I) Immigration and the Constitution
   a) Federal Power
      i) Power to regulate immigration is exclusively Federal (not state)
   b) Sources of the Federal Powers
      i) The Enumerated Powers
         (1) The Commerce Clause – Art. I § 8 Cl. 3
         (2) Migration or Importation Clause – Art. I § 9 Cl. 1
         (3) The Naturalization Clause – Art. I § 8 Cl. 4
         (4) The War Clause – Art. I § 8 Cl. 11
      ii) Implied Constitutional Powers
         (1) *Chae Chae Ping* – Plenary power over Immigration
            (a) Congress may exclude particular class of aliens
            (b) *Ekiu* – No PDP right for alien to enter US
               (i) *Shaughnessy* – LPR has a right to a hearing, but one who leaves
                  without permission does not retain the right upon return
               (ii) *Landon* – Returning LPR’s are entitled to PDP if they are not gone
                  too long
      c) Limits to the Federal Immigration Power
         i) Many qualifications to plenary power doctrine
            (1) *Harisades* – Rational basis review for federal laws
               (a) Substantive Due Process
               (b) 1st Amendment – May apply to all (unclear)
               (c) Ex Post Facto – Only applies to criminal
            (2) *Zadvydas* – Only reasonable detention (6 mos)

II) Immigration Priorities
   a) Immigrants Exempt from Quotas
      i) Immediate Relatives
         (1) Immediate Relatives of US Citizens
            (a) Children – Unmarried & Under 21 – 101(b)(1)
               (i) Step Children
                  1. 101(b)(1)
                     a. (A) – Born in wedlock
                     b. (B) – Stepchild (same with sibs)
                        i. Child is not yet 18 at time of marriage AND
                        ii. Marriage continues to exist OR
                        iii. Family relationship continues to exist
                     c. (C) – Legitimate 101
                        i. Child legitimated under father or child’s domicile AND
                        ii. Legitimation before child reaches 18 AND
                        iii. Child in legal custody of legitimating parent
                     d. (D) – Illegitimate
                        i. Okay if there was a BF parent/child relationship
            (b) Parents – Citizen must be 21 – 201(b)(2)(A)(i)
            (c) Spouses – Must meet formal and legal requirements
               (i) Sham Marriages
                  1. Bilateral – Both deceive INS
2. Unilateral – Alien deceives spouse
   (ii) **Conditional Permanent Residence** – 216(a)(1)
       1. Applies to marriages less than 2 years old – 216(b)(1)
          a. Affirmative petition and interview within 90 days of 2nd anniversary to remove condition – 216(d)(2)(B)
             i. Valid, Ongoing, Not Fraudulent, No Fee – 216(d)(1)(A)
       2. Three Waivers Available – 216(c)(4)
          a. Extreme Hardship to alien or dependent (A)
          b. Battered Woman or Child (B)
          c. Terminated For Cause (C)
   (iii) No marriage while awaiting deportation – 204(g)
       1. May be waived if you leave for 2 years or prove real with clear and convincing evidence

b) **Immigrants Subject to the General Quotas**
   i) **Family-Sponsored Immigrants**
      (1) Four Preference Groups (in descending order)
          (a) 1 - Unmarried Sons and Daughters of citizens
          (b) 2 - Spouses and unmarrieled sons/daughters of LPR
             (i) 2A – Spouses and “Children”
             (ii) 2B – Over age 21 Sons and Daughters
          (c) 3 - Married Sons and Daughters of citizens
          (d) 4 - Siblings of over age 21 citizens
      (2) Status Change – Priority date remains same, preference category changes
   ii) **Employment-Based Immigrants**
      (1) Five Preference Groups
          (a) **Superstars** – 203(b)(1)
             (i) (A) Extraordinary ability in science, art, education, business, sports
                 1. Very top of the field
             (ii) (B) Outstanding professors and researchers
             (iii) (C) Certain multinational executives and managers
          (b) **Stars** – 203(b)(2)
             (i) Two Prongs
                 1. (A) Members of professions holding advanced degrees/equivalent
                 2. (B) Exceptional ability in sciences, arts, or business
             (ii) Generally requires applicant to have job offer and labor certificate
                 1. INS may waive requirement if it would benefit the entire nation
          (c) **Others** – 203(b)(3)(C) [i, ii, iii is corresponding]
             (i) Three Prongs
                 1. Capable skilled immigrants/ No qualified US worker available
                 2. Professionals/Baccalaureate degrees/Members of Profession
                 3. Capable unskilled immigrants/No qualified US available (10K max)
             (ii) Labor Certification Required–No national interest waiver provision
          (d) **Certain Special Immigrants** – 203(b)(4)
             (i) 101(a)(27) employees – Religious and Government Workers
(e) **Immigrant Investors** (Employment Creation) – 203(b)(5)

(i) Three Requirements – 203(b)(5)(A)
   1. (i) - Establish new commercial enterprise in US
   2. (ii) – Active process of investing $1mil. (need not be up front)
   3. (iii) – Employ at least 10 citizens or LPR’s

(ii) **Conditional Permanent Residents**
   1. Sham Investment - Invest money, then withdraw funds
   2. 216A – Attorney General may terminate resident status
      a. 90 day petition for removal of status (see marriage & supp)

(2) **Labor Certification** – 212(a)(5)(A)

(a) Necessary for 2nd and 3rd Preference

(i) Check Schedules
   1. **Schedule A**– Pre-certified/Certification automatic/Bypass DOL
   2. **Schedule B**– Don’t meet criteria/Waiver necessary

(ii) If Not On Schedule A, file to DOL for application/waiver(if on B)

1. Employer shows not successful in getting US workers
   a. No US able, willing qualified available at time/place AND
   b. No US workers will be adversely affected
   c. No unduly restrictive requirements
      i. More than normal for the job
      ii. Exceed requirements in Dictionary Occupational Titles
      iii. Includes foreign language
      iv. Involves combination of duties
      v. Requires worker to live on premises
   d. Business Necessity
      i. Requirements bear reasonable relationship to Job
      ii. Requirements essential to perform job duties

2. Certifying Officer Adjudicates
   a. If requirements met – granted
   b. If not met – Notice of Findings issued
      i. Employer has 35 days to cure defect

(b) Worker need only work at job for reasonable time

(iii) **Diversity Immigrants**

(1) Selection – Up to 55,000 diversity immigrants

(a) Each year AG totals all state’s previous 5 year’s FS/EB/IR immigrants
   (i) If a state’s total is less tha 50,000 – Low Admission State/Eligible

(b) AG divides world into 6 regions classifying as high or low admission
   (i) Low Admission if less than 1/6 of world’s previous 5 year total

(c) AG figures out the % from High Admission Regions in past 5 years
   (i) Low Admission regions receive that (c) % of visas

   1. Visas allocated by proportion of population of low admission states in low admission regions
   2. 203(e)(2) – Recipients are chosen by lottery
   3. No more than 7% may go to any single state
   4. Recipients must meet education or work experience requisites

(c) **Selecting Individual Applicants**
i) Priority Date established on first in time basis
   (1) Visa Bulletin – How long current recipients had to wait
ii) Countries limits and preference limits are prorated – 202(e)

III) Nonimmigrant Priorities – 101(a)(15)
   a) Treaty Traders and Investors – 2 years with possibility of unlimited extensions
      i) E-1 – Treaty Traders – Must have intent to leave upon termination of status
      ii) E-2 – Investors – Must have intent to leave upon termination of status
   b) Temporary Workers
      i) H-1B – Specialty Occupation
         (1) Requirements 214(i)(1):
            (a) Application of Highly Specialized knowledge
            (b) Bachelor’s degree or higher
         (2) 6 year/65,000 max (may come with hope of staying longer) – 214(g)(4)
         (3) Labor Condition Application (LCA) – 212(n) – Employer Attests:
            (a) Paying prevalent wage
            (b) Working conditions of similarly employed not adversely affected
            (c) No strike or lockout
            (d) Employee has notified existing employees of filing
      ii) O – Athletes, Entertainers, Arts, Sciences, Education, and Business
         (1) Must have extraordinary ability shown by national/international acclaim
         (2) 3 year stay with possible 1 year extensions
         (1) P – 1 - Internationally recognized entertainers/athletes in specific events
            (a) Athletes admitted up to 5 years, with possible 5 year extension
            (b) Other entertainers are 1 year w/ 1 year increment extensions
         (2) P - 2 - Wish to enter in reciprocal exchange programs
         (3) P - 3 - Would provide programs that are culturally unique
            (a) P-2 and P-3 admitted for up to 1 year w/ 1 year increment extensions
   c) Lesser Skills and Shortages – H-2
      i) Two Prongs
         (1) H2A – Agricultural worker who has no intention of staying
            (a) Employers must get certification that no workers are found
         (2) H2B – Other temporary laborer with no intention of staying
            (a) Employers for H2B must apply for temporary Labor Certification
            (b) Stay for one year with possibility of one year extension
   d) Educational Categories
      i) F-1 – Bona fide full time student at established school w/ no intent to stay
         (1) Not available for public elementary school students – 212(m)(1)(A)
         (2) Allowed in secondary school for 1yr / Must reimburse city – 212(m)(1)(B)
         (3) Attorney General required to collect information on every foreign student
         (4) Admitted for “duration of status” estimated by school official
            (a) May obtain extension for compelling reason and INS permission
         (5) Eligibility
            (a) Sufficient Funds – 212(a)(4)
            (b) 20 hours of on campus employment / 40 hours during vacations
               (i) Off campus when unforeseen events make economically necessary
(ii) 20 hours off campus after 1 year w/good academics/employer need

ii) M-1 – Vocational or other Nonacademic Study

iii) J-1 – Exchange Visitors – Temporary stay for education related goals
(1) Examples
   (a) Camp Counselors – Over age 18 and several other requirements
   (b) Au Pairs – Comes to live with host/provide child care/attend college
(2) Duration of Stay is case-by-case
(3) Program must be approved by DOS
(4) Applicant must be sponsored by Government Agency
(5) 212(e) – Can’t come back until returning home for 2 years if $ from either gov’t
   (a) Indirect funding from Government may not be counted if de minimis
   (b) Waiver for exceptional hardship, public interest, or persecution
      (i) Get “No Objection” Letter from Own Country

   e) Tourists
      i) Types
         (1) B-1 – Business – no intention of abandoning
         (2) B-2 – Pleasure – no intention of abandoning
      ii) Six month – one year authorized stay; extensions may be granted
      iii) Most common ground for denial is that the person is likely to stay forever
      iv) Tourist visa not catchall category – Can’t come for pleasure and stay to study
      v) Absolute prohibition on employment

   f) Fiances – K-1
      i) 214(d) requirements
         (1) Met in two-year period preceding filing
         (2) Bona Fide intention to marry AND
         (3) Will marry within 90 days of arrival
      ii) K(ii) – Spouses of citizens may enter while their papers are processing

   g) Victims of Trafficking – T
      i) Is or has been a victim of international trafficking – In US
      ii) If 15 years or older, has complied with reasonable help in investigation
      iii) Alien would suffer extreme hardship upon removal
         (1) Involving unusual and severe harm
      iv) 5000/year limit – may adjust to permanent status after 3 years

   h) Victims of Abuse – U
      i) Substantial criminal or mental abuse as a result of criminal activity
      ii) Alien has information concerning the criminal activity
      iii) Criminal activity violated the laws of the US or occurred in the US
      iv) Immediate relatives may stay in order to avoid extreme hardship
      v) 10,000 per year limit – may adjust to permanent status after 3 years

   i) Long Divided Families – V
      i) LPR’s wife and kids may wait in US for priority if petitioned by 12/21/2000
      ii) Must have been waiting three years
      iii) Employment permitted – No numerical limits
      iv) Adjustment to permanent status is contemplated

   j) General Nonimmigrant Problem – Intent To Remain Permanently
i) Most nonimmigrant categories require person sought to remain temporarily
   (1) Dual Intent
      (a) Intend to leave, but will stay if offered
      (b) Burden on INS to prove intention was/is to stay

ii) 248 “Change” of Nonimmigrant Status
    (1) Must obtain favorable INS discretion
       (a) Ineligible:
          (i) Violation of 212(a)(9)(B)(i) – Unlawfully present for 180 + days
          (ii) C, D, K, S Immigrants
          (iii) J nonimmigrants who received medical education or training
          (iv) J nonimmigrants subject to 2 year foreign residence requirement
              that did not receive a waiver (unless changing to A or G)

iii) Extend Stay
     (1) Not available to those that violate terms of their existing stays
     (a) Exception: Extraordinary Circumstances

IV) Exclusion Grounds and Waivers
   a) Grounds Related to Immigration Control
      i) 212(a)(7) Preservation of Integrity of Documents
         (1) Immigrants - Inadmissible
            (a) Not in possession of valid visa, reentry permit or other document OR
            (b) Not in possession of a visa in compliance with [the way to get a visa]
         (2) Nonimmigrants - Inadmissible
            (a) Not in possession of a valid passport OR
            (b) Not in possession of a visa
      ii) 212(a)(6) Illegal Entry and Immigration Violators
          (1) Present without being admitted, paroled, wrong time, wrong place
             (a) Inadmissible
          (2) Failure to attend removal proceedings
             (a) Inadmissible for 5 years from time that they departed or were removed
          (3) 212(a)(6)(C) Misrepresentation
             (a) Fraud, Willful Representation of a Material Fact, Seeks (or Sought):
                (i) Visa, Other Document, Admission, or other Benefit
                    1. Inadmissible – Waiver 212(i)
             (4) Stowaways – Inadmissible
             (5) Smugglers – Inadmissible
             (6) Fraud Violation Penalties – Inadmissible
             (7) Violation of Student Nonimmigrant Visa Terms – Inadmissible
      iii) 212(a)(9) Aliens Previously Removed
          (1) 212(a)(9)(A) – Removed at Entry (Expedited or normal)
             (a) Inadmissible for 5 years
          (2) 212(a)(9)(B) - Aliens Unlawfully Present
             (a) 180 days to 1 year (continuous unlawful presence)
                (i) Voluntarily departed BEFORE commencement of proceeding
                   1. Inadmissible for 3 years from the time of departure or removal
             (b) 1 Year or More (continuous unlawful presence)
                (i) Inadmissible for 10 years
(3) **Unlawful Presence** – Overstay OR Present without having been admitted
   (a) Can’t be unlawfully present before turning 18 years old
   (b) Time from issuance of Notice to Appear to issuance of Removal Order
      (i) Still unclear on whether this counts – Probably Does
(4) **Waiver** – Extreme Hardship available for spouse or kid of citizen or LPR
(5) **Tolling of Extension/Change of Status Application for Good Cause**
   (a) Lawfully Admitted alien
   (b) Nonfrivolous application submitted before the date of expiration AND
   (c) Not employed without authorization while application was pending

iv) **212(a)(9)(C) Unlawfully Present After Previous Immigration Violations**
   (1) Alien who has been present for aggregate of more than 1 year OR
      (a) Inadmissible forever upon trying to reenter unlawfully
   (2) Alien who has been removed
      (a) Inadmissible forever upon trying to reenter unlawfully

b) **212(a)(3) Political and National Security Grounds**
i) **212(a)(3)(A) Security and Related Grounds** - Inadmissible
   (1) Espionage, Sabotage, other unlawful activity (ejusdem generis)
   (2) Any activity where the purpose is:
      (a) Opposition to or overthrow of the Government by force, violence, unlawful means

ii) **212(a)(3)(B) Terrorist Activity** – Inadmissible
   (1) Attorney General or Consular Officer believes:
      (a) Engaged, likely to engage, incited, representative, member
      (b) Used position of prominence to endorse, spouse or child of
         (i) Exception – Spouse or child that didn’t know or have reason to

iii) **212(a)(3)(C) Foreign Policy** - Inadmissible
   (1) Secretary of State has reason to believe would have
      (a) “Adverse Foreign Policy Consequences for the United States”
         (i) Exception – Officials or Candidates for Office
         (ii) Exception – Beliefs that would be lawful in the US
            1. Unless Colin Powell personally determines admission would compromise compelling US foreign policy interest

iv) **212(a)(3)(D) Membership in Totalitarian Party**
   (1) **Immigrant** “Is or has Been” Member of Communist or Other Totalitarian Party
      (a) Exception – Involuntary, Under age 16, Operation of Law, For purpose of obtaining food, rations. . .
      (b) Exception – Membership terminated 2 years prior to application
         (i) Not a threat to the US
         (ii) 5 years if with party controlling foreign state
      (c) Waiver – Immediate relative of US citizen
         (i) Must show not a threat AND humanitarian, family unity or public interest reasons

v) **212(a)(3)(E) Nazi Persecution or Participation in Genocide**
vi) **212(a)(3)(F) Association With Terrorist Activities**

c) **212(a)(2) Criminal Grounds**
i) 212(a)(2)(A)(i)(I) Conviction of Certain Crimes

(1) Convicted Of, Committed, or Committed the Essential Elements of crime involving moral turpitude - Waivable

(a) Exception For Alien Who Committed Only One Crime:
   (i) 212(a)(2)(A)(ii)(I) – Crime Committed before 18 years old and time served was more than 5 years after application OR
   (ii) 212(a)(2)(A)(ii)(II) – Maximum penalty did not exceed 1 year and alien did not serve more than 6 months, regardless of actual sentence

(2) 212(a)(2)(A)(i)(II) Violation of Any Drug Law
   (a) Waivable if possession of 30 grams or less of marijuana

ii) 212(a)(2)(B) Multiple Criminal Convictions - Waivable

(1) Convicted of 2 or more crimes (other than purely political), regardless of single trial or single scheme of misconduct and regardless of moral turpitude

(a) For which the aggregate sentence was 5 years or more

iii) 212(a)(2)(C) Controlled Substance Traffickers – Not Waivable

(1) Anyone having anything to do with (aiding, abetting, conspiracy…) Drug Trafficking
   (a) Includes spouse or children that knowingly received benefit from Drug Dealing

iv) 212(a)(2)(D) Prostitution

v) 212(a)(2)(E) Money Laundering - Waivable

vi) Waiver of Criminal Laws

(1) 212(i) Attorney General may waive fraud

(2) 212(h)(1)(A)
   (a) More than 15 years before the application for a visa
   (b) Not contrary to welfare, safety or security of the US AND
   (c) The alien has been rehabilitated OR

(3) 212(h)(1)(B) Extreme hardship to LPR, Citizen, or Immediate Relative
   (Son, Daughter, Parent, Spouse) Applicant of LPR or Citizen

(4) Exception
   (a) No waiver for murder, torture
   (b) No waiver for an LPR if
      (i) The alien since the date of admission convicted of aggravated felony OR
      (ii) Has not lawfully resided continuously in the US for a period of at least 7 years before the proceedings to remove the alien from the US

1. Courts extended to those not lawfully admitted as LPRs

d) Economic Grounds

i) 212(a)(5) Labor Certification – Must have to perform skilled or unskilled labor

ii) 212(a)(10) Tax Evasion – Anyone that renounces citizenship to avoid taxes

iii) 212(a)(4) Public Charges – Any alien who is likely to become a public charge

(1) Look to age, health, family status, financial status, education and skills

(2) 212(a)(4)(B) Affidavits of Support:
Sponsor promises to come to applicant’s aid if needed
(i) Age 18, Citizen or LPR, Domiciled in US, at least 125% poverty
(ii) Mandatory for immediate relatives and family sponsored
(iii) Legally enforceable for 40 quarter-years

e) 212(a)(1) Public Health and Morals
  i) 212(a)(1)(A)(i) Communicable Disease with Public Health Significance
     (1) AIDS expressly mentioned, TB also
  ii) 212(a)(1)(A)(ii) Failed to prevent vaccinations
     (1) 212(g) Attorney General may waive either for spouses and LPR’s family
  iii) Morals no longer significant – look to polygamy, prostitution, commerce vices

V) Admission Procedure
a) Labor Certification – Date filed is priority date
   i) Only necessary for 2nd and 3rd preference employment immigrants
      (1) Not even necessary if employment is under Schedule A
b) Visa Petition
   i) Filled out by the citizen or LPR
      (1) I-130 – Family Based – Date Filed is Priority Date
         (a) Certain battered women may fill out their own petitions
      (2) I-140 – Employment Based
   ii) INS may require parties for interview, but often not utilized
   iii) Denial
      (1) Petitioner must be given opportunity to respond to adverse decision
         (a) Ultimate denial subject to both administrative and judicial appeal
iv) Approval
   (1) Packet 3 filled arranged for the applicant
   (2) For $1,000 applicant may get premium processing – deals with delay
c) Visa Application
   i) Nonimmigrant
      (1) Receive B-2 visitor visas at the consular post abroad immediately
      (2) Consular officer makes sure the applicant is not the type that would stay
   ii) Immigrant
      (1) Applicant must physically attend scheduled interview
         (a) Residence Rule - Last place of residence (unless hardship waiver)
      (2) Consular Officer – Well trained and Specially Picked
         (a) No administrative or judicial appeal
         (b) Principal consular office must review all decisions
         (c) Visa Office may issue Advisory opinion
            (i) Binding on questions of law, advisory on questions of fact
d) Actual Admission
   i) Immigration Inspectors
      (1) Inadmissible if the person has no visa
      (2) Undergo primary, and perhaps secondary inspection
         (a) If denied, right to removal hearing but rarely invoked
            (i) Notice to Appear – 10 days to secure counsel
            (ii) Noncitizen bears burden to prove admissibility
               1. Appeal to BIA
2. Further review directly to Court of Appeals

(b) 235(b)(1) Expedited Removal
   (i) IF: 212(a)(6)(C) Fraud or 212(a)(7) Documents
   (ii) Exception – Fear of Persecution
   (iii) No Right to appeal

1. Exceptions:
   a. Person claims to be a citizen
   b. Person claims they were never removed
   c. Person claims refugee status

(iv) 235(b)(1)(A)(iii) May be extended to noncitizens already here if:
   1. Present without having been admitted AND
   2. Can’t prove continuous physical presence for 2 years
   3. Still limited to fraud and document violations

(c) 235(c) Terrorist and National Security Cases are Given own procedure

245 Adjustments of Status

i) 245(a) Requirements
   (1) Alien was inspected, admitted, and paroled
   (2) Alien applies for adjustment
   (3) Alien is eligible for immigration and Admissible
   (4) Visa is immediately available to immigrant – Current

ii) 245(i) Illegal entrants allowed to adjust for $1,000 if filed before 1998
    (1) Didn’t have to go home and thus become inadmissible for 3/10 years

iii) 245(o) Employment Based Can Adjust (1st, 2nd, 3rd)
    (1) Admitted Legally
    (2) Didn’t Overstay more than 180 days

iv) 245(c) Disqualifications
    (1) 245(c)(2) Certain nonimmigrants that are out of status
        (a) H,I,J,K – Does anything to render them inadmissible
           (i) Overstaying, accepting unauthorized employment
           (ii) 245(c)(2) Exception – Immediate relatives are not disqualified
           (iii) See 245(k) for employment based immigrants
        (b) Nonimmigrant who violates the terms of stay
        (c) Nonimmigrant who is not in lawful immigration status
        (d) 240(b)(7) Not for 10 years for failure to appear at removal hearing
        (e) 240B(d) Not for 10 years for not complying with voluntary departure

   (2) 245(k) Exception to 245(c) disqualifications for employment based immigrants
      (a) If the alien is present in the US upon filing and has not for more than 180 days:
         (i) Failed to maintain continuously, a lawful status
         (ii) Engaged in unauthorized employment OR
         (iii) Otherwise violated the terms and conditions of the alien’s admission

v) Solution – If you are admissible and current except for 245(c) go to Canada

vi) Appeal – Upon removal, but the 180 day period is not tolled

f) Helping Immigrants With Immigration Procedure
i) 274(e) Knowingly and willfully fails to disclose that they have prepared an application on another’s behalf for a fee with false information shall BE:
   (1) Fined, Imprisoned, both, & Prohibited from assisting in more applications
   (a) 274(f) – Means with knowledge or in reckless disregard of the fact that the application contains a false/fraudulent statement /misrepresentation

VI) Deportation Procedure: Removal Process

a) Apprehension
   i) 287(a) INS powers
      (1) Power to interrogate anyone believed to be noncitizen
      (2) Power to arrest any alien if reason to believe violation and escape
      (3) Power to board any vessel for the purpose of searching noncitizens
      (4) Power to enter private lands other than dwelling for border patrol

b) Hearing Preparation
   i) INS has 48 hours to determine if the noncitizen is in violation of law
      (1) If Yes, Notice to Appear
         (a) Nature, Grounds, Allegations, Time and Place, Right to Attorney
      ii) Decision to Detain (If no, may ask for bond)
         (1) Mandatory for almost any crime-related grounds
         (2) Terrorists
         (3) Arriving Passengers
         (4) Individuals awaiting final removal order
   iii) Miranda inapplicable to deportation

c) Removal Hearing
   i) IJ presides over the hearing
   ii) Right to Counsel at no expense to the government
      (1) IJ advises of free legal services available
   iii) Burden
      (1) INS – Clear and Convincing – Noncitizen
      (2) Shift – Alien – Clear and convincing – Lawfully present
      (3) Shift – INS – Clear and Convincing – Deportability Grounds
      (4) Shift – Alien – Affirmative Relief Eligibility

d) Administrative Review
   i) Appeal to BIA within 30 days
      (1) Removal stayed unless meritless

e) Judicial Review
   i) Available after exhausting all administrative remedies
   ii) Court must affirmatively decide to stay removal
   iii) Determined on the record – no new evidence

f) Execution of the Removal Order
   i) AG directed to remove alien within 90 days of administratively final decision
      (1) Exception – Stay for Motion to Reopen

VII) Deportability Grounds

a) Meaning and Significance of Entry and Admission
   i) 101(a)(13) Admission – Any lawful entry of the alien into the US after inspection and authorization by an immigration officer.
      (1) 101(a)(13)(C) LPR not seeking admission UNLESS:
(a) Abandoned or relinquished LPR status
(b) Absent from US for continuous period in excess of 180 days
(c) Has engaged in illegal activity after having departed the US
(d) Departed US while in (or process leading up) to removal proceeding
(e) Committed Inadmissibility Criminal Offense in 212(a)(2)
   (i) Exception: 212(h) waiver or 240A(a) cancellation
(f) Enter at time/place other than designated OR not inspected
(2) Unless – Not necessarily a new admission if one of the categories apply
   (a) Courts have said that they do (either/or theory)
(3) Fleuti
   (a) Unclear if a person who leaves for insignificant time and falls into
category is “entering”

b) Deportability Grounds Concerned With Immigration Control
   i) Entry Without Inspection
      (1) Ground for inadmissibility, not deportation (see entry while inadmissible)
   ii) 237(a)(1)(A) Entry While Inadmissible (Entry goes for any entry ever)
      (1) Common Uses:
         (a) 212(a)(6)(C)(i) Fraud or willful representation of a material fact
            (i) Waivable – 237(a)(1)(H) IF:
                1. (H)(i) Spouse, parent, son, daughter of LPR AND
                2. Inadmissibility grounds are because of ONLY
                   a. 212(a)(5)(A) Labor Certification OR
                   b. 212(a)(7)(A) Not in Possession of Documents
                      i. If you used fraud to get the documents, then that is different, and waiver does not apply
         (b) 212(a)(7)(A) Fraud rendered documents invalid
         (c) 212(a)(6)(C)(ii) Falsely claiming citizenship
            (i) See also 237(a)(3)(D) – False claim as deportability ground
         (d) 212(a)(6)(A)(i) Arriving other than designated point of entry
   c) Post-Entry Conduct Related to Immigration Control
      i) 237(a)(1)(C)(i) Present in Violation of Law
         (1) Used for noncitizens who have violated status of their stay
      ii) 237(a)(1)(D) Termination of Conditional Status
         (1) Exception: 216(c)(4) Extreme Hardship
      iii) 237(a)(1)(E) Smuggling – conviction not required
           (a) Exception: Family Members (E)(iii)
      iv) 212(a)(1)(A) Inadmissibility at time of Adjustment of Status
      v) 266(b) Violation of Administrative Requirements
   d) Crime Related Deportability Grounds – All Require Convictions
      i) 101(a)(48) Conviction
         (1) Defined
            (a) A formal judgment of guilt of the alien entered by a court OR
            (b) A plea of guilty, nolo contendere, admitted sufficient facts to warrant guilt
            (c) Judge ordered form of punishment, penalty, or restraing on alien’s liberty
Withdraw Plea – Split Courts on Attorney’s Failure to Advise
  (a) Doesn’t matter if alien was unaware of collateral consequences
  (b) Failure to inform renders ineffective assistance of counsel
  (3) Split as to whether expungements eliminate erase conviction – most do
  (4) 237(a)(2)(A)(v) Pardons eliminate moral (i) – (iv)
ii) 101(48)(B) – References to terms of imprisonment count time served
iii) 237(a)(2)(a)(I) Crimes Involving Moral Turpitude
  (1) Convicted of Crime
  (2) *Committed* within 5 years of *admission*
     (a) 5 years measured from time appeal (if as of right) is affirmed
  (3) Convicted of crime for which sentence of 1 year or more *may be* imposed
iv) 237(a)(2)(A)(ii) Two Crimes Involving Moral Turpitude
  (1) Any time after *admission*
  (2) *Convicted* of two or more crimes involving moral turpitude
  (3) Not Arising out of single scheme AND
     (a) Controversy over meaning of single scheme
  (4) Regardless of whether it was single scheme
v) Drug Offenses
  (1) 237(a)(2)(B)(i) General
      (a) Convicted any time after admission
      (b) Any law relating to a controlled Substance
          (i) Exception: Use of 30 grams or less of marijuana
  (2) 237(a)(2)(B)(ii) Drug Abuse
      (a) Is, or at *any* time after admission has been, a drug abuse or addict
  (3) 101(a)(43)(B) Trafficking is an Aggravated Felony
vi) 237(a)(2)(A)(iii) Aggravated Felonies
  (1) Any *conviction* any time after *admission*
      (a) Foreign Law – Applies if imprisonment completed within past 15 yrs.
          (i) No imprisonment = No aggravated felony
      (b) 101(a)(43)(F) Crime of Violence (ambiguous)
          (i) Most look to crime in the abstract
  (c) Consequences
      (i) Don’t have to be within 5 years
      (ii) Deportable without regard to potential or actual sentence
      (iii) Elimination of most discretionary relief possibilities
      (iv) Mandator detention from proceedings until removal
      (v) Prevents person from ever returning to the US without permission
      (vi) Person removed subject to 20 years in prison if ever found in US
          1. Or more if previously committed aggravated felony
vii) 237(a)(2)(D) Miscellaneous Criminal Grounds
  (1) 237(a)(1)(C)(i) Failure to Maintain Status or Comply With Conditions
      (a) Condition of every alien’s status is obedience to all federal and state
          laws prohibiting the commission of violence and for which a sentence
          of more than 1 year term of imprisonment may be imposed
  e) 237(a)(4) Security and Related Grounds
  i) Terrorists, Nazis, Foreign Policy, National Security
f) 237(a)(5) **Public Charge**
   i) Any alien who becomes a public charges within five years of entry
      (1) Exception: Affirmatively show causes arisen since entry

VIII) Relief from Deportability
a) **240A Cancellation of Removal – All Discretionary**
i) 240A(a) **Part A** - Applies to *LPRs*
   (1) Requirements:
      a) Has been an LPR for at least 5 years
      (i) Terminates when removal becomes administratively final
      b) Resided in the US continuously for 7 years under any status AND
      (i) 240(d)(1) Ends At the Earlier of:
         1. 240(d)(1)(A) When the alien is served a Notice to Appear OR
         2. 240(d)(1)(B) When alien commits an:
            a. 212(a)(2) Inadmissibility Crime OR
            b. 237(a)(2) Removable Crime
      (ii) *Period spent here unlawfully counts toward 7*
      (iii) No 90/180 day requirement for LPRs
      c) Has not been *convicted* of an aggravated felony
   (2) 240A(c) **Disqualifications** ((c)(1-6)):
      a) Crewmen
      b) Any J immigrant who came for medical training ever
      c) A J immigrant that has not fulfilled requirements or received a waiver
      d) Foreign Policy
         i) 212(a)(3) inadmissible – Foreign Policy Immigrant OR
         ii) 237(a)(4) – National Security Immigrant
      e) Aliens that ever participated in Persecution
      f) An alien who has previously received cancellation
   ii) 240A(b) **Part B** – Applies to *Nonimmigrants* – 4000 maximum for relief
      (1) AG may Cancel Removal AND Adjust Status
      (2) Requirements
         a) Physically present in US for *continuous period* of at least 10 years (3
            years for battered women) immediately preceding application
         i) Can’t leave more than 90 days at a time or 180 days total
            1. Battered person – If left because of cruelty, doesn’t count
         (ii) Service of Notice to Appear *automatically* ends continuity
         b) Has been a person of good moral character
         i) 101(f) – Drunks, Certain Criminals, Frauders (not exhaustive)
         c) Has not committed an:
            i) 212(a)(2) Inadmissibility Crime
            ii) 237(a)(2) Removable Crime OR
            (iii) 237(a)(3) Registration and Fraud Crime AND
         d) Exceptional and Extremely Unusual hardship to citizen or LPR spouse,
            parent, or child
            i) Substantially beyond that which would normally be expected
      (3) Other:
         a) Usually applies to presence without admission
(b) 2 branches: General Nonimmigrants and Battered Women

b) **NACARA**
   
   i) Two Kinds of *Discretionary* Relief
      
      (1) Amnesty
      
      (2) Right to Apply For Cancellation of Removal (Exempt from 4,000)
         
         (a) Entered Pre-1990 from Guatemala, USSR+, E. Eur., El Salvador
         
         (b) Exceptional and Extremely Unusual Hardship to family or self
         
         (c) 7 yrs.(not ending w/NTA), Affirmative Application,

c) **249 Registry** – Discretionary
   
   i) Entered prior to 1972
   
   ii) Continuous residence since 1972
      
      (1) *Not continuous presence* (longer vacations)
      
   iii) Good moral character
   
   iv) Not ineligible under any of the more serious exclusion grounds
      
      (1) *No hardship requirement*

d) **Legalization**
   
   i) Three Types
      
      (1) 245A General – Continuous Unlawful Presence since 1/1/82 - 1988
         
         (a) Applied for Temporary Resident Alien status – LPR 1.5 years later
            
            (i) Must be Admissible, know English, American history, government
            
            (b) No provision for families – had to come in as preference
         
         (2) 210 Special Agricultural Workers
            
            (a) Temporary Resident Status, pre-5/1/86
            
            (b) Easier to convert to LPR status
      
      (3) Haitians and Cubans – 1995-2000
         
         (a) Automatic legalization if there are no general criminal problems

e) **Adjustment of Status**
   
   i) Affirmative Relief from Removal and Adjustment to LPR
      
      (1) Must attain continuous lawful status
      
      (2) Exception: Immediate relatives of overstayers and special immigrants
      
      (3) File application for adjustment with the IJ

f) **Private Bills**
   
   i) Persuade Congressman to introduce bill for specific individual

g) **Deferred Action**
   
   i) Extraordinary sympathetic factors would make removal unconscionable
      
      (1) Refrain from initiating proceedings in certain compassionate cases
      
      (2) Never gets LPR status

h) **240B Voluntary Departure**
   
   i) 240B(a) – Prior to Completion of Proceedings
      
      (1) Person leaves voluntarily to avoid formal removal order–At Own Expense
         
         (a) Disqualifications:
            
            (i) Aggravated Felony
            
            (ii) Terrorist Activities
            
            (iii)240B(c) People already granted voluntary removal and came back
      
      (2) 240B(a)(3) Required to post bond until the person leaves
      
      (3) 240B(a)(2)(A) May stay as long as 120 days
ii) 240B(b) – Upon Completion of Proceedings
   (1) Requirements
      (a) Physical presence at least one year preceding Notice to Appear
      (b) Good moral character for at least the 5 years preceding application
      (c) Not Deportable under:
         (i) Aggravated Felony
         (ii) Terrorist AND
      (d) Clear and Convincing evidence of the means to leave

i) 241(b)(2) Objections to Destination
i) 241(b)(2)(A)(i) – An alien may select one country
   (1) 241(b)(2)(B) Exception – Can’t be neighbor unless that is native land
      (a) 241(b)(2)(C) – Judge should disregard if:
         (i) Alien fails to designate promptly
         (ii) Government does not respond within 30 days
         (iii) Government won’t except the alien OR
         (iv) Attorney General determines removal to that country would be bad
   (2) 241(b)(2)(D) – If not country of choice, then remove to country of citizen
      (a) Not if that Government doesn’t answer for 30 days
      (b) Not if that Government won’t take him
   (3) 241(b)(2)(E) If choice is no good, and country of citizenship no good:
      (a) Country from which alien was admitted
      (b) Country from which alien left for the US
      (c) Country of previous residence
      (d) Country of birth
      (e) Country with sovereignty over country of birth
      (f) Country were birthplace is located now OR
      (g) Any country that will take him

j) Stays of Removal
i) After final removal order, alien given time to take care of personal matters
   (1) INS may grant temporary stay in its discretion under circumstances

IX) Deportation Procedure – The Courts
a) Representation
i) Who May
   (1) Attorneys
   (2) Law Students
      (a) May work under any qualified individual
      (b) May work for any non-profit organization
      (c) Okay to receive from organization from which you work
      (i) Not allowed to get money directly or indirectly from client
   (3) Reputable Individuals
   (4) Organizations
ii) Disqualified – Any group that receives funding from the US government
iii) Right to Counsel – Sometimes so unfair not to provide that PDP violated
iv) Discipline
   (1) Frivolous Behavior – Go too far
   (2) Ineffective Assistance of Counsel – Don’t go far enough
v) Legal Aid and Pro Bono

b) **Evidence and Proof**
   i) **Admissibility of Evidence**
      (1) Formal rules of evidence don’t apply
         (a) Hearsay Admissible
            (i) Still must be fundamentally fair
            (ii) Evidence is probative
            (iii) Reasonable effort to produce declarant
   ii) 240(b)(4)(B) Right to Cross-Examine
   iii) **Illegally Obtained Statements**
      (1) Illegally Coerced – Violative of 5th in deportation proceedings
      (2) Illegally Seized – Inapplicable unless truly egregious
      (3) Self-Incrimination – Usually applies
         (a) 235(a)(5) Exception: Oath stating length of stay, intent to leave, and if inadmissible
   iv) **Burden of Proof and Scope of Appellate Review**
      (1) 240(c)(3)(A) Standard of Proof and Review
         (a) **Burden of Proof** (Constant burden shift)
            (i) INS then has the burden of proving **alienage**
               1. Statement person made that person is not a citizen
               2. Limited Immunity - may offer immunity from use of statement in subsequent criminal proceedings
               3. Okay to make adverse inference in deportation proceedings
                  a. Silence alone, however, is not enough
            (ii) 291 If it is a question of admissibility, noncitizen has burden of proving that he or she has been **admitted**
               1. Show time, place and manner of entry into the US by document
            (iii) INS has burden of establishing by **clear and convincing evidence** that, an alien who has been admitted the US is **deportable**
               1. Standard lies between preponderance of the evidence and reasonable doubt
               2. Production of documents are the obvious way
   (b) **Standard of Review**
      (i) No decision of deportability shall be valid unless it is based upon **reasonable, substantial and probative evidence**.

c) **Judicial Review of Removal Orders**
   i) **Petitions for Review**
      (1) 242(a)(1) File directly with the Court of Appeals
         (a) 242(b) Filed in Circuit in which IJ completed proceedings
         (b) Appeal must be filed within 30 days, brief within 40 days
            (i) Or else, court dismisses unless manifest injustice
      (2) 242(b)(3)(B) No **Automatic Stay** of Removal
         (a) Person must motion for stay – routinely do so with petition
            (i) Courts split on how to handle stay
               1. Some grant automatically, which INS must oppose in 7 days
      (3) 242(d)(1) **Exhaust all Administrative Remedies**
(a) 242(d)(2) Collateral estoppel and res judicata in effect
(4) 242(b)(4)(A) Decided Solely on Administrative Record
(5) 242(b)(4)(B) Scope of Judicial Review
   (a) Administrative findings are conclusive unless a reasonable adjudicator
       would be compelled to conclude to the contrary

ii) **Exceptions to Eligibility for Review**
   (1) 242(a)(2)(C) Crime related removal orders–Bars when, not whether
       removable
       (a) 212(a)(2) Inadmissible Crimes
       (b) 237(a)(2)(A)(iii) Aggravated Felonies
       (c) 237(a)(2)(B)(C)(D) Deportability Crimes
       (d) 237(a)(2)(A)(ii) Multiple Criminal Convictions
   (2) 242(a)(2)(B) Denials of Discretionary Relief (Often Interpreted Narrowly)
       (a) 212(h) Waiver of Inadmissibility Grounds
       (b) 212(i) Waiver of Fraud
       (c) 240A Cancellation of Removal
       (d) 240B Voluntary Departure
       (e) 245 Adjustment of Status
       (f) Any decision giving discretion to Attorney General under this Title
          (i) Probably means purely discretionary part, not findings of fact
             1. Covers:
                a. 205 Revocation of Visa Petition
                b. 207 Refugee Admissions
                c. 209 Adjustment of Status of Refugees
                d. 236 Detention Pending Removal
                e. 248 Change of Nonimmigrant Status
                f. 249 Registry
             2. Exception – Asylum is reviewable
   (3) 242(a)(2)(A) Expedited Removal Orders
   (4) 240B(e)(Voluntary Departure Regulations
   (5) 242(g) Prosecutorial Discretion
      (a) Commence Proceedings
      (b) Adjudicate Cases
      (c) Execute Removal Orders
   (6) 236(c) **Mandatory Detention Decisions**
      (a) Anyone who is:
         (i) 212(a)(2) Inadmissible Criminal
            1. Exception–237(a)(2)(A)(i) Inadmissible at entry
               a. If prison less than 1 year
         (iii)212(a)(3)(B) National Security Inadmissible
         (iv)237(a)(4)(B) National Security Deportable
      (b) **Exception - Habeus Corpus**
         (i) Court may grant habeas corpus review in pure questions of law
            1. Lack of any evidence at all may be grounds for HC
            2. Goes to eligibility for discretionary relief, not discretion
iii) **Other Strategies**

(1) General Federal Question Jurisdiction
(2) Injunctions and Class Actions  
   (a) Supreme Court has held that a widespread class of noncitizens may object to a widespread INS practice in District Court
(3) 276 Collateral Attacks in Criminal Proceedings  
   (a) Barred unless person exhausted all administrative remedies with respect to the underlying removal order, he or she had been improperly deprived of the opportunity for judicial review, and the removal order had been fundamentally unfair
(4) Claims of US Nationality  
   (a) Nonfrivolous claims have a DP right without a trial on the issue

iv) 242(b)(9) Consolidating Reviewable Claims  
(1) Objections arising from removal must come in one claim—not piecemeal

**d) Exceptions to Usual Removal Proceedings**

i) Expedited Removal – Extended to those not present for 2 continuous years

ii) 238 Expedited Removal of Aliens Convicted of Aggravated Felonies

(1) 238(a)(1) Prison Hearings  
   (a) Almost all deportable aliens given deportation proceedings in prison to avoid further detention after serving sentence  
   (i) Problem of securing counsel from within prison
(2) 238(b) Administrative Removal  
   (a) Aggravated felons who are not LPRs or CPRs  
   (i) Entire proceeding done on paper
(3) 238(c) Judicial Removal  
   (a) Federal sentencing judge may enter removal orders as part of sentence  
   (i) Power extended to all criminal aliens deportable under 237(a)(2)(A)  
   (b) Prosecutor must request; INS must concur  
   (c) Court holds mini-trial on issues of deportability and affirmative relief  
   (d) Denial doesn’t keep AG from holding hearing on same grounds  
   (e) Appealable to the Court of Appeals

iii) **In Absentia Removal Hearings**

(1) 239(a)(1)(F)(i) Must give address and phone number to INS  
   (a) 240(b)(5) (A),(B)Failure will result in in absentia hearing  
   (i) INS gives clear, unequivocal, convincing evidence notice provided  
   (b) To get Removal Rescinded, Motion to Reopen:  
      (i) Within 180 days, exceptional circumstances(beyond control)  
      (ii) Anytime – Didn’t receive notice, in custody, not at fault  
   (c) 240(b)(5)(D)Review only on:  
      (i) Adequacy of notice, Reasons for absence, Deportability  
      (d) Adverse Consequences  
         (i) 240(b)(7) Ineligible for most discretionary relief for 10 years  
            1. Cancellation 1, 2, and Registry  
         (ii) 212(a)(6)(B) Inadmissible 5 years following departure

iv) 241(a)(5) Noncitizens Reentering Illegally After Prior Removal
(1) Original order reinstated, ineligible for any relief ever, removed under prior order

v) Crew Members
   (1) If not a BF crew member, INS may make the captain detain on vessel

vi) 502 **Terrorists if there is Classified Information**
   (1) p.845
   (2) If it is a security problem, closed as a matter of national security

vii) 246 **Rescission of Adjustment of Status**
   (1) Initiated (not concluded) within 5 years, if the person was ineligible at the time it was granted
   (2) Removal hearings based on the person overstayed original nonimm visa
   (3) Appealable to BIA and Appellate Court
   (4) If naturalized, naturalization will be repealed

**X) Refugees**

a) 207 **Overseas Refugees**
   i) People physically situated outside US – *Decision making outside US*
      (1) Internally Displaced Persons–Refugees within their own country of origin
   ii) 207(a)(2) President makes max. *after appropriate consultation with Congress*
      (1) State Department Makes Priorities
         (a) Individuals in greatest, most immediate danger
         (b) Refugees from USSR+, Vietnam, Iran, Cuba, Bosnia, Burma, −−−Africa
         (c) 3 & 4 – Specified family links to the
   iii) 207(b) Emergency situation-President can bring more for humanitarian basis
   iv) 207(c) Attorney General may admit any refugee ((c)(2)and spouse & *child*)
      (1) Not firmly resettled in another country
      (2) Special Humanitarian Concern
      (3) Admissible (exception-public charge, labor certification, documents)
         (a) (c)(4)Exception–212(a) waivable except drug dealers/foreign policy
            (i) Only if humanitarian, public interest, or family unity
   v) 207(c)(4) AG may terminate refugee status if he later finds not a refugee
   vi) 207(d) President needs to report to Congress each year
   vii) 209(a) **Adjustment of Status** requirements:
      (1) Admission not terminated
      (2) Physically present for 1 year
      (3) Hasn’t already acquired permanent resident status
   viii) 212(d)(5)(B) – AG can’t parole refugee unless compelling reasons in public interest with respect to particular alien

b) **Asylum and Nonrefoulement** – *Application Procedure Exactly Same*

i) **Asylum**
   (1) 208(a)(1) Any alien in the US or who arrives in the US may apply
      (a) 209(b) Allowed to adjust status (withholding is not) − 10,000 max
         (i) Applies
         (ii) Physical presence for at least 1 year after granted asylum
         (iii) Continues to be a refugee (or spouse or *child*)
         (iv) Not firmly resettled in another country
         (v) Admissible (exception – public charge, labor cert, documents)
1. 209(c) Exception – 212(a) waivable except drug dealers/foreign policy
   a. Humanitarian, family unity, public interest

ii) Withholding of Removal
   (1) 241(b)(3) AG can’t remove alien to a 3rd country if life or freedom would be threatened in that country (no mention of persecution because of….

iii) Definition
   (1) Persecution or Fear of Persecution
      (a) Persecution
         (i) Look to least intrusive application of law to define persecution
         (ii) Types
            1. Threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive
            2. DOJ – Objectively serious harm or suffering subjectively felt
            3. Economic denial so severe to constitute threat to life/freedom
            4. Usual types are confinement or torture
         (iii) Not – Any other reason for escape besides persecution is irrelevant
            1. Simple Government discrimination
            2. Minor disadvantage/trivial inconvenience
            3. Dissent to government practices
      (b) Fear of Persecution – Must be primary motivation
         (i) Defined – Genuine apprehension of danger in another country
         (ii) Must show that you can’t relocate to another part of the country
            1. Presumption against this if government involved in persecution
         (iii) Other motivations irrelevant, but not adverse
      (c) Past Persecution
         (i) Qualified even if conditions have changed
      (d) Individualized Persecution
         (i) Must adequately distinguish situation from that of others generally
         (ii) Can’t be something the entire country is experiencing
            1. Some courts say a lot of people can’t be experiencing
         (iii) DOJ:
            1. Pattern of persecution against similarly situated individuals AND
            2. Own inclusion in group makes fear reasonable
         (iv) Need not be an intent to punish
      (e) Adverse Impact
         (i) Prosecution is Persecution When:
            1. Prosecution is a pretext for persecution
               a. Showed by excessive punishment or singling out
            (ii) Forced population control is persecution – political opinion
               1. Favorable discretion and 1,000/year limit

(2) Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion
   (a) Race, Religion, Nationality – more prevalent in overseas program
   (b) Political Opinion
(i) Inaction or Neutrality
1. Must have actual opinion, doing nothing does not mean opinion
   a. Not if they will persecute you because of their opinion
      i. Protection of free expression rather than human rights
   b. EZ suggests you must prove what you think
      i. Actions taken don’t matter unless they are your opinion
      ii. i.e. Protesting irrelevant if not your opinion
2. Neutrality may be opinion, but must prove it is opinion
   a. Conscious and deliberate choice to remain neutral

(ii) Imputed Political Opinion (Accepted by all that matter)
1. As long as persecutor thinks you have opinion, it is enough
   a. Don’t want to refrain in fear of what persecutors may think

(iii) Refugees Sur Place
1. Not refugees when they left home, but would be if went back
   a. Should show circumstances changed – close scrutiny
      i. Courts less inclined to grant – but no general principal

(c) Particular Social Group
(i) Acosta – Group that shares common, immutable characteristic
1. Group of people that share a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed
   a. Past Experience – Member should not have had to change
   b. Gay – Yes; Employment – No
   c. Case-by-case
2. Look to Relativism and Universalism
   a. Relativism – Respect for cultural norms
   b. Universalism – Internationally recognized human rights
3. Person would have to face persecution due to inability to comply with standards outside of group
   a. People who find offensive – No; Don’t wish to comply – No
   b. If person is willing to conform to the law - No
4. People unable to escape otherwise accepted persecution if forced to return to their home country
   a. People that want intact genitalia
5. Social Group cannot be defined by the persecution itself

(3) On Account Of and the Nonstate Actor
(a) Nexus (2 Approaches)
   (i) Risk of Harm for Nonconvention reasons + Failure to protect for Convention reasons = Persecution on account of...
      1. Protected Group → Policy of non-protection “on account of” convention reasons → Beaten up for non-convention reasons → Wouldn’t have happened if they thought the government would have stopped them → Persecuted because of protected group
(ii) Risk of Harm for Convention reasons + Failure to protect for Nonconvention reasons = Persecution on account of…

(b) **Failure to Protect**
   (i) **DOJ** – Government takes reasonable steps AND person has reasonable access
      1. Regardless of whether the state is unwilling OR unable
   (ii) **Haines** – Failure to bring the risk of harm below the level of well-founded fear
   (iii) **Horvath** – If state has in place a system for protection AND a reasonable willingness to use it, then state protection is available

(c) **Subcategories of Protected Groups**
   (i) “But For” Test – If the person would not have been persecuted but for their membership, then it is “On account of”
      1. Safeguard – Still must show well-founded fear & persecution

(4) **Well-Founded Fear**
   (a) **If a reasonable person in position would fear persecution**
   (i) Somewhere between 10% and 49% chance of persecution

iv) **Methods of Proof**
   (1) **Material Facts**
      (a) **Membership in a Particular Social Group**
         (i) Membership alone normally insufficient – other evidence required
         (ii) Pattern or practice of persecuting, membership, and reasonable fear
   (b) **Past Persecution**
      (i) Helps to establish well-founded fear
      (ii) Independent basis for refugee status even when no future threat
         1. Rebuttable:
            a. Fundamental change in circumstances eliminating fear OR
            b. Relocation would be reasonable and would solve problem
      (iii) Discretionary – If solely because of past persecution must have:
         1. Compelling reasons for being unwilling or unable to return
         2. Reasonable possibility of other serious harm upon return
            a. *FGM brings this issue if the FGM has already happened*
      (iv) Past persecution is not a basis for withholding of removal
         1. Must show future persecution is more likely than not

(2) **Relevant Evidence**
   (a) **Testimony**
      (i) Credibility
         1. Minor Inconsistencies don’t conclusively mean not credible
         2. Character/Morality – Personal choices often irrelevant
         3. Failure to Apply Elsewhere – Not conclusive of bad faith
         4. Reviewing courts given great deference
         5. Evidence from other sources refuting testimony
         6. Internally Inconsistent – Better have convincing explanation
         7. Deliberate Lies – May be bad, may show how far willing to go
         8. Vague or evasive statements – may distract from credibility
         9. Inherently unbelievable stories – Canadian soldiers raped me
(ii) Testimony alone often sufficient
   
1. If more would seem expected, better explain why don’t have it

(b) **State Department Opinion**
   
(i) Human Rights reports biased by foreign policy are considered
(ii) Advisory Opinions in Individual Cases – DOS may provide in small %
(iii) Advice from UNHCR – Letters upon request admitted into evidence
(iv) Document Center within INS with info on human rights
(v) Judicial Notice – Accept certain facts as true
   
(i) Uncontroverted, but not conclusive and rebuttable

v) **Exceptions to Eligibility**

(1) **207(c)(1) Firm Resettlement – Applies to Asylum, not Withholding**
   
(a) Person firmly resettled if received offer to remain in other country
   
(i) Exceptions
      
1. Entry in 3d country was necessary consequence of flight
2. Remained only as long as necessary and no significant ties
3. Conditions were too restrictive – not really resettled

(b) **208(a)(2)(A) Safe Third Country**
   
(i) May remove to other countries pursuant to agreement if no threat

(2) **208(b)(2)(A) Past Wrongdoing for Asylum**
   
(a) (b)(2)(A)(i) Participated in Persecution
(b) (b)(2)(A)(ii) Particularly Serious Crime/Danger to Community
   
(i) *Convicted* of a particularly serious crime
   
1. 208(b)(2)(B) Aggravated Felony IS particularly serious
2. + Factors: Nature, Facts, Sentence, Danger, Person or property
   
   a. Don’t look at the case in the abstract

(ii) Constitutes a danger to the community

(c) (b)(2)(A)(iii) *Committed* serious nonpolitical crime outside US before arrival

(d) (b)(2)(A)(iv) Danger to US security

(e) (b)(2)(A)(v) 212 or 237 Terrorists (except – AG says no security threat)

(3) **208(b)(2)(B) Past Wrongdoing for Withholding of Removal**
   
(a) Same exact thing except:
   
(i) Aggravated felonies *term of imprisonment* 5 years or more
   
   1. Otherwise case by case

(ii) No 212 Terrorist exception, but 237 counts as security threat

vi) **Discretion**

(1) Fraud /Circumvention of Procedures play large role – Not conclusive

(2) Applicant must prove favorable discretion is warranted
   
(a) Look to the circumstances of third countries alien may have gone to
(b) General humanitarian considerations – age and poor health
(c) Ties that the person has in US and ties they have in 3rd countries

vii) **Procedure**

(1) **Applications** (2 procedures)
   
(a) EOIR: Removal Applications – File with IJ during removal proceeding
   
(i) Only need give forms upon request or express fear of persecution
   (ii) Appealable to the BIA, and then to court – 242(a)(1)
(b) INA: Affirmative Applications – Filed with asylum officer specialist
   (i) Nonadversarial interview allows counsel and documentary evidence
       1. Person specially trained in asylum, int’l law, country condition
   (ii) If yes, admitted, If no, referred to IJ for removal proceeding
       1. EOIR proceedings (above) kick in

(2) Time Constraints
   (a) Interview must commence within 45 days of filing
   (b) Adjudication on application (not appeal) completed within 180 days

(3) Barring/Discouraging Access
   (a) 208(a)(2)(B) Filing Deadlines – Must be filed within 1 year
       (i) (D) Exception – Changed circumstances
       (ii) (D) Exception – Extraordinary Circumstances in delay of filing
       (iii) No judicial review after year passes – asylum denials final
           1. Still eligible for withholding of removal
   (b) 208(a)(2)(A) Safe Countries – Send back to country passed on the way
       (i) Don’t persecute or return to countries that do
       (ii) Bilateral or multilateral agreement
       (iii) Full and fair hearing
       (iv) Iraq → Hungary → Austria → Germany → US
           1. Germany returns to countries that return to countries that do
   (c) 235(b)(1)(A) Expedited Removal
       (i) Person that has “credible fear” has interview at port of entry
           1. Credible fear – Significant possibility
       (ii) If credible fear, detain for further hearing
           1. If no credible hearing, removed without further hearing
               a. Even though they can get a quick informal hearing
                   i. No judicial review
   (d) Detention – Same detention rules as everyone else in removal hearings
   (e) Denying Employment Authorization
       (i) Can’t work for 180 days after applying for asylum
   (f) Sanctioning Frivolous Applications
       (i) Permanently ineligible for any benefits under the INA
   (g) Application Fees – May be posed, but never are
   (h) Preinspection – May be checked at foreign ports to prevent trip if no go
   (i) Indecision – Intercept vessels before they get here

XI) Undocumented Migrants
   a) Immigration Criminal Offenses
      i) 275(a) Entry Without Inspection (1-3)
          (1) Wrong time/place, Eludes examination, Entry or Attempted entry by fraud
              (a) Misdemeanor after 1st offense
      ii) 276 Reentry of Deported Alien
          (1) Felony after 1st offense
      iii) 274 Fraud
          (1) 18 USC 1001 – Felony to defraud government
              (2) 274C Expanded document related violations – civil penalty
275(c) Marriage Fraud
275(d) Immigrant Investor fraud
iv) 274(a)(1) Facilitating illegal immigration – different mens rea requirement

b) Employment Misconduct
i) Employer Sanctions
1) 274A(a)(1) Hire, recruit, refer for fee Knowing that
   a) 274(h)(3) Alien that is not an LPR or otherwise authorized
      i) Authorized – “So” employed – Look to terms of authorization
   (2) 274A(b) Fail to comply with paperwork requirements
   (3) 274A(a)(2) Knowingly continue to employ unauthorized alien
      a) Seemingly no mens rea requirement
      b) Exception – Reasonable time from acquiring knowledge to comply
      c) Exception – Grandfather clause for hiring, recr, referring, or
         continuing employment pre-enactment (1985)
      d) Exception – Casual Employment – Domestic work that is sporadic,
         irregular, or intermittent
   (4) “Knowing”
      a) Constructive Knowledge/Willful Blindness no excuse
         i) Conscious decision to avoid enlightenment
         ii) Deliberate failure to investigate suspicious circumstances
      b) As long as the document on its face looks genuine your okay
      c) INS – Reasonable person would know
ii) 274A(b)(1)(A) Verification of Authorization
   1) First, Document Authorization
      a) Examine Documents
         i) (A doc)Simultaneous Picture and Employment Authorization OR
            1. US Passport
            2. Resident alien card, alien registration card, or other authorized
               resistant to tampering ID
         ii) (BC docs)Two documents with Picture, Employment Authorization
               1. Picture – Driver’s License or ID card or AG authorized
               2. Authorization – SS Card, Other AG authorized
   2) Second, Employer Attestation
      a) Employer attests under penalty of perjury of verification
   3) Third, Employee Attestation
      a) Employee attests that he is citizen, LPR, or otherwise authorized
   4) Fourth, Retention of Documents
      a) Must retain and make available for INS inspection
         i) Referral for a Fee – 3 years after recruiting or referral
         ii) Hiring – Later of 3 years after hiring or 1 year after termination
   5) Enforcement
      a) INS investigates and prosecutes violations – may work with DOL
         i) Served with Notice of Intent to Fine – Right to hearing before ALJ
            1. Civil Fine – Higher for substantive than paperwork
            2. Criminal – Pattern or practice, 6 months in jail
               a. 10+ employees within 1 year, up to 5 years in jail
iii) 274B Prohibition on Discrimination
(1) 274B(a)(1) Unfair to discriminate (fail to: hire, fire, refer, recruit) due to
   (a) National Origin OR
   (b) Citizenship Status if in Protected Group
      (i) Protected
         1. Citizen or National of US
         2. LPR
         3. Legalization Beneficiary (SAW)
         4. 207 Refugee or 208 Asylum
      (ii) Not Protected
         1. Fails to apply within months of eligibility for naturalization AND
         2. Alien who did not complete the naturalization within 2 years
            a. Exception – Actively pursuing, processing taking too long
   (c) Unclear on knowledge requirement
(2) 274B(a)(4) Exception – May prefer Equally Qualified Citizen
   (a) Exception – Can’t terminate in favor of equally qualified citizen
(3) 274B(a)(5) No retaliation on account of being turned in
(4) 274B(a)(6) Can’t request more or different documents AND Can’t refuse to honor documents that reasonably appear genuine IF
   (a) For the purpose of intentional discrimination
      (i) Seemingly anyone can invoke
(5) Exceptions to Anti-Discrimination
   (a) 3 or less employees
   (b) Discrimination covered under Title VII
   (c) Discrimination required in order to do business with government
iv) Penalties – Same as those of 274A Document Requirements
v) Procedure
   (1) People that can bring suit
      (a) Person adversely affected, INS, party discriminated against
(2) EEOC and IRCA
      (a) Can’t file with both
         (i) Work together with respect to time limits and referrals
      (b) EEOC allows adverse impact claims, but only if 15+ employees
(3) Time limits
      (a) Must file within 180 days of discrimination
      (b) Special Counsel decides to press charges within 120 days
(4) Charge
      (a) If complaint is supported a complaint is filed
(5) Hearing – ALJ conducts recorded evidentiary hearing
(6) Conviction – Cease violation, pay fine, anything else appropriate
(7) Review – Either side may obtain judicial (no administrative) review
      (a) Unappealed decision is not enforceable until court so orders
      (b) Attorney Fees and Costs for meritless appeals
c) Public Benefits
   i) Rights of Undocumented Migrants
(1) Courts, Property, Serve as Trustee
(2) Constitutional – 4th, 5th, 6th, and 14th
   (a) 14th EP used to deny state benefits
(3) Labor – NLRA and FLSA

ii) Denial of Rights
(1) Federal and State governments allowed to discriminate for some purposes
(2) 1996 Welfare Act
   (a) Federal
      (i) Aliens ineligible for all public benefits
         1. Exceptions – Emergency relief and treatment for medical care
   (b) State and Local
      (i) May pass legislation expanding some rights
      (ii) Restrictions may not be broader than welfare
      (iii) 187 preempted by Welfare Act

XII) Citizenship
a) Significance of Citizenship
   i) Freedom from Immigration Laws
   ii) Right to pass it to one’s children
   iii) Discriminatory Congress action has been upheld, even against LPR’s
      (1) Most state laws are preempted
      (2) Exception – EP challenges, strict scrutiny
   iv) Nothing in Federal Law inhibits the right of noncitizens to vote
      (1) All 50 states have laws that inhibit
      (2) Some municipalities allow noncitizens to vote in local elections
   v) Military Draft – Opportunity to drop out, but may never naturalize
b) Welfare Reform of 1996
   i) LPR’s ineligible for most forms of public assistance
      (1) Qualified
         (a) LPR’s, Asylees, Refugees, and parolees
            (i) Ineligible for Supplemental Security Income and Food Stamps
               1. Exception – LPRs who worked for 40 quarter years before receiving public benefits
               2. Exception – First five years as refugee/asylee
            (ii) Safeguard – Affidavit of support from relative
            (iii) States permitted to impose same restrictions as Fed Government
      (2) Unqualified –
         (a) Undocument migrants get nothing except emergency care
   ii) Inadmissible – They’ll deport you if you become a public charge within 5 yrs
c) Procedure
   i) Acquiring Citizenship
      (1) Jus Soli (Rights in the Soil)
         (a) Acquiring citizenship by virtue of birth in the country
         (b) All persons born or naturalized in US, subject to jurisdiction thereof
            (i) Exception – Children of diplomats
      (2) Jus Sanguinis
         (a) Inheriting citizenship through parents
(i) Must figure out which law applies – goes by person’s birth

ii) **Naturalization**

   (1) **Criteria**
   
   (a) LPR for 5 years - 318
   
   (b) 5 yrs continuous permanent res immediately before applying – 316(a)
       
       (i) Must be physically present 2 ½ years
       
       (ii) 3 years for spouse of citizen
   
   (c) Good Moral Character – 316(a)(3
   
   (d) Only 18 and older may apply – 334(b)
   
   (e) English language – Read, write, speak – 312(a)(1)
       
       (i) Exception – Physical disability
   
   (f) Knowledge of Civics – 312(a)(2)
   
   (g) Certain Political requirements – 313
       
       (i) People who favor Totalitarian Governments
   
   (2) Instead of Court swearing citizen in, the INS may do so
       
       (a) Courts may determine their own jurisdiction to naturalize

(3) **Denial** – Trial De Novo over eligibility

(4) **Dual Citizenship**

   (a) Three Principals
       
       (i) Every sovereign state decides who its own nationals are
           
           1. 337(a)(2) Only nationality purported to renounce can recognize
       
       (ii) Typical law provides alternative, multiple routes to nationality
           
           (iii) In actual practice the rules vary from state to state
   
   (b) Country must accept oath of renunciation
       
       (i) 349(a)(2) In US, must go to US consular office and affirmatively renounce
           
           1. Applies retroactively

iii) **Loss of Citizenship**

(1) **340(a) Denaturalization**

   (a) Only applies to those that acquire citizenship through naturalization
   
   (b) No statute of limitations
   
   (c) Two Reasons
       
       (i) Naturalization was illegally procured
           
           1. Concealment of material fact
           
           2. Not eligible at time acquired – no bad faith requirement
       
       (ii) Naturalization was procured by misrepresentation of a material fact

(d) **Administrative Reopening of Case**

   (i) AG if less than 2 years, court if more than 2 years

(e) **340(h) Administrative Denaturalization**

   (i) INS may reopen case and revoke naturalization IF:
       
       1. Application granted by mistake OR
       
       2. INS found something after naturalization that:
           
           a. Would have a material effect on original outcome AND
           
           b. Would have proven that:
               
               i. Application was based on fraud OR
               
               ii. The applicant was not eligible
(ii) Must be within 2 years of naturalization
(iii) B of P on noncitizen to prove eligible

(2) Expatriation
   (a) Applies to any US citizen
      (i) 349 Voluntary performing of a specified act
   (b) Unconstitutional to force
      (i) Must have intent to renounce

d) Loss of Citizenship
   i) Denaturalization
   ii) Expatriation