Go to Table of Contents

No. 13-70579
PRO BONO

In the United States Court of Appeals
for the Ninth Circuit

RONY ESTUARDO PEREZ-GUZMAN, a/k/a Ronnie Perez-Guzman,
A# 200-282-241

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

On Petition for Review of a
Decision of the Board of Immigration Appeals
Agency No. A200-282-241

PETITIONER'S OPENING BRIEF

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Click on headings below to go to corresponding page

TABLE OF CONTENTS

Click on headings below to go to corresponding page

Click on headings below to go to corresponding page

Click on headings below to go to corresponding page

Go to Table of Contents

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Rony Estuardo Perez-Guzman ("**Perez**") fled his home country of Guatemala and came to America because he fears that the Guatemalan government and Central American gangs will kill him if he returns. Gang members shot Perez and now are hunting him in retaliation for him testifying against them as a witness in a criminal prosecution. His name appears on a death squad kill list; his cousin was killed after being named on the same list. Guatemalan police officers kidnapped, beat him, and threatened to kill him if he ever returns.

Based upon these outstanding threats and the very real dangers from gangs and the government, Perez fears returning to Guatemala and likely will be killed or tortured if he does. He came to America seeking relief; he was turned away and removed without having an opportunity to raise any of his claims. He came back to America a second time and raised claims of asylum, protection under the Convention Against Torture ("**CAT**"), and withholding of removal. Although he was found to be credible, the Board of Immigration Appeals ("**BIA**") denied all relief.

This petition for review should be granted because the BIA made several fundamental legal errors. It incorrectly refused to consider his asylum claim on the merits because his prior order of removal was reinstated, despite the asylum statute's guarantee of his right to present an asylum claim. It denied his CAT claim but failed even to consider the police officers' death threat and the looming threat of the death squad kill list. It denied his withholding claim because of the purported lack of a protected social group, but this Court sitting en banc recently held that testifying witnesses against Central American gangs can constitute such a group. For these reasons, Perez's petition for review should be granted and this matter should be remanded for the BIA to consider Perez's asylum claim on the merits, to consider all of the evidence supporting his CAT claim, and to consider his withholding claim in light of this Court's recent decision.

JURISDICTIONAL STATEMENT

The BIA reviewed a decision of an Immigration Judge concerning Perez's removal proceedings. The Board of Immigration Appeals had jurisdiction under 8 C.F.R. § 1003.1(b)(3). This Court has jurisdiction under 8 U.S.C. § 1252(a). The decision under review is a final order

that disposed of all of Perez's claims. This Court is the proper venue because the reinstatement proceedings took place in Arizona.

The petition for review is timely. It was filed on February 15, 2013, within 30 days of the BIA's order dated February 7, 2013. 8 U.S.C. § 1252(b)(1).

STATEMENT OF THE ISSUES

1. Under federal law, an alien may apply for asylum "irrespective of such alien's status." Although the reinstatement statute purports to bar relief to aliens in reinstatement status, courts allow aliens to apply for other types of relief while in reinstatement status, notwithstanding the bar. Did the BIA err in holding that Perez was not entitled to asylum relief because he was in reinstatement status?

2. The Convention Against Torture grants relief when it is more likely than not that an alien would, if removed to his home country, be tortured with the consent or acquiescence of a public official. Perez proved that Guatemalan police officers beat him and threatened to kill him if he is ever seen again and that his name appeared on a death squad kill list. Given this evidence, is Perez eligible for relief under the Convention Against Torture?

3. The BIA has an obligation to consider all evidence submitted in connection with a CAT claim. Perez submitted evidence showing that he will likely be killed on account of being on a death squad kill list but the BIA failed to consider it. Should this case be remanded to the BIA to consider the evidence of the death squads?

4. Perez fears persecution because he was a testifying witness against members of a Central American gang. A removal order may be withheld if an alien will face persecution on account of membership in a particular social group and, sitting en banc, this Court held that witnesses testifying against a Central American gang could form such a protected social group. Should this decision be remanded to consider Perez's removal claim in light of that holding?

STATEMENT OF FACTS AND THE CASE*

Perez is a 31-year-old Guatemalan man. He seeks to remain in this country because he fears for his life if he returns to Guatemala. The Asylum Officer found his fears to be credible.[1] The Immigration

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* Citations to the Certified Administrative Record (Doc. 9) use the prefix "AR" followed by the Bates number.

[1] AR000393 (Asylum Officer checked: "The applicant's testimony was sufficiently detailed, consistent and plausible in material respects and therefore is found credible."); AR00395 (Asylum Officer: "The

Judge found his testimony to be consistent and did not make an adverse credibility ruling.[2] He has no criminal record.[3]

I. Perez Has a Reasonable Fear of Death and Torture.

Perez has a reasonable fear because he has in fact been repeatedly threatened or harmed in Guatemala, his home country. He was shot by members of a gang and threatened with intimidation for testifying as a witness; kidnapped, beaten, and left with an open death threat from the police; and local officials placed him on a "death squad" list along with his cousin, who was later killed. He cannot escape these real dangers in Guatemala.

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applicant's testimony was sufficiently detailed, consistent and plausible. Therefore he was found credible.")

[2] AR000008 (Immigration Judge: "This Court notes that the Respondent, as the Court is required to do, has been consistent."). Although Perez-Guzman told Border Patrol that he came "to work," AR000009, the Immigration Judge determined that his statements to Border Patrol "will not be found to be a basis for an adverse credibility finding," AR000012.

[3] AR000190-91 ("***THERE IS NO RECORD OF CRIMINAL HISTORY***"); AR000193-95 ("DOES NOT HAVE ANY ARREST RECORD").

A. Perez Was Shot By Gang Members and Hunted After Testifying as a Witness Against the Gang.

Perez's most serious problems began in 2004 when a member of the Central American gang Mara Salvatrucha ("**MS Gang**") shot Perez in 2004.[4] The MS Gang members shot Perez because Perez witnessed the Gang's attempt to extort money from a local bakery.[5] The bullet wound forced him to be hospitalized for two days.[6]

Perez saw the shooters' faces during the shooting and attempted extortion.[7] In fact, he was the only witness.[8] As a result, the police then used him as a witness in the prosecution's case against the gang members.[9] The gang members went to jail. After they were released,

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[4] AR000399 ("I was injured by a bullet. . . . they call them Mara Salvatrucha.").

[5] AR000400 ("B/c I was a witness of an attempt — extortion.").

[6] AR000401 ("Two days.").

[7] AR000394 ("Not only did he get shot, he also saw the faces of the people that did the shooting.").

[8] AR000400 ("I am the only one who saw that.").

[9] AR000394 ("[T]he police also used him as a witness to prosecute the gang members."); AR000400 ("I was sent to an application to go as witness against them. . . . I got a letter from public ministry to be a witness against them."); AR000095 ("Q. And you testified against the gang members and gave information to the police? / A. That's correct.").

they began hunting for Perez. They came to his house.[10] They threatened him and want to hurt or kill him because he was a testifying witness.[11]

The country conditions evidence in the record confirms these grave dangers. The U.S. State Department reports that there is a "failure to protect . . . witnesses . . . from intimidation."[12] It reports that "witnesses continued to report threats, intimidation, and surveillance."[13] Indeed, "[t]here were credible reports of ***killings of witnesses***."[14] A report from the U.S. Army's Strategic Studies Institute

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[10] AR000400 ("They went to my house to look for me."); AR000394 ("[A]fter the gang members were released from jail, they came to his house looking for him.").

[11] AR000395 ("[H]e was threatened by gang members because he witnessed a crime. . . . he was threatened because they wanted to punish him for serving as a witness for the government."); *see also id.* ("[I]t is to punish him for being a witness."); AR000399–400 ("Q: Why were you having problems with MS? / A: B/c I was a witness of an attempt -- extortion."); AR000095 ("Q. Okay. So then when the gang members got out of jail, they were looking for you to get revenge. Is that right? / A. Exactly.").

[12] AR000219; *see also* AR000226 ("intimidation of . . . witnesses.").

[13] AR000226.

[14] AR000227 (emphasis added).

reports the same thing: "witnesses in politically charged criminal cases have been killed."[15]

B. Perez Was Named on a Death Squad Kill List.

Then, in 2009, Perez discovered from Rufino Hernandez (a city employee) that he had been named on a death squad kill list.[16] "[P]olice and soldiers" formed the death squad.[17] Perez's cousin was also named on the list.[18] His cousin was shot in the head and killed that year, along with others on the list.[19] Perez submitted abundant documents with

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[15] AR000307 (citing Washington Office on Latin America, *Hidden Powers in Post-Conflict Guatemala* 33; Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Reports: Guatemala*).

[16] AR000171 ¶ 5 ("[A] list had been published that contained eleven names including my name and the name of a cousin of mine."); AR000095:16–AR000096:4 ("Q. Was your name on the list? / A. Exactly."); AR000394 ("He later learned that his name was featured on a death squad list."); AR000102:16–AR000103:1 ("[H]e worked for the city. He had a position.").

[17] AR000401; *accord* AR000171 ¶ 6 ("The list was created by a government agency."); AR000394 ("The press reported that the Death squad group was made up of police officers and soldiers who were engaged in social cleansing.").

[18] AR000171 ¶ 5 ("[I]ncluding my name and the name of a cousin of mine.").

[19] AR000175–79 (death certificate of cousin); AR000172 ¶¶ 7–8 (describing death of cousin); AR000401 ("And my name and a name of a cousin were included there. On Apr 28 -29, 2010, he was killed."); AR000394 ("[H]is cousin, who was also featured on the list was shot in

country conditions evidence about the rampant death squads in Guatemala.[20]

C. Police Officers Kidnapped, Beat, and Threatened to Kill Perez.

In 2011 the lawlessness of Guatemalan government officials came to a head for Perez. Guatemalan police officers wearing badges from the thirteenth commission of the civil national police[21] kidnapped him,

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the head."); AR000172 ¶¶ 7–8 ("[T]he death squad had been killing every other person on the hit list.").

[20] Also called *limpieza social*, or social cleansing. *See* AR000166 at ¶ O (excerpts from U.S. Department of State Country Report describing unlawful killings by police force); AR000166–67 at ¶ P (Washington Post excerpt on death squads); AR000167 at ¶ Q (excerpt from Immigration and Refugee Board of Canada on death squads); *id.* at ¶ R (excerpt from Prensa Libre concerning social cleansing operations); AR000168 at ¶¶ S, U (El Periodico de Guatemala excerpts on social cleansing); *id.* at ¶ T (excerpt from World Organization Against Torture on social cleansing); *id.* at ¶ V (excerpt from El Periodico de Guatemala); AR000219 (U.S. Department of State Country Reports); AR000251 (Washington Post article); AR000258 (Immigration and Refugee Board of Canada); AR000264 (El Periodico); AR000268 (Organization Mundial Contra La Torture); AR000272 (El Periodico de Guatemala); AR000277 (Amnesty International).

[21] AR000104:14–20 ("Q. So what department were they from? / A. The thirteenth commission. / Q. Was that part of the national police? A. The civil national police."); *see also id.* ("Because they showed me the police insignia."); AR000097:6–7 ("They told me that they were the police and they showed me the badge that they had."); AR000394 ("The people that kidnapped him were wearing badges.").

blindfolded him,[22] took him to an interrogation room, handcuffed him to a chair,[23] and beat him.[24] The officers broke his nose, cut his eye, and cut his lips open.[25]

Although there was some confusion over whether he was kidnapped and beaten over a case of mistaken identity,[26] the officers made a threat that was very real and targeted directly at Perez: the officers told him not only that they will kill him if he reports them, but

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[22] AR000096:24 ("[T]hey covered my eyes."); AR000172 ¶ 9 ("[C]overed my eyes.").

[23] AR00097:4-5 ("[T]hey put me into a small room and they sat me in a chair and handcuffed me in the back."); AR00402 ("Then they grabbed me, put me in the car and took me with them. . . . They handcuffed me to a chair and beat me."); AR000172 ¶ 9 ("[T]hey dragged me out of the van and threw me in a tiny room. They handcuffed me to a chair, took my blindfold off.").

[24] AR00097:5–15 ("[A]nd started beating me . . . they continued hitting my face . . . They would get angrier and hit me some more."); AR00402 ("[T]hey continued hitting me."); AR000172 ¶ 9 (They "started to beat me. They punched me repeatedly in the face."); AR000394 ("They hit him and punched him.").

[25] AR000172 ¶ 9 ("They broke my nose, opened a gash above my left eyebrow, gave me a black eye, and cut my lips open."); AR00402 ("They broke my nose. They cut me on my eye."); AR00097:13–15 ("That's when they broke my nose, and I have a cut right here and they left my face all bruised up.").

[26] *See* AR00097 (discussion regarding mistaken identity); AR000172 ¶ 10 (same).

also that they will kill him if they ever see him again.[27] They remarked that it would be easy to kill him and leave him in a ditch.[28]

Perez sought medical attention for his injuries and submitted documentation in his immigration proceedings.[29] Perez believes that reporting the police beating and threats to other Guatemalan officials would do no good.[30]

The submitted country conditions evidence corroborates that the police are involved in unlawful and extrajudicial brutality, torture, and killings. The U.S. Department of State 2011 Human Rights Reports for

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[27] AR000403 ("[They told him that] they will kill me if they see me again or if I reported them. . . . That if they see me again, they could kill me."); AR00097:22–25 ("[T]hey never again wanted to see me . . . they would kill me."); AR000395 ("[T]hey threatened to kill him if he reported the incident to the police or if they ever saw him again.").

[28] AR000172 ¶10 ("One of them said they should kill me and leave me in a ditch, that it would be easy for them and nobody would care."); AR00097:17–20 ("And the other people would say well, since they already had me, well it wouldn't -- there would be no loss to them to go ahead and kill me and just dump me somewhere.").

[29] AR000187 (medical clinic letter); AR000188 (English translation); *see also* AR00098:13–15 ("The next day I went to the doctor, he checked me out, gave me medication, and told me to recover for about -- for a week.").

[30] AR000403 ("I think like the other cases, it would have been left just like that. . . . they don't give importance.").

Guatemala reports that "members of the police force allegedly committed unlawful killings."[31] The 2012 version eliminated the hedge word "allegedly" and now reports, in no uncertain terms, "Members of the police and military committed unlawful killings."[32]

The submitted 2011 version of the Reports also confirms torture: "Although the constitution and the law prohibit such practices [under the heading 'Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment'], government agents did not always respect these provisions. There were credible reports of abuse and other mistreatment by PNC members."[33] Officers arrest citizens without warrants, as happened to Perez.[34] The central government is unwilling

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[31] AR000144; *see also* AR000219.

[32] Available at http://www.state.gov/documents/organization/204664.pdf.

[33] AR000146; *see also* AR000222.

[34] AR000147 ("The constitution and the law prohibit arbitrary arrest and detention, but there were credible reports of arrests without judicial warrants."); *id.* ("Critics accused police of indiscriminate and illegal detentions when conducting antigang operations in some high-crime neighborhoods. Security officials allegedly arrested and imprisoned suspected gang members without warrants or on false drug charges.").

or unable to control these officers.[35] The other country conditions evidence reports the same thing.[36] One report asked, "What is more frightening than encountering a group of criminals in a dark alley in Guatemala? Easy: encountering a group of police officers, especially if they belong to Station 13."[37]

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[35] AR000147 ("[T]he government lacked effective mechanisms to investigate and punish abuse and corruption."); *id.* ("Police impunity for criminal activities remained a serious problem."); AR000144 ("[T]here were instances in which members of the security forces, particularly the police, acted independently of civilian control."); *id.* ("Corruption, intimidation, and ineffectiveness within the police force and other institutions prevented adequate investigation of many such killings as well as the arrest and successful prosecution of perpetrators."); AR000232 ("Lack of political will and widespread impunity facilitated government corruption.").

[36] AR 000251 ("Officials say the recent murders may be the work of frustrated police officers."); AR000167 ¶ Q ("Several sources report that police may have been involved in the extrajudicial killing of gang members."); AR000261 ("Former Guatemalan police chief . . . was arrested March 23 for her alleged role in several extrajudicial killings."); AR000277 ("Amnesty International (AI) today accused the Government of Guatemala of tolerating extrajudicial killings allegedly committed by agents of the National Civil Police (PNC)."); AR000285 ("The police, the judiciary, and entire local and departmental governments are rife with criminal infiltrators.").

[37] AR000272 (paragraph break omitted).

II. Perez Came to the United States to Escape His Fear of Torture and Death.

Perez moved several times in an effort to escape these problems, but they followed him wherever he went. With nowhere else to turn, he came to the United States. He now fears that if he returns to Guatemala then he will be tortured and killed.[38] The death squad is "all over Guatemala"[39] and he fears the police would try to harm him.[40]

He first entered without inspection in June 2011. He testified that the Border Patrol agents did not ask him about whether he feared returning to Guatemala.[41] He was removed pursuant to an order of expedited order of removal and was not permitted to see an

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[38] AR000404 ("I could be killed. I have nowhere to go."); AR000405 ("[T]hey torture directly and kill you."); AR000173 ¶ 13 ("I fear that I will be persecuted, harmed, tortured, and killed if I am returned to Guatemala.").

[39] AR000404.

[40] AR000405; AR000173 ¶ 14 ("If the police officers catch me, I believe that they will put a bag over my head, shoot me in the head, and then leave me in a ditch somewhere."); *id.* ¶ 13 ("[T]he police officers who beat me will be looking for me. . . every police agency in the country will try to target me, no matter where I live.").

[41] AR000107:18–19 ("They never asked me those questions that I can recall. They only came out with the paper so that I could sign.").

immigration judge.[42] He reentered on December 26, 2011. His prior order of removal was reinstated.

III. Decisions Below.

During his reinstatement proceedings, Perez, for the first time, sought asylum, protection under the Convention Against Torture, and withholding of removal. Perez was unrepresented and proceeded through all of the proceedings below pro se. Pro bono counsel was appointed for Perez only upon filing the petition for review in this Court.

A. The Asylum Officer Found Perez's Testimony to Be Credible and Found that He Has a Reasonable Fear of Torture.

Perez had a reasonable fear hearing before an Asylum Officer. The Asylum Officer found that Perez's testimony "was sufficiently detailed, consistent and plausible in material respects. Therefore he was found credible."[43]

The Asylum Officer evaluated his risk of being persecuted. He noted the risk of being harmed by gang members, but remarked

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[42] AR000130; AR000172 ¶ 11 ("I was deported without being able to see an immigration judge.").

[43] AR000395.

(incorrectly) that harm meant to "punish him for being a witness" is not a "protected characteristic."[44]

The Asylum Officer also evaluated his risk of being tortured and found that Perez "***has established that he has a reasonable fear of torture if returned to Guatemala***."[45] The Asylum Officer based this finding upon Perez's fear of being killed (which is, of course, sufficiently severe to constitute torture) at the hands of the police either for "remaining in town or for talking to the police about what happened to him."[46] The Asylum Officer noted the badges the officers wore and the country conditions about unlawful killings at the hands of the police.[47]

B. The Immigration Judge Rejected All of Perez's Claims.

The Asylum Officer found that Perez had a reasonable fear of torture and referred him to an Immigration Judge ("**IJ**"). The IJ summarily rejected Perez's asylum claim — without ever considering it on the merits — because a prior order of removal had been reinstated.[48]

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[44] AR000395.

[45] AR000396 (emphasis added).

[46] *Id.*

[47] *Id.*

[48] AR000008.

The IJ rejected Perez's withholding claim because he (incorrectly) believed that Perez's persecution was not on account of one of the five protected reasons. The IJ reasoned that the initial shooting by the gang members was not directed at Perez.[49] The IJ failed to address at all that Perez later testified against those gang members and that they sought to hurt or kill him because he was a testifying witness.

The IJ rejected Perez's CAT claim, as well. The IJ did not even consider the death squad kill list in connection with the CAT claim.[50] And although the IJ considered the police beating in connection with Perez's CAT claim, he did not consider the death threat the officers gave him before they released him. Instead, the IJ considered only the beating itself, noting that it did not rise to the level of torture,[51] and that the beating was not with the knowledge or acquiescence of the government because the officers (or gang members dressed up as police

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[49] AR000013.

[50] The IJ considered the death squad in connection with the withholding claim (AR000014) but not in connection with the CAT claim, which involves an entirely different legal standard.

[51] AR000018.

officers) feared punishment and the conditions in Guatemala were improving.[52]

C. The BIA Affirmed.

Perez appealed to the BIA.[53] A single-member BIA panel dismissed the appeal in an unpublished decision.

Like the IJ, the BIA rejected Perez's asylum claim because a prior order of removal had been reinstated.[54]

The BIA rejected Perez's withholding claim because of a purported failure to show that the persecution was on a protected ground.[55] The BIA failed to consider that the gang members sought Perez out because he was a testifying witness. Rather, the BIA simply reasoned that the *initial* shooting by the gang members was not directed at Perez.[56]

The BIA rejected Perez's CAT claim for several reasons. It held that the police beating did not amount to torture, that the officers released him and feared prosecution, and that the government would

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[52] AR000018–21.

[53] *See* AR000030–38.

[54] AR000002 n.1.

[55] AR000003.

[56] *Id.*

not acquiesce in violence because the conditions in Guatemala are improving.[57] The BIA failed to consider the death squad kill list in connection with Perez's CAT claim.[58]

Perez filed a petition for review of the BIA's decision with this Court and applied for a stay of removal. This Court granted the stay of removal.[59]

STANDARD OF REVIEW

This Court reviews purely factual determinations for substantial evidence. *Cordoba v. Holder*, 726 F.3d 1106, 1113 (9th Cir. 2013). It reviews "de novo both purely legal questions and mixed questions of law and fact requiring [the court] to exercise judgment about legal principles." *Id.* (internal quotation marks and citation omitted).

Because the BIA decision is an unpublished, one-member decision, it is "not entitled to *Chevron* deference." *Garcia v. Holder*, 659 F.3d 1261, 1266 (9th Cir. 2011) ("[I]f the BIA wants its decisions to be given

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[57] AR000004.

[58] Like the IJ, the BIA considered the death squad in connection with the withholding claim (AR000003) but not in connection with the CAT claim, which involves an entirely different legal standard.

[59] Doc. 11.

Chevron deference, it must decide with a three-judge panel or en banc.").

SUMMARY OF THE ARGUMENT

1. Perez is entitled to have his claim for asylum be heard and decided on its merits. Based upon an incorrect interpretation of the immigration statutes, the BIA refused even to consider the merits of his claim. The specific terms of the asylum statute, however, guarantee his right to make a claim. The asylum statute allows "[a]ny alien" to apply for asylum status, "irrespective of such alien's status." 8 U.S.C. § 1158(a)(1).

Although the reinstatement statute bars "any relief" for an alien in reinstatement status, that bar cannot be read to trump the specific asylum statute. 8 U.S.C. § 1231(a)(5). The bar is not as absolute as it seems because this Court and the government allow many forms of relief in reinstatement, ***notwithstanding*** the seemingly absolute bar to "any relief." Applying ordinary tools of statutory interpretation confirms that, when read in context, claims of asylum are available even for an alien in reinstatement.

2. Perez is entitled to relief under the CAT because (a) Guatemalan police officers beat him and threatened to kill him if they see him again, and (b) he has been targeted by Guatemalan death squads and is on a kill list. The BIA failed even to consider the police death threat and death squad kill list in evaluating his CAT claim and the decision should be remanded for this reason alone. The BIA also incorrectly held that the police beating is not torture at the hands of the government.

3. Perez is entitled to withholding of removal because Central American gang members are targeting him for testifying against them. The BIA denied his withholding claim on the basis that Perez failed to establish that he was being targeted as part of a particular social group. This court, sitting en banc, recently held that witnesses against the same gang can be a particular social group. The decision should be remanded for consideration of Perez's withholding claim in light of this en banc decision.

ARGUMENT

I. Asylum Claims Are Available in Reinstatement.

The Immigration and Nationality Act ("**INA**") unambiguously allows ***all aliens*** to apply for asylum, except for specific groups

identified in the asylum statute. *See* 8 U.S.C. § 1158(a)(1). The BIA ignored this statutory mandate and refused even to consider Perez's asylum claim. The BIA insists that aliens who are in restatement status may not apply for asylum. That is wrong.

The reinstatement statute appears at first glance to include a broad bar to relief, but only when read in isolation. It states that any alien in reinstatement status "may not apply for any relief under this chapter," 8 U.S.C. § 1231(a)(5). In context with the rest of the statutory and regulatory scheme, however, it becomes clear that the broad bar to "any relief" does not really mean "any relief" and does not apply to claims of asylum.

Because this is purely a question of statutory interpretation, this Court reviews the BIA's conclusions de novo. *Cordoba*, 726 F.3d at 1113. The single-member decision of the BIA is not entitled to *Chevron* deference. *See Garcia v. Holder*, 659 F.3d at 1266.

A. The Asylum Statute Guarantees Perez the Right to Make an Asylum Claim.

1. The Plain Text of the Asylum Statute Establishes a Broad Right to an Asylum Claim.

The asylum statute grants an unambiguous right to apply for asylum unless an alien falls within specific classes delineated in that

asylum statute. It expressly permits asylum applications regardless of the immigration status of the applicant: "Any alien who is physically present in the United States or who arrives in the United States . . . ***irrespective of such alien's status***, may apply for asylum in accordance with this section." 8 U.S.C. § 1158(a)(1) (emphasis added). In other words, because Perez was physically present inside the United States, he may apply for asylum irrespective of his reinstatement status.

2. None of the Statutory Exemptions Apply to Perez.

The asylum statute has a comprehensive scheme for determining who can apply for asylum relief. It starts from the premise that "[a]ny alien" in the United States can apply for relief, and then carves out specific limited exceptions. The exceptions include the existence of a safe third country, asylum applications filed more than a year after arrival, and applications from someone who persecuted others, was convicted of a serious crime, or is a danger to national security. *See* 8 U.S.C. §§ 1158(a)(2), 1158 (b)(2). None of these exceptions apply to Perez, who has never before sought asylum and has no criminal history.

3. Standard Interpretive Tools Confirm the Availability of an Asylum Claim in Reinstatement.

Several interpretive canons support this interpretation. First, the reinstatement statute must be read in context with the rest of the asylum statutes and other forms of relief available to aliens. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Bureau of Land Mgmt.*, 273 F.3d 1229, 1241 (9th Cir. 2001) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." (internal quotation marks and citations omitted)). The asylum statute indicates that it is available to any alien physically present in the United States. Reading the reinstatement statute to prohibit all asylum applications in reinstatement status would render that provision flatly inconsistent with the asylum statute's broad grant of the right to apply for asylum. It is also flatly inconsistent with the regulations and cases applying other forms of relief (such as CAT and withholding, *see* § I.B, *infra*) to aliens in reinstatement, notwithstanding the statutory bar.

Second, any ambiguities in removal statutes must be construed in favor of the alien. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (noting the "longstanding principle of construing any lingering ambiguities in deportation[60] statutes in favor of the alien"); *Lagandaon v. Ashcroft*, 383 F.3d 983, 993 (9th Cir. 2004) (noting "the canon of construction according to which statutory ambiguities are construed in favor of aliens"). This canon applies with special force in an asylum claim. "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Cardoza-Fonseca*, 480 U.S. at 449. Construed in favor of Perez, the asylum statute must be read to permit him to at least make a claim for asylum, notwithstanding his reinstatement status.

Third, the canon *generalia specialibus non derogant*— "the specific governs the general"—applies. *Lee v. Ashcroft*, 368 F.3d 218, 224 (3d Cir. 2004) (citation omitted) (applying the canon in granting immigration relief). In fact, this canon is particularly appropriate

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[60] Now known as removal. *See Fernandez-Vargas*, 548 U.S. at 33 n.1.

when, like here, the same chapter has a general statute concerning reinstatement, but then deals with the specific form of asylum relief in another, more specific section. The longstanding rule is that "however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Id.* at 223 (quoting *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957)). The general bar in the reinstatement statute cannot apply over the more specific provision for asylum claims.

4. Applying the Reinstatement Statute in this Manner Would Eviscerate the Specific Statutory Provision Regarding Successive Asylum Applications.

a. The Asylum Statute Permits Successive Asylum Applications, Notwithstanding the Reinstatement Statute's Bar.

The asylum statute determines when aliens are entitled to apply for asylum and specifically addresses the potential problem of repeat claimants. In limited circumstances, it expressly permits an alien to file more than one asylum application, even after the alien has been removed. To the extent the reinstatement statute was designed to address the problem of repeated claims for relief by aliens, the Congress expressly addressed that problem as far as it concerns the narrow

context of asylum applications. Ensuring that a general statute does not trump a specific statute becomes doubly important when the specific statute has a comprehensive regime designed to address a particular question. Applying the reinstatement provision in the manner contemplated by the government would effectively eviscerate this specific provision, confirming that the government's interpretation cannot be correct.

The asylum statute has a comprehensive scheme that determines who is in and who is out as far as asylum applications are concerned. The scheme applies ***only*** to asylum claims. It starts from the broad premise that any alien physically present in the United States may apply for asylum, and emphasizes that this right is "irrespective of such alien's status." 8 U.S.C. § 1158(a)(1).

Turning to the problem of repeated claims for relief, the asylum statute expressly forbids an alien from making an asylum claim if he previously applied for and was denied asylum. *See* 8 U.S.C. § 1158(a)(2)(C). So if Perez had made an asylum claim the first time he entered the United States, he could not make an asylum claim if he returned, even without reference to the reinstatement statute. Perez,

however, has never before made an asylum claim — he is a first-time claimant.

But the statute does not stop there. The very next paragraph provides an exception to the exception. It recognizes that it is possible for an alien to be denied asylum relief and then for conditions to become far worse upon return. For example, an applicant could make a first asylum claim based upon economic conditions, and properly be denied relief and an order of removal could be issued. Then, upon return to his home country, a new regime takes over and he is sent to a government-run forced labor camp on account of his religion.

The asylum statute recognizes that denying relief in such a case would fly in the face of the aims of the asylum regime. As a result, it allows a second application after proof of "changed circumstances which materially affect the applicant's eligibility for asylum." *Id.* § 1158 (a)(2)(D). In other words, the asylum statute guarantees his right to seek relief if he returns and things change dramatically for the worse.

The government's interpretation of the reinstatement statute does the opposite and would eviscerate this specific statutory provision. Upon reentry, the prior order of removal would be reinstated and, under

the government's interpretation, the second asylum application could not even be considered on the merits. Such a result would be absurd because the Congress enacted a detailed and express provision dealing with successive asylum applications because it recognized the possibility of changed circumstances. Any interpretation of the reinstatement statute must give effect to that specific provision.

Allowing the blunt bar of the reinstatement provision to trump the specific asylum regime would eviscerate the "changed circumstances" provision from § 1158(a)(2)(D) and is flatly inappropriate. Moreover, it would run roughshod over the goals of asylum and the detailed scheme established for those goals. Such an interpretation cannot stand. *See Bona v. Gonzales*, 425 F.3d 663, 670 (9th Cir. 2005) (invalidating regulation that "conflicts not only with the specific statute on point, but creates absurd results when viewed in light of the larger statutory scheme" (internal citation omitted)).

b. Legislative History Confirms that Asylum Applications Should Not Be Rejected in Reinstatement.

Legislative history confirms that the reinstatement statute cannot be read to prohibit an asylum application. In 1996, the Congress

enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("**IIRIRA**"), Pub. L. No. 104-208, 110 Stat. 3009 (1996). Among other things, the IIRIRA reformed the asylum framework. It expressly retained and re-enacted the broad entitlement to asylum claims, "Any alien who is physically present in the United States . . . irrespective of such alien's status, may apply for asylum." IIRIRA, Pub. L. No. 104-208, § 604, 110 Stat. 3009-690 (codified at 8 U.S.C. § 1158(a)(1)). The same enactment added several exceptions now found in 8 U.S.C. § 1158(a)(2) and 1158(b)(2). *See* IIRIRA, Pub. L. No. 104-208, § 604, 110 Stat. 3009-690. At the same time, it added the exception-to-the-exception, in which an alien who previously applied for asylum and was denied may still be entitled to apply for asylum, ***notwithstanding*** the bar to successive applications, if circumstances have materially changed. *See* IIRIRA, Pub. L. No. 104-208, § 604, 110 Stat. 3009-690 (codified at 8 U.S.C. § 1158(a)(2)(D)).

The IIRIRA also added the reinstatement provision. *See* IIRIRA, Pub. L. No. 104-208, § 305, 110 Stat. 3009-599 (codified at 8 U.S.C. § 1231(a)(5)). In other words, the same act of Congress (a) re-enacted the broad entitlement to asylum claims, (b) reformed the comprehensive

scheme for the availability of asylum claims in particular situations, (c) included a bar to successive asylum claims but an exception to the bar for changed circumstances, and (d) added the prohibition against "relief" from reinstatement. The Congress apparently saw no inconsistency among these provisions, and understood that the reinstatement bar would not disrupt the detailed asylum reform it passed simultaneously.

B. The Ninth Circuit Allows Relief from Reinstatement Notwithstanding the Statutory Bar.

In addition, the interpretation of the reinstatement statute by this Court and even by the agency highlights that the bar to "any relief" does not mean "any relief." Although the reinstatement statute is couched in absolute language, it has never been interpreted to be absolute. Courts and the government permit aliens in reinstatement status to apply for and receive relief under the withholding of removal provision (8 U.S.C. § 1231(b)(3)(A)), pursuant to the Convention Against Torture, and in other instances. In doing so, this Court has repeatedly acknowledged the superficially absolute terms of the statutory bar and then explained that relief is available ***notwithstanding*** that bar. As a

result, resting on the absolute language of the reinstatement statute does nothing to justify allowing it to trump the specific asylum statute.

For example, under settled law an alien in reinstatement may still apply for withholding of removal. *See* 8 C.F.R. § 208.2(c)(2)(i). This Court has remarked on the availability of that type of relief in light of the statutory bar in the reinstatement statute: "***Notwithstanding the seemingly absolute bar*** on immigration relief for immigrants subject to the post-IIRIRA reinstatement provision, however, even aliens subject to the new statute may seek withholding of removal." *Ixcot v. Holder*, 646 F.3d 1202, 1207 (9th Cir. 2011) (emphasis added, paragraph break and internal citation omitted).

The government also grants relief during reinstatement status pursuant to the Convention Against Torture. This Court previously summarized the position of the government on this issue: "The Government's position is that the Convention Against Torture nevertheless constrains the Attorney General from removing aliens to countries where they would be persecuted or tortured, ***notwithstanding the statute***." *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 956 n.1 (9th Cir. 2012) (emphasis added).

In addition, a U Visa is available in reinstatement. *See* 8 C.F.R. § 214.14(c)(1)(ii) ("An alien who is the subject of a final order of removal, deportation, or exclusion is not precluded from filing a petition for U–1 nonimmigrant status directly with USCIS."). The Seventh Circuit, acknowledging the reinstatement bar, explained that an alien "could be eligible for U Visa relief ***notwithstanding*** the [reinstatement of] removal order." *Torres-Tristan v. Holder*, 656 F.3d 653, 662 (7th Cir. 2011) (emphasis added). In that case the government acknowledged the availability of U Visa relief despite the reinstatement bar, as well: Although the petitioner in that case was "subject to 8 U.S.C. § 1231(a)(5) barring him from 'any relief,' the government acknowledges that it did not reject petitioner's U Visa application based on this statutory bar." *Id.* at 662 n.8.

In other words, as all of these cases demonstrate, the bar to relief for those in reinstatement status is not as absolute as it appears; many forms of relief are available "***notwithstanding***" the reinstatement bar. The statute must be interpreted in light of the overall statutory scheme, rather than read in isolation. *See Ariz. Cattle Growers*, 273 F.3d at 1241. In light of the availability of other forms of relief notwithstanding

the bar, the notion that the bar is absolute falls flat on its face. The bar is not absolute and cannot trump the more specific, detailed asylum statute which governs when asylum claims may be made.

C. The Supreme Court Recognizes the Possibility of Asylum Relief in Reinstatement Status.

The Supreme Court recognized "the possibility of asylum to aliens whose removal order has been reinstated under INA § 241(a)(5) [codified at 8 U.S.C. § 1231(a)(5)]." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 n.4 (2006). It made this recognition "***[n]otwithstanding the absolute terms*** in which the bar on relief is stated." *Id.* (emphasis added). Although that statement may be a dictum and the associated discussion is extremely limited, the passage fundamentally reflects the Supreme Court's recognition that the "absolute" nature of the bar is not so absolute at all, and that relief is available notwithstanding the statutory bar.

D. The Availability of Asylum Is an Issue of First Impression.

Although this Court has previously faced similar arguments, it has not yet ruled on the merits for several reasons. For example, in *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 960 (9th Cir. 2012), the petition was dismissed for lack of jurisdiction because the proceedings were not

yet completed and the removal order was not yet final. Similarly, in *Manuel-Miguel v. Holder*, 397 F. App'x 306, 308 (9th Cir. 2010), this Court expressly declined to address the issue because "no asylum application was properly filed" by the petitioner.

The unpublished memorandum decision in *Cabrera-Gonzalez v. Holder*, 532 F. App'x 777, 778 (9th Cir. 2013), states, with no further discussion, "An alien whose prior deportation order has been reinstated is ineligible for asylum relief." For that proposition the memorandum decision cites *Ixcot v. Holder*, 646 F.3d 1202, 1207 (9th Cir. 2011). *Ixcot*, however, addressed an asylum application filed ***before*** the passage of the IIRIRA. *See id.* at 1210. It remanded for consideration of the asylum application on the merits of the asylum claim. *See id.* at 1213. It neither decided nor even specifically stated that a petitioner in reinstatement post-IIRIRA is ineligible for asylum relief.

This is an issue of first impression with this Court. Now is the time to resolve this issue and stop the practice of automatically rejecting asylum applications filed by anyone in reinstatement status.

E. *Chevron* Deference Does Not Salvage the Incorrect Interpretation.

1. The BIA's Decision Is Not Entitled to *Chevron* Deference.

The incorrect interpretation is not entitled to *Chevron* deference because the agency has never articulated a position on the specific question at hand in a manner that warrants *Chevron* deference. First, as a matter of settled law, the single-member decision of the BIA on review here is not entitled to *Chevron* deference. *See Garcia v. Holder*, 659 F.3d at 1266.

Second, the BIA's entire analysis on Perez's asylum claim in this case can be found in a single cursory footnote.[61] In other words, the BIA did not "engage in a meaningful analysis to support its conclusion." *Id.* at 1267. Given its summary nature, the BIA's analysis does not merit significant deference. *Id.*

Third, although the agency may be entitled to some amount of deference concerning rules promulgated to address the question at hand, the government has promulgated no such rule. "When the agency has not spoken authoritatively on the issue at hand, we bypass

[61] AR00002 n.1.

Chevron's framework and interpret the statute as we would any other: by offering our best construction of the law's terms." *Thornton v. Graphic Commc'ns Conference*, 566 F.3d 597, 604 n.7 (6th Cir. 2009).

The BIA cited 8 C.F.R. § 1208.31(e) as support for its position.[62] This rule does not expressly prohibit asylum claims, but limits the IJ's decision to "consideration of the request for withholding of removal only." 8 C.F.R. § 1208.31(e); *see also* 8 C.F.R. § 208.31(e). That rule does not purport to interpret the asylum statute. Nor was it promulgated to expressly answer the specific issue at hand, whether an asylum claim is available at all. To the extent the rule addresses the issue, there is no evidence that the answer to this specific question is the result of reasoned decisionmaking sufficient for judicial review.

The rule found at 8 C.F.R. § 1208.31(e) does not "squarely address[] the question we confront. . . . [It] d[oes] not mention, let alone elaborate on," the asylum statute or the specific availability of ***asylum claims***. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 107–08 (1993). As a result, it warrants no *Chevron* deference.

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[62] *Id.*

2. The BIA's Interpretation Fails Both Step One and Step Two of *Chevron*.

To the extent the BIA relies on 8 C.F.R. §§ 1208.31(e), 208.31(e), or another rule as the basis for its interpretation, the interpretation fails both steps of *Chevron* even if it is entitled to such deference. Under *Chevron* step one, the Court should "look first to the plain meaning of a statute and give effect to that meaning where fairly possible." *Lagandaon*, 383 F.3d at 987. Only if the statute is ambiguous does the Court proceed to step two and ask whether the agency's interpretation is reasonable. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

Traditional canons of construction and other statutory construction tools should be used in a *Chevron* analysis. *See Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1187 (9th Cir. 2001) ("If a court, in employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." (quoting *Chevron*, 467 U.S. at 843 n.9)); *Cardoza-Fonseca*, 480 U.S. at 449 ("We find these ordinary canons of statutory construction compelling.").

The asylum statute guarantees availability of an asylum claim to "[a]ny alien" "irrespective of status." 8 U.S.C. § 1158(a)(1). There is no ambiguity in the text of § 1158 itself. As one court noted, "Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: '[a]ny alien . . . may apply for asylum.'" *Gonzalez v. Reno*, 212 F.3d 1338, 1347 (11th Cir. 2000) (alterations in original).

The central question is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In other words, has the Congress spoken to when an alien may make a claim for asylum? The answer is yes. Section 1158 sets forth a comprehensive eligibility regime. The only exceptions to the broad availability are spelled out in §§ 1158(a)(2) and (b)(2) and do not apply to Perez. Interpreting § 1158(a)(1) to create a new exception to availability that is not contained in and directly conflicts with the codified exceptions fails to give effect to the plain meaning. As a result, the agency's interpretation is not entitled to deference under *Chevron* step one and this Court should "stop the music at step one" and apply the proper interpretation. *Northpoint Tech., Ltd. v. F.C.C.*, 412 F.3d 145, 151

(D.C. Cir. 2005). The agency may not preclude by regulation what § 1158 permits.

The Court need not reach *Chevron* step two because the agency is not entitled to *Chevron* deference and because the agency's interpretation fails step one. If it is necessary to consider step two, however, the agency's interpretation fails there as well because barring an asylum claim during reinstatement is not a reasonable interpretation of § 1158(a)(1). It is "arbitrary, capricious, [and] manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. When a statute sets forth a comprehensive remedial scheme, an agency may not add or subtract from that scheme. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (holding regulations invalid in part because "[t]he categorical penalty is incompatible with the [statute's] comprehensive remedial mechanism.").

There is no indication that the agency considered the detailed eligibility scheme for asylum claims set forth in § 1158 in making any decision to bar relief, nor is there any indication that the agency attempted to reconcile the asylum eligibility scheme in § 1158 with the reinstatement statute in 8 U.S.C. § 1231(a)(5). In sum, there is no

indication that the agency's interpretation is the product of "[r]easoned decisionmaking." *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 657 F.3d 865, 872 (9th Cir. 2011).

Moreover, for all of the reasons described above after applying canons of constructions and other interpretative tools, the statute must be interpreted to allow an asylum claim for any alien physically present in the United States, so long as the alien does not trigger one of the exceptions. The agency's unreasonable interpretation fails *Chevron* step two.

F. Perez's Claim Should Be Remanded for Consideration of His Asylum Claim.

Because the BIA failed even to consider Perez's asylum claim, this matter should be remanded with instructions to the BIA to consider Perez's claim for asylum. *See I.N.S. v. Orlando Ventura*, 537 U.S. 12, 18 (2002) (per curiam) (court should remand to agency rather than decide entitlement to relief).

II. Perez Is Entitled Relief Under the Convention Against Torture.

The BIA also erred in denying Perez relief under the CAT. Perez is entitled to relief because "it is more likely than not that [Perez] would be tortured if removed to the proposed country of removal." 8 C.F.R.

§ 1208.16(c)(2). Perez submitted evidence showing that the Guatemalan police severely beat him, considered killing him, and threatened to kill him if they ever saw him again. He also submitted evidence showing that his name was on a death squad's kill list, and that others on the same list are now dead. The BIA failed even to consider the death squad in connection with his CAT claim. Each of these forces taken individually entitles Perez to CAT relief, and they certainly entitle him to relief when considered together. The BIA did not make an adverse credibility finding, so this Court "must assume that [his] factual contentions are true." *Aguilar-Ramos v. Holder*, 594 F.3d 701, 704 (9th Cir. 2010) (internal quotation marks and citation omitted).

A. Perez Is Entitled to CAT Relief Because the Police Will Kill Him if He Returns.

The undisputed facts show that Perez was kidnapped, beaten, and threatened with his life by Guatemalan police officers.[63] If he returns to Guatemala, he faces the police threat that he will immediately be killed if he is seen in his home country again.

[63] *See* notes 21 to 37, *supra*, and accompanying text.

Although the BIA's reasoning is somewhat unclear, the BIA appeared to deny relief for three reasons: (1) the mistreatment does not amount to torture; (2) the officers were not interested in harming him; and (3) the government would not acquiesce in violence. None of these bases have any merit. And in any event, the decision should be remanded because the BIA failed even to consider the police death threat in its analysis.

1. Beating and Threats Constitute Torture.

For purposes of the CAT, torture is defined broadly to include a variety of acts:

> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 1208.18(a)(1).

The facts in this case indicate torture, and because there was no adverse credibility finding this Court must assume that the facts are

true. *Aguilar-Ramos*, 594 F.3d at 704. Torture includes "[t]he intentional infliction or threatened infliction of severe physical pain or suffering." 8 C.F.R. § 1208.18(a)(4)(i). He meets this standard. Perez was kidnapped, handcuffed to a chair, and severely beaten.[64] The police officers broke his nose and cut him on his eye.[65] Perez submitted medical evidence of his injuries.[66] He was tortured in an effort to get a confession or information about a suspected crime,[67] a motivation which is expressly named in the implementing regulations. *See id.* § 1208.18(a)(1) ("for such purposes as obtaining from him or her or a third person information or a confession").

Torture also includes "[t]he threat of imminent death." *Id.* § 1208.18(a)(4)(iii). He meets this standard, as well. One of the officers wanted to kill him and throw him in a ditch.[68] In the end, he was left

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[64] *See* notes 21 to 24, *supra*.

[65] *See* note 25, *supra*.

[66] *See* note 29, *supra*.

[67] AR00097:8–11; AR000172 ¶ 9; AR000402.

[68] AR000172 ("One of them said they should kill me and leave me in a ditch, that it would be easy for them and nobody would care."); AR00097:17–20 ("And the other people would say well, since they

with an unambiguous threat: if the police officers saw him again, they would kill him.[69]

The BIA failed even to consider this death threat in connection with Perez's CAT claim. The decision should be remanded for this reason alone. This Court, and the BIA and IJ before it, have an obligation to consider ***all relevant evidence*** concerning the CAT claim: "[A]ll evidence relevant to the possibility of future torture ***shall be considered***." 8 C.F.R. § 1208.16(c)(3) (emphasis added); *accord Aguilar-Ramos*, 594 F.3d at 705 n.6 (reversing denial of CAT relief for failure to consider all evidence).

This torture was not a lawful sanction, was not judicially imposed, and was not authorized by law. The torture he experienced at the hands of Guatemalan police officers is precisely what the Convention Against Torture was designed to protect against. It was error to hold that it does not amount to torture, and this Court reviews de novo the question of what constitutes torture. *Cf. Pitcherskaia v. I.N.S.*, 118

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already had me, well it wouldn't -- there would be no loss to them to go ahead and kill me and just dump me somewhere.").

[69] *See* note 27, *supra*.

F.3d 641, 646 (9th Cir. 1997) (reviewing de novo the meaning of persecution).

2. Perez Fears Torture if He Returns.

Perez was left with a clear threat: if the police officers ever see him again, they will kill him. Perez has to show that it is more than 50% likely that he will face torture upon return. This unambiguous threat easily passes that threshold. Moreover, the threat is real: the same officers already severely beat him and considered killing him on the spot. Past torture is the best evidence of the likelihood of future torture. *See Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) ("[T]he existence of past torture is ordinarily the principal factor on which we rely." (internal quotation marks and citation omitted)); *see also* 8 C.F.R. § 1208.16(c)(3)(i) (assessment shall include "Evidence of past torture inflicted upon the applicant").

The BIA noted that Perez was released and warned not to report the incident, explaining that "[t]hese actions indicate that the men were not interested in harming him."[70] That conclusion is not justified. Although the officers may not have intended to hurt Perez initially

[70] AR000004.

(because they mistook him for someone else), the desire to kill him and leave him in a ditch, as well as the unambiguous threat to kill him in the future, occurred after they learned his true identity. It is unreasonable to conclude, from a threat of ***future*** harm, that the officers do not want to harm him.

3. The Kidnapping, Beating, and Threats Were From Public Officials.

In a CAT claim, the torture must be "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). Here, the beatings and threats were made by police officers. There is no doubt that a police officer is a "public official." In addition, the submitted country conditions evidence demonstrates that the Guatemalan government is aware of but unable or unwilling to stop it.[71] *See Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006) ("It is enough that public officials could have . . . simply stood by because of their inability or unwillingness to oppose it.").

To the extent the BIA suggested that a single police offer (or a group of four, as in this case) is insufficient, it severely erred. Actions of

[71] *See* note 35, *supra*, and accompanying text.

even rogue agents can be enough to satisfy a CAT claim. As one court put it, actions in an official capacity satisfy the requirement, and even actions by rogue officers do:

> To the extent that the Egyptian police are acting in their official capacities-as is strongly suggested by the fact that their goal is to extract confessions-then the acts are carried out "by . . . a public official . . . acting in an official capacity." To the extent that these police are acting in their purely private capacities, then the "routine" nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it. As two of the CAT's drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (citations omitted); *see also Barwari v. Mukasey*, 258 F. App'x 383, 385 (2d Cir. 2007) ("[R]ogue police officers are capable of carrying out torture for CAT purposes even when acting outside of their official capacities." (citing *Khouzam*)); *Bal v. Holder*, 471 F. App'x 704, 704–05 (9th Cir. 2012) ("In analyzing Bal's CAT claim, the BIA mischaracterized the 2006 country report when it discounted evidence of torture as occasional acts of rogue agents committed without government acquiescence.").

And in any event, the officers here were investigating a crime of car theft and were acting in their official capacities.[72]

To the extent the BIA suggests that the Guatemalan government has the situation under control, the BIA appears to have adopted an impermissible theory that can only be described as *it's-getting-better*. In adopting this theory, the BIA noted that "the Guatemalan Government has taken strong measures to combat crime," and although it acknowledged that "there is evidence of corruption within the Guatemalan law enforcement community," it explained that "the government continues to prosecute corrupt police officers."[73] Even if true, those trends have no bearing on Perez's request for relief. The question is whether the harm to Perez would be "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). Perez's evidence and the country conditions evidence demonstrates that it would be. Guatemala's good intentions to battle the corruption and violence within its law enforcement forces provide little solace to a

[72] *See* AR00097:8–11; AR000172 ¶ 9; AR000402.

[73] AR000004.

victim of torture. The upward trajectory, even if true, does not somehow make the torture less real or turn the government agents into something else; more likely than not he will still be tortured despite any efforts at improvements the Guatemalan government may be making.

B. Perez Is Entitled to CAT Relief Because He Fears Guatemalan Death Squads Will Kill Him.

Perez introduced evidence sufficient to show that it was more likely than not that if he is returned to Guatemala, then he will be killed at the hands of Guatemalan "death squads." This evidence is sufficient to entitle him to relief under the CAT, but the BIA did not even consider it in connection with his CAT claim.

1. The BIA Failed to Consider Evidence Concerning the Death Squads.

The record contains abundant evidence supporting a CAT claim on the basis of being targeted by death squads. The evidence shows that Perez's name was on a death squad list created by a government official and that others on the list have been killed, including his cousin.[74]

This Court, and the BIA and IJ before it, have an obligation to consider ***all relevant evidence*** concerning the CAT claim: "[A]ll evidence

[74] *See* notes 16 to 20, *supra*, and accompanying text.

relevant to the possibility of future torture ***shall be considered***." 8 C.F.R. § 1208.16(c)(3) (emphasis added); *accord Aguilar-Ramos*, 594 F.3d at 705 n.6 (reversing denial of CAT relief for failure to consider all evidence). At a minimum, this matter must be remanded for consideration of the death squad on Perez's CAT claim.

As a result of failing to consider the death squads at all in the context of the CAT claim, the BIA and IJ also failed to consider country conditions evidence that documented the brutal death squads, their relationship to law enforcement, and Guatemala's inability to control them.[75] Because the BIA ***must*** consider country conditions evidence in connection with a CAT claim, Perez's case should be remanded. *See, e.g.*, *Aguilar-Ramos*, 594 F.3d at 705 ("The failure of the IJ and BIA to

[75] *See* AR000166 at ¶ O (excerpts from U.S. Department of State Country Report describing unlawful killings by police force); AR000166–67 at ¶ P (Washington Post excerpt on death squads); AR000167 at ¶ Q (excerpt from Immigration and Refugee Board of Canada on death squads); *id.* at ¶ R (excerpt from Prensa Libre concerning social cleansing operations); AR000168 at ¶¶ S, U (El Periodico de Guatemala excerpts on social cleansing); *id.* at ¶ T (excerpt from World Organization Against Torture on social cleansing); *id.* at ¶ V (excerpt from El Periodico de Guatemala); AR000219 (U.S. Department of State Country Reports); AR000251 (Washington Post article); AR000258 (Immigration and Refugee Board of Canada); AR000264 (El Periodico); AR000268 (Organization Mundial Contra La Torture); AR000272 (El Periodico de Guatemala); AR000277 (Amnesty International).

consider evidence of country conditions constitutes reversible error."); *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013) ("Given the high likelihood that the BIA did not consider all the country condition evidence properly before it, remand is appropriate."). The country conditions evidence puts the death squads in context. It demonstrates that the death squads are effective at killing the individuals they target, often consist of government agents, and in any event the Guatemalan government has been unwilling and unable to control them.

2. Being Targeted By Death Squads Supports a CAT Claim.

Because the BIA failed to consider any evidence concerning the death squads in the context of Perez's BIA claim, the petition should be granted and the case should be remanded for consideration of the claim. *See Orlando Ventura*, 537 U.S. at 18.

Although this Court need not consider the merits at this stage, Perez's evidence warrants relief under the CAT. At least twice before, this Court granted aliens' petitions for review and remanded CAT claims because of the possibility of torture by death squads. *See Cole v. Holder*, 659 F.3d 762, 775 (9th Cir. 2011); *Aguilar-Ramos*, 594 F.3d at

706. Both cases involved countries that neighbor Guatemala (Honduras and El Salvador, respectively) and apply with equal force there. Both cases discussed the role of death squads and the evidence about their affiliation with Central American governments. *See Cole*, 659 F.3d at 767–68 (discussing evidence concerning death squads); *Aguilar-Ramos*, 594 F.3d at 703, 706 (same). Moreover, in both cases this Court granted relief even though there was no evidence that the alien had ever been named or targeted by a death squad. Perez's case for relief is even stronger because he was specifically identified on a death squad list and his cousin, who was named on the same list, was killed by a death squad.[76] This evidence is far stronger than the general evidence presented in *Cole* and *Aguilar-Ramos*.

Protection from death squads is an important part of the CAT. In enacting legislation to provide a private cause of action for torture as part of implementing the CAT, the Senate expressly called out "extrajudicial killings by death squads." S. Rep. No. 102-249, at 3

[76] AR000175–79 (death certificate of cousin); AR000172 ¶¶ 7–8 (describing death of cousin; AR000401 ("And my name and a name of a cousin were included there. On Apr 28 -29, 2010, he was killed."); AR000394 ("[H]is cousin, who was also featured on the list was shot in the head.").

(1991); *see also Doe v. Qi*, 349 F. Supp. 2d 1258, 1279 (N.D. Cal. 2004) (describing death squads as part of motivation for legislation enacted to implement CAT (quoting S. Rep. 102-249)).

It is beyond dispute that "[t]he threat of imminent death" constitutes torture under the CAT. 8 C.F.R. § 1208.18(a)(4)(iii). It is more likely than not that Perez would face this threat upon return. Other individuals whose names appeared on the death squad list have been killed. It stands to reason, and is an altogether "reasonable inference[]," *Aguilar-Ramos*, 594 F.3d at 704 (citation omitted), that the death squad would finish the job and seek to kill Perez. Simply put, if he returns, he will fear for his life and odds are he will be killed.

In a CAT claim, the torture must be "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). The Guatemalan death squads fit the bill. The evidence in the record demonstrates that the death squads often are composed of members of the police community.[77] Even if the squads have private citizens, the Guatemalan government is

[77] *See, e.g.*, AR000251 ("Officials say the recent murders may be the work of frustrated police officers, former paramilitary members.").

aware of the death squads and has proven to be unable or unwilling to stop them, which is enough to support a CAT claim.[78] *See Ornelas-Chavez*, 458 F.3d at 1060 ("It is enough that public officials could have . . . simply stood by because of their ***inability*** or ***unwillingness*** to oppose it." (emphases added)); *Aguilar-Ramos*, 594 F.3d at 705-06 (Mere "awareness and willful blindness will suffice" to show that the government acquiesced.). Although this Court should remand for failure to consider the death squads, the evidence concerning death squads is sufficient to justify relief under the CAT.

C. The Aggregate Risks Justify CAT Relief.

Perez's CAT claims based upon police beatings and the death squads each entitle him to relief. In the alternative, however, those forces in the ***aggregate*** are enough to entitle him to relief. The BIA must consider the cumulative risks. As this Court has explained:

> Finally, the BIA did not consider the *aggregate* risk that Cole would face from ***police***, ***death squads***, and gangs if returned to Honduras. Cole need not prove that each group, treated individually, would more likely than not torture him. Rather, he must establish that, taking into account ***all possible sources of torture***, he is more likely than not to be tortured, by or with the consent or acquiescence of the

[78] *See, e.g.*, AR000253 ("The police seemed powerless to stop the criminals, and in some cases they became part of the problem.").

> government, if returned to Honduras. ***The BIA erred by treating each potential source of torture individually***, never assessing Cole's ***overall risk*** of being tortured.

Cole, 659 F.3d at 775 (some emphases added). Because the BIA did not consider Perez's death squad claim at all, the matter should be remanded for the BIA to consider not only the claims individually, but also his claims in the aggregate.

III. Perez Is Entitled to Withholding of Removal Because He Is Being Targeted as a Former Witness Against Gangs.

Perez is entitled to withholding of removal because, if returned, his life will be threatened as a result of testifying for the prosecution against gang members. To establish his withholding claim, Perez must prove that his "life or freedom would be threatened in [Guatemala] because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). The BIA denied Perez's withholding claim solely because the likely harm was not "on account of a protected ground."[79] The only issue on appeal, therefore, is whether Perez is being targeted because of one of the identified grounds. He is.

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[79] AR00003.

Members of the Central American MS Gang shot at Perez because he witnessed an attempt by the MS Gang to extort money from a local business.[80] He was the only witness to the shooting and extortion, so the police used him as a prosecution's witness against the MS Gang members.[81] When the gang members were released from jail, they came looking for Perez because he was a testifying witness.[82] Abundant country conditions evidence establishes that witnesses in Guatemala are threatened and killed, and that the government is unable or unwilling to protect them.[83]

This Court, sitting en banc, recently held that witnesses against Central American gangs can be "a particular social group."[84] *See*

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[80] *See* notes 4 to 6, *supra*, and accompanying text.

[81] *See* notes 7 to 9, *supra*, and accompanying text.

[82] *See* notes 10 and 11, *supra*, and accompanying text.

[83] *See* notes 12 to 15, *supra*, and accompanying text.

[84] *Henriquez-Rivas* analyzed the social group under an asylum claim; it expressly did not reach her withholding claim. *See* 707 F.3d at 1094. The analysis applies with equal force under a withholding claim because the statutorily protected grounds are identical.

Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (en banc).[85] Perez's situation bears a striking resemblance to the successful petitioner in *Henriquez-Rivas*. Both Henriquez-Rivas and Perez witnessed a crime committed by the MS Gang.[86] *See* 707 F.3d at 1085. Both Henriquez–Rivas and Perez testified against the gang members in court, leading to convictions.[87] *Id.* at 1086. Gang members came to the homes of both Henriquez–Rivas and Perez, seeking to hurt or kill him because he was a testifying witness.[88] *Id.* at 1092. The home countries of Henriquez–Rivas and Perez both make an effort to protect witnesses, but evidently the efforts fall far short in both countries.[89] *Id.* Both Henriquez–Rivas and Perez were found credible, but the BIA denied

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[85] The BIA recently cited this decision favorably in two precedential opinions. *See Matter of W-G-R-*, 26 I. & N. Dec. 208, 210–12 (2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 233 (2014).

[86] *See* notes 4 to 5, *supra*, and accompanying text. The opinion in *Henriquez-Rivas* is somewhat unclear as to whether the gang involved was MS or M-18, but discusses MS more, and in any event the distinction makes no difference. *Compare* 707 F.3d at 1085 (M-18) *with id.* at 1092 (MS).

[87] *Compare with note* 9, *supra*.

[88] *Compare with* notes 10 and 11, *supra*.

[89] *Compare with* AR000227 ("At year's end 33 persons were in the Public Ministry's witness protection program.").

both of their claims on the grounds that they did not identify a protected social group. *Id.* at 1086. In Henriquez–Rivas's case, however, the BIA addressed the specific group of witnesses; in this case, the BIA failed to address it at all.

Based upon these facts, the en banc court reversed. It held that the group consisting of testifying witnesses against gang members can have both the social visibility and the particularity to satisfy the requirements of a protected group. *See id.* at 1092–93. The Second Circuit reached a similar holding, in holding that cooperating witnesses in war crimes investigations form a protected social group. *See Gashi v. Holder*, 702 F.3d 130, 132 (2d Cir. 2012) ("[W]e conclude that the proposed group of cooperating witnesses is a particular social group under the INA.").

As a result of *Henriquez–Rivas*, this Court has remanded withholding claims alleging similar social groups for reconsideration under *Henrriquez-Rivas*. *See, e.g.*, *Lopez-Simon v. Holder*, 535 F. App'x 585 (9th Cir. 2013) (remanding asylum and withholding claim for consideration of whether government informants can be a particular social group in light of *Henriquez-Rivas*); *Pinhas v. Holder*, 529 F. App'x

811 (9th Cir. 2013) (remanding asylum and withholding claims for consideration of whether DEA collaborators can be a social group in light of *Henriquez-Rivas*). This Court should do the same here.

CONCLUSION

This Court should grant the petition for review, vacate the BIA's order, and remand for (a) consideration of Perez's asylum claim on its merits, (b) consideration of all of the evidence supporting Perez's CAT claim, and (c) consideration of Perez's withholding claim in light of *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

RESPECTFULLY SUBMITTED this 26th day of March, 2014.

OSBORN MALEDON, P.A.

By s/ Eric M. Fraser

Eric M. Fraser
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2794

PRO BONO Attorney for Petitioner

STATEMENT OF RELATED CASES

This case is not related to any other cases presently pending in the Ninth Circuit.

STATEMENT PURSUANT TO NINTH CIRCUIT RULES 15-4 & 28-2.4

(1) Perez is not detained.

(2) Perez has not moved to reopen or for an adjustment of status.

CERTIFICATE OF COMPLIANCE PURSUANT TO

FED. R. APP. P. 32(a) FOR CASE NO. 13-70579

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 12,214 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Century.

Dated this 26th day of March, 2014.

s/ Eric M. Fraser
Eric M. Fraser
PRO BONO Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 26, 2014.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Rony Estuardo Perez-Guzman
939 South Nutwood Street
Anaheim, CA 92804

s/ Eric M. Fraser
Eric M. Fraser
PRO BONO Attorney for Petitioner

Go to Table of Contents

ADDENDUM TO PETITIONER'S OPENING BRIEF

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

Tab A

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A200 282 241 – Florence, AZ Date: FEB -7 2013

In re: RONY ESTUARDO PEREZ-GUZMAN a.k.a. Ronnie Perez-Guzman

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Pro se

ON BEHALF OF DHS: Joey L. Caccarozzo
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The applicant, a native and citizen of Guatemala, appeals from the Immigration Judge's October 23, 2012, decision denying his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1231(b)(3), and his request for protection under the Convention Against Torture ("CAT"), 8 C.F.R. § 1208.16(c).[1] The appeal will be dismissed.

The applicant maintains that he was persecuted in Guatemala by gang members and/or rogue police officers (I.J. at 7-11; Exhs. 3, 4; Tr. at 19-33). In particular, he reported being struck in the leg by a stray bullet in 2004 when gang members fired their weapons at a neighbor from whom they sought to extort money (I.J. at 7; Exhs. 3, 4; Tr. at 20). The applicant testified that he left the city and went to live with his father, and indicated that his father was told by a friend who worked for the local government that he and his cousin were thought to be gang members and that their names appeared on a death squad's hit list (I.J. at 7-8; Exhs. 3, 4; Tr. at 20-21, 24-28, 31). The applicant explained that his cousin was killed by unknown assailants in 2009, and that he decided to return to Guatemala City in order to avoid harm (I.J. at 8-9; Exhs. 3, 4; Tr. at 28-29). He reported being kidnapped by a group of men who claimed to be police officers in 2011, and indicated that the men accused him of being a car thief and interrogated and beat him (I.J. at 10; Exhs. 3, 4; Tr. at 21-22, 29, 31). He explained that the men released him after realizing that they had mistaken him for someone else, and warned him not to report the incident to the authorities (I.J. at 10-11; Exhs. 3, 4; Tr. at 23). The applicant fled to the United States in June 2011, was removed to Guatemala the following month, and re-entered this country without inspection in January 2012 (I.J. at 3-4; Exhs. 3, 4, 5; Tr. at 23-24, 31-33).

[1] On appeal, the applicant argues that the Immigration Judge erred in denying his application for asylum (Notice of Appeal; Respondent's Brief at 3). Because the Department of Homeland Security ("DHS") reinstated a prior order of removal in this case, the Immigration Judge's consideration was limited to the applicant's request for withholding of removal and CAT protection (I.J. at 1-2). *See* 8 C.F.R. § 1208.31(e).

The applicant's asylum application was filed subsequent to May 11, 2005 (Exh. 3). His claim is therefore subject to the statutory amendments made by the REAL ID Act of 2005. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

We review findings of fact, including credibility determinations, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues under a de novo standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the applicant maintains that the Immigration Judge erred in concluding that he failed to establish that he is a refugee, as that term is defined under section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). The REAL ID Act has amended the burden of proof for withholding of removal. "To establish that the applicant is a refugee within the meaning of [section 101(a)(42)(A) of the Act], the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." Section 208(b)(1)(B)(i) of the Act, 8 U.S.C. § 1158(b)(1)(B)(i); *see also* 8 C.F.R. § 1208.13(a); *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (holding that the "one central reason" standard also applies to applications for withholding of removal); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007).

Even assuming that the applicant's testimony is credible, the record fails to establish that anyone in Guatemala was motivated to harm him on account of a protected ground (I.J. at 11-12). *See* section 208(b)(1)(B)(i) of the Act; *Parussimova v. Mukasey*, 555 F.3d 734, 740-41 (9th Cir. 2009) (discussing the more onerous nexus standard under the REAL ID Act); *Matter of J-B-N- & S-M-*, *supra*, at 214 (stating that a protected ground cannot be incidental, tangential, superficial, or subordinate to another reason for harm under the REAL ID Act). The applicant testified that he was an innocent bystander who was a victim of random violence in 2004 (I.J. at 7; Exhs. 3, 4; Tr. at 20). While he suggested that his name appeared on a death squad's hit list in 2009, he experienced no mistreatment as a result and indicated that the list was destroyed (I.J. at 7-9; Exhs. 3, 4; Tr. at 20-21, 24-28, 31). The applicant testified that he was interrogated and beaten in 2011 because he was mistaken for someone else, but was released when the perpetrators realized their mistake (I.J. at 10-11; Exhs. 3, 4; Tr. at 21-23, 29, 31). As noted by the Immigration Judge, none of these acts amounts to persecution "on account of" one of the protected grounds required in order to establish a claim for withholding of removal (I.J. at 12). In the absence of the regulatory presumption that his life or freedom would be threatened in the future, the applicant has failed to meet his burden of proving a clear probability of future persecution (I.J. at 12). *See* 8 C.F.R. § 1208.16(b)(2); *see also Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008). Consequently, we affirm the Immigration Judge's denial of withholding of removal.

To qualify for CAT protection, an applicant must prove that it is more likely than not that he will be tortured if he returns to his native country, and that the act will be instigated by or with the consent or acquiescence of a public official or other person acting in an official capacity. *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1); *see also Shrestha v. Holder*, 590 F.3d 1034, 1048-49 (9th Cir. 2010); *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001). Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for

any reason based on discrimination of any kind." 8 C.F.R. § 1208.18(a)(1); *see also Nuru v. Gonzales*, 404 F.3d 1207, 1217 (9th Cir. 2005). Torture is an extreme form of cruel and inhuman treatment, which does not include lesser forms of cruel, inhuman, or degrading treatment or punishment. 8 C.F.R. § 1208.18(a)(2).

We agree with the Immigration Judge that the applicant has not established his eligibility for protection under the CAT (I.J. at 12-16). The evidence of record does not demonstrate that it is more likely than not that he will be tortured in Guatemala by or at the instigation of or with the consent and acquiescence of a public official or other person acting in an official capacity. Although the applicant maintains that the men who abducted him in 2011 were rogue police officers, the mistreatment he reportedly experienced does not amount to torture (I.J. at 11, 13; Exhs. 3, 4; Tr. at 21-23, 29, 31). Moreover, the men released the applicant after discovering that they had mistaken him for someone else, and warned him not to report the incident to the authorities (I.J. at 13; Exhs. 3, 4; Tr. at 21-23, 29, 31). These actions indicate that the men were not interested in harming him, and feared prosecution if the authorities became aware of their actions (I.J. at 13).

The record does not contain any evidence that the government would acquiesce in (including turning a blind eye to) any violence aimed at the applicant (I.J. at 14-16). *See Aguilar-Ramos v. Holder*, 594 F.3d 701, 705-06 (9th Cir. 2010), *citing Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9th Cir. 2003). As noted by the Immigration Judge, the background evidence reflects that the Guatemalan government has taken strong measures to combat crime (I.J. at 14; Exh. 5; Tr. at 34). While there is evidence of corruption within the Guatemalan law enforcement community, the government continues to prosecute corrupt police officers for their criminal conduct (I.J. at 14-16; Exh. 5). There is no evidence in the record to show that any Guatemalan public official has consented to or acquiesced in prior acts of torture committed by police officers (I.J. at 15; Exh. 5). Further, the evidence does not demonstrate that official corruption in Guatemala is so widespread that it may be presumed to occur in the majority of cases, nor does the evidence show that such corruption often takes the form of acquiescence in torture (I.J. at 15; Exh. 5).

We find no clear error in the Immigration Judge's findings of fact. Moreover, upon de novo review, we agree with the Immigration Judge that there is insufficient evidence to establish that the applicant is likely to be tortured by the Guatemalan government or by private actors with the acquiescence of governmental authorities. *See Zheng v. Ashcroft*, *supra*; *see also Aguilar-Ramos v. Holder*, *supra*. Consequently, the applicant's request for such protection will be denied.

Accordingly, the following order will be entered.

ORDER: The applicant's appeal is dismissed.

FOR THE BOARD

Go to Table of Contents

Tab B

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

File: A200-282-241 October 23, 2012

In the Matter of

RONY ESTUARDO PEREZ-GUZMAN	IN WITHHOLDING ONLY PROCEEDINGS
APPLICANT	

CHARGES:

APPLICATIONS:

ON BEHALF OF APPLICANT: Rony Perez-Guzman, PRO SE

ON BEHALF OF DHS: JOEY CACCAROZZO, ESQUIRE, 3250 NORTH PINAL PARKWAY AVENUE, FLORENCE, ARIZONA 85132

ORAL DECISION and ORDER OF THE IMMIGRATION JUDGE

Respondent is a 31-year-old male, native and citizen of Guatemala, who was placed in withholding only proceedings following the referral on Form I-863 from an Asylum officer to the Immigration Judge, following a finding by the Asylum officer that the Respondent expressed a reasonable fear of torture under the Convention Against Torture. Respondent is not eligible for asylum under INA 208, because the Respondent has been previously

ordered removed pursuant to Section 238 or 235 of the Act and the DHS officials have, pursuant to their authority under the law and regulations, reinstated that prior Order of Removal. The Respondent has expressed a fear of persecution or torture, and the Asylum officer found that reasonable fear to be expressed and referred the matter to the Immigration Judge to consider the Respondent's application for withholding of removal under the statute and under the Convention. Respondent does not appear to be subject to any of the mandatory bars to withholding under the Convention, and is not limited to relief in the form of deferral under the Convention. Therefore, the Court will consider and did consider the Respondent for both withholding under Section 241 and withholding under the Convention or CAT.

This Court finds that the Respondent has failed in his burden of proof to show that he is in need of or eligible for and should be granted relief in the form of withholding, either under the statute or under the Convention.

This Court notes that the Respondent, as the Court is required to do, has been consistent in his statements with the Court as to the fears that he had in Guatemala, meaning the statements he gave to the Asylum officer reflected in Exhibit 1, I-863 and worksheets of the Asylum officer, as well as with his application, the I-589, being Exhibit 3, and with the Respondent's other documents in Exhibit 2 and 4, including the Respondent's declaration, and are not inconsistent internally

among his statements in those regards, following his apprehension in the United States on this second occasion, at which time on the second time he returned to the United States, the first time having resulted in a removal order and removal to Guatemala in June of 2012, and his return soon thereafter following that removal. However, the Court notes that the Respondent did give inconsistent statements, meaning a different statement to the Border Patrol when he was first apprehended, as reflected in his sworn statement to the Border Patrol on June 30, 2011, noting that when asked by the Border Patrol whether he had a reason for coming to the United States and for what purpose did he come to the United States, the Respondent answered "to work." He was again asked, later on the same day of June 30, 2011, for what purpose did he come to the United States, and he again stated "to work."

In addition, the Respondent was asked, also by the Border Patrol, same day on a separate form and at a separate time in the form called I-867, known as the jurat form, record of sworn statement, why did he leave his home country. The Respondent stated, "to find work." Importantly, in this Court's opinion, the Border Patrol also asked the Respondent "do you have any fear or concern about being returned to your home country or being removed from the United States", and the Respondent replied, "no." Border patrol then asked him another question about would you be harmed if you are returned to your

home country or country of last residence, and the Respondent answered "no." Therefore, the Court notes that the Respondent has told Border Patrol agents of the United States when he entered the United States in June of 2011, why did he come to the United States, and he said to work, and would he be afraid of going back or would anyone hurt him, and he said no. It was following that encounter and discussion with the Border Patrol that the Respondent was removed and returned to Guatemala.

Respondent stated in his declaration, which is part of his Exhibit #4, all five exhibits having been admitted and no document proffered by either party denied admission, that when he was removed and deported back to Guatemala he went to a cousin's house and stayed there and did not go anywhere and then decided to return to the United States, which he did, even though nothing else happened to the Respondent when he was returned to Guatemala in 2011. Respondent then returned to the United States, and upon return to the United States, in January of 2012, as reflected by the I-213 that's in Exhibit 5, tab A, Respondent again was asked by the Immigration officers and Border Patrol agents whether he had any fear of persecution or torture if returned to Guatemala, and the Respondent stated that he did not.

However, after being in detention for a certain period of time this year in 2012, the Respondent asked to see, and expressed a fear of persecution or torture, and was given the

opportunity to talk to, an Asylum officer, at which time he gave the interview that is recorded in Exhibit #1 in the worksheet notes of the Asylum officer, finding that the Respondent's testimony was detailed and specific, and therefore found credible, not necessarily believable or other criteria for credibility, but that on the basis of the Respondent's testimony, if everything he said to the Asylum officer were true, that the Asylum officer found that that would be a reasonable fear he may be tortured or would be tortured in Guatemala at the hands of persons he believed to be police officers.

The referral to the Immigration Judge is for review of all of the evidence under the law to determine whether the Respondent has met his burden of proof to show that it is more likely than not that he would be persecuted for one of the five protected grounds for ~~or~~ withholding of removal under INA 241 or whether he would have a more likely than not risk of torture at the hands of a government official or someone the government officials have knowledge of and would acquiesce in such torture.

For withholding of removal under INA 241, the Respondent has the burden of proof to show that it is more likely than not that his life or freedom would be threatened because of or on account of one of the five protected grounds of his race, religion, nationality, membership in a particular social group, or his political or imputed political opinion.

That standard has been interpreted as being a clear probability standard that he would be more likely than not to be persecuted for one of those five reasons, or because of or on account of at least one of those reasons being at least one central reason for such persecution, which is the standard interpreted as being higher and different from the regular standard for asylum, as recognized by the Supreme Court in INS v. Stevic in 1984 and INS v. Cardoza-Fonseca in 1987. The Respondent, according to the evidence presented to this Court, does not have a past persecution on account of a protected ground and therefore is not entitled to a presumption of qualification for withholding under 8 C.F.R. 1208.16(b)(1)(I) or as recognized by the Ninth Circuit Ramadan v. Gonzales decision in 2005. This Court finds that the Respondent, even if everything he did say was true, and the Court will not make an adverse credibility finding because the differences between his telling the Border Patrol after he came to the United States following all of his troubles in Guatemala in 2011 that he had no fear of anybody and no one would hurt him, will not be found to be a basis for an adverse credibility finding as a sufficient enough difference under the Ninth Circuit's interpretation of kinds of inconsistencies.

Untruthfulness evidence must be a basis for such an adverse credibility finding as discussed in Shrestha v. Holder by the Ninth Circuit in 2010 or its new decision in Oshodi v. Holder in 2012, but the Court will, nevertheless, follow the

guidance of the Board in Matter of D-R-, 25 I&N Dec. 445 at 455 (BIA 2011), that an Immigration Judge may make reasonable inferences from direct and circumstantial evidence in the record as a whole and is not required to accept a Respondent's account where other plausible views of the evidence are supported by the record. In that respect, the Court notes that, even though an adverse credibility finding is not made, that the Immigration Court, as the trier of fact, unlike the rule as accepted on appeal by the BIA and/or the Courts of Aappeals, a trial court judge such as the Immigration Judge need not find the Court found by all of the Respondent's evidence or assume the truthfulness of all his statements.

Because the Respondent bears the burden of showing eligibility and the warranting of a grant of withholding under the statute, only if his evidence shows that more likely than not chance of being persecuted because of a protected ground, this Court finds that the Respondent's past harm or conduct from which he fears harm, including the Respondent's statements that he was shot at by gang members who were shooting at another person, the other person being the target of their extortion ransom demands and the Respondent being hit by a stray bullet, that does not constitute persecution on account of any protected ground. Respondent's second incident after he left that area and moved to a different town where his father lives and that he believes his name was on a death squad list because the

of those civilians were believed to be criminals and that that public official would admit to a capital offense in Guatemala to the very person whom they would not be expected or an inference cannot be drawn that they would trust to be on their side of that issue. Meaning the public officials would not expect the father to keep quiet or to acquiesce in or to be in any way favorable toward those public officials, if such public officials approach the father and told the father that they were a member of a conspiracy to murder people, including that man's son.

Therefore, this Court does not believe that the public officials approached the father of the Respondent and told the father that the Respondent was on a hit list to be murdered by a death squad made up of police or soldiers or whomever at the behest of the public officials. In any event, the Respondent stated that either all the people on the hit list had been killed and the Respondent's risk is over, especially since he has since received clearance letters from, as he said, the national civilian police or PNC, as well as the Supreme Court of Guatemala showing that the Respondent has a clean arrest record and no criminal record at all. The Respondent also said that the father was told that the list had been ripped up by the people who made it, showing that the list is no more, the death squads are no longer a threat to the Respondent, if they ever were.

Finally, the Respondent stated that he moved to another city after moving away from the town where his father lives, meaning back at the capital city of Guatemala City with an aunt. While there, he said he was taken by force one day by two men in a car to a room in a house where the persons were believed to be police officers because they had badges, although dressed in civilian clothes. Respondent said to the Asylum officer and to this Court that the Respondent was told by those men that they were police officers, and they accused him of being part of a group of car robbers or car thieves and that they hit him and punched him and actually broke his nose during that time that they had him handcuffed to a chair. When at least one or more of them realized that he was not the person they thought he was or wasn't part of this criminal car thief gang or other gang, they realized that they made a mistake and discussed what to do with the Respondent. The Respondent said that at least one of the officers said they should just kill him and get rid of his body, but another officer and the others in the room, he said there were four of them, then agreed to let the Respondent go and told him not to report it to the police and that they didn't want to see him again.

Respondent said he then left, went to see a doctor, who treated him for a broken nose. The Respondent said he did not tell the doctor who hit him or how he got hurt. He did not tell the doctor he had bruises on his midsection or torso. The

doctor's report, if it is accurate, shows that the Respondent was treated for a broken nose in that time period of May of 2011, but no other bruises, such as the cut Respondent said he had above his eye or any other bruises, because the Respondent stated that "they were just bruises." Therefore, this Court finds that the Respondent, even if he were attacked by policemen or gang members dressed as policemen, since the U.S. State Department report, including the Human Rights Report for 2011 in Exhibit 5, note that even corrupt police officers who have been accused or known or said to have engaged in criminal activity in the past and other gang members and criminals who dress up as police officers both engage in similar types of criminal activity, believed to be or wearing uniforms of police. Therefore, without independent corroborating evidence, this Court has no independent evidence or sufficient evidence to compel the conclusion that the Respondent's attackers, if he was attacked, were in fact police officers as opposed to being gang members dressed as police or wearing some kind of police badge.

Even if the Respondent were detained by police, seeking to find the identity of car thieves and that they did hit the Respondent and break his nose, that conduct does not amount to torture as torture is defined under the Convention Against Torture in its promulgated regulations, including under 8 C.F.R. 1208.16 and .18.

This Court finds, therefore, that the Respondent has

not shown that he has been persecuted in the past or has a more likely than not or clear probability of persecution in the future because of or on account of a protected ground for any of the three incidents, because none of them involved any of those reasons, even as one central reason for such an attack, such as the stray bullet shot by the gangs or these alleged death squad hit list or even being interrogated and punched by police officers or gang members dressed as police officers, none of which involved any of the five protected reasons.

For relief under the Convention Against Torture, the Court finds that the Respondent has failed in his burden of proof to show that it is more likely than not that he would be tortured in Guatemala by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity of the government of Guatemala. In that respect, the Convention requires the Court to find that the Respondent has met his burden of proof that the government or its officials have prior awareness of such torturous activity and thereafter breech their legal responsibility to prevent such acts. In this Ninth Circuit, it has been held that such awareness and acquiescence may take the form of willful blindness or turning a blind eye to such torture, as noted in decisions such as Arteaga v. Mukasey by the Ninth Circuit in 2007, also noting that such torture must be inflicted at the instigation of or with the consent or acquiescence of a

government official, and Ninth Circuit decisions such as Ornelas-Chavez v. Gonzalez in 2006. Torture is an extreme form of intentionally inflicted cruel and inhuman treatment involving severe pain or suffering, whether physical or mental, as defined in 1208.18 under the regulations. The Respondent described, even the pain that would come from a broken nose and other bruises to be just bruises, as an attack that did not amount to that level of severe pain or suffering that could be considered to be torturous.

In any event, the Respondent has failed to show that he was attacked, tortured or not, by police officers, even if the Respondent believed them to be police officers and even if they told him they were police officers and wore police badges. It is also a reasonable inference, in this Court's opinion, also under Matter of D-R-, that if they were real police officers or if they were gang members dressed as police officers that they would fear being apprehended for doing that to the Respondent, meaning interrogating him in a private residence, out of uniform, not driving a police car, and wearing badges, and that they would, by telling the Respondent not to report it to the police, be trying to avoid the kind of capture and punishment that they would expect to be inflicted and imposed on them for such criminal conduct if they were officers breaking the law themselves by beating up an interrogated witness or suspect, or gang members doing so, for whatever reason and intelligence

gathering that the gang members do such things.

This Court notes, as the Respondent stated, that the present government in Guatemala, including the administration of the new president in Guatemala, is a strong government that is strict against criminals and imposing the law against criminals and those who are not criminals. His statement in that regard is consistent with the State Department's observations that Guatemala has taken many steps in the past few years to improve law enforcement's effectiveness and fairness, training of thousands of police officers, particularly those in the civilian national police and military ranks, since the military and the police engage in joint operations against crime and criminals in many parts of Guatemala, including the capital city. Even though corruption among some police and judicial sectors is a particular problem recognized by the U.S. State Department, but also recognized by the Guatemalan government, the Guatemalan government is not acquiescing in such corruption in ways that this Court could demonstrate or that Respondent's evidence demonstrates, because, as the State Department report shows, many of the corrupt or criminal police officers have been prosecuted, particularly in recent years, including for kidnappings and killings and robberies and associations with criminal elements.

There were credible reports that individual PNC officers and some other persons disguised as police officers

stopped cars and busses to demand bribes or steal private property and in some cases kidnapped and raped victims. There is no account in the state department report, as there is in that regard in the most recent Human Rights Report under the title of "role of the police and security apparatus", to indicate that the police are engaged in actually torturing civilians in order to obtain confessions outside of the setting of detained civilians in the prison setting, noting that in the prison setting or in the detention centers there has been abuse recorded, though not reported to have been at that level that the international community recognizes as torture. Therefore, there is no evidence, either from the Respondent or independent evidence from the rest of the world or from government or nongovernmental sources, either in the United States or in the international community or from Guatemala, that independently compels a conclusion that the police are engaged in torture of persons in the Respondent's situation. They did not torture the Respondent in that situation, and they let him go, meaning that they released him with the threat not to go tell the police.

Since the Respondent did not tell the police, did not even tell the doctor who treated him, in his own testimony, the Respondent did not do anything that this Court could find to be a record to show that it is more likely than not those police officers or any others would torture the Respondent or harm him in any way for any reason. If the Respondent did report it to

the public prosecutor in the capital city, under the office of professional responsibility and that office of the national civilian police or PNC that is responsible for investigating accusations of corruption and crime by police and government officials in Guatemala, there's every reason to believe that the government prosecutors and the national police would respond and discipline and prosecute officers who broke the law such as the Respondent accuses them of doing in this case. However, there is no evidence that those police officers or others would harm the Respondent if he returned to Guatemala, because he did not do anything that they would consider to be within the evidence of even accusations of mistreatment in the past, ~~a~~And the Respondent, because he didn't tell anybody, has given them no reason to do so, whether they were criminals in a gang or unlawfully acting and extra-judicially acting police officers in that instance.

Therefore, the Respondent has failed to show that he would be more likely than not to be persecuted because of a protected ground or tortured by a person in the government or with its knowledge or acquiescence. The Court will hereby deny withholding under Section 241(b)(3) and withholding under the Convention Against Torture.

Having denied the Respondent's request for relief, the Court will remand the Respondent to the custody of the Department of Homeland Security for further process, according

to the law.

The Court has created a written summary of the oral decision to deny Respondent's relief in the form of withholding under the statute and Convention, providing copies to both Respondent and Government counsel here in court today, and reserving the Respondent's right to appeal and noting that the Respondent's appeal notice must be filed with and received at the Board of Immigration Appeals in Virginia on or before November 23, 2012, which is 30 days from the instant decision of this Immigration Court. Respondent was given a packet of appeal forms in court this date for him to accomplish that filing of the notice to appeal, if he so chooses, within the next 30 days.

/s/ Bruce A. Taylor
BRUCE A. TAYLOR
Immigration Judge

//s//

Immigration Judge BRUCE A. TAYLOR

taylorb on December 13, 2012 at 12:24 AM GMT

Tab C

8 U.S.C.A. § 1158

§ 1158. Asylum

Effective: June 1, 2009

Currentness

(a) Authority to apply for asylum

(1) In general

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

(2) Exceptions

(A) Safe third country

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

(B) Time limit

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

(C) Previous asylum applications

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

(D) Changed circumstances

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

within the period specified in subparagraph (B).

(E) Applicability

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

(3) Limitation on judicial review

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

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

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

(B) Burden of proof

(i) In general

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

(ii) Sustaining burden

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

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility

on appeal.

(2) Exceptions

(A) In general

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

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

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

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

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

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

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

(B) Special rules

(i) Conviction of aggravated felony

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

(ii) Offenses

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

(C) Additional limitations

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

(D) No judicial review

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

(3) Treatment of spouse and children

(A) In general

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

(B) Continued classification of certain aliens as children

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

(C) Initial jurisdiction

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

(c) Asylum status

(1) In general

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

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

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

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

(2) Termination of asylum

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

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

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

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary

protection;

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

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

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

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

(2) Employment

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

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

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

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

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

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

(5) Consideration of asylum applications

(A) Procedures

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

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

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

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

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

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

(B) Additional regulatory conditions

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

(6) Frivolous applications

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

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Commonwealth of the Northern Mariana Islands

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

CREDIT(S)
(June 27, 1952, c. 477, Title II, ch. 1, § 208, as added Mar. 17, 1980, Pub.L. 96-212, Title II, § 201(b), 94 Stat. 105; amended

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

Tab D

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

8 U.S.C.A. § 1231

§ 1231. Detention and removal of aliens ordered removed

Currentness

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien--

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a) of Title 42 and paragraph (2)[1], the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment--

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[2] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that--

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)--

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens

Subject to paragraph (3)--

(A) Selection of country by alien

Except as otherwise provided in this paragraph--

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if--

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country--

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien--

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

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

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

(c) Removal of aliens arriving at port of entry

(1) Vessels and aircraft

An alien arriving at a port of entry of the United States who is ordered removed either without a hearing under section 1225(b)(1) or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival shall be removed immediately on a vessel or aircraft owned by the owner of the vessel or aircraft on which the alien arrived in the United States, unless--

(A) it is impracticable to remove the alien on one of those vessels or aircraft within a reasonable time, or

(B) the alien is a stowaway--

(i) who has been ordered removed in accordance with section 1225(a)(1) of this title,

(ii) who has requested asylum, and

(iii) whose application has not been adjudicated or whose asylum application has been denied but who has not

exhausted all appeal rights.

(2) Stay of removal

(A) In general

The Attorney General may stay the removal of an alien under this subsection if the Attorney General decides that--

(i) immediate removal is not practicable or proper; or

(ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or of any State.

(B) Payment of detention costs

During the period an alien is detained because of a stay of removal under subparagraph (A)(ii), the Attorney General may pay from the appropriation "Immigration and Naturalization Service--Salaries and Expenses"--

(i) the cost of maintenance of the alien; and

(ii) a witness fee of $1 a day.

(C) Release during stay

The Attorney General may release an alien whose removal is stayed under subparagraph (A)(ii) on--

(i) the alien's filing a bond of at least $500 with security approved by the Attorney General;

(ii) condition that the alien appear when required as a witness and for removal; and

(iii) other conditions the Attorney General may prescribe.

(3) Costs of detention and maintenance pending removal

(A) In general

Except as provided in subparagraph (B) and subsection (d)[3] of this section, an owner of a vessel or aircraft bringing an alien to the United States shall pay the costs of detaining and maintaining the alien--

(i) while the alien is detained under subsection (d)(1) of this section, and

(ii) in the case of an alien who is a stowaway, while the alien is being detained pursuant to--

(I) subsection (d)(2)(A) or (d)(2)(B)(i) of this section,

(II) subsection (d)(2)(B)(ii) or (iii) of this section for the period of time reasonably necessary for the owner to arrange for repatriation or removal of the stowaway, including obtaining necessary travel documents, but not to extend beyond the date on which it is ascertained that such travel documents cannot be obtained from the country to which the stowaway is to be returned, or

(III) section 1225(b)(1)(B)(ii) of this title, for a period not to exceed 15 days (excluding Saturdays, Sundays, and holidays) commencing on the first such day which begins on the earlier of 72 hours after the time of the initial presentation of the stowaway for inspection or at the time the stowaway is determined to have a credible fear of persecution.

(B) Nonapplication

Subparagraph (A) shall not apply if--

(i) the alien is a crewmember;

(ii) the alien has an immigrant visa;

(iii) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States and applies for admission not later than 120 days after the date the visa or documentation was issued;

(iv) the alien has a reentry permit and applies for admission not later than 120 days after the date of the alien's last inspection and admission;

(v)(I) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States or a reentry permit;

(II) the alien applies for admission more than 120 days after the date the visa or documentation was issued or after the date of the last inspection and admission under the reentry permit; and

(III) the owner of the vessel or aircraft satisfies the Attorney General that the existence of the condition relating to inadmissibility could not have been discovered by exercising reasonable care before the alien boarded the vessel or aircraft; or

(vi) the individual claims to be a national of the United States and has a United States passport.

(d) Requirements of persons providing transportation

(1) Removal at time of arrival

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States shall--

(A) receive an alien back on the vessel or aircraft or another vessel or aircraft owned or operated by the same interests if the alien is ordered removed under this part; and

(B) take the alien to the foreign country to which the alien is ordered removed.

(2) Alien stowaways

An owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft arriving in the United States with an alien stowaway--

(A) shall detain the alien on board the vessel or aircraft, or at such place as the Attorney General shall designate, until completion of the inspection of the alien by an immigration officer;

(B) may not permit the stowaway to land in the United States, except pursuant to regulations of the Attorney General temporarily--

(i) for medical treatment,

(ii) for detention of the stowaway by the Attorney General, or

(iii) for departure or removal of the stowaway; and

(C) if ordered by an immigration officer, shall remove the stowaway on the vessel or aircraft or on another vessel or aircraft.

The Attorney General shall grant a timely request to remove the stowaway under subparagraph (C) on a vessel or aircraft other than that on which the stowaway arrived if the requester has obtained any travel documents necessary for departure or repatriation of the stowaway and removal of the stowaway will not be unreasonably delayed.

(3) Removal upon order

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel, aircraft, or other transportation line shall comply with an order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be removed under this chapter.

(e) Payment of expenses of removal

(1) Costs of removal at time of arrival

In the case of an alien who is a stowaway or who is ordered removed either without a hearing under section 1225(a)(1)[4] or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival, the owner of the vessel or aircraft (if any) on which the alien arrived in the United States shall pay the transportation cost of removing the alien. If removal is on a vessel or aircraft not owned by the owner of the vessel or aircraft on which the alien arrived in the United States, the Attorney General may--

(A) pay the cost from the appropriation "Immigration and Naturalization Service--Salaries and Expenses"; and

(B) recover the amount of the cost in a civil action from the owner, agent, or consignee of the vessel or aircraft (if any) on which the alien arrived in the United States.

(2) Costs of removal to port of removal for aliens admitted or permitted to land

In the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien to the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(3) Costs of removal from port of removal for aliens admitted or permitted to land

(A) Through appropriation

Except as provided in subparagraph (B), in the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien from the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(B) Through owner

(i) In general

In the case of an alien described in clause (ii), the cost of removal of the alien from the port of removal may be charged to any owner of the vessel, aircraft, or other transportation line by which the alien came to the United States.

(ii) Aliens described

An alien described in this clause is an alien who--

(I) is admitted to the United States (other than lawfully admitted for permanent residence) and is ordered removed within 5 years of the date of admission based on a ground that existed before or at the time of admission, or

(II) is an alien crewman permitted to land temporarily under section 1282 of this title and is ordered removed within 5 years of the date of landing.

(C) Costs of removal of certain aliens granted voluntary departure

In the case of an alien who has been granted voluntary departure under section 1229c of this title and who is financially unable to depart at the alien's own expense and whose removal the Attorney General deems to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(f) Aliens requiring personal care during removal

(1) In general

If the Attorney General believes that an alien being removed requires personal care because of the alien's mental or physical condition, the Attorney General may employ a suitable person for that purpose who shall accompany and care for the alien until the alien arrives at the final destination.

(2) Costs

The costs of providing the service described in paragraph (1) shall be defrayed in the same manner as the expense of removing the accompanied alien is defrayed under this section.

(g) Places of detention

(1) In general

The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation "Immigration and Naturalization Service--Salaries and Expenses", without regard to section 6101 of Title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.

(2) Detention facilities of the Immigration and Naturalization Service

Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.

(h) Statutory construction

Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(i) Incarceration

(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General--

(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of the undocumented criminal alien; or

(B) take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.

(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.

(3) For purposes of this subsection, the term "undocumented criminal alien" means an alien who--

(A) has been convicted of a felony or two or more misdemeanors; and

(B)(i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;

(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or

(iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed

under section 1258 of this title, or to comply with the conditions of any such status.

(4)(A) In carrying out paragraph (1), the Attorney General shall give priority to the Federal incarceration of undocumented criminal aliens who have committed aggravated felonies.

(B) The Attorney General shall ensure that undocumented criminal aliens incarcerated in Federal facilities pursuant to this subsection are held in facilities which provide a level of security appropriate to the crimes for which they were convicted.

(5) There are authorized to be appropriated to carry out this subsection--

(A) $750,000,000 for fiscal year 2006;

(B) $850,000,000 for fiscal year 2007; and

(C) $950,000,000 for each of the fiscal years 2008 through 2011.

(6) Amounts appropriated pursuant to the authorization of appropriations in paragraph (5) that are distributed to a State or political subdivision of a State, including a municipality, may be used only for correctional purposes.

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