

TABLE OF CONTENTS

A. ASYLUM, WITHHOLDING AND THE CONVENTION AGAINST TORTURE

THE CONTEXT	A-1
ASYLUM	A-1
A. Persecution	A-1
1. Forms of Persecution	A-2
a. Physical Violence	A-2
b. Threats	A-3
c. Detention	A-4
d. Mental, Emotional, and Psychological Harm	A-4
e. Economic Sanctions and Deprivations	A-5
f. Discrimination and Harassment	A-5
B. Source or Agent of Persecution	A-6
1. Examples Discussing Agent of Persecution	A-6
C. Well-Founded Fear of Persecution	A-7
1. Subjective Prong	A-7
2. Objective Prong	A-8
3. Past Persecution Not Required	A-8
4. Demonstrating a Well-Founded Fear	A-9
a. Targeted for Persecution	A-9
b. Pattern and Practice of Persecution	A-9
c. Membership in Disfavored Group	A-9
d. Family Ties	A-10
5. Countrywide Persecution	A-10
6. Continued Presence of Applicant	A-11
7. Continued Presence of Family	A-12
8. Cases Finding No Well-Founded Fear	A-12
D. Past Persecution	A-12
1. Presumption of a Well-Founded Fear	A-13
2. Rebutting the Presumption of a Well-Founded Fear	A-13
a. Fundamental Change in Circumstances	A-13
b. Changed Country Conditions	A-13

	(1) State Department Report	A-14
	(2) Administrative Notice of Changed Country Conditions	A-14
	c. Cases Finding that the INS Failed to Rebut Presumption Based on Changed Circumstances or Conditions	A-15
	d. Internal Relocation	A-16
	3. Compelling Cases of Past Persecution	A-15
	a. Insufficiently Severe Past Persecution	A-17
E.	Nexus to the Five Grounds	A-17
	1. Proving a Nexus	A-17
	2. Race	A-18
	a. Cases Discussing Racial or Ethnic Persecution	A-18
	3. Religion	A-19
	a. Cases Finding Eligibility	A-19
	b. Cases Finding no Religious Persecution	A-19
	4. Nationality	A-20
	5. Social Group	A-20
	a. Types of Social Groups	A-21
	(1) Family and Clans	A-21
	(2) Gender Claims	A-21
	(3) Sexual Orientation	A-21
	(4) Former Status	A-21
	b. Cases Denying Social Group Claims	A-22
	6. Political Opinion	A-22
	a. Organizational Membership	A-23
	b. Refusal to Support Organization	A-23
	c. Labor Union Membership and Activities	A-23
	d. Other Expressions of Political Opinion	A-23
	e. Neutrality	A-24
	(1) Cases Discussing Neutrality	A-24
	f. Opposition to Coercive Population Control	A-24
	g. Imputed Political Opinion	A-25
	(1) Other Cases Discussing Imputed Political Opinion	A-26
	7. Cases Finding no Nexus	A-27

F.	Mixed-motive Cases	A-28
G.	Prosecution	A-28
	1. Pretextual Prosecution	A-28
H.	Illegal Departure Laws	A-29
I.	Military and Conscription Issues	A-29
	1. Conscription Generally	A-29
	2. Exceptions	A-30
	a. Disproportionately Severe Punishment	A-30
	b. Inhuman Conduct	A-30
	c. Moral or Religious Grounds	A-30
	3. Participation in Coup	A-31
	4. Military Informers	A-31
	5. Former Military Membership	A-31
	6. Non-Governmental Conscription	A-32
J.	Exercise of Discretion	A-32
K.	Bars to Asylum	A-33
	1. One-Year Bar	A-33
	a. Exception	A-33
	2. Previous-Denial Bar	A-33
	3. Safe Third Country Bar	A-33
	4. Firm Resettlement Bar	A-34
	5. Persecution-of-Others Bar	A-34
	6. Particularly-Serious-Crime Bar	A-34
	7. Serious Non-Political Crime Bar	A-35
	8. Security Bar	A-35
	9. Terrorism Bar	A-35
II	WITHHOLDING OF REMOVAL	A-36
A.	Eligibility for Withholding	A-36
	1. Higher Burden of Proof	A-36
	2. Mandatory Relief	A-37
	3. Nature of Relief	A-37
	4. Past Persecution	A-37
	5. Entitled to Withholding	A-37
	6. Not Entitled to Withholding	A-39
B.	Bars to Withholding	A-39
	1. Nazis	A-39

2.	Persecution-of-Others Bar	A-39
3.	Particularly Serious Crime Bar	A-39
4.	Serious Non-Political Crime Bar	A-40
5.	Security and Terrorist Bar	A-40
III	CONVENTION AGAINST TORTURE	A-40
A.	Standard of Review	A-41
B.	Definition of Torture	A-41
C.	Burden of Proof	A-41
D.	Country Conditions Evidence	A-42
E.	Past Torture	A-42
F.	Internal Relocation	A-42
G.	Differences From Asylum and Withholding	A-43
H.	Agent or Source of Torture	A-43
I.	Mandatory Relief	A-43
J.	Nature of Relief	A-43
K.	Cases Finding Torture	A-44
L.	Cases Not Finding Torture	A-44
M.	Exhaustion	A-44
IV	SCOPE AND STANDARD OF REVIEW	A-44
A.	Scope of Review	A-44
B.	Standard of Review	A-45
C.	Boilerplate Decisions	A-45
V	CREDIBILITY DETERMINATIONS	A-46
A.	Standard of Review	A-46
B.	Credibility Factors	A-47
1.	Demeanor	A-47
2.	Responsiveness	A-47
3.	Specificity and Detail	A-47
4.	Consistency	A-48
5.	Omissions	A-49
6.	Timing	A-49
7.	Incomplete Asylum Application	A-49
8.	State Department Reports	A-50
9.	Classified Information	A-50
10.	Speculation and Conjecture	A-50

11.	Counterfeit Documents	A-51
12.	Previous Misrepresentations	A-51
C.	Presumption of Credibility	A-51
D.	Implied Credibility Findings	A-52
E.	Sua Sponte Credibility Determinations and Notice	A-52
F.	Remand	A-53
G.	Cases Reversing Negative Credibility Findings	A-53
H.	Cases Upholding Negative Credibility Findings	A-54
VI	CORROBORATIVE EVIDENCE	A-55
A.	Generally Not Required	A-55
B.	Exception	A-55
1.	Easily Available Evidence	A-56
C.	Cases Discussing Corroboration	A-56
D.	Forms of Evidence	A-56
E.	Country Conditions Evidence	A-57
F.	Certification of Records	A-57
VII	DUE PROCESS ISSUES	A-57
A.	Right to a Full and Fair Hearing	A-57
B.	Prejudice Requirement	A-57
C.	Exhaustion Requirement	A-58
D.	Examples	A-58
1.	Right to a Neutral Fact-Finder	A-58
2.	Exclusion of Evidence	A-58
3.	New Country of Deportation	A-59
4.	Right to Translation	A-59
5.	Right to File Brief	A-59
6.	Ineffective Assistance of Counsel	A-59
B.	SUSPENSION OF DEPORTATION, SECTION 212(C) RELIEF AND CANCELLATION OF REMOVAL	
I.	OVERVIEW	B-1
A.	Continued Eligibility for Relief Under the Transitional Rules	B-1

B.	Commencement of Proceedings	B-2
II.	JUDICIAL REVIEW	B-2
A.	Limitations on Judicial Review of Discretionary Decisions	B-2
B.	Judicial Review Remains Over Non-Discretionary Determinations	B-3
C.	Jurisdictional Bar Limited to Statutory Eligibility Requirements	B-4
D.	Jurisdiction Over Constitutional Issues	B-4
E.	Limitations on Judicial Review Based on Criminal Offenses	B-5
F.	Jurisdiction Over Motions to Reopen	B-6
III.	SUSPENSION OF DEPORTATION, 8 U.S.C. § 1254	B-7
A.	Eligibility Requirements	B-7
1.	Continuous Physical Presence	B-7
a.	Jurisdiction	B-7
b.	Standard of Review	B-7
c.	Proof	B-8
d.	Brief, Casual, and Innocent Departures	B-8
e.	Pre-IIRIRA Rule on Physical Presence	B-8
f.	IIRIRA Stop-Time Rule	B-8
g.	NACARA Exception to the Stop-Time Rule	B-9
h.	<i>Barahona-Gomez v. Ashcroft</i> Exception to the Stop-Time Rule	B-9
2.	Good Moral Character	B-10
a.	Jurisdiction	B-10
b.	Standard of Review	B-10
c.	Time Period Required	B-10
d.	Statutory Per Se Ineligibility	B-11
(1)	Aggravated Felonies	B-11
(2)	Confinement	B-11
(3)	Alien Smuggling	B-11
(4)	Drug-Related Crimes	B-11
(5)	Crimes of Moral Turpitude	B-12
(6)	False Testimony	B-12
(7)	Other Grounds of Ineligibility	B-12

3.	Extreme Hardship Requirement	B-12
a.	Jurisdiction	B-12
b.	Qualifying Individual	B-13
c.	Pre-IIRIRA Cases Addressing Hardship	B-13
d.	Current Evidence of Hardship	B-13
4.	Ultimate Discretionary Determination	B-14
B.	Abused Spouses and Children Provision	B-14
C.	Persons Disqualified from Suspension	B-14
1.	Failure to Appear or Depart	B-14
2.	Other Categories of Ineligibility	B-14
IV.	SECTION 212(c) RELIEF, 8 U.S.C. § 1182(c)	B-15
A.	Overview	B-15
B.	Eligibility Requirements	B-15
1.	Seven Years	B-15
2.	Balance of Equities	B-16
C.	Comparable Ground of Exclusion	B-16
D.	Limits on Section 212(c) Relief	B-17
E.	Elimination of Section 212(c) Relief	B-17
1.	AEDPA	B-17
2.	IIRIRA	B-17
F.	Continued Eligibility for Relief	B-18
G.	Ninth Circuit Cases Addressing Elimination of Section 212(c) Relief	B-19
V.	CANCELLATION OF REMOVAL, 8 U.S.C. § 1229b	B-20
A.	Cancellation for Lawful Permanent Residents, 8 U.S.C. § 1229b(a)	B-20
1.	Eligibility Requirements	B-20
2.	Exercise of Discretion	B-20
3.	Termination of Continuous Residence	B-21
a.	Military Service	B-21
B.	Cancellation for Non-Permanent Residents, 8 U.S.C. § 1229b(b)	B-21
1.	Eligibility	B-21
2.	Ten Years of Continuous Physical Presence	B-22
a.	Departure from the United States	B-22

b.	Military Service	B-23
3.	Good Moral Character	B-23
4.	Criminal Bars	B-23
5.	Exceptional and Extremely Unusual Hardship	B-23
a.	Jurisdiction	B-23
b.	Heightened Hardship Standard Does Not Violate Due Process	B-24
c.	Qualifying Relative	B-24
6.	Exercise of Discretion	B-24
C.	Ineligibility for Cancellation	B-24
1.	Aggravated Felons	B-24
2.	Security Grounds	B-25
3.	Previous Grants of Relief	B-25
4.	Failure to Appear or Depart	B-25
5.	Other Categories of Ineligibility	B-25
D.	Numerical Cap on Grants of Cancellation and Adjustment of Status	B-25
E.	NACARA Special-Rule Cancellation	B-26
1.	NACARA Does Not Violate Equal Protection	B-26
2.	No Tolling of NACARA Deadlines	B-26
3.	Judicial Review	B-27
F.	Battered Spouse and Child Provision	B-27

C. MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND TO RECONSIDER

		C-1
A.	Motion to Reopen	C-1
B.	Motion to Reconsider	C-1
C.	Motion to Remand	C-1

II. JURISDICTION

		C-2
A.	Finality of the Underlying Order	
B.	Not a Jurisdictional Prerequisite	C-3
C.	No Tolling of the Time Period to File Petition for Review	C-3
D.	No Automatic Stay of Deportation or Removal	C-3
1.	Exception	C-3

E.	Consolidation	C-3
F.	Departure from the United States	C-3
III.	STANDARD OF REVIEW	C-4
A.	Generally	C-4
B.	Full Consideration of All Factors	C-4
C.	Irrelevant Factors	C-5
IV.	REQUIREMENTS FOR A MOTION TO REOPEN	C-5
A.	Supporting Documentation	C-5
B.	Previously Unavailable Evidence	C-6
C.	Explanation for Failure to Apply for Discretionary Relief	C-6
D.	Prima Facie Eligibility for Relief	C-6
E.	Discretionary Denial	C-7
F.	Additional Considerations	C-7
	1. Later-Acquired Equities	C-7
	2. Credibility Determinations	C-8
V.	TIME AND NUMERICAL LIMITATIONS	C-8
A.	Generally	C-8
B.	Exceptions to the Ninety-Day/One-Motion Rule	C-9
	1. In Absentia Orders	C-9
	a. Exceptional Circumstances	C-9
	(1) Evidentiary Requirements	C-9
	(2) Cases Finding Exceptional Circumstances	C-10
	(3) Cases Finding No Exceptional Circumstances	C-10
	b. Improper Notice of Hearing	C-11
	(1) Presumption of Proper Notice	C-11
	(2) Notice by Certified Mail	C-12
	(3) Notice by Regular Mail	C-12
	(4) Notice to Counsel	C-13
	2. Asylum and Withholding Claims	C-13
	3. Jointly-Filed Motions	C-13
	4. INS Motions Based on Fraud	C-14
	5. Movant in Custody	C-14
	6. Sua Sponte Reopening by the BIA	C-14

VI. EQUITABLE TOLLING	C-14
A. Circumstances Beyond the Applicant’s Control	C-14
B. Fraudulent or Deceptive Conduct	C-15
C. Due Diligence	C-15
VII. INEFFECTIVE ASSISTANCE OF COUNSEL	C-15
A. Presented Through a Motion to Reopen	C-15
B. The <i>Lozada</i> Requirements	C-16
1. Exceptions	C-16
C. Cases Discussing Ineffective Assistance	C-17
VIII. CASES ADDRESSING MOTIONS TO REOPEN OR CONSIDER	C-18
A. Motions to Reopen to Apply for Suspension	C-18
B. Motions to Reopen to Apply for Asylum and Withholding	C-18
C. Motions to Reopen to Apply for Relief Under the Convention Against Torture	C-19
D. Motions to Reopen to Apply for Adjustment of Status	C-19
E. Motions to Reopen to Apply for Other Relief	C-20
D. CRIMINAL ISSUES IN IMMIGRATION LAW	
I. OVERVIEW	D-1
II. JUDICIAL REVIEW	D-1
A. Petition-For-Review Jurisdiction Under the Permanent Rules	D-1
B. Limits on Section 1252(a)(2)(C)	D-2
1. Applicant Must be Charged With and Found Removable Based on Enumerated Crime	D-2
2. Jurisdiction to Determine Jurisdiction	D-3
3. Habeas Corpus Jurisdiction Remains	D-3
4. IIRIRA Transitional Rules	D-4
5. Pre-IIRIRA Changes	D-5
III. DEFINITION OF CONVICTION	D-5
A. Finality	D-5

B.	Pre-Trial Diversion	D-5
C.	Juvenile proceedings	D-6
D.	Post-Conviction Relief	D-6
1.	Reversed Convictions	D-6
2.	Expunged Convictions	D-6
a.	Exception for Minor Drug Offenses	D-6
3.	Writ of Audita Querela	D-7
IV.	DEFINITION OF SENTENCE	D-7
A.	One-Year Sentences	D-7
B.	Enhancements Not Included	D-8
C.	Wobblers	D-8
D.	Probation Violations	D-8
V.	ANALYZING SPECIFIC CRIMES	D-9
A.	Standard of Review	D-9
B.	Categorical Approach	D-9
C.	Modified Categorical Approach	D-10
D.	Record of Conviction	D-10
1.	Probation or Presentence Reports	D-10
E.	Applicability of Criminal Sentencing Cases in the Immigration Context	D-11
VI.	AGGRAVATED FELONIES	D-12
A.	Increasingly Broad Definition	D-12
1.	IIRIRA Amendments	D-13
2.	Retroactive Application	D-13
B.	Theft & Burglary	D-14
1.	Cases Addressing Theft & Burglary Offenses	D-14
C.	Murder, Rape or Sexual Abuse of a Minor	D-15
D.	Fraud, Money Laundering, and Counterfeiting	D-15
E.	Firearms Offenses	D-16
F.	Alien Smuggling	D-16
VII.	CONTROLLED SUBSTANCE OFFENSES	D-16
A.	Simple Possession of Controlled Substance	D-17
B.	Expungement of First Possession Conviction	D-17
C.	Solicitation	D-18

D.	Accessory After the Fact	D-18
E.	Drug-Related Crimes	D-18
VIII.	CRIMES OF VIOLENCE	D-19
A.	Felony Driving Under the Influence	D-19
B.	Battery	D-19
C.	Possession of Firearms	D-20
D.	Other Cases Interpreting Crimes of Violence	D-20
IX.	CRIMES OF MORAL TURPITUDE	D-21
A.	Fraud Cases	D-21
B.	Base or Depraved Acts	D-21
C.	Other Cases Discussing Crimes of Moral Turpitude	D-22
D.	Single Scheme of Criminal Misconduct	D-22
E.	Petty Offense Exception	D-22
X.	DOMESTIC VIOLENCE CRIMES	D-23
E.	IMMIGRATION HABEAS PROCEEDINGS	E-1
I.	OVERVIEW	E-1
II	REQUIREMENTS	E-1
A.	Proper Respondent	E-1
B.	Proper Court	E-1
1.	Transfer Statute	E-2
C.	“ <i>In Custody</i> ” Requirement	E-2
D.	Departure from the United States	E-2
E.	Fee Requirements	E-3
III.	EXHAUSTION	E-3
A.	Judicial Remedies	E-3
B.	Administrative Remedies	E-3
IV.	STANDARD OF REVIEW	E-4
V.	SCOPE OF HABEAS REVIEW	E-4
A.	Constitutional and Statutory Claims	E-4
B.	Discretionary Claims	E-4

VI. SECOND OR SUCCESSIVE PETITIONS

E-5

VII. INDEFINITE DETENTION

E-5