President Obama issued several employment-based executive actions. Implementation of the H-4 EAD discussed earlier was among them. Also included was a call for guidance on the specialized knowledge standard. The USCIS issued a new L-1B guidance memo on March 24, 2015. Public comments were accepted through May 8, 2015, with the memo to take effect August 31, 2015. The new memo, *L-1B Adjudications Policy*, PM-602-0111 (Mar. 24, 2015), can be found at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/2015-0324-Draft-L-1B-Memo.pdf.

Chapter 4: Immigrants and Paths to Permanent Resident Status

General Note: The U.S. Department of State (DOS) has created a new electronic version of the Foreign Affairs Manual (FAM). The new FAM is at https://fam.state.gov/default.aspx#. A crosswalk exists at that website to allow users to go from old FAM cites to new FAM cites. We have not updated FAM citations in Chapter 3. We recommend that you use the DOS' crosswalk to find the current citation.

Page 401 (§ 4.02[B]): Add the following at the bottom of the page, right before subsection [1]:

On June 26, 2013, the U.S. Supreme Court overturned Section 3 of the Defense of Marriage Act. *United States v. Windsor*, 2013 U.S. LEXIS 4921 (2013). The Court held that restricting the interpretation of "marriage" and "spouse" to apply only to heterosexual couples violated the equal protection clause. After *Windsor* the Obama administration took steps quickly to ensure that federal government benefits were implemented for same sex couples. For example, same sex couples are now treated as heterosexual couples are treated when applying for immigration benefits. A U.S. citizen or lawful permanent resident in a same sex marriage may now file a Form I-130 immigrant petition for alien relative on behalf of his or her same sex spouse. *See generally* USCIS, *Same-Sex Marriages FAQ, at* http://www.uscis.gov/family/same-sex-marriages; U.S. Dep't of State, *U.S. Visas for Same-Sex Spouses FAQ, at* http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf.

On June 26, 2015, the U.S. Supreme Court issued *Obergefell v. Hodges*, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015), which takes *Windsor* one step further by clarifying that states cannot ban same sex marriages and must recognize same sex marriages performed in other states.
What other family-based immigrant preference categories are affected by this change in law?

Page 417 (§ 4.02[B][2]): Add the following to Note 2:

The Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 7083, 128 Stat. 5, 568, changed the definition of "orphan" in INA § 101(b)(1)(F); 8 U.S.C. § 1101(b)(1)(F). When adopting from a non-Hague Convention country, it is not required that both parents travel to or during the adoption. Only one parent must have seen and observed the child before or during adoption proceedings. Also, the child will now receive a certificate of citizenship, not lawful permanent resident status, following admission.

Page 419 (§ 4.02[B][2]): Add the following as Note 3, just before *In re Li*:

3. USCIS Policy Memorandum on Hague Convention Adoptions. On December 23, 2013, USCIS issued a policy memorandum outlining the criteria for determining habitual residence in the United States for children from Hague Convention countries. The memo (PM 602-0095) is at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Habitual-Residence-PM-Interim.pdf.

The policy memo provides guidance to meet the habitual residence requirement when it is not possible to obtain the habitual residence certificate from the child's country of origin. Providing a certificate of habitual residence for a child from a country that is a party to the Hague Convention (other than the United States) has become an issue in adoption proceedings and immigrant petitions even when the child is physically in the United States and was not paroled in. Petitioners submitting an I-130 immigrant visa petition to USCIS on behalf of their children pursuant to INA § 101(b)(1)(E); 8 U.S.C. § 1101(b)(1)(E) must provide the certificate of habitual residence or satisfy requirements showing attempts to obtain it if the child's country of origin is a signatory to the Hague Convention.

The petitioning adoptive parent must have two years of legal and physical custody of the child before submitting the I-130. Some families have faced lengthy separations while one parent remains with the child abroad and the other works and lives in the United States.

The USCIS policy memo also added a new section to the Adjudicator's Field Manual (AFM), Chapter 21.4(d)(5)(G). The AFM section provides guidance to officers when the country of origin does not issue certificates of habitual residence. The adoptive parent(s) may show that they meet the intent, actual residence, and notice criteria as described in the policy memo.

Pages 441-42 (§ 4.02[D][1], [2]):

"CLPR" should be read as "Conditional Lawful Permanent Resident." Similarly, "CLPR Spouse" should be read as "Conditional Lawful Permanent Resident Spouse" or "Conditional LPR" spouse.

Page 446 (§ 4.02[D][5]):

"CLPR Children" should be read as "Conditional Lawful Permanent Resident Children" or "Conditional LPR Children.

Page 448 (§ 4.02[D]): Insert the following just before Problem 4-3:

[7] Violence Against Women Act (VAWA)

Page 450 (§ 4.02[D]) Delete the following text at the top of page 450:

Self-Petitioning — Under VAWA, certain spouses and children of abusive U.S citizens and LPRs may self-petition for immigrant classification. These self-petitioners may now seek classification as immediate relatives or FB preference immigrants without the abuser's knowledge.

> The self-petitioner must be legally married to the abuser when the petition is filed, but need not be living with the U.S. citizen or permanent resident. The legal termination of the marriage (due to divorce, death, or annulment) after the petition has been filed will not be the basis for denial or revocation of the petition.

The self-petitioner must also show good moral character and that deportation from the United States would result in extreme hardship to her or her dependents**.**

Evidence for Wavier of Joint Petition…

Insert the following:

Self-Petitioning — Under VAWA, certain spouses and children of abusive U.S citizens and LPRs may self-petition for immigrant classification. These self-petitioners may now seek classification as immediate relatives or family-based preference immigrants without the abuser's knowledge.

The noncitizen spouse self-petitioner must show that her marriage to the U.S. citizen or permanent resident spouse was entered into in good faith. However, the noncitizen spouse remains eligible to file a self-petition even if one of the following has occurred:

- the spouses are no longer living together, and the marriage is no longer viable;
- the marriage was terminated within the past two years, and the self-petitioner can demonstrate a "connection" between the termination of the marriage and the domestic violence;
- the marriage, which the applicant believed was a legal marriage, was never legitimate solely because of the bigamy of the abuser;
- the abuser died within the past two years (U.S. citizen abusers only);
- the abuser lost or renounced citizenship or permanent resident status within the past two years "related" or "due" to an incident of domestic violence; or
- the abuser obtained legal permanent residence status after separation from the self-petitioner but before divorce.

The self-petitioner must also show good moral character. *See generally* Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 41.05 (rev. ed. 2013).
Evidence for Waiver of Joint Petition …

Page 452 (§ 4.02[D]): Add the following as new subsections [8] and [9], just before subsection [E]:

[8] The Adam Walsh Act

The Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act or AWA), Pub. L. No. 109-248, amended INA § 204(a)(1); 8 U.S.C. § 1154(a)(1) and INA § 101(a)(15)(K); 8 U.S.C. § 1101(a)(15)(K) to bar a U.S. citizen or lawful permanent resident convicted of a "specified offense against a minor" from filing an I-130, I-600, or I-129F petition for his or her family member unless "no risk" would be posed by the U.S. citizen or permanent resident to his or her family member. See AWA §111 for the definition of "specified offense against a minor." Further developments in this area include three BIA cases published in May 2014: (1) *In re Aceijas-Quiroz*, 26 I. & N. Dec. 294 (BIA 2014) (BIA has no jurisdiction to review "no risk" determinations made by USCIS); (2) *In re Introcaso*, 26 I. & N. Dec. 304 (BIA 2014) (the petitioner bears the burden of proving whether or not the offense was a "specified offense against a minor"); and (3) *In re Jackson and Erandio*, 26 I. & N. Dec. 314 (BIA 2014) (the AWA applies to all convictions made by a U.S. citizen at any time, even if the convictions occurred before enactment of the AWA).

[9] Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) refers to certain noncitizen children in the United States who may have been abused, abandoned, or neglected by a parent. SIJS is an immigrant classification allows such children to apply for lawful permanent resident status. Section 7.01[M] discusses this classification in more detail.

Page 454 (§ 4.02[E][1]): Page 454 includes selections from the Visa Bulletin for October 2012. The Visa Bulletin is published monthly by the U.S. Department of State. For copies of the most recently published visa bulletin, as well as to access archives for past Visa Bulletins, go to http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html.

Page 458 (§ 4.02[E][2]): Add the following note beneath Table Three for the Philippines:

Chart 4: Comparing Visa Bulletin Movement, Tables One, Two and Three have been revised and can be found in the Course Materials folder at https://webcourses.lexisnexis.com for Chapter 4.

Page 459 (§ 4.02[E][3]): Add question (5) after (4):

(5) Xie, a national of the People's Republic of China, is the beneficiary of an approved I-140 for EB-2 classification. In September 2013, the priority date for China EB-3 advanced ahead of the priority date for China EB-2. If Xie had been classified under EB-3, he would have been able to file an application to adjust status. Can Xie take advantage of this situation? Can he convert his EB-2 petition to EB-3 and file an adjustment application? What if the priority date for EB-2 then moves ahead of the priority date for EB-3? What happens to Xie's application**?**

Note: The authors have created a Visa Bulletin/Category game. Course materials and instructions can be found in the Course Materials folder at https://webcourses.lexisnexis.com for Chapter 4.

Page 479 (§ 4.02[F]): Add the following to the end of Note 1 to Problem 4-4:

Pages 466-78 excerpt a law review article that summarizes how businesses and employees navigate the labor certification and visa petition strategies. It is not unusual for an employee to push her employer for minimum requirements that include an advanced degree or a bachelor's degree plus five years of related experience so that classification as a second preference employment based immigrant can be sought at the I-140 stage of the permanent resident process. In the excerpt that appears in the text, the employee is a national of the People's Republic of China. She believes that the second preference classification (i.e., "EB-2") will be an advantage to her; it will reduce the time that she will be required to wait between the filing of the PERM or alien labor certification and the filing of her Form I-485 application to adjust status. Historically, the second preference immigrant visa category has advanced more quickly than the third preference category of employment based immigrant visas (i.e., EB-3). This year, however, has been an exception. For the first several months of FY2015, the EB-3 category advanced to October 1, 2012, approximately 30 months ahead of EB-2, which languished in early 2009 for several months until the EB-3 category retrogressed in June 2014 to October 1, 2006.

Before EB-3 retrogressed, many employers filed new I-140 petitions with the USCIS asking for workers to be reclassified from EB-2 to EB-3, so these employees could file I-485 applications to adjust status. The priority date for EB-3 then retrogressed, and these new I-485 applicants will now be required to wait for a longer period of time before their I-485 applications may be adjudicated.

As immigration counsel to AZ-Tech, working on an application for permanent resident status for an employee who is a Chinese national, what advice would you have given to the company? To the foreign national? Does the advice that you give depend on whether you are talking to the employer or to the employee? Or, which party you may be representing, i.e. the employer or employee?

Page 501 (§ 4.03[B]): Add the following to the end of Note 2 to Problem 4-9:

If Carlos cannot find a teaching position, what options would you recommend to him? Do DOMA and *Obergefell v. Hodges*, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015)change his situation? What about the diversity green card lottery? See page 394 n.1 and discussion regarding the diversity immigrant category. Can Carlos apply for the diversity lottery?

Page 520 (§ 4.03[D]): Add the following just after the *In re Ho* excerpt, right before § 4.04:

In addition to *In re Ho*, there are three other EB-5 precedents: *In re Soffici*, 22 I. & N. Dec. 158 (INS Assoc. Comm. 1998); *In re Izummi*, 22 I. & N. Dec. 169 (INS Assoc. Comm. 1998); and *In re Hsiung*, 22 I. & N. Dec. 201 (INS Assoc. Comm.1998).

Page 524 (§ 4.04[C][3]): Add the following at the end of subsection [3], just before subsection [4]:

See Chapter 5 pages 626-33 (§ 5.05[D][1]) for additional discussion concerning travel with advance parole. *In re Arrabally and Yerrabelly*, 25 I. & N. Dec. 771 (BIA 2012).

Page 525 (§ 4.04[C]): Add the following as a new paragraph just before Problem 4-12:

Since the 2008 memo issued by Acting Assoc. Dir. Neufeld, additional protection has been extended to the beneficiaries of F-2A petitions who subsequently seek to adjust status under the F-2B category. On November 21, 2013, USCIS issued guidance on the handling of certain family based automatic conversion and priority date retention requests pending the U.S. Supreme Court's ruling on *Mayorkas v Cuella de Osorio*. See USCIS Policy Memo, *Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on* Mayorkas v. Cuellar de Osorio, PM-602-0094 (Nov. 21, 2013), *at* http://www.uscis.gov/sites/default/files/files/nativedocuments/PM-602-0094_Family-Based_Priority_Date_Retention_Final_Memo.pdf. Referring to *In re Wang*, 25 I. & N. Dec. 28 (BIA 2009), this guidance provides that where a petitioner files an F-2B petition on behalf of a former derivative beneficiary of a previously approved F-2A petition, the original priority date may be retained if the requirements of 8 CFR § 204.2(a)(4) or § 204.2(h)(2) are met. This guidance also allows for the automatic conversion of the beneficiary's classification from F-2A to F-2B, allowing the beneficiary of a previously approved F-2A petition to file an application for adjustment of status under the F-2B category without having to file a second I-130 petition. On June 9, 2014, the Supreme Court reversed and remanded the *Osorio* case to the Ninth Circuit for reconsideration pursuant to the BIA's interpretation of INS § 203(h)(3); 8 U.S.C. § 1153(h) in *In re Wang*. *Scialabba v. Cuellar De Osorio*, 2014 U.S. LEXIS 3991 (U.S. June 9, 2014).

Also of interest concerning adjustment of status for family members is *In re Akram*, 25 I. & N. Dec. 874 (BIA 2012) (holding that a noncitizen admitted to the United States as a K-4 nonimmigrant may not adjust status without demonstrating immigrant visa eligibility and availability as the beneficiary of an I-130 alien relative petition filed by his or her stepparent, the U.S. citizen K petitioner; further holding that a K-4 derivative child of a K-3 nonimmigrant who married the U.S. citizen K petitioner after the K-4 reached the age of 18 is ineligible to adjust status because he or she no longer qualified as the petitioner's "stepchild.").

Page 534 (§ 4.04[C][9]): Add the following at the end of the section, just before Problem 4-13:

In addition to foreign nationals eligible to adjust status under INA § 245(i), you may encounter foreign nationals eligible to adjust status under other special programs, such as the Cuban Adjustment Act of 1966 (CAA). The CAA allows nationals and citizens of Cuba who were inspected and admitted or paroled into the United States after January 1, 1959 and who have been physically present in the United States for at least one year to adjust status. The spouses or unmarried children of such Cubans may also apply to adjust status, regardless of nationality, if they were inspected and admitted or paroled into the United States after January 1, 1959 and have been physically present in the United States. The abused spouse or child of a CAA-eligible

spouse or parent is also eligible to adjust status under the CAA. Congress has affirmed the availability of the CAA until there is a democratic government in Cuba. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (enacted as Division C of Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 606(a), 110 Stat. 3009, 3009-695).*See generally* Memorandum from INS Commissioner Doris Meissner to all INS field offices, *Eligibility for Permanent Residence Under the Cuban Adjustment Act Despite Having Arrived at a Place Other Than a Designated Port-of-Entry* (Apr. 19, 1999), *reprinted as* Attachment A to Memorandum from Tracy Renaud, USCIS Chief, Office of Field Operations, to USCIS field leadership, File No. HQ 70/10.10, *Processing of Initial Parole or Renewal Parole Requests Presented by Natives or Citizens of Cuba to USCIS Field Offices* (Mar. 4, 2008), http://www.uscis.gov/sites/default/files/files/pressrelease/CubanParole_4Mar08.pdf.

Certain Haitian nationals are also able to adjust status under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), enacted as tit. IX of Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-538. Although the qualifying period for principal HRIFA applicants ended on March 31, 2000, dependents may still adjust status if they meet eligibility requirements. See USCIS, Green Card for a Haitian Refugee, at http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-haitian-refugee.

Chapter 5: Inadmissibility: In Every Context

Page 540 (§ 5.01): Add to the end of § 5.01, just before § 5.02:

The opening scenario in § 5.01 introduces a number of grounds of inadmissibility. Chapter 5 will discuss the points where inadmissibility occurs in the immigration process as well as grounds, exceptions, and waivers. The U.S. Department of State provides annual data for various immigrant and nonimmigrant visa applications at http://travel.state.gov/content/visas/english/law-and-polcy/statistics/annual-reports/report-of-the-visa-office-2014.html. Table XX provides information about immigrant and nonimmigrant visa applications in fiscal year 2014 and findings of inadmissibility by INA section. The chart also shows the number of applicants who were able to overcome the ground of ineligibility and receive a visa.

An individual may be found inadmissible on more than one ground. While most denials per ground of inadmissibility are in the hundreds or even thousands, in fiscal year 2014 more than 1.7 million applicants were denied nonimmigrant visas under INA § 214(b); 8 U.S.C. § 1184(b) based on immigrant intent. *Id*.

Page 545 (§ 5.02[B]): Add the following to the end of Note 1:

A lot can turn in these cases on the credibility of the noncitizen's testimony. In *Diaz-Perez v. Holder*, 750 F.3d 961 (8th Cir. 2014), DHS questioned Diaz-Perez about his entry to the United States. Diaz-Perez originally stated he entered the United States on foot without inspection several years before. Later, in immigration proceedings, Diaz-Perez testified he told DHS he entered by car and, as a passenger, was inspected and admitted when a CBP officer asked only the driver (his mother-in-law) if she was a U.S. citizen and then waved the car through. The immigration judge found discrepancies in the testimony of Diaz-Perez as well as his mother-in-law and held that he had not been admitted. The BIA agreed, as did the Eighth Circuit.

In May 2015, the Fifth Circuit held that an individual who was "waved-through" at a port of entry was admitted. *Rubio v. Lynch*, 2015 U.S. App. LEXIS 8449 (5th Cir. May 21, 2015). Ramiro Tula Rubio, a U.S. lawful permanent resident and a citizen of Mexico, initially was found ineligible for cancellation of removal because he was not "admitted in any status" before his criminal offense. The Fifth Circuit found that Rubio was physically "waved in" by a U.S. immigration officer when he first entered the United States in 1992 as a four-year-old child riding as a passenger in a car. The court cited Areguillin and *Quilantan*, BIA cases in which persons who were "waved in" were found to have been admitted.

Note that Rubio's conviction occurred several years following a grant of permanent residence and he was found inadmissible while attempting to return to the United States following a trip to Mexico after accuring more than ten years as a permanent resident. Hypotheticals in Chapters 6 and 7 discuss the consequences of grounds of inadmissibility to longterm permanent residents.

Courts differ on what constitutes an "admission." For example, in *Medina-Nunez v. Lynch*, 2015 U.S. App. LEXIS 9503 (9th Cir. June 8, 2015), the court held that an individual who had been accepted into the Family Unity program had not been admitted to the United States. For that reason, the person was not eligible for cancellation of removal for lawful permanent residents.

If an individual used false documentation, he or she may be subsequently found removable and require a waiver. Consider INA § 212(i); 8 U.S.C. § 1182(i), a waiver of inadmissibility due to fraud and misrepresentation, and INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (inadmissible at entry). The former is discussed in Chapter 5. The latter is discussed at the end of Chapter 5 and the start of Chapter 6.

Those who enter the United States through a false claim to citizenship will be found to have entered without inspection. Consider defenses available when the false claim was made before or after IIRAIRA. For example, was the person a minor? Did she believe she was a U.S. citizen? Was it possible to retract the statement? The current language in INA § 212(a)(6)(C)(ii)(I); 8 U.S.C. § 1182(a)(6)(C)(ii)(I) applies to all such claims whether made knowingly or not.

Page 568 (§ 5.03[B]): Add the following as a new paragraph after the paragraph ending with "MaterialSupportFS-26Sep07.pdf" and before the paragraph starting with "INA § 212(d)(3)(B)(i) provides that a waiver…"

In *Ramadan*, the State Department initially denied Ramadan's H-1B visa application under the material support bar due to his financial contributions to a charity that provided financial support to a terrorist group. In another case arising in the context of removal proceedings, the Second Circuit held in *Ay v. Holder*, 743 F.3d 317 (2d Cir. 2014), that Ay provided material support to a terrorist organization, but remanded to allow the BIA to "address in a precedential decision" whether an exception to the ground of inadmissibility for duress is implicit in INA § 212(a)(3)(B)(iv)(VI); 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). In the earlier removal proceedings, the immigration judge found that Ay gave food several times and clothing at least one time to members of Kurdish terrorist groups, one of which might have been an organization designated by the U.S. government as a terrorist organization. Ay argued he supplied the food and clothing under duress.

Multiple issues arise under the Supreme Court's decision in *Kerry v. Din*, 2015 U.S. LEXIS 3918 (U.S. June 15, 2015).
The *Kerry* case concerns Mr. Kanishka Berashk, a citizen of Afghanistan, who is married to U.S. citizen Fauzia Din. The couple has been apart, waiting for the issuance of Mr. Berashk's immediate relative immigrant visa, since 2006. Mr. Berashk was a clerk in the Afghan Ministry of Education. His visa application was denied based on INA § 212(a)(3)(B); 8 U.S.C. § 1182(a)(3)(B) as a foreign national who engaged in "terrorist activities." The Department of State provided no further explanation regarding the reasons for denying Mr. Berashk's visa. The Ninth Circuit held that the Department of State had to provide a facially legitimate and bona fide basis for denying the visa. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013). The government appealed to the Supreme Court.

The Supreme Court upheld the non-reviewability of consular decisions. The Supreme Court held that the U.S. Constitution does not require the U.S. government to provide an explanation for denying the visa application of a spouse of a U.S. citizen. Justices Kennedy and Alito stated that even if a U.S. citizen had a constitutional right to live with his or her spouse, it is enough for the U.S. citizen spouse to be advised of the section of the Immigration and Nationality Act under which the foreign national spouse was excluded.

Justices Scalia, Roberts, and Thomas stated that there is no constitutional interest for U.S. citizens to live in the United States with their spouses. (When you study some of the waivers available for inadmissibility in this chapter, consider how that ruling might affect an argument that a U.S. citizen spouse suffers extreme hardship when his or her foreign national spouse cannot live with them in the United States.)

Also note that Ms. Din, the U.S. citizen spouse of the foreign national denied the visa, brought the case. Compare her claim that her due process liberty interest was violated to the U.S. citizens who sued in *Kleindeinst*.

Page 572 (§ 5.03[D][1]): Add the following to the end of Note 2; just before subsection [2]:

Chapters 2 and 6 discuss enforcement priorities by Immigration and Customs Enforcement. Generally, an overstay in nonimmigrant status (without a criminal offense or other aggravating factors), was not a high priority. Compare the hypotheticals about Sherry Kit, who entered on the visa waiver, to what happened to Sarah Jane McCrohan, an Australian citizen who overstayed less than one day in the United States and was detained by U.S. authorities for three weeks when she tried to leave New York for Ottawa, Canada, headed to the Australian Embassy to sort out her visa situation. Elise Foley, *24-Year-Old Pleads With Immigration Agency to Let Her Fly Back to Australia*, Huffington Post, April 15, 2015, http://www.huffingtonpost.com/2015/04/15/immigration-detention_n_7074032.html..

Page 578 (§ 5.03[E][2]): Add the following to the end of subsection [2], just before subsection [F]:

In Chapter 4, you learned about the requirements of a bona fide marriage when applying for immigration status based on a marital relationship. Persons found to have committed marriage fraud under INA § 204(c); 8 U.S.C. § 1154(c) are ineligible for an immigration benefit through marriage. In April 2015, in *In re Christo*, 26 I. & N. Dec. 537 (AAO 2015), the USCIS Administrative Appeals Office found that a beneficiary who submitted a false marriage certificate with an I-130 immigrant visa petition did not commit marriage fraud. USCIS was deciding the beneficiary's employment-based green card case and reviewed the previous marriage-based immigration case. The AAO read the plain language of INA § 204(c) and found that by submitted the false marriage certificate, the beneficiary did not "enter into" or "attempt or conspire" to enter into a marriage. The AAO found that the beneficiary might be subject to INA § 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i) when applying for adjustment of status.

Pages 587-99 (§ 5.03[G][5] and [6]): Delete the discussion of *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), and *Jean-Louis v. AG of the United States*, 582 F.3d 462 (3d Cir. 2009), and replace with *In re Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015), excerpted in § 5.03[G][7] below.

Page 599 (§ 5.03[G][7]): Add the following at the end of subsection [7], just before subsection [H]:

The Supreme Court decided two cases in 2013 concerning the categorical approach. First, in *Moncrieffe v. Holder*, 2013 U.S. LEXIS 3313 (U.S. Apr. 23, 2013), a long-time permanent resident pleaded guilty under a Georgia state law for possession of marijuana with intent to distribute. The law provided leniency for first time offenders. The amount of marijuana involved was 1.3 grams. However, he was ordered deported pursuant to an aggravated felony (illicit trafficking in a controlled substance). The BIA affirmed removability and the Fifth Circuit rejected Moncrieffe's petition for review.

The Supreme Court found that when using the categorical approach to determine if an offense under state law matches an offense in the INA, a court must determine if the state law fits into the generic definition of the federal offense for immigration purposes. The Georgia statute in *Moncrieffe* included a provision that if an individual shared a small amount of marijuana without remuneration, the offense would be treated as simple possession. The Court found that examining the conviction alone, without other documentation, does not "necessarily" provide facts that would match the offense to one under the federal law requiring removal.

Second, *Descamps v. United States*, 2013 U.S. LEXIS 2276 (U.S. June 20, 2013), used the categorical approach in both the sentencing (the original subject of *Taylor v. United States)* and immigration contexts. Courts use the categorical approach to analyze whether past convictions of an individual in federal court are classified violent felonies, including burglary, arson or extortion, under the Armed Career Criminal Act (ACCA). Three prior convictions for certain violent felonies may increase sentencing for federal defendants under the ACCA. Descamps was convicted of possession of a firearm. The government argued Descamps should receive an enhanced sentence under the ACCA because of his past state convictions.

The categorical approach compares the elements of the past convictions with the elements of the generic crime. Statutes that are the same or narrower than the generic offense qualify under the ACCA. Prior convictions under divisible statutes require that the modified categorical approach be used in the analysis. The Court found that the modified categorical approach does not apply to statutes that contain indivisible sets of elements. Limiting the categorical approach in the analysis of divisible statutes means the judge would not look to the record of conviction, the actual conduct by the defendant. This may result in a finding that a conviction does not result in removability.

Moncrieffe, *Descamps*, and the categorical and modified categorical approaches generally are all discussed in more depth in Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 71.05[6].

In April 2015, then-Attorney General Holder vacated former Attorney General Mukasey's opinion in *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), summarized in § 5.03[5] above. Below are relevant excerpts from the 2015 opinion of the Attorney General:

IN RE SILVA-TREVINO

26 I. & N. Dec. 550 (Att'y Gen. 2015)

On November 7, 2008, Attorney General Mukasey issued an opinion in this matter vacating the August 8, 2006, decision of the Board of Immigration Appeals and remanding respondent's case for further proceedings in accordance with his opinion. *See* Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008). On remand, the Immigration Judge, applying Attorney General Mukasey's opinion, issued a new decision finding respondent ineligible for discretionary relief from deportation. The Board affirmed that decision. The respondent then filed a petition for review with the United States Court of Appeals for the Fifth Circuit. On January 30, 2014, the Fifth Circuit rejected Attorney General Mukasey's opinion as contrary to the plain language of the statute, vacated the Board's decision, and remanded this matter to the Board for further proceedings consistent with the court's opinion. *See* Silva-Trevino v. Holder, 742 F.3d 197, 200-06 (5th Cir. 2014). For the reasons stated herein, I have determined that it is appropriate to vacate Attorney General Mukasey's November 7, 2008, opinion in this matter.

The central issue raised by this case is how to determine whether an alien has been convicted of . . . a crime involving moral turpitude″within the meaning of section 212(a)(2) of the Immigration and Nationality Act. The Board initially addressed this issue in its August 8, 2006, decision in this case, determining that respondent's conviction for the criminal offense of ″indecency with a child″ should not be considered a crime of moral turpitude because the Texas statute under which he had been convicted criminalized at least some conduct that did not involve moral turpitude and was thus not categorically a crime involving moral turpitude. Matter of Silva-Trevino, 24 I&N Dec. at 690-92. After that decision had issued, Attorney General Gonzales directed the Board to refer the case to him for further review. *See* Att'y Gen. Order No. 2889-2007 (July 10, 2007); *see also* 8 C.F.R. § 1003.1(h)(1)(i) (2007) (providing that the Attorney General may direct the Board to refer cases to him ″for review of [the Board's] decision″). After review, Attorney General Gonzales's successor, Attorney General Mukasey, issued an opinion vacating the Board's August 8, 2006, decision and establishing a new three-step framework to be used by Immigration Judges and the Board in determining whether an alien had been convicted of a crime involving moral turpitude. Att'y Gen. Order No. 3016-2008 (Nov. 7, 2008); Matter of Silva-Trevino, 24 I&N Dec. at 687-90 & n.1, 704 . . . .

In the first step of the framework, Attorney General Mukasey directed Immigration Judges and the Board to ″engage in a 'categorical inquiry'″ in order to determine ″whether moral turpitude necessarily inheres in all cases that have a realistic probability of being prosecuted″ under a particular criminal provision. Matter of Silva-Trevino, 24 I&N Dec. at 696-97 (relying on Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007)).

Where this categorical analysis did not resolve the moral turpitude inquiry, the Attorney General instructed adjudicators to proceed to the second step, a ″modified categorical″ inquiry ″pursuant to which adjudicators consider whether the alien's record of conviction evidences a crime that in fact involved moral turpitude. ″ Id. at 698. Recognizing that ″[m]ost courts . . . have limited this second-stage inquiry to the alien's record of conviction, ″ the Attorney General concluded that a third step was necessary because ″when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude provisions.″ Id. at 699. Accordingly, Attorney General Mukasey's opinion directed Immigration Judges and the Board to consider, at the third step in the moral turpitude inquiry, ″any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question″ when ″the record of conviction does not resolve the inquiry.″ Id. at 704. The Attorney General then remanded the case to the Board to ″reconsider, consistent with [his] opinion, whether the crime respondent committed involved moral turpitude. ″ Id. at 709.

On remand, the Board sent the case back to the Immigration Judge who--applying the third step in Attorney General Mukasey's framework--considered evidence outside of the record of conviction to conclude that respondent's conviction had involved moral turpitude because respondent should have known that the victim of his crime was a minor. Silva-Trevino, 742 F.3d at 198-99. As a result, the Immigration Judge found respondent was inadmissible and thus ineligible for discretionary relief from deportation under section 212(a)(2) of the Act. *Id.* On review, the Board affirmed.

In January of last year, on respondent's petition for review, the Fifth Circuit held that "convicted of" as used in section 212(a)(2) did *not* permit Immigration Judges to inquire into relevant evidence outside of the record of conviction in order to classify a particular conviction as one involving moral turpitude. . . . In so doing, the court rejected the third step of Attorney General Mukasey's framework as contrary to the unambiguous language of the statute and thus refused to accord the Silva-Trevino opinion deference. . . .

As the Fifth Circuit recognized, in so ruling it became the fifth circuit court of appeals to reject Attorney General Mukasey's construction of the statute. . . .These courts have all agreed that the phrase "convicted of"″ as used in the Act forecloses any inquiry into evidence outside of the record of conviction. . . . As a result, Attorney General Mukasey's opinion in this matter has not accomplished its stated goal of "establish[ing] a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied." . . .

In addition, in the time since Attorney General Mukasey released his opinion, the Supreme Court has issued several decisions that may bear on administrative determinations of whether an alien has been convicted of a crime involving moral turpitude. In *Carachuri-Rosendo v. Holder*, the Court held that adjudicators could not consider uncharged conduct to determine whether an alien had been ″convicted of″ illicit trafficking, an aggravated felony under the Act. 560 U.S. 563, 581-82, 130 S. Ct. 2577, 177 L. Ed. 2d 68 (2010). Applying *Carachuri-Rosendo* 3 years later, the Court in *Moncrieffe v. Holder* reaffirmed that the phrase "convicted of" required a categorical approach, and it rejected the Government's argument that adjudicators could engage in a "circumstance-specific" analysis of a particular drug conviction to determine if the quantity

of drugs involved made it an aggravated felony. 133 S. Ct. 1678, 1690-92, 185 L. Ed. 2d 727 (2013); *see also* Kawashima v. Holder, 132 S. Ct. 1166, 1172, 182 L. Ed. 2d 1 (2012) (applying the categorical approach to determine if an alien had been convicted of an offense involving fraud or deceit). These decisions cast doubt on the continued validity of the third step of the framework set out by Attorney General Mukasey's opinion, which directs Immigration Judges and the Board to go beyond the categorical and modified categorical approaches and inquire into facts outside of the formal record of conviction in order to determine whether a particular conviction involves moral turpitude.

In view of the decisions of five courts of appeals rejecting the framework set out in Attorney General Mukasey's opinion--which have created disagreement among the circuits and disuniformity in the Board's application of immigration law--as well as intervening Supreme Court decisions that cast doubt on the continued validity of the opinion, I conclude that it is appropriate to vacate the November 7, 2008, opinion in its entirety. . . .
In light of this vacatur, the Board may address, in this case and other cases as appropriate, the following issues:
1. How adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude under the Act;
2. When, and to what extent, adjudicators may use a modified categorical approach and consider a record of conviction in determining whether an alien has been "convicted of . . . a crime involving moral turpitude" in applying section 212(a)(2) of the Act and similar provisions;
3. Whether an alien who seeks a favorable exercise of discretion under the Act after having engaged in criminal acts constituting the sexual abuse of a minor should be required to make a heightened evidentiary showing of hardship or other factors that would warrant a favorable exercise of discretion. . . .

Page 602 (§ 5.04[A]): Add the following new Note 5, just before subsection [B]:

5. Combining § 212(d)(3) Waivers with Other Relief. Your study of the § 212(d)(3) waiver showed that combined with certain nonimmigrant classifications, a beneficiary may obtain an extended period of authorized stay within the United States. For example, § 3.05[B] discussed the U nonimmigrant category for victims of crimes. In *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014), L.D.G. applied for a U visa as the victim of a serious crime against her and her family. However, USCIS found her inadmissible due to both an immigrati on violation (entry without inspection) and a controlled substance conviction. USCIS refused to grant her a waiver for the controlled substance conviction under INA § 212(d)(14); 8 U.S.C. § 1182(d)(14). In removal proceedings, L.D.G. asked the immigration judge to grant her a waiver under INA § 212(d)(3). The immigration judge held that only USCIS could issue § 212(d)(3) waivers. The BIA affirmed. The circuit court reversed. Among other things the court noted that USCIS and immigration judges had concurrent jurisdiction. The court also stated that U visas were created before the creation of the Department of Homeland Security.

Similarly, in *Atunnise v. Mukasey*, 523 F.3d 830, 833 (7th Cir. 2008), the court determined that an immigration judge had the ability to grant a 212(d)(3) waiver. The court described her waiver as "forward looking," to be able to remain in the United States in U status. It did not find anything in the plain language of the statute prohibiting the use of a 212(d)(3) waiver to waive

the inadmissibility of a U visa applicant. The court also found that permitting an immigration judge to grant a 212(d)(3) waiver when deciding eligibility for relief in proceedings was more efficient than "compartmentalizing waiver decisions," particularly due to the long wait times for immigration relief experienced by noncitizens. The court did not rule on the merits of the waiver application but remanded the case so that the immigration judge could consider the waiver application.

Page 611 (§ 5.04[C]): Add the following new Note 5, just before subsection [D]:

5. Limits on § 212(h) Waivers. In *In re Rivas*, 26 I. & N. Dec. 130 (BIA 2013), the Board held that a noncitizen physically present in the United States and in removal proceedings may not obtain a § 212(h) waiver on a "stand-alone" basis and could not be granted such a waiver nunc pro tunc. A concurrently filed application for adjustment of status is required. The Board found that Rivas was ineligible for a § 212(h) waiver because he was not an arriving alien seeking to waive a ground of inadmissibility and he was not applying for the waiver with an application for adjustment of status. *Rivas* differs from *In re Abosi*, 24 I. & N. Dec. 204 (BIA 2007), in which the noncitizen was outside the United States and therefore an arriving alien requesting readmission to the United States.

In September 2014, the Eleventh Circuit denied Rivas' petition for review and stated that an application for adjustment of status to residence must accompany a § 212(h) waiver when a removable permanent resident attempts to reenter the United States from abroad. *Rivas v. Attorney General*, 765 F.3d 1324 (11th Cir. 2014). *Compare Judalang v. Holder*, 2011 U.S. LEXIS 9018 (U.S. 2011) (discussing the availability of former INA § 212(c) relief and unequal treatment of permanent residents who had left the United States and those who had not traveled internationally).

In May 11, 2015, the Seventh Circuit also held that standalone nunc pro tunc waivers pursuant to INA § 212(h) are unavailable and must be accompanied by an application for adjustment of status. *Palma-Martinez v. Lynch,* 785 F.3d 1147 (7th Cir. 2015).

In Chapter 6, you will study the deportation ground of aggravated felony (defined in INA § 101(a)(43); 8 U.S.C. § 1101(a)(43)). Generally, there is little relief for those removed based on an aggravated felony. However, there is no aggravated felony bar to admission, so it is possible that a former permanent resident may apply for adjustment of status and an INA § 212(h) waiver concurrently, as discussed above.

In May 2015, the Board of Immigration Appeals held in *In re J-H-J-*, 26 I. & N. Dec. 563 (BIA 2015), that a noncitizen who adjusted status in the United States and who has not entered as a lawful permanent resident is not barred from establishing eligibility for a waiver of inadmissibility under INA § 212(h) as a result of an aggravated felony conviction. Former permanent residents convicted of aggravated felonies may submit a § 212(h) waiver when applying for an immigrant visa at a U.S. consulate based on a new immigrant visa petition.

Page 633 (§ 5.05[D][2]): Add the following at the end of subsection [2]:

One of President Obama's executive actions announced inNovember 2014 will expand the I-601A provisional waiver program. The provisional waiver shortens the time outside of the United States while eligible individuals apply for immigrant visas at U.S. consulates when the applicable ground of inadmissibility is entry without inspection or accrual of unlawful presence. The provisional waiver does not waive any other grounds of inadmissibility. Currently, only immediate relatives of U.S. citizens are able to utilize the provisional waiver. Through the President's executive action, the provisional unlawful presence waiver will be expanded to include spouses and children of lawful permanent residents and sons and daughters of U.S. citizens.

The executive action regarding provisional waivers also includes a request for the USCIS to provide further guidance on the definition of "extreme hardship," a component of the waiver. The USCIS may define factors leading to a presumption of extreme hardship. As you read about requirements for several waivers that require a showing of extreme hardship to qualifying relatives, consider how a USCIS definition may affect preparation of an application.

No regulations have been issued yet regarding the expansion of provisional waivers. General information is available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf and at http://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers.

Chapter 6: Deportability and the Removal Process

Page 636 (§ 6.01[A]): Add the following after Chart 2:

In fiscal year 2014, U.S. Immigration and Customs Enforcement conducted 315,943 removals, with 213,719 of those removals being individuals attempting to enter the United States without inspection. Of the total removals for fiscal year 2013, ICE removed 177,960 individuals who were previously convicted of crimes. Charts and statistics can be found at http://www.ice.gov/removal-statistics/.

Continuing high levels of removal, enforcement issues at the border, and an over-stretched Immigration Court system have resulted in many challenges for U.S. immigration agencies. An April 2014, a Migration Policy Institute report entitled The Deportation Dilemma: Reconciling Tough and Humane Enforcement, examined the current removal process, developments in apprehensions made at the border and inside the United States, and the possible ways the President can affect immigration policy relating to removal. The report is available at http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

In the summer of 2014, the United States experienced an unprecedented surge of unlawful border crossings in the Rio Grande Valley along the southwestern U.S. border. Many of those attempting to enter the United States were unaccompanied children and mothers with children fleeing violence in their home countries. Their countries of origin were primarily in Central America. In fiscal year 2014, U.S. Customs and Border Patrol apprehended 49,959 unaccompanied minors and 52,326 family units. The large number of apprehensions and the fact that the majority were children resulted in changes in ICE operational policy.See http://www.ice.gov/removal-statistics/ https://www.ice.gov/removal-statistics#wcm-survey-target-id.

While children are not to be detained pursuant to immigration law, unaccompanied minors must be transferred to the Department of Health and Human Services within a short amount of time. As discussed in Chapters 6 and 7, unaccompanied minors are not removed upon apprehension, but are scheduled for removal hearings before immigration judges to determine if relief or an immigration benefit exists for them. New facilities to house the children (and also mothers and children) were constructed. Many of these were in remote locations, making access to representation a challenge. The U.S. immigration bar met the challenge with many volunteer attorneys spending weeks at facilities in Artesia, New Mexico and Dilley and Karnes, Texas to conduct intake interviews, represent individuals at credible fear interviews, and assist with special immigrant juvenile and asylum cases. *See* Julia Preston, *In Remote Detention Center, a Battle on Fast Deportation*, N.Y. Times, Sept. 4, 2014, http://www.nytimes.com/2014/09/06/us/in-remote-detention-center-a-battle-on-fast-deportations.html.

Here is a link to an illustrated story about the experience attorneys and paralegals had while volunteering at Artesia: https://insidewitness.files.wordpress.com. It was written and drawn by Steve Sady, former Federal Public Defender for Oregon and his daughter, artist Clio Reese Sady, who served as volunteers at Artesia.

Page 641 (§ 6.01[D]): Add the following Note to Problem 6-1:

3. More on Inadmissibility as a Ground of Deportability. This problem is another version of Problem 5-5. In Chapter 6, Marian Misfortune may be subject to removal by being inadmissible at entry because her divorce from her U.S. citizen husband was final, although she did not know it, when she was admitted to the United States as a permanent resident.

In an unpublished decision, the BIA held that the government did not prove by clear and convincing evidence that an individual was inadmissible to the United States at the time of adjustment of status (INA § 237(a)(1)(A); 8 U.S.C. § 1227(a)(1)(A)). The BIA held that the foreign national did not receive residence through a willful misrepresentation, INA § 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i), when the U.S. citizen spouse finalized the couple's divorce a month before the joint interview but the foreign national spouse believed the marriage was valid at the time of interview. Matter of Theophilus Anum Sowah, A078 393 756 (BIA Mar. 24, 2014), *available at* http://www.scribd.com/doc/215960495/Theophilus-Anum-Sowah-A078-393-756-BIA-Mar-24-2014. Although the record showed the respondent had received the initial divorce papers, he testified that he did not receive the final divorce papers. His wife accompanied him to the interview. Also, respondent and his wife continued to live together at the time of the immigration interview.

A recent Board of Immigration Appeals decision, *In re Agour*, 26 I. & N. Dec. 566 (BIA 2015), held that adjustment of status is acceptable as the required admission needed for eligibility for a waiver under INA § 237(a)(1)(H); 8 U.S.C. § 1227(a)(1)(H). Agour was initially admitted to the United States in visitor status and received conditional and permanent resident status through marriage. Later, marriage fraud was alleged but Agour was found inadmissible under INA § 212(a)(6)(C) due to the submission of a fraudulent lease with her petition to remove conditional residence.

Rubio v. Lynch, 2015 U.S. App. LEXIS 8449 (5th Cir. May 21, 2015), discussed in the Chapter 5 update, with its holding that a wave-through satisfies the requirement of being admitted in any status, may also support the use of an INA § 237(a)(H)(1) waiver.

Page 686 (§ 6.02[D][2]): Add the following as new Note 3:

3. Immigration Violations May Result in Grounds of Inadmissibility or Deportability. One immigration violation is a false claim to U.S. citizenship under INA § 237(a)(3)(D); 8 U.S.C. § 1227(a)(3)(D). The exception is very narrow and no waiver exists. However, there are a number of "motor voter" cases where noncitizens are asked to register to vote while applying for state driver's licenses. In an Immigration Court decision of May 2, 2014 (Chicago, Illinois), the Immigration Judge found that a foreign national who had entered the United States in K-3 status,

married to a U.S. citizen, merited adjustment of status as a matter of discretion despite having registered to vote and voting in a general election.

Initially, the individual's application for adjustment of status was denied under INA § 212(a)(10)(D)(i); 8 U.S.C. § 1182(a)(10(D)(i), and she was charged with being deportable under INA §§ 237(a)(1)(A) and (a)(3)(D); 8 U.S.C. § 1227(a)(1)(A) and (a)(3)(D) as being both inadmissible at time of adjustment of status and removable for claiming to be a U.S. citizen. The noncitizen was asked if she would like to register to vote as part of her application for a state driver's license. She had difficulty understanding the process and the form. During the immigration adjustment interview, she answered that she had voted. Testimony from an official at the state driver's license facility explained the process for voter registration and stated that state employee clerks do not ask individuals about their eligibility for voting due to age or citizenship; the clerks must ask all applicants if they want to register to vote and are not able to determine if an individual is a U.S. citizen from documents presented. *See* Marwa Eltagouri, *Immigrant Who Wrongly Voted Wins Right to Stay*, Chicago Tribune, July 5, 2014, at http://articles.chicagotribune.com/2014-07-05/news/ct-immigrant-court-ruling-met-20140706_1_richard-hanus-u-s-immigration-motor-voter-law.

Page 686 (§ 6.02[E][1]): Add the following as an alternative to existing Problem 6-5:

Problem 6-5 covers many issues introduced in Chapters 1 through 6. Henry, introduced before in Chapter 5, has been a permanent resident for three years when he is arrested and charged with several crimes that may have an adverse effect on his permanent resident status.

To generate discussion, we have provided general information about the charges and added INA §§ 273 and 274; 8 U.S.C. § 1323 and 1324 to the Essential Materials below. We have also placed the traffic stop and arrest in a county in Ohio that participated in the 287(g); 8 U.S.C. § 1357(g) program through 2012.

PROBLEM 6-5

In Problem 5-3, we met Patrick Thomas and his dad, Henry. In that hypothetical, Patrick, a U.S. citizen, had turned twenty-one years old and planned to petition for permanent residence on behalf of his father who was present in the United States without status for many years. His father had an issue affecting his ability to receive permanent residence: a past criminal offense.

In problem 6-5, it is now three years later. Henry is a permanent resident. For this problem, Henry received a waiver and his permanent resident status three years ago. Patrick contacts the immigration lawyer in Chicago again, Melissa Khan, to make an appointment for her to speak with Henry as soon as possible. His dad had found work with a trucking company in Michigan. Henry's first assignment was to drive a truckload of furniture from a warehouse in Ontario, Canada to

a furniture store in Oxford, Ohio. Henry and the truck entered the United States without any problem but at a weigh station in just a few miles away from his destination, state police found three persons hiding in the back of truck. They were nationals of Paraguay and had no documentation permitting them to be in the United States or Canada. Also, the police determined that the furniture in the truck was stolen. Henry was arrested and is in a local jail awaiting trial at this time.

You are Henry's immigration lawyer. When you meet him to discuss his case, he says that he has been charged with several offenses including smuggling aliens across the U.S. border, transporting aliens within the United States and possession of stolen property ($40,000 in furniture). He had not yet had a criminal trial. You are concerned that he may eventually be found deportable. Under which grounds may he be charged as deportable? Why?
Will Henry's offenses result in aggravated felonies?

Do you think there is an argument that Henry should be charged under grounds of inadmissibility? Why?

If any charges result in convictions, will Henry be removable?

PROBLEM 6-5: ESSENTIAL MATERIALS

INA § 101(a)(43)(G); 8 U.S.C. § 101(a)(43)(G)
INA § 101(a)(43)(M)(i); 8 U.S.C. § 1101(a)(43)(M)(i)
INA § 101(a)(43)(N); 8 U.S.C. § 1101(a)(43)(N)
INA § 101(a)(13)(C)(ii); 8 U.S.C. § 1101(a)(13)(C)(ii)
INA § 237(a)(E); 8 U.S.C. § 1227(a)(E)
INA § 237(a)(2)(A)(i)(I)-(II); 8 U.S.C. § 1227(a)(2)(A)(i)(I)-(II)
INA § 237(a)(2)(A)(ii); 8 U.S.C. § 1227(a)(2)(A)(ii)
INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(iii)
INA § 273; 8 U.S.C. § 1323
INA § 274; 8 U.S.C. § 1324
INA § 287(g); 8 U.S.C. § 1357(g)
8 U.S.C. § 1722(a)(2)
CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR AND RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 71.05

PROBLEM 6-5: NOTES AND QUESTIONS

1. Nowhere Near the International Border. In Problem 6-5, Henry has just been arrested. As you read the essential materials and cases that follow, consider the intersection of immigration law and criminal law. You might want to check a map, but southern Ohio is several hundred miles away from the northern U.S. border. How is that relevant to Henry's legal rights?

U.S. Immigration and Customs enforcement did not renew agreements that expired in December 2012 with state and local law enforcement for the 287(g) program. This program delegated authority for immigration enforcement to state and local governments. Secure Communities was discontinued in November 2014. . As noted in earlier Chapters, ICE has implemented the Priority Enforcement Program (PEP), which provides for DHS to work with state and local law enforcement to identify and take into custody those foreign nationals who pose a danger to public safety. Under PEP, ICE issues detainers when an individual fits into the enforcement priorities in a November 20, 2014 memorandum from DHS Secretary Jeh Johnson. The memo is at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

Also, consider Jennifer Medina, *Fearing Lawsuits, Sheriffs Balk at U.S. Request to Hold Noncitizens for Extra Time*, N.Y. Times, July 5, 2014, at http://www.nytimes.com/2014/07/06/us/politics/fearing-lawsuits-sheriffs-balk-at-us-request-to-detain-noncitizens-for-extra-time.html. Following a federal court decision in Oregon where a sheriff was found to have violated the civil rights of an immigrant by keeping her in the county jail pursuant to the Obama administration's immigration detainer program, more sheriffs are releasing noncitizens instead of keeping them in custody to provide Immigration and Customs Enforcement officials the time to determine if the individual had immigration violations making them removable.

Page 712 (§ 6.03[A]): Add the following at the end of subsection A, just before sub-subsection [1]:

In addition to the definition of conviction provided above under *Matter of Ozkok*, convictions are not final while an appeal is pending. In *Orabi v. Att'y Gen*., 738 F.3d 535 (3d Cir. 2014), the court disagreed with the BIA's finding that a conviction requires only that a formal finding of guilt be entered against the individual. Instead, it held a conviction is not final for immigration purposes until direct appellate review of that conviction has been exhausted or waived.

Page 715 (§ 6.03[A][3]):

The full citation for *Padilla v. Kentucky* is now *Padilla v. Kentucky*, 557 U.S. 356 (2010).

Page 733 (§ 6.03[A][3]): Replace the existing Note 2 with the following:

2. Does Padilla Apply Retroactively? Immediately following the Supreme Court's decision in *Padilla*, circuits were split regarding *Padilla*'s retroactivity. In a 7-2 ruling in 2013, the Supreme Court held in *Chaidez v. United States*, 568 U.S. ___, 2013 U.S. LEXIS 1613 (2013), that *Padilla* does not apply retroactively to cases of noncitizens who pled guilty before the *Padilla* decision in 2010, without knowing the immigration consequences of a plea and whose cases are already final on direct review. The Court stated that *Padilla* established a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989). Therefore, it held that those noncitizens with guilty pleas before *Padilla* are unable to claim ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

Page 736 (§ 6.04[A]): Add the following at the bottom of page 736, after Chart 4:

In the summer of 2014, due to a rapid increase of children and adults with children arriving from Central America, the Office of the Chief Immigration Judge issued a memorandum explaining that the cases of the new arrivals would be "fast-tracked." In some parts of the country the special dockets are called "surge dockets". We avoid the term "expedited dockets" to avoid confusion with removal under INA § 235(b); 8 U.S.C. § 1225(b).

The Memorandum, *Docketing Practices in Scheduling Unaccompanied Children Cases in Light of New Priorities* (Sept. 10, 2014), is at http://www.justice.gov/sites/default/files/eoir/legacy/2014/09/30/Docketing-Practices-Related-to-UACs-Sept2014.pdf. The Memorandum was updated and superseded in March 2015 to include specifics about adults with children. *Docketing Practices in Scheduling Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities* (Mar. 24, 2015) ("Priority Memorandum"), at http://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf.

The basic rules are that within twenty-one days of receiving a Notice to Appear (the charging document) from ICE, EOIR court administrators will schedule an initial master calendar hearing for unaccompanied children. EOIR also announced it would schedule adults with children within twenty-eight days of receiving the Notice to Appear.

Unaccompanied alien children are those who are unmarried, under the age of 18 at time of apprehension, and not with a parent, step-parent, or legal guardian. *See* Kate M. Manuel & Michael John Garcia, Congressional Research Service, *Unaccompanied Alien Children—Legal Issues: Answers to Frequently Asked Questions* (July 18, 2014), *available at* http://trac.syr.edu/immigration/library/P8889.pdf. This report gives the background of the statutes and regulations that govern children in removal proceedings. See the material in Chapter 7 on special immigrant juveniles and in Chapter 8 on asylum and withholding for discussion of special protections for children.

In most large immigration courts, the Acting Chief Immigration Judge assigned special judges to hear these priority docket cases. While the cases are to be started quickly, the Priority Memorandum reminds Immigration Judges that they can grant continuances so that children or adults with children can locate counsel or for other usual reasons for continuances.

In some cities, the result was that the immigration court began to schedule hundreds of cases per week. Public interest and private counsel scrambled to mobilize resources to handle the prioritized cases. In some cities and states, funds were appropriated to aid the unaccompanied children by funding some immigration defense. *See, e.g.*, Nikita Stewart, *Program to Give Legal Help to Young Migrants*, N.Y. Times, Sept. 22, 2014, http://www.nytimes.com/2014/09/23/nyregion/groups-to-provide-lawyers-for-children-who-

face-deportation.html ($1.9 million appropriated by New York City Council), ; Reuters, *California Sets Up Fund for Legal Representation of Immigrant Children*, N.Y. Times, Sept. 27, 2014, http://www.nytimes.com/reuters/2014/09/27/us/27reuters-usa-immigration-california.html ($3 million appropriated to experienced nonprofit legal providers).

The federal government also created the first funding for counsel for children out of a community service appropriation. The Justice Americorps program was designed to both help the immigration courts improve efficiency and to provide some representation to children. Corporation for National and Community Service, Justice AmeriCorps Legal Services for Unaccompanied Children, *at* http://www.nationalservice.gov/build-your-capacity/grants/funding-opportunities/2014/justice-americorps-legal-services; *see also* Kirk Semple, *Youths Facing Immigration Court are to be Given Legal Counsel*, N.Y. Times, July 6, 2014, http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html ($2 million set aside to create a new Justice Americorps program with the Corporation for Community Service).

In July 2014, the American Civil Liberties Union, in conjunction with the American Immigration Council, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates LLP, filed suit in U.S District Court in Seattle, Washington, on behalf of unrepresented immigrant children in removal proceedings. As of July 3, 2015, the class certification is still pending**.** *J.E.F.M. v. Holder*, No. 2:14-cv-01026-TSZ (W.D. Wash., Order dec. Apr. 13, 2015), https://www.aclu.org/sites/default/files/field_document/jefm_v_holder_mtd_order_4_13_15.pdf**.**

Page 739 (§ 6.04[A][3]): Add the following at the end of subsection [3], just before [4]:

As discussed throughout this book, immigration proceedings are considered civil proceedings. While individuals have the right to be represented in immigration proceedings, there is no provision for appointed counsel. However, many law schools, bar associations, and other non-profit organizations have pro bono initiatives to assist noncitizens in removal proceedings in Immigration Court.

The New York Immigrant Family Unity Project is one such program. It offers pro bono counsel to indigent noncitizens in immigration proceedings at New York City's Varick Street Immigration Court. It initially received one year of funding from the New York City Counsel for a pilot program being administered by the Vera Institute of Justice beginning in fall 2013. In June 2014, the New York Immigrant Family Unity Project was included in the New York City proposed budget and would expand the program to include detained, indigent noncitizens in proceedings at the Varick Street, Newark, New Jersey and Elizabeth, New Jersey Immigration Courts. *See also* Kirk Semple, *Public Defender System for Immigrants Facing Deportation Would Pay for Itself, Study Says*, N.Y. Times, May 29, 2014, *at* http://www.nytimes.com/2014/05/30/nyregion/study-favors-free-counsel-to-navigate-deportation.html, which reports on the findings of a study conducted by NERA Economic Consulting and released by the New York City Bar Association. The report found that appointing attorneys to represent noncitizens in immigration proceedings would reduce government expenses for detaining and removing noncitizens and lead to more efficiency.

Page 741 (§ 6.05[A]): Add the following just before the paragraph that starts "The ACUS Study reported that…":

The federal government's demand for immigration detention facilities and bed space continues to grow due to a congressional bed mandate. This has resulted in the privatization of many detention facilities. *See* William Selway & Margaret Kirkwood, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, Bloomberg Businessweek, Sept. 24, 2013, *at* http://www.bloomberg.com/news/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants.html.

Page 762 (§ 6.05[C]): Add the following after *Demore v. Kim*, just before [1] Detention Issues:

Increasingly, advocates are challenging detention as part of removal. For example, in five habeas cases decided in June 2015 alone, the litigants successfully challenged the government's interpretation of provisions for mandatory detention under INA § 236; 8 U.S.C. § 1226. *Antoniou v. Shanahan*, 2015 U.S. Dist. LEXIS 72501 (S.D.N.Y. June 4, 2015); *Minto v. Decker*, 2015 U.S. Dist. LEXIS 73662 (S.D.N.Y. June 5, 2015); *Singh v. Sabol*, 2015 U.S. Dist. LEXIS 72149 (M.D. Pa. June 4, 2015), *Sutherland v. Shanahan*, 2015 U.S. Dist. LEXIS 73505 (S.D.N.Y. June 5, 2015); *Bugianishvili v. McConnell*, 2015 U.S. Dist. LEXIS 82138 (S.D.N.Y. June 24, 2015).

Bugianishvili found that prolonged detention without bond during removal proceedings is unconstitutional. Bugianishvili is a long time permanent resident. Between 2009 and 2014, he was arrested three times for shoplifting and pleaded guilty to attempted petit larceny, petit larceny, and criminal possession of stolen property under New York law. He was sentenced to thirty days in jail and one day of community service. He completed his incarceration in 2009. ICE agents arrested Bugianishvili in October 2014 andcharged with removability under INA § 237(a)(2)(ii); 8 U.S.C. § 1227(a)(2)(ii), the conviction of two or more crimes of moral turpitude not arising out of a single scheme of criminal misconduct. ICE found Bugianishvili subject to mandatory detention without bond. Bugianishvili moved for a bond hearing and one was held in April 2015. The immigration judge denied the motion for bond without considering the merits. Bugianishvili's attorneys submitted a habeas petition in U.S. District Court the same day.

While arguing that the offenses were not crimes of moral turpitude and receiving an initial decision in his favor followed by one concluding the offenses were subject to INA § 237(a)(2)(ii), Bugianishvili's U.S. citizen daughter submitted an immigrant visa petition (I-130) on his behalf. A visa would be available to him as an immediate relative and Bugianishvili would submit a waiver application as he had a qualifying relative (pursuant to INA § 212(h)). Despite expedite requests from his attorneys to ICE regarding the processing of the immigrant visa petition, months passed and Bugianishvili remained in custody. Following a grant of the I-130 in May 2015, the next hearing for Bugianishvili was scheduled for October 2015.

The U.S. District Court acknowledged that under the INA, the "Attorney General shall take into custody any alien who . . . is deportable by reason of having [two convictions for CIMTs not

arising out of a single scheme of criminal misconduct] . . . when the alien is released" from criminal incarceration underlying the government's charge of removability.

The district court discussed *Demore v. Kim* and *Zadvydas v. Davis* and their findings regarding the length of detention, due process, and the ability to achieve the purpose of detention. Here, Bugianishvili was held for almost eight months, almost "8 times longer than the criminal incarceration underlying the government's charge of removability." The court found Bugianishvili's case to differ from those offered by the government to argue that his appeal was the cause of the delay by stating that Bugianishvili's proceedings had just begun, his next hearing was four months away, and another hearing might be required—raising the possibility of detention without bond for a long unspecified amount of time. The court held that to beunconstitutional.

Page 762 § 6.05[C][1]: Add the following at the end of [1] Detention Issues:

You have read about detention for persons with criminal convictions and removal orders. As noted at the beginning of the 2015 update for Chapter 6, the number of people seeking asylum and other immigration relief being detained by the Department of Homeland Security has increased exponentially. Many of the individuals being held have relatives and strong ties in the United States and do not pose a threat U.S. safety and security. The detentions cost the United States hundreds of dollars per person detained per day.

Advocates have noted that detained women and children do not have adequate healthcare and are sometimes held in facilities kept at low temperatures, causing physical illness as well as negative effects to mental health. There has been renewed attention to the settlement agreement in *Reno v. Flores*, a 1993 U.S. Supreme Court case regarding policies for the detention, release and treatment of minors in immigration custody. *Reno v. Flores*, 507 U.S. 292 (1993). DHS filed a motion to modify the *Flores* settlement agreement on February 27, 2015, following plaintiffs' memorandum to support a motion to enforce settlement of the class action. The parties must file a joint status report with the district court in June 2015.

On June 24, 2015, DHS Secretary Jeh Johnson announced steps to reform family immigration detention.*See*http://www.dhs.govnews/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers.

Page 764 (§ 6.05[C][2]): Add the following as a new paragraph at the end of subsection [2], just before subsection [3]:

The government and the BIA have recognized the need for safeguards in immigration proceedings for noncitizens who may be mentally incompetent to represent themselves. Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, *Civil Immigration Detention: Guidance for New Identification and Information Sharing Procedures Related to Unrepresented Detainees With Serious Mental Disorders or Conditions* (Apr. 22, 2013), *at* https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf; *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011).

Chapter 7: Relief from Removal

Page 768 (Problem 7-1): Problem 7.1 presents a complex scenario that allows you to explore the many types of relief from removal available, determine if a type of relief corresponds to the fact pattern in Problem 7.1, and discuss which forms of relief may be the best ones for Tim Yang and why.

On June 26, 2015, the U.S. Supreme Court ruled that same-sex couples may legally marry throughout the United States. *Obergefell v. Hodges*, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015). Earlier, on June 26, 2013, the U.S. Supreme Court overturned Section 3 of the Defense of Marriage Act (DOMA). *United States v. Windsor*, 2013 U.S. LEXIS 4921 (2013). Section 3 of DOMA had defined marriage as being between a man and a woman. Therefore, it is now possible to consider additional avenues of relief in Problem 7.1 based on the relationship of Tim and his partner, John.

Information about USCIS processing of petitions and applications based on same-sex marriages is on the USCIS website at http://www.uscis.gov/family/same-sex-marriages. The USCIS will recognize the marriage as long as the couple was married in the United States or in a foreign country that recognizes same-sex marriage.

On August 1, 2013, the State Department issued a cable regarding the processing of applications based on same-sex marriages: Next Steps on DOMA -- Guidance for Posts. Cable number 00112850,
http://travel.state.gov/pdf/Next_Steps_On_DOMA_Guidance_For_Posts_August_2013.pdf. On June 20, 2014, then-Attorney General Holder issued a memorandum on the implementation of *United States v. Windsor*, which discusses how federal agencies, including the Department of Homeland Security and the Department of State, implemented the *Windsor* decision.

Please note that information from U.S. government agencies may be updated frequently.

Returning to Problem 7.1, this means Tim may qualify for a family-based adjustment of status pursuant to an immediate relative petition if he and John marry. From the facts, Tim and John are in a long-term relationship and marriage may be the next step for them.

Page 771.
The text contains an image of a Notice to Appear relating to Problem 7-1. Can you find the errors in the Notice? How might counsel respond to a Notice to Appear with these types of errors? Review Note 1 on page 675 in Chapter 6 concerning Motions to Suppress and/or Terminate.

Page 779 (§ 7.01): Add new note 4:

4. What is an aggravated felony? There continues to be substantial litigation challenging the government's characterization of convictions as "aggravated felonies" under INA § 101(a)(43); 8

U.S.C. § 1101(a)(43). In 2013 the Supreme Court rejected the government's characterization of a state conviction for possession of marijuana with intent to distribute as an aggravated felony meeting the standards of INA § 101(a)(43)(B) "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." *Moncrieffe v Holder*, ___U.S.___, 2013 U.S. LEXIS 3313 (2013). Mr. Moncrieffe had been convicted of a Georgia statute regarding intent to distribute. The Supreme Court ruled the conviction did not meet all of the elements of the INA's definition of an aggravated felony. Do you see the significance of challenging the aggravated felony characterization? Both Tim Yang in Problem 7-1 and Mr. Moncrieffe are probably still deportable due to criminal convictions, but if deportable as an aggravated felon, almost all forms of relief from removal are barred.

Page 790 (§ 7.01[H]): A 2014 Second Circuit decision provides a new twist on relief under INA § 212(c). In *United States v. Gill*, 748 F.3d 491 (2d Cir. 2014), the court held that making noncitizens ineligible for § 212(c) relief merely because they were convicted after trial would have an impermissible retroactive effect because it would impermissibly attach new legal consequences to convictions that pre-date the repeal of § 212(c) in 1996. This case potentially opens up 212(c) relief to a larger number of noncitizens.

Page 802 (§ 7.01[H][2]): A 2014 BIA decision incorporates *Judulang v. Holder*, the 2011 Supreme Court case excerpted in the text. In *Matter of Abdelghany*, 26 I. & N. Dec. 254 (BIA 2014), the BIA held that with a few significant exceptions, a lawful permanent resident of the United States who has accrued seven consecutive years of lawful unrelinquished domicile in the United States is eligible to apply for section 212(c) relief in removal proceedings if he or she is removable by virtue of a plea or conviction entered before April 1, 1997. This BIA decision modifies Note 2 on page 813. A practice advisory about *Matter of Abdelghany* is at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Matter_of_Abdelghany_3-14-2014.pdf.

Page 841 (§ 7.01[M]): Special immigrant juvenile status (SIJS) cases have received a lot of attention recently because the number of unaccompanied children crossing the U.S-Mexico border from Central America has skyrocketed. Between October 2013 and June 2014, about 50,000 unaccompanied children have been apprehended on the U.S.-Mexican border. Fernanda Santos, *Border Centers Struggle to Handle Onslaught of Young Migrants*, N.Y. Times, June 18, 2014, http://www.nytimes.com/2014/06/19/us/border-centers-struggle-to-handle-onslaught-of-children-crossers.html. A June 20, 2014 White House fact sheet on the U.S. government's response to the crisis is at http://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-unaccompanied-children-central-america. Among other things the administration announced that it will provide limited public funding through Americorps to help fund lawyers for children facing removal. However, the funding is limited to approximately $22,000 for an attorney position. Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, N.Y. Times, June 6, 2014, http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html. Many such children may qualify for SIJS.

One of the important aspects of SIJS is that the child must first receive a finding from a family or juvenile court qualifying the child as a child who cannot be reunified with one or both parents

due to abuse, neglect or abandonment and that it is in the "best interests" of the child to remain in the United States. Accordingly, attorneys must research the local family or juvenile law to learn the substantive and procedural requirements. You can find more resources at: www.safepassageproject.org (focus on New York) or http://www.publiccounsel.org/publications?id=0119 (focus on California). These organizations may also be able to help you find a referral in your state.

Here is a 2013 New York appellate decision reversing a family court's finding that the child did not meet the statutory elements to qualify for SIJS:

In the Matter of Marcelina M.-G. (Anonymous), petitioner-appellant,

v.

Israel S. (Anonymous), et al., respondents; Susy M.-G. (Anonymous), nonparty- appellant.

112 A.D. 3d 100 (N.Y. App. Div. 2d Dep't 2013)

APPEAL by Marcelina M.-G., and SEPARATE APPEAL by Susy M.-G., in a child custody proceeding and related guardianship proceedings pursuant to Family Court Act article 6, as limited by their respective briefs, from so much of an order of the Family Court (David Klein, J.), entered September 13, 2011, in Westchester County, as denied, without a hearing, the motion of Susy M.-G., in which Marcelina M.-G. joined, for the issuance of an order declaring that Susy M.-G. is dependent on the Family Court and making specific findings that she is unmarried and under 21 years of age, that reunification with one or both of her parents is not viable due to parental abuse, neglect, or abandonment, and that it would not be in her best interests to be returned to her previous country of nationality or last habitual residence, so as to enable her to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 U.S.C. § 1101(a)(27)(J).
OPINION & ORDER

ROMAN, J.
Introduction
In 1990, Congress enacted the special immigrant juvenile provisions of the Immigration and Nationality Act (*see* 8 U.S.C. § 1101[a][27][J]; Pub L 101-649, § 153, 104 US Stat 4978 [101st Cong, 2d Sess, Nov 29, 1990]), which provide a gateway for undocumented children who have been abused, neglected, or abandoned to obtain lawful permanent residency in the United States. Prior to petitioning the relevant federal agency for special immigrant juvenile status, an immigrant juvenile must obtain an order from a state juvenile court making findings that the juvenile satisfies certain criteria. Among those findings is a determination that reunification with "1 or both" of the juvenile's parents "is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (8 U.S.C. § 1101[a][27][J][i]). The principal issue presented on this appeal is whether a juvenile may satisfy this statutory reunification requirement when the juvenile court determines that reunification is not viable with just 1, as opposed to both, of the

juvenile's parents. For the reasons that follow, we conclude that the "1 or both" language requires only a finding that reunification is not viable with 1 parent.

Factual and Procedural Background

Susy M.-G. was born in November 1994, in Honduras. As recounted in Susy's affidavit in support of her motion, she lived alone with her mother, Marcelina M.-G., until she was about six years old. At that time, the mother's boyfriend "Tony" began living with them part-time. Susy indicated that Tony was "mean and violent" toward her. Her mother "threw [Tony] out of [the] house" prior to the birth of Susy's half-brother Jason in November 2001.

When Susy was about 10 years old, her mother left Honduras to work in the United States. The mother had told Susy that "[s]he was leaving in three days," and that Susy and Jason would be going to live with their aunt "Estella." Susy asserted that "[l]ife at Estella's was miserable." According to Susy, "Estella was physically violent and verbally abusive" toward her, as were Susy's cousins. "Estella would smack [Susy] with whatever she could find, for no good reason at all," and called her names, including telling Susy that she was a "whore." Estella also used the money that Susy's mother sent for Susy for Estella's own family.

Susy averred that she had never lived with her father, Israel, whose last name she did not know. According to Susy, her mother said that the father was an alcoholic and violent toward the mother, and that they were "better off without him." Susy indicated that she did not think that her father had ever supported her or her mother financially, and that her father "never was present in [her] life." Although Susy indicated that she talked to her father "on the phone sometimes," she stated that they were "not close."

In 2008, Susy arranged for herself and her younger brother to travel to the United States with the help of "coyotes" (smugglers), because "[l]ife with Estella was unbearable." When Susy told her mother about this plan, her mother was initially "not happy at all with us coming to the United States," but eventually "relented and asked her boyfriend to help pay for the trip." Susy indicated that during the "very long trip," they "traveled with different people and smugglers by bus and car," and that they "had to sleep in strange places on the way." She explained that when they arrived at the United States-Mexico border, they tried crossing, but the coyotes saw border patrol and ordered them to run away back toward Mexico. They crossed the border into the United States on their next attempt, but were pursued by the border patrol. "Everyone started running" in different directions, and Susy lost sight of Jason. When Susy heard that Jason had been picked up, she back-tracked so that he would not be alone, and she was detained by border patrol.

Susy and Jason were taken to a group home where they remained for about three days, and were then transferred to a foster home in Texas. After approximately 80 days, Susy's uncle, Francisco G., arrived, and took Susy and her brother to New York to stay with Francisco and his family. Francisco enrolled Susy and Jason in school. With respect to her living situation, Susy explained as follows:

"At first it was hard adjusting to a new place and a new language but I now feel a lot more comfortable in the United States and I have friends. It is the first time I feel safe and taken care of as a child—it is a wonderful feeling to be provided for and be part of a loving family. I see my mother who lives close by with her boyfriend and their baby daughter but my caretaker and head of family is Francisco. I am happy living with him and his family."

The Guardianship Petition and Motion for Special Findings

[Editor's note: initially, Francisco, Suzy's uncle, sought to be named Suzy's guardian and the initial application said that Suzy's mother had abandoned her. As the case progressed, Suzy's mother sought to be named as custodian.] . . .

In support of the motion, Susy alleged that she was under 21 years of age, unmarried, and dependent upon the Family Court in that the court had accepted jurisdiction over the matter of her guardianship, and her parents had effectively relinquished control over her. Additionally, Susy maintained that reunification with one or both of her parents was not viable due to neglect and abandonment. Specifically, Susy alleged that her father had abandoned her and had not provided any financial support or parental guidance. In addition, Susy asserted that her mother had neglected her by failing to provide her with adequate food, clothing, shelter, and education in Honduras, and by allowing her to travel unaccompanied to the United States. Lastly, she alleged that her mother had abandoned her by failing to provide her with any substantial financial assistance or provisions since she arrived in the United States.

In support of her motion, Susy submitted her affidavit and birth certificate, as well as her brother's affidavit. In addition, Susy submitted an affidavit from her mother. In her affidavit, the mother averred that Susy's father, Israel, "never was responsible—he drank, used drugs, and was violent towards [the mother], even breaking [her] nose once." The mother asserted that the father had "never been involved in [Susy's] life," and had also "never shown an interest in being involved in [the child's] life, or offered to pay for her expenses in any way." The mother also indicated that her former boyfriend, Jason's father, had "beat[en]" the child.

The mother stated that when she lived in Honduras, she had relied on her sister Estella to take care of her children while she worked. She was aware that Estella had hit Susy, and that Estella would deprive the child of meals as a punishment. The mother indicated that she "continued to have Estella take care of [Susy] because [she] had no other choice."

The mother acknowledged having left her children in the care of Estella when she left Honduras and immigrated to the United States in 2004. The mother stated that after she left Honduras, "Susy related on several occasions that Estella beat her frequently and permitted her daughters to hit her as well. She also told [the mother] that Estella would frequently not feed [Susy and Jason], and only provided them with one meal a day on average." The mother indicated that she sent money to Estella to pay for room and board for the children, and to cover expenses such as medical bills for Jason and school clothes.

According to the mother, in 2008, Susy informed her that she had contacted a "coyote" about transporting her and Jason to the United States. "Although [the mother] did not want them to come to the United States," she "was afraid [Susy] otherwise would run away from home," so she "agreed to speak to the coyote and pay him to bring Jason and Susy to the United States." The mother ultimately learned from immigration authorities that the children had been arrested.

The mother noted that her brother-in-law, Francisco, agreed to pick up the children in Texas and bring them back to live with him and his family. The mother asserted that she currently lived with her youngest daughter in a small apartment in the same town as Francisco, and that she did not have the resources to support Susy or Jason. She indicated that the children were "very happy" living with Francisco and his family, and that she wanted them "to stay with their Aunt and Uncle," noting that "it [was] much better for them than to be with [her]."

In further support of her motion for an order of special findings, Susy submitted a letter from a licensed clinical social worker, Maribel Rivera, dated December 9, 2009. Rivera stated that Susy

was attending individual psychotherapy sessions, and had been diagnosed with post traumatic stress disorder and "depressed mood due to multiple changes in her life." Susy also submitted a "Record of Deportable/Inadmissible Alien" document issued by the United States Department of Homeland Security, which reflected, inter alia, that Susy was apprehended on August 19, 2008, at or near Rio Grande City, Texas.

The Mother's Custody Petition

Although the mother had initially supported Francisco's application for guardianship of Susy, in May 2011, the mother filed a petition for custody of Susy. The mother indicated that she resided in Westchester County, and that it would be in Susy's best interests to have custody awarded to her because the father was not involved in the child's life, and the child "want[ed] to live with [the] mother." The mother also submitted a memorandum of law in support of Susy's motion for special findings.

The Family Court's Determination

At a court appearance on June 21, 2011, the Family Court, inter alia, granted the mother's petition for sole custody of Susy and, as a result, dismissed Francisco's petition for guardianship of the child. In addition, the court denied Susy's motion for a special findings order. Counsel for the mother argued that because Susy had been neglected by her father, she was eligible for special findings under "the new law" even though the mother obtained custody. The court responded, "I think that is a strained reading of a statute. I think that it is a bending over more than backwards in order to create an artificial citizenship, frankly, and I will not make a special finding." The court indicated that Susy was "with her natural parent," and that she "doesn't need them both." . . .

Special Immigrant Juvenile Status

On appeal, Susy and the mother contend that the Family Court erred in denying Susy's motion for an order of special findings on the basis that custody was awarded to the mother. They argue that the court's determination was contrary to the plain language of the special immigrant juvenile status (hereinafter SIJS) statute, which permits SIJS eligibility where, as here, reunification is not viable with one of the child's parents. Additionally, Susy and her mother contend that Susy satisfied the other eligibility requirements for SIJS and, therefore, Susy's motion should have been granted.

The SIJS provisions of the Immigration and Nationality Act were enacted by Congress in 1990 . . . To be eligible for SIJS, an immigrant juvenile must obtain an order from a state juvenile court making findings that the juvenile satisfies certain criteria…Once the state court makes an SIJS predicate order, a juvenile may apply to the USCIS for SIJS using an I-360 petition, and if the juvenile is granted SIJS, he or she may be considered for adjustment to lawful permanent resident status. … .

At the time of the enactment of the statute in 1990, a state court's SIJS predicate order was required to find that (i) the juvenile was dependent on a juvenile court located in the United States and had been deemed eligible for long-term foster care, and (ii) it would not be in the juvenile's best interest to be returned to the juvenile's or parent's home country. …. In 1997, Congress amended the law out of concern that juveniles entering the United States as visiting students were abusing the SIJS process. … The amendments modified the SIJS definition to include an immigrant whom a juvenile court had "legally committed to, or placed under the custody of, an agency or department of a State," and added the requirement that the finding of eligibility for long-term foster care be "due to abuse, neglect, or abandonment" (Pub L 105-119,

§ 113, 111 US Stat 2440, 2460 [105th Cong, 1st Sess, Nov 26, 1997]; …Immigration Law and Procedure § 35.09[1] [Matthew Bender 2013]). Congress also added consent provisions, requiring the express consent of the United States Attorney General to the dependency order, and providing that no juvenile court had jurisdiction to determine the custody status or placement of a juvenile in the actual or constructive custody of the Attorney General unless the Attorney General specifically consented to such jurisdiction …According to the House Conference Report, the modifications in the statute were made "in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children" (HR Rep 105-405, 105th Cong, 1st Sess at 130 [1997] …

In 2008, the requirements for SIJS were again amended, this time by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (*see* Pub L 110-457, 122 US Stat 5044 [110th Cong, 2d Sess, Dec 23, 2008]). The 2008 amendments expanded eligibility to include those immigrant children who had been placed in the custody of an individual or entity appointed by a State or juvenile court … Congress also removed the requirement that the immigrant child had to be deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and replaced it with a requirement that the juvenile court find that "reunification with [1] or both of the immigrant's parents is not viable due to abuse, neglect, abandonment[,] or a similar basis found under State law" (Pub L 110-457, 122 U.S. Stat 5044, 5079…).

Thus, under the current law, a "special immigrant" is a resident alien who is under 21 years of age, unmarried, and dependent on a juvenile court located in the United States or "legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States" (8 U.S.C. § 1101[a][27][J][i]; *see* 8 CFR 204.11; …Additionally, the court must find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law," and "that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence" (8 U.S.C. § 1101[a][27][J][i], [ii] …

By making these preliminary factual findings, the juvenile court is not rendering an immigration determination … Rather, "the final decision regarding [SIJS] rests with the federal government, and, as shown, the child must apply to that authority." …

Analysis

In the present case, we find that the Family Court erred in denying Susy's motion for the issuance of an order making a declaration and specific findings that would allow her to apply to the USCIS for SIJS. The record establishes that Susy is under 21 years of age and unmarried (*see* 8 CFR 204.11[c][1], [2]). Additionally, since the Family Court placed Susy in the custody of her mother, she has been "legally committed to, or placed under the custody of . . . an individual . . . appointed by a State or juvenile court located in the United States." …

With respect to the nonviability of reunification with one or both parents, the record reveals that Susy was abandoned by her father. Susy averred in her affidavit that she never lived with her father, and that she did not think he ever provided financial support. Although Susy indicated that she talked to her father "on the phone sometimes," she asserted that he had never been present in her life. Susy's mother confirmed in her affidavit that the father was never involved in Susy's life. According to the mother, the father "never was responsible—he drank, used drugs, and was violent towards [her]," and "had never shown an interest in being involved in Susy's life, or offered to pay for her expenses in any way." Thus, Susy established that reunification with her

father was not viable due to abandonment. … The Family Court, as evidenced by its comments at the hearing, denied Susy's application for a special findings order on the ground that the viability of reunification with Susy's mother rendered Susy ineligible for SIJS. However, we disagree with the Family Court's interpretation of the reunification component of the statute.

…Under the plain language of the statute, to be eligible for SIJS, a court must find that "reunification with *1 or both* of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (8 U.S.C. § 1101[a][27][J][i] [emphasis added]). We interpret the "1 or both" language to provide SIJS eligibility where reunification with just one parent is not viable as a result of abuse, neglect, abandonment, or a similar State law basis. …Thus, contrary to the Family Court's determination, the fact that the mother was available as a custodial resource for Susy does not, by itself, preclude the issuance of special findings under the SIJS statute. …

The legislative history of the SIJS statute supports this interpretation of the reunification requirement. …As set forth above, prior to the 2008 amendments, the statute required a determination that the child was eligible for long-term foster care. …. The phrase "[e]ligible for long-term foster care" meant a determination "by the juvenile court that family reunification is no longer a viable option" (8 CFR 204.11[a]). Thus, under the former version of the statute, "SIJS was only available when reunification with *both* parents was not possible." …"[B]y eliminating the long-term foster-care requirement and instead requiring only a finding that reunification with 1 or both' parents is not viable," the statute, as amended in 2008, "requires only a finding that reunification is not viable with one of the child's parents." …

We note while we find a literal reading of the phrase "1 or both" to be supported by the plain language of the statute, the Supreme Court of Nebraska has declined to adopt a literal reading of the phrase (*see In Re Erick M.*, 284 Neb 340, 352, 820 NW2d 639, 648). In *Erick M.*, the court found the phrase "1 or both" to be ambiguous because it can reasonably be interpreted "to mean that a juvenile court must find, depending on the circumstances, that *either* reunification with one parent is not feasible *or* reunification with both parents is not feasible" (*In Re Erick M.*, 284 Neb at 345, 820 NW2d at 644 [emphasis in original]). After holding that courts "should generally consider whether reunification with either parent is feasible," the *Erick M.* court determined that the petitioner therein was not eligible for SIJS predicate findings because reunification with his mother was feasible. …

Initially, to the extent the language of the statute can indeed be viewed as ambiguous, it has been held that "ambiguities in immigration statutes must be read in favor of the immigrant."… In any event, for the reasons discussed, we decline to adopt the Nebraska Supreme Court's interpretation of the statute. Absent a grant of special findings in this case, Susy might face deportation to Honduras where her father has abandoned her and there appear to be no other fit relatives to care for her, essentially rendering the fact that the child has a fit parent in the United States immaterial. We believe this would be contrary to the purpose of the SIJS statute. "Indeed, the very reason for the existence of special immigrant juvenile status is to protect the applicant from further abuse or maltreatment by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect." . . .

Moreover, and indeed significantly, the findings by the state juvenile court "do not bestow any immigration status on SIJS applicants" … but, instead, are prerequisites to applying for SIJS classification with the USCIS. … In sum, we find that Susy has satisfied the statute's reunification requirement by demonstrating that reunification with her father was not viable.

Turning to the best interests component, as discussed, the record shows that the father, who apparently continues to live in Honduras, abandoned Susy. Additionally, Susy's aunt, Estella, with whom she previously lived in Honduras, was neglectful and abusive toward her. The mother stated that she had left Susy with Estella because she had no other alternative, which indicates that there are no other relatives available to care for Susy in Honduras. The record also reveals that the child has suffered psychological distress. By contrast, the record demonstrates that in the United States, Susy is attending school, has made friends, and has family members to care for her, including her mother, as well as her uncle and aunt. Under these circumstances, the record demonstrates that it would not be in the best interests of the child to return to Honduras. …
Accordingly, the order is reversed insofar as appealed from, on the law and the facts, the motion is granted, it is declared that Susy is dependent on the Family Court, and it is found that she is unmarried and under 21 years of age, that reunification with one or both of her parents is not viable due to parental abuse, neglect, and abandonment, and that it would not be in Susy's best interests to return to Honduras, her previous country of nationality and last habitual residence.

Under New York law the family court has jurisdiction until the child is twenty-one for guardianship proceedings. New York courts have affirmed that a parent can petition for a child via a guardianship proceeding. *See also Maria P.E.A. v. Sergio A.G.*, 111 A.D. 3d 619 (N.Y. App. Div. 2d Dep't 2013) (single parent SIJS granted as part of guardianship).

On June 25, 2015, the USCIS issued a policy memorandum entitled Updated Implementation of the Special Immigrant Juvenile *Perez-Olano* Settlement Agreement regarding the settlement agreement in *Perez-Olano v. Holder*, No. CV 05-3604 (C.D. Cal. 2005). The memorandum (PM-602-0117) is at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0624_Perez-Olano_Settlement_Agreement_PM_Effective.pdf. The *Perez-Olano* settlement agreement benefits all juveniles "including but not limited to: SIJ applicants, who, on or after May 13, 2005, apply or applied for SIJ status or SIJ-based adjustment of status based on their alleged SIJ eligibility."

In July 2014, the USCIS and the plaintiffs entered into a stipulation relating to petitions or applications for adjustment of status based on special immigrant juvenile status that were denied because the court dependency order expired at the time of filing. By stipulation, the USCIS will not deny a special immigrant juvenile petition if the class member was under twenty-one years old, unmarried, and otherwise eligible and the class member is the subject of a valid dependency order or was the subject of a valid dependency order that terminated based on age before filing the petition. The USCIS will reopen SIJ petitions and adjustments based on SIJ that it denied, revoked, or terminated on or after December 15, 2010, based on age if the class member was under twenty-one and unmarried when the I-360 was submitted to the USCIS. The policy memorandum provides information regarding who qualifies and how class members can request that their cases be reopened. Class members may file motions to reopen pursuant to the stipulation on or before June 15, 2018.

Page 847 (§ 7.02[A]): This section summarizes the legal memoranda authorizing DHS to use prosecutorial discretion in low priority removal proceedings. According to a 2014 study, however, DHS rarely exercises prosecutorial discretion. *See* Transactional Records Access Clearinghouse, Syracuse University, *ICE Rarely Uses Prosecutorial Discretion to Close*

Immigration Cases (Apr. 24, 2014), http://trac.syr.edu/whatsnew/email.140424.html (finding that ICE exercises prosecutorial discretion to close cases in immigration court only about 6.7 percent of the time).

As discussed in updates of chapter 1 and 6, on November 20, 2014, Department of Homeland Security Secretary Jeh Johnson issued a memo regarding the prosecutorial discretion directives in implementing President Obama's 2014 executive actions on immigration enforcement and removal policy. The memo is at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf . The 2014 executive actions provide guidance on using prosecutorial discretion to focus immigration enforcement resources on noncitizens whose removal from the United States is a higher priority. The executive actions also expand the eligibility for deferred action to more potential applicants.

DHS uses prosecutorial discretion to decide which non-U.S. citizens should be put into or taken out of removal proceedings. DHS Secretary Johnson's memo provides information on policies to be used by ICE, CBP and USCIS to apprehend, detain, and remove foreign nationals who are threats to national security, public safety and border security. Except as noted in the memo, the November 20, 2014, DHS memo rescinds and supersedes the 2011 Morton memos on civil immigration enforcement and prosecutorial discretion as well as previous memos regading case-by-case review, civil immigration enforcement and detainers, and the National Fugitive Operations Program (November 17, 2011; December 21, 2012 and December 8, 2009, respectively).
On May 4, 2015, the DHS Inspector General issued a report: DHS Missing Data Needed to Strengthen Its Immigration Enforcement Efforts. The report (DHS OIG-15-85) is at https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-85_May15.pdf. The report states that in fiscal years 2013 and 2014, CBP, ICE and USCIS (the three DHS components with primary immigration enforcement roles) "received collectively, on average annually, about $21 billion." The report states that "DHS does not collect and analyze data on the use of prosecutorial discretion" to fully assess its current immigration enforcement activities and to develop future policies.

The report summarizes the type of data that USCIS, ICE and CBP collect. It states that "as of September 30, 2014, USCIS reported that it had approved 632,855 DACA requests," and that the Office of the Border Patrol "reported that it released 650 DACA-eligible individuals." The report also states that ICE did not have information regarding how many DACA-eligible foreign nationals were released. The report notes that in fiscal year 2014, ICE recorded 12,757 instances in which an ICE officer released a noncitizen pursuant to prosecutorial discretion after determining that the individual was not an enforcement priority. ICE also stated that "the prosecutorial discretion data may not always be accurate and complete." The DHS OIG report recommends that DHS collect data on its use of prosecutorial discretion.

On June 17, 2015, ICE issued FAQs on Prosecutorial Discretion and Enforcement Priorities. The FAQs are at http://www.ice.gov/immigrationAction/faqs. The FAQs include information for persons in ICE custody or in removal proceedings who wish to argue they are not an enforcement priority or that they are eligible for the exercise of prosecutorial discretion.

Page 849 (§ 7.02[B]): Add the following as new Notes 4-7:

4. DACA Renewals. Many individuals who received DACA are nearing the expiration of their two-year initial grant. On June 5, 2014, USCIS noted that it would begin accepting renewal requests as well as initial applications from persons who had not applied previously and met the criteria. USCIS stated that as of April 2014, 560,000 individuals received DACA. More information about the DACA renewal process can be found at http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal.

Applicants for DACA renewals report that processing for both status and employment authorization cards is taking more than 120 days. In May 2015, three immigrants and two immigration service providers filed a nationwide class action lawsuit alleging that the USCIS and DHS were unlawfully delaying the adjudication of employment authorization applications and refusing to issue interim employment authorization.

On June 15, 2015, the USCIS issued renewal information and tips to stakeholders, "Don't Let Your Work Permit Expire; Follow These DACA Renewal Tips," urging applicants to apply early, stating that USCIS' goal is to process DACA renewals in 120 days and permitting applicants to submit inquiries on cases pending more than 105 days. The document is at http://www.uscis.gov/news/dont-let-your-work-permit-expire-follow-these-daca-renewal-tips.

5. DACA and Traveling. DACA is a form of temporary relief. It is not an immigration status. An individual granted DACA may request advance parole for international travel for humanitarian, educational or employment purposes. A DACA recipient should not leave the United States unless both DACA and the advance parole have been granted. Individuals with unexecuted deportation or removal orders, in immigration proceedings or who have other inadmissibility issues should consult with an immigration attorney before traveling outside the United States.

6. DACA and Unlawful Presence. Noncitizens with unlawful presence have been able to depart and return to the United States pursuant to advance parole under *Matter of Arrabally and Yerrabelly*, discussed in Chapter 4. In *Arrabally*, the Board found that international travel with advance parole was not a departure triggering the 10-year bar to admission. Also, remember that unlawful presence does not begin to accrue until an individual turns 18 (Chapter 5).

Many individuals with DACA may have entered the United States without inspection and therefore are not eligible to apply to adjust status to become permanent residents in the United States even if an immigrant visa is available for them. However, those with DACA and advance parole who travel internationally and are then paroled into the United States may qualify for adjustment of status pursuant to an immediate relative petition (avoiding consular processing and the I-601A waiver process). Individuals with temporary protected status using advance parole

also would be able to adjust status this way. Individuals subject to other grounds of inadmissibility would be ineligible for adjustment of status.

7. DACA and Driver's Licenses. While DACA recipients can obtain employment authorization, it is difficult as a practical matter in many places to work if you can't legally drive. Most states permit DACA recipients to obtain driver's licenses. Arizona initially prevented DACA recipients from obtaining driver's licenses. In July 2014, the Ninth Circuit struck down the state restriction, finding that there was no rational basis to distinguish between these temporarily authorized noncitizens and others. *Ariz. Dream Act Coalition v. Brewer*, 2014 U.S. App. LEXIS 12746 (9th Cir. July 7, 2014). *See* Michael Musial, *Court Blocks Arizona on Immigrant Driver's Licenses, Dreamers Rejoice*, Los Angeles Times, July 7, 2014, http://www.latimes.com/nation/nationnow/la-na-nn-arizona-drivers-licenses-immigrants-20140707-story.html.. On December 17, 2014, the U.S. Supreme Court issued an order denying Arizona's application for a stay. The U.S. District Court for the District of Arizona issued an order and permanent injunction in January 2015, requiring the Arizona Department of Transportation to consider employment authorization cards issued to DACA recipients as valid proof of eligibility for a driver's license. *Ariz. Dream Act Coalition v. Brewer*, 2015 U.S. Dist. LEXIS 8043 (D. Az. Jan. 22, 2015).

Page 849: Add the following new subsection, just before § 7.03:

§ 7.02[C] Immigration Accountability Executive Actions and Pending Litigation

President Obama introduced several immigration-related executive actions on November 20, 2014. The measures included an expanded deferred action program for undocumented persons within the United States, revised border security and enforcement policies, and family- and employment-based immigration reforms.

General information on these executive actions is at:

- President Obama's address: http://whitehouse.gov/issues/immigration/immigration-action#
- The White House, Fact Sheet: Immigration Accountability Executive Action, https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action
- Department of Homeland Security, Fixing Our Broken Immigration System Through Executive Action –Key Facts (Nov. 21, 2014), http://www.dhs.gov/immigration-action
- Kate M. Manuel, Congressional Research Service, The Obama Administration's November 2014 Immigration Initiatives: Questions and Answers (Nov. 24, 2014), https://www.fas.org/sgp/crs/homesec/R43798.pdf

As noted in the update to Chapter 1, the Secure Communities program has ended and is replaced with the Priority Enforcement Program (PEP). Enforcement priorities for ICE and CBP are discussed in Chapter 1. Reforms relating to employment-based immigration are discussed in updates to Chapters 3 and 4. An expansion of the provisional waiver program is included in the update to Chapter 7.

The President holds the power to grant deferred action under the Immigration and Nationality Act and the regulations promulgated thereunder and the principle of prosecutorial discretion. As

explained earlier in Chapter 7, deferred action is not a legal immigration status. It is a temporary status that permits employment authorization.

One of the November 2014 executive actions creates a new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) for unauthorized individuals who are the parents of U.S. citizen or lawful permanent resident children born on or before November 20, 2014. The parents must have lived in the United States continuously since before January 1, 2010, and must be able to substantiate that they were present in the United States on November 20, 2014 and on the date they apply for deferred action. Deferred action will be granted for three years.

Another executive action extends the group to whom Deferred Action for Childhood Arrivals (DACA) is available. Noncitizens who entered the United States before January 1, 2010, who can demonstrate physical presence in the United State since that time, and who were under age sixteen when they entered the United States will be eligible. Although the initial DACA relief required that DACA applicants to under the age of thirty-one when applying, the expanded DACA program has no age limit. Deferred action will be granted for three years.

Potential applicants within the enforcement priorities described in the November 20, 2014 memo of DHS Secretary Johnson will not be eligible for this relief.

In December 2014 over two dozen states challenged the executive actions concerning the expanded DACA program and the new DAPA program. *Texas v. United States*, Civil No. B-14-254 (S.D. Tex.). The complaint, seeking declaratory and injunctive relief, claims that the President's executive actions violate the Constitution's Take Care Clause and the Administrative Procedure Act. A federal district court granted a preliminary injunction in February 2015. *Texas v. United States*, 2015 U.S. Dist. LEXIS 18551 (S.D. Tex. Feb. 16, 2015). The district court ruled that the states were likely to prevail on their claim that the executive actions failed to comply with the notice and comment requirements of the APA.

The federal government unsuccessfully filed an emergency motion to stay the injunction pending appeal. *Texas v. United States*, 2015 U.S. App. LEXIS 8657 (5th Cir. May 26, 2015). The Fifth Circuit panel found that the government "is unlikely to succeed on the merits of its appeal of the injunction." The Fifth Circuit heard oral arguments on the merits of the federal government's appeal of the preliminary injunction on July 10, 2015.

Because of the ongoing litigation, the expanded DACA program and the DAPA program have not started as of July 2015.

Page 851 (§ 7.03[4]): Add to the end of the TPS section, just before subsection [5]:

As of June 2015, temporary protected status exists for qualifying nationals of the following countries: El Salvador, Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone, Somalia, Sudan, and Syria. Eligibility requirements and registration and re-registration dates

differ by country. More information can be found at www.uscis.gov/humanitariantemporary-protected-status-deferred-enforced-departure/temporary-protected status.

Page 851 (§ 7.03[5]): Add to the end of the Cuban Adjustment Act subsection, just before subsection [6]:

On June 19, 2015, USCIS issued an interim policy memorandum (PM-602-0110) providing guidance concerning the Violence against Women Act (VAWA) amendments to the Cuban Adjustment Act. The memorandum is at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/PED-VAWA_CAA-Amendments-PM-602-0110.pdf.

VAWA 2000 and VAWA 2005 amended the CAA to ameliorate the application for adjustment of status requirements under section1 of the CAA for battered or abused spouses or children of qualifying Cuban principals.

Page 854 (§ 7.03[B]): Add the following to the end of Chapter 7:

Parole-in-Place is a type of relief that can enable an individual who was not inspected or admitted to apply for adjustment of status within the United States. Although this is not a new form of relief, in the past few years its use has increased for spouses, children and parents of members of the U.S. armed forces on active duty, the selected reserve of the ready reserve, and former members of the U.S. armed forces or the selected reserve of the ready reserve. Parole-in-place provides relief to those U.S. military family members subject to the ground of inadmissibility in INA § 212(a) (6) (A) (I).

Those qualifying relatives may qualify for the grant of a parole while physically present in the United States without inspection or admission under INA § 212(d) (5) (A). This section of the INA permits the discretion to grant a parole to "any alien applying for admission to the United States." The applicant may be physically present in the United States pursuant to INA § 235(a) (1). The parole-in-place request is submitted to the local USCIS office. If parole-in-place is granted, the individual may apply for adjustment of status with an immigrant petition in the immediate relative category. Parole-in-place does not excuse other inadmissibility issues. More information may be found in a November 15, 2013, USCIS Policy Memorandum at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

The November 20, 2014 executive actions include a provision to expand parole-in-place to include families of individuals in the process of enlisting in the U.S. military.

Chapter 8: Asylum and Relief for People Seeking Refuge

Page 868 (§ 8.01[A][2]): Add the following immediately before Notes and Questions:

The refugee announcement for fiscal year 2014 is available at http://www.whitehouse.gov/the-press-office/2013/10/02/presidential-memorandum-refugee-admissions-fiscal-year-2014. The 2014 figure is 70,000, the same as in 2013.

The announcement for 2015 is at http://www.whitehouse.gov/the-press-office.2014/09/30/presidential-memorandum-fy-2015-refugee-admissions. The number remains at 70,000. Of that total, 4,000 are set aside for children from El Salvador, Guatemala, and Honduras.Unusually, the state Department announced that children under 18 who have a parent living in the United States in lawful status (e.g., LPR, U.S. citizenship, TPS) may apply "in country." See discussion below.

The in-country processing program has not yet produced very many admissions of children as refugees. While the CBP website reports that thousands of applications have been processed, the USCIS Ombudsman office reports that "[a]s of March 28, 2016, only 144 individual beneficiaries—46 refugees and 98 parolees—had arrived in the United States through the CAM program. Of those, 93 arrived from El Salvador, 46 from Honduras and 5 from Guatemala." Correspondence with Professor Benson dated June 20, 2016.

In response to the Syrian crisis, the President stated in 2015 that 10,000 Syrian refugees would be resettled as part of an overall increase to 85,000 refugees in the annual statement. http://www.state.gov/j/prm/releases/docsforcongress/247770.htm. However, the cumbersome, and ossified security clearance process that is part of the refugee admission procedures has delayed the admission of all but 1,200 Syrian refugees. For an article explaining the complexity of the review process see Eliza Griswald, "Why Is It So Difficult for Syrian Refugees to Get Into the U.S.?," *N.Y. Times*, Jan. 20, 2016, http://www.nytimes.com/2016/01/24/magazine/why-is-it-so-difficult-for-syrian-refugees-to-get-into-the-us.html.

For a good article explaining the difference between refugee admissions and asylum, see Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, Migration Information Source, Oct. 28, 2015, http://www.migrationpolicy.org/article/refugees-and-asylees-united-states. The article also contains many useful statistics.

Page 872 (§ 8.02[A]): Add the following before [2]:

In the spring and summer of 2014, thousands of Central Americans, mostly unaccompanied children and women traveling with very small children, arrived at the U.S. southern border. While the numbers of unaccompanied minors from Central America had been rising for several years, the numbers tripled in 2014. Part of the federal government's response was to announce a new and limited form of in-country processing for up to 4,000 children from three nations: El

Salvador, Guatemala, and Honduras. The procedure allows a parent resident in the United States to apply to sponsor the child as a refugee. The parent must have some form of legal status in the United States: permanent residence, asylee, or temporary protected status. (Children with U.S. citizen parents or stepparents could qualify for a different overseas priority processing or for direct immediate relative sponsorship.) The child must be unmarried and under the age of 21. The parent must provide DNA testing evidence to prove the family relationship. If the child does not meet the full definition of a refugee found in INA § 101(a)(42); 8 U.S.C. § 1101(a)(42), USCIS will consider allowing the child and potentially an accompanying parent to enter the United States on humanitarian parole. To learn more see http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam.

Page 890 (§ 8.02[A]): Add new Note 3, just before Problem 8-3:

3. Mothers and Children at the Border. In the spring and summer of 2014, a large number of El Salvadoran, Honduran, and Guatemalan women carrying small children began to arrive at the southern border of the United States. If the women articulated a fear of return or if they could not be immediately returned to Mexico, the women and children were sometimes released into the interior of the United States and placed in removal proceedings. ICE has very limited family detention facilities. As the press began to cover the story and the numbers of women and children continued to increase, the Obama administration convened a special task force.

The White House characterized the situation as a "humanitarian crisis." By June 2014, CBP reported that more than 52,000 unaccompanied minors had been apprehended since October 2013 and that the number of women and small children arriving from Central America was continuing to increase. As of the end of June, President Obama said that the administration would increase family detention.

For a report documenting that many children fleeing Central America have viable claims for protection, see UN High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (Mar. 13, 2014), *available at* http://www.refworld.org/docid/532180c24.html.

Is Marta's situation distinct from the women and children arriving from Honduras, El Salvador and Guatemala? How? Why do numbers make such a difference in procedures?

You can find resources about unaccompanied children at www.safepassageproject.org. This nonprofit organization trains and mentors attorneys representing immigrant children. The resources focus on New York law. However, new resources are posted that refer to other organizations with resources in other states.

Page 900 (§ 8.02[B][1]): Insert the following before the paragraph beginning with "The landmark case…":

In the summer of 2014, the BIA adopted its first clear precedent decision that asylum eligibility for married women in Guatemala who could not find effective protection from

domestic violence. We have included the case at the end of this section. Here we discuss the evolution of the theory.

Page 903 (§ 8.02[B][3]): Insert right before [4] Mental Disabilities and the Theory of a Particular Group:

In August 2014, the BIA issued a much clearer and developed opinion describing victims of domestic violence as a viable social group:

Matter of A-R-C-G-

26 I. & N. Dec. 388 (B.I.A. 2014)

In a decision dated October 14, 2009, an Immigration Judge found the respondents removable and denied their applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3) (2006). … We find that the lead respondent, a victim of domestic violence in her native country is a member of a particular social group composed of "married women in Guatemala who are unable to leave their relationship." ….

I. FACTUAL AND PROCEDURAL HISTORY

The lead respondent is the mother of the three minor respondents. The respondents are natives and citizens of Guatemala who entered the United States without inspection on December 25, 2005. The respondent filed a timely application for asylum and withholding of removal under the Act.

The Immigration Judge found the respondent to be a credible witness, which is not contested on appeal. It is undisputed that the respondent, who married at age 17, suffered repugnant abuse by her husband. This abuse included weekly beatings after the respondent had their first child. On one occasion, the respondent's husband broke her nose. Another time, he threw paint thinner, which burned her breast. He raped her.

The respondent contacted the police several times but was told that they would not interfere in a marital relationship. On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again. The respondent repeatedly tried to leave the relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him. Once she went to Guatemala City for about 3 months, but he followed her and convinced her to come home with promises that be would discontinue the abuse. The abuse continued when she returned. The respondent left Guatemala in December 2005, and she believes her husband will harm her if she returns.

The Immigration Judge found that the respondent did not demonstrate that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." The Immigration Judge determined that there was inadequate evidence that the respondent's spouse abused her "in order to overcome" the fact that she was a "married woman in Guatemala who was unable to leave the relationship." He found that the respondent's abuse was the result of "criminal acts, not persecution," which were perpetrated "arbitrarily" and "without reason." He accordingly found that the respondent did not meet her burden of demonstrating eligibility for asylum or withholding of removal under the Act.

. . .We subsequently requested supplemental briefing from both parties and amici curiae to address the issue whether domestic violence can, in some instances, form the basis for a claim of asylum or withholding of removal under section 208(a) and 241(b)(3) of the Act. *See Matter of R-A*, 22 I&N Dec. 906 (BIA 1999) (en banc), *vacated,* 22 I&N Dec. 906 (A.G. 2001), remanded, 23 I&N Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008).

In response to our request for supplemental briefing, the DHS now concedes the respondent established that she suffered past harm rising to the level of persecution and that the persecution was on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." However, the DHS seeks remand, arguing that "further factual development of the record and related findings by the Immigration Judge are necessary on several issues" before the asylum claim can be properly resolved. The respondent opposes remand and maintains that she has met her burden of proof regarding all aspects of her asylum claim. We accept the parties' position on the existence of harm rising to the level of past persecution, the existence of a valid particular social group, and the issue of nexus under the particular facts of this case.

II. ANALYSIS

A. Particular Social Group

The question whether a group is a "particular social group" within the meaning of the Act is a question of law that we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii)(2014). . .. The question whether a person is a member of a particular social group is a finding of fact that we review for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We initially considered whether victims of domestic violence can establish membership in a particular social group in *Matter of R-A*, 22 I&N Dec. at 907. We reversed an Immigration Judge's finding that the respondent in that case was eligible for asylum on account of her membership in a particular social group consisting of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." *Id.* at 911. The majority opinion reasoned that the preferred social group was "defined principally, if not exclusively, for purposes of" the asylum case and that it was unclear whether "anyone in Guatemala perceives this group to exist in any form whatsoever," including spousal abuse victims themselves or their male oppressors. *Id.* at 918. We further reasoned that even if the proffered social group was cognizable, the respondent did not establish that her husband harmed her on account of her membership in the group. *Id.* at 920-30.

The Acting Commissioner of the former Immigration and Naturalization Service ("INS") referred the decision to the Attorney General for review. In 2001, Attorney General Janet Reno vacated our decision in *Matter of R-A-*, 22 I&N Dec. 906. She remanded the case for the Board's reconsideration following final publication of proposed regulations that addressed the meaning of various terms in asylum law, including "persecution," "membership of a particular social group," and "on account of" a protected characteristic. *See Asylum and Withholding Definitions*, 65 Fed. Reg. 76, 597-98 (proposed Dec. 7, 2000).

On February 21, 2003, Attorney General John Ashcroft certified *Matter of R-A-* for review and provided an opportunity for additional briefing. He remanded the case to the Board in 2005, directing us to reconsider our decision "in light of the final rule." *Matter of R-A-*, 23 I&N Dec. 694. The proposed regulations were not finalized. On September 25, 2008, Attorney General Michael Mukasey certified this case for his review and issued a decision ordering us to reconsider it, removing the requirements that we await the issuance of the final regulations. *Matter of R-A-*, 24 I&N Dec. 629. *Matter of R-A-* is no longer pending.

B. Respondent's Claim

The DHS has conceded that the respondent established harm rising to the level of past persecution on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." The DHS's position regarding the existence of such a particular social group in Guatemala under the facts presented in this case comports with our recent precedents clarifying the meaning of the term "particular social group." *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). In this regard, we point out that any claim regarding the existence of a particular social group in a country must be evaluated in the context of evidence presented regarding the particular circumstances in the country in question.

In *Matter of W-G-R-* and *Matter of M-E-V-G*, we held that an applicant seeking asylum based on his or her membership in a "particular social group" must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. The "common immutable characteristic" requirement incorporates the standard set forth in *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985). The "particularity" requirement addresses "the question of delineation." *Matter of W-G-R-*, 26 I&N Dec. at 239. The "social distinction" requirement renames the former concept of "social visibility" and clarifies "the importance of 'perception' or 'recognition' to the concept.

In this case, the group is composed of members who share the common immutable characteristic of gender. *See Matter of Acosta*, 19 I&N Dec. at 233 (finding that sex is an immutable characteristic); *see also Matter of W-G-R-*, 26 I&N Dec. at 213 ("The critical requirement is that the defining characteristic of the group must be something that either cannot be changed or that the group members should not be required to change in order to avoid persecution.") Moreover, martial status can be an immutable characteristic where the individual is unable to leave the relationship. A determination of this issue will be dependent on the particular facts and evidence

in a case. A range of factors could be relevant, including whether dissolution of marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints. In evaluating such a claim, adjudicators must consider a respondent's own experiences, as well as more objective evidence, such as background country information.

The DHS concedes that the group in this case is defined with particularity. The term used to describe[] the group- "married," "women," and "unable to leave the relationship" –have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent's experience with the police. *See Matter of M-E-V-G-*, 26 I&N Dec. at 239; *Matter of W-G-R-*, 26 I&N Dec. at 214. In some circumstances, the terms can combine to create a group with discrete and definable boundaries. We point out that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation. *See Matter of W-G-R-*, 26 I&N Dec. at 214 (observing that in evaluating a group's particularity, it may be necessary to take into account the social and cultural context of the alien's country of citizenship or nationality); Committees on Foreign Relations and Foreign Affairs, 111th Cong., 2d Sess., *Country Reports on Human Rights Practices for 2008 2598* (Joint Comm. Print 2010), *available at* www.//www.gpo.gov/fdsys/pkg/CPRT-111JPRT62391/pdf/CPRT-111JPRT62391.pdf ("Country Reports") (discussing sexual offenses against women as a serious societal problem in Guatemala); Bureau of Human Rights, Democracy, and Labor, U.S. Dep't of State, *Guatemala Country Reports on Human Rights Practices-2008* (Feb. 25, 2009), http://www.state.gov/j/drl/rls/hrpt/2008/wha/119161.htm In this case, it is significant that the respondent sought protection from her spouse's abuse and that the police refused to assist her because they would not interfere in a martial relationship.

The group is also socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. at 240 ("To be socially distinct, a group need not be seen by society; rather it must be perceived as a group by society."). [Editors' Note: this case is presented below.]

When evaluating the issue of social distinction, we look to the evidence to determine whether a society, such as Guatemalan society in this case, makes meaningful distinctions based on the common immutable characteristics of being a married woman in domestic relationship that she cannot leave. Such evidence would include whether the society in question recognizes the need to offer protection to victim of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical. *Cf. Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (finding that competing family business owners are not a particular social group because they are not perceived as a group by society).

Supporting the existence of social distinction, and in accord with the DHS's concession that a particular social group exists, the record in this case includes unrebutted evidence that Guatemala has a culture of "machismo and family violence." *See Guatemala Failing Its Murdered Women: Report, Canadian Broad. Corp.* (July 18, 2006). http://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240. Sexual offenses, including spousal rape, remain its serious problem. *See Country Reports*, *supra*, at 2608. Further, although the record reflects that

Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because the National Civilian Police "often failed to respond to requests for assistance related to domestic violence." *Id.* at 2609.

We point out that cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information.

C. Remaining Issues

…

If the respondent succeeds in establishing that the Government was unwilling or unable to control her husband, the burden shifts to the DHS to demonstrate that there has been a fundamental change in circumstances such that the respondent no longer has a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1)(i)(B), (ii), (2014). Alternatively, the DHS would bear the burden of showing that internal relocation is possible and is not unreasonable. 8 C.F.R. § 1208.12(b)(1)(i)(B), (ii); *see also Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012).

. . .

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion for the entry of a new decision.

Notes and Questions:

1. **Defining Social Group**. After you have read the cases on social visibility below that reject a social group for youth fearing gang recruitment because the group is defined by the persecution, revisit the opinion above. How is the social group defined *but for* the persecution and abuse?

2. **Years of Advocacy.** The BIA decision recognizing domestic violence victims as members of a social group only occurred after years of advocacy both outside and within the government. The UNHCR published guidelines about the adjudication of refugee claims for victims of domestic violence in the mid-1990s.

Page 905 (§ 8.02[B][5]): Add the following to the end of Note 2:

In February 2014, the BIA has rephrased this requirement of visibility to be one of social distinction by the society at large. The opinions appear to suggest that homosexuals seeking protection from persecution can meet the social distinction requirement. *See Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014) and *Matter of M-E-V-G-*, *26* I. & N. Dec. 227 (BIA 2014). These cases are excerpted below.

Page 906 (§ 8.02[B]): Add the following new subsection [6], just before subsection [C]:

[6] Social Group and the Social Distinction Requirement – The Impact for Children Fleeing Gang Violence

As mentioned above, the BIA had required that an asylum applicant identify a "social group" that was already a visible, particular group in society. On February 7, 2014, the Board issued two precedent decisions that affect asylum claims on account of membership in a particular social group: *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014), and *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014). In both cases, the BIA clarified its requirement of "social visibility." Under the new test, an asylum application must show that a social group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) "socially distinct within the society in question."

In earlier cases, the BIA had rejected some asylum claims, holding that a proposed social group of young men fearing gang retribution or persecution did not meet the statutory definition because the social group was not one that was socially "visible." Several federal courts criticized this requirement and the BIA revisited the issue.

According to the 2014 BIA decisions, social visibility does not signify literal or ocular visibility. The BIA intended the term to mean that society as a whole must perceive or recognize the social group as distinct. To make this point clear, the BIA renamed the element, now calling it "social distinction" instead of "social visibility."

The 2014 cases also require an individual to prove that the social group is recognized by society in general, not just by the persecutors. The BIA held that the fact persecution did not itself create a social group. The BIA reaffirmed the distinctions in cases involving persecution of homosexuality or of girls or women subjected to female genital mutilation. The cases state that what qualifies as "social distinction" will continue to be made on a case-by-case basis.

For a thoughtful critique of these new decisions, see National Immigrant Justice Center, *Applying for Asylum After* Matter of M-E-V-G- *and* Matter of W-G-R- (Mar. 4, 2014), *available at*
https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_Final_3.4.14.pdf.

Problem 8-3.1 Developing Social Group Theory for a Child Fleeing Gang Violence

Ryan Gentle, a New York attorney, has agreed to take on the pro bono representation of a teenager, Julio Reyes, in removal proceedings. Ryan believes that Julio, a citizen of Honduras, may have a claim for asylum. He has agreed to represent Julio file an application for asylum before the USCIS Asylum Office. Ryan notes that although Julio has been placed into removal proceedings, when he was arrested he met the definition of an unaccompanied alien child and therefore, the application for asylum can be made before the USCIS Asylum Office and the

removal proceeding can be administratively closed pending the outcome of the asylum application. Ryan wants you to prepare a legal memorandum supporting Julio's asylum application. He wants you to summarize Julio's eligibility for asylum protection. If time is short, Ryan will accept a detailed outline of the legal elements.

Ryan has done some research about articulating the nexus between Julio's fears of harm in Honduras and establishing that his claim is based on one of the protected grounds. He is particularly concerned about arguing that the February 7, 2014 BIA cases *Matter of M-E-V-G-* and *Matter of W-G-R-* (see below) do not preclude Julio's claim for asylum. In your legal memorandum he wants to articulate the prima facie case for Julio, explaining how Julio qualifies for asylum protection and applying the relevant case law to support the grant of his application.

Ryan will prepare the relevant form I-589 asylum application and Julio's affidavit in support of the application after he has read your summary of the facts to develop the legal argument in the brief. He has suggested that you note for him in that brief where you would attach exhibits of supporting materials. For example, if you are going to cite the Honduras Country Condition Report prepared by the State Department (see below), you would note in your brief that you would quote the report.

FACTUAL BACKGROUND:

Julio was born in Marcala, Honduras in May of 2000. He attended school until the sixth grade (2011) but that year his father, Ernesto, left the family and his mother said there were no more funds for school fees. Ernesto entered the U.S. without inspection and is now married to a U.S. citizen named Ruth.

Julio is the oldest of three children. He has a little sister who is 12 and a little brother who is 10. Julio went to work on the family's small coffee fields farms in the highlands. Julio's mother is named Sylvia; she is 36 years old. She lives in Honduras and has never lived anywhere else. Sylvia told Julio that Ernesto had traveled to the United States to earn money for the family.

Julio turned 12 in 2012. It was the coffee harvest season in midwinter and he was working in the small family field when a group of local teenage boys surrounded him and told him that the land was forfeited to the Mara. The Mara members told Julio that he could pay a "rent" of $250 or he could give the land to the gang. (The "Maras" is a generic term for gang. There are several well-known gangs operating in Honduras.)

The family did not have the money demanded by the gang and Julio said he would give up the land. A few days later one of Julio's uncles went to work on the land. When he did not return at nightfall Julio went to look for him. Julio found his Uncle's dead body in the coffee fields. Julio said his uncle died from multiple stab wounds. Julio went to the Marcala police and filed a report. The coroner issued a death certificate that stated the cause of death was "murder." The family waited to be interviewed further by the local police or prosecutor. No call came. Julio went to the police department to make a complaint and was told by the desk sergeant that there was no witness to the murder, so nothing could be done. The next day Julio's mother found a note that said they would all be dead if they went to the police again. Julio told his mother Sylvia that he had not told anyone he was going to visit the police. Sylvia told Julio that he should travel

to the United States to try to find his father. She told him that he had to earn money to replace the family's lost income.

Julio began his journey to the United States the next week. He rode the bus from Honduras through Guatemala to the Mexican border. He successfully evaded the border authorities in Mexico and traveled by train to Northern Mexico. He hired a smuggler and was brought by foot into the Arizona desert. After walking for hours a truck picked them up and was driving them to Tucson. He said the truck was pulled over right at the city limits by Tucson city police. Julio said he heard the police officer tell the driver, in Spanish, that he pulled him over because, "This looks like a car of illegals to me. I'm going to call CBP." Customs and Border Patrol Agents (CBP) arrived about thirty minutes later and arrested everyone in the truck. Julio never saw any of them again and did not know any of their full names. (Ryan says he does not need you to focus on any motion to suppress the arrest. He is considering that option separately.)

CBP turned Julio over to ICE, where he was placed in a juvenile detention facility. Julio stayed there one month, until he was told he was going to be released to his father, Ernesto. The government had located Ernesto in Yonkers and his father paid for Julio to be flown to New York. Julio is now living with Ernesto and his stepmother Ruth. Ruth is a U.S. citizen.

ICE put Julio in removal proceedings. He is charged with being an alien and a citizen of Honduras. The Notice to Appear says that he was arrested on or near Tucson, Arizona and that he is removable as an illegal entrant pursuant to INA § 212(a)(6)(A).

Ryan ended his memorandum to you with this note: "I am worried about Julio. He appears very withdrawn and nervous around his father. I asked him if he is afraid to go home. He did not answer for a long time. He finally said, "I can't go back. My family is trapped between the gangs and the police the gangs control. I have to stay here and work and help them as best I can."

Ryan found some information about Honduras that is attached to his memo to you. He tells you that you should not do any more research about the country at this time but to work with the materials he attached.

Ryan has interviewed Julio several more times and has learned a few more facts about his life in Marcala. Julio believes the gang that attacked him was the MS-18 because he saw the number 18 tattooed on two of the boys and he knows they are in the area. Ryan found a video from last summer in another region of Honduras at http://www.youtube.com/watch?v=R3cO89t54jU. The video has some very graphic images.

Julio told Ryan that at least three boys he knows have been killed by gang members. He thinks it is because the boys would not help the gang. Two girls he knows in Marcala told him they were going to live with relatives because the gangs constantly threatened them and they were afraid of being kidnapped. Julio doesn't know where those girls are now.

Ryan talked to Sylvia on the phone. He asked her if she would put her testimony about the gangs into a notarized affidavit. Sylvia said she was too afraid to get a letter signed by any official because she was sure the word would get out that she was talking about the gangs. She told Ryan

that Julio had made enough trouble for the family by going to the police. She does not have an email account. Ryan reached her by calling a store in town and arranging a time to talk with Sylvia. The store does have a fax machine.

Ryan says he is aware that another way for Julio to immigrate is through his stepmother Ruth or perhaps via Special Immigrant Juvenile status but he would like to pursue asylum at this time because Julio is a minor and because Julio is very worried about his mother Sylvia and his siblings left behind. Julio told Ryan that he cannot sleep because he worries his family is not safe.

ESSENTIAL MATERIALS FOR PROBLEM 8-3.1

Matter of M-E-V-G-, 26 I. & N. Dec. 227 (BIA 2014) [below]

U.S. Dep't of State, 2013 Honduras State Department Country Report, *at* http://www.state.gov/documents/organization/220663.pdf. Portions of that report discuss gang activity, police corruption, labor laws, and other topics relevant to human rights in Honduras.

Carmen Stella Van den Heuvel, *Honduran Maras Gangs: Destroying Everything in Their Path*, Washington Times, Mar. 16, 2013, *at* http://communities.washingtontimes.com/neighborhood/world-view/2013/mar/16/honduran-maras-gangs-human-marabuntas/#ixzz2mG7ldkPG.

Women's Refugee Commission, *Forced From Home: The Lost Boys and Girls of Central America* (Oct. 2012), *at* https://www.google.com/search?client=safari&rls=en&q=Women%E2%80%99s+Refugee+Commission,+Forced+From+Home:+The+Lost+Boys+and+Girls+of+Central+America&ie=UTF-8&oe=UTF-8..

Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 33.04[4][c].

Matter of M-E-V-G-,
26 I. & N. Dec. 227 (B.I.A. 2014)

This case is before us on remand from the United States Court of Appeals for the Third Circuit for further consideration of the respondent's applications for asylum and withholding of removal. The court declined to afford deference to our conclusion that a grant of asylum or withholding of removal under the "particular social group" ground of persecution requires the applicant to establish the elements of "particularity" and "social visibility. "

Upon further consideration of the record and the arguments presented by the parties and amici curiae, we will clarify our interpretation of the phrase "particular social group."[2] We adhere to

[2] On remand, both parties and amici curiae filed additional briefs, which we acknowledge and appreciate. On December 11, 2012, a

our prior interpretations of the phrase but emphasize that literal or "ocular" visibility is not required, and we rename the "social visibility" element as "social distinction." . . .

I. FACTUAL AND PROCEDURAL HISTORY

Prior decisions of the Board and Third Circuit have set forth the underlying facts of this case in detail. In short, the respondent claims that he suffered past persecution and has a well-founded fear of future persecution in his native Honduras because members of the Mara Salvatrucha gang beat him, kidnaped and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang. In addition, the respondent testified that the gang members would shoot at him and throw rocks and spears at him about two to three times per week. The respondent asserts that he was persecuted "on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs. "

The Immigration Judge issued a decision on June 15, 2005, denying the respondent's applications for asylum, withholding of removal, and protection under [CAT] We summarily affirmed the Immigration Judge on February 27, 2006...

On remand, we issued a decision on October 22, 2008, which again denied the respondent's applications for asylum and withholding of removal. We held that the respondent did not establish past persecution "on account of a protected ground" and applied our intervening decisions in *Matter of S-E-G-, 24 I. & N. Dec. 579 (BIA* 2008), and *Matter of E-A-G-, 24 I. & N. Dec. 591 (BIA* 2008), in concluding that the respondent did not show that his proposed particular social group possessed the required elements of "particularity" and "social visibility."

The case is now before us following a second remand from the Third Circuit. …The court found that our requirement that a particular social group must possess the elements of "particularity" and "social visibility" is inconsistent with prior Board decisions, that we have not announced a "principled reason" for our adoption of that inconsistent requirement, and that our interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).* …Nevertheless, the court advised that "an agency can change or adopt its policies" and recognized that the Board may add new requirements to, or even change, its definition of a "particular social group. " *Id.* . . .

II. ISSUE

The question before us is whether the respondent qualifies as a "refugee" as a result of his past mistreatment, and his fear of future persecution, at the hands of gangs in Honduras. Specifically, we address whether the respondent has established an asylum claim based on his membership in a particular social group.

III. PARTICULAR SOCIAL GROUP

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three-member panel of the Board heard oral arguments from both parties and the United Nations High Commissioner for Refugees ("UNHCR").

A. Origins

An applicant for asylum has the burden of establishing that he or she is a refugee within the meaning of section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2012). This requires the applicant
to demonstrate that he or she suffered past persecution or has a well-founded fear of future persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion." *Id.; see also INS v. Elias-Zacarias, 502 U.S. 478, 483*--84 (1992); *INS v. Cardoza-Fonseca, 480 U.S. 421, 436*--37 (1987) (recognizing that one of Congress' primary purposes in passing the Refugee Act of 1980…, was to implement the principles agreed to in the United Nations Protocol Relating to the Status of Refugees. . . .).

The phrase "membership in a particular social group, " which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define. *Matter of Acosta, 19 I. & N. Dec. 211, 232*--33 (BIA 1985); *see also, e.g., Valdiviezo-Galdamez* II, 663 F.3d at 594 ("The concept is even more elusive because there is no clear evidence of legislative intent."); *Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993)* ("Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group. '").

Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424--25 (1999); *see also* section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (2012) (providing that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The Board's reasonable construction of an ambiguous term in the Act, such as "membership in a particular social group, " is entitled to deference. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 844.

We first interpreted the phrase "membership in a particular social group" in *Matter of Acosta*. We found the doctrine of "ejusdem generis" helpful in defining the phrase, which we held should be interpreted on the same order as the other grounds of persecution in the Act. Matter of Acosta, 19 I. & N. Dec. at 233--34. . . . The phrase "persecution on account of membership in a particular social group" was interpreted to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Matter of Acosta*, 19 I. & N. Dec. at 233. The common characteristic that defines the group must be one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*

B. Evolution of the Board's Analysis of Social Group Claims

Matter of Acosta was decided based on whether a common immutable characteristic existed. *Matter of Acosta*, 19 I. & N. Dec. at 233. We rejected the applicant's claim that a Salvadoran cooperative organization of taxi drivers was a particular social group, because members could change jobs and working in their job of choice was not a "fundamental" characteristic. *Id. at 234* ("[T]he internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice."). Because there was no common immutable characteristic

in *Matter of Acosta*, we did not reach the question whether there should be additional requirements on group composition.

At the time we issued *Matter of Acosta*, only 5 years after enactment of the Refugee Act of 1980, relatively few particular social group claims had been presented to the Board. Given the ambiguity and the potential breadth of the phrase "particular *social* group, " we favored a case-by-case determination of the particular kind of group characteristics that would qualify under the Act… .This flexible approach enabled courts to apply the particular social group definition within a wide array of fact-specific asylum claims.

Now, close to three decades after *Acosta*, claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. . . .
Matter of R-A-, 22 I. & N. Dec. 906, 919 (BIA 1999; A.G. 2001), we cautioned that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown." [3]

Over the years there were calls for the Board to state with more clarity its framework for analyzing social group claims. …To provide clarification and address the evolving nature of the claims presented by asylum applicants, we refined the particular social group interpretation first discussed in *Matter of Acosta* to provide the additional analysis required once an applicant demonstrated membership based on a common immutable characteristic.

In a series of cases, we applied the concepts of "social visibility" and "particularity" as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements. …Although we expanded the particular social group analysis beyond the *Acosta* test, the common immutable characteristic requirement set forth there has been, and continues to be, an essential component of the analysis.

In *Matter of C-A-*, we recognized "particularity" as a requirement in the particular social group analysis and held that the "social visibility" of the members of a claimed social group is "an important element in identifying the existence of a particular social group. " *Matter of C-A-, 23 I. & N. Dec. 951, 957, 959*-61 (BIA 2006) (holding that "noncriminal informants working against the Cali drug cartel" in Colombia were not a particular social group) , *aff'd sub nom. Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006),cert. denied, 549 U.S. 1115 (2007).* We subsequently determined that a "particular social group" cannot be defined exclusively by the claimed persecution, that it must be "recognizable" as a discrete group by others in the society, and that it must have well-defined boundaries. *Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69,*

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[3] [N. 7] Although our decision in *Matter of R-A-* was vacated by the Attorney General in 2001 and was explicitly limited to the facts of that case, its role in the progression of particular social group claims analysis remains relevant.[Editors' Note: see the recent development in protecting women in violent marriages in *Matter of A-R-C-G* above].

74--76 (BIA 2007) (holding that "wealthy" Guatemalans were not shown to be a particular social group within the meaning of the "refugee" description), *aff'd sub nom. Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).*

Finally, in 2008, we issued *Matter of S-E-G-* and *Matter of E-A-G-*, in which we held that--in addition to the common immutable characteristic requirement set forth in *Acosta*--the previously introduced concepts of "particularity" and "social visibility" were distinct requirements for the "membership in a particular social group" ground of persecution. In *Matter of S-E-G-, 24* I. & N. Dec. at 582, we stated that we were seeking to provide "greater specificity to the definition of a social group" outlined in Acosta by requiring an applicant to establish "particularity" and "social visibility, " consistent with our prior decisions. In *Matter of E-A-G-*, we noted that "we have issued a line of cases reaffirming the particular social group formula set forth in Matter of Acosta . . . and providing further clarification regarding its proper application." *Matter of E-A-G-*, 24 I. & N. Dec. at 594 (reaffirming the requirements of *Acosta* and the additional requirements of "particularity" and "social visibility").

…

C. Positions of the Parties

On appeal, the respondent and amici curiae argue that the Board should disavow the requirements of "social visibility" and "particularity" and should restore *Matter of Acosta* as the sole standard for determining a particular social group. [8] The Department of Homeland Security ("DHS") argues that "social visibility" and "particularity" are valid refinements to the particular social group interpretation but that the two concepts should be clarified and streamlined into a single requirement.

IV. ANALYSIS

We take this opportunity to clarify our interpretation of the phrase "membership in a particular social group. " In doing so, we adhere to the social group requirements announced in *Matter of S-E-G-* and *Matter of E-A-G-*, as further explained here and *in Matter of W-G-R-*, 26 I. & N. Dec. 208 *(*BIA 2014), a decision published as a companion to this case. [9] We believe that these requirements provide guidance to courts and those seeking asylum based on "membership in a particular social group, " are necessary to address the evolving nature of claims asserted on this ground of persecution, and are essential to ensuring the consistent nationwide adjudication of asylum claims. *See Matter of R-A-*, 24 I. & N. Dec. 629, 631 (A.G. 2008) ("Providing a consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration laws is one of the key duties of the Board."); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); 8 C.F.R. § 1003.1(d)(1) (2013). In this regard, we clarify that the **"**social visibility" test was never intended to, and does not require, literal or "ocular" visibility.

A. Protection Within the Refugee Context

The interpretation of the phrase "membership in a particular social group" does not occur in a contextual vacuum. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) (stating that although analysis of a statute begins with its text, interpretation of the statutory language does not occur in a contextual vacuum). Consistent with the interpretive canon "ejusdem generis," the

proper interpretation of the phrase can only be achieved when it is compared with the other enumerated grounds of persecution (race, religion, nationality, and political opinion), and when it is considered within the overall framework of refugee protection.
…The limited nature of the protection offered by refugee law is highlighted by the fact that it does not cover those fleeing from natural or economic disaster, civil strife, or war. *See Matter of Sosa Ventura, 25 I. & N. Dec. 391, 394 (BIA* 2010) (explaining that Congress created the alternative relief of Temporary Protected Status because individuals fleeing from life-threatening natural disasters or a generalized state of violence within a country are not entitled to asylum) . Similarly, asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions. *See Konan v. Att'y Gen. of U.S.*, 432 F.3d 497, 506 (3d Cir. 2005)*;Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d Cir. 2001) ("[O]rdinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum. "); *Singh v. INS, 134 F.3d 962, 967 (*3d Cir. 1998*)* ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum . . . .") .

Unless an applicant has been targeted on a protected basis, he or she cannot establish a claim for asylum. . . .

The "membership in a particular social group" ground of persecution was not initially included in the refugee definition proposed by the committee that drafted the U.N. Convention; it was added later without discussion. *Matter of Acosta*, 19 I. & N. Dec. at 232. The guidelines to the Protocol issued by the United Nations High Commissioner for Refugees ("UNHCR ") clearly state that the particular social group category was not meant to be "a 'catch all' that applies to all persons fearing persecution. " UNHCR, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, at 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), *available at* http://www.unhcr.org/3d58de2da.html ("UNHCR Guidelines").

Societies use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion. The distinctions may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible. Some distinctions are based on beliefs and characteristics that are largely internal, such as religious or political beliefs. Individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual. The members of these factions generally understand their own affiliation with the grouping, and other people in the particular society understand that such a distinct group exists.

Therefore these enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or "ocular" visibility. Considering the refugee context in which they arise, we find that the enumerated grounds all describe persecution aimed at an immutable characteristic that separates various factions within a particular society.

B. Particular Social Group

Given the suggestions that further explanation of our interpretation of the phrase "particular social group" is warranted, we now provide such clarification based on the analysis set forth above. …

The primary source of disagreement with, or confusion about, our prior interpretation of the term "particular social group" relates to the social visibility requirement. *See Umana-Ramos v. Holder*, 724 F.3d at 672--73; *Henriquez-Rivas v. Holder*, 707 F.3d at 1087;*Valdiviezo-Galdamez* II, 663 F.3d at 603--09. Contrary to our intent, the term "social visibility" has led some to believe that literal, that is, "ocular" or "on-sight," visibility is required to make a particular social group cognizable under the Act. See *Valdiviezo-Galdamez* II, 663 F.3d at 606--07. Because of that misconception, we now rename the "social visibility" requirement as "social distinction." [4] This new name more accurately describes the function of the requirement. Thus, we clarify that an applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is

(1) composed of members who share a common immutable characteristic,
(2) defined with particularity, and
(3) socially distinct within the society in question.

1. Overview of Criteria

. …

The "particularity" requirement relates to the group's boundaries or, as earlier court decisions described it, the need to put "outer limits" on the definition of a "particular social group. " … The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the "social distinction" requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other

[4] [note 11]The term "social distinction" was proposed by the DHS on appeal. It argued for the combination of the "social visibility" and "particularity" requirements into a single "social distinction" requirement because of the close relationship between the two concepts. While we acknowledge that there is some degree of overlap, combining the requirements is not warranted because they serve distinct purposes. Thus, while we adopt the term "social distinction," our use of the term differs from that proposed by the DHS on appeal and at oral argument. In addition, we recognize that the DHS's proposed test also included a separate requirement that the social group must exist independently of the fact of persecution. However, this criterion is well established in our prior precedents and is already a part of the social group analysis. *See* Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. at 74; *see also* Lukwago v. Ashcroft, 329 F.3d 157, 172 (3d Cir. 2003) ("[A] 'particular social group' must exist independently of the persecution suffered by the applicant for asylum. ").

persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society. [5]

Literal or "ocular" visibility is not, and never has been, a prerequisite for a viable particular social group. … An immutable characteristic may be visible to the naked eye, and it is possible that a particular social group could be set apart within a given society based on such visible characteristics. However, our use of the term "social visibility" was not intended to limit relief solely to those with outwardly observable characteristics. Such a literal interpretation would be inconsistent with the principles of refugee protection underlying the Act and the Protocol.

Our interpretation of the phrase "membership in a particular social group" incorporates the common immutable characteristic standard set forth in *Matter of Acosta,* 19 I. & N. Dec. at 233, because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members' identities or consciences. Our interpretation also encompasses the underlying rationale of both the "particularity" and "social distinction" tests.

2. "Particularity"

While we addressed the immutability requirement in *Acosta*, the term "particularity" is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined. [6] …

A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. *Id.* (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

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[5] [fn 12] Although members of a particular social group will generally understand their own affiliation with the group, such self-awareness is not a requirement for the group's existence. *See, e.g.*, Henriquez-Rivas v. Holder, 707 F.3d at 1089 ("[F]or example, an infant may not be aware of race, sex, or religion. "). Nevertheless, as a practical matter, this point is of little import because the applicants in removal proceedings are generally professing their membership in these groups in the process of seeking asylum

[6] [FN 13] However, there is a critical difference between a political opinion or religious belief, which may in theory be entirely personal and idiosyncratic, and membership in a particular social group, which requires that others in the society share the characteristics that define the group.

The group must also be discrete and have definable boundaries--it must not be amorphous, overbroad, diffuse, or subjective. … The particularity requirement clarifies the point, at least implicit in earlier case law, that not every "immutable characteristic" is sufficiently precise to define a particular social group. *See, e.g.*, *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (finding the characteristics of poverty, homelessness, and youth to be "too vague and all encompassing" to set perimeters for a protected group within the scope of the Act).

3. "Social Distinction"

Our definition of "social visibility" has emphasized the importance of "perception" or "recognition" in the concept of "particular social group. " *See Matter of H-, 21 I. & N. Dec. 337, 342 (*BIA 1996) (stating that in Somali society, clan membership is a "highly recognizable" characteristic that is "inextricably linked to family ties"). The term was never meant to be read literally. The renamed requirement "social distinction" clarifies that social visibility does not mean "ocular" visibility --either of the group as a whole or of individuals within the group--any more than a person holding a protected religious or political belief must be "ocularly" visible to others in society. *See, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d at 1087--89. ***Social*** distinction refers to social recognition, taking as its basis the plain language of the Act--in this case, the word "social." To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. *Matter of C-A-*, 23 I. & N. Dec. at 956--57 (citing UNHCR Guidelines, *supra*). Society can consider persons to comprise a group without being able to identify the group's members on sight.

The examples in *Matter of Kasinga*, *Matter of Toboso-Alfonso*, and *Matter of Fuentes*, illustrate this point. It may not be easy or possible to identify who is opposed to FGM, who is homosexual, or who is a former member of the national police. These immutable characteristics are certainly not ocularly visible. Nonetheless, a society could still perceive young women who oppose the practice of FGM, homosexuals, or former members of the national police to comprise a particular social group for a host of reasons, such as sociopolitical or cultural conditions in the country. For this reason, the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive the group of its protected status as a particular social group. ….

The Third Circuit has indicated that it was "hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility. '" *Valdiviezo-Galdamez* II, 663 F.3d at 608. We respectfully disagree. As recognized by other courts, there is considerable overlap between the "social distinction" and "particularity" requirements, which has resulted in confusion. . . .

The "social distinction" and "particularity" requirements each emphasize a different aspect of a particular social group. They overlap because the overall definition is applied in the fact-specific context of an applicant's claim for relief. While "particularity" chiefly addresses the "outer limits" of a group's boundaries and is definitional in nature,… this question necessarily occurs in the context of the society in which the claim for asylum arises, *see Matter of S-E-G-*, 24 I. & N. Dec. at 584 (inquiring whether the group can be described in sufficiently distinct terms that it "would be recognized, in the society in question, as a discrete class of persons"). Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently "particular." Similarly, societal

considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the "social distinction" test.

For example, in an underdeveloped, oligarchical society, "landowners" may be a sufficiently discrete class to meet the criterion of particularity, and the society may view landowners as a discrete group, sufficient to meet the social distinction test. However, such a group would likely be far too amorphous to meet the particularity requirement in Canada, and Canadian society may not view landowners as sufficiently distinct from the rest of society to satisfy the social distinction test. In analyzing whether either of these hypothetical claims would establish a particular social group under the Act, an Immigration Judge should make findings whether "landowners" share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers "landowners" as a significantly distinct group within the society. Thus, the concepts may overlap in application, but each serves a separate purpose.

4. Society's Perception

The Ninth Circuit has recently observed that neither it nor the Board "has clearly specified whose perspectives are most indicative of society's perception of a particular social group. " *Henriquez-Rivas v. Holder*, 707 F.3d at 1089 (suggesting that "the perception of the persecutors may matter the most" in determining a society's perception of a particular social group) ; *see also Rivera-Barrientos v. Holder*, 666 F.3d at 650--51 (referencing the relevant society as both "citizens of the applicant's country" and "the applicant's community"). Interpreting "membership in a particular social group" consistently with the other statutory grounds within the context of refugee protection, we clarify that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.

Defining a social group based on the perception of the persecutor is problematic for two significant reasons. First, it is important to distinguish between the inquiry into whether a group is a "particular social group" and the question whether a person is persecuted "on account of" membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred by defining a social group based solely on the perception of the persecutor.
Second, defining a particular social group from the perspective of the persecutor is in conflict with our prior holding that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm." *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74. The perception of the applicant's persecutors may be relevant, because it can be indicative of whether society views the group as distinct. However, the persecutors' perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group. *Id.; see also, e.g., Henriquez-Rivas v. Holder*, 707 F.3d at 1102 (Kozinski, C.J., dissenting) ("Defining a social group in terms of the perception of the persecutor risks finding that a group exists consisting of a persecutor's enemies list."); *Mendez-Barrera v. Holder*, 602 F.3d at 27 ("The relevant inquiry is whether the social group is visible in the society, not whether the alien herself is visible to the alleged persecutors. ").

For example, a proposed social group composed of former employees of a country's attorney general may not be valid for asylum purposes. Although such a shared past experience is immutable and the group is sufficiently discrete, the employees may not consider themselves a separate group within the society, and the society may not consider these employees to be meaningfully distinct within society in general. Nevertheless, such a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.

The former employees of the attorney general may not be considered a group by themselves or by society unless and until the government begins persecuting them. Upon their maltreatment, it is possible that these people would experience a sense of "group," and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way. …The act of persecution by the government may be the catalyst that causes the society to distinguish the former employees in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.

The persecutor's actions or perceptions may also be relevant in cases involving persecution on account of "imputed" grounds, such as where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a particular social group. … For example, an individual may present a valid asylum claim if he is incorrectly identified as a homosexual by a government that registers and maintains files on homosexuals --in a society that considers homosexuals a distinct group united by a common immutable characteristic. In such a case, the social group exists independent of the persecution, and the perception of the persecutor is relevant to the issue of nexus (whether the persecution was or would be on account of the applicant's imputed homosexuality).

Persecution limited to a remote region of a country may invite an inquiry into a more limited subset of the country's society, such as in *Matter of Kasinga,* 21 I. & N. Dec. at 366, where we considered a particular social group within a tribe. *Cf. Henriquez-Rivas v. Holder*, 707 F.3d at 1089 ("Society in general may also not be aware of a particular religious sect in a remote region."). However, the refugee analysis must still consider whether government protection is available, internal relocation is possible, and persecution extends countrywide. Section 101(a)(42) of the Act; *Gambashidze v. Ashcroft, 381 F.3d 187, 192*--94 (3d Cir. 2004); Abdille v. Ashcroft, 242 F.3d at 496; *Matter of C-A-L-, 21 I. & N. Dec. 754, 757*--58 (BIA 1997). Only when the inquiry involves the perception of the society in question will the "membership in a particular social group" ground of persecution be equivalent to the other enumerated grounds of persecution.

C. Evidentiary Burdens [omitted]

Our interpretation of the phrase "membership in a particular ***social*** group" originated with the immutable characteristics test in *Matter of Acosta*. In response to the evolution of social group claims presented, we announced the addition of the "particularity" and "social visibility" requirements in *Matter of S-E-G-* and *Matter of E-A-G-*. Our transition to the term "social distinction" is intended to clarify the requirements announced in those cases; it does not mark a departure from established principles. We would reach the same result in *Matter of S-E-G-* and

Matter of E-A-G- if we were to apply the term "social distinction" rather than "social visibility. " Therefore, we need not revisit cases where we used the term "social visibility. " *See INS v. Abudu*, 485 U.S. 94, 107 (1998); *Matter of S-Y-G-*, 24 I. & N. Dec. 247, 257 (BIA 2007) (explaining that an incremental or incidental change does not meet the requirements for untimely motions to reopen and that even a change in law is insufficient absent evidence that the prior version was meaningfully different); *Matter of G-D-*, 22 I. & N. Dec. 1132, 1135 (BIA 1999) (stating that an incremental development in case law does not warrant sua sponte reopening).

E. International Interpretations …

While the views of the UNHCR are a useful interpretative aid, they are "not binding on the Attorney General, the BIA, or United States courts." *INS v. Aguirre-Aguirre*, 526 U.S. at 427. Indeed, the UNHCR has disclaimed that its views have such force and has taken the position that the determination of "refugee" status is left to each contracting State. …

We believe that our interpretation in *Matter of S-E-G-* and *Matter of E-A-G*, as clarified, more accurately captures the concepts underlying the United States' obligations under the Protocol and will ensure greater consistency in the adjudication of asylum claims under the Act. …Unlike the UNHCR's alternative approach, we conclude that a particular social group must satisfy both the "protected characteristic" and "social perception" approaches, in addition to the particularity requirement, as described above.

V. APPLICATION TO THE RESPONDENT

In our prior decision in this case, we rejected the respondent's gang-related claim based on the reasoning set forth in *Matter of S-E-G-* and *Matter of E-A-G-*. In *Matter of S-E-G-*, 24 I. & N. Dec. at 582, we denied a gang-related asylum claim asserting a proposed social group of "Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth." The applicant's membership in a particular social group was not established because he did not show that the proposed group was sufficiently particular or socially distinct, that is, recognized in the society in question as a discrete class of persons…. His fear was based on his individual response to the gang's efforts to increase its ranks, not on persecution aimed at his membership in a group. *See INS v. Elias-Zacarias*, 502 U.S. at 483 (rejecting a guerrilla recruitment claim where the applicant failed to establish that the persecutor had a motive other than increasing the size of its forces). Similarly, the applicant in *Matter of E-A-G-* did not establish that the proposed group, "persons resistant to gang membership, " was a particular social group. *Matter of E-A-G-*, 24 I. & N. Dec. at 594--95 ("The focus is not with statistical or actuarial groups, or with artificial group definitions. Rather, the focus is on the existence and visibility of the group in the society in question and on the importance of the pertinent group characteristic to the members of the group.").[7]

[7] [footnote 16] We also rejected the applicant's second proposed social group of "young persons who are perceived to be affiliated with gangs." *Matter of E-A-G-*, 24 I. & N. Dec. at 593. We held that membership, or perceived membership, in a criminal gang cannot constitute a particular social group because "[t]reating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior." *Id*. at 596; *see also* Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007).

While there is no universal definition of a "gang," it is generally understood to be "a criminal enterprise having an organizational structure, acting as a continuing criminal conspiracy, which employs violence and any other criminal activity to sustain the enterprise." UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 1 n.3 (Mar. 31, 2010), *available at*http://www.unhcr.org/refworld/docid/4bb21fa02.html (quoting the Federal Bureau of Investigation's definition of a gang).

The UNHCR has recognized that "[g]ang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak. Ordinary people may be exposed to gang-violence simply because of being residents of areas controlled by gangs. " *Id.* para. 10, at 4. Although the UNHCR indicates that certain marginalized social groups may be specifically targeted by gangs, it also noted that "a key function of gangs is criminal activity. Extortion, robbery, murder, prostitution, kidnapping, smuggling and trafficking in people, drugs and arms are common practices employed by gangs to raise funds and to maintain control over their respective territories." *Id.* para. 8, at 3.

In *Matter of S-E-G-*, 24 I. & N. Dec. at 588, we also noted that the evidence of record indicated that El Salvador suffered from widespread gang violence, stating that "victims of gang violence come from all segments of society, and it is difficult to conclude that any 'group,' as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador." Although this evidence of indiscriminate gang violence and civil strife was largely dispositive of the applicant's ability to establish the proposed group's existence in the society in question, it also undermined his attempt to establish a nexus between any past or feared harm and a protected ground under the Act.

Against the backdrop of widespread gang violence affecting vast segments of the country's population, the applicant in *Matter of S-E-G-* could not establish that he had been targeted on a protected basis.… Although he was subjected to one of the many different criminal activities that the gang used to sustain its criminal enterprise, he did not demonstrate that he was more likely to be persecuted by the gang on account of a protected ground than was any other member of the society. *Matter of S-E-G-*, 24 I. & N. Dec. at 587 ("[G]angs have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power.").

The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum. …*see also Matter of Sosa Ventura*, 25 I. & N. Dec. at 394 (discussing the history of Temporary Protected Status and the fact that individuals fleeing life-threatening natural disasters or a generalized state of violence were not entitled to either asylum or withholding of removal). Congress may choose to provide relief to those suffering from difficult situations not covered by asylum and withholding of removal. *See, e.g.*, section 244(a)(1) of the Act, 8 U.S.C. § 1254a(a)(1) (2012); Ruth Ellen Wasem & Karma Ester, Cong.

Research Serv., RS 20844, *Temporary Protected Status: Current Immigration Policy and Issues* 2 (2010), *available at* http://fpc.state.gov/documents/organization/137267.pdf.

Nevertheless, we emphasize that our holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs. *Matter of S-E-G-*, 24 I. & N. Dec. at 587 (recognizing that the evidence of record did not "indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society, or that these individuals suffer from a higher incidence of crime than the rest of the population"). Social group determinations are made on a case-by-case basis. *Matter of Acosta*, 19 I. & N. Dec. at 233. For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground. …

VI. CONCLUSION

We interpret the "particular social group" ground of persecution in a manner consistent with the other enumerated grounds of persecution in the Act and clarify that our interpretation of the phrase "membership in a particular social group" requires an applicant for asylum or withholding of removal to establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. Not every "immutable characteristic" is sufficiently precise to define a particular social group. The additional requirements of "particularity" and "social distinction" are necessary to ensure that the proposed social group is perceived as a distinct and discrete group by society. We further clarify that a particular social group does not require literal or "ocular" visibility.

…

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Notes and Questions:

1. Is "Family" a Particular Social Group? Note that the BIA did not deny the case but remanded to determine if in Honduras, the social group could meet the social distinction standard. One other approach based on Julio's facts is to claim that his persecution is based on his family. *See Aldana-Ramos v. Holder*, 757 F.3d 9 (1st Cir.2014) (family targeted by gangs could be social group and child does not need to prove nexus to a protected ground other than membership in the family) and *Padilla v. Holder*, 2013 U.S. App. LEXIS 18128 (2d Cir. Aug. 30, 2013) (kinship ties and family membership can constitute social group persecution); *Reyes-Mendez v Lynch*, 2015 U.S. App. LEXIS 19259 (7th Cir. Nov. 4, 2015) (persecution for being in a family is sufficient even if family members are not being persecuted due to a protected ground.) *But cf.* Quinteros v. Holder, 707 F.3d 1006 (8th Cir. 2013) (threat to parent from gang

was insufficient). Can Julio structure his claim to be persecution based on his membership in a family? How else might you structure his social group claim?

2. How Do Children Manifest Political Opinions? In the facts we are told that Julio went to the authorities in his region of Honduras. Could these acts of a twelve-year-old child be seen as political acts? Cases for children have been approved where the persecution is on account of his political actions and opinion or the opinion that gangs or the government might impute based on his behavior. *See also Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014) (El Salvadoran persons taking concrete steps to oppose gang membership and gang authority could constitute a social group; case involved an adult and questions the recent BIA decisions about social group distinction); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc) ("witnesses who testify against gang members" may be cognizable as a particular social group for the purposes of asylum).

3. Procedural Challenges? Consider whether Ryan, the attorney for Julio, should be making any procedural challenges to the Notice to Appear. Julio was apprehended within 100 miles of the Southern border. He was not placed in expedited removal. The old Immigration and Naturalization Service had a policy memorandum that stated it is **not** appropriate to use expedited removals with unaccompanied juveniles. *See* Memorandum from Paul Virtue, INS General Counsel, *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997) (AILA InfoNet Document No. 97082191), *available at* http://www.aila.org/content/default.aspx?docid=19758. The Trafficking Victims Reauthorization Act of 2008 also precludes the use of expedited removal with unaccompanied children apprehended at the border.

As of July 3, 2014, the Administration and Congress appeared to be questioning whether expedited removal could be used with unaccompanied minors. See Press Release date June 30, 2014. http://thinkprogress.org/wp-content/uploads/2014/06/White-House-letter-to-Congress-for-2-billion-fund-June-30-2014.pdf.

In the spring of 2016, members of Congress introduced legislation that would allow forms of expedited removal for unaccompanied minors. H.R. 1114, the "Protection of Children Act," would allow the Secretary of State to negotiate expedited return policies with sending nations. The bill would also require detention of unaccompanied minors. This bill cleared the House Judiciary and Foreign Affairs Committee and was referred to the floor, where it remains. There is a companion bill pending in the Senate: S.2561. Read more at https://www.congress.gov/bill/114th-congress/house-bill/1149?q=%7B%22search%22%3A%5B%22%5C%22expedited+removal%5C%22%22%5D%7D&resultIndex=2.

Other bills would afford greater due process rights to children in removal proceedings and would provide free counsel to indigent children. H.R. 4646 and S. 2540, Fair Day in Court for Kids Act of 2016, at https://www.congress.gov/bill/114th-congress/house-bill/1149?q=%7B%22search%22%3A%5B%22%5C%22expedited+removal%5C%22%22%5D%7D&resultIndex=2. *See also* H.R. 1700, the Vulnerable Immigrant Voice Act, which would provide counsel for children and the mentally incompetent. The bill is available at

https://www.congress.gov/bill/114th-congress/house-bill/1149?q=%7B%22search%22%3A%5B%22%5C%22expedited+removal%5C%22%22%5D%7D&resultIndex=2.
You may want to review the material in Chapter Two that discussed statutory and regulatory limits to expedited removal.

Assuming that the case remains in regular removal, could Ryan move to suppress the statements Julio might have made before he was represented? See Chapter 6 removal procedures for a brief discussion of suppression in removal.

4. Other Remedies for Julio? While the main focus of this problem is social group persecution, could Julio possibly qualify for a family-based petition filed by his U.S. citizen stepmother Ruth? *See* INA § 201; 8 U.S.C. § 1151 and the definition of a child found in INA § 101(b); 8 U.S.C. § 1101(b). Review Chapter 4 on stepchildren and sponsorship under the legal immigration system.

Could Julio qualify for Special Immigrant Juvenile Status? Review INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J). If Ruth were to seek to become Julio's legal guardian and the family or juvenile court accepts jurisdiction over Julio, the court would need to consider whether Julio was abandoned, abused, or neglected by one or both of his parents and that reunification with such parent and return to Honduras was not in Julio's best interest. See Chapter 7 for a further discussion of Special Immigrant Juvenile Status.

Consider whether any of these remedies is less difficult and traumatizing for Julio. He has told Ryan he worries about his family in Honduras. How can a twelve-year-old help his family in another country? Remember the discussion earlier in this chapter that there are not automatic derivative claims for parents or siblings based on persecution of a child.

5. Right to Appointed Counsel. Julio is fortunate because Ryan Gentle has agreed to represent him on a pro bono basis. Do children in removal proceedings have a right to appointed counsel at government expense? The current statute, case law, and regulations do not require the government to appoint counsel. This means that only one-third of children were able to gain access to legal counsel. This affects the outcome of their case substantially. According to one report, children without legal counsel were deported in over 80% of cases, while children with access to legal counsel were deported in about 20% of cases. Transactional Records Access Clearinghouse, *Representation for Unaccompanied Children in Immigration Court* (Nov. 25, 2014), http://trac.syr.edu/immigration/reports/371/.

In the summer of 2014, the Obama Administration announced $2 million in funds to help fund public interest immigration representation through the Americorps program. Most advocates said this sum would not be sufficient to provide legal counsel for all the children in removal. Kirk Semple, *Public Defender System for Immigrants Facing Deportation Would Pay for Itself, Study Says*, N.Y. Times**,** May 29, 2014, *at* http://www.nytimes.com/2014/05/30/nyregion/study-favors-free-counsel-to-navigate-deportation.html.

In June 2016, a federal district court granted class certification for children under 18 residing within the Ninth Circuit who were put into removal proceedings as aliens seeking admission on or before July 9, 2014. The suit seeks to establish a Fifth Amendment right to counsel for children in removal proceedings. The case was originally filed as J-E-F-M- v. Holder; it is now

named F.L.B. v. Lynch, C14-1026 TSZ (W.D. Washington). Materials about the litigation can be found at http://www.legalactioncenter.org/litigation/appointed-counsel-children-immigration-proceedings or at https://www.aclu.org/cases/jefm-v-lynch.

In a deposition taken in the case, an immigration judge stated that he had helped children as young as three or four understand their immigration proceedings without counsel. This statement triggered a great deal of press and some very creative videos of young children trying to defend themselves in hypothetical simulated deportation proceedings. See coverage in major papers: http://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html and https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html. For videos see https://youtu.be/BN9t7LUf6RQ.

Page 952 (§ 8.03[A]): Add the following to Note 7:

The BIA revisited all of the issues in *Negusie* such as the scope of the persecutor bar. But in a June 2016 case, *Matter of M-H-Z-*, 26 I. & N. Dec. 757 (BIA 2016), the BIA discussed a similar issue of whether a person could be barred from relief for providing "material support" to a terrorist organization. The BIA expressly found that there was no implied exception for material support provided under duress. In *M-H-Z-*, the applicant was forced to provide food, money, and space at her hotel for members of the Colombian revolutionary movement known as the FARC (Revolutionary Armed Forces of Colombia.).

In some recent federal cases, the courts have struggled with whether a duress exception is possible. *Compare Annachamy v. Holder*, 733 F.3d 254 (9th Cir. 2013) (no duress exception even if argued that actions were legitimate political activity) *overruled on other grounds by* *Abdisalan v. Holder*, 774 F.3d 517, 526 (9th Cir. 2014) *with Ay v. Holder*, 743 F.3d 317 (2d Cir. 2014) (remanding to BIA to determine if support provided under duress was a bar).

The scope of *M-H-Z-* could be wide ranging. For people who are forced to provide support to their persecutors before fleeing to seek asylum, a rigid application of the bar to eligibility could disqualify those individuals from protection and negate mandatory protection under the duty of nonrefoulement. However, the BIA expressly rejected this assertion in the case, stating that an individual who is barred due to the provision of material support can still seek an individual waiver under INA § 212(d)(3)(B)(i). The BIA explained in a footnote how an individual must seek this waiver, which cannot be granted by the Immigration Judge:

> The Immigration Judges and the Board do not have the authority to adjudicate this discretionary waiver, which was accorded to the Secretary of State to exercise prior to the initiation of removal proceedings and to the Secretary of Homeland Security to exercise at any time, but only upon consultation with the Attorney General. The United States Citizenship and Immigration Services ("USCIS") issued a fact sheet describing the process by which the Secretary of Homeland Security exercises the authority to grant a waiver. *See* USCIS Fact Sheet, "Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final

> Orders of Removal" (Oct. 23, 2008), *https://www.uscis.gov/sites/default/files/USCIS/News/Pre-2010%20-%20Archives/2008%20Press%20Releases/Oct%2008/DHS_implements_exempt_auth_certain_terrorist_inadmissibility.pdf*. This guidance indicates that the Secretary has given the USCIS authority, in consultation with U.S. Immigration and Customs Enforcement, to grant such waivers on a case-by-case basis to aliens who fall within particular categories of cases.
>
> *Matter of M-H-Z-*, 26 I. & N. Dec. at 762 n.5.

USCIS did issue two policy memoranda that created limited exceptions, but which use an approach of measuring the limited amount or insignificance of the support. USCIS, Policy Memorandum PM-602-0112, *Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support* (May 8, 2015), http://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0508_Certain_Limited_Material_Support_PM_Effective.pdf; USCIS, Policy Memorandum PM-602-0113, *Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support* (May 8, 2015), http://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0508_Insignificant_Material_Support_PM_Effective.pdf.

Page 954 (§ 8.03[E]): Add at the end of subsection E, just before § 8.04:

Children who enter the United States under the age of 18 and who are traveling without a parent or guardian are statutorily exempt from the one-year limit to apply for asylum. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044. The TVPRA created a new provision, INA § 208(a)(2)(E); 8 U.S.C. § 1158(a)(2)(E), that eliminates the one-year bar for these juveniles. Even if the child is over 18 at the time of application, the agency maintains that the bar does not apply. Memorandum from Ted Kim, Acting USCIS Chief Asylum Division, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013), http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf.

This memo also allows children in removal to have their claim for asylum heard first by the USCIS Asylum Office. In most courts, an immigration judge will grant administrative closure while the case is adjudicated at the USCIS Asylum Office. The Chief Immigration Judge reiterated the power of immigration judges to administratively close cases in a memorandum issued April 6, 2015. See http://www.justice.gov/eoir/pages/attachments/2015/04/07/15-01.pdf.

On June 30, 2016, The American Immigration Council, the Northwest Immigrant Rights Project, Dobrin & Han, PC, and the National Immigration Project of the National Lawyers Guild filed a class action lawsuit in federal district court in Seattle, Washington on behalf of four asylum seekers challenging DHS's failure to advise them of the one-year deadline for filing their asylum

applications. *Mendez Rojaz v. Johnson*, No. 2:16-cv-01024 (W.D.. Wash. filed June 30, 2016). The suit alleges that DHS and EOIR policies unlawfully interfere with the ability of asylum applicants to meet the one-year deadline. The complaint alleges that DHS frequently does not lodge the Notice to Appear with the Immigration Court after apprehension and the individual does not have the ability to file affirmatively with the USCIS Asylum Office because the database shows that they are in the process of being put into removal. EOIR does not allow filings at the court windows; they must be made before an Immigration Judge. Backlogs and delays may mean that the individual does not get notice of the one-year deadline until it is nearing or, in some cases, only after the deadline has passed.

Chapter 9: U.S. Citizenship and Naturalization

Page 978 (§ 9.01[B][6]): Add the following to the end of subsection [6], just before subsection [7]:

This discussion continues today. The next presidential election will be in November 2016. One of the candidates is Senator Ted Cruz, the junior Republican senator from Texas. Senator Cruz was born in Calgary, Canada in 1970. His father, who became a naturalized U.S. citizen in 2005, was born in Cuba. His mother was born in Delaware. https://en.wikipedia.org/wiki/Ted_Cruz. Is Senator Cruz a "natural born citizen"?

Page 979 (§ 9.01): Add the following new subsection C, just before § 9.02:

C. Why Not Become a U.S. Citizen?

Not everyone who becomes a lawful permanent resident becomes a U.S. citizen. *See* Kirk Semple, *Making Choice to Halt at Door of Citizenship*, N.Y. Times, Aug. 26, 2013, *at* http://www.nytimes.com/2013/08/26/nyregion/making-choice-to-halt-at-door-of-citizenship.html. According to Semple, only about 60% of the foreign nationals who become lawful permanent residents become U.S. citizens. Compare Miriam Jordan, *Citizenship Agency Faulted Over Delays for Muslim Applicants*, Wall St. Journal, Aug. 21, 2013, *at* http://online.wsj.com/article/SB10001424127887323423804579023250536841912.html. In her article, Jordan describes a formerly secret USCIS program called Controlled Application Review and Resolution Program (CARRP) that uses information kept by law enforcement agencies, including the Federal Bureau of Investigation, to determine whether an individual is a national security risk. As a result of this program, some naturalization applicants - including many Muslim applicants - have had their applications for U.S. citizenship delayed for years or denied.

How do we encourage permanent residents who do not apply for naturalization to become U.S. citizens while keeping those permanent residents who may find their applications delayed or denied from becoming discouraged? What do these two articles tell us about becoming a U.S. citizen?

Page 980 (§ 9.02): Add the following at the end of Note 2:

Compare *Tuaua v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013) (holding that "unincorporated territories" like American Samoa are not within the United States for purposes of granting U.S. citizenship at birth). Although American Samoa has been part of the United States for more than 100 years, persons born there have no right to vote, bear arms, or hold jobs that require U.S. citizenship. Persons born in American Samoa are classified as "noncitizen nationals." They are the only Americans so classified by federal law.

The plaintiffs in *Tuaua* argued that not granting U.S. citizenship to individuals born in American Samoa violates the Citizenship Clause of the 14th Amendment, which guarantees that everyone born in the United States is a citizen. Amicus briefs in support of the plaintiffs by citizenship and

constitutional law scholars have been filed. At the time of this writing, the case is on appeal in the D.C. Circuit.

Page 986 (§ 9.02): Add the following to Note 4 after Problem 9-5:

See also Julia Preston, *New Test Asks: What Does 'American' Mean?*, N.Y. Times, Sept. 28, 2007, *at* http://www.nytimes.com/2007/09/28/washington/28citizen.html. This article describes the revised civics test that applicants must take as part of the naturalization process. USCIS claims that the revised test incorporates more ideas about the workings of democracy and the diversity of the population that has contributed to our country's history, i.e., Native Americans, African-Americans and women. Naturalization applicants no long have to know who said "Give me liberty or give me death," or who wrote "The Star-Spangled Banner." Now they are expected to know the contributions made by Susan B. Anthony and the identity and role of the speaker of the House of Representatives.

You may also want to review the following article about the new examination: Dafna Linzer, *The Problem With Question 36: Why Are So Many of the Answers on the U.S. Citizenship Test Wrong?*, Slate, Feb. 23, 2011, *at* http://www.slate.com/id/2286258/.

You can also search for Craig Ferguson Takes the Citizenship Test at https://www.youtube.com/watch?v=ROuyKYF8Yjo. In this video, Craig Ferguson, the former late night talk show host and now U.S. citizen, describes taking the naturalization examination.

If most native-born U.S. citizens would not be able to pass this exam, should it be kept as part of the naturalization application process? What purpose does the exam serve?

Page 997 (§ 9.03[B][1]): Add the following just before Problems 9-6 through 9-12:

Note: A copy of the charts created by immigration attorney Robert Mautino can be found in the Course Materials folder at https://webcourses.lexisnexis.com for Chapter 9.

As you review these charts, do you notice a different standard being applied to the requirements for derivative U.S. citizenship, depending on whether the U.S. parent is the mother or the father? Should claiming citizenship through your father be more difficult then through your mother? A recent case held no. *Morales-Santana v. Lynch*, 2015 U.S. App. LEXIS 11729(2d Cir. 2015). Morales-Santana was born outside the United States in 1962 to unwed parents. At the time his father satisfied the physical presence requirements for transmitting citizenship that applied to unwed U.S. citizen mothers, but did not satisfy the more stringent requirements that applied to unwed citizen fathers. The court held that Morales-Santanta derived citizenship through his father and that to deny him that benefit would violate equal protection; the same benefits that extended to unwed mothers should extend to unwed fathers.