No. _____

In The
Supreme Court of the United States

RONY ESTUARDO PEREZ-GUZMAN
AKA RONNIE PEREZ-GUZMAN,

Petitioner,

v.

JEFFERSON B. SESSIONS III,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two provisions of the Immigration and Nationality Act (INA) dealing with asylum and reinstated removal orders directly conflict with one another. Under the asylum provision, "Any alien who is physically present in the United States[,] . . . irrespective of such alien's status, may apply for asylum. . . ." 8 U.S.C. § 1158(a)(1). The reinstatement section, meanwhile, authorizes the government to reinstate a prior removal order and provides that a noncitizen subject to reinstatement "may not apply for any relief under [the INA]." 8 U.S.C. § 1231(a)(5).

In this enforcement action against a noncitizen triggering both sections, both the noncitizen and the government asked the United States Court of Appeals for the Ninth Circuit to resolve the conflict solely on the statutory text. Instead, the court of appeals invoked *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and deferred to an agency rule that addressed only one of the two provisions. The questions presented are:

1. Whether a court must defer to an agency's position under *Chevron* when the only ambiguity is a direct conflict between two statutory sections, which the agency has not addressed.

2. Whether the INA's asylum provision affords a noncitizen in reinstatement proceedings the opportunity to seek asylum in the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rony Estuardo Perez-Guzman petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App.1-32) is reported at 835 F.3d 1066. The decisions of the Board of Immigration Appeals (App.33-39) and the immigration judge (App.40-55) are unreported.

JURISDICTION

The Ninth Circuit entered judgment on August 31, 2016, and denied a timely petition for rehearing and rehearing en banc on April 26, 2017. On July 7, 2017, Justice Kennedy extended the time for filing this petition until August 24, 2017. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY & REGULATORY PROVISIONS

Pertinent statutory provisions from the Immigration and Nationality Act (INA) are the asylum provision, 8 U.S.C. § 1158, and the reinstatement provision, 8 U.S.C. § 1231. They are reprinted in the appendix

to this petition. App.61-73 (asylum); App.74-98 (reinstatement). In addition, 8 C.F.R. § 1208.31 is reprinted at App.99-103.

STATEMENT

This case concerns the proper balance between the judiciary's constitutional prerogative to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), and judicial deference to executive agencies under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It arises out of an immigration enforcement action against Petitioner Rony Estuardo Perez-Guzman (Perez), a Guatemalan seeking refuge in the United States.

Perez's case implicates two conflicting provisions of the INA: the asylum provision in § 208(a)(1), 8 U.S.C. § 1158(a)(1), and the reinstatement provision in § 241(a)(5), 8 U.S.C. § 1231(a)(5). The asylum provision begins, "*Any alien* who is physically present in the United States[,] . . . *irrespective of such alien's status*, *may apply for asylum*. . . ." 8 U.S.C. § 1158(a)(1) (emphases added). The reinstatement provision, meanwhile, authorizes the government to reinstate a prior removal order and states that a noncitizen in reinstatement status "*may not apply for any relief* under [the INA]." 8 U.S.C. § 1231(a)(5) (emphasis added).

I. Legal framework.

Asylum. The United States offers asylum to noncitizens who are unable or unwilling to return home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(42) (defining "refugee"); 8 U.S.C. § 1158(b)(1)(A) (granting the Secretary of Homeland Security and the Attorney General discretion to grant asylum to refugees). The specifics of asylum eligibility and procedure are spelled out in § 208 of the INA, 8 U.S.C. § 1158.

Section 1158(a)(1) begins with a broad grant of authority: "*Any alien who is physically present in the United States*[,] . . . *irrespective of such alien's status, may apply for asylum*. . . ." (Emphasis added). Section 1158(a)(2) places certain limitations on this grant, including a one-year time limit for applying from within the United States, a bar on successive applications absent changed circumstances, and an exception for noncitizens who may be removed to a safe third country under an international treaty. *Id.* § 1158(a)(2)(A)-(D).

Subsection (b) of § 1158 mirrors the structure of subsection (a)—it grants broad authority, and then qualifies it. Section 1158(b)(1) empowers the Attorney General and Secretary of Homeland Security to grant asylum to noncitizens who have been persecuted or fear persecution on the basis of race, religion, nationality, membership in a particular social group, or

political opinion. Subsection (b)(2), however, specifies that the Attorney General and Secretary may *not* grant asylum to a noncitizen who (1) has persecuted any person on the basis of his membership in a protected group; (2) has been convicted of a "particularly serious crime"; (3) has committed a serious nonpolitical crime abroad; (4) is a danger to national security; or (5) who was firmly resettled in another country before coming to the United States. (None of these exceptions apply to Perez.)

Under § 1158(b) & (d), the Attorney General must establish regulatory procedures for applying for asylum, and "may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)." *Id.* § 1158(b)(2)(C). The Attorney General has not invoked this authority to address the interplay between § 1158(a)(1) and § 1231(a)(5).

Reinstatement. Like the asylum provision, the reinstatement provision in § 1231(a)(5) uses categorical language. Unlike § 1158(a)(1), however, it lacks any specific qualification. It states without exception that if the Attorney General finds that a noncitizen has previously been removed, "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 [the INA]." *Id.* § 1231(a)(5) (emphasis added).

Despite its categorical and mandatory language, the government and the courts have recognized several

limitations on reinstatement. First, even though § 1231(a)(5) says that the prior order "is reinstated" once the Attorney General finds the noncitizen has been previously removed, the government treats reinstatement as discretionary. *See Villa-Anguiano v. Holder*, 727 F.3d 873, 878-79 (9th Cir. 2013). Second, agency regulations, BIA decisions, and judicial precedent provide that the bar on "any relief" in § 1231(a)(5) does not prohibit noncitizens in reinstatement status from applying for withholding of removal, *see Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 n.4 (2006); protection under Article 3 of the Convention Against Torture, 8 C.F.R. §§ 1208.31(e), 1208.16(c)(4); or U or T visas, *see* 8 C.F.R. § 214.14(c)(1)(ii); *Torres-Tristan v. Holder*, 656 F.3d 653, 660, 662 (7th Cir. 2011). *See also* App.18 ("[B]oth provisions are qualified in certain respects—§ 1158 by various textual exceptions, and § 1231(a)(5) by the government's practice and our precedent.").

Notwithstanding these exceptions, the government contends that the plain text of § 1231(a)(5) bars noncitizens in reinstatement status from applying for asylum under § 1158. Consistent with the government's position that the statutes are unambiguous, the agency has not promulgated a regulation addressing the interplay between § 1158(a)(1) and § 1231(a)(5).

II. Facts and procedural background.

In 2011, Perez fled to the United States to escape violence in his home country. App.4. He was stopped by border patrol agents and, two weeks later, removed using an expedited removal process. *Id.*; *see also* 8 U.S.C. § 1225(b) (expedited removal). Under the expedited process, Perez never got to see an immigration judge, and he testified that border patrol agents never asked him if he feared returning to Guatemala. App.4.

Six months later, Perez reentered the United States because he still feared for his life. App.5. The government immediately reinstated his prior order of removal under § 1231(a)(5). *Id.* During the reinstatement proceedings, Perez sought asylum, withholding of removal, and protection under the Convention Against Torture (CAT). *Id.* Only the asylum claim is relevant here.

The interviewing asylum officer found that Perez had established that he reasonably fears torture if returned to Guatemala, and referred him to an immigration judge. App.2. But the immigration judge, and later the Board of Immigration Appeals (BIA), refused to consider Perez's asylum claim solely because he was in reinstatement status.[1] App.5; App.33-34 n.1; App.40-41.

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[1] The immigration judge and BIA also denied Perez's withholding of removal and CAT claims. App.36-38; App.54. The parties agree that these claims must be remanded for reconsideration in light of intervening precedent, and the Ninth Circuit has so ordered. App.31.

Perez filed a petition for review with the United States Court of Appeals for the Ninth Circuit, arguing that the plain text of § 1158(a)(1) entitles him to seek asylum. App.10-11. The government argued that the plain text of § 1231(a)(5) bars noncitizens in reinstatement status from seeking asylum. *Id.* Both parties asked the Ninth Circuit to rule on the statutory text alone; the government did not contend in its answering brief that its position should be given deference under *Chevron*. Dkt. 41-2 (Respondent's Br.) at 18-27.

Although the government did not claim that the agency had issued a regulation interpreting the interplay between reinstatement and asylum, shortly before oral argument the Ninth Circuit ordered the parties to submit supplemental briefs addressing 8 C.F.R. § 208.31(e).[2] App.57. The order directed the parties to "address whether that regulation represents the agency's authoritative interpretation of the interplay between 8 U.S.C. § 1158 and 8 U.S.C. § 1231(a)(5), and whether it is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." App.57.

Neither the text of 8 C.F.R. § 1208.31(e) nor the rulemaking adopting it (64 Fed. Reg. 8478 (Feb. 19, 1999)) purports to reconcile the conflict between the text of the asylum and reinstatement provisions. This

[2] The Ninth Circuit's order cited 8 C.F.R. § 208.31(e), which was recodified at and is substantively identical to 8 C.F.R. § 1208.31. *Cf.* App.8 n.2. This petition uses them interchangeably.

silence suggests that the agency never intended to answer that question, or that the agency was unaware of the conflict. The regulation itself states only that a noncitizen in reinstatement status who is found to have a reasonable fear of persecution or torture can be referred to an immigration judge for "withholding of removal only." 8 C.F.R. § 1208.31(e). It does not cite or discuss § 1158(a)(1). This silence makes sense, given that the agency promulgated the regulation as part of an interim rulemaking establishing procedures for complying with the Convention Against Torture, as the title and introduction confirm. *See* 64 Fed. Reg. at 8478 ("Regulations Concerning the Convention Against Torture"). Remedies provided by the Torture Convention are narrower than asylum and are, by definition, available to many who would not qualify for asylum under the asylum provision by virtue of, for example, a criminal conviction.

The interim rulemaking adopting 8 C.F.R. § 1208.31(e) likewise does not address § 1158(a)(1). It states, without explanation or citation, that noncitizens in reinstatement status "are ineligible for asylum. They may, however, be entitled to withholding of removal under either section 241(b)(3) of the Act, or under the Convention Against Torture, or to deferral of removal under § 208.17(a)." 64 Fed. Reg. at 8485.

Under this Court's precedent, a "regulation does not receive *Chevron* deference" if it lacks a "reasoned explication." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016). Accordingly, Perez argued in

his supplemental brief that deference to 8 C.F.R. § 1208.31 was not appropriate because the agency had not provided any reasoning for this purported "interpretation." Dkt. 74 (Petitioner's 2d Supp. Br.) at 5-10.

In its supplemental brief, the government doubled down on its plain-text position. It stated:

> Respondent respectfully suggests that resolution of this question is not necessary to disposition of the instant petition for review. As argued in Respondent's Answering Brief, asylum constitutes discretionary relief from removal, and the plain language of 8 U.S.C. § 1231(a)(5) precludes all "relief." Thus, the Court need not address the issue of whether *Chevron* deference to the agency's reasonable interpretation of an ambiguous statute is warranted.

Dkt. 72 (Respondent's Supp. Br.) at 1. The government argued in the alternative that if the court found "any ambiguity in 8 U.S.C. § 1231(a)(5) concerning the availability of discretionary relief such as asylum, [then] the agency reasonably promulgated 8 C.F.R. § 208.31(e) to preclude asylum." *Id.*

After argument, the Ninth Circuit entered a second *sua sponte* order for supplemental briefing. This time, the court ordered the parties to brief: (1) the impact of this Court's decision in *Encino Motorcars* on Perez's "argument that 8 C.F.R. § 1208.31 should not be accorded *Chevron* deference"; and (2) whether Perez's arguments to that effect were timely under 28 U.S.C. § 2401(a), as interpreted by *Wind River Mining Corp.*

v. United States, 946 F.2d 710 (9th Cir. 1991), among others. App.59-60.

As to the second of these questions, 28 U.S.C. § 2401(a) states that a civil action against the United States must be brought within six years "after the right of action *first accrues*." (Emphasis added.) In *Wind River*, the Ninth Circuit held that § 2401(a)'s limitations period begins to run at different times depending on whether the challenge to agency action is procedural or substantive. A challenge to a "mere procedural violation in the adoption of a regulation or other agency action" begins to run on the date the agency adopts the regulation or decision. *Wind River*, 946 F.2d at 715. The limitations period on challenges to "the substance of an agency decision as exceeding constitutional or statutory authority," meanwhile, begins to run upon the *application* of the agency regulation or decision to the particular challenger. *Id.*

All parties (*including the government*) agreed that Perez's *Chevron* arguments were substantive and therefore timely. App.19 n.6; *see also* Dkt. 85 (Respondent's 2d Supp. Br.) at 8-9 ("[Perez] is not raising a 'procedural challenge' to the validity of the regulation. . . . Rather, Petitioner argues that 8 C.F.R. § 1208.31(e) is substantively deficient because of alleged flaws in the agency's interpretation concerning whether asylum is available in reinstatement proceedings.").

III. The Ninth Circuit's decision.

On August 31, 2016, the Ninth Circuit ruled in the government's favor at *Chevron* step two, and found Perez's arguments against *Chevron* deference time-barred. App.19-23.

At *Chevron* step one, the court of appeals held that the asylum and reinstatement provisions conflict with each other, and then assumed that the conflict triggered deference under *Chevron*. App.12-13; App.18. It thus proceeded to treat 8 C.F.R. § 1208.31(e) as the agency's controlling interpretation of the INA's conflicting asylum and reinstatement provisions. App.26-27. In a footnote, the court brushed aside the government's position that deference was neither necessary nor appropriate. App.23-24 n.8. The Ninth Circuit reasoned that it was not required to defer to the government's position (that the court should not defer to the government), because the government's plain-text argument was merely a "convenient litigating position." *Id.*

Treating 8 C.F.R. § 1208.31(e) as the agency's authoritative interpretation of the INA's conflicting asylum and reinstatement provisions, the Ninth Circuit held that the agency's reading of § 1231(a)(5) as controlling was entitled to deference. App.23-29.

The court of appeals also refused to consider Perez's argument that 8 C.F.R. § 1208.31(e) did not warrant *Chevron* deference at step two because it lacked a reasoned basis. Despite all parties' consensus that this argument was substantive, the Ninth Circuit ruled

that Perez alleged "a procedural violation in the adoption of a regulation." App.19-20 (citation omitted). It therefore held that Perez's argument was untimely under *Wind River* and § 2401(a) because he made it more than six years after the 1999 rulemaking. App.19-23. In support, it cited this Court's comment in *Encino Motorcars* that "a basic *procedural* requirement[] of administrative rulemaking is that an agency must give adequate reasons for its decisions." App.20-21 (quoting *Encino Motorcars*, 136 S. Ct. at 2125).

Perez filed a petition for rehearing supported by three different *amicus* briefs. The Ninth Circuit ordered the Government to respond to the petition for rehearing and also to the arguments presented by the *amici*. On April 26, 2017, the Ninth Circuit denied rehearing. App.56.

REASONS TO GRANT THE PETITION

This Court should grant review to clarify whether *Chevron* applies to unambiguous but conflicting statutes. In *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), several Justices suggested that it does not, but the Court did not resolve that issue. The Court should answer that question now because it is creating confusion among courts in a way that implicates fundamental questions about separation of powers and the judiciary's role. If allowed to stand, the Ninth Circuit's expansive interpretation of *Chevron* will enable courts

to avoid ruling on a pure legal question under the guise of agency deference when even the agency does not claim the question falls within its interpretive authority.

This Court should also find asylum available to individuals in reinstatement status. Eight Circuits have addressed the issue, and although each has found asylum unavailable, their inconsistent reasoning highlights the flaws in the agency's position. The asylum provision is an intricate scheme governing asylum eligibility, which was enacted to conform U.S. law with the Refugee Convention. The reinstatement bar, by contrast, is a blunt instrument lacking the comprehensive scheme found in the asylum provision, and subject to several implicit limitations. This Court should restore access to asylum for bona fide refugees who are improperly excluded under the agency's approach.

I. The court of appeals' decision misapplies *Chevron* and exceeds the constitutional bounds of agency deference.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court set out the two-step framework for assessing whether a court must defer to an agency's interpretation of a statute it administers. At step one, a court must determine whether "Congress [has] directly spoken to the precise

question at issue." *Id.* at 842. If the statute is unambiguous—a question that should be answered after "employing traditional tools of statutory construction," *id.* at 843 n.9—the agency must give effect to Congress's clear intent and apply the statute as written. *Id.* at 843. But if "the statute is silent or ambiguous with respect to the specific issue," then the court proceeds to step two and determines "whether the agency's answer is based on a permissible construction of the statute." *Id*. If both conditions are met, a court must defer to the agency's interpretation "unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

A. *Chevron* requires a statutory gap or ambiguity; a conflict is neither.

The parties did not brief the issue of whether a statutory conflict qualifies as an ambiguity for *Chevron* purposes because both sides contended that the statutes are unambiguous, and because the government did not purport to resolve any statutory ambiguity. The Ninth Circuit ruled on deference anyway, and in doing so, assumed that the conflict between the asylum and reinstatement provisions created an ambiguity. App.12. That assumption is wrong.

By its plain terms, the *Chevron* framework does not apply absent statutory ambiguity. *Chevron*, 467 U.S. at 843. That ambiguity may result from unclear language, or from a "gap" in the statute. *Id.*

Here, the court of appeals identified only one ambiguity: an "apparent conflict" between the two statutory provisions. App.12-13. But as several members of this Court have recently highlighted, a direct statutory conflict is not an ambiguity.

In *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), this Court considered the meaning of 8 U.S.C. § 1153, the INA section setting forth the priority rules for people seeking visas as beneficiaries of lawful permanent residents. *See* 134 S. Ct. at 2196-98 (Op. of Kagan, J.). The BIA contended that the statute was ambiguous and thus that the Court should defer to the agency's interpretation. *Id.* at 2201-02.

Although a majority of the Court upheld the BIA's reading of § 1153, only three Justices relied on *Chevron*. *See id.* at 2195-96. This group concluded that two "Janus-faced" clauses in § 1153 created an ambiguity that triggered *Chevron* deference. *Id.* at 2203-10.

The remaining six Justices disagreed that the statute was ambiguous and urged for a ruling on the plain text. *Id.* at 2214-20. Importantly, three of the Court's members specifically rejected the broad reading of *Chevron* now adopted by the Ninth Circuit in Perez's case. *Id.* at 2214-16. In a concurrence joined by Justice Scalia (and in relevant part by Justice Alito), the Chief Justice wrote, "To the extent the plurality's opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong. . . . Direct conflict is not ambiguity, and the resolution of such a conflict is not

statutory construction but legislative choice." *Id.* at 2214 (Roberts, C.J., concurring); *see also id.* at 2216 (Alito, J., dissenting) (agreeing that "[d]irect conflict is not ambiguity").

The fundamental premises justifying *Chevron* confirm that a statutory conflict is not an ambiguity. "*Chevron* is rooted in a background presumption of congressional intent." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). That is, *Chevron* presumes that Congress intentionally delegated responsibility for resolving ambiguities in a statute to the administering agency because "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (citation omitted); *cf. City of Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring) (If Congress has not spoken unambiguously, "the judge will ask whether Congress would have intended the agency to resolve the resulting ambiguity.").

Delegation is assumed where Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In the case of statutory conflict, however, Congress *has* spoken to the precise issue; it just did so in opposing ways. If Congress enacted conflicting statutes with irreconcilable commands, then it did not delegate. "*Chevron* is not a license for an agency to repair a statute that does not make sense." *Scialabba*, 134 S. Ct. at 2214 (Roberts, C.J., concurring).

Here, for example, Congress spoke to whether a noncitizen in reinstatement status can seek asylum. It has said both that "any alien" can apply for asylum "irrespective" of immigration status, 8 U.S.C. § 1158(a)(1), and also that a noncitizen in reinstatement status cannot receive "any relief" under the INA. 8 U.S.C. § 1231(a)(5). That is not an ambiguity from which Congressional delegation can be inferred. "[W]hen Congress assigns to an agency the responsibility for deciding whether a particular group should get relief, it does not do so by simultaneously saying that the group should and that it should not." *Scialabba*, 134 S. Ct. at 2214 (Roberts, C.J., concurring).[3] Indeed, neither Perez nor the government disputes that Perez's

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[3] *National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2007) does not suggest otherwise. *Homebuilders* involved inconsistent mandates in two different Congressional acts (the Endangered Species Act (ESA) and Clean Water Act (CWA)) administered by two different agencies. *Id.* at 661-62. The two Acts contained apparently conflicting mandates concerning the factors an agency must consider when deciding whether to transfer permitting authority to the states. *Id.* at 650-52. In light of their policy expertise, the agencies were able to harmonize the apparently conflicting text of each Act without negating either statute as applied to the case before the Court at the time. *See id.* at 665 ("This interpretation harmonizes the statutes by giving effect to the ESA's . . . mandate whenever an agency has discretion to do so, but not when the agency is prohibited from considering" the ESA's mandate by the CWA.).

Here, two provisions of the same Act appear mutually exclusive as applied to Perez—he cannot simultaneously be permitted to seek asylum "irrespective of [his] status" under § 1158 and be barred from seeking asylum under § 1231(a)(5). Reconciling these conflicting mandates is a question of statutory interpretation for the courts, not a matter of agency expertise or policy choice.

circumstances trigger the text of *both* statutory provisions. The question, therefore, is not how to resolve statutory ambiguity, but rather how to resolve statutory conflict.

The Ninth Circuit reasoned that the direct conflict between § 1158(a)(1) and § 1231(a)(5) created an ambiguity because Congress has not directly spoken to the precise question of how to reconcile the conflicting mandates. *See* App.12-13. But that approach begs the question. Under the Ninth Circuit's view, a statutory conflict qualifies as ambiguity per se. *Chevron*'s presumed Congressional delegation cannot stretch that far.

In short, the court of appeals cited no authority justifying *Chevron* deference in the face of a statutory conflict between two provisions of the same statutory enactment. This Court should grant review to answer the important question of federal law left unresolved by *Scialabba*.

B. Invoking *Chevron* because of a direct statutory conflict undermines the separation of powers and conflicts with congressional intent.

This question deserves review because the Ninth Circuit's overbroad reading of *Chevron* violates separation-of-powers principles.

The Constitution assigns the judicial department the task of interpreting the laws of Congress. U.S. Const.

art. III, § 2 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, [and] the laws of the United States. . . ."). The framers contemplated that "[t]he interpretation of the laws is the proper and peculiar province of the courts" and it "belong[s] to [judges] to ascertain . . . the meaning of any particular act proceeding from the legislative body." THE FEDERALIST NO. 78 (Alexander Hamilton).

By contrast, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). As noted above, *Chevron* presumes that Congress has delegated to an agency the necessary *administrative* powers to carry out programs entrusted to it. *Chevron*, 467 U.S. at 843 (observing that administering a program necessarily requires an agency to formulate policy and rules to fill in gaps left by Congress). "*Chevron*'s rule of deference was based on—and limited by—this congressional delegation." *City of Arlington*, 133 S. Ct. at 1881 (Roberts, C.J., dissenting).

Filling in gaps or interpreting ambiguous terms in a statute Congress has charged the agency to administer falls within this delegated power. But "[i]f two laws conflict with each other, the courts must decide on the operation of each." *Marbury*, 1 Cranch at 177. Resolving a direct and unambiguous statutory conflict is not "administering" the statute in light of the agency's policy expertise; it is saying what the law is. That question "is emphatically the province and duty of the judicial department." *Id.*; *see also Perez v. Mortgage Bankers*

Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring) ("[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.").

If there were any doubt about this principle, Congress resolved it in the Administrative Procedure Act by placing in the hands of the "reviewing court" the responsibility to "decide all relevant questions of law, [and] interpret constitutional *and statutory provisions*." 5 U.S.C. § 706 (emphasis added); *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) ("Congress vested the courts with the power to 'interpret . . . statutory provisions' and overturn agency action inconsistent with those interpretations. Congress assigned the courts much the same job in the immigration field where we happen to find ourselves today.") (citing 5 U.S.C. § 706 and 8 U.S.C. § 1252(a)(2)(D)).

In *Chevron* itself, the Court took care to emphasize that the doctrine does not supplant the judiciary's "final authority on issues of statutory construction." 467 U.S. at 843 n.9. The Ninth Circuit violated this basic principle by ruling that *Chevron* requires a court to defer to an agency when faced with a true statutory conflict between two unambiguous mandates. The Court should grant review to restore the proper balance between judicial deference and the separation of powers.

C. The Ninth Circuit compounded its error by deferring to an agency when the agency never squarely confronted the statutory conflict.

Because it misread *Chevron* as applying to a direct statutory conflict, the court of appeals denied the parties the opportunity to have the judiciary say what the law is at *Chevron* step one. Then the Ninth Circuit compounded the problem by deferring to the agency at *Chevron* step two even though the agency had never addressed the statutory conflict at issue.

At step two, Perez argued that 8 C.F.R. § 1208.31(e) should not be accorded *Chevron* deference because it lacked a reasoned basis. The Ninth Circuit held this argument untimely under 28 U.S.C. § 2401(a) and its precedent in *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713-14 (9th Cir. 1991). App.19-23.[4]

As a result, the court of appeals deferred at step two to agency action that was unreasoned given that the agency did not perceive any statutory ambiguity to resolve after reasoned decisionmaking. This result cannot be squared with Supreme Court precedent requiring courts to judge the reasonableness of the

[4] The parties agreed that Perez's argument was timely. App.19 n.6; *see* Dkt. 85 (Respondent's 2d Supp. Br.) at 8-9. Setting aside whether *Wind River* and its application are correct, *see* John Kendrick, Note, *(Un)limiting Administrative Review:* Wind River*, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 VA. L. REV. 157 (2017), the Ninth Circuit's deference to unreasoned agency action demonstrates the danger of courts abdicating their responsibility to say what the law is.

agency's action based on the agency's explanation. *See, e.g.*, *Encino Motorcars*, 135 S. Ct. at 2127 ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given."). The reasoned-decisionmaking requirement exists for a reason. "Without an explanation of the agency's reasons, it is impossible to know whether the agency employed its expertise or 'simply pick[ed] a permissible interpretation out of a hat.'" *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1150 (9th Cir. 2013) (citation omitted).

Nothing in the administrative record indicates that the agency intended for 8 C.F.R. § 1208.31(e) to answer the question posed by this case. Neither the text of the rule itself nor the discussion section of the rulemaking cite or discuss 8 U.S.C. § 1158(a)(1) (the asylum provision), and nothing acknowledges or purports to resolve the interplay between asylum and reinstatement. *See generally* 64 Fed. Reg. 8478.

In fact, the government has implicitly conceded that 8 C.F.R. § 1208.31(e) was not meant to reconcile the reinstatement and asylum provisions. The government has suggested that the rulemaking's cursory statement about noncitizens in reinstatement status being "ineligible for asylum" merely reflects the agency's view that the plain text of § 1231(a)(5) controls. Because the agency never cited or discussed § 1158(a)(1), however, it appears that the agency was not even aware of the alleged ambiguity. Thus, there was nothing for the court of appeals to defer *to* because

the agency did not actually address the central question at issue.[5]

The Ninth Circuit's decision to defer to unreasoned agency action deepens the separation-of-powers concerns raised by the Ninth Circuit's erroneous reading of *Chevron* because it further circumscribes the courts' role in reviewing statutory conflicts and thus further insulates agency action from scrutiny. These compounded errors show that *Chevron* has become unmoored from its original principles and needs to be reanchored by this Court.

The Ninth Circuit's eagerness to defer to the agency reflects a growing temptation to use *Chevron* to avoid difficult statutory-interpretation questions. This inclination is not unique to the Ninth Circuit. "[T]he problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring). In light of the national importance of these issues, this Court's review is warranted.

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[5] The Ninth Circuit's insistence on ruling under *Chevron* step two in this case is all the more puzzling because the agency never claimed any ambiguity. The agency could not have engaged in a reasoned decisionmaking process to address an ambiguity or conflict the agency did not identify or even recognize.

II. Applying the normal tools of statutory construction, the INA's specific asylum provisions defeat the general reinstatement bar.

Where, as here, two statutory provisions conflict, "the courts must decide on the operation of each." *Marbury*, 1 Cranch at 177. Applying the normal tools of statutory construction in this case, the court of appeals should have concluded that the general reinstatement provision cannot operate as a categorical bar to asylum for noncitizens in reinstatement status.

A. The asylum provision is explicit about who can seek asylum and who cannot, but the reinstatement bar has a number of implicit exceptions.

This Court's precedent requires statutory provisions to be considered holistically and in context. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Under this approach, several aspects of the asylum provision demonstrate that 8 U.S.C. § 1158 alone determines who may seek and be granted asylum.

For example, both the asylum provision and the reinstatement provision use seemingly categorical language. But for good reason, courts have respected the asylum provision's broad text. Because of international-treaty obligations and humanitarian concerns (addressed below), courts have been extremely wary of creating exceptions to the asylum provision beyond the limited and express exceptions enacted by Congress.

By contrast, the reinstatement bar is judicially and administratively porous. As the court of appeals recognized, "notwithstanding the prohibition on 'any relief,' withholding of removal and CAT protection are available to individuals in reinstatement proceedings," as are U Visas—exceptions created by courts and the executive branch, without any textual basis in the reinstatement provision itself. *See* App.14 (collecting citations).

These exceptions caused the court of appeals to conclude that "both provisions are qualified in certain respects—§ 1158 by various textual exceptions, and § 1231(a)(5) *by the government's practice and our precedent*." App.17-18 (emphasis added). But respecting "textual exceptions" consciously inserted by Congress into the asylum provision is very different from the potpourri of judicial and administrative exceptions that already permeate the seemingly categorical bar of the reinstatement provision. Thus, as between the two, this history suggests that courts should use the reinstatement provision as the release valve for the tension between the provisions.

The detailed text of § 1158 is also instructive. Congress stated twice that any limit on asylum must be consistent with § 1158. The asylum provision instructs that "any alien" may seek asylum and that such an individual "may apply for asylum in accordance with this section." 8 U.S.C. § 1158(a)(1). It further mandates that any additional limits on asylum must be "consistent with this section." *Id.* § 1158(b)(2)(C). This latter provision has particular significance because that

subsection supplies the Attorney General's authority to limit asylum, yet the agency never invoked that authority when promulgating 8 C.F.R. § 1208.31.

The provision within § 1158 relating to successive asylum applications shows how asylum and reinstatement should interact with one another. Although Congress generally prohibited successive asylum applications, *see* 8 U.S.C. § 1158(a)(2)(C), the next subsection creates an exception that permits an individual to seek asylum a second time based on changed circumstances. *Id*. § 1158(a)(2)(D). Because an unsuccessful asylum application will almost always result in a removal order, the only way to give meaning and effect to the successive-application provision is to recognize that some individuals may seek asylum even if they return following that removal order. That provision thus undermines the agency's interpretation of the reinstatement bar and demonstrates why it cannot stand. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("[A]n agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole' does not merit deference.") (citation omitted). The Ninth Circuit dismissed this text in a footnote, finding that it had "no opportunity" to consider this provision because Perez was a first-time applicant. App.30 n.10. But this overlooks the successive-application provision's role in the statutory structure and the court's obligation to construe the statutes to give meaning to all provisions. *See Utility Air*, 134 S. Ct. at 2442 ("Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds

of reasonable interpretation.' And reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'") (citations omitted).

B. Applying the specific-general canon illustrates that the asylum provision should exclusively govern who may seek asylum.

In addition to considering the entirety of the statutory text, it is a well-established principle of statutory construction that, in the course of giving meaning to all statutory provisions, "the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012); *accord Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944). In *RadLAX*, this Court distinguished a "detailed provision that spells out the [relevant] requirements" and "prescribed in great detail" the relevant procedures, from "a broadly worded provision." 132 S. Ct. at 2071. The same considerations apply here. The asylum statute is lengthy and detailed (2,440 words) but the reinstatement bar is a single, 87-word sentence whose relevance turns on the meaning of the word "relief," which is undefined anywhere in the INA or in the regulations.

Instead of taking the detailed nature of the asylum provision as evidence of that provision's specificity, the Ninth Circuit reasoned that the guarantee that

"any alien" may apply for asylum irrespective of status was "undercut[]" by a "series of exceptions" barring some noncitizens from asylum. App.14. But these exceptions support Perez's position. The statute creates limited, narrowly tailored exceptions, which demonstrate the asylum provision's specificity.

For example, one of the limits on who may *seek* asylum requires a bilateral treaty obligation, *see* 8 U.S.C. § 1158(a)(2)(A), and the other two can be excused for changed circumstances, *id.* § 1158(a)(2)(D). Meanwhile, limitations on who may be *granted* asylum are rooted in the provisions of the United Nations' 1967 *Protocol Relating to the Status of Refugees* (the "Convention" or "Refugee Convention"), 19 U.S.T. 6223, 606 U.N.T.S. 267. Statutory limitations on asylum eligibility—e.g., the bars for those who have been convicted of certain crimes, who are a danger to the community, or who have ties to terrorism—generally relate back to the Refugee Convention. *See* Refugee Convention, Art. 1, 33(2). And the same is true for the bars for individuals who have persecuted others or committed serious nonpolitical crimes. *Compare* 8 U.S.C. § 1158(b)(2)(A)(i), (iii), *with* Refugee Convention, Art. 1(F)(c), (b). In other words, unlike the reinstatement bar, the exceptions to asylum found within § 1158 are detailed, specific, and rooted in the Refugee Convention.[6]

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[6] The Ninth Circuit also bypassed the "longstanding principle" of "construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." App.18 n.5; *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S.

C. International law requires the United States to offer asylum to refugees.

The United States' treaty obligations confirm that the reinstatement bar cannot categorically prevent refugees from seeking asylum in this country.

Under the *Charming Betsy* doctrine, a statute "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The *Charming Betsy* doctrine recognizes the "firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *accord Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Chew Heong v. United States*, 112 U.S. 536, 550 (1884).

Congress adopted the original version of the asylum provision as part of the Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102, which sought "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). The asylum provision therefore must be read in light of the Refugee Convention it is meant to effectuate.

421, 449 (1987)). The immigration lenity canon is essential to ensure that interpretations are consistent with the statute's "humanitarian purpose." *INS v. Errico*, 385 U.S. 214, 225 (1966).

Applying the general reinstatement bar to prevent refugees from seeking asylum in the United States (and instead limiting them to withholding of removal) contradicts multiple obligations under the Refugee Convention. Most fundamentally, it violates the Convention's prohibition on penalizing refugees based on their manner of entry into a receiving country. Article 31(1) states, "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who . . . enter or are present in their territory without authorization." 19 U.S.T. at 6275. Recognizing that those fleeing persecution rarely have an opportunity to obtain travel documents, contracting states must "exempt refugees fleeing persecution from sanctions that might ordinarily be imposed for breach of the asylum state's general migration control laws." James C. Hathaway, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 405-06 (2005). Because the reinstatement bar depends *solely* on an individual's "illegal entry or presence," it cannot be used to penalize refugees without violating Article 31 of the Convention. *See Fernandez-Vargas*, 548 U.S. at 44 (Section 1231(a)(5) penalizes "the alien's choice to continue his illegal presence, after illegal reentry."); *see also Garcia v. Sessions*, 856 F.3d 27, 59 (1st Cir. 2017) (Stahl, J., dissenting) (characterizing the reinstatement bar as a penalty because it "categorically prevents an alien in [Petitioner's] situation from applying for relief" that would otherwise be available).

Second, the reinstatement bar impedes a refugee's right to employment under the Convention. Article 17

of the Convention states that a contracting state "shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment." 19 U.S.T. at 6269. Recipients of withholding of removal enjoy no such right; they must apply for work authorization and suffer through delays in processing. *See* 8 C.F.R. § 274a.12(a)(10). The work-permit requirement for withholding recipients "likely violates the spirit, if not the letter, of Article 17." *Garcia*, 856 F.3d at 56 (Stahl, J., dissenting).

Likewise, the Convention affords refugees the right to travel. Article 28 states, "Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory." 19 U.S.T. at 6274. This provision is a "categorical requirement, a mandatory obligation on Contracting States." *Garcia*, 856 F.3d at 57 (Stahl, J., dissenting) (internal quotation marks and citation omitted). Yet withholding recipients do not have access to a travel document as contemplated by Article 28. By regulation, refugee travel documents are available only to asylees. 8 C.F.R. § 223.1. Not only is a withholding grantee not authorized to receive travel documentation, but the BIA requires that an individual granted withholding—unlike an individual granted asylum—must simultaneously be ordered removed. *See Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 & n.3 (BIA 2008). Any foreign travel therefore constitutes a "self-deportation." *See* 8 C.F.R. § 241.7.

In sum, the United States' obligations under the Refugee Convention confirm that the general reinstatement bar cannot defeat a noncitizen's right to seek asylum from persecution or torture in the United States "irrespective of such alien's status." 8 U.S.C. § 1158(a)(1).

III. This case involves issues of exceptional importance and is an ideal vehicle for resolving the statutory conflict and clarifying persistent questions about *Chevron*'s reach.

The Court should grant review in this case because it neatly presents two related and recurring issues that are confusing the courts of appeals: (1) whether directly conflicting statutory text qualifies as an "ambiguity" for *Chevron* purposes, and (2) whether a refugee in reinstatement proceedings may seek asylum. Resolving these issues has substantial importance for many bona fide refugees and for the law generally.

Perez's case contains no lingering factual issues that would impede the Court's review of the statutory conflict. The government does not assert that it has any basis, other than the reinstatement statute, for refusing to consider Perez's asylum application. Nor could it. Perez has no criminal history, and he does not fall within any of the INA's specific exceptions to asylum eligibility. App.48. Further, the government has already found that Perez is credible and that he

reasonably fears torture at the hands of the Guatemalan government if he returns. App.43-44.

Moreover, despite the similarity in outcomes among the courts of appeals that have addressed the issue, the courts so far have been unable to agree on the proper methodology for resolving this straightforward question of statutory interpretation. Two early decisions held that the plain text of the reinstatement bar precluded access to asylum, but did so without addressing the asylum provision. App.12 ("those circuits did not discuss § 1158(a)(1)"); *see Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016) (no mention of § 1158(a)(1)); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489-90 (5th Cir. 2015) (mentions § 1158(a)(1) in passing). One assumed in dicta that asylum was unavailable. *Herrera-Molina v. Holder*, 597 F.3d 128, 139 (2d Cir. 2010). And another avoided the issue entirely, holding that the court lacked jurisdiction over the question. *Garcia v. Sessions*, 859 F.3d 406, 408 (7th Cir. 2017).

The Ninth Circuit's decision below was the first to give this issue sustained attention. The Ninth Circuit found itself unpersuaded by the approaches of other courts (App.12), and became the first of three circuits to decide at *Chevron* step two. The First and Third Circuits have since followed suit. *Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017); *Cazun v. U.S. Att'y Gen.*, 856 F.3d 249 (3d Cir. 2017). Neither circuit's decisions were unanimous, however. Judge Stahl dissented in the First Circuit, reasoning that international treaty obligations required the United States to afford access to

asylum to those in reinstatement. *See Garcia*, 856 F.3d at 52-60 (Stahl, J., dissenting). And in the Third Circuit, Judge Hardiman concurred but disagreed with the resolution of the case at *Chevron* step two. *Cazun*, 856 F.3d at 261-67 (Hardiman, J., concurring). Most recently, the Fourth Circuit joined the group ruling at *Chevron* step one, over a dissent from Judge Traxler who concluded that, on the facts of that case, the Court lacked jurisdiction. *Calla-Mejia v. Sessions*, No. 16-1280, ___ F.3d ___, 2017 WL 3400010 (4th Cir. Aug. 9, 2017).

In short, the more courts consider this question, the more they disagree about how to reconcile the INA's conflicting asylum and reinstatement provisions, and the role of *Chevron* in deciding that question. This confusion is not a mere regulatory inconvenience for refugees seeking asylum from persecution and torture, but a matter of life or death for a significant number of people. In 2013, DHS issued 170,247 reinstatement orders. *See* Dep't of Homeland Sec. Office of Immigration Statistics, *Immigration Enforcement Actions: 2013*, at 5 tbl. 7 (Sept. 2014), http://1.usa.gov/1wMj45G. And a small percentage but sizeable number of these individuals subject to reinstatement are would-be asylum seekers.

In sum, the administrative law question concerning invoking *Chevron* deference to resolve a statutory conflict has substantial importance in this case and in many other cases. And the immigration law question concerning asylum availability has substantial importance for thousands of people in life-or-death situations. This case squarely presents both of these

critical and recurring questions at the intersection of federal immigration and administrative law, and the Court should grant review.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONY ESTUARDO PEREZ-GUZMAN, AKA Ronnie Perez-Guzman, *Petitioner*, v. LORETTA E. LYNCH, Attorney General, *Respondent*.	No. 13-70579 Agency No. A200-282-241 OPINION

On Petition for Review of an Order
of the Board of Immigration Appeals

Argued and Submitted May 4, 2016
Pasadena, California

Filed August 31, 2016

Before: Raymond C. Fisher, Milan D. Smith, Jr., and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Fisher

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OPINION

FISHER, Circuit Judge:

Rony Estuardo Perez-Guzman (Perez), a native and citizen of Guatemala, entered the United States without inspection for the first time in 2011. The Department of Homeland Security (DHS) apprehended and removed him after expedited removal proceedings. Perez reentered the United States in 2012 and was again apprehended by DHS, which reinstated the earlier removal order. After an asylum officer found Perez had established a reasonable fear of being tortured if removed to Guatemala, he was referred to an Immigration Judge (IJ) for consideration of his applications for withholding of removal and protection under the Convention Against Torture (CAT). Because Perez was subject to a reinstated removal order, the IJ declined to consider his application for asylum. The IJ denied

on the merits his requests for withholding of removal and protection under CAT, and the Board of Immigration Appeals (BIA) affirmed.

The parties agree that we must remand to the BIA on Perez's claims for withholding of removal and protection under CAT in light of intervening circuit precedent. The issue we consider here is whether an individual subject to a reinstated removal order is eligible to apply for asylum under the Immigration and Nationality Act (INA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). We hold Congress has not clearly expressed whether 8 U.S.C. § 1231(a)(5), enacted by IIRIRA, prevents an individual subject to a reinstated removal order from applying for asylum under 8 U.S.C. § 1158. We conclude, however, that the Attorney General's regulation preventing Perez from applying for asylum under these circumstances is a reasonable interpretation of the statutory scheme, and is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, we remand to the BIA only for reconsideration of Perez's withholding and CAT claims.

I. Background

A. Factual Background

Perez alleges that three incidents in his home county [sic] of Guatemala make him eligible for asylum, withholding of removal and CAT protection. First, Perez was struck by a stray bullet fired by members of

a gang extorting a local businessman and gave a statement to police about the gang members involved in the shooting. After they were released from jail, the gang members visited Perez's house while he was away.

Second, Perez discovered his name appeared on a "death squad kill list" compiled by a group of police officers and soldiers who engaged in extrajudical law enforcement by executing suspected gang members, guerrillas and other criminals. Other individuals on the list were later killed, including Perez's cousin. Shortly after his cousin's murder, Perez fled his hometown.

Finally, Perez was abducted by individuals purporting to be Guatemalan police officers. The kidnappers blindfolded Perez, tied him to a chair and beat him before realizing they had abducted the wrong man. The kidnappers discussed killing Perez, but released him with the threat that they would kill him if he reported the attack.

Perez left Guatemala and entered the United States for the first time in June 2011, but was stopped by the Border Patrol. He later testified before the IJ that the Border Patrol agents never asked him whether he feared returning to Guatemala, but only "came out with a paper" for him to sign certifying that he had entered the country illegally. Records of a brief interview conducted during the expedited removal process, however, note Perez answered in the negative when asked whether he feared returning to Guatemala. He was removed to Guatemala in July 2011.

Perez reentered the United States and was apprehended a second time in January 2012. DHS reinstated his earlier removal order. Because Perez expressed a fear of returning to Guatemala, he was referred to an asylum officer, who found his fear of persecution or torture was reasonable and referred him to an IJ for further proceedings.

Before the IJ, Perez sought asylum, withholding of removal and protection under CAT. The IJ, however, concluded Perez was ineligible for asylum because he had previously been removed and DHS had reinstated his earlier removal order. The IJ also denied Perez's applications for withholding of removal and CAT protection, concluding he had not established a likelihood that he would either be persecuted on a protected ground or tortured with government consent or acquiescence if returned to Guatemala. The BIA affirmed the denial of withholding of removal and CAT protection on the merits. It explained it would not reach the merits of Perez's asylum claim and that "[b]ecause the Department of Homeland Security . . . 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. *See* 8 C.F.R. § 1208.31(e)."

B. Legal Background

Perez's claim turns on the interplay between two provisions of the INA – 8 U.S.C. § 1158, the asylum

statute, and 8 U.S.C. § 1231(a)(5), the reinstatement bar.[1]

The Refugee Act of 1980 directed the Attorney General to establish procedures for granting asylum and enacted the initial version of § 1158, which afforded any alien the right to apply for asylum irrespective of immigration status. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 208, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1158). Although Congress later amended the statute to prevent individuals convicted of aggravated felonies from receiving asylum, *see* Immigration Act of 1990, Pub. L. No. 101-649, § 515, 104 Stat. 4978, the law governing asylum applications remained largely unchanged until the enactment of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996).

In its post-IIRIRA form, § 1158(a)(1) retains its original scope, stating that "[*a*]*ny alien* who is physically present in the United States . . . *irrespective of such alien's status*, may apply for asylum in accordance with this section." § 1158(a)(1) (emphasis added). A few statutory exceptions qualify this broad eligibility, barring asylum applications from individuals who can be resettled in another country, *see* § 1158(a)(2)(A), failed to timely apply, *see* § 1158(a)(2)(B), or previously were denied asylum, *see* § 1158(a)(2)(C). Section 1158(a)(2)(D) creates an exception to the exceptions in subsections (a)(2)(B) and (C), stating in relevant part that an

[1] Unless otherwise noted, all citations are to title 8 of the United States Code.

individual may make a second application for asylum notwithstanding a previous denial if he shows changed circumstances affecting his eligibility for asylum. *See* § 1158(a)(2)(D).

IIRIRA also revised the effect of reinstatement, the summary removal process whereby the government reinstates and executes an individual's previous removal order rather than initiating a new removal proceeding against him. Before IIRIRA, only a subset of individuals who illegally reentered the country were subject to reinstatement of their earlier removal orders; the rest were placed in ordinary removal proceedings, even on subsequent reentries. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33-35 (2006). In addition, individuals in the "limited class of illegal reentrants" subject to reinstatement could still "seek some varieties of discretionary relief" from their reinstated removal order. *Id.* at 34 With IIRIRA, however, Congress replaced the old reinstatement provisions with "one that toed a harder line," and "[u]nlike its predecessor, . . . applie[d] to all illegal reentrants, explicitly insulate[d] the [reinstated] removal orders from review, and generally foreclose[d] discretionary relief from the terms of the reinstated order." *Id.* at 34-35 (noting the availability of withholding of removal). This reinstatement bar, codified at § 1231(a)(5), states

> [i]f 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.

§ 1231(a)(5) (emphasis added). "[T]his chapter" refers to chapter 12 of title 8 of the U.S. Code, which contains both the asylum statute and reinstatement bar.

Consistent with this section, the Attorney General promulgated 8 C.F.R. § 1208.31(e),[2] which states in relevant part that "[i]f an asylum officer determines that an alien [subject to a reinstated removal order] has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a . . . [r]eferral to [an] Immigration Judge, *for full consideration of the request for withholding of removal only*." 8 C.F.R. § 1208.31(e) (emphasis added).[3] The notice published in the Federal Register stated in its summary that "[f]or persons subject to reinstatement, . . . the rule establishes a screening mechanism" similar to the one

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[2] The regulation was originally promulgated as 8 C.F.R. § 208.31(e), but the administrative regulations governing immigration proceedings were recodified in 2003 to reflect the transfer of the Immigration and Nationality Service's functions to DHS. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824 (Feb. 28, 2003). For convenience, we refer to the regulation as 8 C.F.R. § 1208.31(e) throughout this opinion.

[3] A separate regulation permits an individual subject to a reinstated removal order to seek CAT protection as well. *See* 8 C.F.R. § 1208.16(c)(4).

used in expedited removal proceedings. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (Feb. 19, 1999). The notice went on to explain that the new process was intended "to rapidly identify and assess" claims for withholding of removal and CAT protection made by individuals subject to reinstated removal orders and other forms of expedited removal to "allow for the fair and expeditious resolution of such claims without unduly disrupting the streamlined removal processes applicable to these aliens." *Id.* at 8479; *see also id.* at 8485 (discussing 8 C.F.R. § 1208.31 specifically). The notice further stated the agency's conclusion that such individuals, including "aliens subject to reinstatement of a previous removal order under [§ 1231(a)(5)]," were "ineligible for asylum" but "may be entitled to withholding of removal" or CAT protection. *Id.* at 8485. The notice identified a number of statutes giving the agency authority to promulgate regulations to govern asylum and withholding procedures, including § 1158. *See id.* at 8487 (listing the authorities for 8 C.F.R. Part 208 generally).

II. Discussion

As noted, the parties agree remand is appropriate on Perez's withholding of removal and CAT claims in light of intervening circuit precedent. The only disputed question is whether Perez is entitled to a remand on his asylum claim as well. We conclude he is not.

A. Exhaustion

At the outset, we reject the government's contention that Perez failed to exhaust his argument for asylum eligibility before the BIA. Although we generally lack jurisdiction to review a final agency order unless administrative remedies have been exhausted, *see Alvarado v. Holder*, 759 F.3d 1121, 1127 (9th Cir. 2014), exhaustion is not required where it would be futile to raise a particular issue before the agency. Here, the BIA rejected Perez's asylum claim under 8 C.F.R. § 1208.31(e), which bars individuals in reinstatement proceedings from applying for asylum. Because the BIA had no authority to disregard this regulation, exhaustion would have been futile. *See Coyt v. Holder*, 593 F.3d 902, 905 (9th Cir. 2010) ("Because the BIA has no authority to declare a regulation invalid, 'the exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation because of a conflict with a statute.'" (quoting *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1273 (9th Cir. 1996))); *Espinoza-Gutierrez*, 94 F.3d at 1273 (observing that an argument contesting the validity of an agency's own regulations will "necessarily . . . fall[] on deaf ears" because the BIA "simply has no authority to invalidate a regulation that it is bound to follow").

B. Asylum

Perez argues the asylum statute's language permitting "[a]ny alien" to apply for asylum "irrespective of such alien's status" unambiguously permits him to

apply for asylum notwithstanding his reinstated removal order. § 1158(a)(1). The government, in response, argues the reinstatement bar's statement that an individual subject to a reinstated removal order "is not eligible and may not apply for any relief under this chapter" unambiguously makes Perez ineligible to apply for asylum, a form of relief arising under the same chapter. § 1231(a)(5). The question is whether § 1158's permission to apply for asylum or § 1231(a)(5)'s denial of any relief falling within the same chapter governs the class of individuals who, like Perez, are subject to reinstated removal orders.

To answer this question of statutory interpretation, we follow the framework laid out in *Chevron*. "Under the first step, we determine 'whether Congress has directly spoken to the precise question at issue.'" *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010) (quoting *Chevron*, 467 U.S. at 842-43). If the intent of Congress is clear, our inquiry ends and we give effect to Congress' unambiguously expressed intent. *See id.* If, on the other hand, Congress has not spoken to a particular issue or the statute is ambiguous, we may consider the responsible agency's interpretation of the statutory scheme. "[I]f the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

In addressing this question, we are not writing on a clean slate. Three other circuits have already considered the interplay between § 1158 and § 1231. Each has concluded that individuals subject to reinstated removal orders may not apply for asylum relief. *See Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 491 (5th Cir. 2015) (relying on § 1231(a)(5)'s plain language, as well as relevant regulations and case law); *Herrera-Molina v. Holder*, 597 F.3d 128, 138-39 (2d Cir. 2010) (discussing § 1231(a)(5)'s text as well as relevant circuit precedent and regulations). Although we find these opinions persuasive in some respects, those circuits did not discuss § 1158(a)(1), but mentioned it only in passing, *see Ramirez-Mejia*, 794 F.3d at 490, or not at all, *see Jimenez-Morales*, 821 F.3d at 1310; *Herrera-Molina*, 597 F.3d at 138-39. Thus, although we reach the same conclusion as these other courts, we do so on somewhat different reasoning.

1. *Chevron* Step One

At step one of *Chevron*, we conclude Congress has not directly spoken to the interplay of § 1158(a)(1) and § 1231(a)(5). On the contrary, § 1158(a)(1) and § 1231(a)(5) are in apparent conflict. Section 1158 broadly grants "any alien" the opportunity to seek asylum, "regardless of such alien's status," subject only to a few exceptions not applicable here. Section 1231, by contrast, expressly bars aliens subject to reinstated removal orders from any relief under chapter 12, the chapter that includes asylum. In attempting to resolve

this apparent conflict, we begin with the language of the statute, reading it in context and giving undefined terms their ordinary meanings. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 283-84 (2011); *Synagogue v. United States*, 482 F.3d 1058, 1061-62 (9th Cir. 2007). "Our goal is to understand the statute 'as a symmetrical and coherent regulatory scheme' and to 'fit, if possible, all parts into a harmonious whole.'" *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1145 (9th Cir. 2013) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

Each party argues the plain language of § 1158 and § 1231(a)(5) can be harmonized by interpreting one section as establishing an absolute rule to which the other section must yield. Perez contends § 1231(a)(5) does not really bar "any relief" under chapter 12, whereas the government says § 1158(a)(1) does not really permit "any alien" to apply for asylum. "Read naturally, the word 'any' has an expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). But within a particular statute, "[a]mbiguity is a creature . . . of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'" (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974))).

We agree with the parties that although both subsections use absolute language, each is qualified in certain respects when read in context. The text of § 1158(a)(1) states that "[a]ny" alien may apply for

asylum "in accordance with this section," regardless of immigration status. § 1158(a)(1). The rest of § 1158, however, undercuts the breadth of that guarantee by including a series of exceptions preventing certain aliens from applying under specific circumstances. *See* § 1158(a)(2)(A)-(C). Section 1231(a)(5)'s text is perhaps stronger in stating that the reinstatement of a prior removal order precludes "any relief under this chapter." § 1231(a)(5). But our well-settled interpretation of § 1231(a)(5) recognizes that, notwithstanding the prohibition on "any relief," withholding of removal and CAT protection are available to individuals in reinstatement proceedings. *See Ixcot v. Holder*, 646 F.3d 1202, 1207 (9th Cir. 2011) ("Notwithstanding the seemingly absolute bar . . . aliens subject to [§ 1231(a)(5)] 'may seek withholding of removal'. . . ." (quoting *Fernandez-Vargas*, 548 U.S. at 35 n.4)); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 956 n.1 (9th Cir. 2012) (assuming CAT "constrains the Attorney General from removing aliens . . . notwithstanding" the language of § 1231(a)(5)). The Attorney General's regulations agree. *See* 8 C.F.R. § 1208.31(e) (allowing withholding of removal); 8 C.F.R. § 1208.16(c)(4) (allowing CAT protection); 8 C.F.R. § 214.14(c)(1)(ii) (allowing U Visas).[4]

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[4] The government suggested for the first time at oral argument that the two sections do not actually conflict if "relief" is understood as a term of art under the INA. It posits that, in barring any "relief," § 1231(a)(5) does not prevent individuals from seeking nondiscretionary forms of "protection" like withholding of removal and protection under CAT. Although one other circuit found this purported distinction persuasive, *see Ramirez-Mejia*, 794 F.3d at 489, we treat this argument as waived because any

The relevant question, however, is not simply whether the two provisions are absolute, but how Congress intended to harmonize them. If one subsection's text were clearly intended to take precedence over the other, our inquiry would be at an end. That *both* provisions are qualified in certain respects moves us no closer to a clear answer. Neither subsection gives an indication of how Congress intended to resolve a conflict between the two. We therefore turn to the other "traditional tools of statutory construction" in search of an answer. *See Chevron*, 467 U.S. at 843 n.9.

Both Perez and the government invoke the canon of *generalia specialibus non derogant* – the "principle that the specific governs the general" – to advance their preferred interpretation of the statutory scheme. *See Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 504 (2012). The canon provides that a "narrow, precise, and specific" statutory provision is not overridden by another provision "covering a more generalized spectrum" of issues. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976). When two statutes come into conflict, courts assume Congress intended specific provisions to prevail over more general ones, *see Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957), the assumption being that the more specific of two conflicting provisions "comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence," Antonin Scalia &

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textual distinction between the two terms was raised for the first time at oral argument, *see Harger v. Dep't of Labor*, 569 F.3d 898, 904 n.9 (9th Cir. 2009).

Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012).

As Scalia and Garner acknowledge, however, it is "[s]ometimes . . . difficult to determine whether a provision is a general or a specific one." *Id.* at 187. Here, the difficulty is that each subsection is specific in certain respects and general in others. Section 1158(a)(1) is more specific in that it speaks narrowly to the rules governing asylum applications. Conversely, § 1231(a)(5) is more specific in that it speaks directly to the particular subset of individuals, like Perez, who are subject to reinstated removal orders. Although the government's position may have a slight edge, both parties' arguments on this point are sensible. We conclude the general-specific canon does not help to *clearly* discern Congress's intent as to which section should take precedence here.

Nor does the legislative history of § 1158 and § 1231(a)(5) resolve this ambiguity. IIRIRA's amendments to the INA show Congress intended to add more detail to the existing asylum scheme while simultaneously expanding the scope and consequences of the reinstatement of an earlier removal order. Because neither party has identified any legislative materials speaking directly to the availability of asylum in reinstatement proceedings, however, we conclude the legislative history "is silent on the precise issue before us." *Chevron*, 467 U.S. at 862.

Perez and amici argue IIRIRA broadened the scope of § 1158 when it amended the statute slightly to

allow "[a]ny alien," rather than "an alien," to apply for asylum. But the rest of § 1158(a)(1)'s text reenacted the existing language permitting the alien, "regardless of such alien's status, to apply for asylum." *Compare* 8 U.S.C. § 1158(a) (1980) (permitting "an alien physically present in the United States, . . . , irrespective of such alien's status, to apply for asylum"), *with id.* § 1158(a)(1) (1996) (providing that "[a]ny alien who is physically present in the United States . . . , irrespective of such alien's status, may apply for asylum"). We are reluctant to assume Congress' intent is clear from this change alone, and must read this amendment in concert with the simultaneous enactment of § 1231(a)(5), which was a completely new addition in IIRIRA. In adopting both changes simultaneously, Congress effectively adopted "a clear limitation in one section" – § 1231(a)(5) – "without amending another section" dealing with the same subject matter. *See Ramirez-Mejia*, 794 F.3d at 490. This might suggest Congress assumed § 1231(a)(5)'s use of the phrase "any relief under this chapter" would most naturally be read as precluding asylum applications. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction. . . .").

In sum, when read in context and compared with each other, § 1158(a)(1) and § 1231(a)(5) reveal no clear congressional intent on how to resolve a claim, like Perez's, which places the two sections in conflict. Both provisions appear to establish broad and conflicting rules. On closer examination, however, it is apparent

that both provisions are qualified in certain respects – § 1158 by various textual exceptions, and § 1231(a)(5) by the government's practice and our precedent. Furthermore, we cannot say the general-specific canon clearly resolves the ambiguity in the statutory scheme.[5] We therefore conclude Congress has not spoken directly to whether individuals subject to reinstated removal orders may apply for asylum. We accordingly proceed to *Chevron*'s second step, where we ask whether the agency's interpretation of an ambiguous statute is a permissible construction of the statutory scheme. *See Chevron*, 467 U.S. at 843.

2. *Chevron* Step Two

Before we address the substance of the agency's interpretation, we must briefly discuss Perez and amici's argument that 8 C.F.R. § 1208.31(e) should not be accorded *Chevron* deference because the agency failed to adequately explain its reasoning when it

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[5] Perez also cites the "longstanding principle of construing any lingering ambiguities in [removal] statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Like the rule of lenity, this rule is a tiebreaker in the case of insoluble – or "lingering" – ambiguity. *Id.*; *see Lagandaon v. Ashcroft*, 383 F.3d 983, 993 (9th Cir. 2004). As we have held in the criminal context, however, "[t]he rule of lenity . . . does not prevent an agency from resolving statutory ambiguity through a valid regulation." *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1271-72 (9th Cir. 2001) (citing *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995)); *see also Mujahid v. Daniels*, 413 F.3d 991, 998-99 (9th Cir. 2005) (prioritizing the rule of lenity over *Chevron* deference "is tenuous at best and requires us to fill in more blanks than we are willing to do").

promulgated the regulation in 1999. We do not reach the merits of this argument because it is untimely.

a. Timeliness

Procedural challenges to agency rules under the Administrative Procedure Act are subject to the general six-year limitations period in the U.S. Code. *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 713-14 (9th Cir. 1991) (citing 28 U.S.C. § 2401(a)). Under *Wind River*, challenges to a "mere procedural violation in the adoption of a regulation or other agency action" must be brought within six years of the agency rulemaking, whereas challenges to "the substance of an agency's decision as exceeding constitutional or statutory authority" may be brought any time "within six years of the agency's application of the disputed decision to the challenger." *Id.* at 715-16. Whether Perez's challenges are timely therefore depends on whether they are procedural or substantive.[6]

Perez's central claim is that the Attorney General's refusal to consider his asylum application is

[6] Perez argues we should not rule on timeliness because the government did not raise it until supplemental briefing. We have given both parties "ample opportunity to address the issue" through supplemental briefing, and will exercise our discretion to decide it. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447-48 (1993). Although the government suggested in supplemental briefing that Perez's challenge is substantive, there is no "impropriety in refusing to accept what in effect [is the parties'] stipulation on a question of law." *Id.* at 448. In addition, the government noted that "[i]f this were . . . a procedural challenge . . . it would be time-barred."

based on an unreasonable interpretation of § 1158 and § 1231(a)(5). The parties agree this is a substantive challenge. Because it was brought within six years of the BIA's refusal to consider Perez's asylum application, it is timely. *See Cal. Sea Urchin Comm'n v. Bean*, ___ F.3d ___, 2016 WL 3739700, at *4 (9th Cir. July 12, 2016) (holding timely a challenge to "the present application of an earlier rule that allegedly contradicted the agency's statutory authority").

Perez and amici also argue that 8 C.F.R. § 1208.31 merits no deference at *Chevron* step two because the agency allegedly failed to explain its interpretation of § 1158 and § 1231 when it originally promulgated the regulation. This portion of their challenge, in other words, alleges "a procedural violation in the adoption of a regulation." *Wind River*, 946 F.2d at 714. We conclude that although Perez's arguments about the substance of 8 C.F.R. § 1208.31's interpretation are timely, his arguments about the alleged procedural errors in its promulgation are not. We therefore decline to consider them. *See also Sai Kwan Wong v. Doar*, 571 F.3d 247, 262-63 (2d Cir. 2009) (collecting cases).

The Supreme Court's recent decision in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), supports this approach. There, the Court held an agency regulation that represented a change in longstanding agency position was not entitled to *Chevron* deference because the agency had failed to adequately explain its change in position. The Court explained that a "basic *procedural* requirement[] of administrative rulemaking is that an agency must give adequate reasons for

its decisions." *Id.* at 2125 (emphasis added); *see also id.* ("*Chevron* deference is not warranted where the regulation is 'procedurally defective' – that is, where the agency errs by failing to follow the correct procedures in issuing the regulation."). "Of course," it noted, "a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule." *Id.* (citing *JEM Broad. Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994)).

JEM Broadcasting arose in a similar procedural posture to this case. The FCC had earlier promulgated a rule preventing review of certain license applications that included inaccurate or incomplete information. *See JEM Broad.*, 22 F.3d at 322-23. The FCC subsequently declined to review JEM's defective application by citing that rule, and JEM sought to "attack . . . the *procedural genesis* of the [rule] in the context of an *enforcement action*," by arguing the rule had been improperly promulgated without notice and comment years earlier. *Id.* at 324. The D.C. Circuit held JEM's challenge was untimely:

> JEM does not claim . . . that the "hard look" rules are unconstitutional, that they exceed the scope of the FCC's substantive authority, or . . . that the rules are premised on an erroneous interpretation of a statutory term. . . .
>
> [C]hallenges to the *procedural lineage of agency regulations*, whether raised by direct appeal . . . or as a defense to an agency enforcement proceeding, will not be entertained outside the . . . period provided by statute.

Id. at 325 (quoting *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1040 (D.C. Cir. 1991)). Although it recognized that "some parties – such as those not yet in existence when a rule is promulgated" – would "never . . . have the opportunity to challenge the procedural lineage of rules that are applied to their detriment," the court concluded "the law countenances this result because of the value of repose." *Id.* at 326. We have reached the same conclusion. *See Wind River*, 946 F.2d at 715 ("The government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure."); *see also Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1129 (9th Cir. 1999) (noting a limitations period on procedural challenges is necessary "so that regulations are not indefinitely subject to challenge in court").[7]

In the absence of binding contrary authority, we apply the approach required by *Wind River* and approved by the Supreme Court in *Encino Motorcars* to

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[7] Perez also argues his challenge is timely because the agency "fail[ed] to put aggrieved parties on reasonable notice of the rule's content." *JEM Broad.*, 22 F.3d at 326. We disagree. We noted in *Wind River* that "'[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.'" 946 F.2d at 714 (alteration in original) (quoting *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990)). Here, the notice published in the Federal Register was sufficient to inform an interested party the regulation created a streamlined system for assessing claims from individuals in reinstatement proceedings and that the agency viewed such individuals as ineligible for asylum. *See* 64 Fed. Reg. at 8485, discussed above at pp. 9-10.

conclude Perez's procedural challenge to 8 C.F.R. § 1208.31(e) falls outside the limitations period. We therefore move on to determine whether 8 C.F.R. § 1208.31(e) is a permissible construction of the statute under *Chevron* step two.

b. The Chevron Step Two Inquiry

At step two of *Chevron*, we must "accept the agency's construction of the statute" so long as that reading is reasonable, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X Internet Servs.*, 545 U.S. at 980. Deference "is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)). With these principles in mind, we consider whether 8 C.F.R. § 1208.31(e), which prevents individuals subject to reinstated removal orders from applying for asylum but permits them to seek withholding of removal, is a reasonable interpretation of § 1158 and § 1231. We conclude it is.[8]

[8] Perez and amici argue 8 C.F.R. § 1208.31(e) does not merit *Chevron* deference because the agency failed to exercise its interpretive authority at all and treated § 1231(a)(5) as unambiguous. They therefore suggest we should remand to the agency under the rule expressed in *Negusie v. Holder*, 555 U.S. 511 (2009), and *Gila River Indian Community v. United States*, 729 F.3d 1139 (9th Cir. 2013). We reject this suggestion. The government's argument on appeal that the statute is unambiguous does not tell us how the

First, the regulation is consistent with a reasonable judgment that § 1231(a)(5) is a more specific provision than § 1158, even if not conclusively so, and is therefore "more deserving of credence" when the two provisions conflict. Scalia & Gardner, *supra*, at 183. As discussed, both parties advance reasonable arguments for why the canon favors their interpretations of the statutory scheme. At step two, however, "we are not deciding between two plausible statutory constructions; we are evaluating an agency's interpretation of a statute under *Chevron*." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 492 (9th Cir. 2007) (en banc). It was not unreasonable for the agency to conclude § 1231(a)(5)'s prohibition on "any relief under this chapter" forecloses individuals from applying for asylum relief.

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agency viewed the statute when it initially promulgated the regulation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (noting appellate counsel's "convenient litigating position" is not entitled to deference). Rather, agency action rises or falls on the agency's own contemporaneous reasoning, and where we have remanded under *Negusie* the administrative record has more clearly shown that "the agency misapprehended the clarity of the statute" and "mistakenly derermine[d] [sic] that its interpretation [was] *mandated* by plain meaning, or some other binding rule," *Gila River*, 729 F.3d at 1149 (emphasis added). The administrative history does not discuss the specific language of the asylum statute, but neither does it suggest the agency saw § 1231(a)(5) as compelling the regulation's particular approach to asylum, withholding of removal or CAT protection. On the contrary, the agency's explanation shows it applied its expertise by crafting an expedited screening process and balancing the fair resolution of claims for relief from removal against Congress' desire to provide for streamlined removal of certain classes of individuals, including those subject to reinstated removal orders. *See* 64 Fed. Reg. at 8485, discussed above at pp. 9-10.

Indeed, the other circuits to consider this issue have concluded it does. *See Jimenez-Morales*, 821 F.3d at 1310; *Ramirez-Mejia*, 794 F.3d at 490; *Herrera-Molina*, 597 F.3d at 138-39.

Second, the agency's approach is consistent with Congress' intent in IIRIRA that the reinstatement of a previous removal order would cut off certain avenues for relief from removal. Reinstatement was designed to be "a different and far more summary procedure" than regular removal. *Morales-Izquierdo*, 486 F.3d at 491. To that end, Congress intended § 1231(a)(5) to subject more individuals to reinstatement proceedings and to "limit[] the possible relief from a removal order available to them." *Fernandez-Vargas*, 548 U.S. at 33; *see also Ramirez-Mejia*, 794 F.3d at 490. Forbidding asylum applications from individuals in reinstatement proceedings, although harsh, is in keeping with this approach. *See Barnhart v. Walton*, 535 U.S. 212, 219 (2002) (upholding an agency construction that made "considerable sense in terms of the statute's basic objectives"). Furthermore, the agency's interpretation is a reasonable construction of the legislative history we discussed above, which is at least consistent with the view that, in enacting § 1158(a)(1) and § 1231(a)(5) together, Congress assumed the phrase "any relief under this chapter" would include the asylum provision in the statute. *See Chevron*, 467 U.S. at 862 (noting that when legislative history "as a whole is silent" on the "precise issue" before the court, it may nonetheless be "consistent" with a particular interpretation of the statute). Had Congress intended to include a carve-out

for asylum relief, it could have done so explicitly when it wrote § 1231(a)(5) or revised § 1158.

There are nonetheless some weaknesses in the agency's approach, but they are not fatal to its interpretation. We have already noted that, notwithstanding § 1231(a)(5)'s bar on "any relief" under chapter 12, the Attorney General has interpreted that section to permit individuals to seek withholding of removal, CAT protection and U Visas – all forms of relief that, like asylum, arise under chapter 12. *See* 8 C.F.R. §§ 214.14(c)(1)(ii), 1208.16(c)(4), 1208.31(e). The government suggests this policy draws a reasonable line between discretionary and nondiscretionary relief, and the Supreme Court acknowledged "the practical import of th[at] distinction," albeit in a slightly different context. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987) (holding it was "not . . . at all anomalous" that asylum applicants and applicants for withholding were governed by different standards of proof and stating there was "no basis for the . . . assertion that the discretionary/mandatory distinction has no practical significance").

This explanation, however, fails to account for why, under the Attorney General's regulations, individuals in reinstatement are permitted to apply for U Visas – a form of discretionary relief – but not for asylum. It may be relevant that U Visas were created in 2000, four years after IIRIRA implemented the revised asylum statute and the reinstatement bar. *See* Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464. In concluding

that the Attorney General's approach in 8 C.F.R. § 1208.31(e) is reasonable under *Chevron*, however, we note the Supreme Court apparently found nothing inconsistent between the "absolute terms" by which § 1231(a)(5) bars relief and the government's decision to make certain forms of relief from removal available in reinstatement proceedings. *See Fernandez-Vargas*, 548 U.S. at 35 n.4 ("Notwithstanding the absolute terms in which the bar on relief is stated, even an alien subject to [§ 1231(a)(5)] may seek *withholding of removal* under [§ 1231(b)(3)] . . . , or under 8 C.F.R. §§ 241.8(e) and 208.31. . . ." (emphasis added)); *see also Jimenez-Morales*, 821 F.3d at 1310 (citing *Fernandez-Vargas*, 548 U.S. at 35 n.4); *Herrera-Molina*, 597 F.3d at 139 n.8 (same).[9] Although the availability of asylum is an important component of our immigration law, it is not unreasonable to conclude Congress intended to bar this form of relief to persons in reinstated removal proceedings while preserving relief for individuals able to meet the higher standards for withholding of removal and CAT relief. *See Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016) (denying rehearing en banc) ("Even if withholding of removal and CAT protection are slightly less potent remedies than asylum, the difference may well be consistent with Congress's

[9] In *Fernandez-Vargas*, the Supreme Court parenthetically described 8 C.F.R. §§ 241.8(e) and 208.31 as "raising the possibility of asylum." 548 U.S. at 35 n.4. This appears to have been an oversight; although both regulations refer to "asylum officers," they clearly permit only withholding from removal. Indeed, the main text of the Court's footnote correctly refers only to "seek[ing] withholding of removal" under those regulations.

intent to penalize illegal reentry. We need not justify the difference, but we note possible reasons for it.").

In addition, although the Attorney General's interpretation makes sense as applied to an individual who has already had an opportunity to seek asylum upon his initial entry to the United States, it does not account for individuals in reinstatement proceedings who may have compelling claims based on new circumstances arising subsequent to their previous removal proceedings. The Attorney General's interpretation of § 1231(a)(5) may have dire humanitarian consequences for individuals in reinstatement who seek relief from removal, either because they were previously denied asylum and are now subject to changed circumstances or because they were improperly denied an opportunity to seek asylum during their earlier removal from the United States. However, the government has discretion to forgo reinstatement and instead place an individual in ordinary removal proceedings. *See Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013). Once in ordinary proceedings, the individual can raise an asylum application without implicating § 1231(a)(5)'s bar. The government has followed this procedure before, *see, e.g.*, *Maldonado Lopez v. Holder*, No. 12-72800 (9th Cir. dismissed Feb. 4, 2014), and we assume it will continue to exercise that discretion in appropriate cases, such as those presenting strong humanitarian concerns. To the extent this consideration "really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open

by Congress," it cannot invalidate the agency's interpretation at *Chevron*'s second step. *See Chevron*, 467 U.S. at 866.

In sum, despite our reservations, we are not persuaded that 8 C.F.R. § 1208.31(e)'s interpretation of § 1231(a)(5) and § 1158(a)(1) is an unreasonable construction of the statute. *See Chevron*, 467 U.S. at 843-44 It is consistent with the broad language of § 1231(a)(5), with Congress' intent to make reinstatement an expedited process for removing individuals who reenter the United States and with the overall legislative history of both provisions.

Perez's remaining arguments to the contrary are not persuasive. First, Perez and amici argue the Attorney General's interpretation of § 1231(a)(5) is contrary to the structure of § 1158 itself. They focus in particular on § 1158(a)(2)(D), which provides that an applicant's second asylum application "may be considered" if he shows changed circumstances materially affecting his eligibility for asylum. Perez and amici argue that if § 1231(a)(5) categorically forbids an individual in reinstatement from applying for asylum, § 1158(a)(2)(D) is superfluous. This argument incorrectly assumes that any individual to whom § 1158(a)(2)(D) applies will *necessarily* be subject to a reinstated removal order. Not so. The reinstatement of a prior removal order is neither "automatic" nor "obligatory," and the Attorney General has discretion not to reinstate an individual's earlier removal order and instead place him in ordinary removal proceedings. *See Villa-Anguiano*, 727 F.3d at 878 (quoting *Alcala v. Holder*, 563 F.3d 1009,

1013 (9th Cir. 2009)). If the Attorney General elects to place an individual who previously applied for and was denied asylum into ordinary removal proceedings upon his reentry to the United States, § 1158(a)(2)(D) is not superfluous. On the contrary, it affirmatively authorizes a second asylum claim in light of his changed circumstances – something that would ordinarily be precluded by § 1158(a)(2)(C).[10]

Second, Perez and amici argue the asylum statute is a "closed universe" unaffected by other portions of the INA. In other words, they suggest § 1158's enumerated exceptions for eligibility to apply for asylum are exhaustive. Amici note the asylum scheme makes no reference to § 1231(a)(5), and suggest § 1158 was intended to govern asylum applications independent of the rest of the INA. The Attorney General, however, is not unreasonable for adopting a contrary view. None of the various provisions for relief under the INA explicitly refers to § 1231(a)(5), but § 1231(a)(5) specifies "any relief under this chapter." No explicit cross-reference to every affected section is necessary for us to conclude that "any relief under this chapter" can reasonably be read to preclude applications for asylum, a form of relief arising under chapter 12.

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[10] Perez is a first-time asylum claimant, and alleges no circumstances that materially changed between his removal from the United States and his subsequent reentry. We therefore have no opportunity here to determine how § 1158(a)(2)(D) might affect § 1231(a)(5) in a case where those two provisions are actually in conflict.

For the foregoing reasons, we hold that 8 C.F.R. § 1208.31(e) is a reasonable interpretation of the interplay between § 1158 and § 1231, and we must therefore defer to it under *Chevron*. In keeping with that regulation, Perez is not eligible to apply for asylum under § 1158 as long as he is subject to a reinstated removal order.

C. Withholding of Removal and CAT Relief

After the BIA concluded Perez had not shown past persecution on account of his membership in a particular social group, we held witnesses who testify against gang members may constitute a "particular social group." *See Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc). In addition, after the BIA rejected Perez's CAT claim because there was no evidence the Guatemalan government sanctioned his abuse by police, we held that local officials' acquiescence in torture is sufficient to entitle an applicant to CAT relief, even if the national government did not acquiesce in the treatment. *See Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013). In light of these intervening authorities, the parties agree we should remand on Perez's claims for withholding of removal and CAT relief.

III. Conclusion

We remand for the agency to reconsider Perez's applications for withholding of removal and CAT protection in light of *Henriquez-Rivas v. Holder*, 707 F.3d

1081 (9th Cir. 2013) (en banc), and *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013). We affirm the BIA's conclusion that it could not consider Perez's application for asylum relief in light of his reinstated removal order.

PETITION GRANTED IN PART AND DENIED IN PART; REMANDED TO THE BIA.

Each party shall bear its own costs on appeal.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: FEB -7 2013

File: A200 282 241 – Florence, AZ

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.

[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

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).

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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)(1). 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.

/s/ Roger Pauley
FOR THE BOARD

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. Gonzalesz* 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 Respondent's father was told by one of the public officials of the town that the town leaders or public officials had created a list and a death squad to kill the persons on that list and that somebody in the city administration or city council told the Respondent's father that the Respondent's name was on that list, along with a cousin.

Even if the cousin was later killed, there's no evidence that the cousin was killed because his name was on any list, that he was killed by any such death squad,

and there's no other independent evidence to indicate that that list existed or that the father was told about the list by city officials or otherwise. The Respondent's father was still alive and still living in that town, and the Respondent said he asked his father to write a letter about it, but his father refused, meaning that this Court and the Respondent are not in possession of any independent corroborating evidence under the REAL ID Act to show that the Respondent was on a list put together to be assassinated by members of a death squad, and this Court does not believe, and under *Matter of D-R-*, makes an inference that the Respondent's testimony, even if he did not completely fabricate it, is implausible or a misinterpretation that is not reasonable for this Court to assume or to agree with that a public official would admit to the father of a potential murder victim that the public officials had conspired among themselves to hire a group of murderers to go kill civilians, even if some 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 [sic] 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 [sic] 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~~A~~nd 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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONY ESTUARDRO [sic] PEREZ-GUZMAN, AKA Ronnie Perez-Guzman, Petitioner, v. JEFFERSON B. SESSIONS III, Attorney General, Respondent.	No. 13-70579 Agency No. A200-282-241 ORDER (Filed Apr. 26, 2017)

Before: FISHER, M. SMITH and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges M. Smith and Nguyen have voted to deny the petition for rehearing en banc and Judge Fisher has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONY ESTUARDRO PEREZ-GUZMAN, AKA Ronnie Perez-Guzman, Petitioner, v. LORETTA E. LYNCH, Attorney General, Respondent.	No. 13-70579 Agency No. A200-282-241 ORDER (Filed Apr. 20, 2016)

The parties are ordered to submit supplemental briefs addressing the relevance of 8 C.F.R. § 208.31(e) to this case. The parties should address whether that regulation represents the agency's authoritative interpretation of the interplay between 8 U.S.C. § 1158 and 8 U.S.C. § 1231(a)(5), and whether it is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

These supplemental briefs shall be no longer than 5 pages or 1,400 words and shall be submitted no later than 7 days after entry of this order. Parties shall file the supplemental briefs electronically without submission of paper copies.

FOR THE COURT:

MOLLY C. DWYER
Clerk of Court

By: Omar Cubillos
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONY ESTUARDRO PEREZ-GUZMAN, AKA Ronnie Perez-Guzman, Petitioner, v. LORETTA E. LYNCH, Attorney General, Respondent.	No. 13-70579 Agency No. A200-282-241 ORDER (Filed Jun. 20, 2016)

Before: FISHER, M. SMITH and NGUYEN, Circuit Judges.

The parties are ordered to submit supplemental briefs addressing:

1. The effect, if any, of *Encino Motorcars, LLC v. Navarro*, No. 15-415 (U.S. June 20, 2016), on petitioner's argument that 8 C.F.R. § 1208.31 should not be accorded *Chevron* deference. The government should also address the petitioner's earlier suggestion in supplemental briefing that the agency's reasoning was not adequately explained.

2. Whether petitioner's challenge to the regulation is timely under *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991), and *JEM*

Broadcasting Co. v. FCC, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (cited with approval in *Encino Motorcars*).

Amici are invited to submit a supplemental brief on these issues as well. The briefs shall be no longer than 10 pages or 2,800 words and shall be submitted no later than 14 days after the entry of this order.

These supplemental briefs should be filed electronically. Submission of paper copies in addition is optional.

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 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

[1] So in original. Probably should be "sections".

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.

8 U.S.C. § 1231

Detention and removal of aliens ordered removed

(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

[1] So in original. Probably should be "subparagraph (B)".

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).

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[2] So in original. Probably should be followed by a closing parenthesis.

(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

[3] So in original. Probably should be subsection "(e)".

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.

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[4] So in original. Probably should be "1225(b)(1)".

(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.

8 C.F.R. § 1208.31

Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(a) *Jurisdiction.* This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. The Service has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) *Initiation of reasonable fear determination process.* Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 1241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) *Interview and procedure.* The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable

fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on

account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

(d) *Authority.* Asylum officers conducting screening determinations under this section shall have the authority described in § 1208.9(c).

(e) *Referral to Immigration Judge.* If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I-863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 1208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I-898, Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien shall indicate whether he or she desires such review.

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Form I-863. The record of determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Form I-863 with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to the Service for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit Form I-589, Application for Asylum and Withholding of Removal.

(i) The immigration judge shall consider only the alien's application for withholding of removal under § 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies to the Board of Immigration Appeals. If the alien or the Service appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under § 1208.16.