Introduction

-Terminology
- Alien in this book will be “noncitizen” although “non-national” is more precise
- According to INA everyone in the world is either a “national” or an “alien.”
- Nations are either citizens or not (non-citizens nationals are Native Americans)

-Background
- Until the late 1800s Immigration was left to the states, today it’s almost entirely federal
- Homeland security act of 2002: brought all these agencies under one umbrella: (DHS)
  - 2 for enforcement functions
    (1) Bureau of Customs and Border Protection (CBP) and
    (2) Bureau of Immigration and Customs Enforcement (ICE)
  - 1 for service functions
    (1) US Citizenship and Immigration Services (USCIS)
- DOJ lost INS but retains the Executive Office for Immigration Review (EIOR)- only does adjudication. Has 3 units:
  - Office of the Chief Immigration Judge (preside over removal hearings)
  - Board of Immigration Appeals (BIA)
  - Office of the Chief Administrative Hearing Office (evidentiary hearings)

-Immigration law is discriminatory. But we have non-discriminate laws. Why is immigration ok?
- Admit only friendly people, scarce resources, advantage to those who came first, territorial
- Why does place of birth have anything to do with Immigration?
- Status quo, family ties, citizenships based solely on birth is attempt to overturn Dread Scott

-Immigration and Diversity- Do we want a multicultural society?
  - “Melting Pot” v. “Mosaic”: are any of these models realistic?
    - “Melting Pot”: melt together, similarities (more noticeable) outweigh the differences
    - “Mosaic”: emphasizes separateness of communities living peacefully side-by-side
    - “Granola”: what ought to be aspired for (Legomsky): Ingredients maintain separate flavor but more “nutritious” when mixed together
  - Peter Schuck says immigrant makes societies more diverse (nobody refutes this).
  - Citizenship, Economic, Language, Culture, Opinion, Religious, Age, Job skills
  - Peter Brimelow says US will only succeed as a “nation” which requires a common “ethnoculture core”
    - Yugoslavia split and they are minimally diverse, so America will be an even bigger split
    - After 1964, too many immigrants and now multiculturalism more than assimilation
    - Note: 1921- 65: national origin quota system based on how many people in America could trace ancestry (W.Europe, no limit). In 1965 system abolished and increase from Asia and less from Europe (premium on family unification)

-Statutory Interpretations (CB 356, N.2)
  (1) Literal Plain Meaning Rule
    - When literal language admits of only one meaning, the court must adopt that meaning even if doing so will produce absurd results
  (2) Social Purpose Rule: legis. history and related statutory provisions help Court determine purpose
    - Court seeks out the purposes of the legislation and adopts whichever interpretation will best advance those purposes
    - Use whatever interpretation helps to achieve the purpose
  (3) Golden Rule: use literal language unless produces absurd result:
    - Intermediate approach. Plain-language, unless doing so would produce an absurd result, in which case ascertain the purpose of the legislation.
Immigration and the Constitution
-Sources of the Federal Immigration Power: The Plenary Congressional Power Over Immigration

(1) Enumerated Powers Doctrine:
-Only powers that the federal government has are those enacted/positively authorized by the Constitution (Does not have to be express: can be implied)
-Immigration Power from other Enumerated Constitutional Powers Given to Congress:
  -Commerce *(US v. Holliday)*, passengers are objects of commerce, substantially effect
  -Naturalization ("to establish an uniform rule of naturalization", so Congress made lawful admission as a permanent resident a prerequisite to naturalization)
  -Declare War- to regulate “alien enimies” (what about friends?)
  -1808 Migration Clause- congress may prohibit migration after 1808 (only slaves?)
  -Necessary and Proper Clause (combines with naturalization power to give Congress the necessary and proper power to regulate immigration)

-1850s CA needed work, hired Chinese,1882 work done & Chinese excluded from immigrating
-F: P came to US in 1879, congress passed statute to allow Chinese coming before 1980 to be allowed to come and go, with a certificate. P got certificate to visit China, but when he came back congress had passed a statute revoking the 1980 immigrant exception.
-Holding: Congress has the sovereign power to exclude non-citizens
  -Inherent right of a sovereign country (international law): Exclusive/absolute jurisdiction over its own territory in order to maintain independence
  -Power resides in Congress and not the 50 states (domestic law)
  -don’t want differering policies & don’t want state to hinder foreign policy
  -Ex post facto only applies to cases of punishment, and deportation is civil
  -Policy: security, uniform law is necessary (freedom of movement), Foreign relations
  -Structural theories (Aleinkoff and Martin)
    -Framers intended the US gov’t to have same powers as any other central power has
    -Framers intended for Congress to decide who we would be as a people

-Limits to federal immigration power

(1) Constitutional restraints on Congressional power
  -*Chinese Exclusion Case*: (fed gov’t can exclude aliens): if congress passes law excluding a group of citizens the court can’t review it because it’s for political dept
  -*Ekii*: (due process means whatever congress says it means) Exclusion Japanese immigrant, excluded at border b/c “likely to become a public charge” she said her husband who live in US could pay for her, she was excluded without a hearing Held: due process not violated: The process given by Congress is due process
  -*Yamakia*: Procedural due process applies in deportation- hard to reconcile w/ Yue Ting
  -*Fong Yue Ting*: (Extends power of exclusion to deportation) Law was that Chinese laborers found in the U.S. were to be deported unless they were already in the U.S. when the statute was enacted and could get a certificate (exception) only if a white person testified to that presence. Here, they did not know white people to testify. Court held:
    (1) Sovereign countries can deport non-citizens (extended to deportation)
    (2) That power resides with federal government (Congress) and not the states
    (3) Immune from due process: Congress decides what process is due
-#3 no longer good law: today procedural due process applies in deportation but not exclusion cases
-extension of exclusion (don’t let them in) to deportation (kick person out)?
- deportation different bc you’re a part of society, higher stakes
- Yue Ting said deportation not punishment- it is civil sanction (seems like punishment)
- No crim protection (attorney, ex post facto, cruel-unusual punishment)

Shaughnessy v. U.S. ex rel. Mezei (CB 145) Deferential standard: facially permissible reason

F: LPR (lived here US ~25 yrs) visits dying mother in Hungary for 19 mos, on return to US he is permanently excluded -national security grounds- on Ellis island, no country would take him
-P challenges exclusion procedural due process- no explanation for his exclusion
-H: excluded alien can’t challenge on due process grounds. Confinement without explanation ok. Whatever procedure prescribed by Congress that’s due process
- Rule today: alien or excluded alien gets due process that congress gives prescribes, but LPR might be able to demand due process.
- note: after enough publicity, Mezei got relief
- Problem: not typical exclusion case: LPR leaves temporarily and comes back as soon as possible: Exclusion in form but deportation given the interests concerned
- Held: alien has precarious tenure, when he leaves he gets no due process
- Court must tolerate bad legislation b/c of Congress plenary power

- Should due process apply in the pure/true exclusion case? (see Mezei)
- Procedural due process, Fourteenth Amendment – Issues: Is there a life, liberty, or property interest? If such an interest is at stake, what process is due?
- Mathews balancing is distinct from the threshold issue: does due process even apply?
- Note: Mathews usual formula- 1: private interest that will be affected, 2: risk of an erroneous deprivation of such an interest, 3: the Gov’ts interest
- Mezei court says no liberty or property involved so due process doesn’t apply

(2) Limits on Congressional Regulation of Immigration

- Landon v. Plasencia: Returning LPR left and came back SC gave right to due process
- reconciled it with Mezei by saying that you lose your right to due process only when you’re gone for a long time (like Mezei).
- Harisiades v. Shaughnessy (CB 163): Detailed reasons for special deference to Congress
- F: 3 long-term LPRs, former members of the Communist Party. Legislation made previous membership in Communist Party a ground for deportation (law made retroactive by Congress)
- Majority: these decisions are largely immune from judicial review because involve foreign policy (But Majority doesn’t say no substantive or rationality review)
  I- Substantive Due Proc’s applicable to all “persons” not just citizens: If LPR deported, decision is subject to rational basis review- needs to be rational connection between the grounds of deportation and what congress wants to accomplish (soverign power, foreign policy, security, etc): must be reasonable.
  - Here, the Act is reasonable, and the LPRs can be deported
- II-1st Amendment: appears to be same standard but not applied the same
  - Court Holds: they do have a first amd right to express themselves but first amendment simply does not protect people that want to promote the violent overthrow of the government
Here, SC uses **Dennis** test: restrict political speech if “clear and present danger.” Court was concerned Communists from the outside and inside could join together, (BUT never said danger is clear and present)

-However, **ADC v. Meese** struck down some INS provisions and applied the same standards in Im standards as it does for everyone- dist. ct. refused to apply plenary power doctrine

-could mean SC doesn’t bar 1 amd claim in removal hearing

**III-Ex Post Facto**

-Ex Post Facto clause doesn’t apply to deportation b/c a civil and not a criminal proceeding (no attorney, ex post facto, cruel-unusual punishment)

-Here, it might seem like criminal punishment.

-Most common deportation ground illegally overstayed

**-Zadvydas v. Davis:** Reasonable Detention Period

-Held: detention only allowed for a reasonable period (indefinite and potentially permanent detention of deportable aliens is at least constitutionally questionable)

-courts can interpret immigration statutes favorably to noncitizens to avoid Con questions and plenary power questions

-might signal wakening of plenary power

**Francis v. INS** (2nd Cir, 1976): Provision at this time: A lawfully admitted alien of 7 years convicted of a narcotics offense who departed and returned to the U.S. can’t come back unless immigration judge uses discretion. However the judge had no discretion to allow a lawfully admitted alien convicted of a narcotics offense to remain in the U.S. if he never made a temporary departure from the country since his conviction

-Court struck down suspension provision and held distinction bt two classes of aliens lacked any basis rationally related to a legitimate governmental interest and deprived alien of equal protection of law

-Galvin v. Crest** (1954) Stare Decisis argument: SC can’t say Con limits congress in Immigration, bc there is so much case-law

-Are Stare Decisis elements satisfied?

(1) It makes the law more predictable

-Congress relies on it, but they could rely on it if it changed

(2) litigants are similarly situated and

-they still would in future cases

(3) for judicial efficiency

-it would not bring justice system to a halt

**Summary**: apparent holes in the plenary power doctrine (CB 229-231): seven holes noted:

(1) Courts will often interpret im statutes favorably to noncitizens in order to avoid not only the need to decide con Qs, but also the harsh results of the plenary power doctrine (**Zadvydas** and **Martinez**)

(2) SC’s recent decisions in **Demore** and **INS v. St. Cyr** recognized noncitizens’ rights to judicial review of removal orders by way of habeas corpus (courts not likely to allow Congress to strip jurisdiction for review)

(3) Procedural due process is clearly required in expulsion cases and in most cases involving the exclusion of returning LPRs

(4) With respect to substantive due process of fed “equal protection” lower courts often translate the plenary power doctrine into a “rational basis” test when distinction makes no sense at all (**Fiallo**)

(5) (maybe) Im statutes are subject to the same 1st amd standards as other statutes

(6) SC in **Chadha** suggests that separation of powers challenges might be at least somewhat less vulnerable to plenary power doctrine.

(7) There is a willingness to consider Con limitaions when prolonged detention is challenged (**Zadvydas**, **Martinez**). Prolonged detention: not viewed favorably
**Admission Process**

**Introduction:**
- 101(a)(15) defines “immigrant” as any non-citizen who can’t establish he or she fits into one of the enumerated non-immigrant classes.
- The intending immigrant must meet the requirements of one of several categories laid out in 201 & 203 and avoid the various affirmative grounds of inadmissibility.
- the admission standards for immigrants are tougher than those provided for non-immigrants.

**Exempt from the general quotas:**
(1) Most important exempts group consists of immediate relatives 201(b)(2)(A)(i)
  - spouses, parents, and children (under 21) of United States citizens
(2) LPRs returning from temporary visits abroad 101(a)(27)(A), 201(b)(1)(A).
  - same with certain former US citizens, children born to LPRs temporarily abroad, and persons who receive certain permanent forms of discretionary relief from removal, same with refugees
(3) parolees 212(d)(5)
  - Secretary of DHS has discretion to parole a noncitizen into the US temporarily
(4) Congress from time to time admits special groups ad hoc on a non-quota basis,
  - have authorized imited issuance of visas underrepresented countries
  - occasionally awarded LPR status on non-quota basis (cuba and Haitians),
  - enacted temporary legislation for nurses working in the US on to adjust to LPRs

**Immigrants Subject to the General Quotas:** governed ceilings and sub-ceilings/fiscal year
- Programs: Three main programs for immigrants subject to general quotas:
  **(1) Family-Sponsored Immigrants:** Program Preference Categories/Sub-Ceilings
    - 1st: Unmarried sons/daughters of U.S. Citizens (over age-21): §203(a)(1)
    - 2nd: Spouses and unmarried sons and daughter of LPRs
      - 2A’s: Spouses and “children” of LPRs (At least 77% of the 2nd go to 2A’s): § 203(a)(2)(A)
      - 2B’s: All other 2nd Preference § 203(a)(2)(B): unmarried and over 21 year old child
    - 3rd: Married sons and daughters of United States citizens: § 203(a)(3)
    - 4th: Siblings of over-age-21 United States citizens: § 203(a)(4)
  **(2) Employment-Based Immigrants 203(b)**
    - 1st: Priority Workers: 28.6%
      - persons with extraordinary ability in the sciences art education business or athletics, Outstanding professors and researchers, Multinational executives and managers
    - 2nd: Members of the Professions holding Advanced Degrees: 28.6%
      - members of the professions holding advanced degrees an aliens of exceptional ability
    - 3rd: Skilled Workers, Professionals: 28.6%
      - skilled workers, professionals (without advanced degrees)
    - 4th: Special Immigrants (often Religious workers): 7.1%
      - certain religious workers, long-term foreign employees of the United States government
    - 5th: Employment Creation: 7.1%
      - entrepreneurs who invest at least $1 million each in enterprises that employ these ten Americans
(3) Diversity Immigrants 203(c)
- admitted because they were born in countries or regions from which the United States has received relatively little immigration in recent years
- worldwide ceiling: 55,000 (201(e)), but recently reduced to 50,000

-Accompanying to Join 203(d)
- A spouse or child who is accompanying, or following to join an immigrant who is within any of the three broad preference categories is entitled to the same preference status and the same place in line as the principal immigrant
- the spouse or child must be acquired before the principle immigrant’s admission as a LPR

Formulas: for family-sponsored and employment-based
-Family Sponsored annual World-wide limit 203(a):
- 480,000 – last year’s immediate relatives + last year’s unused employment based visas in the preceding fiscal year
- Or: 226,000 if formula = less than 226,000 (compromise adopted in 1990)
-Family Preferences sub ceilings:
- 1st: 23,400 + unused Fourths
- 2nd: 114,200 + unused Firsts + (plus any excess total family-sponsored ceiling over 226,000)
  - 2A: receives 77% of 2nd preference visas (75% exempt from 7% country limit)
  - 2B: all other second preference immigrants
- 3rd: 23,400 + unused Firsts and Seconds
- 4th: 65,000 + unused Firsts, Seconds, Thirds

-Employment Based annual World-wide limit 203(b):
- 140,000 + last year’s unused family-sponsored visas
-Employment Preferences sub ceilings:
- 1st: 28.6% of E-B ceiling + unused 4th’s and 5th’s
- 2nd: 28.6% of E-B ceiling + unused 1st’s
- 3rd: 28.6% of E-B ceiling + unused 1st’s and 2nd’s
- 4th: 7.1% of E-B ceiling
- 5th: 7.1% of E-B ceiling

-Diversity 201(e): Numerical limit = 50,000
  - no more than 7% of diversity visas may go to natives of a single country/year

Country limits: In each fiscal year, the combined numbers of family sponsored and employment based immigrants from a single country may not exceed 7% of the combined worldwide limits for family sponsored and employment based immigrants
- for a colony of a foreign country, the corresponding number is 2%
Selecting Individual Applicants

- Priority Date – Date on which the applicant files the relevant document
- Immigrants at the front of the line are processed in monthly gulps: monthly visa bulletin:
  - Current - If there is no backlog at all for the particular preference/country combination, the class is said to be current, and the letter C appears
  - Unavailable – If no visas will be available that month, the letter “U” appears

Family Immigration

- 201(b)(2) exempts immediate relatives & children of LPR temporarily born abroad from quotas
- 203(a): special preferences to immigrants with slightly less compelling family relationships
- 203(d) preference to spouses and children accompanying or following to join most immigrants
  - Subject to quotas: wait depends on supply of visas, demand of visas, country which the visa will be charged. Many times it takes several years
  - Not subject to quota: only delay is gathering papers and processing them

- Status Change During the Wait: INS regulations provide that upon most changes in status or either the petitioner or the beneficiary, the application is automatically treated under whatever category the new circumstances dictate
- Which applicants get in is a first-come, first-serve basis except adjustment has to be made for per-country limit (No more than 7% of total number can come from 1 country)
  - That number will vary from year to year (usually 27,000 or 28,000)

Definitions:

- Child Status Protection Act (section 2) freezes age (processing time won’t count against him/her)
  - To be “child”: must be under 21 and not married
- “Dual Intent”: have intent to leave unless can find some other legal way to stay in the U.S.
- “Spouse”: INA authorizes admission in many places for spouse of someone
  - Spouse Defined
  - Marriage legally valid in particular jurisdiction where it took place
  - Marriage is legal under U.S. immigration law
  - Many miscellaneous categories depend on definition of spouse:
    - Child, born out of wedlock, Waiver provisions (For LPRs applying, deportation…)
- Definition of Child
  - Under § 101(b)(1), a “child” must be (1) unmarried and (2) under age-21. There are additional restrictions for children born out of wedlock, step-children, and adopted children
  - Sibling Relationship: Note: Affects other terms in statute, to establish the existence of a sibling relationship the petitioner must show that he and the beneficiary are, or once were, “children” of a common “parent” within the meaning of the statute
  - Stepchild: Same inquiry for stepsiblings
    - not 18 at time the marriage creating the status of stepchild occurred AND
    - Establish that marriage which created step-relationships still exists OR
    - Where the parties have legally separated or where the marriage has been terminated by divorce or death, the appropriate inquiry is whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild
Marriage
-Requirements:
  -(1) satisfy state/foreign jurisdiction requirements
     -(marriageable age, authorized official, parties not already married to others, etc.)
  -(2) has to be spouse (under federal immigration laws)
     -Ex: same-sex marriages, sham marriages (must be factually genuine: meaning that at the inception of the marriage the parties intended to establish a life together)

Same-sex Marriage
-Adams v. Howerton (CB 255): same-sex marriages: What did Congress intend on issue of?
  -F: Adams marries another male (noncitizen). Marriage must satisfy requirements within that jurisdiction (foreign country, or state) and the INA has to recognize it. Parties have to have the intent to spend their lives together.
  -H: Congress did not intend to recognize same-sex marriage
     -(1) Legislative History: Court turns to 1965 legislative history: Court says that appears Congress had made homosexuality a ground for exclusion
     -(2) Plain Meaning: Court defines “spouse” according to common meaning (1 m, 1 f)
     -(3) Deference: Court defers to expertise of INS
  -Note: problem with Court’s statutory interpretation: never examined purpose of statute: immediate relative provision to relieve suffering from separation of a spouse (same sex couple also suffer)

Marriage Fraud
-Two Types of Sham Marriages
  -(1) Bilateral – Both spouses marry solely to facilitate immigration
  -(2) Unilateral – The beneficiary spouse deceives petitioner spouse as to the beneficiary’s feelings and intentions

-Immigration Marriage Fraud Amendment (IMFA) 1986: INA §216
  -Applies to anyone who is admitted to US as LPR (Spouses, children, fiancé- Immediate relative or 2A) through U.S. citizen, by virtue of a marriage that’s less than two years old. Does not apply to accompanying or following spouses. § 216(g).
    -If it applies, then LPR status conditional for 90 days before the 2 year anniversary of LPR status then must petition to remove the conditional status
      -Meet these 2 conditions and status becomes unconditional LPR (must testify):
        -(1) intent for lasting/permanent marriage
        -(2) show marriage still exists (not divorced/annulled)
    -Issue: if domestic abuse against conditional LPR spouse
      -Congress addressed by allowing for petition for waiver if certain events occur (battery, abuse, etc…): See §216 (§ 216(c)(4))
        -Must show: extreme hardship if removed, marriage was entered into in good faith, was not a fault
    -IMFA also addressed marriage fraud to avoid deportation: §240(h)
      -After IMFA: if marriage while deportation proceedings won’t count unless:
        -(1) leave country for 2 years and re-apply OR
        -(2) show by clear and convincing evidence that the marriage is legitimate

Step Relationships
-Matter of Mourillon
  -Facts: Petitioner is U.S. citizen, born in British West Indies, must show common parent to be sibling with beneficiary
  -Held: step-relationships can be terminated by the death or divorce of the parties whose marriage created the step-relationship.
    -family relationship must continue to exist as a matter between the step-siblings.
  -Under present law: Mourillon would have proven father relationship so have common father with the beneficiary sibling
Paternity Fraud

-Nguyen (CB 284, N.1): Statutory distinction upheld because:
   -(1) paternity fraud is easier
   -(2) mother forms closer/nurturing relationship to child
     -This is important b/c DNA testing may make rationale #1 irrelevant
   -Paternity Issue related to definition of Child: 101(b)(1)
     -prove paternity through bona-fide parent-child relationship (101(b)(1)(D))
     -parent, father, mother defined at 101(b)(2)

Legitimation

In Mourillon immigration law looks to Curacao law to determine legitimation
   -Congressional concern: fraud, so why have the “legitimation” exception?
     -If willing to give the child full rights: want to increase the odds that true parent-child relationship
   -Court in Mourillon concludes that the 2 children have a common mother
     -Court still must examine if brother-sister relationship still exists (bring evidence):
       -if marriage creating step-relationship still exists
       -have evidence that brother-sister family relationship still exists

-Palmer v. Reddy (p.182 CB) – Held, as long as the marriage creating the step-relationships took place before the child turned 18, and the marriage is still intact, a step-relationship will be found even if there’s no parent-child relationship in fact.

-Gur (p.182 CB) – If each of the two purported siblings can identify a time when he or she was the “child” of the common parent, the two will be found to be siblings, even if not simultaneously.
   -Don't have to simultaneously meet the child definition if have common parent
   -Note: would still have to show that a sibling relationship exists
Employment Based Preferences

-Intro:
  congress steadily expanded the program on the basis of occupational credentials
  -Immigration act of 1990: doubled overall ceiling on employment based immigrants
  -in 2000 congress exempted most employment-based immigrants from the per-country limits
  -Substantive goals of the employment based program: Professional diversity, economic
development, hire workers Americans wont do, protect the US work force
  -Procedural goals/administrative process: sensible, accuracy, speed, hire the best, efficient, simplicity

-Does the present system meet these criteria? not much speed or simplicity. We should
  look at these persons and see if they will be a benefit for the US economy in the long
term. Canada has a point system. Age, language, degrees, etc to decide whether you're
  going to contribute
  Julian Simon (free market conservative): if someone wants to work in the US than the
gov't should get out of their way. He says we should auction the visas: that might not
  work be good for the poor

-First 3 of 5 are for performing work that is needed in USA
  1-“Superstars”: outstanding in field and certain multinational executives and managers
  2-“Stars”: advanced degrees and exceptional ability
  3-“Others”: skilled laborers, professions, etc…Labor Certification

1. First preference – “Priority workers,” extraordinary skills, specified occupations, outstanding
   professors/ researchers, executives and managers of multinational companies. § 203(b)(1)
   -Self-Petition: First Preference (CB 454) says that "extraordinary ability" 1st preference employment
   immigrants may petition for themselves or have others petition for them.
   -For most other employment preferences petition must come from employer
   -don't need labor certificate or job offer.

2. Second preference – Professionals with advanced degrees (usu. meaning graduate degrees) and
   immigrants with exceptional ability in certain fields. § 203(b)(2).
   -Labor certification required. 203(b)(2)(A)
   -Job offer requirement but may be waived “in the national interest.” 203(b)(2)(B)
     -to waive: applicant must show (1) area of employment is of substantial intrinsic merit
     (2) employment will benefit the nation, not just the local area (3) applicant will serve the
     national interest to a substantially greater degree than would an available U.S. worker.

3. Third preference –
   (1)Immigrants capable of performing certain “skilled labor” for which qualified US workers are
   not available (without advanced degrees)
   (2)Immigrants who have baccalaureate degrees and are members of the profession
   (3)Other workers who are capable of performing unskilled labor for which qualified US workers
   are not available, not of a temporary or seasonal nature
   -Labor certification required, no provision for national interest waivers
   -job offer required
   -no more than 10,000 may be awarded to the “other workers” prong in a single fiscal year
**Labor Certification**: § 212(a)(5)(A): designed to assure that the immigrant’s employment will neither displace nor disadvantage American workers (Ultimate decision made by Dept of Labor)

- Labor certification procedure is now much simpler: PERM
  - submit a statement is enough (utilize random audits)
  - Employer must document its unsuccessful attempts to recruit American workers at the prevailing wages
- Obtaining Labor Certification:
  - Schedule A – Occupations that the Labor Department has pre-certified as meeting the statutory requirements for labor certification
    - If listed in Schedule A, labor certification is deemed to have been automatically granted. Ex. physical therapist and nurses
    - Applicant whose occupation is on that list must apply for a waiver and make certain showings beyond those usually required
  - Schedule B – Occupations that will not meet the statutory criteria for labor certification. Employer must go through labor certification process:
    - **Elements of Labor Certification**: Employer must show:
      1. Not enough able, willing, qualified U.S. citizen or LPR workers
         - Must show that the job opportunity has been and is being described without unduly restrictive requirements. (see “business necessity” requirement below)
      2. Will not adversely affect wages/conditions of U.S. workers
         - must pay same price for work

- **“Business necessity”** Element (CB 299)
  - Labor Dept. requires “business necessity”: relates to statute saying no other qualified workers
  - Rationale: attempt to balance protecting US labor force and increasing efficiency for companies. Concern that will advertise in a way to ensure only one person could take the job. Concern with limiting credentials, unduly restrictive (Ex: exceed Dictionary of Occupation Titles, foreign language, combine duties, live on employer’s premises)

- **Elements of Business Necessity**
  - **Information Industries** (CB 303): definition of business necessity:
    - (1) job requirements reasonably relate to the occupation in the context of the employer’s business
      - relate to duties more than requirements should labor dept decide this?
        - yes: closes the loop hole and better allocation of visas
        - no: if you want to hire someone who can work for you and teach you a language- labor department turned that down
    - (2) Job requirements are essential to perform the job duties (as described by the employer)
  - **Matter of Marian Gram** - issue with the second element. Is the live in requirement essential to reasonably performing job duties? Court said no bc employer did not show enough evidence (frequency of calls, etc)
  - no labor shortage for cleaners, but there is for people who will live in
  - Labor Dept. made subtle differences when adopting the Information Industries definition (CB 303, N.1): Now “job duties and requirements” (Gives Labor Dept. discretion to ask what job duties are reasonable for employer to ask of employee)

- **Minimal Job Qualifications**: Qualified vs. equally qualified
  - must hire the minimally qualified U.S. citizen over the more qualified immigrant (must show that no able, qualified American workers)
  - Ex. 3 people are qualified but the best is a noncitizen, must higher citizen
- Must stay on the job for a reasonable period of time
- Foreign language requirements used by employers to narrow the applicant pool
  - Hypo: Chinese restaurant, non-English speaking work-force, generally the language requirement is permitted if needed to perform job- cases come out both ways
- Combining Job Duties Robert L. Lippert Theaters
  - company hired an accountant/film runner: two jobs in one. Company must really show that it’s economically infeasible to hire two people. The requirement is higher because they’re worried it’s getting too specific.
  - attempt to protect US labor force and efficiency of company- balancing
- There’s nothing fraudulent about asking for particular job duties.
  - It is fraudulent to make a job description then not ask person to actually work

   - Covers every category of “special immigrant” described in § 101(a)(27), except for those described in subsections (A) and (B).
   - Includes:
     - certain religious workers
     - certain long-term foreign employees of the U.S. govt/embassies. § 203(b)(4)
     - former US citizens who lost it and are now getting it back
     - lawful permanent residents that leave country than come back
   - Mostly concerned with the special circumstances of the people they encompass

5. Fifth preference – The “Employment creation” preference, which includes immigrant investors.
   Requirements:
   - Establish new commercial enterprises in the United States
   - Invest at least $1 million- Need not pay up front, need only be investing 203(a)(5)(A)(ii)
     - In 02 Congress changed it from “establish” a commercial enterprise to “invest in”
     - DHS Secretary can reduce this
   - Employ at least ten Americans
   - Conditional Residence: may terminate immigr. investor’s status within two years upon finding:
     - That the establishment of the commercial enterprise was intended solely as a means of evading the immigration laws OR
     - The various requirements for 5th preference statutes are not being sustained

Diversity Immigrants
   - Congress has taken steps to diversity the admission of immigrants (there is a bill to get rid of it)
   - Mechanics:
     - Admits up to 50,000 diversity immigrants each year
     - All 50,000 diversity visas are allocated to natives of low-admission states
     - Attorney General divides up the 50,000 visas between two groups:
       (1) The group of high admission regions
       (2) The group of low-admission regions
   Two Other Requirements:
   - Individual must meet specified requirements of education level or work experience
   - Not more than 7% of 50,000 visas may go to natives of a single state in a given year
Non-Immigrants

-Introduction

-Non immigrants are admitted for specific reasons (work, study, visit) for a fixed duration
-You are presumptively an immigrant unless you affirmatively prove that you fit into one of the non-immigrant categories in the INA. Non-immigrant categories have less stringent requirements than immigrant categories. § 101(a)(15) lays out the numerous categories of non-immigrants.
-INA §101(a)(15): subsections
  -describes categories of non-immigrants and also categories of non-immigrant visas
  -Several non-immigrant categories are subject to quotas (H-1B and H-2B, etc... mostly on temp workers, not students or visitors)


-Persons entitled to enter the United States under provisions of a treaty
-Both categories are ordinarily admitted for two years initially
  -Unlimited number of possible two-year extensions
-No need to intend to retain one’s foreign residence
  -Both require an intent to depart upon termination

-Temporary Workers 101(a)(15)(H)

-H-1B's specialty occupations: athletes and entertainers 101(a)(15)(H)(i)(b)

-Requirements:
  -that a person be in a specialty occupation
  -theoretical and practical application of a body of highly specialized knowledge
  -Requires equivalent of a bachelor’s degree
-Applicants for employment-based immigrant preference facing long waiting period seek H-1B visas in order to be able to begin working in the interim.
-May be admitted for up to 6 years. § 214(g)(4).
-Employer must file labor condition application (LCA) with the DOL and pay $1000/petition
-May enter with the hope of attaining LPR status at some future time
  -Noncitizen’s seeking of permanent resident status is not evidence of an intention to abandon a foreign residence for obtaining an H-1B visa


-Comes to the US to:
  -Perform agricultural labor or service of a temporary or seasonal nature OR
  -Perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country
    -Both prongs require that the person have a residence in a foreign country which he has no intention of abandoning
-employer must obtain from the Dept of Labor a certification that sufficient American workers cannot be found and that nonimmigrants’ employment will not depress the wages or working conditions of American workers
  -Labor Dept's temporary labor certification is merely advisory
-Initially admitted for up to a year
  -Can receive one year extensions up to a total stay of three years

-Case in book: someone on H-2 visa worked two years in a row and was treated poorly by his employers. He filed a racketeering suit: if laborer talks to legal aid their blacklisted
**H-3s: Trainees**: H-3’s 101(a)(15)(H)(iii)

- Person who has a residence in a foreign country which he has no intention of abandoning who is cutting temporarily to the United States as a trainee
- Can only stay a total of 2 years
- Graduate medical training is excluded

**Misc. other temporary workers**

- Members of foreign vessels and aircraft’s, foreign journalists, official representatives of foreign governments and international organizations, religious workers,
- **Q**: Person who participates in international cultural exchange program approved by the attorney general for the purpose of providing practical training, employment (101(a)(15)(Q)
  - Limited to fifteen months
- Walt Disney lobbied for this provision for foreign youth who wished to come to United States for short periods to work in Disneyland and Disney world
- Potential for widespread use
- To prevent its use as a back door for ordinary employment the regulations say that the work component must serve as the vehicle to achieve the objectives of the cultural component

**Under H1-B**

- **O** – Athletes, entertainers, persons in the other arts, the sciences, education, and business
  - Nonimmigrant must have extraordinary ability demonstrated by sustained national or international acclaim
- **P** – Entertainers
  - **P -1**: Internationally recognized athletes, P-2, P-3: Artists and entertainers

**International Union of Bricklayers v. Meese** (CB 348)

- California gold mine, new technology, used B-1 visa (the temporary visitor business visa)
- Held: b/c performing labor, need to use the H1-B or H2-B visa which requires labor certification
- Here: social purpose rule of statutory interpretation: purpose is to protect American workforce
- Note: interaction between B-1 and H-2 visas: company needs experts to install and maintain equipment (but must look to see if American workers can fulfill the work)
- Now: allowed to come to train workers about machinery but not to do labor on the machinery
Educational Categories: Students

-F-1: 101(a)(15)(F): covers F-1 students

Introduction:
- SEVIS: info. about each foreign student result of EBSVERA (enacted May 2002)
- Stringent restrictions on employment.
- 101(a)(15)(M) – People who intend to enter vocational or other “non-academic”
  institutions.
- F-2 for spouses and children accompanying or following to join
- Large # of foreign students reflect perceptions of quality of United States universities
- Universities have become more dependent on foreign students mostly at graduate level
- The most serious concerns about foreign students were after the attacks of 9/11
  - Some strategies had the effect of making the visa process more complicated

Eligibility
- Must demonstrate sufficient funds 212(a)(4)
- Stringent restrictions on employment
- Can only stay for duration of status

-F-1 Duration of Student’s Stay: “Duration of Status” students admitted for duration of status
- School official estimates reasonable completion date for a particular program
  - Student may remain in the United States until that date, assuming he or she
    remains in a full-time student in good standing
  - If unable to finish on time, student applies to the university for extension
    - Extension will be granted upon a showing of “compelling academic or
      medical reasons”
      - Such as changes of major or research topics, unexpected research
        problems, or documented illnesses.
    - The university must inform USICS of the extension.
- School required to collect information on every foreign student enrolled

Work:
- May work on campus as a part of their educational programs up to 20 hours per week
  while school is in session and 40 hours per week during school vacations
- Off campus employment is allowed only when unforeseen circumstances arising after
  admission make employment after the first year economically necessary and USCIS
  approves

-F-2 includes spouses and children accompanying or following to join.
- F-1 status may not be granted to permit a child to attend a public school
- Student can’t attend a public secondary school unless pay full cost of education

Matter of Healy and Goodchild
- Two B-2 holders arrived to US port with acceptance letters to 9 month programs of the
  Clayton school for continuing education. Former INS had not approved a school for
  foreign students
- Absent service approval of the school to which an alien student is destined he may not
  establish eligibility for nonimmigrants student visa under section 101(a)(15)(F)
- This makes schools such as Claymont to be unavailable to aliens students
  Policy: we want to make sure that school meets some minimum level
**J-1: 101(a)(15)(J) -Exchange Visitors**

- **Introduction**
  - Part of a mutual exchange program in which students, teachers, scholars, and others enter the country temporarily to pursue various education related goals.
  - Exchange visitors spouses and children get J-2 accompanying or following to join.
  - Purpose of the program: benefit their countries of origin when they return.
  - Slightly more liberal employment rules than F-1.
  - Many exchange visitor programs provide fellowships or other types of funding.
  - The intended duration of stay is not usually a significant factor in choosing between F-1 and J-1 status.

- **Eligibility:** Harder to obtain J-status than F-status:
  - Must be part of a specific program approved in advance by State Dept. and applicant must be sponsored (U.S. govt., for. agency).
  - Must be coming temporarily to the U.S. and Must maintain foreign residence.
  - Maximum duration of stay comparable to F-status.

- **212(e), the brain-drain provision,**
  - Foreign residence requirement: return to country for at least two years before applying for LPR status, an immigrant visa, or a non-immigrant visa under subsections H or L.
  - For 212(e) to apply requirements:
    - Any funding comes from govt. (even indirectly, 25% is probably enough), OR
    - If country is on the chart/list with needs of necessary skills
    - Got medical training in the US
  - **Waiver:** Then examine: if qualify for discretionary waiver:
    1. Exceptional hardship to U.S. citizen or LPR spouse or child
    2. If an Agency requests a waiver (Ex: if Defense Dept. says we need this person here)
    3. Or if in public interest
    4. Writing from country that says it has no objection

- **Silverman v. Rogers** (p.359 CB) – The court held that the hardship waiver in § 212(e) favorable recommendation of the Sec of State combined with request of an interested govt. agency or request of INS Commissioner, if Commissioner finds exceptional hardship.
  - Legislative history of the provision indicated that Congress wanted there to be fewer hardship waivers.

- **Difference** between J-1 and F-1: Might not qualify for J-1 unless
  - Studies must be part of a specific program approved by the State Department.
  - Applicant must be sponsored by a U.S. government agency or a recognized international agency, or one of various private agencies.

- **Change of Status v. Adjustment of Status**
  - Adjustment of Status: Procedure non-immigrants use to become LPRs or immigrants (INA §245).
  - Change Status: go from non-immigrant category to another non-immigrant category (INA §248).
  - Person must meet necessary substantive requirements.
  - Some restrictions: J-visa and 212(e) if have 2 year foreign residence requirement then can’t change status (?)
  - Result: can’t change status, could return home and apply to consulate for F-status.
**Tourists: 101(a)(15)(B)**

- **101(a)(15)(B):** Authorizes the admission of certain non-immigrants who want to visit the United States temporarily either for business (B-1) or for pleasure (B-2)
  - vast majority of non-immigrants come as tourists B-2 (pleasure visa)
- Except for those who enter under the § 217 visa waiver program, Authorized period of initial admission ranges from six months to one year and extended in six-month increments.
- Healy and Goodchild (p.365 CB): B-status isn’t catch-all; describes particular non-immigrants statute says doesn’t include “one coming for the purpose of study.”
- B-2 visitor absolutely can't work, because:
  - it’s easy to get it, tourists are least regulated group
  - it helps make sure people will go back home
- Typical reason for denial: consular officer believes applicant intends to remain permanently
  - How would a counselor be sure that applicant intends to remain permanently?
    - good track record
    - links to home country- family, job, home, etc.
    - links to the USA, extensive ties (there are no bright line rules)
    - return plane ticket
    - 3rd world countries have a high rate of fraud- many assume fraud
- decision of a counselor’s decision is not really appealable

- **Finaces (K-1) and Children (K-2)** 101(a)(15)(K) and 214(d) for the noncitizen fiancé
  - noncitizen fiancé to receive K1 status and noncitizen minor children accompanying or following to join receive K2 status
  - Must have met each other during the two-year period preceding the filing of the petition
    - K-3: Spouses of citizens while the immigration documents are processing
    - K-4: Children of spouses

- **A Few Other Nonimmigrant Categories**
  - 101(a)(27) creates nonimmigrant “S” visas (post 9/11)
    - for individuals were able to share critical reliable information about either ordinary criminal organizations or terrorist organizations
  - 101(a)(15)(T) visas are for victims of a severe form of trafficking in persons we’re physically present the United States or a port of entry as a result of the traffic
    - limit of 5,000 per year not counting family members
  - 101(a)(15)(U)
    - those who have suffered substantial physical and mental abuse as a result of any several enumerated acts of violence
      - limit is 10,000 per year not including family members
  - 101(a)(15)(V)
    - provide limited relief to certain long divided families
**Intent to Remain**

- Present in nearly all non-immigrant categories: B, H, J, and L all require that the person seek to enter "temporarily," and B, F, and J require that the person have a foreign residence "which he has no intention of abandoning."

- If have intent to remain: denied visa or denied admission
  - Must dispel suspicion that you intend to stay here permanently: show that you have some type of marital or familial tie to your home country, or some type of career tie.

- If ICE discovers that the person originally entered with the intent to remain permanently here she may be deportable 237(a)(1)(A)
  - Preconceived intent to remain does not preclude a genuine change of mind

- **Dual Intent:** can have alternative intentions:
  - Argue that you have alternative plans in mind, which is OK – you intend to remain only temporarily, but you hope to acquire LPR status some day if the law permits it. Both prongs of your dual intent have to be legal for it to be OK
  - It’s not ok to go with the intent of breaking the law

**Ethical Issue:** F-1 students ineligible if they intended to stay. What should a lawyer tell them?
- Is it ok to inform client of legal consequences of forming various intention? (ex. “if your intent is this, than X and…"
  - Issue: people will fake their intentions- unwillingly helping client to commit fraud?
  - Alternative of not telling client law seems even more problematic
- If it’s really close to the line and you have doubts, don’t take chances.
Inadmissability Grounds (Exclusion Grounds)

-Introduction

- The inadmissibility/exclusion grounds apply to all non-citizens (immigrants and non-immigrants, outside and inside the border) who have not been “admitted” as defined by § 101(a)(13).
  - 101(a)(13) after inspection and authorization by an immigration officer
- The non-citizens in the interior to whom the exclusion grounds apply are:
  - those who entered illegally (§ 212(a)(6)) and
  - those who seek to change(248)/adjust(245)/naturalize(316) status
- When multiple exclusion grounds apply to the same behavior, have to find some waiver or counter-argument for each one

Grounds Related to Immigration Control

Most reflect congressional judgments that certain classes of Noncitizens would have adverse impact on the nation’s health and welfare

- Is present without having been admitted – Inadmissible. § 212(a)(6)(A)(i).
- Didn’t enter at an authorized port of entry – Inadmissible. § 212(a)(6)(A)(i).
  - Subsection (ii) provides exception for battered women and children.
- Was unlawfully present for a continuous period of between 180 days and 1 year and then voluntarily departed prior to the commencement of removal proceedings – Inadmissible for 3 years after date of departure/removal. § 212(a)(9)(B)(i)(I).

Exceptions:
- Doesn’t apply to LPRs.
- Don’t count time under age-18
- Subsection (iii): minors, asylees, family unity, battered women and children
- F-1: If a nonimmigrant violates terms of admittance by overstaying (F-1 drop out), INA memo said it is not unlawful until immigration judge hears case and determines violation occurred
  - According to EOIR, time spent in removal proceedings is NOT unlawful presence
  - According to INS/ICE, removal proceeding time is unlawful presence
- Two or more separate period may be aggregated (DHS memo)
- “Tolling for good cause” – (calculation of time here is tolled for a max of 120 days)
  - Subsection (iv) allows tolling not to exceed 120 days if alien was lawfully admitted or paroled, filed non-frivolous application for extension/change of status before expiration, and didn’t work without authorization. Any time after 120 days is unlawful presence
    - In 2000 INS issued a memo saying that a timely filed non frivolous application for extension or change of status is pending as a stay authorized by the AG (and thus covers more than just 120 days and will go to the 10 yr bar too)
- Waiver for “extreme hardship” available under § 212(a)(9)(B)(v)
  - if it is established that the refusal of admission would result in extreme hardship to the citizen, or LPR, or parent (not children) of such alien
    - courts can’t review Attorney General’s discretion
- Possible Voluntary Departure: 240(B) sections (a) or (b)- In deportation context
  - If INS agrees, it could either join with non-citizen in motion to IJ to dismiss case, and then the INS could grant voluntary departure, or it could join with the non-citizen in requesting the IJ to grant voluntary departure, rather than be formally removed.
    - Individual who is granted voluntary departure is not considered “unlawfully present” until the due date for his departure.
    - The point is to try to accept an offer after a Notice to Appear has been filed, because then the non-citizen could avoid the 3-year bar in § 212(a)(9)(B)(i)(I), by not leaving “prior to the commencement of removal proceedings” but instead after.
-Was unlawfully present for a continuous period of 1 year or more and then departed or was removed
  – Inadmissible for 10 years after date of departure/removal. § 212(a)(9)(B)(i)(II).

  **Exceptions:**
  - Does not apply to alien seeking admission 10 years after date of alien’s last departure
  - Doesn’t apply to LPRs.
  - Don’t count time under age-18.
  - Subsection (iii): minors, asylees, family unity, battered women and children
    - F-1: If a nonimmigrant violates terms of admittance by overstaying (F-1 drop out), INA memo said it is not unlawful until immigration judge hears case and determines violation occurred
    - According to EOIR, **time spent in removal proceedings is NOT unlawful presence**
    - According to INS/ICE, removal proceeding time is unlawful presence
  - Two or more separate period may be aggregated (DHS memo)
    - “Tolling for good cause” – (calculation of time here is tolled for a max of 120 days)
      - Subsection (iv) allows tolling not to exceed 120 days if alien was lawfully admitted or paroled, filed a non-frivolous application for extension/change of status before expiration, and didn’t work without authorization. Any time after the 120 days constitutes unlawful presence.
    - In 2000 INS issued a memo saying that a timely filed non frivolous application for extension or change of status is pending as a stay authorized by the AG (and thus covers more than just 120 days and will go to the 10 yr bar too)
    - **Waiver** for “extreme hardship” available under § 212(a)(9)(B)(v): spouse, child, USC/LPR
      - if it is established that the refusal of admission would result in extreme hardship to the citizen, or LPR, or parent (not children) of such alien
      - courts can’t review Attorney General’s discretion
  - Present in the US without being admitted or paroled, or who arrives in the US at any time or place other than as designated by the Attorney General, is inadmissible-212(a)(6)(A)(i)
    - Didn’t attend all or part of a removal proceeding – Inadmissible for 5 years after “such alien’s subsequent departure or removal.” § 212(a)(6)(B).
      - is time from notice to appear until issuance of removal order “unlawful presence”?
        - former ins memo said yes, as did justice department
        - EOIR believes that the time spent in removal proceedings is not unlawful presence
  - Has been ordered removed upon arrival previously – Inadmissible for 5 years after date of removal.
    § 212(a)(9)(A)(i).
    - Subsection (iii) provides **exception** if AG consents to the alien’s reapplication for admission.
  - Has been ordered removed (not upon arrival) previously – Inadmissible for 10 years after the date of departure/removal. § 212(a)(9)(A)(ii).
    - Subsection (iii) provides **exception** if AG consents to the alien’s reapplication for admission.
    - 10 year bar for prior removal hearing is more easily waived (than 10 year bar for 1+ year unlawful presence)
  - Has been ordered removed on at least two previous occasions – Inadmissible for 20 years after last date of removal. § 212(a)(9)(A)(i) or (ii). – Inadmissible for 20 years
    - Subsection (iii) provides **exception** if AG consents to the alien’s reapplication for admission.
  - Has been ordered removed at any time previously and has been convicted of an aggravated felony – Inadmissible. § 212(a)(9)(A)(i, ii).
    - Subsection (iii) provides **exception** if AG consents to the alien’s reapplication for admission.
  - Violated term or condition of student visa under F-status – Inadmissible “until the alien has been outside the U.S. for a continuous period of 5 years after the date of the violation.” § 212(a)(6)(G).
- Is an immigrant and doesn’t possess a valid, unexpired required document when applying for admission – Inadmissible. § 212(a)(7)(A).
  - **Waiver** available under § 212(k) if immigrant possesses an immigrant visa [doesn’t say valid and unexpired], and didn’t and couldn’t reas. have known that he or she was inadmissible before traveling to the U.S. and applying for admission.
- Is a non-immigrant and doesn’t possess a valid, unexpired required document when applying for admission – Inadmissible. § 212(a)(7)(B)(i).
  - **Waiver** available under § 217 (special visa waiver program for non-immigrants from certain countries) and under § 212(d)(4) (“unforeseen emergency in individual cases”).
- Misrepresentation: by fraud or willfully misrepresenting a material fact, seeks to procure an immigration status – Inadmissible. § 212(a)(6)(C)(i).
- Noncitizens who procure visas, admission, or certain other documents or benefits by fraud or misrepresentation become inadmissible for life § 212(a)(6)(C)(i)
  - **Waiver** for extreme hardship available under 212(i) via 212(a)(6)(C)(iii): show extreme hardship to spouse or child of LPR then maybe waived
  - 212(a)(6)(C)(i) has 4 prongs:
    i. Visa
    ii. Other documentation
    iii. Admission to the U.S. OR
    iv. Other benefit provided under the INA
- Falsely claimed citizenship – Inadmissible. § 212(a)(6)(C)(ii).
  - An alien who falsely represents himself to be citizen of the US to benefit from this act is inadmissible
  - **Waiver** 212(a)(6)(C)(ii)(II) provides exception for one whose parents are citizens, who permanently resided in the U.S. prior to attaining age-16, and who reasonably believes that he or she is a citizen.
  - **Waiver** for extreme hardship available for immigrant under § 212(i) (to spouse or child of citizen or LPR)

**Economic Grounds**

- Three Economic Grounds For exclusion
  - **Labor Certification**- 212(a)(5)(A) Working in the US without a labor certificate
  - Those who formally renounced their US citizenship for the purpose of avoiding taxation by the United States- 212(a)(10)(E)
    - **Waiver** available under 212(k) (see 212(k))
  - Noncitizen likely at any time to become public charge 212(a)(4) (see below)
    - 212(a)(4)(D) provides an exception for a family-sponsored spouse or child of a citizen who presents an affidavit of support (see below)
  - **Public Charge Issue**
    - Primarily dependent on the government for subsistence as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization or for long-term care at government expense
    - Main question is whether the assistance program is intended to be a primary source of cash for income maintenance
      - Gov’t takes into account: age, health, family status, assets and resources, education
  - **Affidavit of Support**: person promises aid if immigrant become public charge
    - Note: not always binding until 1996 amendment so that now the affidavit of support is a legally binding contract (part of 1996 welfare reform)
    - Sponsor Requirements (main one: Sponsor must be the person who is petitioning for the immigrant’s admission)
Political and national security grounds
-immigration laws exclude individual solely because of their political views
-After President McKinley was assassinated in 1901 a statue was enacted to exclude anarchists or others who believed in/advocated forceful overthrow United States government
-in 1950 (peak of the Cold War) Congress made past or present membership communist party a specific ground for exclusion

-Presents a foreign-policy issue – Under § 212(a)(3)(C): Alien whose entry Sec of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the US (Ex. recalling an ambassador)

-Exceptions for foreign officials or candidates 212(a)(3)(C)(ii)
  -not excludable “solely” because of aliens past, current, or expected beliefs, statements or associations of they would be lawful in the US
-Exception for other aliens 212(a)(3)(C)(iii): if not an official
  -not excludable because of aliens past, current, or expected beliefs, statements or associations of they would be lawful in the US, unless Sec of Sate personally determines alien’s admission would comprise a “compelling” US foreign policy interest
  -This is one of the VERY FEW that 212(d)(3)(A) does NOT waive- Secretary of state waiver
-These exceptions are automatic
-Note: Special removal procedure for any of the above, except 212(a)(3)(A)(ii) – Under § 235(c), an on any of the above grounds except (3)(A)(ii) (“other unlawful activity”), using confidential info., person may be removed without a hearing.
-Affiliated with a Communist/totalitarian political party (meaningful association) –§ 212(a)(3)(D).
  -Does not affect non-immigrants
  -Exceptions 212(a)(3)(D)(ii) for involuntary membership, or under 16 yrs old, for food, etc
  -Exception: 212(a)(3)(D)(iii): for past membership
   -2 years before filing application (5 years if affiliations were with controlling party)
   -Also need to show not a threat to security of US
  -Exception 212(a)(3)(D)(iv): At Gen can waive if immigrant is parent, spouse, son, father, sibling, of US citizen or LPR (but no sibling for LPR) for humanitarian purposes, no threat.
  -Doesn’t affect X as a non-immigrant but if in a year she wants to come in on a permanent basis then concerned with the communist issue: 212(a)(3)(D): Problem 6, CB 426?
  -Issue: 212(a)(3)(D)(iv): certain family members are accepted, But not parent of an LPR, But if child naturalizes: then USC daughter: Problem 8 CB 426?
-??Is a non-immigrant “from a country that is a state sponsor of international terrorism”?? – § 306(a) of EBSVERA (enacted in May 2002) prohibits the issuance of any non-immigrant visa to any person from state sponsor of terrorism

Public Health and Moral Exclusions
-Available Grounds: 212(a)(1) – Neither a physical nor a mental disorder is generally a basis for exclusion unless the associated behavior poses one of several specified threats
  -Has “a communicable disease of public health significance” (includes HIV) – § 212(a)(1)(A)(i).
    -Waiver available under § 212(g).
    -Waiver available under § 212(g).
  -Drug abuser or addict – § 212(a)(1)(A)(iv).
    -No waiver available under § 212(g)
Criminal Grounds (§212(a))

- Convicted of or admits to having committed ONLY ONE crime (other than a purely political offense) involving moral turpitude § 212(a)(2)(A)(i)(I).
  - **EXCEPT:** Under 212(a)(2)(A)(ii), not excludible if alien committed ONLY ONE crime:
    - 212(a)(2)(A)(ii)(I) requirements:
      - applicant was under 18 at the time crime was conducted AND
      - does not matter when convicted, only matters when conducted
      - if crime was committed more than 5 years before application submitted AND
        - care about when it was committed not when convicted
      - released from any confinement more than 5 years before application submitted
        - looking at date of release
  - OR 212(a)(2)(A)(ii)(II) Requirements:
    - Max penalty possible for crime was 1 year in prison AND
    - applicant wasn’t sentenced to more than 6 months
      - count time served, and not time imposed for sentence
    - Strategy: defense counsel requesting 364 days vs. 1 year. BIA has held that if a sentence of one year or more is imposed but then vacated to permit the judge to reduce the sentence to under one year, the new sentence is the one that counts. *Matter of Min Song*
    - Note: no discretion so if fall in exception, inadmissibility is automatically waived for these 2
    - Waiver for immigrant under § 212(h) if crime didn’t involve murder or torture (see 212h below)
    - Waiver 212(d)(3)(A) for non-immigrant could work (if 2 crimes but not sentenced to 5 yrs)
  - Multiple criminal convictions (2 or more) for which the aggregate sentences to confinement were > 5 years – Inadmissible. § 212(a)(2)(B).
    - Need not be crimes of moral turpitude
    - Measured by "sentences to confinement"
      - sentenced to five years or more
    - Waiver available under § 212(h) if convictions didn’t involve murder or torture.
  - Convicted of or admits to having committed a crime relating to a controlled substance – Inadmissible. § 212(a)(2)(A)(i)(II).
    - Waiver available under § 212(h) if offense was possession of less than 30g marijuana.
  - Drug dealer – Inadmissible. § 212(a)(2)(C)(i). Controlled substance traffickers
    - Conspirator, abettor, aider, assister, or (ii) immediate relative who has profited from it
    - NO 212(h) waiver available
  - Prostitute – Inadmissible. § 212(a)(2)(D)(i).
    - Waiver available under § 212(h).
    - Waiver available under § 212(h) if crime didn’t involve murder or torture.
-Waiver under § 212(h):
  -212(h)(1): 3 different waivers
    -(h)(1)(A)(i): Prostitution or if activity occurred more than 15 years ago, and
    (ii) Not contrary to national welfare, safety, security of US, and
    (iii) Alien has been rehabilitated, OR: (1)(B)
    -(h)(1)(B): extreme hardship to US Citizen or LPR spouse/parent/child (separation may not count), OR: (1)(C)
    -(h)(1)(C): deals with victims of domestic violence (must be victim)
  -Note: catch-all end paragraph. No waiver shall be provided if:
    -(1) convicted of aggravated felony after LPR status
    -(2) lack of 7 years of continuous lawful presence prior to removal proceedings
  -Test: check requirements:
    -If non-citizen is an LPR, and he or she has committed an aggravated felony since being admitted as an LPR or hasn’t lawfully resided continuously in the U.S. for at least 7 years up to the initiation of removal proceedings, then no waiver available.
    -Otherwise, AG discretionary waiver available if:
      -(A - immigrant) crime was prostitution or crime happened over 15 years before the application, person no longer constitutes a threat, and person has been rehabilitated;
      -(B - immigrant) extreme hardship; or
      -(C - alien) battered spouse or child.

Miscellaneous Waiver for Non-Immigrants: §212(d)(3)(A)(i): discretionarily waive any inadmissibility ground (NOT for immigrants) after approval of Att Gen of a rec by the Sec of state or by the counselor office
  -Not Available for:
    (3)(A)(i)(l) (entering to spy or violate export law);
    (3)(A)(ii) (entering to engage in unlawful activity);
    (3)(A)(iii) (entering to do something against the U.S. govt.);
    (3)(C) (entering would have potentially adverse foreign policy consequences); and
    (3)(E) (participated in Nazi persecutions of genocide).
  -These waivers are granted fairly liberally, but not automatically.
  -Also have the choice to grant under subsection (ii) to admit as non-immigrants

Procedure for Removal:
1. ICE (within DHS) serves notice to appear
2. then ICE alleges facts
3. then ICE enumerates inadmissibility grounds
4. as long as immigrant falls in inadmissibility ground and not grounds/discretion for waiver then removed
Procedure: Making Determinations for Getting into the U.S.

Overview. The admission process comprises up to 4 hurdles that the prospective entrant must clear.

1. **Labor certification**: Applies only to individuals who seek certain statuses (I-140 for employment). Filed with Department of Labor
   - Immigrants: applying under the second and third employment-based preferences must first obtain labor certification.
   - Non-immigrants: some employers must apply for labor certification or, in some instances, file labor condition applications.

2. **Visa petition**: Filing the visa petition with USCIS, applies only to certain statuses. USCIS in DHS establishes that the noncitizen beneficiary meets the definition of the particular status.

3. **Visa Application (U.S. consulate overseas)**: Filing the visa application with the appropriate U.S. consulate abroad, limited to certain statuses. US consulate in DOS
   - must fits definition of applicable status, and that none of the affirmative grounds for inadmissibility applies

4. **Actual admission** to the U.S.: Apply for admission at port of entry
   - person appears at an authorized entry point and formally applies for admission
   - immigration inspector may reexamine noncitizen to insure no statutory inadmissibility grounds

- **Family-sponsored petitions Application Process**: immigrant applying: (Ex: immed. relative of USC):
  - **First**: visa petition: Family petition (I-130) filed w/ USCIS by LPR or US citizen 204(a)(1)(A, B)
    - Visa Petition: focuses on petitioner and the relationship to the beneficiary
    - Must prove:
      - (1) meet immediate relative definition (i.e. submit copy of marriage certificate, etc.)
      - (2) show spouse is USC (birth certificate, or documents showing how acquired USC, such as descent, or U.S. passport)
  - **Second**: visa application USCIS forwards visa petition to the National Visa Center (file reviewed) then sent on to appropriate consulate/embassy overseas
    - consular officer interviews you and gives you the visa if no problem
    - Application focuses on beneficiary
    - Note: the application phase occurs overseas
    - Note: No review: consular’s decision denying application for visa
      - Will look to bank account, traveler’s checks, return plane ticket, etc.
  - **Third**: must show visa at port of entry: To CBP official (agency of DHS)
    - If CBP official is not satisfied then orders removal hearing
    - Ability to appeal: ICE or non-citizen can appeal removal decision to BIA
      - If BIA orders removal then can appeal to court (Circuit court where you are located)
    - 222(e): all non-immigrant visa applicants except for those in a few narrowly defined categories are required to appear for a personal interview with a consular officer
  - **Fourth**: Actual/Physical Admission. CBP in DHS
    - Have full LPR status once enter (marriage context is conditional for 2 years)
    - if at border: clearly and beyond a doubt entitled to admission then let in
    - if not: then inspector transfers you to removal proceeding
      - can be reviewed by BIA, can appeal BIA decision to the Court of Appeals

- Ex. Citizen of India comes for 3 week visit in America
  1. Not applying for employment, some need visa application (temporary workers), or a labor certification
  2. Pick which category of non-immigrants: B2 visitor pleasure visa.
  3. Apply at consulate. Focus will be whether applicant has intent to immigrate or visit. Also, counselor will want to make sure you’re not inadmissible.
  4. Show up at a US port of entry. Immigrant inspector has right to inspect you, but it will not be as thorough as at the consulate.
Domestic Violence: if person undocumented and in abusive relationship, they can petition on their own
- VAWA: allows woman to file w/o needing husband to file
- To self-petition: must show
  - non-citizen entered into marriage in good faith
  - show pictures
  - good moral character,
  - prior residence in US with spouse,
  - extreme hardship to petitioner or petitioner’s child.
  - Also extended to noncitizen abused children.
  - show joint financial arrangements, lease, own car together, joint bank account, etc.

Ex. - Linda Kelly he met a girl in school fell in love and got married. He abused her when she was pregnant and made her eat off the floor
- Note: To prove you are a victim of domestic violence you have to get reports and such. Many times they go unreported.
- Note: law does not exempt self-petitioners from removal for presence without admission. So removal if petition is denied.
- In order to do a self petition you have to show that marriage is entered into in good faith.
- Normally you’d show photos of couple, trips taken together, a lease, ownership. Imagine one of the partners was subjected to domestic violence. It would be harder to get the information.
- Also, if person being abused is undocumented than they want to lay low and not want to show that she owns property in the US.
- 3 problems: domestic violence, immigrant, possibly undocumented- make it tough to establish elements for self petition

Labor Certification: 212(a)(5)(A)
- The requirement of labor certification is designed to curb the displacement of American workers.
- Employer’s app. must show: § 212(a)(5)(A)
  -(1) there aren’t sufficient workers in the U.S. who are able, willing, qualified, and available in the employer’s geographic area; and
  -(2) employment of the alien won’t adversely affect the wages and working conditions of U.S. workers similarly employed.
- Some occupations are categorically “pre-certified” or rejected. 20 CFR §§ 656.10-656.11.
- Job requirements are presumptively unduly restrictive if:
  -(1) they aren’t normally required for that type of job in the U.S.;
  -(2) they exceed the requirements in the Dictionary of Occupational Titles (DOT);
  -(3) they include a foreign language;
  -(4) they involve a combination of duties; or
  -(5) they require the worker to live on the employer’s premises. But employer can demonstrate by documentation that its requirements arise from a business necessity.

Graham (p. 195 CB): Board of Alien Labor Certification Appeals (CB xiv) (BALCA) held:
  -(1) “Business” defined liberally – “the ‘business’ of running a household or managing one’s personal affairs.”
  -(2) “To establish the business necessity for a live-on-the-premises requirement for a domestic worker, the employer must demonstrate that the requirement is essential to perform, in a reas. manner, the job duties as described by the employer.” Case-by-case evaluation.
  -(3) Employer here didn’t provide enough documentation to justify a business-necessity exception. Needed to show the number of days per month she was away from home overnight, how much extra cost would be involved in hiring a child monitor and housekeeper for the particular nights that she and her husband anticipated being away from home, etc.
- **Exemptions**: don’t need visa to enter the U.S.
  - LPR returning after gone for less than a year (just need green card)
  - Refugees
  - Visa waiver program: B1(business) or B2(visitor)

-under 217, secretary of DHS and secretary of state have a program where countries that have historically low rates of visa refusals may enter the US as tourists or business visitors for up to 90 days without having to procure a visa.

-requirements: country must have a reciprocal policy for US citizens, individuals must present a return ticket and must not be a safety threat
- most are European countries
- fear about vulnerability of this increased after 9/11

-Country must be on list: determined by INA §217 (List determined by high rates of visa approval and low rates of visa abuse): can only stay for **90 days**

- **Review of visa denials**: No judicial and ALMOST no administrative review
- Reason for “almost” no admin review: Technically, when a visa is denied, the denial is not final until principal officer at post reviews it
  - Counselor officers have a huge workload principal consular officer uses informal “spot check”
  - Officer can obtain Advisory Opinion by Visa Office (VO)
  - It’s advisory but it binds the consulate on an interpretation of law
  - No requirement to seek advisory opinion, but applicant can try to persuade officer to
  - should there be formal review of denial of visas
  - Yes: encourage COs to be careful, uniformity, no threat to safety, avoid scandals, too much discretion unchecked, very important decision
  - No: Resources, time consuming, less procedural protection due to noncitizens overseas, CO’s are experts/reliable

**Review of denials at the boarder**
- travelers encounter CBP immigration inspector who determines whether traveler is a US citizen, and if not, whether any of the inadmissibility grounds in 212(a) apply
- very small proportion of those whom the immigration officers refuse to admit actually exercise their statutory right to a hearing. Many go home.
  - Getting a ruling against you keeps you out for 5 years.

- **Formally begins** when ICE serves noncitizen a “notice to appear” it alleges facts and charged inadmissibility ground and the individuals procedural rights 239(a)
  - 240(c)(2)(A) an arriving noncitizen bears burden of proving admissibility= must prove he/she is clearly and beyond doubt entitled to be admitted and is not inadmissible
  - problem: which part does “clearly and beyond doubt” modify?
  - getting counsel is not always easy. It’s expensive.
  - regs authorize either noncitizen or ICE to appeal to board of immigrant appeals (BIA)

- **Expedited removal**
  - 235(b)(1): immigration officer determines an arriving noncitizen is inadmissible when there is fraud or lack of proper documents. They are deportable on the spot. They can request a judge who they’ll usually call on the phone.
  - exception: noncitizens indicates fear of prosecution or intention to apply for asylum receive screening interviews

- National security and foreign policy cases
  - 235(c) sets up special procedure for cases if an officer or immigration judge suspects that an alien may be inadmissible for national security and foreign policy reasons, officer or judge shall order the alien removed.
**Change of status, § 248** – Under § 248, certain non-immigrants can switch to different non-immigrant categories without having to leave the U.S. to go to the consulate office in their home country.

- **Requirements:**
  1. Must have been lawfully admitted as a non-immigrant,
  2. Must be “continuing to maintain that status,”
  3. Must be eligible (certain categories of non-immigrants are ineligible to change to certain other categories), and
  4. Must obtain the favorable exercise of INS discretion.

- 248 lists the kinds of non-immigrants who can change their status (visitors, J-1 medical, etc.)

**Adjustment of Status (§245)**

- Modifies procedure of last 2 steps of process (if required, you still have to file visa petition)
- Adjustment of status, § 245 if already in U.S., meet substantive requirements of LPR status: then can become LPRs without having to leave U.S. to go to the consulate office in their home country
- Application: have to file application with the IJ

- **Who can adjust, according to the requirements in subsection (a)**
  1. Must apply for adjustment,
  2. Must be eligible to receive an immigrant visa and must be admissible, and
  3. There must be an immigrant visa immediately available at time application is filed

- Limitations to adjustment: disqualified classes of people (can just go home and apply from there)
  - §245(c)(2): if out of status in the U.S. or in the past (i) below does not work here
  - Exception: out of status for no fault of their own
  - §245(k): for employment-based, if out of status less than 180 days
  - §245(c): Also issues of working without authorization (subject to (k))

- To apply for adjustment: must have been inspected and admitted (no EWIs)

- **Judicial Review: Adjustment of Status**
  - Court can’t review discretionary component of decision
  - Court can still review the question of law (what is a crime of moral turpitude?)

- **Note:** In removal proceeding can re-submit the application to adjust

- In the deportability context, adjustment can provide affirmative relief from removal and a means of attaining LPR status without leaving the U.S. See cancellation of removal, part B;
  - The IJ’s decision whether to order removal (which reflects decision on adjustment of status) is appealable to the BIA,
  - but a BIA decision denying adjustment of status is not appealable.

**Third Party National Processing (CB 494)**

- For “orphaned immigrants” and is discretionary
  - Must be present in country
  - Must be lawfully in country
  - Ex: can’t apply from home consulate but could go to Mexico or Canada’s consulate

**Extending one’s non-immigrant status.**

- Extending one’s stay – Under 8 C.F.R. § 214.1(c), a non-immigrant may apply for an extension of his or her current visa. But extensions aren’t available to those who have overstayed or otherwise violated the terms of their existing stays, absent “extraordinary circumstances.”
-Petitioner dies while petition still pending
  - If U.S. citizen petitioner dies if petitioning for spouse and marriage is 2+ years old then the petition allowed
  - If petitioner dies: related to 9/11 (Also if employment provision and business was destroyed by 9/11)

-Nonimmigrant v. immigrant Visas in general
  - procedures for processing are similar
    - both screen applicant to see if they are eligible
    - both: visa issuance provides a document that permits the applicant to obtain transportation to the USA
  - Major practical difference: stems from the disparity of importance bt the two
    - Nonimmigrant visas: usually used for short period of stay: much greater volume of demand, single short form
      - typical Q: seeking to ender temporarily?
      - made at consular post abroad where aliens resides
      - DS-156 form- short form asks questions about purpose of trip. Photos needed.
      - B-2 tourist visas are usually issued without the need for supporting documents
      - E-1 (treaty trader) or E-2 (treaty investor) application need extensive documentation to show that the substance requirements are met
      - For student F-1 school’s I-20 form and J-1 the program sponsor’s DS-2019 form
      - other visas require prior approval of a visa petition by USCIS: temporary worker (H), intracompany transferee (L), fiancé(e) (K), alien of extraordinary ability in sciences, arts education, business, or athletics (O), and athlete or performing artist (P)
    - Immigrant visas: permanent residence, leads to citizenship: detailed app, several detailed questionnaires, police certificates
      - ordinarily made at consular post abroad
      - an interview must be physically attended to secure the visa.
      - consulates encouraged to exercise discretion
      - visa processing consist of a succession of packets sent by the consular office successful, it culminates in an interview where a formal application form OF-230 parts I and II are signed and visa issued on form OF-155.
      - approved immigrant visa petitions approved by USCIS are sent to national visa center in New Hampshire- notifies alien beneficiary and attorney.
Deportation

Introduction:

-Fong Haw Tan v. Phelan (1948 SC): -SC said that since there are such extreme results from deportation, when something is ambiguous courts should read statues in favor of noncitizen

-In practice, court makes decision based on several factors.

-Before IIRIRA if you made an “entry” you’d face deportability, if you were “admitted” you’d face exclusion. IIRIRA replaced 101(a)(13) entry with admission

-Not every physical cross in the USA is entry. Inspection is on the US side. So you can enter in physical sense, but not legal sense. For “entry”: must be free of official restrain

-Today, noncitizens who have not yet been admitted must contend with the grounds for inadmissibly, and those who have already been admitted contend with the grounds for deportability

-noncitizens who have entered but have not been admitted (entered without inspection) are now considered inadmissible rather than deportable.

-Inadmissible: seeks admission, deportable: has already been admitted

-now both use “removal proceeding” but there is a difference in burden of proof and length of time a person who has not been found inadmissible/deportable must wait before returning

What is “admission”??

-For non-immigrants, – Under § 101(a)(13)(A), an “admission” is a “lawful entry of the alien into the U.S. after inspection and authorization by an immigration officer.” For non-immigrants, every new lawful entry into the U.S. constitutes a new admission.

-For LPRs, – Under § 101(a)(13)(A), an “admission” is a “lawful entry of the alien into the U.S. after inspection and authorization by an immigration officer.”

-101(a)(13)(C): An LPR will not be regarded as seeking admission “unless” the alien:

   -(i) has relinquished LPR status;
   -(ii) has left the U.S. for a continuous period of more than 180 days;
   -(iii) has engaged in illegal activity after having departed the U.S.;
   -(iv) has departed from the U.S. during a removal proceeding;
   -(v) has committed a crime covered by § 212(a)(2) (unless granted relief); or
   -(vi) is attempting an unauthorized entry.

-The law is unclear as to whether the converse is true, i.e., whether an LPR who has made an entry and who falls into one of the exceptions is to be regarded as seeking admission.

-One federal district court has held that in that case the Fleuti doctrine determines whether the departure meaningfully interrupted the person’s permanent residence in the U.S. Argue use of the word entry in the definition of admission means that Fleuti is still applicable

-In contrast, the BIA has held that a returning LPR who falls into one of the exceptions is to be regarded as seeking admission.

When an LPR leaves the US temporarily and then returns, is the return an “entry”? If your second entry triggers deportation grounds it could be an issue

-Rosenberg v. Fleuti (US SC, 1963)

-F: Respondent was a Swiss national who resided in the United States continuously, except for a brief (couple hour) visit to Mexico. When he came back they said he was deportable -inadmissible at time of entry (for being homosexual- “psychopathic” personality was ground for exclusion in 1956) Court of appeals set aside the deportation order on the ground that it was unconstitutionally vague. SC avoided constitutionality, and focused on whether respondent's return constituted an entry.

-Held, “it effectuates congressional purpose to construe the intent exception to section 101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien’s permanent residence.”
-Court does not use literal meaning of “any coming”
-Golden rule- depart literal meaning unless doing so would produce an absurd result
  -Court says that after you’re an LPR it’s absurd to lose it all in a 2 hr visit.
  -Court used analogy of naturalization and how it’s not interpreted literally
-Social purpose rule- more activist than golden rule
  -Court interprets based on what congress was trying to accomplish
-Court says one must intend depart in a way that would be meaningfully interrupted
  Factors to consider in inferring such intent:
  -(1) the length of the absence (time)
  -(2) the purpose of the visit, and
  -(3) whether the alien had to procure any travel documents in order to make the trip (“since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country”).
-Court looked to previous cases:
  -**DiPasquale** (CB 513): train passed through Canada
  -**Delgadillo**: Merchant Marine to Cuba
  -Note: unintended and involuntary departures led Congress to change the law
  -Dissent: Congress meant to codify the specific results of the above cases
  -Majority: no “sport of chance” or arbitrary or hazards lead to deportation

-Congress codified **Fleuti** 301(a) replaced the statutory entry definition with “admission”
  -Admission- with respect to an alien- the lawful entry of the alien into the US after inspection and authorization by an immigration officer
  -There are exceptions in 101(a)(13)(C) but if you don’t fall within one of them you are regarded as someone seeking admission
**Grounds for deportability** (CB Ch. 7): deportation: remove someone who was once in the country

- **Test:**
  - (1) What deportability grounds? (Examine the charges)
  - (2) Is a waiver available?

- Deportable because was inadmissible at time of entry or adjustment. § 237(a)(1)(A).
  - A catch-all that repairs mistaken admission-decisions. Note that § 237(a)(1)(A) (deportable because was inadmissible at time of entry) applies to any entry, not just the most recent one.
  - **Waiver** available in § 237(a)(H) for non-citizens who entered fraudulently (212(a)(6)(c)(i)) whose inadmissibility directly results from fraud or misrepresentation.
  - Requirements for waiver:
    - (1) is the spouse, parent, son, or daughter of a citizen or LPR; and
    - (2) was otherwise admissible at the time of admission. (Or is a domestic-violence victim.)

- Grounds in 237(a) are aimed at noncitizens who congress regards as substantively undesirable: threats to public health, safety, morality, the economy, national security.

- Note: Interaction between Exclusion and Deportation: 237(a)(1)(A): inadmissible at time of entry, using section 212(a)

- **Entry While Inadmissible and Related Issues:** 212(a)(6)(A)(i) and 237(a)(1)(A)
  - 212(a)(6)(A)(i) – An alien present in the US without being admitted or paroled, or who arrives in the US at any time or place other than as designated by the Attorney General, is inadmissible
  - 237(a)(1)(A) – Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable
  - **Policy:** Reflects view of deportation as an instrument for correcting errors or lapses in the admission process
Fraud: common use of 237(a)(1)(A) (renders deportable any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time)

-212(a)(6)(c)(i) – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure a visa, other documentation, or admission into the US or other benefit provided is inadmissible

-Waiver-237(a)(1)(H): Applies to one particular case: deportable b/c inadmissible at time of entry b/c of fraud provision 212(a)(6)(C)(i) and deportable under 237(a)(1)(A), and you have an immediate family relationship with a citizen or LPR, and otherwise admissible, and were in "possession of an immigrant visa" [given literal meaning: does not say valid and unexpired], (if all these conditions met: then discretion to waive deportability)

-Even if affected by (7)(A) (lack valid entry doc) OR 212(a)(5)(A) (labor certification) then waiver can still be considered

-Note: was otherwise admissible except for grounds specified under (7)(A) or (5)(A) which were a direct result of fraud

-policy: they don’t want to forgive people for substantively not being inadmissible, but they will forgive fraud if you are otherwise admissible.

-Ex. if another substantive ground (ex crime of moral turpitude) you can still use 212(h) waiver retroactively

-Waiver 212(i) via 212(a)(6)(C)(iii): show extreme hardship to spouse or child of LPR.

-Documents - 212(a)(7)(A)(i)(I): An immigrant at the time of application who is not in possession of a valid unexpired immigrant visa, reentry permit, ... is inadmissible

-Waiver under 212(k) – discretion of US Attorney General

-212(a)(7)(B)(i)(I) not in possession of valid unexpired passport is inadmissible

-Waiver 212(d)(4)- emergency, discretion

-212(a)(6)(C)(ii)(I) - A noncitizen who gains entry by falsely claiming to be a US citizen has not been inspected and therefore is deportable for having entered without inspection

-Waiver 212(a)(6)(C)(ii)(II) provides exception for one whose parents are citizens, who permanently resided in the U.S. prior to attaining age-16, and who reasonably believes that he or she is a citizen.

-Claims of false US citizenship: 237(a)(3)(D)(i) - Any alien who falsely represents or has falsely represented himself to be a citizen of the US for any purpose is deportable

-Waiver 237(a)(3)(D)(ii) provides exception for one whose parents are citizens, who permanently resided in the U.S. prior to attaining age-16, and who reasonably believes that he or she is a citizen.
**Post entry conduct**: Deportation Grounds Related to **Immigration Control**
- Has overstayed or worked without authorization – Under § 237(a)(1)(B), a non-citizen who is present in the U.S. in violation of the INA or any other U.S. law is deportable.
- Is an IMFA non-citizen or immigrant investor whose conditional status was terminated – Deportable. § 237(a)(1)(D): Applies to both marriages and immigrant investors
- § 237(a)(1)(C)(i) – Failure to maintain, or to comply with the conditions of one’s nonimmigrant status
- Inadmissibility at the time of adjustment of status -212(a)(1)(A) – In addition to inadmissibility at time of entry a deportation ground, inadmissibility at time of adjustment of status is also a deportation ground.
- Smugglers: 237(a)(1)(E) – alien knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the US in violation of law is deportable
  - Secretary of DHS has discretion for waiving people smuggling for LPRs who assist only certain family members 237(a)(1)(E)(iii)

**Crime-Related Deportability Grounds** 237(a)(2)
- Conviction--For the purposes of the INA 101(a)(48)(A): A formal judgment of guilt of the alien entered by the court or (see below)
  - **Moral Turpitude**: Within 5 years after admitted, was **convicted** of a crime which involved moral turpitude and for which the sentence of one year or longer may be imposed – Deportable. § 237(a)(2)(A)(i).
    - Only way to be sure that crime involves moral turpitude is to consult the list in a treatise
    - Elements:
      - Elements of the crime in the abstract must involve moral turpitude
      - Committed within five years after the date of admission AND
      - Is convicted of a crime for which a sentence of one year or longer may be imposed.
- Two or more crimes involving moral turpitude, convicted, not arising out of a single scheme of misconduct – Deportable. § 237(a)(2)(A)(ii).
  - No 5 year limit
  - What’s constitutes a “single scheme of misconduct?”
    - The First Circuit and the BIA have held that the crimes “there must be no substantial interruption that would allow the participant to dissociate himself from his enterprise and reflect on what he has done.” (Pacheco)
    - In contrast, the Ninth Circuit has held: single scheme if the crimes “were planned at the same time and executed in accordance with that plan.” (Gonzalez-Sandoval)
- Has been convicted of any offense relating to a controlled substance (except possession of < 30g marijuana) – Deportable. § 237(a)(2)(B).
- 101(a)(43)(B) – Illicit trafficking in a controlled substance, including a drug trafficking crime is an **aggravated felony**
- Waiver--Presidential or Gubernatorial pardon will suffice for waiver 237(a)(2)(A)(v) –
  - A pardon eliminates deportability for moral turpitude, aggravated felonies, and high-speed flight
  - Judicial Recommendation Against Deportation used to help (judge recommends whether alien should be deported)
  - JRAD- since been repealed
**Aggravated Felony**: Most Important Crime Related Deportability Ground 237(a)(2)(A)(iii)

An alien who is convicted of an aggravated felony at any time after admission is deportable.

- 237(a)(2)(A)(iii) renders deportable any noncitizen who after admission as been convicted of an aggravated felony
- don’t have to be committed within 5 years after admission to give rise to deportability
  - LPR admitted as child and commits aggravated felony at age 60 is deportable

**Consequences of Committing Aggravated Felony**:
- 236(c)(1)(B) mandatory detention
- 212(9)(A)(ii) prevents the person after removal from ever returning to the United states without special permission from the AG (only released if they can help with a criminal investigation)
- 276(b)(2): 20 year prison if found in US unlawfully without special permission.
- Calling a crime an aggravated felony eliminates most discretionary relief possibilities
- Deletes certain procedural safeguards: ineligible for asylum, detention is automatic
- Prevents the person after removal from ever returning to the United States without special permission from the Attorney General

**Definition of “aggravated felony”**: 101(a)(43): list, does not need to be “aggravated” or a “felony”

Definition of an aggravated felony 101(a)(43)
- Murder, rape, sexual abuse of a minor
- Illicit trafficking in controlled substances
- Illicit trafficking in firearms or explosives
- Offenses related to money laundering in excess of $10,000
- Crime of violence with a term of imprisonment at least one year
- Theft w/ term of imprisonment at least 1 year
- Demand or receipt of ransom
- Child pornography
- Racketeering etc. w/ imprisonment of over 1 year
- Owning, transporting etc. business of prostitution
- Smuggling ppl (except to get own family in)
- Fraud, mutilating etc. a passport for which term of imprisonment is 12 months
  - Except for a first offense where they were doing it to get spouse, kid, or parent in
- Failure to appear offense where the underlying offense is punishable by a term of imprisonment of at least 5 years
  - And more

**Exception**: Presidential pardon

**Avoid Prison Sentence in Combination with international laws and 101(a)(43)(T)**

- Note: the second-to-last sentence of 101(a)(43) provides that the term “aggravated felony” applies to violations of federal law, state law, and the law of a foreign country “for which the term of imprisonment was completed within the previous 15 years.”
  - Implication: if you weren’t sentenced to imprisonment at all in the foreign country, ex. if you paid a fine instead, then the aggravated felony provision can’t be applied to you.

**Crime of Violence 101(a)(43)(F)**: term of imprisonment is at least 1 year is an aggravated felony;

- 101(48)(B): For purposes of aggravated felony, reference to imprisonment includes period of incarceration ordered by the court regardless of suspension of sentence in part or in whole
- “crime of violence” is defined in 18 U.S.C. § 16 as:
  - “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another,
-OR (b) any other offense that’s a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

**Leocal v. Ashcroft** (CB 555): Issue: should crime of violence be interpreted to include DUI?
- Haitian citizen (also LPR), convicted DUI causing serious bodily injury
- Courts bound by Chevron: follow an agency’s reasonable interpretation
- Here: BIA initially included DUI as a crime of violence
- Determining crime of violence (defined at CB 556): Court says when determining look at crime in the abstract (categorically) rather than specific facts
- Held: unanimous (9-0) decision that not crime of violence-DUI offense is not a crime of violence because they gave the term “use” a ordinary or natural meaning (element for crime of violence: use.. physical force against another)
  - Note: society’s view that DUI doesn’t rise to the level of theft, rape, murder
  - Also: Court was deferring to BIA’s interpretation which had now adopted the stance that DUI is not a crime of violence
  - Crime of violence required higher mens rea than accidental or negligent conduct

### Convictions and guilty pleas

**What is Conviction?**
- Many deportability grounds require the person to have been convicted of a crime
  - Conviction--For the purposes of the INA 101(a)(48)(A):
    - A formal judgment of guilt of the alien entered by the court or, if adjudication of guilt has been withheld, where
    - A judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
    - The judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed. (probation is punishment)
- Conviction Issue: Any alien who is convicted of a crime
  - If an alien has appeal as of right, the conviction becomes final when the appeal is confirmed
  - If appeal is discretionary, the pendency of review does not affect the finality of the conviction
- Issues with respect to convictions:
  1. Did the action that the court took amount to a conviction for removal purposes?
  2. Could any subsequent developments, like an expungement or a vacation of the judgment, have erased the conviction?
  3. Can the non-citizen withdraw his guilty plea on the grounds that he wasn’t aware of the deportation consequences that pleading guilty would entail?
- 101(a)(48)(A) – The term conviction means, with respect to an alien, a formal judgment of guilt of the alien entered by a court

**Erasing A Conviction**
- Withdrawing a guilty plea:
  - *Parrino* (p.508 CB) – court wouldn’t allow D to withdraw guilty plea merely b/c he didn’t understand or foresee the collateral consequences of his guilty plea.
  - *Pozo* (p.513 CB) – More sympathetic. Similar facts as in *Parrino*, except that D didn’t ask his criminal defense attorney about the possible deportation consequences of his guilty pleas.
    - Held: “Sixth amendment constitutional standards: effective assistance of counsel[.]
    - The court remanded the case, ordering the lower court to assess the reasonableness of the attorney’s conduct in light of a variety of factors
-Turns to a significant degree upon whether the attorney had sufficient information to form a reasonable belief that the client was in fact an alien
-Expungements: expungement under a state rehabilitative statute never erases the conviction for immigration purposes (Courts and the BIA have retreated from this significantly)
-Executive Pardons: 237(a)(2)(A)(v) – A pardon eliminates deportability for moral turpitude, aggravated felonies, and high-speed flight

**Deportability grounds that do not require a criminal conviction at all**

- Smuggling
- Marriage Fraud
- Breach of certain registration and reporting requirements
- Illegal voting
- War crimes
- Affiliation with subversive groups
- National Security

**Political and national security grounds.** § 237(a)(4)(D)

- *Kulle* (p.560 CB) Held: (1) § 237(a)(4)(D) ("the Holtzman Amendment") doesn't punish individuals for actions previously taken analogous to inadmissibility grounds
- exception: no more deportability ground based on affiliation with communist party
- Until 05, terrorism-related grounds were another exception- the REAL ID act expands terrorism related deportability grounds to cover all of the corresponding inadmissibility grounds.
- The word "assisted" in § 212(a)(3)(E) (the exclusion ground to which § 237(a)(4)(D) refers) has been construed liberally, can be inferred from the circumstances.
Deportability Policy

- Process: hold deportation proceeding at prison facility to see if the person should be removed.
- Problems: prison facilities are not in convenient places, so it's hard for prisoners to get representation. In most removal proceedings there are no serious issues as to whether the person is deportable. The person concedes deportability. The main issue is, is there some basis for affirmative relief. If you hold removal hearing before the date of actual removal, it will be hard to see how rehabilitated the person is. Nonetheless, those determinations are made.

- Underlying Q: why do we deport people because of criminal issues anyway?
  - Argument for deportation:
    - civil disability, same reasons as no open boarders, difference bt citizens & noncitizens
  - Arguments against deportation:
    - crim law system should just work it out
      - General deterrence - society should not repeat
      - Specific deterrence- this person should not repeat
        - If legislator thinks this is enough, why create more (deportation)

- 3 diff timing devices about when crime committed
  - within x years from entry/admission – commission of criminal/conviction
  - still no conviction
  - from time of commission/conviction – deportation/removal proceedings start
    - true statute of limitation
  - from entry/admission – start of deportation/removal proceedings
    - reflects recognition of roots and hardship of leaving society

Relief from deportability

- there are several forms of relief which reflects that removal has potentially severe consequences
- can apply to as many remedies as you want
- all relief provisions have different requirements and many have different consequences
- limitations from relief
- It is only while removal proceeding are pending before the immigration judge that one may apply for cancellation at all
  - individuals properly notified of removal hearings and fail to appear, or receive voluntary departure and fail to leave on time, become ineligible to apply for any of several specified remedies for ten years. 240(b)(7)
  - aggravated felons are expressly disqualified from most of the major relief provisions including cancellation of removal and registry 240(a)(2)
  - anyone who is deportable on terrorist grounds (and in some cases national security), is also barred from several forms of discretionary relief 240A(c)(4)
  - DHS requires anyone who applies for any form of relief that confers a right to reside in the US to provide certain biographical and biometric data for background checks.
  - 306(a)(2)(B) severely curtailed judicial review of denials of discretionary relief to bar judicial review of any judgment regarding the granting of relief under certain provisions (including cancellation of removal, voluntary departure, and adjustment of status)
Relief From Deportability (Lasting Relief)

- **Lasting relief:** removal doesn’t take place, and person obtains or retains LPR status (like affirmative defenses, defenses: non-citizen has the burden of proof)
- Generally discretionary (for AG: now head of DHS)
- Note: cancellation of removal (parts A&B) granted to only 4,000 individuals per year. § 240A(e)(1)

**Cancellation of Removal: 240A(a) Part A** available to certain LPRs (Most commonly: LPR commits crime)

- Under § 240A(a), the AG (really, IJ at removal hearing) may cancel the removal of an LPR who falls within an inadmissibility or deportability ground.
- Policy: we want: to get rid of undesirables, don’t want to impose additional punishment or adverse effects on family/employers
- can only be invoked by an LPR

**Requirements**

- (1) Must have been a lawfully admitted LPR for at least 5 years (INS and DOJ have held that LPR status doesn’t end until there’s a final administrative order for removal);  
  - final admin order of removal is when LPR status stops
  - courts open to when LPR status ends
- (2) must have resided continuously in the U.S. for 7 years after having been “admitted in any status” (ends with Notice to Appear, § 240A(d)(1));
  - temporary trip overseas is not likely to break up continuous residence but it might to continuous physical presence
  - “admitted in any status” does not mean “legally” so could be illegal
  - Can be a non-immigrant for 2 of the 7 years
- (3) must not have been convicted of an aggravated felony; and
- (4) must not implicate the national-security inadmissibility/deportability grounds.
- (5) In addition to establishing eligibility, the applicant must show that he or she merits the favorable exercise of discretion.

-timing: two separate requirements
- five years of LPR status
  - LPR status terminates upon entry of a final administrative order of exclusion, deportation or removal- admin order is deemed final when BIA affirms it or when time for filing a BIA appeal lapses
- cancellation of removal part A requires that the person resided in the USA continuously for 7 years after having been admitted in any status 240A(a)(2)

-disqualifications
  - aggravated felons 240A(a)(3)

-discretion
  - applicant must show he/she merits the favorable exercise of discretion

-Trilogy is codified in Part A relief from deportability
  - relief will be available to both inadmissible and deportable noncitizens, even when the particular charge does not rest on entry or admission
  - deportable noncitizen will not have to leave and return in order to qualify
  - does not require deportable noncitizens to identify a comparable inadmissibility ground,
  - unlike what the Att Gen had required under the old one

240A(a) codified Trilogy of cases:
1. Matter of L: long-term LPR, convicted of a crime involving moral turpitude five years after his initial admission. L left the USA for two months. On arrival, INS charged he was
deportable because inadmissible due to crime moral turpitude (no “fleuti” doctrine at the time)
-L would not have been deportable had he remained in the USA
-Att Gen concluded that since no policy of congress could be served by such an irrational result, relief could be granted nunc pro tunc, thereby waiving inadmissibility that existed at the time of L’s readmission

2. Matter of G.A.: long-term LPR convicted of a crime involving marijuana, deportable under (now) 237(a)(2)(B)(i) although he committed the crime more than 5 yrs after admission, several years later he departed and returned making him deportable 237(a)(1)(A) for entering the USA while inadmissible under (now) 212(a)(2)(A)(i)(II) because of his drug conviction
-the BIA granted section 212(c) relief citing the Matter of L, note, there was no 5 year limit on the crime here, Att general said we can waive inadmissibility at entry, but that still leaves other deportability ground and att general waived it
-troubling Q: If GA had not left the US after his conviction, would he still have been eligible for relief under 212(c)? Provision seems to say no (unfair, arbitrary)

3. Francis v. INS: recognized the anomaly from Matter of GA
-it would be irrational to limit section 212(c) relief to those long-term LPRs who temporarily leave the US after the events that render them deportable, the court held that such a distinction viloated equal protection
-court said it would be irrational for us to say you qualify for relief if you leave and return, but if you stay put you wont qualify. It would be irrational, says the court. So they extended it to this.

-Through the trilogy, relief was extended to deportable noncitizens even those who had not made temp overseas excursions: taken together, these decisions moved 212(c) far beyond the literal statutory language.

4. Matter of Hernandez-Vasillas BIA overruled Granados: observed that 212(c), by its terms, made certain exclusion grounds non-waivable. As long as the particular deportability ground was not analogous to one of these non-waivable exclusion grounds,
-Commissioner asked Attorney general to review this case
-Attorney general reversed the BIA and reinstated Grandos
-he ruled that 212(c) was meant to waive only those deportability grounds for exclusion. That way, the application of 212(c) would bear at least some relationship to the statutory language referring to admission
-effect: relief will be available to noncitizens charged with offenses congress regarded as the most serious but those charged with offenses congress regarded as less serious
Cancellation of Removal Part B: 240A(b): non-permanent residents, often requested by noncitizens who are out of status (usually undocumented migrants), LPRs can request 240A(b), the AG (IJ at removal hearing) may cancel the removal and adjust to LPR status a non-citizen who falls within an inadmissibility or deportability ground.

-Can be invoked by anyone, not just LPR
-available to both inadmissible an deportable noncitizens
-As in (a), applicants have two separate hurdles to clear:
  -statutory eligibility
  -favorable exercise of discretion

Requirements

-(1) continuous physical presence in the U.S. for at least 10 years immediately preceding the date of application
  - require presence to be continuous to ensure your ties are strong
  -notice to appear automatically ends a person’s continuous physical presence
  -With Wadman (similar to fleuti doctrine), the BIA and courts applied the meaningful interruption test almost universally
  -continuous physical presence defined in § 240A(d)(1, 2)
    -24A(d)(2) a single departure of more than 90 days automatically destroys continuous physical presence, as do cumulative absences of more than 180 days. (makes it more predictable for everyone)
    -for battered or those subjected to extreme cruelty, continuous physical presence is 3 yrs.
  -usually used to waive presence without admission
    -arriving noncitizens who return from temp visits abroad after 10 years of undocumented presence in the US may also apply for cancellation in part B

-(2) good moral character during the 10-year period;
  -101(f) – Defines persons who lack good moral character (List is not exhaustive)
    - preclusive categories include alcoholism, specified criminal activities, false testimony for the purpose of obtaining any benefit
  -(3) must not have been convicted of a criminal offense described in § 212(a)(2) or be subject to the falsification-of-documents deportability ground in § 237(a)(3);
  -(4) removal would result in exceptional and extremely unusual hardship to citizen or LPR spouse, parent, or child
    -usually the most formidable hurdle to clear
    -conference committee report of IIRIRA: harm must be “substantially beyond that which ordinarily would be expected to result from the alien’s deportation”
    -Mere showing of economic detriment not enough INS v. Jong Ha Wang
    -Could arise in a couple forms:
      -when noncitizen in removal proceedings applies to the immigration judge for cancellation applicant has burden of establishing the required hardship
      -it’s discretionary in nature, and not directly viewable
      -person is ineligible for cancellation at the time of administrative proceedings, but before actual removal from the USA he or she becomes eligible
      -motion is filed with BIA and the case is reopened for removal proceedings. BIA judges has discretion but if he
refuses, you can appeal to the BIA- so your case will be heard one way or another
-(5) must not be a J-visitor who hasn’t yet completed the 2-year foreign residency requirement under § 212(e); and
-(6) must not implicate the national-security inadmissibility/deportability grounds.
-In addition to establishing eligibility, the applicant must show that he or she merits the favorable exercise of discretion.
**Domestic Violence:** Must show extreme cruelty (237(a)(7))
- special branch for battered spouses and battered children
- AG may cancel removal of AND adjust to LPR an alien who is inadmissible or deportable from the US if the alien demonstrates they have been victims of domestic violence
- required physical presence is only 3 years
- both have similar requirements: continuous physical presence, good moral character, hardship. Both have disqualifications
  - difference: for battered people, under specified circumstance the requirements can be loosened

**Ineligible for cancellation at the time of proceedings, but becomes eligible** before the actual removal
- Ex: now have exceptional and extremely unusual hardship
- Proper procedure is a motion to reopen removal proceedings
- BIA and IJ have discretion in motions to reopen (Appealable to the Judiciary)

**Non-immigrant visa time count toward residency?**
- Should a year on this visa count toward 7 years residency? (The only way she can get a business visitor visa is by saying she doesn’t intend to stay, so seems like she’s not really a resident. (BUT – courts have held that it counts)
- does she meet the 7+ year continuous residence?: Doesn’t say lawful residence (some provisions add lawful) You do have to be admitted in a lawful status, but then doesn’t say lawful later for continuous residence.

**Status Gained by Fraud:** No Consideration for Cancellation of Removal
- Problem 3: LPR status gained by fraud never gets consideration for cancellation of removal.

**Registry (§249): much in common with Cancellation of Removal Part B**
- used by undocumented but long-term residents §249
- confers a discretionary authority on the attorney general to award LPR status to certain Noncitizens who entered the United States before a specified date
- Elements:
  - Cutoff date: 1/1/1972
  - Continuous residence: (10 years or since entry?)
- advantage: people won't have an incentive to remain unlawfully

**Moving to reopen** removal proceedings (coupled with a request for stay of removal). Can do this to apply for cancellation, or if hardship circumstances have changed.
- If non-citizen makes out prima facie case of eligibility (e.g., for cancellation), and the IJ grants motion to reopen, the non-citizen can get an evidentiary hearing opportunity to prove the facts necessary for cancellation (and possibly a temporary stay of removal).
- Decision of IJ whether to reopen and decision in the proceeding are both appealable to BIA.
- BIA “has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.” 8 C.F.R. § 3.2(a) (2001).
- A BIA denial of reopening, and possibly a BIA decision denying cancellation, are reviewable in a U.S. Court of Appeals. Motioning to reopen can stay removal and buy the non-citizen more time in the U.S. (and for that reason have been controversial).
- **Wang** (p.586 CB) – In a per curiam opinion, the S. Ct. dismissed a Korean couple’s motion to reopen.
-Held: B/c couple hadn’t complied w/ a regulation requiring motions to come with supporting materials (affidavits and other evidence), the BIA was reasonable to deny their motion.
-The hardship allegations: kids didn’t speak Korean and would lose educational opportunities
-According to the S. Ct., this wasn’t enough to warrant an evidentiary hearing.

-Legalization: 1986 legalization program was the largest
-Legal questions no longer important b/c the program is essentially over since 9/11
-Raging debate: should we legalize 12 mil undocumented immigrants in US today?
-probably increase income tax amount
-Protection under labor laws- increase workers rights, labor conditions
-Might be acting unfairly to legal
-could give incentive to people to sneak in

-Adjustment of Status (§245): Lasting relief b/c acquire LPR status
-Dual Function in the Deportability Context
-Affirmative Relief from Removal
-Means of attaining LPR status without leaving the US

-Requirements:
-245(a): Admission to the U.S.
-245(c): Ineligible for adjustment if ever out of status in the U.S.
-245(c): Ineligible if alien was employed while not authorized
-those who are deportable for overstaying or otherwise violating the terms of their nonimmigrant visas, and who are exempt from the out of status bar because they are now either immediate relatives or employment-based preference immigrants who have not been out of status more than 180 days can still qualify for adjustment of status
-immediate relatives mostly apply for adjustment of status during removal
-(??) May have to fit in exception to the out of status requirement to qualify for adjustment in the removal setting (This is technical: 245(a) refers to 240(a)(1))

-Private Bills (specific bills):
-used to be common, not anymore
-legislation that provides LPR status for a specified individual when existing general provisions would not

-Recurring Limitations
-Individuals who are properly notified of their removal hearings and fail to appear, or who receive voluntary departure and fail to leave on time, become ineligible to apply for any of several specified remedies for ten years
-Aggravated felons are expressly disqualified from most of the major relief provisions, including cancellation of removal and registry
-A conviction of an aggravated felony precludes a showing of good moral character, which itself is a required element of several relief provisions
-Anyone deportable on terrorist grounds is barred from several forms of discretionary relief
-Extremely limited judicial review – § 242(a)(2)(B) bars judicial review of “any judgment regarding the granting of relief” under certain provisions, including cancellation of removal, voluntary departure, and adjustment of status. The same provision also bars judicial review of nearly every other discretionary decision or action of the AG
-Judicial review of discretionary relief severely curtailed in IIRIRA
-Att Gen may not cancel the removal and adjust the status under this section of more than 4,000 applicants per fiscal year
Relief From Deportability (Limited Relief): like a temporary stay of the removal order.
-Prosecutorial Discretion: Limited resources: Some compassionate circumstances: ICE will not prosecute
-Something that attorneys request

-Deferred action. DHS exercises prosecutorial discretion in unusually compassionate situations.
-ICE recognizes that in some cases, extraordinary sympathetic factors make removals unconscionable
-Commissioner Meissner’s memo (2000) about this explains that the source of INS prosecutorial discretion is its limited resources.
-The memo lists factors to be taken into account (?p.616? CB):
  -whether the person is an LPR, the duration of his or her residence,
  -any criminal history,
  -humanitarian concerns,
  -whether there were past immigration violations,
  -how long a bar to future return removal would create, and
  -the person’s role in the community.
-Note that this is only a temporary remedy, doesn’t grant the non-citizen any status.
-No judicial review- it’s up to administrative official
-Ex. Leon Wildes- attorney for John Lennon and Yoko Ono
  -used freedom of info act to get stuff out of it

-Voluntary Departure INA §240B: Most common form of discretionary relief from removal
-Introduction:
  -A person who receives and accepts a grant of voluntary departure under § 240B leaves "voluntarily"; in exchange, no formal removal order issues.
  -Sec of DHS may permit certain noncitizens to depart voluntarily at their own expense either in lieu of removal proceedings or before removal proceedings have been completed (unless you’re a terrorist, aggravated felon, etc.)
-Benefits for voluntary removal
  -Avoidance of the 10-year bar on admissibility under § 212(a)(9)(A)
  -noncitizens formally ordered to be removed (other than at a port of entry) are ineligible to return to the US for at least 10 years (20 years for second offense, forever for aggravated felony) unless they can obtain permission from Sec of DHS
    -they are not subject to this bar (but they’re not home free either)
  -nothing to be gained from waiting for removal hearing, in the meantime the individual has to either post bond or remain in detention.
    -If you depart voluntarily might simple reenter surreptitiously
-voluntary departure not available to
  -10 year noncitizens who failed to appear at departure hearings or failed to honor terms of a prior voluntary departure order 240(b)(7)
-No judicial review
  -240B(f) bars judicial review of order denying voluntary departure under sec. (b)
    -242(a)(2)(B)(i) prohibits the courts from reviewing any judgment regarding the granting of relief under the Section 240(B)
  -240(B)(e) empowers the Sec of DHS to limit eligibility for voluntary departure (no parameters on secretary’s power)
Requirements for § 240B, subsection (a): less stringent than 240B(b); at individual's own expense
- Alien may apply for voluntary departure either before or during removal proceeding:
  - Immigration judge can grant permission up to 30 days after master calendar hearing (that's the latest, then subsection (a) becomes unavailable). 240B(a)(1)
  - Alien not removable because of an aggravated felony or because of terrorist activity;
  - Alien must leave within 120 days of receiving permission for voluntary departure;
  - And alien “may” be required to post bond;

Requirements for subsection (b): authorizes voluntary departure at the conclusion of removal proceeding, again at the individual's own expense:
- Alien may apply for voluntary departure during removal proceeding;
  - One-year physical presence requirement immediately preceding the notice;
  - Five-year good moral character requirement;
    - 101(f) defines persons who lack good moral character
  - Alien has established that he has the means and intention to depart the US
  - Alien not removable because of an aggravated felony or because of terrorist activity;
  - Alien can’t have been found inadmissible previously because of presence without admission or parole and permitted voluntary departure;
  - Any additional regulations;
  - Alien must leave within 60 days of receiving permission for voluntary departure; and
  - Alien “shall be required” to post bond.
- Consequences of subsection (b) occur if don’t depart within 60 days:
  - Get fine plus 10-year period of ineligibility for voluntary departure, cancellation of removal, change of status, adjustment of status, and registry.

Compare:
- 240B(a): Leave at own expense, Some disqualifiers, Up to 120 days
  - Before deportation proceedings or during them before a decision has been made
  - A is easier to get because they’re accepting responsibly and because if it’s a close call they have to chose between taking part A or B
- 240B(b): 1 year of p/p, 5 years of good moral character, Up to 60 days
  - At the conclusion of removal proceedings

Voluntary Departure and Unlawful presence under a year
- A person who has been present in the US for between 180 days and 1 year and is granted voluntary departure at the commencement of removal proceedings is not subject to the three-year bar (INA § 212(a)(9)(B)) if you leave before the initiation of removal proceedings you are barred for 3 years but if you get voluntary departure during removal proceedings, there is no bar.

Procedural Complication: voluntary departure can be granted up to 30 days after setting up the Master Calendar: So look now at 212(a)(9)(B)(i)(I) (doesn’t kick in)
- Result: if decline voluntary departure, removal proceedings start, he tries to accept but it is denied: he could have removal order
- If guesses wrong: face 10 year exclusion
- If he thinks waiver will be granted, he can apply after the notice to appear

Note: if over a year (Problem 6): 212(a)(9)(B)(i)(II): no requirement of prior to the removal hearing, lead to less options, 10 year bar either way
-Stay of Removal (Give extra period before removal order executed) after BIA has issued a formal removal they give some time for people to stay in US to take care of personal matters.
  -Coupled with pending “motion to reopen”
  -ICE has total discretion (DHS, in its discretion, to grant a temporary stay under 8 C.F.R. § 241.6.)
  -motions to re-open do not automatically stay removal

-Objections to destination. § 241(a)(2) allows non-citizen to designate the country of deportation, unless the chosen country refuses to accept the person. In the latter case, the IJ has the authority to specify the country to which the person will be removed (options laid out in statute)
  -Judge at removal hearing selects removal country
    -Step 1: noncitizen’s designation of a preferred country
      -if removed, person must be removed to the designated country unless any of several exceptions applies- then the designation is disregarded
    -Sept 2 kicks in: person is removed to country where he or she is a “subject, national, or citizen” with some exceptions
      -if exception applies & person is not removed to step 2 country, go step 3
    -Step 3: judge picks from country from which person admitted to the US, persons birth country, etc
      -if removal to those six possibilities is impracticable, inadvisable, or impossible, then the SC said the 4th step is:
    -Step 4: judge can designate another country whose gov’t will accept the alien into that country
      -only step in which the country’s affirmative acceptance is a prerequisite to removal (Jama SC, 2005 concluding that in the third step “another” only modified the word “country”)

Constitutional defenses to removal: Have been rejected All sorts of constitutional defenses to removal – unfair to the U.S.-citizen-children of aliens who are removed, ex post facto punishment, cruel and unusual punishment, estoppel – have been rejected. See pp.627-28 CB

Miscellaneous defenses to removal
  -citizenship (always will work)
  -deportable parents have US citizen children (rejected by courts so far)
  -removal as a punishment (unsuccessful)
Deportation Procedure

- Introduction

  - Deportation proceeding: short-hand for after admitted (officially a removal hearing)
  - “Notice to Appear” initiates the proceeding

- Apprehension:

  - INA expressly charges the Attorney General with the administration and enforcement of the immigration laws
  - 287(a) – Specific powers given to INS employees without a search or arrest warrant:
    interrogate noncitizens, arrest any noncitizen if there reason to believe in violation of the immigration laws, Within a reasonable distance from any external boundary the power to board for purpose of searching for noncitizens AND Within 25 miles of any external boundary, the power to enter private lands other than dwellings for the purpose of patrolling the border
  - Immigration Officers Include: All immigration inspectors at the border, All border patrol agents, All investigators, The Attorney General may also deputize properly trained state employees to perform investigation, apprehension, and detention functions
  - In certain situations the immigration officer must have a reasonable suspicion that the subject is not a citizen or that he or she is within the US in violation of the law
  - Other actions: probable cause to believe the person is a noncitizen here unlawfully

- Before the Hearing

  - Within 48 hours of the arrest, the INS must decide whether there is prima facie evidence that the arrested alien is in the US in violation of law
  - If there is prima facie evidence, the INS issues a Notice to Appear, serves it on the alleged noncitizen, and files it with the immigration judge

Delays

Judge Van Wyke’s opinion: Issue: proper degree of independence that IJ and BIA have in deportation cases

  - INS was delaying. Immigration Judge wanted them to adjudicate a visa petition. Claimant was deportable, but his defense is that he’s applying for an adjustment of status. INS purposely sits on the I-130- knowing that without their approval the change of status will not happen. Immigration judge was upset since they would not make a decision so he closed the deportation case.
  - INS called the chief immigration judge who called Judge Van Wyke to encourage him. There’s an independence issue: he wants to please his boss.
    - Job security- the more of it, the more independent
    - Independent decision making – should chief judge be involved in first place
    - Process is flawed because a phone call should not be influential (ex parte communication is not allowed to reverse)

- The usual removal procedure

  - If there is prima facie evidence that non-citizen in U.S. unlawfully, the DHS (in particular, ICE) issues a Notice to Appear, serves it on the person, and files it with an immigration court.
    - Service of Notice to Appear marks commencement of removal proceeding and vests jurisdiction in the IJ.
  - Then there is a master calendar hearing (similar to a preliminary hearing in the criminal context)

- Counsel in Removal Proceedings

  - Counsel. Under § 240(b)(4)(A), the non-citizen has the right to be represented by counsel, but only at his or her expense. “at no expense to the government”
  - Representation by counsel correlates of success for noncitizens in removal proceedings
    - But maybe people who got pro bono lawyers had stronger cases on the merits
    - There are provisions that say that in removal proceedings person has right to counsel (gov’t won’t pay) by people authorized to practice in removal proceedings.
-attorneys, law students (limitations: any non-profit, supervision, paid by organization, any year), law graduate (limitations), reputable individual (limitations, need good moral character), accredited representatives (by BIA) 
-organizations 

-Aguilera-Enriquez v. INS: - LPR went to Mexico and upon his return through Texas was caught attempting to smuggle cocaine. He pled guilty. INS ordered him deported. Said his lawyer did not inform him that he’d be deportable if he pleads guilty He appealed to BIA challenging Texas Appeal dismissed as well as his appeal claiming due process violations. 

Holding: representation is therefore provided to an indigent client on a case-by-case basis as determined by “fundamental fairness”
  -Held: look to fundamental fairness
  -Look to Mathews v. Eldridge Factors (CB 663)- because wanted to avoid ‘criminal’ issue 
    (1) Private individual interest: is person LPR/non-citizen, entered or not? 
    (2) Govt. interest/value in dispensing the safeguard: representation is costly 
    (3) How valuable is safeguard for reaching an accurate decision: lawyer investigates problem and puts together evidence
-Dissent said LPRs you should have right to counsel at gov’t expense if you financially need it. 

-Gideon SC held Con requires the states to provide counsel to indigent defendants in all criminal cases (not just capital cases). However, Removal is classified as a “civil” proceeding

-Counsel is very unlikely to be appointed under the case. 
- NY declines fed funding so they can represent noncitizen 
  -One lawyer in NY represents detained criminal noncitizens
-Equal access to justice act: in an adversary adjudication (admin agency level) a party can obtain award of attorneys fees against gov’t and shows that gov’t case is frivolous. 
  -Problem: here, removal hearing is not covered as adversary adjudication

-Discipline of Immigration Practitioners
-Introduction:
  -all who practice before DHS or EOIR are subject to special rules which may overlap with ABA to encompass all categories of people authorized to practice in immigration proceedings. 
  -sanctions include permanent expulsion, temporary suspension, private censure, etc.
  -Any person may file a complaint against a practitioner who is believed to have violated a rule 
    -office of general counsel of EOIR or DHS conducts investigation
    -judgments are appealable

-Substantive grounds for discipline of immigration practitioners: 8 CFR §1003 (p 686) 
  -frivolous behavior
    -purpose: prevent inefficiencies. If you have no ground for appeal, but you do it anyway it could delay deportation because you get an automatic stay. 
    -dangers of provision: if not sure whether frivolous, probably wont file. you can argue to overturn previous decision so long as it’s in good faith but BIA decides good faith. 
  -Ineffective assistance of counsel
    -used to re-open cases
    -not usually a basis for withdrawing a guilty plea in criminal proceedings or for reopening a removal proceeding unless the ineffectiveness prejudiced the client
    -two common ways for this issue to arise:
      1. Removal charge hinges on the person’s criminal conviction and the person seeks to vacate the underlying conviction on the ground that counsel was ineffective during proceedings 
      2. Counsel was ineffective in the removal proceeding itself
-**People v. Pozo** (most recent): seems to say should allow a person to withdraw guilty plea b/c didn’t know deportation consequences, claimed lawyer was ineffective by *not telling him information*.
  -Prejudice issue: must show prejudice (negative impact) from counsel’s ineffectiveness
  -Here: nobody spotted the issue until notice for removal proceeding
  -Even stronger case when attorney knows of risk but doesn’t bother to look it up

  **Strickland** standard: attorney’s performance fell below an objective standard of reasonableness and deficient performance resulted in prejudice to D
  -note: several states pass legislation that says trial judge must ask if person is a US citizen. If they say no he says you have to consider deportation.

-**U.S. v. Parrino** (CB 677, N.1) contrast with Pozo
  -F: LPR charged with criminal offense and pleads guilty and conviction- ground for deportation.
  Deportation proceedings are brought but D did not know that it would be grounds for deportation and would not have pleaded guilty.
  -H: The only consequence judge has to tell him about is the direct consequences, not lateral ones. A direct one would be how long you’ll be in jail. But deportation is in lateral consequence.

-**Matter of Lozada** (CB 681)
  -leading case for reopening case.
  -F: lawyer does a lousy job, order of removal from BIA, and then new lawyer says old lawyer was ineffective. BIA is weary of these claims.
  -Held: Court will not re-open case: no ineffective assistance. Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.
  -Critique: client shouldn’t have to ask lawyer to file a brief (lawyer should know this)
  -disciplined for frivolous behavior and ineffective assistance of counsel. Problem:
    -if there’s a new/creative argument you want to make you might fear it was frivolous. But if you don’t make argument but later court says you should have, could be disciplined
    -this is not a unique problem for lawyer to be in.

-**Detention.** Under § 236(a), the govt. has the discretion to detain a non-citizen during removal proceedings.
  -Release requires a finding that the person will not endanger persons or property and is likely to appear for the removal proceeding.
  -236(c)(1)(D): mandatory detention if alleged basis for inadmissible/removal is terrorist activities.
  -Detention is also mandatory for almost anyone who’s inadmissible or deportable on crime-related grounds, most arriving passengers, and individuals awaiting the execution of final removal orders

-**Evidence/Proof** in Removal Proceedings
  -Admissibility of evidence: probative and fundamentally fair can be admitted
    -Formal rules of evidence don’t apply
    -all testimony is under oath or affirmation and by statute noncitizen has right to cross examine gov’ts witnesses 240(b)(4)(B)
    -hearsay allowed, but by introducing it, does deprive person right to cross?
      -to prevent this courts require gov’t to make reasonable effort to produce witness at hearing before resorting to hearsay
      -Can’t be fundamentally “unfair”
    -In practice, it rests on whether the ICE trial attorney has made a reasonable effort to bring live witness in court.

  -Exclusory rule- if gov’t gets evidence illegally (4th amendment) than on motion by D, evidence is admissible in court. SC has said that this does not apply in removal proceedings absent “egregious” circumstances.
    -if noncitizen can show that evidence was seized in a racially discriminatory role, it can be considered “egregious” and evidence can be suppressed.
**Burdens of Proof**

1- **ICE first has the burden of proving** that the subject of the proceeding is a noncitizen.
   - Can infer alienage from silence is permissible (But will need more evidence to obtain the necessary clear and convincing evidence for deportability)

2- **Then burden is on noncitizen** to prove (240(c)(2)): either:
   - 2a- if alien is applicant for admission; alien is clearly and beyond doubt entitled to be admitted and is not admissible under 212
     - noncitizen who is present without admission is deemed an applicant for admission 235(a)(1) and inadmissible under 212(a)(6)(A)(i)
   - 2b- by clear and convincing evidence, that the alien is lawfully present in the US pursuant to a prior admission

3- **If a noncitizen has previously been admitted to the US, ICE must prove deportability** by “clear and convincing evidence” 240(c)(3)(A)
   - if they do so, noncitizen can try to get discretionary relief
     - exception for gov’ts burden of proof in deportability cases:
       - if person against whom proceeding is brought does not prove the time, place, and manner of his or her entry the person is presumed to be in US in violation of law and deportable under 237(a)(1)(B)
   - Self-Incrimination: Privilege may apply in deportation cases as long as the statement would be incriminating

**Summary:**

1. Govt. proves a person not a USC
   - Infer alienage from silence is permissible (But will need more evidence to obtain the necessary clear and convincing evidence for deportability)
2. Person must prove that was admitted (240(c)(2))
3. Govt. then must prove deportability by clear and convincing evidence

**Actual Deportation Procedure**

- General: IJ hands down a decision of EITHER:
  - (1) order removed
  - (2) order terminating proceeding
  - (3) middle ground: voluntary departure

- Removal Hearing Issues for IJ:
  - (1) is person deportable?
  - (2) if deportable, is person deserving of statutory relief?
    - Most issues on appeal fall under #2 above:
      - (1) is person qualified? (hardship, amount of unlawful presence, etc.)
      - (2) does person deserve relief?

**Structure for Appeals**: both ICE and the non-citizen have right to appeal (reality: most appeals brought by non-citizens)

- moved from INS to EOIR to insulate from political pressures
- 02 Ashcroft issued rule to expand use of one member decisions and affordances without reasoned opinions

Streamlining Appeal Process:

1. Appellant (noncitizen or ICE) files notice of appeal with IJ no later than 30 days after decision (automatically stays execution of IJ’s decision)
2. Chair of board refers case to one of the board members
   - board member can give summer dismissal (lack of issue for appeal generally) if:
     - notice of appeal fails to specifically state reasons for appeal
appeal was filed for improper purpose
appellant indicates intention to file brief but does not
appeal does not fall within board’s jurisdiction
appeal is untimely
One member can give Affirmation w/o Opinion (AWO)
One member decides it is an easy case so quickly disposes of it (One member instead of three member panel)
No opinion

(3) Absent summer dismissal, board member decides whether to act alone or forward case to a 3 member panel (must act alone if he finds case falls within one of 6 enumerated situations)
if it goes to 3 member panel, they have discretion to hold oral argument
en banc in exceptional cases
LA times: many BIA affirmances without opinion, some judges doing 50 cases/day
new rule causes increased rate of rejections, restricted scope of BIA review (from de novo to “clearly erroneous”), allows Att Gen to fire BIA judges (independence issue)

Normal Appeal Process (without above streamlining procedures)
BIA waits for transcript from IJ and briefs from attorneys
Possible summary dismissal
Possible 1 member affirmance without opinion: comes in after brief filed and transcripts filed
Once BIA decision issued: right to petition to Court of Appeals
If single-member AWO: the Court of Appeals will review the IJ decision
But certain IJ findings are not reviewable in court
If Court of Appeals can’t determine if can decide the issue: must remand to the BIA to finally give reasons

Summary dismissals of BIA v. Affirmances without opinion
Summary dismissals happen before they see transcript or any briefs.
Single member affirmances without opinion: It’s only one person (not 3) and it’s without an opinion so you don’t have to explain the decision you’ve reached.
both: speed up the process: important to gov’t because detaining people is expensive, also gov’t does not want to give person a frivolous reason for people to extend their stay speeding it up decreases things
Dangers: need to see transcripts if it’s about facts. if it’s about law, you want to see the briefs.
For that reason summary dismissal is conditioned in some ways (notice of appeal did not specify grounds is the common one)

Motions to reopen or reconsider
reopen: uses present material new facts that were not available and could not have been discovered or presented at former hearing
reconsider: calling attention to errors of fact or law in the prior board decision and therefore must be supported by pertinent authority
court are not inclined to reopen cases unless there are unusual circumstances
judicial review for inadequate report
noncitizen’s fault, too bad
BIA can be reversed for not doing a good job
Expedited removal procedure – See § 235(b)(1).
- Expedited removal applies to non-citizens upon their arrival; it also may be extended to non-citizens who are present in the U.S. without having been admitted and who are unable to prove continuous physical presence in the U.S. for the immediately preceding two years.
- If an immigration officer at port of entry “determines” that an arriving non-citizen is inadmissible under either the fraud ground or the improper-documentation ground, the person is ordered removed without further hearing.

- There is no administrative appeal, except for returning LPRs, admitted refugees, and individuals who have already received asylum. But no review on merits
  - Under § 242, the only judicial review available is for the issues of whether the person is a citizen, whether the person was in fact ordered removed, and whether the person comes within one of the above exceptions (returning LPRs, admitted refugees, and asylees).
- Because under § 212(a)(9)(A) formal removal at a port of entry renders a person inadmissible for 5 years, non-citizens often strategically withdraw their applications when admission appears unlikely. Immigration inspectors pressuring those w/ meritorious cases to withdraw?
- 242(a)(2)(b) there are certain orders predicated on criminl convictions which are subject to no judicial review
- 242(a)(2)(c) bars judicial review of most discretionary decisions (cancellation of removal, voluntary removal, waivers of inadmissibility based on fraud)

EXCEPTIONS:
  - 242(a)(2)(b) - US SC had trouble with repealing habeas corpus unless congress speaks really clearly on this, congress with REAL ID added “habeas corpus” too to repeal it. it’s all stripped: -Con Q is whether congress can do that. Unresolved.
  - (b) and (c) above shall not apply to Con questions or Qs of law. If claim is about the law… and based on discretion

- Exceptions to whole deportation proceeding
  - voluntary removal
  - certain criminal ones
  - in absentia
  - if you are removed then you come back illegally, they can remove you based on old one
  - airline crews and shipping crews

- Issue: Notice of the Appeal: problem: attorney has not yet received the transcript
  - Hard to put together the notice of appeal without much time

Judicial Review of removal orders (assume removal order has been issued)
Introduction:
- Longstanding refusal of the courts to review the decisions of consular officers denying visas
- Hobbs act (subject to exceptions) once all the relevant administrative authorities have passed on the case, the noncitizen has a right to judicial review of an order of removal
- first the district court’s review deportation cases by way of Habeas corpus but that carried baggage so they stopped

- General Rule: Judicial review = ascertaining whether the evidence relied upon by the trier of fact was based on reasonable, substantial, and probative evidence
  - (1) exhaust administrative review remedies
  - (2) right to obtain court review: skip district court and appeal straight to Court of Appeals
-Problem: general rule now subject to exceptions:
  -INA 242(a)(2): Matters not subject to judicial review
  -INA 242(a)(2)(B): discretionary relief
    - (2)(B)(i): involves 212(h)
    - (2)(B)(ii): discretion of Ag or Secretary of DHS
  -Exceptions are limited to not reviewing the exercise of discretion so error in law is still subject to review (even if error in law going to discretion)
  -INA 242(a)(2)(C): relating to criminal grounds

-Constitutional Issues still not resolved
  -St. Cyr (Supreme Court): couldn’t mean to bar habeas corpus

-Petition for judicial review does not amount to a stay of removal
  -Petition must be filed in the circuit in which the removal was hearing was held no later than 30 days after the final removal order
  -Now: need affirmative decision from the Court to stay removal
  -Court takes preliminary look to decide if not frivolous then grant stay of removal
  -Since you can be kicked out while petition is pending unless court says otherwise, always couple the appeal with request to stay
  -Note: often removed from country while petitions for review are pending

-Limited judicial review:
  -Limited judicial review for crime-related removal orders – § 242(a)(2)(C)
  -Limited judicial review for denials of discretionary relief – § 242(a)(2)(B): No court shall have jurisdiction to review: Cancellation of removal, Voluntary Departure, Adjustment of status, Waivers of inadmissibility (and others)
  -Limited judicial review for expedited removal orders – § 242(a)(2)(A)
  -Limited review of AG regs that limit the eligibility for voluntary departure – § 240B(e).
  -Limited review of prosecutorial discretion – § 242(g).
  -Limited review of detention decisions – § 236(a), § 236(e)

-Strategies to get around Limitations on Judicial Review: see large outline
  -Habeas corpus – A ct. may be able get around the above-mentioned limitations on review through other sources of subject-matter jurisdiction, such as habeas corpus.
  -Other strategies – General federal jurisdiction (28 U.S.C. § 1331). Again, have to see how this interfaces with the above-mentioned limitations on review.
  -Consolidating reviewable claims – See §§ 242(b)(9), 242(b)(6).

The detention of noncitizens: post 9/11 strategy has been vastly increased resort to preventative detention.

-detention in connection with removal proceedings
  -236(a) govt’ officials have discretion whether to detain or release while removal proceedings are pending
    -release requires finding that noncitizen will not endanger persons or property and is likely to appear for the removal proceeding
  -236(c)(1)(D): mandatory detention: pending removal proceedings, of any noncitizen who is alleged to be inadmissible or deportable on the basis of terrorist activities
    -for a month, if you came to port without papers seeking asylum, mandatory detention, repealed.
  -mandatory detention: noncitizen is not a threat to society and grants release on bond, ICE may appeal the decision to BIA. Judge’s decision ordering release must be staued and noncitizen is detained for as long as appeal takes
    -ICE need not state any reason for doubting immigration judge’s decision to release
Immigration and National Security

The Detention of Non-citizens: 236(a) gov’t officials have discretion whether to detain or release while removal proceedings are pending (release requires finding that noncitizen will not endanger persons or property and is likely to appear for the removal proceeding)

-Mandatory detention: 236(c)(1)(D) pending removal proceedings, of any noncitizen who is alleged to be inadmissible or deportable on the basis of terrorist activities
-Operation Liberty Shield (terminated after 1 month) mandated detention of asylum seekers coming from one of 34 named countries (Mostly Arab or Muslim)

-Appeals in bond cases-
  -Used to be when IJ said detention wasn’t necessary ICE could appeal to BIA and the release order would be stayed only if the then INS could show the appeal was likely to succeed and the person’s release would cause irreparable harm.
  -NOW: A 2001 regulation issued by Attny Gen. changed it so if ICE appeals the stay is automatic, ICE need not show any reason for doubting the decision of the IJ.

-FBI opposed discretionary release for 9/11 ppl who they couldn’t guarantee were not terrorists

Discretionary detention v. categorical determination
Officials have discretion to detain, but there are certain general categories where you have to be detained (aggregated felony, terrorism)

<table>
<thead>
<tr>
<th>Discretionary detention (case by case determination)</th>
<th>General categorical determination (ex agg felons)</th>
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<tbody>
<tr>
<td>-detain less people, less expensive</td>
<td>-avoid hearings to flesh out facts</td>
</tr>
<tr>
<td>-less risk of error bc more thoughtful determinations</td>
<td>-high risk of error</td>
</tr>
<tr>
<td>-false negatives: if judge is wrong about determination</td>
<td>-false positives: should be detained, but determination is false on true facts</td>
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Hold until clear FBI policy: PETTBOM investigation
- much of FBI’s work was focused on Arabs and Muslims. In the process, they found lots of illegal immigrants and turned them over. Since they were picked up during counter-terrorism review, they’d detain them all without determination of public safety.
  -FBI said so long as they’re behind bars, we can take our time and investigate
  -Problem people in jail for months and never let out, even if ordered removed
  -INS said they won’t detain them and wait for FBI, but will give FBI notice.

-monitoring of attorney-client conversations
- if an inmate has something to do with terrorism, the PENTBOM said that they will provide appropriate procedures for monitoring or review of communications between inmate and attorney who are traditionally covered by privilege
- safe-guards: reasonable suspicion, privilege team keeps it confidential from DHS investigators unless they think attack is imminent
- ABA says you don’t need this because you can get a court order to say that you can monitor the conversation if it’s in furtherance of crime

-Of the people who show up to register, 13k were people awaiting green cards- family members of Citizens and LPRs, but they complied with registration law. They were arrested, detained, and put into removal proceedings.
  -No more incentive to register
  -However, they got rid of 13k unregistered immigrants

Preventive Detention- keep person in jail for temp period of time pending something.
- benefits: person will show up at removal hearing, public safety (counterterrorism), interrogate them, deterrent
- costs: freedom of movement, can’t work, study, socialize, cost to gov’t, detainee’s family-income
**Student-Related Issues:** SEVIS program: universities forced to gather info. on students -people are suspicious of students after 9/11

**Shrinking Procedural Rights:** strategies allow gov’t to suppress information for national security

1. **Arriving noncitizens**
   - 235(c) an immigration officer/judge who suspects that an arriving noncitizen is inadmissible on any of several specified national security related grounds (including terrorism) is required to order the person removed and report the removal to secretary of DHS.
   - If secretary decides on confidential info that the person is inadmissible and that discloser of the information would be prejudicial to the public interest, safety or security, then the noncitizen can be removed without a hearing

2. **The terrorist removal court**
   - elaborate new procedure for inadmissibility/deportability of suspected terrorists
   - statutory definition for terrorist is a noncitizen linked by any of several specified ways to terrorist organizations or any of several designated unlawful acts
   - 502 requires chief justice to appoint five dist judges to a “removal court”
     - if DHS does not need to rely on classified info, special removal court not used
     - if classified info is used the Sec must file an application with removal court stating relevant facts
   - if judge finds probable cause to believe person is an alien terrorist, judge grants application, removal hearing will take place which will be open to the public
   - noncitizen is entitled to reasonable notice of charges. If indigent, counsel will be appointed. 504(c)(1)
   - THIS PROCESS HAS NEVER BEEN USED

3. **Closed removal hearings**
   - need to balance individual freedoms with security concerns
   - in 01 Chief Immigration Judge instructed other judges to close removal hearings in “special interest” cases to the public and not say anything about the cases to anyone
     - Closed to press, family, friends, etc.
   - raise con issues, not for procedural rights of noncitizens, but for right of public and press to have access to the proceedings
   - justifications: revealing other terrorist orgs on how gov’t operates
   - it still makes it harder, or the person might be innocent. Eaves dropping issue

4. **Secret evidence hearings**
   - 240(b)(4)(B) goes beyond arriving noncitizens
   - allows gov’t to use secret “national security” information either in opposition to the person’s admission to the US, or in opposition to the person’s application for discretionary relief
   - note: such a short “summary brief” may not allow person to prepare a good defense if it does not state dates and other important info
   - distinction between closed hearing and secret evidence hearings
     - closed hearing: all the evidence coming in but it’s closed to the public
     - public interest could be hurt since we don’t know process
     - if gov’t knows that it wont be public it might affect the way they act
     - Secret Evidence hearing, maybe even worse
     - might not be able to prepare for a defense

5. **Military tribunals**
   - in Jan 02, under military order, us armed forces took captured Taliban and al Qaeda fighters from Afghanistan and suspected terrorist from other countries to us naval base at Guantanamo bay for detention
   - no right to jury trial, 2/3rds is enough to get convicted, even for death penalty
Visas and other overseas policies
-if country is from sponsors of international terrorism list, applicant must complete substantial additional paperwork and must receive special clearance before consular officer is permitted to issue visa
-DHS may prevent a visa issuance but may not reverse a consular officer’s refusal to issue a visa
-heightened security and delays due to elevated security precautions

Restrictions on visa waiver program
-217 permits sec of DHS in consultation with sec of state to designate certain countries whose nationals may enter us for up to 90 days as either B-1 or B-2 visitors without having to obtain visas
-some think it should be repealed

Profiling: Enhanced border enforcement?
-profiling: it can be rationale so long as enforcement resources are finite and police have reason to believe certain appearances and behavior tend to be disproportionately present in a given class of suspects
-problems arise when it is based on person’s race, religion, gender
-Nothing inherently offensive about profiling; however there are variables that might affect one’s view as to whether a particular instance of profiling is offensive. Ex:
  -rationality/effectiveness
  -magnitude of harm sought to prevent
  -classification used (nationality, race, gender, etc)
  -degree of intrusion
  -citizens and noncitizens or just the latter
  -objectively identifiable or inferred from physical appearance
-Shuck says profiling is all you have to go on
-David Cole: need cooperation of Arab communities, profiling alienates people who could help
-99.9% of noncitizens who are Arabs or Muslims have nothing to do with terrorism, so it’s not rational to search that population for racists
-maybe asking wrong question. Is it justified to investigate proportional to %age?
-no because it’s discriminatory even assuming it’s rational
-Why is discrimination wrong?
  -it is hurtful, it takes away an interest, etc
-Mark Krikorian -because the terrorist threat is ‘asymetrical’ we need aggressive immigration policies to minimize threats
-Muzaffar Chishti: there have been too many incidents of long time US residents being detained by the gov’t and held without charge, denied access to legal counsel, secret immigration hearings
  -new security has Con problems
  -gov’t success in apprehending terrorists has not been from 9/11 detentions but from other efforts like international intelligence initiatives
  -gov’t has used national origin as a proxy for evidence of dangerousness

David Cole, the priority of morality: the emergency constitution’s blind spot
-many middle eastern men were arrested and nothing really came out of it.
-there have been many examples of these policies: Japanese internment
-three preventative detention experiences in the US of the last century all resulted in the mass incarceration of people who turned out NOT to pose the national security threat that justified their detentions in the first place
Q: how much of the blame can immigration take to combat terrorism?
   - would they have caught the 9/11 terrorists?
     - some say no, some say yes (902, top)
       - Mary Ryan says there was no reason to say they were suspicious
       - Krikorian says that their applications were sloppy and counselor’s officers were pressured

   - Should counselors let people in if they are young and single on tourist visas?
     - they’re most likely to immigrate
     - sometimes people have to give favorable visas so that the host country will not be offended (Saudi Arabia)

   - Krikorian says we need to finds illegal immigration is really bad for terrorism and that is the key
     - is there really a positive correlation?
       - on one hand they want to buy time, on the other hand they don’t want to be in the attention of authorities
Refugee Law

-Policy: refugees deserve humanitarian response- persecuted, unable to turn to their gov’ts
- Tension between national self-interest and humanitarian
- Historically they were fleeing communist regimes
- Ideological selection? Some people say that our refugee policy wrongly favors our politics
- UNHCR (United Nations High Commissioner for Refugees)
  - Providing international protection and seeking permanent solutions to the problems of refugees by way of voluntary repatriation or assimilation in new national communities
  - Non-political work, humanitarian
- Prof Suhrke identified causes of refugee situations and ask if we will see more or less?
  - “Push and pull factors”: competition for land/resources will increase due to population growth, unequal distribution of wealth, weak dispute resolution mechanisms to resolve are too weak to solve disputes, wars of independence, structural weaknesses of 3rd world nations, possibilities of nuclear war
- What are ways in which world can minimize refugee flows
  - Ethnic harmony, economic aid
- What happens to refugees?
  - 1. Voluntary repatriation to original country- people are willing to go back
     - Regime may have changed, or they changed, passage of time
  - 2. Local integration- settle permanently in place you now are
     - Could damage diplomatic relationships, also country may have to struggle to maintain basic necessities for their own people, even with funding, it’s a problem
  - 3. Permanent resettlement in a 3rd country
     - Have to find illegal way to get in, not easy
- US definition is broader than 1951 convention: you can have been persecution or (well founded) fear, but convention only allows fear of persecution

-General Information about Refugee Programs
- Off shore (“overseas refugees”) - outside of US territory or at “first asylum” want to come to US
  - Coming from other country
  - A way to get into the country
- On shore (“asylum seekers”) - already reached US and seek to remain
  - Present in U.S. either at border or in the interior
  - Like a defense to stay in country
- Can apply during removal hearing or affirmatively through USCIS
- Don’t have to be either to apply, only need to meet def of “refugee”
- Under US law “asylum” is a remedy for persecution to remain at least temporarily and usually permanently in the US

- Remedies available to refugees that have arrived at the U.S.
- Asylum §208
  - Can bring existing spouse and children
  - Stay permanently
  - Not guaranteed, discretionary
- Withholding of Removal (Nonrefoulement): §241(b)(3)
  - Can’t bring family or stay permanently
  - Right not to be returned to the country of persecution
  - Note: asylum application in the alternative is an application for withholding of removal
  - Mandatory (not discretionary if you meet elements
Refugee defined (§INA 101(a)(42))

101(a)(42): Must have persecution or well-founded fear of persecution on account of:
- Race
- Religion
- Nationality
- Member of social group
- Political opinion

Applying Refugee Concepts to Fact Scenarios
- is it persecution?
- Severe enough, individualized, not prosecution
- can it be linked to race, religion, etc…?

Overseas Refugee Process in U.S: §§ 207 and 209
- No judicial review of these cases

(1) President decides how many people authorized to come in for the coming fiscal year (lately around 70,000), he will also specify some regional allocation (SE asia, South America, etc)
- Note: the president involved in high level consultation with Congress to set the number
- Secretary of DHS has to decide how many of the authorized number will get in (usually same #)

(2) Persons apply overseas

(3) Individual Applications
- Asylum Officers look to priorities set forth by State Dept. (which change from year to year)
- Within given region all first priority regions admitted up to pres quota then 2nd and 3rds
- Refugee cannot have been firmly “re-settled” in another country
- Most applicable exclusion grounds are waivable by DHS
- Automatically exempted from certain exclusion grounds
- Labor certification
- Public Charge
- Required documents

Spouses and children accompanying are admitted under the same criteria – 207(c)(2)

(4) After person gets in as a refugee: 1 year and apply for LPR
- Maintain refugee status for 1 year then apply for permanent status: 209(a)(1) (apply for adjustment of statues)
- Only 10,000 refugees annually allowed to adjust to LPR status (?)
- AG may later determine that the principal refugee did not in fact meet the refugee definition at the time of admission: 207(c)(4)

(5) Parole: §212(d)(5)(A): if you don’t meet the definition of refugee then the parole option may be more available (Ex: if fleeing a war but not persecuted)
- It says that Att Gen (now DHS) has discretion to allow people to come into country for urgent humanitarian reasons.
- Congress said there are compelling cases and they apply to a specific case
Asylum procedure. § 208. Usually apply for asylum as an affirmative defense after initiation of removal hearing, but also can apply affirmatively for asylum
   - If DHS already initiated removal proceedings, application is filed with immigration judge
   - If removal proceedings have not yet been instituted, one may take initiative and apply to USCIS. Called “affirmative” applications and adjudicated by ‘asylum officers’
     - Applicant gets a “nonadversarial” interview.
     - Either grants asylum or refers case to immigration judge for removal proceedings
     - At removal proceeding, immigration judge reviews asylum claim de novo

Asylum: Can stay in US and bring family

Withholding of removal, AKA nonrefoulement (international law term), § 241(b)(3).
   - Remedy: right not to be returned to a particular country; DHS can send you somewhere else

Making a claim
   - To make out a claim, you have to establish that you meet the definition of “refugee” in § 101(a)(42):
     - Three Statutory Elements
       - (1) fear of persecution
       - (2) on account of race/religion/nationality…
       - (3) well-founded fear
     - Even if meet the elements of refugee: still face exceptions making you ineligible for asylum/withholding of removal

Persecution Element

Matter of Acosta (CB 941): overview of requirements of asylum, Focus: fear of persecution
   - Taxi Driver in El-Salvador started a group of taxi drivers and got threatened by guerillas who wanted to over through the gov’t because they claimed he was a traitor for not participating in work stoppages to hurt the economy.
   - Need to define:
     - (1) fear
     - (2) persecution

Fear:
   - Primary motivation for requesting refugee status must be a genuine apprehension of danger in another country (Acosta)
     - Taken literally BIA seems to be saying that if there is another reason that’s even more important, than this will not be the primary one.
     - Generally: primary motivation is not a big issue (Acosta)
   - The term contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome
   - The home government must be either the party that is inflicting the harm or unwilling or unable to control a private actor who is inflicting it
   - A refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country – he must show that the threat of persecution exists for him country-wide
     - If the government is either the perpetrator or the sponsor of the persecution, there is a rebuttable presumption that relocation is not a reasonable alternative
Individualized Persecution Issue (CB 949, N.3)

-(Acosta): Generally harsh conditions shared by many persons does not amount to persecution. Exposure to the general dangers of war/other strife not persecution
- Must adequately distinguish one's situation from others in the country
- Harm or suffering must be inflicted in order to punish him (Acosta)
- Requires either a threat to the life or freedom of or infliction of suffering or harm upon those who differ in a way regarded as offensive (Acosta)

- Department of Justice View on Individualism:
  - IJ shall not require evidence that person would be singled out individually for persecution if:
    1. Applicant established that there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of Race, Religion, Nationality, Member of social group, Political opinion, AND
    2. The applicant establishes inclusion in and identification with such group or persons such that his or her fear of persecution upon return is reasonable

-Bolanos-Hernanez (CB 950, N.4): Solidified the position that widespread threats of violence should bolster the person's application
  - Prof says: some courts use specific limitations and reason is that huge populations could get through. To elevate this, just set numerical limits

- Choice Issue: when person has a choice (See Fatin v. INS)
  - Either do X and face persecution, OR
  - Do Y and not face persecution
  - Then usually: do B
    - Context religious belief: does law force you to suppress religious belief so you don't face persecution?
    - If any of these options are not persecution then the Court could not find persecution (unless it would abhor you to do otherwise See Fatim)

- Persecution v. Prosecution
  - Normally, gov'ts have right to make criminal offenses
    - UNHCR: crim. prosecution may be considered persecution if just a pretext (look at factors):
      - If the punishment is excessive
      - If it is selectively applied to a group
    - Problem: normally criminal prosecution is not persecution

-Domestic Violence as Persecution: R.A. case (CB 1026-1027)
  - Case still pending before the BIA
  - Final Asylum Regulations from Justice Dept. still not given
  - Issues:
    - Non-state actor
    - Social group

-Non-State Actor Issue (later): Some countries – France and Germany – take the position that the persecutor has to be a government actor, as opposed to a private actor (not the U.S.)
  - Germany has changed their law and France is expected to

-Past persecution relevant in 2 ways:
  - (State dept.) If a person is found to be a refugee solely on the basis of past persecution, then asylum must be denied on discretionary grounds unless the person has demonstrated either
    a) compelling reasons for being unable or unwilling to return or
(b) “a reasonable possibility” that he or she may suffer other serious harm upon removal to that country.
-If claimant demonstrates past persecution then rebuttable presumption that you hold well-founded fear of future persecution
  -(state dept) Two Ways Gov’t Rebut Presumption of well founded fear:
    - (1) fundamental change in circumstances that eliminates the required well-founded fear on one of the protected grounds OR
    - (2) could avoid future persecution by relocating to another part of country
-If show past persecution: this will help when reach discretionary stage of asylum
-When all you can show is past persecution although you are statutorily allowed to get asylum, bc of discursion you will probably get denied. Better to show future, and use past as back-up

-Persecution that is not bodily harm
  -Economic devastation (extreme) can rise to the level of persecution;
  -If not doing something that’s prohibited means giving up something fundamental, then we can argue it’s persecution.
  -Forced to practice or prohibited from practicing religion (issues in Fatin)

Not Persecution:
  -Term requires more than simply governmental discrimination: not all discrimination rises to level of persecution (courts have stated) so may need something in addition (Ahmed v. Ashcroft)
  -Minor disadvantage or trivial inconvenience not enough

On account of Race, Religion, Nationality, Political opinion

-Race, Religion, Nationality
  -have been increasing
  -UNHCR defines:
    -race “in it widest sense to include all ethnic groups that are referred to as ‘races’ in common usage”
    -nationality to include not only citizenship status, but also membership of an ethnic or linguistic group
    -these two overlap
  -UNHCS does not define
    -religion soviet Jews and Muslims has been more common
    -Conscientious objector claims have raised Qs about religious persecution
Political Opinion

- Majority of asylum claimants in US allege persecution on political opinion or social group
  - Acts don’t (generally) establish political opinions (Elias-Zacarias)
  - F: He’s afraid to join Gorillas because if he does, the gov’t will harm him
  - Scalia: Not political opinion if the only evidence is that the person has done nothing
  - Persecution on account of political opinion is persecution on account of the victim’s persecution, not the persecutor’s
    - Must be the actual political opinion, not just something that you do or say
    - It’s not enough to show someone will persecute you in order to promote their own political objectives
  - Sevens (dissent) bases discrimination on account of political opinion on whether your actions show an opinion: overt manifestation of act
  - Neutrality may be a political opinion, but must prove that this is the political opinion
    - there’s a difference between neutrality and risk-adverse/indecisive
    - Must make a conscious and deliberate choice to remain neutral
    - There are limits: can’t commit illegal act (Tim McVeigh)
    - Dissent is more explicit about saying that a conscious choice of neutrality is a political opinion
  - Policy: A rule that one must identify with one of two dominant factions in order to possess a political opinion, when many persons may be opposed to the views of both factions would frustrate the purpose of the refugee act

Imputed Political Opinion

- As long as the persecutor believes the applicant holds a particular view and intends to persecute the person because of it, it does not matter that the belief is wrong - View is accepted by all that matter
  - 9th – Even falsely or cynically imputed political opinion may suffice
    - Lazo-Majano v. INS court said cynical imputed political opinion can suffice. Court said that actual political opinion is that men should not be permitted to dominate women.
    - Matter of RA BIA found claim credible of a for imputed political opinion-Guatemalan woman whose husband was harming her (abuse) and police would not protect her
  - Policy: normally asylum is for humanitarian relief of suffering, but sometimes there are stronger reasons: human rights model (stand up for the rights of others)

Refugees Sur Place

- Applicants who were not refugees when they left home, but who become refugees while abroad
  - Conditions at home changed while they were away
  - Because a person may assert an unpopular opinion for the very purpose of creating eligibility for asylum, UNHCR urges a careful examination of the circumstances
  - Courts have been less inclined to find a well founded fear of persecution based on political opinion when the fear arises because of post-departure activities

- Common Facts Situations
  - Departure or failure to return violated the country’s emigration laws
  - After leaving the country, the applicant began expressing new views or engaging in political associations that might lead to persecution upon return
  - The applicant applied for asylum, was turned down, and now fears that the very act of having applied for asylum will prompt the government of the country of origin to brand him a subversive or a traitor
Social Group Element

-Preliminary Issues:

-(1) Why grant asylum in the first place? Militate in favor of asylum for this social group?
-(2) Why limit asylum? Why limit asylum to this group?

-Test:

(1) identify a particular (immutable) social group (describe it)
(2) show you are a member
(3) well-founded fear of persecution based on that membership

- Immutable Characteristic: Acosta

-Group of persons all of whom share a common, immutable characteristic
  (1) Can’t be changed (often based on past experience)
  (2) Characteristic so fundamental to identity that law shouldn’t require you to change it

-Policy: if you can’t avoid persecution because you can’t change characteristic either because it’s (practically) impossible, it’s a social group. If you can change it, no group.

-Past Experience (only DOJ):

-must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it (DOJ)

-Ejusdem generis: the one general provision in list of specific provisions should follow the types of things as the specific provisions (the other 4 prongs are immutable (race, religion…))

-In Acosta the BIA said being a taxi driver is not immutable b/c could take another job
- Employment is not immutable
- Gays officially recognized as a social group

Closely Affiliated, Voluntary Association: Sanchez-Trujillo

- 9 Cir. held that a group defined as “a class of young, working class, urban males” was not a “particular social group” within the meaning of INA § 101(a)(42).
  -“[T]he phrase ‘particular social group’ implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”
  -voluntary association including a former association or by an innate characteristic that is so fundamental
  -In other words: cohesive (how closely they stick together) and homogeneous (similarity to some degree).

-Not used much anymore: “homogenous” element is no longer invoked
- Policy: if have cohesive group then seems less likely that need asylum
- Note: Manantiel later made an either/or test incorporating as alternative tests:
  -Acosta or Sanchez-Trujillo

DOJ Proposed Rule(2000): may include some of both Acosta and Sanchez-Trujillo

-Prove immutability (adopted from Acosta) and Also lists several other factors
- Main issue: Past occurrence: must prove the characteristic was immutable at the time of the past occurrence (Ex: former gang members not a social group b/c was not immutable at time joined the group (CB 986, N.7),
  -Policy: want to give protection (asylum) to those who can’t avoid it (other policy factors go the other way)
  -eliminates possibility of past experience being collective illegal activity
  -but this could also be dealt with by persecution/prosecution
- also have factors to consider that are not determinative but help decide whether a particular social group exists
Arthur C. Helton’s formulation: social group is a group—it’s a catchall

Imputed membership of group: shouldn’t matter, analogous to imputed political opinion doctrine.

Sexual Orientation Issue: Matter of Toboso-Alfonso
  -F: Homosexual from Cuba- Got persecuted for it, was searched, threatened to go to jail, neighbors threw eggs at him.
  -claimed that homosexuals form a particular social group in Cuba and suffer persecution by the government as a result of their status.
    (INS argued that the “socially deviant behavior, i.e., homosexual activity,” was not a basis for finding a social group within the contemplation of the 1980 Refugee Act)
  -BIA held homosexuality is immutable (so fundamental to his identity) and gays/lesbians are acceptable social group
  -Twist: He is persecuted because of his status, not his acts. If was only acts it might not be persecution under Acosta, but because of a crime (assume sodomy is a crime)- Could argue they should be treated the same because it’s an overt manifestation and disproportional consequences
  -Although BIA said that gays and lesbians are groups, in order to get asylum they must:
    -must show that if sent back they really are going to do bad things to you
    -those bad things constitute persecution
    -must show that those persecution will occur because you are gay/lesbian

Gender as specific grounds Issue
  -Fatin v. INS, Alito (CB 1000)
    -Facts: Iranian woman refused to wear veil, she was opposed to wearing veil
    -Issue: whether women or subgroup of women can be a social group
    -To request asylum applicant must show he/she is a part of a group by:
      1. Identify particular social group Acosta test (immutable characteristic)
      2. Show you are a member of the group
      3. Well founded fear of persecution on account of that membership
  -First social group: “all women”
    1. Alito says this could be a social group bc it meets Acosta test (immutable characteristic)
    2. Obviously satisfied
    3. FAILS because she is not being persecuted “solely” due to her gender
      -“solely” is not in statute. Court reasons not all women are being persecuted to wear veil thus it’s not persecution on of a social group.
      -Convincing? Hypo: demented dictator thinks left handed people are bad. He hates black people too. He persecutes all left handed black people. Judge Alito would not give asylum in this case.
  -Second social group: “all women who find the dress code offensive”
    1. FAILS- but could be a social group if it’s fundamental enough to identity
      -Alito rejects this argument by saying that merely being offended by a practice is not enough to be persecuted.
  -Third social group: “all women who find veil requirement so offensive they would defy the law”
    1. FAILS- but could rise to a level of a social group
      -Alito says if she can show that she will be persecuted because she would defy the law, it could work.
Also, language in opinion suggests he might recognize persecution to people who find the law so abhorrent that they refuse to comply (more severe than offensive)

- here, she only said she’d try her best not to conform.
- courts say when you can avoid persecution by making a choice, than we won’t say that you are persecuted
- Is it persecution to follow a religious belief that you don’t hold?
  - some say yes some say no

Female Genital Mutilation (FGM): *Matter of Kasinga* (CB 1008)

- F: She ran away from her husband and tribe (Tchamba-Junsuntu) tribe before they FMG her and she lived in Germany with lady until a Nigerian sold her a passport and she got to the USA where her aunt is and she asked for asylum right away. Country of Togo would not have helped to protect her, she could not live in another tribe in Togo
- Issue: should opposition to what is going to be done be an element of a social group definition? (More likely falls under the issue of rising to the level of persecution)
- BIA analysis leaves unclear how to decide FGM claims in the future. BIA referred to this particular case and this particular tribe. They also say this is an immutable characteristic which suggests it’s more general.
  - Most people assume that involuntary FGM is persecution no matter what even though the case was a bit ambiguous
- BIA cites *Fatim* for the purpose of supporting the decision here.
  - *Fatim* women are social group, but if it’s “solely bc she’s a women” she’d lose
  - *Fatim* dictum: must be so deeply opposed that it’s abhorrent to qualify for persecution
    - This is not for all women “solely”
    - She did not say she would defy the law
    - She falls within “all women who find law offensive,” so it might not be a social group if it’s not immutable.
      - therefore it would turn on dictum must be so deeply opposed that it’s abhorrent
- BIA could have distinguished *Fatim* by saying this is an intrusion on the body, not just the dress code.

- Should voluntary FGM be asylum?
  - Argument for YES: it’s an intrusion, loss of sexual sensation, medical problems, WHO condemn involuntary FGM as a human rights issue
  - Argument for NO: cultural relativism- many feminists scholars have split from majority and say we need to be culturally sensitive and not assume norms are same everywhere

Why isn’t gender one of the grounds for persecution?
- Fear it would open flood doors - Also in 51 gender was not a big issue, not on radar.
- Women are grossly underrepresented in international organizations
  - hard to think of a reason today not to have gender other than increase in #s
- Alito says women are a social group but no asylum bc not “solely” because women
  - would it be the same result if gender was on the list? no longer a social group
- All of these cases would be easier to decide if gender was on list
Non-State Actor Issue (state actor issue from refugee definition: 101(a)(42))
- Arises in context of domestic violence and guerrilla groups
- Justice Dept. Regulations (CB 1036, N.6)
  - Regulations state: govt. or a person or group is “unwilling or unable to control”
  - Does govt. have to be both unwilling and unable?
    - Hypo: what if a well intentioned govt’ takes all reasonable measures to prevent domestic violence but contrary social norms are so entrenched that domestic violence is still rampant (this result seems to go against the policy of asylum law)
- A few countries said that there has to be a state actor, but now Germany is changing and France will soon because even without direct state inclusion.
  - If case is indirectly through state actor because they’re not doing anything or enough about it, it’s just as bad

Matter of RA – She fled Guatemala to escape the prolonged and savage physical beating and mental abuse inflicted on her by her husband.
- She claimed asylum on imputed political opinion (husband interpreted her resistance as a political opinion that denied his right to dominate her and he punished her for it) and a particular social group (Guatemalan women involved intimately with Guatemalan men who believe in male domination of females). Immigration judge granted asylum.
  - BIA REVERSED: she has not shown that women are expected by society to be abused or that there are any adverse societal consequences to women or their husbands if the women are not abused
  - reopened by Reno and Ashcroft did not decide it, and still no decision.

On account of (“because of”- according to Congress)
- Causal nexus between the persecution and one of the five protected classes
  - if “on account of” is interpreted to mean “but for” (as in tort), then persecution can be on account of race even if there are other factors.
  - in Fatin, court acknowledged that a women from a social group but denied relief bc she could not show persecution “solely” on account of her gender
  - In Kasina – (FMG) “but for” test would have simplified analysis in Kasinaga Test could be: would persecution happen “but for” group/race/religion
  - substantial factor can substitute for “but for

- Elias-Zacarias (p.895 CB) – Persecution on account of political opinion, means persecution on account of the victim’s political opinion, not the persecutor’s.

Well founded, country wide: If you fear being persecuted, your fear is well-founded and country-wide.
- Fatin (p.930 CB) – didn’t show that for her the requirement of wearing veil or complying with Iran’s other gender-specific laws would be so profoundly abhorrent that it could be said she had a well-founded fear of persecution (assuming that threatened non-physical harm could qualify as persecution).
- Acosta (p.875 CB) – BIA held that respondent didn’t establish a legitimate fear of persecution from the Salvadoran government (“no basis whatsoever in either his personal experiences or in other external events”) or from the guerrillas (the terrorists were no longer active)
  - plus there was no evidence that the guerrillas’ persecution of taxi drivers occurred throughout the country, so maybe he could’ve avoided persecution by moving to another city
**Standard of Proof**
- How likely does it have to be that this claimed persecution will actually take place before an IJ or asylum judge will say that you’re eligible for asylum or withholding of removal?
  - **Asylum:**
    - *Cardoza-Fonseca* (CB 1051): SC said you have to meet refugee definition – have to have a “well-founded fear of persecution.” For asylum, “well-founded fear” had lower standard than withholding of removal.
      - Well founded fear is somewhat below clear probability
      - Lower courts say that “well founded” essentially means “reasonable fear” a reasonable person in your shoes.
        - Ex: 1 in 10 chance could be reasonable fear (9th Circuit)
    - **Withholding of Removal (§241(b)(3))
      - *INS v. Stevic*: SC said you can’t be returned if your “life or freedom would be threatened on account of…”
        - Clear probability of persecution: more likely than not: a greater than 50% chance
        - High standard criticized by international community
      - Issue: Why show more to get withholding of removal (can only stay for a while, don’t get family) than asylum (get to stay and bring family)?
        - Explanation: Asylum has lower standard of proof because asylum involves discretion and withholding of removal is mandatory if the requirements are met
          - when all you can show is past persecution although you are statutorily allowed to get asylum, bc of discursion you will probably get denied. Better to show future
            - So high standard as threshold for withholding of removal
            - But reality: asylum rarely denied on discretionary grounds

**Methods of proof** - what you should bring to prove a case
  - **Material facts:**
    - Membership in a persecuted group
      - “singling out” requirement of Acosta
      - Membership establishes the applicant is sufficiently likely to incur consequences
    - Bring facts that if true show well-founded fear of persecution
      - Ex: govt. persecutes class of people and you belong to it
    - Past persecution: discretion is used against you, better to bring future
      - it’s better to make past persecution an independent basis for refugee status, if with no future threat
      - What evidence can be brought to prove these facts
        - gov’t can rebut presumption of well founded fear of future persecution either (a) by showing any fundamental change in circumstances” or (b) by showing that the applicant could avoid future persecution by relocation
          - If a person is found to be a refugee solely on the basis of past persecution, then asylum must be denied on discretionary grounds unless the person has demonstrated either (a) compelling reasons for being unable or unwilling to return or (b) “a reasonable possibility” that he or she may suffer other serious harm upon removal to that country.
    - Note: most refugees flee the country w/o documents
  - **Applicant’s own testimony** Heavily dependent on their own testimony
    - Credibility
      - applicant has incentive to exaggerate probability of harm (does not mean they’re lying)
      - usually have no documents and no witnesses or document
      - Credibility of their testimony is important
- If inconsistency in story is trivial (one where person could not have had a motive to do deliberately), it should not be taken into consideration.
- Why applicant didn’t he apply somewhere else is not grounds for denying asylum

-Minor inconsistencies

**Damaize-Job v. INS** (9th cir) (CB 1059)
- Applicant gave wrong dates for daughter’s birth and other dates
- Held: not material (No incentive/reason to make this up)

- Character/morality
- Also: applicant failed to marry the mother of his children (but Court can’t make this judgment: even if immoral, doesn’t make him untrustworthy)

- Other Evidence to bolster a case: Human Rights Reports, State Dept, UNHCR, NGO
- Judges will admit these sources and take into account arguments of bias
- Reviewing courts have generally accorded great deference to the credibility determinations of the immigration judge who “views the witness as the testimony is given”
- The BIA now revies IJ findings of fact under a clearly erroneous standard

-State department Opinions
- State dept must compile annual reports that describe the status of human rights in most of the world’s countries- human rights organizations have been critical of these reports (admin does not report human rights problems in countries it does business with)
- State dept may supply advisory opinions in individual asylum cases- state dept has opportunity to comment- asylum officers would be influenced only by advisory opinions that contain information they did not already have.

- Advise from UNHCR
- US law: no provision for UNHCR participation in adjudication of asylum cases
- Other sources of info: DHS has a “document center with information on human rights conditions”
- Stay away from politically motivated material
Exceptions to Eligibility for Asylum

(1) Firm resettlement exception: 207(c)(1)
- according to justice dept, a person is firmly resettled if another country if, before arriving in US, the person received an offer to resettle permanently in that country
- exceptions: no firm resettlement if person’s entry into third country was a necessary consequence of his flight from persecution or he remained only as long as it was necessary to arrange onward travel and ties were not established

(2) Past wrongful doing: not a desirable resident: 208(b)(2)(A)
- Not a desirable resident if:
  - have persecuted others
  - Have been a terrorist
  - Criminal offenders: “particularly serious crime” and remains a danger to community (under U.S. law every aggravated felony is particularly serious crime (ineligible for asylum)
    - this is one requirement not 2: once you’ve been convicted than there’s a conclusive presumption that you are a danger to community, so no asylum
  - unavailable when the attorney general finds “reasonable grounds” for believing the person is a danger to the security of the USA. 208(b)(2)(A)(iv)
  - Also note: any aggravated felony plus 5 year prison sentence = ineligible for withholding of removal. 241(b)(3)(B)

(3) 1951 convention exclude certain classes of applicants from protection
- international criminal offenders, those who have committed serious nonpolitical crimes, and guilty acts contrary to the purposes of the United Nations.

Asylum Process/Procedure
- note: asylum application is automatically treated as withholding of removal if asylum is denied

- Two Separate Procedures
  (1) EOIR/BIA: Already in Proceedings
    - Person applies for asylum and/or withholding of removal by filing an application with the immigration judge
    - Decision is appealable to the BIA
    - BIA decision is appealable in court – 242(a)(1)
  (2) USCIS: Affirmative Applications
    - Applications filed with asylum officers
    - Officers specially trained in International law, country conditions, asylum law
    - Officers are based in 7 several major cities throughout the United States
      - Non-adversial Interview
        - Noncitizen may be represented by counsel and may submit documentary evidence
        - note: some people think it should be adversarial
      - Decision
        - If the officer grants the application, then applicant will be admitted
        - If the officer denies the application, then refers the case to an IJ for the initiation of removal proceedings
      - EOIR proceedings with IJ, BIA, and reviewing court kick in
      - 209(b) if granted asylum and remain in US for one year, adjust to permanent resident

- Pros and cons of judicial review.
  - Pros: corrects errors and puts pressure on administrators to get decision right, judges are independent,
  - Cons: costs and delay. Congress put lots of barriers to judicial review. If you are denied asylum through expedited removal, you can’t get removal on merits (unless you are a US citizen or LPR or they got the wrong person)
- **Problems with Adjudication Process** (Arise out of: Want to be fair to applicant and be efficient/cost effective. Also, want to deter the non-eligible, and encourage the eligible)
  - Political Bias: Critics charge that various officials who decide asylum cases improperly emphasize political factors
  - Long Delays: INS and IJ’s have lots of applications which may take years
    - Prevents applicants from security and peace of mind
    - However, very act of applying entitles applicants to some benefits
  - Unfounded Claims: Many interim benefits while the claim is pending
  - Fiscal Costs: Costs behind the hearings, appeals, benefits, and detention
  - Procedural fairness: do procedures adequately safeguard claimant’s needs?
    - access to counsel: there are practical challenges to find one
    - gov’ts interpreters in immigration proceedings are inadequate
  - Children: Elian Gonzalez
    - fled Cuba with mother who died on the way, rescued at sea clinging to an inner tube, 11th Cir decided to let father have him
    - raised Q: what should happen when a child applies for asylum against wishes of his parents?

- **Time Constraints-Time to Finish Proceedings**
  - In the absence of exceptional circumstances, the initial interview shall commence not later than 45 days after the date an application is filed. 208(d)(5)(A)(ii)
  - 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. 208(d)(5)(A)(iii)

**Issue: Two bites at the apple**
- Asylum officer can grant asylum
- Or if denied: renew asylum application at the removal proceeding
  - Most applicants w/o status: so if asylum officer denies the applicant is referred to removal proceeding (Where can apply de novo before immigration judge)
  - If asylum officer says no, immigration judge says yes: immigration judge is right
  - Immigration judge has advantage of first record

- **Barring or Discouraging Access to Asylum Seekers**
  - Filing Deadlines: 208(a)(2)(B) – With some exceptions, asylum 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 (in other countries deadline is days, not year)
    - Exceptions
      - 208(a)(2)(D) – An application for asylum of an alien may be considered 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 [one year period].
      - Once the administrative officials find an absence of clear and convincing evidence that the applicant arrived during the past year, and also find that neither of the exceptions applies, the asylum denials are final – No Judicial Review is permitted
  - 208(a)(3) – No court shall have jurisdiction to review any determination of the Attorney General [concerning the limit]
**Safe Countries**
- Countries that don't practice persecution or return refugees to countries that will
- Asylum claimants from countries that are on the safe list are presumed ineligible

**Returning asylum seekers to 3rd countries**
- Under certain circumstances, if a person travels through one or more safe third countries before arriving in a country where asylum application is filed, the country will refuse to decide asylum claims on merits and send him/her to 3rd country
  - UNHCR report: recommendations for minimum legal requirements and best practice criteria for return of asylum seekers to 3rd countries

**Min legal requirements:**
- 3rd country will readmit individual, give him fair refugee status determination, applicant has no well founded fear of being persecuted, destination country will not violate rights of applicant, destination country may not knowingly return applicant to third country that will break his human rights, 3rd country will provide effective protection without determination or will make a determination, etc.

**Basic practice criteria**
- Applicant should not go to a country if he does not have meaningful links there- family, cultural ties

**Safe Third Country**
- 208(a)(2)(A)
  - The Attorney General may determine that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country in which the alien’s
  - Attorney General’s decision is not reviewable under 208(a)(3)
  - If a person travels through US and applies for asylum at Canadian boarder, than they will sent back to US to have the US decide, vice-versa

**Expedited Removal**
- Policy: Deter fraudulent entries, reduce # of asylum applications, reduce costs
- Used if person doesn’t have proper entry documents Or: person engaged in fraud
- 235(b)(1)(A)(i) (Note: lifetime ban for trying to enter by fraud)

**Credible Fear of Persecution**
- 235(b)(1)(A)(i) – An asylum officer shall conduct interviews of aliens at a port of entry or at such other place designated by the Attorney General
- 235(b)(1)(B)(v) – Credible fear of persecution means that there is a significant possibility, that that alien could establish eligibility for asylum

**IF YES: Detention For Further Consideration**
- 235(b)(1)(B)(ii) – If the officer determines at the time of the interview that an alien has credible fear of persecution, alien shall be detained for further consideration for the application of asylum

**IF NO: No Credible Fear**
- Upon finding none, the alien is removed
- 235(b)(1)(B)(iii)(I) – If the officer determines at the time of the interview that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the US without further hearing or review

**Statistics**
- Statistics show that of all the people who are subjected to expedited removal around 1% ask for asylum- but of those like 80% are ruled to have shown credible fear.
Judicial Review

Upon the individual’s request, an immigration judge will promptly review 235(b)(1)(B)(iii)(III) – The Attorney General shall provide by regulation and upon the alien’s request for prompt review by an immigration judge of a determination under (I) that the alien does not have a credible fear of persecution.

Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

There is no other administrative review unless the person attests under penalty of perjury that he or she has already been admitted as an LPR, a refugee, or an asylee - 235(b)(1)(C)

Detention

Those who apply for asylum in removal proceedings are subject to the same detention rules as anyone else in those proceedings.

May be held without bond, released on bond, or paroled without bond – 236(a)

Policy questions:

- Question of specialization: Immigration judges and BIA judges are specialized.
  - Pro: more familiar with conditions in other countries, know more about substantive asylum law, learn cultural signals, efficiency: don’t need to inform adjudicator
  - Con: hard to specialize without developing opinions can bring a biased, become desensitized because of constant exposure, might not pay as much attention to laws

- If you have a specialized adjudicator, does that substitute for having counsel?
  - Caseload is so high and a good lawyer can do lots in advance to prepare the case, and people are more likely to confide with people on their side.

- Immigration judges used to get information on state deportation reports,
  - State dept has foreign policy interest: exaggerates bad stuff for unfriendly countries

- Disadvantages to having lawyers
  - Makes it seem like people are coached
  - Some people think lawyers muck things up

- In Switzerland they further sub-specialize depending on where the people are from
  - Also pros and cons: particular problems are geography- all adjudication occurs in Bern
  - In US that’s not workable because we’re too big, 7 locations-
    - Might develop more bias, but might also be able to tell a true story

- Should adjudicators be required to be lawyers?
  - Adjudicators have to listen to arguments from lawyers and produce a record which includes reasoned opinion. In US it’s necessary
**Convention against Torture (CAT)**

- What happens when a person cannot meet the refugee definition and the international community agrees the person needs protection? (U.S. law: CAT (CB 1148) is another mechanism)
- Note: self-executing treaty is on the same plane as federal statute
- Senate took position: CAT not self-executing
  - Can only argue a violation of the Congress passed implementing statute
- Senate passed Understandings and Declarations modifying CAT
  - This guided the formation of the statute passed by Congress
- Our concern: Art. I (torture) and Art. II (can’t return to country where likelihood of torture)
  - CAT: cannot be removed to country where *substantial grounds* for believing torture
- Elements of torture from CAT (Art III) include: intentional, public official in official capacity, etc.
- Elements of torture from Senate Ratification Resolution (CB 1152) include *severe* physical pain/suffering, imminent, etc...
  - Under U.S. implementing statute: can give deferral of removal
    - Then govt. procedure is less burdensome than withholding of removal
    - Only have to show that now no reason to believe torture will occur to return
- Government acquiescence: Issue: is government acquiescence included in the definition?
  - Here: government is aware
  - Issue: who is the offender?
    - If government = the offender then C is not in the government’s custody or control
    - If accused = the offender then maybe (1)(b) (CB 1152) only applies if government has acquiesced
  - Issue from (1)(d): did the official breach legal responsibility?
    - The police knew but (1) does domestic law in this country require the police to intervene? (2) is the requirement to intervene only from domestic law or can it come from international law?
    - Note: legal responsibility to intervene could be breached by CAT provision itself (international law) which requires investigation into cases of torture
- Summary:
  - CAT important when can’t prove persecution based on one of the 5 grounds
    - But treatment has to rise to level of torture under CAT
  - Note: *Sale v. Haitian Council* (CB 1158, N.10) held that refugee convention was not applicable on the high seas but not the case with CAT
  - Note: prohibition on sending a person to a country where face torture is absolute
  - Can have scenario where asylum grounds apply but CAT doesn’t
    - If the persecution doesn’t rise to level of torture
  - Private actor: harder to get relief
  - Temporary Protective Status (U.S. law): the U.S. or Attorney General declares a country to be a natural disaster or at war
    - Can remain in the U.S. until the danger subsides
    - You can’t bring in your family members.
    - If not a state actor, it’s harder to get relief with torture
- Why would you need this if you already have withholding of removal?
  - Situations where withholding of removal would not work
    - If persecution not on account of race, religion, etc.
  - There are certain exceptions to withhold removal and asylum (terrorists, criminals, etc). There are NO exceptions here.
    - US law draws distinction between people who fall within exception and those who don’t. If you qualify for torture and don’t fall in an exception category you get what’s called “withholding of removal” but if you do fall in an exception and you qualify for torture you get “deferral of removal”
**Temporary Protected Status**

- Many face dangers if they go back to their countries: armed conflict, national disaster
- In 1990 Congress added provision (244 of INA) called temporary protected status (TPS)
- Secretary of DHS has discretion to designate particular country as TPS country.
- Extraordinary disaster makes it unsafe for people of that country to return.
- There is a cut off date to qualify.
- Need individual qualifications.
- It’s temporary though.
- TPS people are not eligible for adjustment of status. You have to go back, get a visa, then return.
- Good for a year and can be renewed several times. See 1164 – 83

**European convention of human rights**

- Says people can’t be subjected to torture.
- Not allowed to send someone to another country in which there’s a real risk that person will have torture.
Undocumented Migrants
- non-US citizens who are present in the US without valid documentation of lawful immigration status
- in 2005, estimated 11 mil. Average increase of about {1/2} mil/year,
  - 57% from Mexico, 24% from other Latin American countries, 9% from Asia, 6% from Europe/Canada, 4% from other regions
- Trend: merge criminal and immigration law
  - Criminalize what were formerly civil offenses
  - Or strengthen criminal sanctions
  - Crimes include: entry w/o inspection, smuggling, transporting, etc…
- Criminal Provisions (CB 1204)
  - Fraud: Defraud the U.S. govt. is felony under 18 USC 1001
  - 274C (?): Expands the range of document related violations and civil penalties
    - Marriage Fraud – 275(c): knowingly enters into a marriage for the purpose of evading any provision of the immigration laws
    - Immigration-Related Entrepreneurship Fraud: Any individual who knowingly established a commercial enterprise, evading any provision of the immigration laws
- Others found under Section A of the Casebook
  - Entry w/o Inspection: 275(a)
  - Reentry of Deported Alien: §276(?)

Employer Sanctions
- 86 Congress enacted Immigration Reform and Control Act (used to not be enforced too much)
- Theory: illegal immigration is a serious harm, illegal immigrants won’t come if there are no jobs, if we punish employers, they won’t hire
  - 274A(1)(A) Knowingly hiring a non-U.S. citizen not authorized to work (CB 1209)
    - Civil offense, unless pattern or practice: then can amount to a criminal offense
  - Also: if hire somebody w/o going through the procedural steps
    - Civil offense: must pay fine
- Required Procedure:
  1. check if person has documents: the employer must examine certain documents furnished by the employee – 274(b)(1)
  2. sign document stating that you have checked: Employer Attestation -274A(b)(1)(A)
    - Note: casual domestic employment is exempt from the procedural steps
- Continuing employment violation – Civil offense “to continue to employ [an] alien in the U.S. knowing the alien is (or has become) an unauthorized alien…” § 274A(a)(2).
  - Note: 274(h)(3) determines unauthorized alien
  - Knowing: Constructive knowledge is enough Mester Manufacturing Co v. INS
    - Deliberate failure to investigate suspicious circumstances
    - Willful blindness – Awareness that the fact was highly probable and a conscious decision to avoid enlightenment States v. Jewell
- Prohibitions on Discrimination: 274B
  - Reaction to discrimination: new civil offense that states that employer can’t adopt a policy that discriminates based on:
    1. national origin
    2. U.S.C. (?)
    - Ex: employer can’t put in place a policy that will only hire U.S. citizens
      - Rationale: combat fear that employer sanction will increase discrimination practices in employment
Undocumented Migrants and Education

-California Proposition 187
- No public school (elementary and secondary) could enroll undocumented migrants
  - Struck down by District Court on preemption grounds: regulating immigration is pre-empted by the federal govt.
- Pros: it’s an incentive for undocumented to come in and it’s a burden for state
- Cons: society will be better off to give education, teachers would be adversary

**-Plyler v. Doe:** Struck down TX statute that permitted school district to exclude undocumented immigrants. Court stressed the impact: taking away education from children
  - Court used equal protection grounds: no substantially related to objective between preventing harm and causing harm to children
  - Issue: if state today passes prop. 187 type statute it is not clear how the Supreme Court would rule on the constitutionality

- Post Secondary Education: IRCA provision
  - For purposes of in-state tuition: person unlawfully present in a state doesn’t qualify unless it gives same benefit to out of state us citizen.
    - Hard: no loans/and low income
  - Section 8 of CA proposition would have barred undocumented students from enrolling in any public college, university, etc.

**Driver's License Issue**
- They are de-facto IDs, even though they seek to increase safety and such.
  - Which is it more of?
- Note: DMV record is the most used and abundant source of information about people, so not allowing illegal immigrants to get them will prevent us from having important information about them.
- REAL ID Act Option: for states to grant a driver’s license that states not valid for federal ID purposes (Such ID will show essentially that a person is undocumented)
  - Tactical issue by undocumented as to whether they should get it

**Undocumented Migrants and Public Benefits**
- Public Benefits: Federal: 1996 Welfare Act made undocumented aliens ineligible for all public benefits, also not eligible for state or local public benefits unless state passes legislation to the contrary
  - Exceptions: Emergency disaster relief, Emergency medical care, Treatment for communicable diseases
- Public rights include: Access to the courts, Right to own real property, Right to serve as trustee, Right to acquire and convey personal property, Constitutional Rights (4th, 5th, 6th, and 14th), Labor Rights (NLRA: May vote in union elections, FLSA)
  - Hoffman, SC said undocumented workers wrongfully discharged in retaliation for union activities can’t be awarded back pay for the period after their discharge
- Denial of Rights: Federal and state governments permitted to discriminate against all aliens for some purposes and to distinguish between LPRs and undocumented aliens
- Limited Ability to Exercise Rights: Fear of exposing their undocumented status
Citizenship
-Citizenship v. Nationality

-Almost all citizens are also nationals in U.S. (except American Samoans)
-Other countries have larger distinction between citizen and national
-Ex. Mexico citizens rights are better than nationals

-Citizenship Acquired at Birth:
- *Jois soli*: “Right of the land”, generally confers a nation’s citizenship on persons born within that nation’s territory
  - after civil war 13th amnd abolished slavery, 14th prohibited denial of the vote on racial grounds, 14th allows all persons born or naturalized in US as citizens of the US and state they reside (even slaves)
  - *US v. Wong Kim*: a person born in US is a citizen if his parents are LPRs
    - diplomats in US’s children and children born of alien enemies are not citizens at birth
  - Even someone born to two noncitizens
    - in debate now, but assumption is they are citizens

- Jus Sanguis: “Right of the blood” Citizenship by descent, requires that one or both parents be citizens at the time of the child’s birth.
  - To prevent passing citizenship into perpetuity without having ever stepped into the US, Congress has imposed two limits: a residence limit and a retention requirement,
    - 1978 Congress abolished the retention requirement, and in 1994 Congress enacted legislation permitting anyone who had lost his or her citizenship because of the retention requirement (except for certain people ineligible on ideological grounds) to regain citizenship simply by taking an oath of allegiance to the United States.

- Complicated bc law that governs this has been constantly changing- changes are not made retroactive. To understand whether person got citizenship at birth, you have to see when person was born. It is hinged on parents’ citizenship. So we’re looking at law in effect when parent was born.

SEE CHART on PAGE:
- **Citizenship Acquired After Birth:**
  - United States Constitution authorizes Congress to “establish an uniform Rule of Naturalization.” US Const. art. I § 8, cl. 4
  - INA §310(a) (Imm. Act of 1990) transferred from courts to AG the authority to grant naturalization
  - Courts have jurisdiction to review naturalization denials de novo. See INA §§310(b,c)

- **Administrative Naturalization** (after 1990): means LPR goes through process (Sometimes there are other ways also called naturalization)
  - **Substantive criteria:**
    - Lawful permanent resident (INS §318)
      - leaves out those who were admitted as LPR fraudulently
    - Residence and Physical presence requirement:
      - must reside continuously in the US for 5 years preceding filing of application, all after admission as LPR; must be “physically present” in the US for at least ½ that period, and must “reside continuously” in the US from the filing of the application to the grant of the naturalization. INA §316(a). 3 years if married to citizen 319(a)
    - Good moral character. INA §316(a).
    - Age: 18 & up (administrative naturalization);
      - children eligible for derivative naturalization
    - English Language
      - “an understanding of the English language, including the ability to read, write, and speak words of ordinary usage.” INA §312(a)(1).
    - Knowledge of Civics
      - a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States.” INA §312(a)(2)
    - Political requirement
      - INA §313 disqualitifies all applicants who either during the ten year period immediately preceding the filing of the application or during the interval between the filing and the taking of the final oath of citizenship, fell within any of the several related classes (advocates of opposition of gov, members of communist part, and others)
      - Petitioner must affirmatively demonstrate attachment to the principles of Unties States Constitution. INA §316(a), take oath of allegiance, 8 CFR §337.1(a)(2001).

- **Procedure**
  - 410(a) gives Att Gen sole authority to naturalize persons.
  - Congress then allowed courts to notify Att Gen that they will assert exclusive authority to administer oaths of allegiance in naturalization cases 310(b) (only ceremonial function )
  - process starts when person files application with USCIS. 334(a)
  - USCIS examiner interviews applicant and conducts any further investigation
    - criminal background check
    - must be record of interview
  - examiner grants or denies the application
    - before doing so he can grant a continuance to give applicant chance to cure
    - if examiner does not announce decision within 120 days, applicant can request hearing in Dist court 336(b)
    - if denied, applicant may request evidentiary hearing before an immigration officer 336(a, c).
Collective naturalization:
- private bills
- Child Citizenship Act of 2000- (INA 320)
  (a) has a US citizen parents;
  (b) is under age of 18;
  (c) resides in US as LPR in the custody of the parent.
  - applies to adopted and birth biological children
  - ex. child who is admitted in US as immediate relative while under
    18 and in legal and physical custody of his or her citizen parent
    becomes a US citizen upon admission.
  - not retroactive
- Child can be naturalized if (INA 322)
  (1) has citizen parent (who files application);
  (2) either citizen parent or citizen grandparent has been physically present
      in the US for 5 years, at least 2 of which after applicant was 14;
  (3) kid is under 18; and
  (4) kid resides outside US in custody of parent, but temporary in the US
      after lawful admission (not clear if entire process needs to be complete
      before kid is 18)
  - unlike 301(g), 322 allows either citizen parent or grandparent to
    meet requirement, and requires that the five years/two years
    requirement be satisfied before child turns 18, so not necessary to
    satisfy these requirements before child’s birth
  - parent must file application before child turns 18. could be that
    entire process needs to be complete before child is 18

Dual Nationality:
- Based on 3 principles:
  - every sovereign state decides who its own nationals are
  - To be US citizen you have to renounce former allegiances 337(a)(2), but
    only the country whose nationality the applicant purports to renounce can
    decide whether to give effect to renunciation
  - If us citizen renounces US citizenship to get citizenship somewhere else
    they will only lose if subjectively intended to relinquish it 349(a)(1)
  - typical law provides alternative multiple routs to nationality
  - rules vary from state to state
- Issues:
  - divided loyalties
  - unjustly enriched
  - double taxation, other complications, declining military service

Automatically confers US citizenship on any child who

Statelessness:
- person born in jus sanguinis in country X to parents who are both citizens of jus soli
  country Y could end up with no nationality at all.
- more likely later in life
-Two ways to lose citizenship

(1) De-Naturalization (§340)- Revocation of Naturalization
-Only applies to people who acquire citizenship through naturalization
-Judicial de-naturalization: 340(a): US may revoke naturalization if it was illegally procured or willful misrepresentation or concealment of material fact
- concealment of material fact has to be willful, so does concealment
-illegally procured: you were in fact ineligible for citizenship when you got it, even if you did not intend it
- Most often occurs to Nazi war criminals
-Procedural issue:
- Secretary of DHS (executive branch) confers naturalization. Since it’s in power to give it to you, the executive branch on its own can de-naturalize you.
- 340(h): Sec of DHS has power to correct, re-open, alter, modify, or vacate an order naturalization a person

(2) Ex-Patriation (§349)
-applies to citizens no matter how they got citizenship
- SC held it’s unconstitutional to take away citizenship unless that person intends to renounce it
- INA 349(a) 3 requirements for expatriation
  (1)-commit one of the physical acts included in statute (going to US consulate overseas and making an oath of renunciation, being part of foreign gov’t)
  (2)-have to commit that act voluntarily
  (3) -have to do it with the intent to relinquish citizenship
-citizenship cannot be taken away without individual’s assent
-* Perez- denationalized an American citizen who voted in a foreign political election bc congress thinks it would cause potential embarrassment to US foreign policy
  -*Afroyim- struck down Perez and said that person stays citizen unless they relinquish the right of citizenship
- *Trop- congress has no power to take away citizenship involuntarily, it would be cruel and unusual (8th amd)
- *Nishikawa- gov’t has to prove expatriating act by clear and convincing evidence.

-Issue: intent requirement
-Ex: terrorist, want to destroy country, intend to keep U.S.C. to enable me to destroy US
- Still have intent to keep U.S.C.: should this be allowed?

-Related Issues:
- You have may have to renounce your citizenship somewhere else where you become a citizen. Now state department assumes you don’t rescind it. But Germany says you really do have to renounce.
- Key: it is up to each country to decide who is a citizen
- Statelessness: If a person would otherwise be stateless, person where he was born has to give him citizenship (most countries have not signed on).
- Eg. Girl was born out of wedlock from Swedish and US citizen. Due to the laws in place, she was stateless.
- Dual citizens: multiple allegiance?
- Why have citizenship at all?
  - there are lots of consequences for being a citizen: welfare, teacher, juror, why?
  - if you abolish citizenship states could still regulate stuff