REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
TABLE OF CONTENTS FOR COURSE MATERIALS

Unit 11: Exceptions to Protection (Cessation and Exclusion Grounds)

Exceptions to protection for refugee status, asylum, and withholding

Summer 2018

Refugee Law

Exclusion from refugee definition - UN Refugee Convention Art. I(F)

- Commission of crime against peace, war crime, crime against humanity
- Commission of serious non-political crime outside country of refuge prior to admission
- Guilty of acts contrary to purposes and principles of United Nations

Exceptions to non-refoulement Art. 33.2

- Reasonable grounds for regarding person as danger to country's security;
- The individual, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of the country.

Exceptions to refugee status under U.S. law

- Persecution of others on Convention ground.
- Falling under INA § 212 criminal and security inadmissibility grounds, but all grounds waivable EXCEPT:
  - 212(a)(2)(C) [controlled substance traffickers],
  - 212(a)(3)(A) [coming to U.S. to engage in espionage, sabotage, prohibited export of goods, technology, or sensitive information; engage in activity with purpose of overthrowing U.S. government by force, violence, or other unlawful means];
  - 212(a)(3)(B) [terrorist activities];
  - 212(a)(3)(C) [admission would have potentially serious adverse foreign policy consequences];
  - 212(a)(3)(E) [participation in Nazi persecution, genocide, or acts of torture or extrajudicial killing].

Exceptions to asylum under INA § 208(a)(2)

- Safe third country.
- Previous asylum application and denial (unless changed circumstances).
- Failure to file within one year of entry (or within reasonable time of expiration of valid status),unless changed circumstances in country, extraordinary circumstances for delay, or within reasonable time of expiration of valid status.

Exceptions to asylum under INA § 208(b)(2)(A)

- Persecution of others b/c of Convention ground.
- Having been convicted of particularly serious crime, constitutes a danger to U.S. community; aggravated felony under INA 101(a)(43) presumed particularly serious crime.
- Serious reasons to believe person has committed a serious nonpolitical crime outside U.S. prior to entry.
- Reasonable grounds for regarding person as danger to U.S. security.
- Firm resettlement in another country.

Terrorist exception to asylum – INA § 208(b)(2)(A)(v)

- Applicant is described in INA § 212(a)(3)(B)(i)(I) [has engaged in terrorist activity], (II) [reasonable grounds to believe person will engage in terrorist activity], (III) [incited terrorist activity], (IV) [reps of terrorist organizations], or (VI) [member of terrorist org., unless can show did not know and should not reasonably have known it was terrorist org.], or in INA § 237(a)(4)(B) [terrorist activities].
- For (IV) only, not a bar if AG determines there are not reasonable grounds for regarding alien as a danger to the security of the U.S.

Material Support to Terrorism Bar under U.S. Law

- Inadmissible if provided "material support" to terrorists under INA 212(a)(3)(B) (a form of engaging in terrorist activity).
- Result – refugees not allowed to enter U.S.
- CIS' first method of addressing issue – waivers.
- Consolidated Appropriations Act of 2008 – material support bar inapplicable to certain individuals who provided assistance under duress.

Withholding ineligibility grounds INA § 241(b)(3)(B)

- Persecution of others on Convention ground;
- Having been convicted of particularly serious crime, constitutes danger to U.S. community; aggravated felony with sentence of at least 5 yrs presumed.
- Serious reasons for believing committed serious nonpolitical crime outside U.S. before arrival.
- Reasonable grounds for believing alien is security risk

Examples of aggravated felonies § INA 101(a)(43) – 21 in all

- Murder; rape; sexual abuse of a minor
- Illicit trafficking in controlled substances
- Illicit trafficking in firearms or destructive devices
- Crime of violence under 18 U.S.C. § 16, with 1 yr. sentence.
- Theft or burglary offense with sentence of at least 1 year.
- Commercial bribery, forgery, counterfeiting with 1 yr. sentence.
- Obstruction of justice, perjury, with 1 year sentence.
- Fraud where loss to victim exceeds $10,000.
- Attempts, conspiracies to commit listed offenses.
- Includes U.S. federal, state, and local, and foreign offenses.

§ 413(f) of the Anti-terrorism and Effective Death Penalty Act of 1996

- AG may withholding alien's deportation, notwithstanding any other provisions of the law, if:
- Life or liberty would be threatened in country of return on account of one of five Convention grounds, and
- Grant of withholding necessary to ensure compliance with UN Protocol.
- BUT abrogated April 1, 1997; no longer in effect.

Cessation clauses under UN Refugee Convention

- Voluntarily re-availed self of protection of country of nationality;
- Voluntarily re-acquired nationality;
- Acquired new nationality and enjoys protection of that country;
- Voluntarily re-established self in country he left;
- Can no longer refuse to avail self of protection of country of nationality because of changed circumstances.

Cessation of asylum status under U.S. law – INA § 208(c)(2)

- Falls under deportation ground;
- No longer meets conditions of asylum due to fundamental change in circumstances;
- Falls under one of exceptions to protection;
- May be removed to country where life or freedom would not be threatened on Convention ground; and eligible to receive asylum or equivalent temporary protection;
- Voluntarily availed self of protection of country of nationality;
- Acquired new nationality and enjoys its protection.

20 I. & N. Dec. 99 (BIA), Interim Decision 3118, 1989 WL 331872

United States Department of Justice

Board of Immigration Appeals

MATTER OF SOLEIMANI

Decided by Board July 13, 1989

**2 BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

....

The respondent is a 34–year–old native and citizen of Iran. Evidence included in the record establishes that she is Jewish. In various *101 affidavits and statements, as well as her testimony at her deportation hearing, she related that she fled Iran on October 23, 1981, with her mother and brother, traveling over the mountains to Pakistan without a visa, where they later obtained a visa to remain in Pakistan temporarily until November 4, 1981. According to the respondent, after staying 5 days in Pakistan, she and her family flew to Athens, Greece, without visas and, being unsuccessful in obtaining visas there, subsequently flew to Rome, Italy, again without visas. From there, after 2 or 3 days, they flew to Israel without visas in November 1981, where she remained until September 15, 1982. The record also includes the respondent's Iranian passport but does not document the type of visa or status the respondent had during her stay in Israel.

According to the respondent, she obtained a visa as a visitor for pleasure while in Israel, initially intending to remain with her family in Israel only until the situation in Iran improved. In her affidavits, statements, and hearing testimony, she related that she never worked or owned property in Israel and was never directly offered Israeli citizenship, permanent resettlement, or resident status in Israel. She also reported that she had developed pneumonia during her travels and was sick and under a physician's care for months of her stay in Israel. The respondent was hospitalized there due to her illness. She reportedly lived with her grandmother while in Israel, apparently paying rent. Observing that she had visited Israel seven different times in the past, she related that she had gone to school to study Hebrew during her last stay in Israel but had never received any financial assistance for any reason from the Israeli Government, as she had relied on her brothers and her own funds for support.

While in Israel, the respondent was issued a nonimmigrant visitor for pleasure visa by the American consulate on June 10, 1982, with which she entered the United States on September 16, 1982, with her Iranian passport. She was authorized to remain until December 16, 1982, and on November 22, 1982, applied for asylum with the district director. The district director denied the application on November 1, 1984. Deportation proceedings were instituted on March 1, 1985.

**3 The respondent has reported that she initially obtained the nonimmigrant visitor's visa and came to the United States in order to attend a family wedding and to visit her three brothers. According to the respondent, she remained in the United States for several months visiting family and friends and then filed her application for asylum, as she was still unable to return safely to Iran and had no other home. She observed that she had not expected the regime in Iran to remain in power as long as it had and, for this reason, had also not sought asylum in Israel previously. The respondent related that her three brothers, her mother, her sister, and a nephew were in the United States, and that *102 her only remaining family in Israel was her grandmother. According to the respondent's asylum application, one brother was a student, while her other brothers, as well as her mother and sister, were also asylum applicants.

In conjunction with the respondent's initial asylum application, the district director requested and obtained an advisory opinion from the United States Department of State's Bureau of Human Rights and Humanitarian Affairs ("BHRHA"). In the advisory opinion, dated October 26, 1984, the BHRHA expressed its view that the respondent, if a member of the Jewish faith, had a well-founded fear of persecution if returned to Iran. However, it also concluded that in view of Israel's Law of

Return, which entitled the respondent as a member of the Jewish faith to reside permanently and enjoy the rights of citizenship in Israel, it was probable that she was offered resident status, citizenship, or some other type of permanent resettlement. It appeared to the BHRHA that the respondent had become firmly resettled in Israel and was therefore ineligible for asylum pursuant to 8 C.F.R. § 208.8(f)(1)(ii) (1984).

***

[The IJ found Soleimani would be persecuted as an Iranian Jew if returned to her country and granted withholding, but denie asylum because IJ found she had become firmly resettled in Israel.]

***

**4 Having established a well-founded fear of persecution on account of religion if returned to Iran, the respondent thus demonstrated that she was a "refugee" within the meaning of section 101(a)(42)(A) of the Act and established her statutory eligibility for asylum under section 208. ....

An alien is deemed to be "firmly resettled" if he has been offered permanent resettlement by another country as a consequence of his flight from persecution, unless it is established that the conditions of his residence in that country have been substantially and consciously restricted by the authorities of that country. 8 C.F.R. § 208.14 (1988); Matter of Portales, supra; Matter of Lam, supra.

***106** In the case at hand, the immigration judge concluded that the respondent had been "offered" permanent resettlement under Israel's Law of Return, and that her choosing not to become a resident did not obviate the fact of her firm resettlement. However, there is nothing in the record, beyond the BHRHA's perfunctory reference to its existence, documenting the nature and purpose of Israel's Law of Return or the specific provisions of that law. Absent any such documentation, the Board cannot find that the respondent had been offered permanent resettlement in Israel within the meaning of the firm resettlement concept. There exists no evidence that the respondent would be eligible for an offer of resettlement under any such law and no evidence regarding the extent of any restrictions or conditions that may be placed on offers of resettlement, under that law. Foreign law is a matter to be proven by the party seeking to rely on it, and the Immigration and Naturalization Service has submitted nothing of record regarding Israel's Law of Return. See Matter of Annang, 14 I & N Dec. 502 (BIA 1973).

7 Moreover, whether or not an outstanding offer of permanent residence or citizenship to all Jews who arrive in Israel constitutes a specific offer of permanent resettlement to the respondent herself, the pertinent regulations and the Board's prior decisions cannot be read so restrictively that the respondent's circumstances in Israel become irrelevant. An alien will not be found to be firmly resettled elsewhere if it is shown that his physical presence in the United States is a consequence of his flight in search of refuge, and that his physical presence is reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by an intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge. * The question of resettlement is not always limited solely to the inquiry of how much time has elapsed between the alien's flight and the asylum application. Other factors germane to the question of whether the alien has firmly resettled include family ties, intent, business or property connections, and other matters. ***

As a preliminary matter, the Board concludes that, at the time the respondent first arrived in Israel in November 1981, she was then fleeing persecution, having escaped Iran by fleeing over the mountains into Pakistan. The respondent herself has stated that she and her family had left Iran due to the political situation there. The fact that ***107** she may have had some hope that circumstances there would improve so as to allow her to return does not change the fact that she had fled on account of persecution or a fear of persecution.

However, the record demonstrates that her intervening residence in Israel before applying for asylum in the United States did not reasonably constitute a termination of her original flight in search of refuge. Her later physical presence in the United States remained reasonably proximate to her flight. In this regard, the Board points out that the respondent took no active steps demonstrating that she had firmly resettled in Israel or had an intent to do so. She remained there only 10 months, and during this time lived with her grandmother, recuperating from her illness and attending school in order to study Hebrew. Her

attending school in itself does not demonstrate firm resettlement. See Matter of Chai, supra. Additionally, she neither worked nor sought employment in Israel. She did not seek any financial or other benefits from the Israeli authorities. The respondent has also testified, and the Service has not contested, that she only received a nonimmigrant visitor's visa in Israel and never sought a more permanent status or the benefits accruing from a more permanent status during her stay in Israel. Although she does have permanent family in that country, this consists solely of her grandmother, while the remainder of her family lives in the United States. Given these circumstances, the Board concludes that the respondent had not firmly resettled in Israel or any other country prior to her application for asylum in the United States.

**8 The determination that the respondent was not firmly resettled in Israel does not end the Board's inquiry as to whether she should be granted asylum in the exercise of discretion. As noted above, the record shows that the respondent did have some ties to Israel, and even if they were not sufficient to demonstrate firm resettlement, such ties are a factor to be evaluated in the exercise of discretion. Among the factors which should be considered are: whether she passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through, and whether she made any attempts to seek asylum before coming to the United States; the length of time she remained in the third country and her living conditions, safety, and potential for long-term residency there; whether she has relatives legally in the United States or other personal ties to this country which motivated her to seek asylum here rather than elsewhere; and the extent of her ties to any other countries where she does not fear persecution. Matter of Pula, supra.

Moreover, if the respondent engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered. *108 Id. Finally, other relevant factors include general humanitarian considerations such as an alien's tender age or poor health, and whether the alien has established statutory eligibility for asylum but cannot meet the high burden required for withholding of deportation. Id. The evaluation should be made by considering the entire context of the case, and in the absence of adverse factors, asylum should be granted in the exercise of discretion.

Under the balancing analysis set forth in Matter of Pula, supra, the Board finds that a grant of asylum is warranted as a matter of discretion. Although the respondent does have some ties to Israel, her only remaining relative in Israel is her grandmother, while the rest of her family resides in the United States, most of whom were also asylum applicants at the time of the deportation proceedings. As noted above, the respondent neither worked nor sought employment in Israel and essentially spent her 10 months there recuperating from pneumonia and attending language courses. All during this time she had only a nonimmigrant status in Israel. Additionally, the respondent arrived in the United States by legal means through a nonimmigrant visa and applied for asylum while she was still in a legal status in this country. There is no showing in the record that the respondent had a preconceived intent to apply for asylum in this country before coming to the United States so as to circumvent orderly refugee procedures. Her ties to Israel alone should not preclude a grant of asylum as a matter of discretion. They should be balanced with the remaining factors which include the facts that her ties to Israel are somewhat limited, that she came to this country by legal means and applied for asylum while in a legal status here, that there is no evidence that she engaged in fraud in order to circumvent orderly refugee procedures, and that there are no other factors adverse to the respondent in the record.

**9 Accordingly, the asylum application will be granted in the exercise of discretion.

ORDER: The appeal is sustained.

FURTHER ORDER: The application for asylum is granted.

EXCERPTS FROM THE UNHCR HANDBOOK:

(3) Persons considered not to be deserving of international protection

Article 1 F of the 1951 Convention:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

....

151. The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.

152. In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

154. A refugee committing a serious crime in the country of refuge is subject to due process of law in that country. In extreme cases, Article 33 paragraph 2 of the Convention permits a refugee's expulsion or return to his former home country if, having been convicted by a final judgement of a "particularly serious" common crime, he constitutes a danger to the community of his country of refuge.

155. What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. in some countries the word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as "crimes" in the penal law of the country concerned.

156. In applying this exclusion clause, it is also necessary to strike a balance between the

nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.

157. In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

158. Considerations similar to those mentioned in the preceding paragraphs will apply when a crime – in the widest sense – has been committed as a means of, or concomitant with, escape from the country where persecution was feared. Such crimes may range from the theft of a means of locomotion to endangering or taking the lives of innocent people. While for the purposes of the present exclusion clause it may be possible to over-look the fact that a refugee, not finding any other means of escape, may have crashed the border in a stolen car, decisions will be more difficult where he has hijacked an aircraft, i.e. forced its crew, under threat of arms or with actual violence, to change destination in order to bring him to a country of refuge.

EXCERPTS FROM

UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees

E. GROUNDS FOR REJECTING INDIVIDUAL RESPONSIBILITY

Lack of mental element (*mens rea*)

64. As reflected in Article 30 of the ICC Statute, criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. Where there is no such mental element (*mens rea*) a fundamental aspect of the criminal offence is missing and therefore no individual criminal responsibility arises. A person has intent where, in relation to conduct, the person means to engage in the conduct or, in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Thus, for example, an individual who intended to commit the act of murder cannot be liable for a crime against humanity if he or she was unaware of an ongoing widespread or systematic attack against the civilian population. Such knowledge is a requisite component of the mental element of a crime against humanity. In such a case, the applicability of Article 1F(b) may be more appropriate.

65. In certain circumstances the individual may actually lack the mental capacity to be held responsible for a crime, for example, on the grounds of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity.[66]

Defences to criminal liability

66. Regard should be had to general principles of criminal liability to determine whether a valid defence exists for the crime in question, as outlined in the examples below.

(i) Superior orders

67. A commonly-invoked defence is that of "superior orders" or coercion by higher governmental authorities, although it is an established principle of law that the defence of superior orders does not absolve individuals of blame. According to the Nuremberg Principles: "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility under international law, provided a moral choice was in fact possible for him."[67]

68. Article 7(4) of the ICTY Statute provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility". Article 33 of the ICC Statute states that the defence of superior orders [66] See also paragraph 91 below on minors.

(ii) Duress/coercion

69. The defence of duress was often linked to that of superior orders during the post-Second World War trials. According to Article 31(d) of the ICC Statute, the defence of duress only applies if the incriminating act in question results from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. There are, therefore, stringent conditions to be met for the defence of duress to arise.

70. Where duress is pleaded by an individual who acted on the command of other persons in an organisation, consideration should be given as to whether the individual could reasonably have been expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise. Each case should be considered on its own facts. The consequences of desertion plus the forseeability of being put under pressure to commit certain acts are relevant factors.

(iii) Self-defence; defence of other persons or property

71. The use of reasonable and necessary force to defend oneself rules out criminal liability. Similarly, reasonable and proportionate action to defend another person or, in the case of war crimes, property which is essential for the survival of the person or another person or for accomplishing a military mission, against an imminent and unlawful use of force, may also provide a defence to criminal responsibility under certain circumstances (see, for example, Article 31(c) of the ICC Statute).

Expiation

72. The exclusion clauses themselves are silent on the role of expiation, whether by serving a penal sentence, the grant of a pardon or amnesty, the lapse of time, or other rehabilitative measures. Paragraph 157 of the Handbook states that: ... The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

73. Bearing in mind the object and purpose behind Article 1F, it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. Each case will require individual consideration, however, bearing in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities.[68] In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply. This is more likely to be the case for crimes under Article 1F(a) or (c), than those falling under Article 1F(b).

74. As for lapse of time, this in itself would not seem good grounds for setting aside the exclusion clauses, particularly in the case of crimes generally considered not subject to a statute of limitation. A case by case approach is necessary once again, however, taking into account the actual period of time that has elapsed, the seriousness of the offence and whether the individual has expressed regret or renounced criminal activities.

75. The effect of pardons and amnesties also raises difficult issues. Although there is a trend in some regions towards ending impunity for those who have committed serious violations of human rights, this has not become a widely accepted practice. In considering the impact on Article 1F, consideration should be given as to whether the pardon or amnesty in question is an expression of the democratic will of the relevant country and whether the individual has been held accountable in other ways (e.g. through a Truth and Reconciliation Commission). In some cases, a crime may be of such a heinous nature that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.

F. PROPORTIONALITY CONSIDERATIONS

76. The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention.[69] State practice on this issue is not, however, uniform with courts in some States rejecting such an approach, generally in the knowledge that other human rights protection mechanisms will apply to the individual,[70] while others take account of proportionality considerations.[71]

77. In UNHCR's view, consideration of proportionality is an important safeguard in the application of Article 1F. The concept of proportionality, while not expressly mentioned in the 1951 Convention or the *travaux préparatoires*, has evolved in particular in relation to Article 1F(b), since it contains a balancing test in so far as the specific terms "serious" and "non-political" must be satisfied.[72] More generally, it represents a fundamental principle of international human rights law[73] and international humanitarian law.[74] Indeed, the concept runs through many fields of international law.[75] As with any considerations have also arisen in Swiss cases, for example in Decision 1993 No. 8, the Swiss Asylum Appeals Commission held:

> To determine an act to be a particularly serious crime in the sense of Article 1F(b) of the Convention, it is necessary that, all things considered, the interest of the perpetrator in being protected against serious threats of persecution in his country of origin appear less by comparison with the reprehensible nature of the crime that he committed and with his guilt. (unofficial translation. Original text reads: Pour qualifier une action de crime particulièrement grave au sens de l'art. 1 F, let. b de la Convention, il faut que, tout bien pesé, l'intérêt de l'auteur à être protégé de graves menaces de persécutions dans son pays d'origine apparaisse moindre en comparaison du caractère répréhensible du crime que celui-ci a commis ainsi que sa culpabilité.)

In the case of E.K., judgment of 2 November 2001, EMARK 2002/9, concerning two former members of the Kurdish separatist PKK from Turkey, the Swiss Asylum Appeals Commission took into account proportionality considerations, such as the length of time since the acts were committed, the young age at which they were committed, and the asylum-seekers' subsequent withdrawal from the organisation.

75 The International Court of Justice (ICJ) in its judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports, 1986, p. 14, found that the right of self-defence, as an exception to the prohibition on the use of force in the UN Charter, must be exercised in a proportionate manner. The ICJ confirmed that this proportionality exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, especially bearing in mind that a decision leading to exclusion does not equate with a full criminal trial76 and that human rights guarantees may not represent an accessible "safety valve" in some States.

78. In reaching a decision on exclusion, it is therefore necessary to weigh up the gravity of the offence for which the individual appears to be responsible against the possible consequences of the person being excluded, including notably the degree of persecution feared. If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant. This being said, such a proportionality analysis would normally not be required in the case of crimes against peace, crimes against humanity, and acts contrary to the purposes and principles of the United Nations, as the acts covered are so heinous that they will tend always to outweigh the degree of persecution feared. By contrast, war crimes and serious non-political crimes cover a wider range of behaviour. For those activities which fall at the lower end of the scale, for example, isolated incidents of looting by soldiers, exclusion may be considered disproportionate if subsequent return is likely to lead, for example, to the individual's torture in his or her country of origin. Where, however, persons have intentionally caused death or serious injury to civilians as a means of intimidating a government or a civilian population, they are unlikely to benefit from proportionality considerations.

...

H. SPECIAL CASES

Minors

91. In principle, the exclusion clauses can apply to minors but only if they have reached the **age of criminal responsibility**. Great caution should always be exercised, however, when the application of the exclusion clauses is being considered in relation to a minor. Under Article 40 of the 1989 Convention on the Rights of the Child, States shall seek to establish a minimum age for criminal responsibility. Where this has been established in the host State,92 a child below the minimum age cannot be considered by the State concerned as having committed an excludable offence. For those over this age limit (or where no such limit exists), the maturity of the particular child should still be evaluated to determine whether he or she had the mental capacity to held responsible for the crime in question. The younger the child, the greater the presumption that such mental capacity did not exist at the relevant time.

92. Where **mental capacity** is established, particular attention must be given to whether other grounds exist for rejecting criminal liability, including consideration of the following factors: the age of the claimant at the time of becoming involved with the armed group; the reasons for joining (was it voluntary or coerced or in defence of oneself or others?); the consequences of refusal to join; the length of time as a member; the possibility of not participating in such acts or of escape; the forced use of drugs, alcohol or medication (involuntary intoxication); promotion

within the ranks of the group due to actions undertaken; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered by the child as a result of his or her involvement. In the case of child soldiers, in particular, questions of duress, defence of self and others, and involuntary intoxication, often arise. Even if no defence is established, the vulnerability of the child, especially those subject to ill-treatment, should arguably be taken into account when considering the proportionality of exclusion for war crimes or serious non-political crimes.

93. At all times, regard should be had to the overwhelming obligation to act in the "best interests" of the child in accordance with the 1989 Convention on the Rights of the Child. Thus, specially trained staff should deal with cases where exclusion is being considered in respect of a child applicant.[93] In the UNHCR context, all such cases should be referred to Headquarters before a final decision is made on exclusion. The "best interests" principle should also underlie any post-exclusion action. Articles 39 and 40 of the 1989 Convention are also relevant as they deal with the duty of States to assist in the rehabilitation of "victims" (which would tend to include child soldiers) and set down standards for the treatment of children thought to have infringed the criminal law.[94]

129 S.Ct. 1159
Supreme Court of the United States

Daniel Girmai NEGUSIE, Petitioner,
v.
Eric H. HOLDER, Jr., Attorney General.

Decided March 3, 2009.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, SOUTER, GINSBURG, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, in which ALITO, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined. THOMAS, J., filed a dissenting opinion.

Opinion

An alien who fears persecution in his homeland and seeks refugee status in this country is barred from obtaining that relief if he has persecuted others.

> "The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality ***514** Act (INA), § 101, 66 Stat. 166, as added by Refugee Act of 1980, § 201(a), 94 Stat. 102–103, 8 U.S.C. § 1101(a)(42).

This so-called "persecutor bar" applies to those seeking asylum, § 1158(b)(2)(A)(i), or withholding of removal, § 1231(b)(3)(B)(i). It does not disqualify an alien from receiving a temporary deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20, p. 20, 1465 U.N.T.S. 85; 8 CFR § 1208.17(a) (2008).

In this case the Board of Immigration Appeals (BIA) determined that the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress. In so ruling the BIA followed its earlier decisions that found *Fedorenko v. United States,* 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981), controlling. The Court of Appeals for the Fifth Circuit, in affirming the agency, relied on its precedent following the same reasoning. We hold that the BIA and the Court of Appeals misapplied *Fedorenko.* We reverse and remand for the agency to interpret the statute, free from the error, in the first instance.

I

Petitioner in this Court is Daniel Girmai Negusie, a dual national of Eritrea and Ethiopia, his father having been a national of the former and his mother of the latter. Born and educated in Ethiopia, he left there for Eritrea around the age of 18 to see his mother and find employment. The year was 1994. After a few months in Eritrea, state officials took custody of petitioner and others when they were attending a movie. He was forced to perform hard labor for a month and then was conscripted into the military for a time. War broke out between Ethiopia and Eritrea in 1998, and he was conscripted again.

***515** When petitioner refused to fight against Ethiopia, his other homeland, the Eritrean Government incarcerated him. Prison guards punished petitioner by beating him with sticks and placing him in the hot sun. He was released after two years and forced to work as a prison guard, a duty he performed on a rotating basis for about four years. It is undisputed that the prisoners he guarded were being persecuted on account of a protected ground—*i.e.,* "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). Petitioner testified that he carried a gun, guarded the ****1163** gate to prevent escape, and kept prisoners from taking showers and obtaining fresh air. He also guarded prisoners to make sure they stayed in the sun, which he knew was a form of punishment. He saw at least one man die after being in the sun for more than two hours. Petitioner testified that he had not shot at or directly punished any prisoner and that he helped prisoners on various occasions. Petitioner escaped from the prison and hid in a container, which was loaded on board a ship heading to the United States. Once here he applied for asylum and withholding of removal.

***

[The IJ found Negusie credible but denied withholding of removal because, although there was no evidence to show Negusie acted maliciously, "the very fact that he helped [the government] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others" and barred asylum and withholding. IJ granted deferral of removal under the

14

Convention against Torture. The BIA affirmed.]

***516** The BIA *** held that "[t]he fact that [petitioner] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Ibid.* That is because " 'an alien's motivation and intent are irrelevant to the issue of whether he "assisted" in persecution ... [I]t is the objective effect of an alien's actions which is controlling.' " *Ibid.* (quoting *Matter of Fedorenko,* 19 I. & N. Dec. 57, 69 (BIA 1984)).

On petition for review the Court of Appeals agreed with the BIA that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes. App. to Pet. for Cert. 2a (citing *Fedorenko,* 449 U.S., at 512, n. 34, 101 S.Ct. 737). We granted certiorari....

II

Consistent with the rule in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the BIA is entitled to deference in interpreting ambiguous provisions of the INA. The question here is whether an alien who was compelled to assist in persecution can be eligible for asylum or withholding of removal. We conclude that the BIA misapplied our precedent in *Fedorenko* as mandating that an alien's motivation and intent are irrelevant to the issue whether an alien assisted in persecution. The agency must confront the same question free of this mistaken legal premise.

A

[1] It is well settled that "principles of *Chevron* deference are applicable to this statutory scheme." *INS v. Aguirre–Aguirre,* 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). Congress has charged ***517** the Attorney General with administering the INA, and a "ruling by the Attorney General with respect to all questions of law shall be controlling." ****1164** 8 U.S.C. § 1103(a)(1). Judicial deference in the immigration context is of special importance, for executive officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Abudu,* 485 U.S. 94, 110, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988). The Attorney General's decision to bar an alien who has participated in persecution "may affect our relations with [the alien's native] country or its neighbors. ***

The Government, like the BIA and the Court of Appeals, relies on *Fedorenko* to provide the answer. This reliance is not without some basis, as the Court there held that voluntariness was not required with respect to another persecutor bar. 449 U.S., at 512, 101 S.Ct. 737. To the extent, however, the Government deems *Fedorenko* to be controlling, it is in error.

****1165** In *Fedorenko,* the Court interpreted the Displaced Persons Act of 1948 (DPA), 62 Stat. 1009. The DPA was enacted "to enable European refugees driven from their homelands by the [second world] war to emigrate to the United States without regard to traditional immigration quotas." 449 U.S., at 495, 101 S.Ct. 737. Section 2(b) of the DPA provides relief to "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization" ***519** of the United Nations (IRO Constitution). 62 Stat. 1009. The IRO Constitution, as codified by Congress, excludes any individual "who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." Annex I, Part II, § 2, 62 Stat. 3051–3052.

The *Fedorenko* Court held that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa" under § 2(a) of the IRO Constitution. 449 U.S., at 512, 101 S.Ct. 737. That Congress did not adopt a voluntariness requirement for § 2(a), the Court noted, "is plain from comparing § 2(a) with § 2(b), which excludes only those individuals who '*voluntarily* assisted the enemy forces.' " *Ibid.* The Court relied on the principle of statutory construction that "the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in persecution of civilians ineligible for visas." *Ibid.*

Fedorenko does not compel the same conclusion in the case now before us. The textual structure of the statute in *Fedorenko* ("voluntary" is in one subsection but not the other) is not part of the statutory framework considered here. Congress did not use the word "voluntary" in any subsection of the persecutor bar, so its omission cannot carry the same significance.

The difference between the statutory scheme in *Fedorenko* and the one here is confirmed when we " 'look not only to the particular statutory language, but to the design of the statute as a whole and to its object and

policy.' " [Citations omitted.] Both statutes were enacted to reflect principles set forth in international agreements, but the principles differ in significant respects.

*520 As discussed, Congress enacted the DPA in 1948 as part of an international effort to address individuals who were forced to leave their homelands during and after the second World War. *Fedorenko, supra,* at 495, 101 S.Ct. 737. The DPA excludes those who "voluntarily assisted the enemy forces since the outbreak of the second world war," 62 Stat. 3052, as well as all who "assisted the enemy in persecuting civil populations of countries," *id.*, at 3051. The latter exclusion clause makes no reference to culpability. The exclusion of even those involved in nonculpable, involuntary assistance in Nazi persecution, as an expert testified in *Fedorenko,* may be " '[b]ecause the crime against humanity that is involved in the concentration camp puts it into a different category.' " 449 U.S., at 511, n. 32, 101 S.Ct. 737.

The persecutor bar in this case, by contrast, was enacted as part of the Refugee Act of 1980. Unlike the DPA, which was enacted to address not just the post war refugee problem but also the Holocaust and its horror, the Refugee Act was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons. As this Court has twice **1166 recognized, " 'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. 6577 (1968)," as well as the "United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), reprinted in 19 U.S.T. 6259." *Aguirre–Aguirre,* 526 U.S., at 427, 119 S.Ct. 1439 (quoting *Cardoza–Fonseca,* 480 U.S., at 436–437, 107 S.Ct. 1207).

These authorities illustrate why *Fedorenko,* which addressed a different statute enacted for a different purpose, does not control the BIA's interpretation of this persecutor bar. ***

*521 C

[3] The Government argues that "if there were any ambiguity in the text, the Board's determination that the bar contains no such exception is reasonable and thus controlling." Brief for Respondent 11. Whether such an interpretation would be reasonable, and thus owed *Chevron* deference, is a legitimate question; but it is not now before us. The BIA deemed its interpretation to be mandated by *Fedorenko,* and that error prevented it from a full consideration of the statutory question here presented.

In denying relief in this case the BIA recited a rule that has developed in its own case law in reliance on *Fedorenko*: "[A]n alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution ... [I]t is the objective effect of an alien's actions which is controlling." App. to Pet. for Cert. 6a. The rule is based on three earlier decisions: *Matter of Laipenieks,* 18 I. & N. Dec. 433 (1983); *Matter of Fedorenko,* 19 I. & N. Dec. 57; and *Matter of Rodriguez–Majano,* 19 I. & N. Dec. 811 (1988).

In *Matter of Laipenieks,* the BIA applied the Court's *Fedorenko* analysis of the DPA to a different postwar statute, which provided for the deportation of anyone associated with the Nazis who "ordered, incited, assisted, or otherwise participated" in persecution based on a protected ground. 8 U.S.C. § 1182(a)(3)(E)(i). Finding no agency or judicial decision on point, the BIA relied on *Fedorenko.* It recognized that the unique structure of the *Fedorenko* statute was not present in § 1182(a)(3)(E)(i), but the BIA nevertheless adopted wholesale the *Fedorenko* rule: "[A]s in *Fedorenko,* ... the plain language of [§ 1182(a)(3)(E)(i)] mandates a literal interpretation, and the omission of an intent element compels the conclusion that [§ 1182(a)(3)(E)(i)] makes all those who assisted in the specific persecution deportable." 18 I. & N. Dec., at 464. In other words, "particular motivations or intent ... is not a relevant factor." *Ibid.*

*522 The second decision, *Matter of Fedorenko,* also dealt with § 1182(a)(3)(E)(i), and it involved the same alien whose citizenship was revoked by this Court's *Fedorenko* decision. This time the agency sought to deport him. Fedorenko responded by requesting suspension of deportation. He argued that, unlike the DPA's bar on any assistance—voluntary or involuntary—in persecution, see *Fedorenko,* 449 U.S., at 512, 101 S.Ct. 737, the text and structure of § 1182(a)(3)(E)(i) required deportation only of those who voluntarily assisted in persecuting others. The BIA rejected that distinction, noting that it was foreclosed by *Matter of Laipenieks:* "It may be, as [Fedorenko] argues, that his service at Treblinka was involuntary.... We need **1167 not resolve the issue, however, because as a matter of law [Fedorenko's] motivations for serving as a guard at Treblinka are immaterial to the question of his

deportability under" § 1182(a)(3)(E)(i). 19 I. & N. Dec., at 69–70.

Later, the BIA applied this Court's *Fedorenko* rule to the persecutor bar that is at issue in the present case. In *Matter of Rodriguez–Majano,* the BIA granted relief because the alien's coerced conduct as a guerrilla was not persecution based on a protected ground. 19 I. & N. Dec., at 815–816. Nevertheless, in reaching its conclusion the BIA incorporated without additional analysis the *Fedorenko* rule as applied in *Matter of Laipenieks* and reiterated in *Matter of Fedorenko.* 19 I. & N. Dec., at 814–815. The BIA reaffirmed that "[t]he participation or assistance of an alien in persecution need not be of his own volition to bar him from relief." *Id.,* at 814 (citing *Fedorenko,* 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686).

Our reading of these decisions confirms that the BIA has not exercised its interpretive authority but, instead, has determined that *Fedorenko* controls. This mistaken assumption stems from a failure to recognize the inapplicability of the principle of statutory construction invoked in *Fedorenko,* as well as a failure to appreciate the differences in statutory purpose. The BIA is not bound to apply the *Fedorenko* rule ***523** that motive and intent are irrelevant to the persecutor bar at issue in this case. Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency.

III

[4] Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, " ' "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." ' " *Gonzales v. Thomas,* 547 U.S. 183, 186, 126 S.Ct. 1613, 164 L.Ed.2d 358 (2006) *(per curiam)* (quoting *Ventura,* 537 U.S., at 16, 123 S.Ct. 353, in turn quoting *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985)). This remand rule exists, in part, because "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps ... involves difficult policy choices that agencies are better equipped to make than courts." *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

* * *

***525** We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Footnotes

* The rationale for the duress defense, however, is conventionally "not that the defendant ... somehow loses his mental capacity to commit the crime in question," but rather that "even though he has done the act the crime requires and has the mental state which the crime requires, his conduct ... is excused." 2 W. LaFave, Substantive Criminal Law § 9.7(a), p. 73. (2d ed. 2003).

1 Notably, the EPA cast its activity not as statutory construction but as public administration; its rulemaking sought to achieve policy goals, such as reducing regulatory complexity and promoting plant modernization. See 46 Fed.Reg. 50766 (1981). To be sure, the EPA argued that its regulation defining "stationary source" as an entire plant was permissible under the Clean Air Act, but the agency treated its rulemaking as a matter of fashioning sound policy, not of discerning the meaning of "stationary source" in the statute.

***

119 S.Ct. 1439
Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE, Petitioner,
v.
Juan Anibal AGUIRRE-AGUIRRE.

Decided May 3, 1999.

***418** Justice KENNEDY delivered the opinion of the Court.

We granted certiorari to consider the analysis employed by the Court of Appeals in setting aside a determination of the Board of Immigration Appeals (BIA). The BIA ruled that respondent, a native and citizen of Guatemala, was not entitled to withholding of deportation based on his expressed fear of persecution for earlier political activities in Guatemala. The issue in the case is not whether the persecution is likely to occur, but whether, even assuming it is, respondent is ineligible for withholding because he "committed a serious nonpolitical crime" before his entry into the United States. 8 U.S.C. § 1253(h)(2)(C). The beginning point for the BIA's analysis was its determination that respondent, to protest certain governmental policies in Guatemala, had burned buses, assaulted passengers, and vandalized and destroyed property in private shops, after forcing customers out. These actions, the BIA concluded, were serious nonpolitical crimes. In reaching this conclusion, it relied on a statutory interpretation adopted in one of its earlier decisions, *Matter of McMullen,* 19 I. & N. Dec. 90 (BIA 1984), aff'd, 788 F.2d 591 (C.A.9 1986).

On appeal, the Court of Appeals for the Ninth Circuit concluded the BIA had applied an incorrect interpretation of the serious nonpolitical crime provision, and it remanded for further proceedings. ***

***419** We granted certiorari. 525 U.S. 808, 119 S.Ct. 39, 142 L.Ed.2d 30 (1998). We disagree with the Court of Appeals and address each of the three specific areas in which it found the BIA's analysis deficient. We reverse the judgment of the court and remand for further proceedings.

I

....

***421** We turn to the matter before us. In 1994, respondent was charged with deportability by the Immigration and Naturalization Service (INS) for illegal entry into the United States. Respondent conceded deportability but applied for asylum and withholding. At a hearing before an Immigration Judge respondent testified, through an interpreter, that he had been politically active in Guatemala from 1989 to 1992 with a student group called Estudeante Syndicado (ES) and with the National Central Union political party. App. 19–20, 36–37. He testified about threats due to his political activity. The threats, he believed, were from different quarters, including the Guatemalan Government, right-wing government support ****1444** groups, and left-wing guerillas. App. to Pet. for Cert. 23a.

Respondent described activities he and other ES members engaged in to protest various government policies and actions, including the high cost of bus fares and the government's failure to investigate the disappearance or murder of students and others. App. 20–21; App. to Pet. for Cert. 22a–23a. For purposes of our review, we assume that the amount of bus fares is an important political and social issue in Guatemala. We are advised that bus fare represents a significant portion of many Guatemalans' annual living expense, and a rise in fares may impose substantial economic hardship. See Brief for Massachusetts Law Reform Institute et al. as *Amicus Curiae* 18–19. In addition, government involvement with fare increases, and other aspects of the transportation system, has been a focus of political discontent in that country. *Id.,* at 16–21.

According to the official hearing record, respondent testified that he and his fellow members would "strike" by "burning buses, breaking windows or just attacking the police, police cars." App. 20. Respondent estimated that he participated in setting about 10 buses on fire, after dousing them with gasoline. *Id.,* at 46. Before setting fire to the buses, he and his group would order passengers to leave ***422** the bus. Passengers who refused were stoned, hit with sticks, or bound with ropes. *Id.,* at 46–47. In addition, respondent testified that he and his group "would break the windows of ... stores," "t[ake] the people out of the stores that were there," and "throw everything on the floor." *Id.,* at 48.

***

[The IJ granted withholding and asylum. INS appealed to

18

BIA, which sustained the appeal and ordered deportation, finding Aguirre had committed a serious nonpolitical crime within the meaning of § 1253(h)(2)(C).]

In addressing the definition of a serious nonpolitical crime, the BIA applied the interpretation it first set forth in *Matter of McMullen,* 19 I. & N. Dec., at 97–98, 19 I. & N. Dec. 90: "In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." In the instant case, the BIA found, "the criminal nature of the respondent's acts outweigh their political nature." App. to Pet. for Cert. 18a. The BIA acknowledged respondent's dissatisfaction with the Guatemalan Government's "seeming inaction in the investigation of student deaths and in its raising of student bus fares." *Ibid.* It said, however: "The ire of the ES manifested itself disproportionately in the destruction of property and ***423** assaults on civilians. Although the ES had a political agenda, those goals were outweighed by their criminal strategy of strikes...." *Ibid.* The BIA further concluded respondent should not be granted discretionary asylum relief in light of "the nature of his acts against innocent Guatemalans." *Id.,* at 17a.

A divided panel of the Court of Appeals granted respondent's petition for review and remanded to the BIA. 121 F.3d 521 (C.A.9 1997). According to the majority, the BIA's analysis of the serious nonpolitical crime exception was legally deficient in three respects. First, the BIA should have "consider [ed] the persecution that Aguirre might suffer if returned to Guatemala" and "balance[d] his admitted offenses against the danger to him of death." *Id.,* at 524. Second, it should have "considered whether the acts committed were grossly out of proportion to the[ir] alleged objective" and were "of an atrocious nature," especially with reference to Ninth Circuit precedent in this area. ****1445** *Ibid.* (internal quotation marks and citation omitted). Third, the BIA "should have considered the political necessity and success of Aguirre's methods." *Id.,* at 523–524.

Judge Kleinfeld dissented, [finding criminal nature of acts outweighed their political nature and that BIA "reasonably conclude[d] that [his] crimes were disproportionate to his political objectives." ***

II

As an initial matter, the Court of Appeals expressed no disagreement with the Attorney General or the BIA that the phrase "serious nonpolitical crime" in § 1253(h)(2)(C) should be applied by weighing "the political nature" of an act against its "common-law" or "criminal" character. [Citations omitted.] Nor does respondent take issue with this basic inquiry.

[4] The Court of Appeals did conclude, however, that the BIA must supplement this weighing test by examining additional factors. In the course of its analysis, the Court of Appeals failed to accord the required level of deference to the interpretation of the serious nonpolitical crime exception adopted by the Attorney General and BIA. Because the Court of Appeals confronted questions implicating "an agency's construction of the statute which it administers," the court should have applied the principles of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, the court should have asked whether "the statute is silent or ambiguous with respect to the specific issue" before it; if so, "the question for the court [was] whether the agency's answer is based on a permissible construction of the statute." *Id.,* at 843, 104 S.Ct. 2778. See also *INS v. Cardoza–Fonseca,* 480 U.S., at 448–449, 107 S.Ct. 1207.

It is clear that principles of *Chevron* deference are applicable to this statutory scheme. The INA provides that "[t]he Attorney General shall be charged with the administration and enforcement" of the statute and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1) (1994 ed., Supp. III). Section 1253(h), moreover, in express terms confers decisionmaking authority on the Attorney General, making an alien's entitlement to withholding turn on the Attorney General's "determin[ation]" whether the statutory conditions for withholding have been ***425** met. 8 U.S.C. §§ 1253(h)(1), (2). In addition, we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Abudu,* 485 U.S. 94, 110, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988). A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for

assessing the likelihood and importance of such diplomatic repercussions.

....

A

[5] The Court of Appeals' error is clearest with respect to its holding that the BIA was required to balance respondent's criminal acts against the risk of persecution he would face if returned to Guatemala. In *Matter of Rodriguez–Coto,* 19 I. & N. Dec. 208, 209–210 (1985), the BIA "reject[ed] any interpretation of the phras[e] ... 'serious nonpolitical crime' in [§ 1253(h)(2)(C)] which would vary with the nature of evidence of persecution." The text and structure of § 1253(h) are consistent with this conclusion. Indeed, its ***426** words suggest that the BIA's reading of the statute, not the interpretation adopted by the Court of Appeals, is the more appropriate one. As a matter of plain language, it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country. See *ibid.* ("We find that the modifie[r] ... 'serious' ... relate[s] only to the nature of the crime itself").

***[F]or aliens to be eligible for withholding at all, the statute requires a finding that their "life or freedom would be threatened in [the country to which deportation is sought] on account of their race, religion, nationality, membership in a particular social group, or political opinion," *i.e.,* that the alien is at risk of persecution in that country. 8 U.S.C. § 1253(h)(1). By its terms, the statute thus requires independent consideration of the risk of persecution facing the alien before granting withholding. It is reasonable to decide, as the BIA has done, that this factor can be considered on its own and not also as a factor in determining whether the crime itself is a serious, nonpolitical crime. ***

In reaching the contrary conclusion and ruling that the risk of persecution should be balanced against the alien's criminal acts, the Court of Appeals relied on a passage from the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) (U.N. Handbook). ***427** We agree the U.N. Handbook provides some guidance in construing the provisions added to the INA by the Refugee Act. *INS v. Cardoza–Fonseca,* 480 U.S., at 438–439, and n. 22, 107 S.Ct. 1207. As we explained in *Cardoza–Fonseca,* "one of Congress' primary purposes" in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968), to which the United States acceded in 1968. 480 U.S., at 436–437, 107 S.Ct. 1207. *** The basic withholding provision of § 1253(h)(1) parallels Article 33, which provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.,* at 6276. *** [T]he Convention states that its provisions "shall not apply to any person with respect to whom there are serious reasons for considering that ... he has committed a serious non-political crime outside the country of refuge prior to his admission to that ****1447** country as a refugee." Convention Art. I(F)(b), 19 U.S.T., at 6263–6264. Paragraph 156 of the U.N. Handbook, the portion relied upon by the Court of Appeals, states that in applying the serious nonpolitical crime provision of Convention Art. I(F)(b), "it is ... necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared...."

[6] The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts. "Indeed, the Handbook itself disclaims ***428** such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol ... is incumbent upon the Contracting State in whose territory the refugee finds himself.' " *INS v. Cardoza–Fonseca,* 480 U.S., at 439, n. 22, 107 S.Ct. 1207 (quoting U.N. Handbook ¶ (ii), at 1). ***

B

[7] Also relying on the U.N. Handbook, the Court of Appeals held that the BIA "should have considered whether the acts committed were 'grossly out of proportion to the alleged objective.' ... The political nature of the offenses would be 'more difficult to accept' if they involved 'acts of an atrocious nature.' " 121 F.3d, at 524 (quoting U.N. Handbook ¶ 152, at 36). The court further suggested that the BIA should have considered prior Circuit case law that "cast[s] light on what under the law are acts of [an] atrocious nature." 121 F.3d, at 524. Citing its own opinion affirming the BIA's decision in *Matter of McMullen,* see *McMullen v. INS,* 788 F.2d 591

20

(C.A.9 1986), the Court of Appeals stated that "[a] comparison of what the *McMullen* court found atrocious with the acts committed by Aguirre suggests a startling degree of difference." 121 F.3d, at 524. It reasoned that while *McMullen* had involved "indiscriminate bombing, murder, torture, [and] the maiming of innocent civilians," respondent's "only acts against innocent Guatemalans were ***429** the disruption of some stores and his use of methods that we would all find objectionable if practiced upon us on a bus in the United States but which fall far short of the kind of atrocities attributed to McMullen and his associates." 121 F.3d, at 524.

We do not understand the BIA to dispute that these considerations—gross disproportionality, atrociousness, and comparisons with previous decided cases—may be important in applying the serious nonpolitical crime exception. .... The criminal element of an offense may outweigh its political aspect even if none of the acts are deemed atrocious, however. For this reason, the BIA need not give express consideration to the atrociousness of the alien's acts in every case before determining that an alien has committed a serious nonpolitical crime.

....

***431** In the instant case, the BIA determined that "the criminal nature of the respondent's acts outweigh their political nature" because his group's political dissatisfaction "manifested itself disproportionately in the destruction of property and assaults on civilians" and its political goals "were outweighed by [the group's] criminal strategy of strikes." App. to Pet. for Cert. 18a. The BIA concluded respondent had committed serious nonpolitical crimes by applying the general standard established in its prior decision, so it had no need to consider whether his acts might also have been atrocious. The Court of Appeals erred in holding otherwise.

C

[8] The third reason given by the Court of Appeals for reversing the BIA was what the court deemed to be the BIA's failure to consider respondent's "offenses in relation to [his] declared political objectives" and to consider "the political necessity and success of [his] methods." 121 F.3d, at 523–524. As we have discussed, *supra,* at 1444, 1448–1449, the BIA did address the relationship between respondent's political goals and his criminal acts, concluding that the violence and destructiveness of the crimes, and their impact on civilians, were disproportionate to his acknowledged political objectives. To the extent the court believed the BIA was required to give more express consideration to the "necessity" and "success" of respondent's actions, it erred.

****1449 *432** It is true the Attorney General has suggested that a crime will not be deemed political unless there is a " 'close and direct causal link between the crime committed and its alleged political purpose and object.' " *Deportation Proceedings for Doherty,* 13 Op. Off. Legal Counsel, at 23 (quoting *McMullen v. INS,* 788 F.2d 591 (C.A.9 1986)). The BIA's analysis, which was quite brief in all events, did not explore this causal link beyond noting the general disproportion between respondent's acts and his political objectives. Whatever independent relevance a causal link inquiry might have in another case, in this case the BIA determined respondent's acts were not political based on the lack of proportion with his objectives. It was not required to do more. Even in a case with a clear causal connection, a lack of proportion between means and ends may still render a crime nonpolitical. Moreover, it was respondent who bore the burden of proving entitlement to withholding, see 8 C.F.R. § 208.16(c)(3) (1995) ("If the evidence indicates that one or more of the grounds for denial of withholding of deportation ... apply, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply"). He failed to submit a brief on the causal link or any other issue to the BIA, and the decision of the Immigration Judge does not address the point. In these circumstances, the rather cursory nature of the BIA's discussion does not warrant reversal.

712 F.3d 1338
United States Court of Appeals,
Ninth Circuit.

Roberto Javier **BLANDINO–MEDINA**,
Petitioner,
v.
Eric H. HOLDER, Jr., Attorney General,
Respondent.

No. 11–72081. | Argued and Submitted Oct. 17, 2012.
| Filed April 10, 2013.

Synopsis
Background: Nicaraguan citizen petitioned for review of two decisions by the Board of Immigration Appeals (BIA) reversing an Immigration Judge's (IJ's) grant of withholding of removal pursuant to the Convention Against Torture (CAT), and affirming the IJ's finding that his California conviction for lewd and lascivious acts with a child under the age of 14 was a particularly serious crime, rendering him statutorily ineligible for withholding of removal.

Holdings: The Court of Appeals, Bea, Circuit Judge, held that:

[1] applicable section of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) unambiguously precluded Department of Homeland Security's (DHS) creation of additional categories of per se particularly serious crimes based solely on the elements of the offense, and

[2] alien failed to establish a clear probability that he would be tortured if he returned to Nicaragua, and thus was not entitled to withholding of removal under the Convention Against Torture (CAT).

Affirmed in part, vacated in part, and remanded.

Attorneys and Law Firms

*1340 Madeline Feldon (argued), Amy VyHanh Nguyen (argued), and Evangeline G. Abriel, Santa Clara University School of Law, Santa Clara, CA, for Petitioner.

Zoe J. Heller (argued), Office of Immigration Litigation, Washington, D.C., for Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A077–223–173.
Before: CARLOS T. BEA and ANDREW D. HURWITZ, Circuit Judges, and WILLIAM K. SESSIONS, District Judge.*

OPINION

BEA, Circuit Judge:

Roberto Xavier **Blandino–Medina**, a Nicaraguan citizen, seeks review of two decisions by the Board of Immigration Appeals ("BIA"): (1) a decision reversing an Immigration Judge's ("IJ's") grant of withholding of removal pursuant to the Convention Against Torture ("CAT"), and (2) a decision affirming the IJ's finding that Blandino's conviction for lewd and lascivious acts with a child under the age of 14, in violation of California Penal Code § 288(a), is a particularly serious crime, rendering him statutorily ineligible for withholding of removal.

We have jurisdiction under 8 U.S.C. § 1252(a)(1). We affirm the BIA's decision concerning withholding of removal pursuant to the CAT, but vacate its decision holding that Blandino's conviction under Section 288(a) is a particularly serious crime *per se*, and remand to the BIA to consider the circumstances of the offense.

I. Facts and Procedural Background

Blandino is a Nicaraguan citizen, born in 1982. Several members of Blandino's family were affiliated with the Somoza regime, and after the Sandinistas took power, his family was persecuted. Blandino's father fled to the United States in 1986 and was later granted political asylum. In 1987, Blandino came to California to live with his father.

When Blandino was ten years old, his father sent him back to Nicaragua. Shortly after returning, Blandino encountered problems with the Sandinista National Liberation Front ("FSLN"). While Blandino was in school, the FSLN forced students to do manual labor. Blandino was forced to build barricades and beaten for not complying with the FSLN's instructions. When he

was fifteen years old, Blandino was detained by the police for three days and questioned about his parents.

On December 19, 1998, Blandino entered the United States without permission and was apprehended by Border Patrol agents. The Immigration and Nationalization Service ("INS") sought to remove him for entering the country illegally. Blandino applied for Temporary Protected Status ("TPS"), and in 1999 the INS granted that application and closed removal proceedings.

Since 1999, Blandino has been convicted of three crimes. The third conviction is central to this appeal: a 2008 guilty plea to the felony of lewd and lascivious conduct with a child under the age of fourteen in *1341 violation of Section 288(a),[1] for which Blandino was sentenced to one year in county jail, five years of felony probation, and registration as a sex offender.

In 2009, the Department of Homeland Security ("DHS") re-instituted removal proceedings. Blandino appeared before an IJ, conceded the legal and factual bases for removal, but sought cancellation of removal and adjustment of status (along with a waiver of inadmissibility) pursuant to 8 U.S.C. § 1182(h), as a spouse or child of a person granted asylum. Claiming political persecution, Blandino also applied for asylum, withholding of removal under 8 U.S.C. § 1231(b)(3), and relief under the CAT.

The IJ denied Blandino's applications for cancellation of removal and for a waiver of inadmissibility in conjunction with his application for adjustment of status. The IJ also denied Blandino's asylum application. However, the IJ granted Blandino's application for withholding of removal under 8 U.S.C. § 1231(b)(3), and relief under the CAT.

The government appealed the IJ's grant of withholding of removal under 8 U.S.C. § 1231(b)(3) and the CAT to the BIA; Blandino did not seek review of the IJ's denial of cancellation of removal, waiver of inadmissibility, or asylum. The BIA remanded for the IJ to determine whether Blandino's conviction under Section 288(a) was a "particularly serious crime" rendering him ineligible for withholding of removal.[2] The BIA instructed the IJ "to examine the statutory elements of the alien's crime; if an offense qualifies as a particularly serious crime based solely on its elements, then no further inquiry is required and the application for withholding of removal must be pretermitted."

On remand, the IJ noted that he had previously found Blandino's Section 288(a) conviction not particularly serious because "respondent honestly believed based upon the victim's representation that she was 19 years old." After examining the elements of Section 288(a), but without reexamining the facts and circumstances of Blandino's conviction, the IJ concluded that Blandino had been convicted of a particularly serious crime.

The BIA dismissed Blandino's appeal, agreeing "with the Immigration Judge's determination that the respondent is ineligible for withholding of removal under the [INA] as his offense constitutes a 'particularly serious crime' *per se*." This petition for review followed.

....

III. The BIA's Authority to Determine that Certain Offenses Are "Particularly Serious Crimes" *Per Se*

[4] Whether the BIA applied the proper legal standard in determining whether Blandino's crime was "particularly serious" *1343 raises a question of law. We have jurisdiction over questions of law raised in petitions for review. 8 U.S.C. § 1252(a)(2)(D); *see also Miguel–Miguel v. Gonzales,* 500 F.3d 941, 944 (9th Cir.2007). Although we "cannot reweigh evidence to determine if the crime was indeed particularly serious, [we] can determine whether the BIA applied the correct legal standard." *Afridi v. Gonzales,* 442 F.3d 1212, 1218 (9th Cir.2006). This Court reviews both the BIA's decision and those portions of the IJ's decision incorporated by the BIA. *See Kalubi v. Ashcroft,* 364 F.3d 1134, 1137 n. 3 (9th Cir.2004).

A. Standard of Review and *Chevron* Deference

We ordinarily review questions of law *de novo.* However, the Court must afford deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to the BIA's reasonable interpretations of ambiguous statutes it is charged with administering. *See INS v. Aguirre–Aguirre,* 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (citing 8 U.S.C. § 1101(a)(3)).

The first step of the *Chevron* analysis considers whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. "If the intent of Congress is clear, that is the end of the

matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43, 104 S.Ct. 2778. Courts "only defer ... to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *INS v. St. Cyr,* 533 U.S. 289, 320 n. 45, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778).

"[I]f the statute is silent or ambiguous with respect to the specific issue," the court moves to step two of the *Chevron* inquiry, and considers "whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. Deference "is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.' " *Aguirre–Aguirre,* 526 U.S. at 425, 119 S.Ct. 1439 (quoting *INS v. Abudu,* 485 U.S. 94, 110, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988)).

B. Statutory Framework

[5] Applying the "traditional tools of statutory construction," we conclude that 8 U.S.C. § 1231(b)(3)(A) is not ambiguous.

We begin with the text and the history of the statute. Section 1231(b)(3)(A)(ii) provides that an alien may not be removed to a nation in which his life or freedom would be threatened on a protected ground unless "the Attorney General decides ... the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." Before 1990, the Immigration and Nationality Act did not define "particularly serious crime." *See Miguel–Miguel,* 500 F.3d at 945.

In *Matter of Frentescu,* 18 I. & N. Dec. 244 (BIA 1982), the BIA developed a multi-factor test for determining whether a crime was particularly serious. Frentescu had been convicted of burglary, sentenced to three months in jail, and placed on probation for one year. *Id.* at 245. To determine whether Frentescu had been convicted of a "particularly serious crime," the BIA described the required inquiry as follows:

> *1344 While there are crimes which, on their face, are "particularly serious crimes," or clearly are not "particularly serious crimes,"[3] the record in most proceedings will have to be analyzed on a case-by-case basis. In judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.

Id. at 247.[4] After applying these "*Frentescu* factors" the BIA found that Frentescu's crime was not particularly serious, because it was a crime against property, he had not been armed, and had received a relatively short sentence. *Id.*

In 1990, we held that *Frentescu's* case-by-case analysis was mandatory and that the BIA could not create categories of *per se* particularly serious crimes. *Beltran–Zavala v. INS,* 912 F.2d 1027 (9th Cir.1990). We explained:

> If Congress wanted to erect per se classifications of crimes precluding immigration and nationality benefits, it knew how to do so ... In contrast, the language of [the particularly serious crime provision], as interpreted in *Frentescu,* commits the BIA to an analysis of the characteristics and circumstances of the alien's conviction.

Id.

Since *Beltran–Zavala,* Congress has thrice amended the provision barring withholding of removal for those convicted of certain crimes. In 1990, Congress amended the INA to provide that all aggravated felonies were categorically particularly serious crimes.[5] Immigration Act of 1990, Pub.L. No. 101–649, § 515 (Nov. 29, 1990). This amendment effectively overruled *Matter of Frentescu* and *Beltran–Zavala* in part, by precluding case-by-case analysis of an aggravated felony. *See Afridi,*

442 F.3d at 1220 n. 4.

In 1996, Congress eliminated the categorical rule, replacing it with a rebuttable presumption that aggravated felonies were particularly serious crimes. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, § 413(f) (Apr. 24, 1996). A few months later, however, Congress again amended the statute. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104–208, div. C, sec. 305, § 241 (Sept. 30, 1996) (codified at 8 U.S.C. § 1231(b)(3)(B)) ("IIRIRA"). This version, which applies to Blandino's case, and remains in effect today, provides in relevant part:

> ***1345** [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B)(iv).

Thus, the current version of the statute establishes a two-tiered approach. Aggravated felonies[6] for which an alien receives a sentence of imprisonment of five years or more are particularly serious crimes *per se.* This *per se* class, however, "shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." *Id.* The question at the first step of the *Chevron* inquiry is whether the statute is ambiguous as to whether the Attorney General has authority to create additional categories of *per se* particularly serious crimes.

We find that Congress has clearly expressed its intent: the overall structure of the INA compels the conclusion that Section 1231(b)(3)(B)(iv) establishes but one category of "per se" particularly serious crimes, and requires the agency to conduct a case-by-case analysis of convictions falling outside the category established by Congress. *See Illinois Pub. Telecommc'ns Ass'n v. Federal Commc'ns Comm.*, 117 F.3d 555, 568, *decision clarified on reh'g*, 123 F.3d 693 (D.C.Cir.1997) ("[U]nder step one of *Chevron,* we consider not only the language of the particular statutory provision under scrutiny, but also the structure and context of the statutory scheme of which it is a part.").

We start by applying the basic statutory construction principle of *expressio unius est exclusio alterius.* Under that principle, the express creation of one category of *per se* particularly serious crimes should be understood as the exclusion of other categorically particularly serious crimes. *See Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir.2005) (en banc) ("The doctrine of *expressio unius est exclusio alterius* 'as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.' ") (quoting *Boudette v. Barnette,* 923 F.2d 754, 756–57 (9th Cir.1991)).

This reading is also the most consistent with the structure of the INA as a whole. Congress put considerable effort into delineating which crimes should be categorized as particularly serious *per se.* The extensive and detailed definition of the term "aggravated felony" in 8 U.S.C. § 1101(a)(43) demonstrates that Congress made specific decisions about what sorts of crimes should qualify as facially particularly serious. *Cf. Alphonsus v. Holder,* 705 F.3d 1031, 1043 (9th Cir.2013) ("The aggravated felony definitions serve both to delineate the group of *per se* particularly serious crimes and to suggest the types of crimes most likely to be covered by the statute even when the aggregate sentence is less than five years.").

Our conclusion that Section 1231(b)(3)(B)(iv) precludes the agency's creation of additional categories of particularly serious crimes *per se* is supported by a comparison between Section 1231, which ***1346** governs withholding of removal, and Section 1158, which governs asylum. Section 1158(b)(2)(A)(ii) prohibits the Attorney General from granting asylum to an alien "if the Attorney General determines that ... the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." This language is nearly identical to the provision at issue in this case, which provides that an alien shall not be eligible for withholding of removal "if the Attorney General decides that ... the alien, having been convicted by a final judgment of a particularly

serious crime is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii).

There are, however, key differences between the two provisions. All aggravated felonies are categorically particularly serious crimes for the purposes of asylum, but only aggravated felonies for which the alien was sentenced to at least five years' imprisonment are categorically particularly serious for the purposes of withholding of removal. *Compare* 8 U.S.C. § 1158(b)(2)(B)(i) (asylum) *with* 8 U.S.C. § 1231(b)(3)(B)(iv) (withholding of removal). More importantly, the provisions differ in describing how the Attorney General may designate other crimes as "particularly serious." The withholding of removal provision allows the Attorney General to determine "that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B)(iv). In contrast, the asylum statute allows the Attorney General to "designate by regulation offenses that will be considered to be a [particularly serious crime]." 8 U.S.C. § 1158(b)(2)(B)(ii).

We noted in *Delgado v. Holder* that "[t]here is little question that [the asylum] provision permits the Attorney General, by *regulation,* to make particular crimes categorically particularly serious even though they are not aggravated felonies." 648 F.3d 1095, 1106 (9th Cir.2011) (en banc) (emphasis in original). However, the withholding of removal statute is notably missing an analogue provision permitting the Attorney General to designate crimes as categorically particularly serious even if they are not aggravated felonies for which the defendant has received a sentence of at least five years.

The current language of both provisions was simultaneously enacted by Congress in 1996, when it passed the IIRIRA.[7] *See* Pub.L. No. 104–208, div. C, sec. 305, § 241, and sec. 604, § 208 (Sept. 30, 1996). "When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act ... it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.' " *Clay v. United States,* 537 U.S. 522, 528–29, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) (quoting *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). This principle bolsters our conclusion that Congress's failure to include a provision explicitly granting the Attorney General the authority to designate offenses as categorically particularly serious crimes in the withholding of removal context precludes the agency's interpretation of the statute as granting it that authority.

For these reasons, we conclude that Section 1231(b)(3)(B)(iv) unambiguously provides one category of particularly serious crimes *per se,* precluding the agency's interpretation of the statute as allowing it to ***1347** create additional categories of facially particularly serious crimes.

C. BIA and Ninth Circuit Precedent

Although we base our conclusion on the text, history, and structure of the statute, our holding also comports with Ninth Circuit precedent and with the BIA's practice of applying the *Frentescu* case-by-case analysis in most cases involving convictions of offenses other than aggravated felonies. In two en banc decisions, the BIA held that the IIRIRA revived the *Frentescu* case-by-case analysis for aggravated felony convictions resulting in a sentence of less than 5 years. *See Matter of L–S–,* 22 I. & N. Dec. 645, 649 (BIA 1999) (en banc), *Matter of S–S–,* 22 I. & N. Dec. 458, 463–65 (BIA 1999) (en banc).[8] In 2006, this court accordingly reversed a decision by the BIA for failure to apply the *Frentescu* factors. *See Afridi,* 442 F.3d at 1218. Afridi was convicted under California Penal Code § 261.5(c) for unlawful intercourse with a minor who was more than three years younger than the perpetrator and was sentenced to three years' probation. *Id.* at 1214. The BIA found him statutorily ineligible for withholding of removal because he had been convicted of a particularly serious crime. *Id.* at 1217. This court granted the petition for review in part noting, "The BIA considered two of the *Frentescu* factors, the nature of the conviction and the sentence imposed ... [but] the BIA did not consider the circumstances and underlying facts of the conviction." *Id.* at 1219. We specifically noted that under the most recent statutory amendments, "aggravated felonies resulting in sentences fewer than five years are not per se particularly serious and still require a case-by-case analysis, as laid out in *Frentescu.*" *Id.* at 1220 n. 4.

The government argues that we should defer to the BIA's construction of 8 U.S.C. § 1231 in *Matter of N–A–M–,* 24 I. & N. Dec. 336 (BIA 2007), that it may designate an offense as a particularly serious crime *per se.* But, because we have already resolved this case at the first step of the *Chevron* inquiry, we do not move to the second

step of the inquiry, in which we ask whether the agency's interpretation is a "permissible construction" of the statute. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. We note briefly, however, that *Matter of N–A–M–* does not necessarily support the government's position. The respondent in that case was convicted of felony menacing and sentenced to four years' deferred judgment. 24 I. & N. Dec. at 337. The BIA stated that where "a conviction is not for an aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years, we examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *Id.* at 342. The agency noted in dictum that "[o]n some occasions, we have focused exclusively on the elements of the offense,"[9] but "we have generally ***1348** examined a variety of factors and found that the consideration of the individual facts and circumstances is appropriate." *Id.* (internal quotations omitted). And, although stating that "that the respondent's offense is a particularly serious crime based solely on its elements," the BIA nonetheless examined the individualized characteristics of the offense, including the fact that the offense was a crime against a person, that the respondent was required to register as a sex offender, and the statement in support of the warrantless arrest describing the nature of the respondent's crime. *Id.* at 343.

We acknowledge that two other circuits have assumed, without explicitly deciding, that the BIA can make the "particularly serious crime" determination based solely on the elements of the offense.[10] However, no Ninth Circuit decision so holds, and our considered analysis of the statute at issue compels a contrary conclusion.

IV. Substantial Evidence Supported the BIA's Finding that Blandino Failed to Establish a Clear Probability of Torture

[6] We affirm the BIA's denial of withholding of removal under the CAT because Blandino has not established a clear probability that he would be tortured if he returned to Nicaragua. This court reviews "for substantial evidence the factual findings underlying the ... BIA's determination that [the applicant] was not eligible for deferral of removal under the CAT." *Arbid v. Holder,* 674 F.3d 1138, 1143 (9th Cir.2012). Under this standard, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

In its initial decision to grant Blandino relief under CAT, the IJ specifically identified the past persecution of Blandino's family as grounds for granting relief. On appeal, the BIA found that the record as a whole provided insufficient evidence to establish that it was "more likely than not" that Blandino would be tortured by the Nicaraguan government, and noted that rather than presenting hard evidence of a probability that he would be tortured, Blandino merely presented a series of worst-case scenarios. Furthermore, he had not presented evidence that similarly-situated individuals are being tortured by Nicaraguan officials. Given the deference this court must afford to the BIA's findings of fact, we affirm its decision to deny CAT relief to Blandino.

Conclusion

For the foregoing reasons, we GRANT Blandino's petition for review of the BIA's ***1349** determination that he committed a particularly serious crime, and we REMAND with instructions that the agency engage in a case-specific analysis in accordance with *Matter of Frentescu* to determine whether Blandino's conviction under Section 288(a) is a particularly serious crime, rendering him statutorily ineligible for withholding of removal.

We DENY Blandino's petition for review of the BIA's denial of his claim for relief under the Convention Against Torture.

All pending motions in this case are DENIED.

GRANTED IN PART, DENIED IN PART, AND REMANDED.

Parallel Citations

13 Cal. Daily Op. Serv. 3893, 2013 Daily Journal D.A.R. 4598

Footnotes

* The Honorable William K. Sessions, III, District Judge for the U.S. District Court for the District of Vermont, sitting by designation.

1 California Penal Code § 288(a) states: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

2 8 U.S.C. § 1231(b)(3)(B)(ii) provides that an alien may not be removed to a nation in which his life or freedom would be threatened on a protected ground unless "the Attorney General decides ... the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States."

3 The BIA did not identify in *Matter of Frentescu* any crimes that were, on their face, "particularly serious crimes" or clearly not "particularly serious crimes."

4 The *Frentescu* factors have evolved slightly. The BIA no longer engages "in a separate determination to address whether the alien is a danger to the community." *Matter of N–A–M–,* 24 I. & N. Dec. 336, 342 (BIA 2007); *see also Kankamalage v. I.N.S.,* 335 F.3d 858, 861 n. 2 (9th Cir.2003) ("Once the INS makes a finding that an offense constitutes a particularly serious crime, a separate determination of danger to the community is not required.").

5 At that time, only a limited number of offenses had been designated "aggravated felonies." *See* Pub.L. No. 100–690, § 7342, 102 Stat. 4181, 4469–70 (1988 version of the INA) (defining "aggravated felony" as: "murder; any drug trafficking crime ... or any illicit trafficking in any firearms or destructive devices"). The Immigration Act of 1990 added money laundering and crimes of violence for which the term of imprisonment is at least five years to the list of aggravated felonies. *See* Pub.L. No. 101–649, § 501, 104 Stat. 4978, 5048.

6 "As used in immigration law, 'aggravated felony' is a term of art referring to the offenses enumerated in [8 U.S.C.] § 1101(a)(43)." *Delgado v. Holder,* 648 F.3d 1095, 1101 (9th Cir.2011) (en banc).

7 Prior to the enactment of the IIRIRA, the asylum statute did not have a "particularly serious crime" provision; rather, it simply stated that aliens convicted of aggravated felonies were ineligible for asylum. *See* 8 U.S.C. § 1158 (Apr. 24, 1996).

8 In *Matter of S–S–,* the BIA also noted that "Congress easily could have designated categories of aggravated felonies that it considered to be particularly serious crimes—either independently or in conjunction with a specific sentence—but it did not do so." 22 I. & N. Dec. at 464. After holding that an individualized consideration of the facts and circumstances of each conviction for aggravated felonies resulting in less than five years' imprisonment was necessary, the BIA went on to note, "We leave for another day the question of whether, and under what conditions, it might be appropriate, as a matter of discretion, for the Attorney General to designate certain offenses as being particularly serious crimes per se." *Id.* at 465 n. 7.

9 The BIA cited *Matter of Garcia–Garrocho,* 19 I. & N. Dec. 423, 425–26 (BIA 1986), in support of this proposition. The applicant in *Garcia–Garrocho* had been convicted of first-degree burglary in violation of New York Penal Law § 140.30. *Id.* at 425. The BIA stated that certain crimes are "inherently" or "per se" particularly serious, and require "no further inquiry into the nature and circumstances of the underlying conviction," *id.,* and held that "the applicant's conviction for burglary in the first degree is within the category of crimes that are per se 'particularly serious.' " *Id.* at 426. However, *Garcia–Garrocho* predates the 1996 passage of IIRIRA, which established the two-tier approach to determining which offenses are particularly serious crimes.

10 In *Hamama v. INS,* which was decided several months before the "particularly serious crimes" provision at issue in this case was enacted by the IIRIRA, the Sixth Circuit stated that the BIA "has the prerogative to declare a crime particularly serious without examining each and every *Frentescu* factor." 78 F.3d 233, 240 (6th Cir.1996). In *Lapaix v. U.S. Attorney General,* the Eleventh Circuit stated that in making the "particularly serious crime" determination, the IJ is "free to rely solely on the elements of the offense," but that "IJ's generally consider additional evidence" and apply the *Frentescu* factors. 605 F.3d 1138, 1143 (11th Cir.2010).

TERRORIST-RELATED INADMISSIBILITY GROUNDS (TRIG)

Application to applicants for refugee status, asylum, and withholding: refugees are inadmissible, and applicants for asylum and withholding are ineligible for relief if they fall under the TRIG (INA § 208(b)(v); INA § 241(b)(3)(B)).

INA § 212(a)(3)(B) – terrorist inadmissibility ground - inadmissible if has, inter alia:

- Engaged in a terrorist activity
- Is a member of a Tier I or Tier II terrorist organization
- Is a member of a Tier III terrorist organization, unless demonstrates by clear and convincing evidence that did not know and should not reasonably have known that organization was a terrorist organization
- Endorses or espouses terrorist activity
- Is spouse or child of an alien inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last five years, UNLESS should not reasonably have known or has renounced.

Definitions:

- "Terrorist activities": includes hijacking, seizing of persons, assassination, violent attack, use of explosives, or threat, attempt, or conspiracy to do any of them.

- "Engage in terrorist activities": includes committing act, planning, solicitation of funds, gathering information on potential targets, and providing material support.
    - Providing material support: committing act one knows or reasonably should know affords material support, including a safe house, transportation, communications, funds or other material financial benefit, false documentation or id, weapons, explosives, or training,
    - for commission of terrorist activity
    - to any individual one knows or seasonably should know has committed or plans to commit terrorist activity; to designated terrorist org.; or to non-designated terrorist org. UNLESS shows by clear and convincing evidence that he did not know and should not reasonably have known that organization was terrorist organization.

Terrorist organizations are:

Tier I:	designated organizations under INA 219;
Tier II:	Designated upon publication in Federal Register by Secretary of State in consultation with AG, DHS.
Tier III	Not designated, but group of two or more individuals, whether organized or not, that engages in or has a subgroup that engages in terrorist activities.

<u>Relief under Consolidated Appropriations Act of 2007 and other provisions:</u>

- Some groups specifically exempted from Tier III categorization: Karen National

Union/Karen National Army – Burma; Chi National Front/Chin National Army – Burma; Chin National League for Democracy – Burma; Kayan New Land Party – Burma; Arakan Liberation Party – Burma; Tibetan Mustangs – Tibet; Cuban Alzados – Cuba; Karenni National Progressive Party – Burma; Appropriate groups affiliated with the Hmong – Vietnam; groups affiliated with Montagnards – Vietnam; Africa National Congress – South Africa (Added July 2008 by P.L. 110-257).

- DHS and DOS, in consultation with AG, may exempt individuals from TRIG bars. Some limitations, e.g., members and officers of Tier I and II orgs. To date, conduct and group exemptions:

- Conduct exemptions:
  - Material support under duress
  - Solicitation under duress
  - Military-type training under duress
  - Voluntary provision of medical care
  - Certain limited material support
  - Insignificant material support

- Group exemptions: association or activities with All-Burma Student's Democratic Front; material support to All India Sikh Student's Federation-Bittu Faction; certain association or activities with Iraqi National Congress, Kurdish Democratic Party, Patriotic Union of Kurdistan, Kosovo Liberation Army, participation in Iraqi uprisings against Saddam Hussein; FMLN; Ethiopian People's Revolutionary Party; Oromo Liberation Front; Tigray People's Liberation Front; Eritrean Liberation Front.

- Factors for showing duress:
  - Whether the applicant reasonable could have avoided, or took steps to avoid, providing material support
  - The severity and type of harm inflicted or threatened
  - To who the harm or threat of harm was directed
  - The perceived imminence of the harm threatened
  - The perceived likelihood that the threatened harm would be inflicted
  - Any other relevant factor regarding the circumstances under which the applicant felt compelled

- And must establish individual requirements.
  - Establish that he or she is otherwise eligible for the immigration benefit
  - Undergo and pass all required background and security checks;
  - Fully disclose the nature and circumstances of each provision of material support; and
  - Establish that he or she poses no danger to the safety and security of the United States.

Statistics: as of March 31, 2014: 17,321 exemptions granted (not all refugees, some in other categories); 2,584 cases on hold.

U.S. Citizenship and Immigration Services

Terrorism-Related Inadmissibility Grounds Exemptions

The Secretaries of State and Homeland Security, in consultation with the Attorney General, can authorize exemptions from the terrorism-related inadmissibility grounds (TRIG). See INA section 212(d)(3)(B).

Please see below for more information on each of these exemptions approved to date.

Situational Exemptions to Date	Group-Based Exemptions To Date
Material Support Under Duress	All Burma Students Democratic Front (ABSDF)
Solicitation Under Duress	All India Sikh Students Federation-Bittu Faction (AISSF-Bittu)
Military-Type Training Under Duress	Iraqi National Congress (INC), Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK)
Voluntary Medical Care	10 Named Organizations in the Consolidated Appropriations Act of 2008 (CAA)
Certain Applicants with Existing Immigration Benefits	Certain Association or Activities with the Kosovo Liberation Army (KLA)
Iraqi Uprisings	Farabundo Marti para la Liberacion National (FMLN)
Certain Limited Material Support	Nationalist Republican Alliance (ARENA)
Insignificant Material Support	Ethiopia People's Revolutionary Party (EPRP)
	Oromo Liberation Front (OLF)
	Tigray Peoples Liberation Front (TPLF)
	Democratic Movement for the Liberation of Eritrean Kunama (DMLEK)
	Eritrean Liberation Front (ELF)
	Certain Burmese Groups

Last Reviewed/Updated: 12/29/2016

31

U.S. Citizenship and Immigration Services

Terrorism-Related Inadmissibility Grounds (TRIG) - Situational Exemptions

Situational Exemptions to Date
Material Support Under Duress
Solicitation Under Duress
Military-Type Training Under Duress
Voluntary Medical Care
Certain Applicants with Existing Immigration Benefits
Iraqi Uprisings
Certain Limited Material Support
Insignificant Material Support

Material Support Under Duress

Exemptions may be granted for applicants who provided material support under duress to designated or undesignated terrorist organizations, which at minimum requires that the material support was provided in response to a reasonably-perceived threat of serious harm. An example of material support under duress could include providing money or a service (such as transporting fighters and supplies) to a rebel group when threatened at gunpoint to comply with such a demand.

For more information on the Exemption for Providing Material Support to an Undesignated Terrorist Organization, please see:

- February 26, 2007 Exercise of Authority (PDF, 113 KB)
- May 24, 2007 USCIS Implementation Memorandum (PDF, 514 KB), "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations"

For more information on the Exemption for Providing Material Support to a Designated Terrorist Organization, please see:

- April 27, 2007 Exercise of Authority (PDF, 1.60 MB)
- May 24, 2007 USCIS Implementation Memorandum, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations"

Return to the top

Solicitation Under Duress

Effective January 7, 2011, the secretary of homeland security, in consultation with the secretary of state and the attorney general, exercised her discretionary authority not to apply an inadmissibility ground to certain applicants who, under duress, solicited funds or members for a terrorist organization.

For more information on this exemption, please see:

- January 7, 2011 Exercise of Authority (PDF, 1.80 MB)

32

- February 23, 2011 USCIS Implementation Memo, "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For Solicitation of Funds or Members Under Duress"

Return to the top

Military-Type Training Under Duress

Effective January 7, 2011, the secretary of homeland security, in consultation with the secretary of state and the attorney general, exercised her discretionary authority not to apply an inadmissibility ground to certain applicants who, under duress, received military-type training from, or on behalf of, a terrorist organization.

For more information on this exemption, please see:

- January 7, 2011 Exercise of Authority
- February 23, 2011 USCIS Implementation Memo, "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For Receipt of Military-Type Training Under Duress"

Return to the top

Voluntary Provision of Medical Care

Effective October 13, 2011, the secretary of homeland security, in consultation with the secretary of state and the attorney general, authorized an exemption for certain applicants who provided medical care to individuals that the applicant knew, or reasonably should have known, committed or planned to commit a terrorist activity, or to members of a terrorist organization as described in INA Section 212(a)(3)(B)(vi). An example of the provision of medical care could include providing services in the capacity of a medical professional to members of a terrorist organization.

For more information on this exemption, please see:

- October 13, 2011 Exercise of Authority
- November 20, 2011, USCIS Implementation Memo, "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For the Provision of Material Support in the Form of Medical Care"

Return to the top

Certain Applicants with Existing Immigration Benefits (Limited General Exemption)

On August 10, 2012, the secretary of homeland security, in consultation with the secretary of state and the attorney general, authorized an exemption for certain applicants with existing immigration benefits who are currently inadmissible under INA section 212(a)(3)(B)(i). Applicants eligible for this exemption must have only select voluntary, nonviolent, associations or activities with certain undesignated terrorist organizations. This exemption may be applied only to applicants who currently possess lawful status in the United States (i.e., asylee or refugee status, temporary protected status, or adjustment of status under the Nicaraguan Adjustment and Central American Relief Act or Haitian Refugee Immigration Fairness Act, or similar immigration benefit other than a nonimmigrant visa), and to beneficiaries of a Form I-730 Refugee/Asylee Relative Petition, filed at any time by such an asylee or refugee.

For more information on this exemption, please see:

- August 10, 2012 Exercise of Authority
- September 26, 2012, USCIS Implementation Memo, "Implementation of New "Limited General" Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Qualified Applicants with Specified Associations and Activities with Qualified Undesignated, or 'Tier III,' Terrorist Organizations"

Return to the top

Iraqi Uprisings

On August 17, 2012, the secretary of homeland security, in consultation with the secretary of state and the attorney general, exercised her discretionary authority not to apply most terrorism-related inadmissibility grounds to certain applicants who participated in the Iraqi uprisings against the government of Saddam Hussein in Iraq from March 1 through April 5, 1991.

For more information on this exemption, please see:

33

- August 17, 2012 Exercise of Authority (PDF, 191 KB)
- November 12, 2012, USCIS Implementation Memo (PDF, 278 KB), "Implementation of New Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Participation in the Iraqi Uprisings

Return to the top

Certain Limited Material Support

On February 5, 2014, the secretary of homeland security and the secretary of state (the "Secretaries"), following with the attorney general, exercised their discretionary authority not to apply the material support inadmissibility ground to certain applicants who provided certain limited material support to an undesignated terrorist organization, or to a member of such an organization. Limited material support may include:

- Certain routine commercial transactions;
- Certain routine social transactions;
- Certain humanitarian assistance; and
- Material Support provided under substantial pressure that does not rise to the level of duress ("sub-duress pressure").

For more information on this exemption, please see:

- February 5, 2014, Exercise of Authority
- May 8, 2015, Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support

Return to the top

Insignificant Material Support

On February 5, 2014, the secretary of homeland security and the secretary of state (the "secretaries"), following consultation with the attorney general, exercised their discretionary authority not to apply the material support inadmissibility ground to applicants who provided insignificant material support to an undesignated terrorist organization, or to a member of such an organization.

For more information on this exemption, please see:

- February 5, 2015, Exercise of Authority
- May 8, 2015, Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support

Return to the top

Last Reviewed/Updated: 12/29/2016

34

U.S. Citizenship and Immigration Services

Terrorism-Related Inadmissibility Grounds (TRIG) - Group-Based Exemptions

Group-Based Exemptions To Date

Association or Activities with the All Burma Student's Democratic Front (ABSDF)
Provision of Material Support to the All India Sikh Student's Federation- Bittu Faction (AISSF-Bittu)
Certain Association or Activities with the Iraqi National Congress (INC), Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK)
10 Named Organizations in the Consolidated Appropriations Act of 2008 (CAA)
Certain Association or Activities with the Kosovo Liberation Army (KLA)
Farabundo Marti para la Liberacion National (FMLN) and Nationalist Republican Alliance (ARENA)
Ethiopian People's Revolutionary Party (EPRP)
Oromo Liberation Front (OLF)
Tigray People's Liberation Front (TPLF)
Democratic Movement for the Liberation of Eritrean Kunama (DMLEK)
Eritrean Liberation Front (ELF)
Certain Burmese Groups

Last Reviewed/Updated: 12/29/2016

35

U.S. Citizenship and Immigration Services

Terrorism-Related Inadmissibility Grounds (TRIG) - Group-Based Exemptions

Group-Based Exemptions To Date

Association or Activities with the All Burma Student's Democratic Front (ABSDF)

Association or Activities with the All Burma Student's Democratic Front (ABSDF)

Effective December 16, 2010, the secretary of homeland security, in consultation with the secretary of state and the attorney general, exercised her discretionary authority not to apply terrorism-related inadmissibility grounds to certain applicants who have voluntary associations or activities with the All Burma Student's Democratic Front (ABSDF) as described in INA section 212(a)(3)(B).

For more information on this exemption, please see:

- December 16, 2010 Exercise of Authority (PDF, 103 KB)
- December 29, 2010 USCIS Implementation Memo (PDF, 66 KB), "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For Activities and Associations Relating to the All Burma Student's Democratic Front (ABSDF)"

Provision of Material Support to the All India Sikh Student's Federation- Bittu Faction (AISSF-Bittu)

Provision of Material Support to the All India Sikh Student's Federation- Bittu Faction (AISSF-Bittu)

Effective October 16, 2010, the secretary of homeland security, in consultation with the secretary of state and the attorney general, exercised her discretionary authority not to apply an inadmissibility ground to certain applicants who have voluntary provided material support to the India Sikh Student's Federation-Bittu Faction (AISSF-Bittu) as described in INA section 212(a)(3)(B)(iv)(VI).

For more information on this exemption, please see:

- October 16, 2010 Exercise of Authority (PDF, 90 KB)
- December 29, 2010 USCIS Implementation Memo (PDF, 61 KB), "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For Material Support to the All India Sikh Student's Federation-Bittu Faction (AISSF-Bittu)"

Certain Association or Activities with the Iraqi National Congress (INC), Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK)

Certain Association or Activities with the Iraqi National Congress (INC), Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK)

On December 19, 2014, the president signed into law the National Defense Authorization Act for Fiscal Year 2015 (NDAA FY 2015), Public Law (P.L.) 113-291, 128 Stat. 3292 (2014). Section 1264(a)(1) of the NDAA FY 2015 provides that the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK) are excluded from the definition of Tier III organizations under the Immigration and Nationality Act (INA) section 212(a)(3)(B)(vi)(III).

36

Previously, on September 21, 2009, the secretary of homeland security and the secretary of state, in consultation with the attorney general, exercised their authority not to apply the terrorism-related grounds of inadmissibility (TRIG) contained in INA section 212(d)(3)(B) for certain activities and associations involving the Iraqi National Congress (INC), the KDP, and PUK.

For more information on this exemption, please see:

- September 21, 2009 Exercises of Authority (PDF, 1.44 MB)
- January 23, 2010 USCIS Implementation Memo, (PDF, 700 KB) "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For Activities and Associations Relating to the INC, KDP and PUK"
- March 13, 2015, USCIS Implementation Memo (PDF, 6.51 MB), "Implementation of Section 1264(a)(1), Subtitle E, Title XII, of the National Defense Authorization Act for Fiscal Year 2015, and Updated Processing Requirements for Discretionary Exemptions to Terrorism-Related Inadmissibility Grounds for Activities and Associations Relating to the Kurdistan Democratic Party and the Patriotic Union of Kurdistan"

10 Named Organizations in the Consolidated Appropriations Act of 2008 (CAA)

10 Named Organizations in the Consolidated Appropriations Act of 2008 (CAA)

In December 2007, Congress named 10 organizations in the Consolidated Appropriations Act of 2008 (CAA) that are not to be considered Tier III organizations based on activity before December 27, 2007, when the CAA was signed into law. As a result, individuals are not inadmissible under INA Section 212(a)(3)(B) for certain activities or associations with one of the groups named below, if those activities and associations took place before December 27, 2007.

However, this "automatic" relief provision did not cover an applicant's activities or associations with the 10 named groups if they took place after December 27, 2007, or if they related to one of the inadmissibility grounds under INA Section 212(a)(3)(B) that does not specifically relate to a organization, but rather describes individual activity. In order to address this, in June 2008 the secretaries of homeland security and State, in consultation with the attorney general exercised their discretionary authority to make exemptions available in these two categories.

These groups covered by the CAA and the 2008 exercises of authority include:

- Karen National Union/Karen National Army (KNU/KNA) - Burma
- Chin National Front/Chin National Army (CNF/CNA) - Burma
- Chin National League for Democracy (CNLD) - Burma
- Kayan New Land Party (KNLP) - Burma
- Arakan Liberation Party (ALP) - Burma
- Tibetan Mustangs - Tibet
- Cuban Alzados - Cuba
- Karenni National Progressive Party (KNPP) - Burma
- "Appropriate groups affiliated with the Hmong" – Vietnam
- "Appropriate groups affiliated with Montagnards" – Vietnam
- African National Congress (ANC) – South Africa (Added July 2008 by P.L. 110-257)

For more information on these exemptions, please see:

- June 18, 2008, Exercise of Authority (PDF, 773 KB)
- July 28, 2008, USCIS Implementation Memo (PDF, 629 KB) "Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds"

Certain Association or Activities with the Kosovo Liberation Army (KLA)

Certain Association or Activities with the Kosovo Liberation Army (KLA)

37

Effective June 4, 2012, the secretary of homeland security, in consultation with the secretary of state and the attorney general, authorized an exemption for certain applicants who have voluntary, nonviolent associations or activities with Kosovo Liberation Army (KLA) as described in INA section 212(a)(3)(B).

For more information on this exemption, please see:

- June 4, 2012, KLA Exercise of Authority (PDF, 98 KB)
- USCIS Implementation Memo (PDF, 303 KB), "Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Kosovo Liberation Army (KLA)"

Farabundo Marti para la Liberacion National (FMLN) and Nationalist Republican Alliance (ARENA)

Farabundo Marti para la Liberacion National (FMLN) and Nationalist Republican Alliance (ARENA)

On April 3, 2013, following consultation with the secretary of state and the attorney general, the acting secretary of homeland security exercised her discretionary authority not to apply certain terrorism-related inadmissibility grounds to certain applicants for voluntary activities or associations relating to the Farabundo Marti National Liberation Front (FMLN) or to the National Republican Alliance (Alianza Republicana Nacionalista, or ARENA).

For more information on this exemption, please see:

- April 3, 2013 Exercise of Authority (FMLN) (PDF, 225 KB)
- April 3, 2013 Exercise of Authority (ARENA) (PDF, 244 KB)
- May 22, 2013, USCIS Implementation Memo (PDF, 559 KB), "Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) For Activities and Associations Relating to the Farabundo Marti National Liberation Front (FMLN) or to the Nationalist Republican Alliance (Alianza Republicana Nacionalista, or ARENA)"

Ethiopian People's Revolutionary Party (EPRP)

Ethiopian People's Revolutionary Party (EPRP)

On October 17, 2013, following consultation with the secretary of state and the attorney general, the acting secretary of homeland security (the "Acting Secretary") exercised his discretionary authority not to apply certain terrorism-related inadmissibility grounds to certain applicants for voluntary activities or associations relating to the Ethiopian People's Revolutionary Party (EPRP). Specifically, the exercise of authority permits exemption of the following activities:

- Solicitation of funds or other things of value for;
- Solicitation of any individuals for membership in;
- Provision of material support to; or
- Receipt of military-type training from, or on behalf of, the EPRP.

For more information on this exemption, please see:

- October 17, 2013 Exercise of Authority (PDF, 122 KB)
- June 15, 2014, USCIS Implementation Memo (PDF, 215 KB), "Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) For Activities and Associations Relating to the Ethiopian People's Revolutionary Party (EPRP)"

Oromo Liberation Front (OLF)

Oromo Liberation Front (OLF)

On October 2, 2013, following consultation with the secretary of state and the attorney general, the acting secretary of homeland security (the "Acting Secretary") exercised his discretionary authority not to apply certain terrorism-related inadmissibility grounds to certain applicants for voluntary activities or associations relating to

38

the Oromo Liberation Front (OLF). Specifically, the exercise of authority permits exemption of the following activities:

- Solicitation of funds or other things of value for;
- Solicitation of any individuals for membership in;
- Provision of material support to; or
- Receipt of military-type training from, or on behalf of, the OLF.

For more information on this exemption, please see:

- October 2, 2013 Exercise of Authority (PDF, 150 KB)
- December 31, 2013, USCIS Implementation Memo (PDF, 90 KB), "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For Activities and Associations Relating to the Oromo Liberation Front (OLF)"

Tigray People's Liberation Front (TPLF)

Democratic Movement for the Liberation of Eritrean Kunama (DMLEK)

Eritrean Liberation Front (ELF)

Eritrean Liberation Front (ELF)

On October 17, 2013, following consultation with the secretary of state and the attorney general, the acting secretary of homeland security (the "acting secretary") exercised his discretionary authority not to apply certain terrorism-related inadmissibility grounds to certain applicants for voluntary activities or associations relating to the Eritrean Liberation Front (ELF). Specifically, the exercise of authority permits exemption of the following activities:

- Solicitation of funds or other things of value for;
- Solicitation of any individuals for membership in;
- Provision of material support to; or
- Receipt of military-type training from, or on behalf of, the ELF.

Additionally, an applicant who had activities or associations with the ELF before January 1, 1980, must meet additional qualifications. In these cases, the applicant must already have an existing or pending immigration benefit that meets one of the following criteria:

1. On or before October 17, 2013, the applicant was admitted as a refugee or granted asylum, or had an asylum or refugee application pending; or
2. The applicant is the beneficiary of a Form I-730 Refugee/Asylee Relative Petition filed at any time by a petitioner who was an asylee or refugee on or before October 17, 2013.

For more information on this exemption, please see:

- October 17, 2013 Exercise of Authority (PDF, 132 KB)
- June 15, 2014, USCIS Implementation Memo (PDF, 1.67 MB), "Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) For Activities and Associations Relating to the Eritrean Liberation Front (ELF)"

Certain Burmese Groups

Certain Burmese Groups

Effective March 11, 2016, the secretary of homeland security, in consultation with the secretary of state and the attorney general, authorized an exemption for certain applicants who have voluntary associations or activities with Certain Burmese Groups as described in INA section 212(a)(3)(B).

39

For more information on this exemption, please see:

- March 11, 2016 Exercise of Authority (PDF, 1.36 MB)
- June 2, 2016 USCIS Implementation Memo (PDF, 2.57 MB), "Implementation of the Discretionary Exemption Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for Certain Burmese Groups"

Last Reviewed/Updated: 12/29/2016

40

USCIS TRIG NGO Meeting
April 8, 2014

Statistical Update: *Below are the USCIS statistics on TRIG cases. Statistics are current as of 3/31/2014. Numbers in parentheticals represent statistics from prior meeting.*

Total Exemptions Granted	**17,321 (16,575)**
Refugees	**12,518 (12,250)**
Group Exemptions	7,056 (7,019)
Burmese cases	6,643 (6,642)
Cuba	281 (281)
Iraq	112 (96)
Iraqi Uprising	4 (3)
Medical Care	33 (26)
Tier III Duress Exemptions	4,870 (4,716)
Tier I/II Duress Exemptions	555 (486)
Adjustment of Status/I-730 SCOPS	**4,152 (3,681)**
Group Exemptions	1,173 (875)
Duress Exemptions	2,400 (2,271)
Individual Exemptions	18 (18)
Medical Care	18 (14)
LGE	427 (395)
Iraqi Uprising	116 (108)
Adjustment of Status-Field Offices	**46 (45)**
Asylum	**513 (508)**
Tier III Duress Exemptions	206 (203)
Tier I/II Duress Exemptions	266 (271)*
Group Exemptions	21 (18)
Medical Care	20 (16)
NACARA	**92 (91)**

Total Exemptions Denied	**146 (143)**
Refugees	**86 (86)**
Asylum Division	**25 (25)**
Asylum (I-589)	25 (25)
NACARA (I-881)	0 (0)
SCOPS	**27 (27)**
Field Offices	**8 (5)**

Total Cases on Hold	**2,584 (3,017)**
Refugee	**327 (327)**
Service Center Operations	**2,127 (2,486)**
I-485	1,946 (2,220)
I-730	173 (186)
I-821	7 (20)
Others	1 (60)
Asylum Division	**73 (116)**
Asylum (I-589)	71 (114)
NACARA (I-881)	2 (2)
Field Offices	**57 (88)**

*This discrepancy is pending investigation.