No.

In the
Supreme Court of the United States

LUIS GUTIERREZ-ROSTRAN,
Petitioner,

v.

LORETTA E. LYNCH,
Attorney General of the United States,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Court of Appeals has jurisdiction to hear a claim that the Board of Immigration Appeals erred in its interpretation of the law concerning the filing deadlines for asylum in 8 U.S.C. §1158 (a)(2)(D).

PARTIES TO THE PROCEEDINGS

The Petitioner, who was petitioner below, is Luis Gutierrez-Rostran.

The Respondent, who was the respondent below, is Loretta E. Lynch, Attorney General for the United States.

There are no corporate parties.

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OPINIONS AND ORDERS BELOW

1. The decision of the Seventh Circuit dismissing the appeal, which is the subject of this petition, is reported at 810 F.3d 497 (7th Cir. 2016). See App. 1a-8a.

2. The underlying decision of the Board of Immigration Appeals is unreported. See App. 9a-11a.

3. The original decision of the Immigration Judge denying asylum is unreported. See App. 12a-28a.

JURISDICTION

The final decision by the Seventh Circuit dismissing the appeal was entered on January 13, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This is an immigration matter originally heard by the Executive Office of Immigration Review, pursuant to 8 U.S.C. §1229(a) and 8 C.F.R. §1003.

STATUTORY PROVISIONS INVOLVED[1]

1. 8 U.S.C. §1158 (a)(1) provides:

> 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. 8 U.S.C. §1158(a)(2)(B) provides:

> 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.

3. 8 U.S.C. §1158(a)(2)(D) provides:

> 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

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[1]The statutes in their entirety are reprinted in the Appendix. See App 29a-53a.

> relating to the delay in filing an application within the period specified in subparagraph (B)

4. 8 U.S.C. §1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

STATEMENT OF THE CASE

The Seventh Circuit had proper jurisdiction to hear Mr. Gutierrez's appeal of the Agency's denial of his asylum claim pursuant to 8 U.S.C. §1252(a)(2)(D) because he was raising a question of law, but the Court of Appeals held to the contrary and that is the subject of this petition for certiorari.

On November 15, 2010, the Department of Homeland Security issued Mr. Gutierrez a Notice to Appear alleging that he was a citizen of Nicaragua who entered the United States without being admitted or paroled by an Immigration Officer in violation of INA §212(a)(6)(A)(i).

On April 30, 2013, Mr. Gutierrez, through counsel, admitted the allegations and conceded the charge of removability. On June 12, 2013, he filed an application for Asylum, Withholding of Removal and

protection under the Convention Against Torture.

A merits hearing was held on June 12, 2013 (the same day he filed his application). On November 6, 2013, the Immigration Judge ("IJ") issued a decision denying all forms of relief and ordering that Mr. Gutierrez be removed to Nicaragua. App. 12a-28a. Mr. Gutierrez timely appealed the decision of the IJ to the Board of Immigration Appeals ("BIA"). On May 14, 2015 the BIA adopted and affirmed the decision of the IJ with comment. App. 9a-11a. Mr. Gutierrez appealed the decision of the BIA to the Seventh Circuit Court of Appeals. Petitioner argued that the Agency had committed a legal error in failing to review the merits of his asylum claim in making its decision as to whether Mr. Gutierrez had proven that conditions had changed in Nicaragua that affected his eligibility for asylum. The Agency conceded in its brief and at oral argument that the IJ and the BIA never considered the merits of the asylum claim. Therefore, all of the factual issues regarding his eligibility to file a late asylum claim had been conceded. All that remained was the legal question of whether the Agency had erred in failing to review the underlying asylum claim in determining if changed country conditions materially affected his asylum claim allowing for the late filing.

On January 13, 2016 the Seventh Circuit Court of Appeals issued a decision dismissing the appeal on the grounds that it did not have jurisdiction to review his claim that he should have been allowed to file a belated petition for asylum. It held that he had not raised a pure question of law and "issues of changed or extraordinary circumstances are mixed questions of

law and fact that lie outside the realm of §1252(a)(2)(D)'s grant of jurisdiction," *citing Aimin Yang v. Holder*, 760 F.3d 660, 665 (7th Cir. 2014). App. 2a.[2]

REASONS FOR GRANTING THE WRIT

1. Whether the Circuit Courts have jurisdiction to review a decision by the Board of Immigration Appeals concerning the late filing of an asylum claim, is an important federal question concerning the REAL ID Act that should be decided by this court.

In the case below the facts were undisputed, and the only question was one of law. The government conceded in its brief and at oral argument that when the Agency reviewed whether Mr. Gutierrez had met the legal standard allowing for the late filing of his asylum claim, it never considered the merits of his asylum claim. Respondent's brief at 14-16, Dkt. #26. The Agency never determined if at any point in time Mr. Gutierrez had a well founded fear of persecution. When he tried to appeal the Agency's misapplication of this law, the Seventh Circuit ruled that it did not have jurisdiction to review it because 8 U.S.C.

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[2]The Seventh Circuit also decided that the BIA had not adequately justified denying Withholding of Removal and remanded that issue to the BIA, which matter is not at issue in this petition.

§1252(a)(2)(D) limits jurisdiction to pure questions of law, and whether an increased risk of violence in Nicaragua constituted "changed circumstances" that allow for a belated asylum application was a mixed question of law and fact. App. 2a (c*iting Aimin Yang v. Holder,* 760 F.3d 660, 665 (7th Cir. 2014).[3]

Petitions for asylum must be filed within one year of an alien's arrival in the U.S. unless the applicant can show to the satisfaction of the Attorney General the existence of changed circumstances which materially affect the alien's eligibility for asylum. 8 U.S.C. §1158(a)(2)(D). Among other things, in order to prove eligibility for asylum an alien must prove that he or she has a well founded fear of persecution if returned to the alien's home country. Mr. Gutierrez's application claiming changed circumstances was denied by the Agency before it ever considered the merits of his claim that he had a well founded fear of persecution. He sought to appeal that decision to the Seventh Circuit.

The issue of if and when an alien can file a late asylum claim is critically important to asylum seekers. In a volatile world, conditions change constantly. An alien who has been residing in the U.S. for more than a year may suddenly find it impossible to return home because of a regime change or the rise

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[3]In *Yang* the Seventh Circuit held that the decision as to whether an alien has established an exception allowing for the late filing of an asylum claim to be purely factual and the conclusion never reviewable. 760 F.3d at 665.

in terrorism. He or she could not have applied for asylum earlier because home conditions were benign, and may be barred from doing so now because asylum applications must be filed within one year of entry into the United States. 8 U.S.C. §1158(a)(2)(B). In these cases, whether the alien has proved a change of circumstances that materially affect his eligibility for asylum is therefore the most significant decision in the asylum process.

Whether one of the most significant decisions made by the Agency in an asylum petition can be reviewed by a circuit court is therefore an important federal question. 8 U.S.C. §1252(a)(2)(D) was enacted to resolve this issue, but it has not been uniformly interpreted by the appellate courts. This section was enacted as part of the REAL ID Act of 2005 in response to this Court's holding in *INS v. St. Cyr,* 533 U.S. 289 (2001). In *St. Cyr* the Supreme Court found jurisdiction stripping language in immigration statutes unconstitutional, holding that to completely remove the appellate court's jurisdiction to review Agency removal decisions would amount to a suspension of habeas corpus in violation of U.S. Const., Art. I, §9. 533 U.S. at 300-01. The REAL ID Act gave back to the federal courts the jurisdiction to review questions of law and constitutional questions. 8 U.S.C. §1252(a)(2)(D). However, the appellate courts have found it difficult to determine whether this statute gives them jurisdiction to review the Agency's conclusion that a petitioner has not established changed circumstances when the appellant claims that the Agency misconstrued or erroneously interpreted 8 U.S.C. §1158 (a)(2)(D), or misapplied it

to uncontested facts.

The Seventh Circuit read the jurisdictional statute narrowly and refused to hear Mr. Gutierrez's potentially valid appeal. This decision is inconsistent with this Court's prior decisions in three ways: 1) This Court has a "long standing principle of construing any ... ambiguities in deportation statutes in favor of the alien." *Dada v. Mukasey*, 554 U.S. 1, 19 (2008). The Seventh Circuit did not construe section 1252(a)(2)(D) in favor of the alien, but construed it against him. App. 2a. 2) This Court held in *INS v. St. Cyr,* 533 U.S. at 298, and *Kucana v. Holder* 558 U.S. 233, 235 (2010) that there is a strong presumption that agency decisions are reviewable and cannot be shielded from review by calling them "discretionary." The Seventh Circuit did the opposite, characterizing the Agency's failure to consider Mr. Gutierrez's claim that a change of circumstances materially affected his eligibility for asylum as a discretionary question of fact and holding that it was unreviewable. App. 2a. 3) This Court said in *INS v. St. Cyr* that whether undisputed facts meet the legal standard for deportability is a reviewable question of law. 533 U.S. at 298. The Seventh Circuit held to the contrary, that whether the undisputed facts meet the legal standard of "changed conditions" is a non-reviewable question of fact. App. 2a.

The question of when an appellate court has jurisdiction to review an error in an Agency decision concerning the late filing of an asylum claim has caused turmoil for immigrants, agency staff and courts for over a decade. See, e.g., *Ramadan v. Gonzales,* 479 F.3d 646, 648 (9th Cir 2007). It is an issue that can result in the United States deporting a

person to a country were they can be persecuted or killed. With the large increase in asylum filings over the last several years, it is a question that will continue to cause disorder in the adjudication of these cases for years to come unless this Court clarifies the interpretation of the statute. Mr. Gutierrez's appeal presented a straightforward question of statutory interpretation which he was entitled to have reviewed. However, the Seventh Circuit refused to hear the case because of its steadfast stance that it will not review any issue relating to the late filing of an asylum claim. Therefore, this is an important federal issue and it is time for the United States Supreme Court to answer this question.

2. The Circuit Courts are divided on whether they have jurisdiction to review the Agency's refusal to hear a belated asylum application.

The Circuit Courts are split regarding their jurisdiction to review an error made by the Agency in its determination of whether an alien has proved that he is legally entitled to file a claim for asylum more than one year after entering the United States.

The Ninth, Sixth and Eleventh Circuits have held that the courts of appeals have jurisdiction. The Ninth Circuit in *Ramadan v. Gonzales,* 479 F.3d 646, 648 (9th Cir 2007), held "that our jurisdiction over 'questions of law' as defined by the REAL ID Act includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed

questions of law and fact." *Accord Fakhry v. Mukasey* 524 F.3d 1057 (9th Cir. 2008)*; Vahora v. Holder,* 641 F.3d 1038 (9th Cir 2011). The Sixth Circuit in *Mandebvu v. Holder* 755 F.3d 417, 425-26 (6th Cir. 2014) held that "we retain our jurisdiction to review applications that were denied for untimeliness" if the "appeal does not require this court to revisit the evidence submitted in support of their claim," but only asks if the IJ correctly applied the facts to the legal standard of "changed circumstances." *Accord Khozhaynova v. Holder*, 641 F.3d 187, 191 (6th Cir. 2011). The Eleventh Circuit in *Jean-Pierre v. United States AG*, 500 F.3d 1315, 1322 (11th Cir. 2007), also ruled that it had jurisdiction, stating that "we have jurisdiction to review Jean Pierre's claim in so far as he challenges the application of an undisputed fact pattern to a legal standard."

The Seventh and Fourth Circuits have held to the contrary. In *Aimin Yang v. Holder,* 760 F.3d 660, 665 (7th Cir. 2014), the Seventh Circuit held that the REAL ID Act "supplies jurisdiction for review of constitutional claims and questions of law [but we] have held that the issues of changed or extraordinary circumstances are questions of fact that lie outside the realm of §1252(a)(2)(D)." It has steadfastly refused to accept jurisdiction in even one case involving an exception to the one-year rule. See *Paez Restrepo v. Holder,* 610 F.3d 962 (7th Cir. 2010); *Viracacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008); *Leguizamo-Medina v. Gonzales,* 493 F.3d 772 (7th Cir. 2007). The Fourth Circuit has held flatly that "we lack jurisdiction to review the immigration judge's determination" that there have been no changed

circumstances excusing a delay in filing. *Gomis v. Holder,* 571 F.3d 353, 358 (4th Cir. 2009).

The Circuits acknowledge the split, but cling to their separate interpretations.

> We are aware that some circuits have concluded that these issues are reviewable mixed questions of law and fact, [b]ut others agree with us. We are not inclined to change our approach and thus conclude that we have no jurisdiction to address Yang's arguments based on changed or extraordinary circumstances.

Yang, 760 F.3d at 665 (citations omitted). *See also Paez Restrepo v. Holder,* 610 F.3d 962, 965 (7th Cir. 2010) ("we shall [not switch sides] unless the statute is amended or the Supreme Court approves the Ninth Circuit's position"). Therefore, this split is not likely to be resolved without the intervention of the United States Supreme Court.

The statutes involved -- 8 U.S.C. §1158 (a)(2)(D) and 8 U.S.C. §1252(a)(2)(D) -- are federal laws that concern inherently national claims that require uniform interpretation across our country. Had Mr. Gutierrez filed his asylum petition in California, the Ninth Circuit would have reviewed the Agency's failure to consider the merits of the underlying asylum claim. But because he lived in Indiana, his appeal went to the Seventh Circuit, which declined to hear the appeal. This arbitrariness is unacceptable and the circuit split needs to be addressed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted:

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April, 2016

APPENDIX A
Opinion for which review is sought

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 15-2216

January 13, 2016

LUIS GUTIERREZ-ROSTRAN, Petitioner,
v.
LORETTA E. LYNCH, Attorney General of the United States, Respondent.

Petition for Review of an Order of the Board of Immigration Appeals. No. A200-882-317.

Before BAUER, POSNER, and HAMILTON, Circuit Judges.

POSNER, Circuit Judge. The petitioner, Luis Gutierrez-Rostran, a Nicaraguan citizen, entered the United States illegally in 2006, and decided to stay. Although his stated motive for immigrating was fear that the government of Nicaragua would encourage or condone his being murdered by its supporters because of his and his family's political views, he did not make a timely application for asylum. See 8 U.S.C. § 1158(a)(2)(B).

In 2010 he was convicted of public intoxication and driving under the influence. After eight days in jail he was issued a Notice to Appear for immigration

proceedings and released on bail the same day. Eventually he was ordered to be removed to Nicaragua. He then applied for asylum under 8 U.S.C. § 1158, and for withholding of removal under 8 U.S.C. § 1231(b)(3)(A) (formerly 8 U.S.C. § 1253(h)(1)(1990)) in the alternative. To obtain the second form of relief he had to show that his "life or freedom would be threatened in [Nicaragua] because of [his] race, religion, nationality, membership in a particular social group, or political opinion." The immigration court turned him down and the Board of Immigration Appeals affirmed, precipitating the petition for review that brings his case to us.

He challenges both the denial of his untimely asylum application and the denial of his claim for withholding of removal. Regarding the former challenge, to prevail given the untimeliness of the application he would have to show that the immigration court or the Board had committed a legal error, 8 U.S.C. § 1252(a)(2)(D); Restrepo v. Holder, 610 F.3d 962, 964-65 (7th Cir. 2010), and he hasn't done that. He argues only that violence toward persons such as him has increased in Nicaragua in recent years, thus justifying his belated application. But unfortunately for him "issues of changed or extraordinary circumstances are questions of fact that lie outside the realm of § 1252(a)(2)(D)." *Aimin Yang* v. Holder, 760 F.3d 660, 665 (7th Cir. 2014).

So we turn to his claim for withholding of removal, and begin by sketching some essential background. Augusto César Sandino was a Nicaraguan revolutionary who between 1927 and 1933 conducted a rebellion against the U.S. military occupation of

Nicaragua. He was assassinated in 1934 at the direction of Anastasio Somoza Garcia, who became the nation's ruler, succeeded by his sons after he was assassinated. The Sandinista party, named in memory of Sandino, rose up against the Somozas, and under the leadership of Daniel Ortega wrested control of the country from them. That happened in 1979 and Ortega ruled the country as a dictator until 1990. He then permitted free elections, was repeatedly defeated, and did not achieve his old authority until he won (though with only a plurality of the votes) the presidential election held in 2006. Since then his power has been secure.

Ortega's defeats in that interim period were by the Liberal Constitutionalist Party (known as PLC from the initials of its Spanish name), then the main opposition party, and parties allied to it, notably the Independent Liberal Party (the PLI). Gutierrez-Rostran was active in one of those two parties (though it's unclear which one), as were his father, his two brothers, and two uncles, one of them a mayor and the other a PLC representative who, Gutierrez-Rostran testified, "was to become a mayor as well."

Because of the family's intimate connections with a political movement that had long delayed Ortega's return to power, both Gutierrez-Rostran and his two brothers fled the country when Ortega was elected president in 2006, though the brothers fled not to the United States but to Costa Rica and Guatemala, respectively, and since fleeing have (for a reason we'll explain shortly) been able to make extended visits to Nicaragua without being threatened or harassed.

In his hearing before the immigration court on his application for withholding of removal, Gutierrez-Rostran testified that his family and members of the PLI had told him that both his cousin and his friend had been murdered by the Sandinistas--in fact by the son of one of President Ortega's bodyguards. Another friend of Gutierrez-Rostran, Rogelio Ruiz-Sotelo, testified that the cousin had received threats from Sandinistas, and though in response to the threats he had moved to a far-off city in Nicaragua he nevertheless was murdered there. Ruiz-Sotelo further testified that he'd attended the cousin's funeral and heard things in the city that convinced him that the murderer was a Sandinista. (That testimony was hearsay, but hearsay is admissible in immigration proceedings. N.L.A. v. Holder, 744 F.3d 425, 436 (7th Cir. 2014).) He also testified that, while a poll worker in an election held in 2012, he had been stoned by Sandinistas and forced to surrender his ballots to them, and that he had complained to the authorities but both the captain of police and the town's mayor were Sandinistas and threatened to kill him if he said anything about the attack against him. (On the collaboration of Nicaraguan police in Sandinista violence against political opponents, see, e.g., Tim Rogers, "6 Dead in Post-Election Violence," Nicaragua Dispatch, November9,2011, http://nicaraguadispatch.com/2011/11/6-dead-in-post-election-violence/ .)

The immigration judge who presided at Gutierrez-Rostran's hearing denied withholding of removal on the ground that none of his immediate family members had been harmed or even threatened, and that the various articles and reports he submitted

about political violence between Sandinistas and members of the opposition parties fell short of proving that it was more likely than not that he would be persecuted if he returned to Nicaragua. The Board affirmed the denial, discounting as "speculative" the contention that the cousin's murder had been "at the hands of the Sandinistas."

The treatment by the immigration court and the Board of the cousin's murder was too cursory to justify denial of Gutierrez-Rostran's application for withholding of removal. There was evidence of violence by Sandinistas against liberal party members; the cousin was a liberal from a well-known liberal family; and Gutierrez-Rostran's testimony, Ruiz-Sotelo's testimony (including his testimony that public officials--a mayor and a police chief--had refused to protect him against Sandinista harassment), and letters of Gutierrez-Rostran's parents and of PLI officials, made a prima facie showing that Gutierrez-Rostran would be in great danger were he to be returned to Nicaragua while the Sandinistas are in power. Although Gutierrez-Rostran's parents, brothers, sisters, and uncles have not been persecuted, the parents are old (his father is 78) and neither they nor his one surviving uncle nor the sisters nor the brothers–who, remember, no longer live in Nicaragua--are politically active. An uncle of Gutierrez-Rostran who had been a liberal mayor was allowed to die in peace, but he too was old.

Neither the immigration judge nor the (as usual) single-member "panel" of the Board of Immigration Appeals gave a reason for doubting the weight or truthfulness of the evidence, evidence from which an

inference could be drawn that Gutierrez-Rostran would indeed face a grave threat of suffering his cousin's fate were he forced to return to Nicaragua. Admissible, pertinent, credible evidence can't just be ignored, as the immigration court and the Board did in this case; reasonable grounds must exist, and be articulated, to justify rejection of such evidence. See, e.g., Lian v. Ashcroft, 379 F.3d 457, 461-62 (7th Cir. 2004). The immigration judge stated in his opinion, and the Board registered no disagreement, that Gutierrez-Rostran's testimony was "internally consistent, consistent with his written statement, and consistent with the other documents he submitted." The immigration judge also made no adverse credibility finding with regard to Ruiz-Sotelo. Yet having indicated that he thought Gutierrez-Rostran's testimony had been credible and not having suggested that Ruiz-Sotelo's evidence was not credible, the immigration judge contradicted himself by saying that "there is no evidence to corroborate the respondent's belief that [his cousin and friend] were killed by the Sandinista youth for their political beliefs." Ruiz-Sotelo had testified without contradiction that Sandinistas had threatened and then killed the cousin and friend, and why would Sandinistas have killed them other than for political reasons?

Against all this it can be argued that while the evidence indicates danger to Gutierrez-Rostran if he is returned to Nicaragua, it does not indicate that he is "more likely than not" to be persecuted if he is sent there, which the Supreme Court in INS v. Stevic, 467 U.S. 407, 424-25, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984), held is the standard of proof for withholding of

removal. See also 8 C.F.R. § 1208.16(b)(2); Torres v. Mukasey, 551 F.3d 616, 625 (7th Cir. 2008). That of course is the normal civil standard of proof. But it can't be taken literally in the immigration context. In an ordinary civil case there are witnesses, lay and/or expert, on both sides of the case, and likewise documentary evidence. But in the usual withholding-of-removal case, including this case, the only evidence is presented by the alien--and the immigration judge appears to have deemed that evidence credible.

What is missing in a case like this are data that would enable a rational determination of whether there was a greater than 50 percent probability that the alien would lose his life or his freedom if removed to his country of origin. Rodriguez-Molinero v. Lynch, No. 15-1860, 2015 U.S. App. LEXIS 21977, 2015 WL9239398, at *1 (7th Cir. Dec. 17, 2015). The first step in such an inquiry would be to define the endangered group (obviously not all the Nicaraguans who voted for PLC or PLI candidates) and the second to determine what percentage of them have lost their life or freedom at the hands of the Sandinistas, and also whether that percentage is growing or declining (or not changing). The immigrant is required to present evidence that he faces a significant probability of persecution if he is removed to his country of origin, and Gutierrez-Rostran did present such evidence, as we have seen. He could not be expected to quantify the probability of his being persecuted or killed should he be removed to Nicaragua. The data that would enable such quantification appear not to exist, because to be reliable they would have to specify all persons who had characteristics similar to those of the applicant

for withholding of removal and how many of them had been killed or persecuted because of those characteristics. If such data do exist somewhere, the immigration authorities or the State Department may have access to them, but there is no indication of that.

The immigration judge may have been acknowledging the difficulty of taking the "more likely than not" standard literally as a 50+ percent probability when he said that an alien seeking withholding of removal could satisfy the standard of proof by demonstrating a "reasonable probability" of persecution if removed to his country of origin. That description of the standard is a step in the right direction.

The denial of withholding of removal and the affirmance of that denial by the BIA member who as the (entire) appeal "panel" denied the petitioner's appeal were not adequately reasoned and so must be set aside and the case returned to the Board for further proceedings consistent with this opinion. The petition for asylum is dismissed, however, as noted earlier in this opinion.

APPENDIX B
Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office of Immigration Review
Decision of the Board of Immigration Appeals
File: A200 882 317 - Chicago, IL
Date: May 14, 2015

In re: LUIS GUTIERREZ-ROSTRAN a.k.a. Luis Gutierrez

IN REMOVAL PROCEEDINGS

CHARGE: Sec.212(a)(6)(A)(I), I&N Act [8 U.S.C. § 1182(a)(6)(A)(I)] - Present without being admitted or paroled.

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure

APPEAL

The respondent, a native and citizen of Nicaragua, has appealed from the decision of the Immigration Judge dated June 12, 2013, denying his applications for asylum, withholding of removal, protection under the Convention Against Torture ("CAT"), and voluntary departure. *See* sections 208(b)(l)(A), 24 l(b)(3)(A), and 240B(b) of the Immigration and Nationality Act, 8 U.S.C. §§ 115a(b)(l)(A), 1231(b) (3)(A), and 1229c(b); 8 C.F.R. §§ 1208.16 and 1208.18. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.l(d)(3)(I). We review de novo all other issues, including whether the parties have met the relevant burden of proof and issues of discretion. 8 C.F.R. § 1003.l(d)(3)(ii). The respondent's asylum application was filed on June 12, 2013, and is governed by the REAL ID Act (Exh. 2; I.J. at 2, 6). *See Matter of S.B.,* 24 I&N Dec. 42, 43 (BIA 2006).

We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano,* 20 l&N Dec. 872, 874 (BIA 1994). The respondent's asylum application, filed more than 6 years after his arrival in the United States, was untimely, and he did not establish an exception to the filing deadline. Sections 208(a)(2)(B) and (D) of the Act; 8 U.S.C. § 1208.4(a)(4). The respondent did not show "changed circumstances which materially affect [his] eligibility for asylum" (1.J. at 7-8). The claim that the murder of the respondent's cousin in January 2013 was at the hands of the Sandinistas and was politically motivated is speculative (I.J. at 7; Tr. at 36-39, 52-54, 62, 97, 108). Additionally, the respondent has not shown that the increased political power of the Sandinista National Liberation Front ("FSLN") is material to his claim where he was not harmed or personally threatened on account of his political activities, and his brothers, also supporters of the liberal party, have been able to return to Nicaragua for visits without incident.

With respect to the respondent's applications for withholding of removal and protection under the CAT, we agree with the Immigration Judge, for the reasons

stated in his decision, that the respondent did not meet the heavy burden of establishing that he will more likely than not be persecuted or that he will more likely than not be tortured following his return to Nicaragua (I.J. at 8-9). *See* 8 C.F.R. §§1208.16(b)(2), 1208.16(c)(2) and (3), and 1208.18(a). Upon our de novo review, we agree with the Immigration Judge that the respondent does not merit a favorable exercise of discretion with respect to his application for voluntary departure. Although the respondent's residence in the United States of 8 years and family ties are favorable factors, they do not outweigh the respondent's repeated disregard for the law by driving without a license and, on one occasion, driving while intoxicated. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed

s/ Hugh G. Mullane
FOR THE BOARD

APPENDIX C
Decision of the Immigration Judge

United States Department of Justice Executive
Office for Immigration Review
Immigration Court
Chicago, Illinois

File #: A200-882-3 l7 Date: November 6, 2013

In the Matter of)
Luis GUTIERREZ-ROSTRAN,)
Respondent.)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(I) of the Immigration and Nationality Act ("INA" or "Act") - Present without being admitted or paroled

APPLICATIONS : INA § 208 -Asylum; INA § 241(b)(3)-Withholding of Removal; 8 C.F.R. § 1208.16© - Protection under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT")

DECISION OF THE IMMIGRATION JUDGE

I. BACKGROUND

The respondent is a 27-year-old male native and citizen of Nicaragua. He entered the United States without inspection at an unknown date, at or near Reynosa, Texas. On November 15, 2010, the Depart-

ment of Homeland Security issued a Notice to Appear ("NTA") alleging that the respondent was a native and citizen of Nicaragua who entered the United States without being admitted or paroled after inspection by an Immigration Officer. Exh. 1. The NTA charged him with removability under INA § 212(a)(6)(A)(I) for being present in the United States without having been admitted or paroled.

At a hearing on April 30, 2013, the respondent, through counsel, admitted the allegations and conceded the charge of removability contained on the NTA. He declined to designate a country of removal so the court designated Nicaragua, the country of citizenship. *See §* 241(b)(2)(D).

On June 12, 2013, the respondent filed an application for asylum, withholding of removal, and protection under CAT. Exh. 2. I held a merits hearing on the respondent's application for relief on that date.

II. CLAIM AND EVIDENCE PRESENTED

The respondent claims that he is eligible for asylum, withholding of removal, and protection under CAT because he fears persecution and torture in Nicaragua on account of his political opinion and membership in a well-known politically-active family.

On June 12, 2013, I heard testimony from the respondent and another witness. Their testimony is summarized as follows:

A. Testimony

1. Respondent 's testimony

The respondent, Luis Gutierrez-Rostran, was born

in Nicaragua and lived in Matiguas until he left for the United States. His parents both live in Nicaragua and he has four siblings. He left for the United States in 2006 and traveled through El Salvador, Guatemala, and Mexico to reach the U.S. The trip took about 15 days. He was not offered any permanent status in the countries he traveled through. He testified that he did not seek asylum in those countries because he did not like ·Central America and he wanted to come to the U.S.

The respondent left Nicaragua because the Sandinista National Liberation Front won the election in November 2006.The respondent is a member of the Partido Liberal Indepemdiente ("PLI"), the liberal party. The PLI was formerly a part of the Partido Liberal Constitucionalista ("PLC"). The PLI opposed the Sandinistas and was in power until 2006, when Daniel Ortega and the Sandinistas won the election. As a member of the liberal party, the respondent worked to organize the liberal youth before the 2006 election. During the election, he oversaw a voting location and was in charge of the people that took in the votes. Each party had representatives at the voting location.

When the Sandinistas won the election, the respondent fled because he feared violence from the Sandinistas. He did not personally experience any violence but he was scared that the Sandinistas would kill him. The respondent's two brothers, Francisco Gutierrez and Rafael Amador, also left the country, going to Costa Rica and Guatemala. His brothers also feared the Sandinistas would target them because they are members of the liberal party. His two sisters

and 78-year-old father remain in Nicaragua. The respondent testified that the Sandinistas left his father alone because he was old. The respondent testified that he and his brothers were in danger because they were young and more active while his father was tired and did not take part in politics.

The respondent testified that his family members are well known members of the liberal party. His uncle Guillermo Gutierrez was a member of the liberal party and be was mayor of Matiguas as recently as 2006. His uncle died of cancer at some point after the respondent fled to the U.S. He did not know the exact date, but believed he died sometime in 2009. The respondent also has an uncle named Modesto Gutierrez who was a high-profile member of the PLC.

The respondent testified that the Sandinista youth became very violent after the 2006 elections. The violence began during the campaigns, got worse during the elections, and has continued to worsen since he left. He testified that there was a peaceful period sometime between the 2006 elections and the elections in 2011 and 2012,but after that, the violence got worse again. He heard about the situation in Nicaragua through the news and through his family. The Sandinista youth, the police, and the army interfere with liberal political gatherings and rallies and members of the liberal party have been hurt.

In January 2013, the respondent' s cousin, who was also named Luis Gutierrez, was killed because he was a member of the liberal party. The respondent heard about his cousin's murder from other members

of his family: He testified that another member of the liberal party, a friend of his named Lesther Guzman, was shot to death by the Sandinistas because he was a member of the liberal party.

The respondent worries that he will also be murdered or tortured by the Sandinista youth for being a liberal if he returns to Nicaragua. He believes this is a risk for all members of the liberal party and stated that he will continue to support the PLI if he returns. His fear of being killed or tortured extends to all regions of Nicaragua because he will support the PLI anywhere he goes, so the Sandinistas will find out his political affiliation wherever he goes. If he returns he plans to attend PLI political rallies and demonstrations, just as he did before he fled Nicaragua. On cross examination, he could not explain why he would be in greater danger now than when he was previously actively involved in politics in Nicaragua.

The respondent testified that his brother Rafael recently returned to Nicaragua to visit their parents. He had no problems entering the country. He said Rafael is also seeking medical treatment in Nicaragua because he had been suffering from severe headaches in Guatemala. The respondent recently spoke to Rafael, who told him that he was feeling much better and that the news in Nicaragua was reporting that there was lots of violence in the country. His other brother, Francisco, also recently returned to Nicaragua to visit family. The respondent had not heard that his brother was having any problems with the authorities since returning but believes he is taking a risk by being in Nicaragua. The respondent'

s father has told him not to return to Nicaragua because there is a lot of violence there right now. He testified that no other members of his family have been threatened.

The respondent could not explain why he did not file for asylum when he first arrived in the United States in 2006. When asked if he would have applied for asylum if he had not been detained by immigration officials after his arrest, he answered that he did not want to say no but that he also could not say yes. He stated that he felt he would have applied at some point because of his fear of returning now that the Sandinista have been elected again.

On cross examination, the respondent stated that he had been arrested three times in the U.S. In 2010 he was stopped by the police while driving and arrested for possession of a false government ID. The possession charge was dismissed, but he was convicted of operating a vehicle without a license. Later that same year he was arrested for operating a vehicle while intoxicated and for public intoxication. He was found guilty on both charges. In 2011, he was again arrested for operating a vehicle without a license. When asked why he was operating a vehicle without a license while intoxicated, he responded that he did it because he was happy about the birth of his son.

2. Testimony of Rogelio Sotelo

Rogelio Sotelo is a 21-year-old citizen of Nicaragua who lived in Matiguas, the same town as the respondent. He has been a liberal all his life and is a member of the PLI. He testified that the PLI was formerly known as the PLC. He left Nicaragua in 2013

for political reasons.

In Nicaragua, Sotelo was in charge of taking ballots to different towns for the election. He worked the ballot box in Matiguas in the November 2012 elections. He was on hi way to deliver the ballots but the road was blocked. When he stopped, people started throwing rocks at him and his car, and they threatened to kill him if he did not turn over the ballots. One of the rocks hit him in the forehead. He handed over the ballots because he was scared he would be killed if he refused.

Sotelo returned home and tried to file a complaint the next day, but the chief police officer in his town was a Sandinista who also threatened to kill him. Sotelo told the police captain that he had been threatened the night before, on November 4. The captain told him not to go through with the complaint and that if he did pursue the complaint, he would call the mayor of the town, who was also a Sandinista, and that Sotelo would be killed. The following day, the mayor threatened Sotelo in person with a gun. The mayor told him that if he followed through with the complaint he would send some of his friends who were gang members to kill him. After the threats from the mayor, Sotelo was frightened, and moved from his town to the capital. But he continued to receive threats even after leaving for the capital, and so be fled to the United States.

Soleto testified that other PLI members who carried the ballots and worked at the tables during the election were also threatened. PLI politicians also faced threats from the Sandinistas. He testified that

the majority of PLI members in Nicaragua are being threatened by the Sandinistas.

Sotelo testified that the respondent's family members are liberals and members of the PLI. The respondent's uncle, Guillermo Gutierrez, was a liberal and the former mayor of their town. He testified that the respondent's cousin, whose name is also Luis Gutierrez, was killed about six months ago for being a liberal and because he was related to Mayor Gutierrez. Soleto stated that the Sandinistas had a grudge against the former mayor and the family as a whole. When asked how he knew Luis had been killed because he was a liberal, Sotelo said Luis had told him that he had been followed and threatened by the Sandinistas. After his death, the police arrested someone for the murder but he was later released. Sotelo did not know the name of the person arrested for the murder or why he was released, but he heard that he was a member of the Sandinista party.

When asked to describe the respondent's activities with the PLI, Sotelo replied that, in 2006, the respondent walked around with his uncle Guillermo Gutierrez while he was campaigning. He also participated in the elections in 2006 by working at the election tables and helping to count ballots. He testified that the respondent will be killed if he returns to Nicaragua and that there is no place in Nicaragua where he would be safe.

On cross examination, he conceded that while the respondent' s entire family are members of the PLI, aside from his cousin, nothing has happened to other members of the family. Even the respondent's uncle,

the former mayor, was not harmed by Sandinistas before he died even though he remained a PLI supporter. Sotelo could not explain why the Sandinistas would target younger members of the party but not a well- known PLI member and former mayor against whom they had a grudge.

B. Documentary evidence

In addition to the testimony, I have considered. the documents relevant to the respondent's claim, including:

Exhibit 1: Notice to Appear;

Exhibit 2: I-589 Application for Asylum, Withholding of Removal, and protection under CAT, filed with the Immigration Court on June 12, 2013, with supplemental documents including:

Tab A: Respondent's affidavit;

Tab B: Respondent's identity documents;

Tab C: Additional affidavits and letters;

Tab D: Country conditions evidence;

Tab E: Additional country conditions evidence;

Tab F: Respondent's criminal history records;

Tab G: Documents issued by DHS;

Tab H: Witness list;

Exhibit 3: FBI RAP sheet.

III. FINDINGS AND ANALYSIS

Having considered the respondent's testimony and the record in its entirety, I find the respondent credible. He is not eligible for relief, however, because his asylum application is untimely and his testimony, while credible, is nonetheless insufficient to meet his burden of proof for withholding of removal or relief under CAT.

A. Credibility and Corroboration

Because the respondent filed his applications for asylum, withholding of removal, and protection under CAT in 2013, the credibility and corroboration provisions of the REAL ID Act govern his applications.[4] The REAL ID Act requires, in the absence of documentary proof, that an Immigration Judge use the details of an alien's story to make an evaluation of its truth. *Mitondo v. Mukasey,* 523 F.3d 784, 789 (7th Cir. 2008). Under the terms of the REAL ID Act, the applicant's testimony is sufficient to sustain his burden of proof without corroboration "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." INA § 208(b)(l)(B)(ii).

The court may evaluate the alien's credibility "using whatever combination of considerations seems best in the situation at hand."*Id* The REAL ID Act

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[4]The REAL ID Act's credibility and corroboration provisions govern asylum applications made on or after <ay 1, 2005. INA 208(b)(1)(B), n. 65.2.

lists the following factors among those that may be considered in the assessment of an asylum applicant's credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, whether or not such inaccuracy or falsehood goes to the heart of the applicant's claim. INA § 208(b)(l)(B)(iii).

Having reviewed the respondent's testimony and documentary submissions, I find the respondent credible. His testimony is internally consistent, consistent with his written statement, and consistent with the other documents he submitted.

B. Asylum

1. One-Year Bar

Section 208(a)(2)(B) of the Act provides that an alien may not apply for asylum unless he or she demonstrates by clear and convincing evidence that the application was filed within one year after the date of the alien's arrival in the United States. An alien may apply for asylum beyond the one-year deadline only if he demonstrates to the satisfaction of the court either (1) the existence of changed circumstances which materially affect the applicant's eligibility for asylum, or (2) extraordinary circumstances relating to the delay in filing an application for asylum more than one year after arriving in the United States. *See* INA § 208(a)(2)(D).

In this case, the respondent did not apply for

asylum until June 2013 - 6.5 years after he arrived in the United States. Accordingly, he is subject to the one-year bar to asylum. The respondent argued that changed circumstances exist that justify the delay in filing his asylum application. He does not argue that there are any extraordinary circumstances which excuse his untimely filing.

The federal regulations define "changed circumstances"as changes in conditions in the respondent's country of nationality. 8 C.F.R. § 1208.4(a)(4). A material change in country conditions need not be "dramatic/' and need not involve "broad social or political change in the country." *See Joseph v. Holder,* 579 F.3d 827, 833-34 (7th Cir. 2009). However, the asylum applicant must "file an asylum application within a reasonable period given those 'changed circumstances.'" 8 C.F.R. *§* 1208.4(a)(4)(ii); *see Matter of T.M.H.* & *S.W.C.,* 25 I&N Dec. 193 (BIA 2010).

As changed country conditions, the respondent cites increased violence against PLI members since the elections in November 2012, including the murder of his cousin Luis Gutierrez. He also cites an Amnesty International report that, following the election, the yo1,1th wing of the Sandinista National Liberation Front attacked 30 youth activists taking part in an anti-Ortega demonstration. *See* Exh. 2, Tab E.

The respondent has not demonstrated a material change in circumstances. He cites increased political violence in Nicaragua, but also testified that violence against PLI members in Nicaragua has been an ongoing problem since the 2006 elections, and that this was the reason he fled the country. His evidence

does not support a conclusion that violence has now increased or that his family is facing an increasing risk. The respondent's uncle, a well-known PLI member and former elected official lived in Nicaragua for years after the respondent fled without facing threats or harm. The respondent's parents and sisters have remained in Nicaragua without incident and his two brothers, who also fled Nicaragua, have recently returned to Nicaragua to visit family without incident. Finally, there is insufficient evidence to corroborate the circumstances of the death of the respondent's cousin. The respondent submitted an affidavit from his father and statements from Sotelo and the PLI party but these statements provide only speculation that Gutierrez was killed by Sandinistas and that the cause was political.

Upon review of the record, the evidence does not establish an exception to the one-year filing requirement and therefore the respondent is ineligible for asylum.

C. Withholding of Removal

An alien who is barred from asylum by the one-year deadline may still be eligible for withholding of removal under section 241(b)(3) of the INA. Under INA §241(b)(3), an individual may not be removed to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Stevie,* 467 U.S.407 (1984). An applicant for withholding of removal who has not suffered past persecution must show it is "more likely than not" that his life or freedom would

be threatened on account of one of the protected grounds if he were removed to his home country. *Stevie,* 467 U.S. at 424; 8 C.F.R. § l208.16(b)(2).

The burden of proof required for withholding of removal is higher than that required for asylum: the respondent must demonstrate a "clear probability" that he will be persecuted, i.e., that it is "more likely than not" that he will be persecuted. 8 C.F.R.*§* 1208.16(b)(2); *Torres v. Mukasey,* 551 F.3d 616, 625 (7th Cir. 2008). This can be done by establishing either a reasonable probability that he will be singled out individually for persecution, or a pattern or practice of persecution of an identifiable group, to which the alien demonstrates he belongs, such that the alien's fear is reasonable. *See* 8 C.F.R. *§* 1208.13(b)(2)(I), (iii); *Capric v. Ashcroft,* 355 F.3d 1075, 1085 {7th Cir. 2004).

The record does not show that it is more likely than not that the respondent's life or freedom will be threatened if he returns to Nicaragua because of his political opinion or membership in a politically-active family. He notes that his cousin Luis Gutierrez and his friend Lesther Guzman were both recently murdered in Nicaragua. But there is no evidence to corroborate the respondent's belief that they were killed by the Sandinista youth for their political beliefs. He argues that his family members are high profile supporters of the PLI, but no one else in his family has been harmed or threatened in Nicaragua. His uncle, who was a former PLI elected official, remained safely in Nicaragua for years after the respondent left and his two brothers, who also left the country, have returned to Nicaragua to visit without

incident. The respondent submitted reports from Amnesty International detailing some detention and ill-treatment of liberal party members, and clashes between members of the liberal party and Sandinista youth members. Exh. 2, Tab E. He also submitted articles detailing claims of election fraud by the Sandinistas, including an article reporting that six people, both Sandinistas and members of the liberal party, were killed in post-election violence. *Id.* This evidence falls short of establishing that it is more likely than not that the respondent would be persecuted for his political beliefs if he returns to Nicaragua.

D. Protection under CAT

The Convention Against Torture and simple-meeting regulations provide that no person may be removed to a country where it is more likely than not that such person will be subject to torture. 8 C.F.R. *§§* 1208.16, 1208.17, 1208.18; *see also Khan v. Fillip,* 554 F.3d 681, 690 (7th Cir. 2009); *Matter of M-B-A-,* 23 I&N Dec. 474, 477-78 (BIA 2002). Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . 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)(l); *see also Khan,* 554 F.3d at 692.

As the respondent has not shown that it is more likely than not that he will be persecuted, he cannot show that he is more likely than not to experience a level of harm that would meet the definition of torture. Therefore, the respondent is not eligible for

protection under CAT.

E. Voluntary Departure

At the conclusion of removal proceedings, the court may grant voluntary departure in lieu of removal. INA § 240B(b). Voluntary departure is a discretionary form of relief. *See Macer of Argals,* 22 I&N Dec. 811, 817 (BIA 1999).

The respondent admitted to multiple arrests and convictions for driving without a license, and convictions for public intoxication and driving while intoxicated. Drunk driving is an extremely dangerous crime which creates a risk to the lives and property of others. *See Began v. US ,* 553 U.S. 137, 141-42 (2008); *Portillo-Renton v. Holder,* 662 F.3d 815 (7th Cir. 2011). Accordingly, I decline to exercise my discretion to grant voluntary departure in this case.

IV. CONCLUSION

For the reasons set forth above, I conclude that the respondent has failed to establish eligibility for asylum, withholding of removal, or protection under CAT, and deny voluntary departure. Accordingly, the following order will be entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that the respondent's application for asylum be DENIED.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal be DENIED.

IT IS FURTHER ORDERED that the respondent's application for protection under CAT be DENIED.

IT IS FURTHER ORDERED that the respondent 's request for voluntary departure be DENIED.

IT IS FURTHER ORDERED that the respondent be removed to Nicaragua on the charge contained on the Notice to Appear.

s/ Carlos Cuevas
IMMIGRATION JUDGE

APPENDIX D
Statutes involved

8 U.S.C. § 1158. Asylum

(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 section1 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.

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8 U.S.C. §1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal. Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under

section 2347 (c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(I) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except

as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(I) any judgment regarding the granting of relief under section 1182(h), 1182(I), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (c), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(I) of this title.

(D) Judicial review of certain legal claims. Nothing in subparagraph (B) or (c), or in any

other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions. No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of

removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal. With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline. The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms. The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general. The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order. Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief. The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review. Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of

discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3) (c) of this title, unless the court finds, pursuant to with subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination. The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider. When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general. If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality. If the defendant claims in the motion to be a national of the United States and the district court finds that--

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality

claim and decide that claim as if an action had been brought under section 2201 of Title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation. If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review. The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction. This subsection–

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)1 of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review. Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising

from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition. A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders. A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief. Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings. Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general. Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions. Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (I) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal. A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases. It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite

to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision. In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry. In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general. Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the

Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases. Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction. Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.