No. _____

In the Supreme Court of the United States

TAMER S. WASSILY,
Petitioner,
v.
PAMELA BONDI, UNITED STATES ATTORNEY GENERAL,
Respondent.

BYRON E. VELASQUEZ ARREAGA,
Petitioner,
v.
PAMELA BONDI, UNITED STATES ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The asylum laws offer protection against removal for certain noncitizens in this country who suffered past persecution or reasonably fear future persecution in their country of nationality. For those "granted asylum," the immigration laws also provide a pathway to obtain lawful permanent resident (LPR) status. Under 8 U.S.C. § 1159(b), the government "may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum," if certain statutory criteria are satisfied. The question presented is:

Whether noncitizens who were "granted asylum," but whose asylum was later terminated, are eligible for adjustment to LPR status under Section 1159(b) (as the Fifth Circuit held), or are categorically ineligible (as the Second and Fourth Circuits held)?

PARTIES TO THE PROCEEDING

Petitioners in this Court and in the court of appeals are Tamer S. Wassily and Byron E. Velasquez Arreaga.

Respondent in this Court and in the court of appeals is Pamela Bondi, Attorney General.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Wassily v. Bondi, No. 22-6247, United States Court of Appeals for the Second Circuit, judgment entered August 7, 2025 (150 F.4th 100), rehearing denied October 14, 2025.

Velasquez Arreaga v. Bondi, No. 23-6289, United States Court of Appeals for the Second Circuit, judgment entered August 7, 2025 (150 F.4th 100), rehearing denied October 14, 2025.

People v. Velasquez-Arreaga, No. 2019-09518, 306/18, judgment entered October 20, 2021 (198 A.D.3d 933).

Wassily v. Holder, No. 10-2804, United States Court of Appeals for the Second Circuit, judgment entered May 1, 2013 (523 F. App'x 783), amended May 3, 2013.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tamer S. Wassily and Byron E. Velasquez Arreaga respectfully petition this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.[1]

OPINIONS BELOW

The decision of the court of appeals for both Wassily and Velasquez Arreaga (App. 1a-30a) is reported at 150 F.4th 100. The orders of the court of appeals denying rehearing en banc (App. 31a-32a) are unreported. The decisions of the Board of Immigration Appeals for Wassily (App. 33a-36a, 59a-61a, 62a-68a) and Velasquez Arreaga (App. 109a-115a, 121a-27a) are unreported. The decisions of the immigration judges for Wassily (App. 37a-58a, 69a-108a) and Velasquez Arreaga (App. 128a-34a, 135a-40a) are also unreported. A prior decision of the court of appeals for Wassily is not published but is reported at 523 F. App'x 783.

JURISDICTION

The court of appeals entered judgment on August 7, 2025. App. 1a-30a. On October 14, 2025, the court of appeals denied petitioners' timely petitions for rehearing en banc. *Id.* at 31a-32a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Petitioners file this petition jointly under Supreme Court Rule 12.4 ("When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices.").

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the petition appendix. App. 141a-58a.

INTRODUCTION

Section 1159(b) of Title 8 of the United States Code provides that the Attorney General "may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum."[2] The question presented is an important one for noncitizens who were granted asylum: whether the Attorney General has discretion to adjust their status to lawful permanent resident (LPR) if their asylum has been terminated. That question has divided the courts of appeals and the Board of Immigration Appeals (BIA).

In a split decision, the Second Circuit held that the Attorney General has no such discretion because the termination of asylum is a categorical bar to LPR adjustment under Section 1159(b). In so holding, the Second Circuit sided with a similarly split decision from the Fourth Circuit, as well as a split BIA decision, and diverged from a unanimous decision out of the Fifth Circuit. Counting heads, the judges who have considered this question are now evenly split: 6-6. Only this Court can definitively resolve the entrenched conflict.

The Second Circuit also picked the wrong side of the split. Under the plain text of the statute, "[a]ny alien granted asylum"—regardless whether their

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[2] Although the Secretary of the Department of Homeland Security also has authority to adjust, this petition uses "Attorney General" as shorthand.

asylum has since been terminated—is eligible for adjustment to LPR status, assuming the other express statutory criteria are satisfied. The phrase "granted asylum" is used elsewhere in the same subsection to refer to a completed, historical event—not a continuing, present status. By contrast, neighboring provisions within Section 1159 *do* require continuing status. The imposition of an extratextual, continuing status requirement for asylum cannot be squared with the statute or the discretion vested in the Attorney General. And especially after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), any ambiguity the conflicting interpretations might suggest should be resolved in favor of petitioners—given the longstanding canon that ambiguities in deportation statutes must be construed in favor of the noncitizen.

This Court's review is needed to resolve the conflict, to give effect to the statutory text, and to return discretion to the Attorney General. It is also needed to prevent perverse consequences. The Second Circuit's decision will harm noncitizens who have lost asylum through no fault of their own and those who still fear persecution. It will harm innocent spouses and children whose status is "derivative." And it will harm all those who, but for termination, would have been worthy of waivers for humanitarian, family-unity, or public-interest reasons. This petition is an ideal vehicle and there is no reason to wait. The Court should grant review.

STATEMENT OF THE CASE

1. The Immigration and Nationality Act provides protections for noncitizens who are "unable or unwilling to return to" their home "country because of

persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Individuals who satisfy that definition and are outside the United States may be admitted as refugees under Section 1157. *Id.* § 1157(c). Individuals who satisfy that definition and are already physically present in the United States may be granted asylum under Section 1158. *Id.* § 1158(a). Spouses and children of asylees may receive "derivative" protection. *See id.* § 1158(b)(3)(A).

Neither refugee status under Section 1157 nor asylum status under Section 1158 "convey[s] a right to remain permanently in the United States." *Id.* § 1158(c)(2); *see id.* § 1157(c)(4). For that, a noncitizen must adjust to LPR status under Section 1159. Adjustment to LPR status is available for both refugees and asylees, but the preconditions differ.

Under Section 1159(a)(1), refugees can adjust to LPR status if (A) their admission "has not been terminated"; (B) they have been "physically present in the United States for at least one year"; and (C) they have not already acquired LPR status. *Id.* § 1159(a)(1). If refugees meet each of these conditions and are admissible (subject to certain waivers), they "shall … be regarded" as LPRs. *Id.* § 1159(a)(2).

By contrast, under Section 1159(b), the Attorney General "may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum," if certain other conditions are met. *Id.* § 1159(b). Specifically, the noncitizen must (1) have applied for adjustment to LPR status; (2) have "been physically present in the United States for at least one year after being granted asylum";

(3) "continue[] to be a refugee" or the child or spouse of a refugee; (4) have not firmly resettled in a foreign country; and (5) otherwise be admissible "at the time of examination for adjustment"—unless subsection (c) provides an exception. *Id.* Subsection (c), in turn, allows the Attorney General to grant waivers of certain grounds of inadmissibility "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.* § 1159(c).

The grounds for terminating the status of a person admitted as a refugee under Section 1157 and a person granted asylum under Section 1158 are likewise distinct. Refugee status under Section 1157 may be terminated only "if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) … at the time of the alien's admission." *Id.* § 1157(c)(4). Asylum status under Section 1158 may be terminated for many different reasons—most of which turn on a change in circumstances arising after the initial grant of asylum. *See id.* § 1158(c)(2). These include a change in the conditions in a noncitizen's home country, an intervening bilateral agreement between the United States and another country, the noncitizen acquiring a new nationality, or the noncitizen being convicted of a "particularly serious crime," defined to include any "aggravated felony." *Id.* § 1158(b)(2)(A), (b)(2)(B)(i), (c)(2)(A)-(D). When a principal asylee's status is terminated, any derivative spouse or child loses their asylum as well. *See* 8 C.F.R. § 1208.24(d).

2. Both petitioners had their asylum terminated and were ultimately denied LPR status.

a. Petitioner Tamer Wassily is a native and citizen of Egypt. App. 3a. In 2000, he was granted asylum due to persecution in Egypt for his Coptic

Christian beliefs. *Id.* In 2004, he was convicted of third-degree stalking and child endangerment, and the government moved to reopen removal proceedings. *Id.*

The immigration judge (IJ) found that Wassily's conviction was a particularly serious crime and terminated his asylum. *Id.* Wassily appealed to the BIA, which affirmed. *Id.* at 3a-4a. Wassily then filed a petition for review, which the Second Circuit granted, finding that remand was required for the BIA to determine whether "reliable evidence supports a particularly serious crime determination." *Wassily v. Holder*, 523 F. App'x 783, 785 (2d Cir. 2013).

On remand, Wassily filed an application to adjust to LPR status. *See* App. 39a-40a. The IJ again determined that Wassily's conviction was a particularly serious crime and terminated his asylum. *Id.* at 4a-5a; *see id.* at 46a-50a. In the same decision, the IJ considered and granted Wassily's application for adjustment to LPR status. *Id.* at 51a-58a.

The IJ first found that Wassily satisfied the statutory conditions in Section 1159(b)(1)-(4). *Id.* at 51a-54a. In considering Section 1159(b)(3)'s "continues to be a refugee" requirement, the IJ noted Section 1159 "does not contain an explicit requirement" that an applicant also have "continued asylee status." *Id.* at 4a (quoting *id.* at 52a). And the IJ found he continued to have a "well-founded fear of persecution" based on his Coptic Christian beliefs. *Id.* at 52a-54a. Next, because Wassily did not satisfy Section 1159(b)(5)'s requirement that he be otherwise admissible "at the time of examination for adjustment," 8 U.S.C. § 1159(b)(5), the IJ considered whether Wassily was entitled to a discretionary waiver of inadmissibility under Section 1159(c). *Id.*

at 54a-57a. The IJ concluded that Wassily was, finding that "humanitarian considerations," such as the threat of religious persecution and family unification, "weigh[ed] in favor of a discretionary grant." *Id.* at 57a. The IJ thus granted Wassily's application to adjust to LPR status. *Id.* at 58a.

The BIA reversed. *Id.* at 5a. The BIA did not find that Wassily did not merit adjustment as a matter of discretion. Instead, relying on an intervening (and split) BIA decision, the BIA held that Wassily was categorically ineligible to adjust to LPR status because his asylum had been terminated before his adjustment application was adjudicated. *Id.*; *see id.* at 33a-36a (citing *Matter of T-C-A-*, 28 I. & N. Dec. 472 (B.I.A. 2022)).

b. Petitioner Byron Velasquez Arreaga is a native and citizen of Guatemala who was granted asylum in 1996. *Id.* at 6a. In 2015 and 2018, Velasquez Arreaga was convicted for driving while intoxicated, and the government commenced removal proceedings. *Id.*

The IJ found that Velasquez Arreaga's convictions were particularly serious crimes and terminated his asylum. *Id.* at 6a-7a. Velasquez Arreaga subsequently applied to adjust to LPR status, but the IJ found that Velasquez Arreaga was ineligible to adjust because his asylum had been terminated—reaching the opposite result from the IJ in Wassily's case. *Id.* at 7a.

Velasquez Arreaga appealed to the BIA, which affirmed. *Id.*; *see id.* at 121a-27a. Velasquez Arreaga then filed a petition for review in the Second Circuit, and the parties agreed to a remand based on the non-finality of his 2018 conviction. *Id.* at 109a-10a; *see id.* at 116a-20a. Once that conviction became final, the

BIA issued a decision consistent with its prior order, holding that once Velasquez Arreaga "was no longer an asylee, he was ineligible to adjust" to LPR status. *Id.* at 113a; *see id.* at 7a.

3. Petitioners filed separate petitions for review in the Second Circuit, which had jurisdiction under 8 U.S.C. § 1252(a)(5). But the court of appeals heard argument in tandem and issued an identical opinion in both cases. In a split decision, the court denied both petitions and held that once asylum has been terminated, adjustment under Section 1159(b) is categorically unavailable. App. 1a-18a (majority); *id.* at 19a-30a (Robinson, J., dissenting). In so holding, the court acknowledged it was "declin[ing] to follow the Fifth Circuit's" contrary decision. *Id.* at 13a n.13.

a. Focusing on Section 1159(b)'s introductory language, the majority held that "'the status of any alien granted asylum'" referred to a present condition, such that "only noncitizens with current asylum status [can] adjust to [LPR] status." *Id.* at 2a-3a . The majority concluded that the "'ordinary meaning of "status" signals a present condition'—in particular, a legal condition." *Id.* at 12a (quoting *Cela v. Garland*, 75 F.4th 355, 364 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 2657 (2024)). If Congress had intended for "anyone previously granted asylum to become a lawful permanent resident," the majority reasoned, there would have been "no need for Congress to use the word 'status' at all." *Id.*

The majority also looked to "the neighboring provision of 8 U.S.C. § 1158(c)." App. 13a. The majority reasoned that since "granted asylum" and "asylum granted" in that provision refer to "then-existing asylum status," the phrase "'any alien granted asylum'" in the neighboring Section 1159(b)

must also refer to then-existing asylum status. *Id.* at 13a-14a. The majority acknowledged that the use of "granted asylum" in Section 1159(b)(2), the actual provision at issue, points in the opposite direction. *Id.* at 15a. But it concluded that inclusion of the word "being" before "granted" in that provision made all the difference. *Id.*

The majority likewise acknowledged that "other parts of 8 U.S.C. § 1159" expressly require a noncitizen seeking adjustment to "maintain some other current condition." *Id.* at 14a. But it deemed these provisions irrelevant because they do not "speak[] of a 'granted' status." *Id.* at 14a-15a & n.14. And while the majority admitted its reading intruded on the Attorney General's discretion under Section 1159(c) to waive grounds of inadmissibility, it found that intrusion acceptable because the grounds for inadmissibility and termination are not perfectly "coextensive." *Id.* at 16a.

Finally, the majority found its reading "buttressed" by a post-enactment "statutory note" to the Immigration Act of 1990. *Id.* at 16a-18a. That note stated that Section 1159(b) shall apply to a noncitizen "granted asylum before the date of the enactment of this Act (regardless of whether or not such asylum has been terminated …)" and "who is no longer a refugee because of a change in circumstances in a foreign state." *Id.* at 17a (emphasis omitted) (quoting Pub. L. No. 101-649, § 104(d), 104 Stat. 4978, 4985 (1990)). The majority believed this note indicated Section 1159(b) did not normally apply "'regardless of whether or not' their asylum had been terminated.'" *Id.* at 17a-18a (quoting Immigration Act).

b. Judge Robinson dissented. In her view, the "best understanding of § 1159(b) is that it encompasses 'any' noncitizen 'granted asylum,' regardless of whether the asylum was subsequently terminated." *Id.* at 20a.

"[A]ny alien granted asylum," the dissent explained, is a past-tense phrase covering all aliens who had been previously granted asylum, regardless whether their asylum was terminated. *Id.* The dissent emphasized the "expansive meaning" of "any," *id.* (citation omitted), and the fact that "if Congress had intended 'any alien granted asylum' to mean 'any asylee,' or any noncitizen 'who continues to be subject to asylum protections,' it could have said so," *id.* at 20a-21a.

Congress did just that in Section 1159, the dissent explained. The statute "tells us in no uncertain terms that when Congress intended to require continuity of a predicate status as a precondition to adjustment to LPR status, it said so in plain terms." *Id.* at 21a. And Congress "did so *three times* within § 1159." *Id.* at 24a. For "a Congress downright preoccupied with the timing question in front of us now," the dissent continued, its "failure to specify that asylee status must be current under § 1159(b) can only be understood as a purposeful omission." *Id.* at 25a (quoting *Cela*, 75 F.4th at 367 (Harris, J., concurring in part and dissenting in part)).

The dissent noted this interpretation resulted in the similar treatment of those granted admission as refugees under Section 1157 and those granted asylum under Section 1158. *Id.* at 26a. And that interpretation "maintain[ed] the balance Congress struck" in Section 1159(c)'s waiver provision. *Id.* at 27a. The majority's reading, by contrast,

"categorically strip[ped] the Attorney General" of discretion if asylum has been terminated. *Id.* at 30a; *see id.* at 27a-30a.

The dissent also highlighted the "incongruous" result of the majority's reading, which would make the authority to grant LPR status "depend entirely on the order" in which petitions for termination of asylum and for adjustment of status are considered. *Id.* at 29a. The dissent explained that, under the majority's reading, two noncitizens—both of whom remain refugees and satisfy all of the qualifications of Section 1159(b)—could be treated differently merely because an IJ resolved the petition for termination of asylum before the application for adjustment. *Id.*

4. The court of appeals denied rehearing en banc. *Id.* at 31a-32a.

REASONS FOR GRANTING THE WRIT

This case presents a recurring and important question: whether noncitizens who have been "granted asylum," but whose asylum was later terminated, remain eligible for adjustment to LPR status under Section 1159(b). The Second Circuit's split decision deepened an existing and acknowledged circuit split between the (split) Fourth Circuit and the Fifth Circuit. Even the BIA split on this question. Only this Court can definitively resolve the conflict.

The Second Circuit also got the answer to that question wrong. Text and context make clear that Congress knew how to impose a continuing-asylum requirement if it wanted to, but it declined to do so here. And the error is an important one. The Second Circuit's decision means near-certain removal not only for noncitizens whose grants of asylum have been terminated—but also for their innocent spouses and

children. This petition also presents an ideal vehicle: In Wassily's case, the IJ found that humanitarian considerations warranted a discretionary grant of LPR status. And the BIA denied adjustment to LPR status solely because his asylum had been terminated. The Court's review is warranted.

I. The Second Circuit's Decision Deepens An Acknowledged Circuit Split Between The Fourth And Fifth Circuits

The question presented has divided the courts of appeals. The Fifth Circuit has unanimously held that Section 1159(b) unambiguously *permits* noncitizens whose asylum has been terminated to adjust to LPR status. By contrast, the Second and Fourth Circuits have held in split decisions that Section 1159(b) unambiguously *precludes* such adjustment. The Court's review is needed to resolve the conflict.

In *Siwe v. Holder*, the Fifth Circuit unanimously held that Section 1159(b) permits adjustment to LPR status for noncitizens whose asylum has been terminated. 742 F.3d 603, 606-12 (5th Cir. 2014) (Jones, Wiener, & Graves, JJ.). The Fifth Circuit relied on the plain meaning of "'any alien granted asylum'" to hold that a noncitizen granted asylum in the past qualifies for adjustment of status, regardless whether his asylum has been subsequently terminated. *Id.* (quoting 8 U.S.C. § 1159(b)). As the Fifth Circuit explained, Congress's inclusion of express "continuing-status requirements" in Sections 1159(a) and (b) shows "Congress knows how to impose a continuing-status requirement when it wishes to do so." *Id.* at 608-09. But "[n]owhere" in Section 1159 "d[id] Congress require that an alien's asylum, once granted, still must be in effect at the time he applies

for adjustment of status." *Id.* at 608. Any alternative reading, the Fifth Circuit reasoned, would undermine "Congress's careful balancing of interests" in Section 1159(c)'s waiver provision. *Id.* at 609.

In *Cela v. Garland*, a divided panel of the Fourth Circuit held exactly the opposite—that Section 1159(b) unambiguously *precludes* the Attorney General from adjusting the status of noncitizens whose asylum has been terminated. 75 F.4th 355, 363-65 (4th Cir. 2023) (Agee & Quattlebaum, JJ.). There, both the majority and dissent acknowledged that its decision created a circuit split. *See id.* at 365 n.11 (acknowledging "the Fifth Circuit reached a different conclusion"); *id.* at 366 (Harris, J., concurring in part and dissenting in part).

The majority was "persuaded by the words 'status' and 'adjust,'" concluding that "'status' signals a present condition" and "'adjust' suggests a requirement of an existing status." *Id.* at 364-65. The dissent, in turn, concluded that "Congress did not intend to limit eligibility for adjustment of status under § 1159(b) to current asylees," and reasoned that "any alien granted asylum" is not synonymous with an "asylee." *Id.* at 366 (Harris, J., concurring in part and dissenting in part). Like the Fifth Circuit, the dissent emphasized that "when Congress intended to impose a continuing-status requirement in § 1159, it did so expressly and unambiguously." *Id.* at 367. And again like the Fifth Circuit, the dissent noted that a categorical rule precluding adjustment "has the effect of undermining the discretion that Congress clearly sought to vest in the agency head under § 1159(c)." *Id.* at 367-68.

The Second Circuit has now sided with the Fourth Circuit, App. 12a, and "decline[d] to follow the Fifth

Circuit's reading" in *Siwe*, *id.* at 14a n.13. Judge Robinson in dissent likewise noted the "circuit split on the question." *Id.* at 19a. In a footnote, the Second Circuit majority suggested the Fifth Circuit might have reached a different conclusion had it "consider[ed] the language of 8 U.S.C. § 1159(b) in light of 8 U.S.C. § 1158(c)." App. 14a n.13. But the Fifth Circuit would not (and could not) overturn circuit precedent on that basis without taking the issue en banc. *See Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.3d 587, 591 (5th Cir. 2019) (overruling must be "unequivocally directed by controlling Supreme Court precedent" (citation omitted)). What's more, only noncitizens can file petitions for review from BIA decisions. *See* 8 U.S.C. § 1252(b)(3) (Attorney General is always the respondent). Which means that so long as the BIA continues to follow *Siwe* in the Fifth Circuit—as it is required to do—the split will remain entrenched.

Nor is there any need for further percolation. In opposing further review in *Cela*, the government specifically noted petitioners' two pending cases and suggested they "may well result in additional reasoned decisions made with the benefit of the analysis of the Board and the other circuits." SG Br. 15-16, in *Cela v. Garland*, No. 23-686 (May 8, 2024), 2024 WL 2093969 ("*Cela* SG Br."). That has now happened: three courts of appeals have carefully grappled with interpreting the statutory provision at issue and the split has only deepened.[3] There is no reason to further delay the Court's review.

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[3] Other courts of appeals have noted or addressed the question presented—albeit only in passing. *See, e.g.*, *Ishmael v.*

II. The Second Circuit's Decision Is Wrong

Section 1159(b)'s prefatory clause allows the Attorney General to "adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum," if five criteria are met. 8 U.S.C. § 1159(b). The question presented is whether the Attorney General may adjust the status of noncitizens who were "granted asylum," but whose asylum has since been terminated. The text of Section 1159(b) and the surrounding context of Section 1159 make clear the answer to that question is yes. The Second Circuit's contrary reasoning does not withstand scrutiny. And any ambiguity should be resolved in petitioners' favor.

A. Section 1159(b) Does Not Impose A Continuing-Asylum Requirement

Section 1159(b)'s text and the immediate context make clear that any noncitizen granted asylum can adjust to LPR status even after termination.

1. Section 1159(b)'s prefatory clause is written using expansive and backward-looking terms. The Attorney General may adjust the status of "*any* alien

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Att'y Gen., 77 F.4th 175, 179-80 (3d Cir. 2023) (holding that petitioner met "the statutory requirements to apply for adjustment of status," even though the earlier "terminat[ion of] his grant of asylum" was proper); *Abrahamyan v. Garland*, No. 22-854, 2023 WL 8908755, at *2 (9th Cir. Dec. 27, 2023) (noting the "conflict between the Fourth and Fifth Circuits about the meaning of 'the status of any alien granted asylum' under § 1159(b)" but declining to "weigh in"); *Bare v. Barr*, 975 F.3d 952, 966-67 (9th Cir. 2020) (noting the issue and citing *Siwe*, but leaving the question undecided); *Sharashidze v. Gonzale*s, 480 F.3d 566, 568 (7th Cir. 2007) (stating, in dicta, that those with "terminated asylee status" are "no longer eligible" for adjustment of status under Section 1159(b)).

granted asylum." 8 U.S.C. § 1159(b) (emphases added). "'[A]ny'" has an "expansive meaning." App. 20a (Robinson, J., dissenting) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). And "granted," when used as a past-tense verb, refers to something that has happened in the past. *See, e.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant …."); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (emphasizing "backward-looking language" in construing past-tense statutory terms). Plainly read, Section 1159(b) "encompasses 'any' noncitizen 'granted asylum,' regardless of whether the asylum was subsequently terminated." App. 20a (Robinson, J., dissenting).

Perhaps even more notable, though, is what Section 1159(b)'s prefatory clause does *not* say. "Nowhere in this section does Congress require that an alien's asylum, once granted, still must be in effect at the time he applies for adjustment of status." *Siwe*, 742 F.3d at 608. "[I]f Congress had intended 'any alien granted asylum' to mean 'any asylee,' or any noncitizen 'who continues to be subject to asylum protections,' it could have said so." App. 20a (Robinson, J., dissenting); *see also Cela*, 75 F.4th at 366 (Harris, J., concurring in part and dissenting in part) ("[T]he term "'any alien granted asylum" is not synonymous with the term "asylee,"' which Congress would be expected to use had it intended to require *current* asylum status."). But Congress instead used the phrase "any alien granted asylum." And courts should not "read[] words … into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). Yet that is exactly what the Second

Circuit did—reading "granted asylum" to mean "presently be granted asylum." App. 12a.

2. "There is a case to be made that the phrase 'any alien granted asylum,' standing alone, answers [the question presented] in favor of eligibility." *Cela*, 75 F.4th at 366 (Harris, J., concurring in part and dissenting in part). But, of course, the prefatory clause does not stand alone. And what follows in the remainder of Section 1159(b) further confirms the phrase's ordinary meaning.

To start, Section 1159(b)(2) provides that an applicant for adjustment of status must have been "physically present in the United States for at least one year after being granted asylum." 8 U.S.C. § 1159(b)(2). In this paragraph, "granted asylum" can only refer to a completed, historical event, not a continuing, present status. And "identical words … in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005); *see Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007) (finding canon "doubly appropriate" where phrase was "simultaneously inserted two subsections later").

Section 1159(b) also imposes two *express* continuing-status rules unrelated to asylum status. Section 1159(b)(3) requires that an applicant "continue[] to be a refugee within the meaning of Section 1101(a)(42)(A)" when seeking adjustment. 8 U.S.C. § 1159(b)(3). And Section 1159(b)(5) requires that the applicant remain "admissible … at the time of examination for adjustment." *Id.* § 1159(b)(5). These explicit continuing-status requirements make the absence of anything similar in Section 1159(b)'s prefatory clause especially "conspicuous[]." *Siwe*, 742 F.3d at 608; *see Collins v.*

Yellen, 594 U.S. 220, 248 (2021) (courts assume that "Congress acts intentionally and purposely" when using language in one section of a statute and omitting it elsewhere (citation omitted)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (same). Congress clearly knew how to require that a noncitizen "continue[] to be" an asylee or remain an asylee "at the time of examination for adjustment." *See* App. 24a (Robinson, J., dissenting). It chose not to require either here.

3. The rest of Section 1159 resolves any lingering doubt.

a. The immediately preceding subsection, Section 1159(a), governs LPR adjustment for refugees and was enacted at the same time as Section 1159(b). *See* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105-06. Just like (b)(3) and (5), subsection (a) imposes its own explicit continuing-status requirement. It allows the Attorney General to adjust a refugee's status only if his admission as a refugee "has not been terminated." 8 U.S.C. § 1159(a)(1)(A). Congress could have imposed parallel requirements in subsections (a) and (b). That is, it could have allowed asylees to adjust status only if their asylum "has not been terminated." It did not.

In short, "*three times* within § 1159," Congress "specif[ied] when a noncitizen must maintain a predicate status in order to be potentially eligible for adjustment of status." App. 24a (Robinson, J., dissenting). Yet it did not do so here. For "a Congress downright preoccupied with the timing question," this "can only be understood as a purposeful omission." *Cela*, 75 F.4th at 367 (Harris, J., concurring in part and dissenting in part); *see* App. 24a-25a (Robinson, J., dissenting).

Congress had good reasons for treating refugees and asylees differently when it comes to termination. The Attorney General may terminate asylum for a host of reasons—several of which rest entirely outside an asylee's control. A "fundamental change in circumstances" in the noncitizen's country of origin, for example, may lead to termination of asylum. 8 U.S.C. § 1158(c)(2)(A); *see id.* § 1158(b)(1)(A). Or a treaty might allow removal to a third country where the noncitizen could receive asylum (or equivalent protections). *See id.* § 1158(c)(2)(C). Even for those whose termination was a result of criminal convictions, *see id.* § 1158(b)(2), (c)(2)(B), the convictions have nothing to do with a fear of persecution in their home country, if forced to return. And many of these former asylees and derivative spouses and children may have established strong ties to the United States over a long period of time.

Refugees, on the other hand, are subject to a different adjustment scheme. They must present themselves for LPR adjustment within one year of arriving in the United States. *Id.* § 1159(a)(1)-(2). And unlike asylees, there is only one ground for termination of refugee status: "The refugee status of any alien … may be terminated … if the Attorney General determines that the alien *was not in fact a refugee* within the meaning of section 1101(a)(42) … at the time of the alien's admission." *Id.* § 1157(c)(4) (emphasis added). So under the statute, when a refugee's status is terminated, he (i) will have been present in the United States for, at most, a single year, and (ii) would have never been properly considered a refugee in the first place—meaning he *never* faced a likelihood of persecution in his home country and was *never* properly admitted to this

country. Congress decided that such refugees should not be able to adjust to LPR status, while leaving the Attorney General with discretion to adjust to LPR status the status of former asylees who feared (and may still fear) persecution, and who spent years building a life in this country—as well as those granted asylum as derivative asylees.

And in one important respect, Section 1159(b) does treat those granted asylum under Section 1158 the same as those admitted as refugees under Section 1157: both must be "found to be refugees" to adjust to LPR status. App. 29a-30a (Robinson, J., dissenting). In this sense, the "two categories of noncitizens do stand in the same shoes." *Id.* at 29a.

b. The immediately subsequent subsection, Section 1159(c), further supports petitioners' interpretation. Section 1159(b)(5) requires that noncitizens be "admissible" when they apply for adjustment to LPR status—*i.e.*, not subject to any ground of inadmissibility in 8 U.S.C. § 1182(a). But Congress created an "except[ion]" in subsection (c), 8 U.S.C. § 1159(b)(5), which allows the Attorney General to "waive" that requirement "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.* § 1159(c). That is, Congress "expressly contemplate[d] that some noncitizen refugees with criminal convictions, including for potentially serious crimes, may nevertheless be eligible for LPR status." App. 28a (Robinson, J., dissenting).

Because the grounds for termination of asylum substantially overlap with the grounds for inadmissibility, *compare* 8 U.S.C. § 1182(a), *with id.* § 1158(c)(2), the decision below "deprives the Attorney General … of that discretion in cases in

which asylum has been terminated." App. 28a (Robinson, J., dissenting); *see also Siwe*, 742 F.3d at 609 (government's reading "effectively abrogate[s] Congress's careful balancing of interests" in Section 1159(c)); *Cela*, 75 F.4th at 367-68 (Harris, J., concurring in part and dissenting in part) (government's reading "undermin[es] the discretion that Congress clearly sought to vest in the agency head under § 1159(c)"). It is strange to think that, in any case involving termination, the Attorney General is "categorically strip[ped]" of discretion, App. 30a (Robinson, J., dissenting)—no matter the public interest, no matter the need to ensure family unity, and no matter the humanitarian concerns.

4. Other statutory and regulatory indicia point in the same direction. The Department of Justice regulations align with petitioners' reading, interpreting Section 1159(b)'s reference to "any alien granted asylum" to mean "any alien who has been granted asylum." 8 C.F.R. § 1209.2(a)(1); *see* App. 25a (Robinson, J., dissenting).

And so does the statutory history. More than half a century ago, Congress rejected a continuing lawful-status requirement for adjustment to LPR status. Under the 1952 INA, the Attorney General could grant adjustment only to someone who was "lawfully admitted" and who was "continuing to maintain that status." INA, Pub. L. No. 82-414, § 245(a), 66 Stat. 163, 217 (1952). The 1952 Act was criticized because, among other things, "this new adjustment of status may be granted only to an alien lawfully admitted … who is continuing to maintain that status," thereby excluding the "great number" of noncitizens "whose present status is irregular, for one reason or another." *Whom Shall We Welcome: Report of the President's*

Commission on Immigration and Nationalization 210-11 (1953), https://ia801306.us.archive.org/14/items/whomweshallwelco00unit/whomweshallwelco00unit_bw.pdf. In 1958, Congress responded by eliminating these "rigidly limited conditions," *id.*, and permitting adjustment for any noncitizen admitted as a "bona fide nonimmigrant," Act of Aug. 21, 1958, Pub. L. No. 85-700, 72 Stat. 699, 699. While the adjustment provisions continued to evolve to the language we have today, Congress never reimposed any continuing lawful-status requirement. Congress's decision to dispense with that requirement should be respected.

B. The Second Circuit's Reasoning To The Contrary Is Flawed

The Second Circuit's response to this textual and contextual evidence was limited. The majority relied instead on the word "status," two phrases in Section 1158(c), and a post-enactment statutory note for support. None holds up.

1. Start with the word "status." The majority noted that "'the ordinary meaning of "status" signals a present condition'—in particular, a legal condition." App. 12a (quoting *Cela*, 75 F.4th at 364). But that just begs the question of what "status" is being adjusted: "current asylum status" or something else—like "non-LPR status" or the status of having once been "granted asylum." *See Cela*, 75 F.4th at 366 (Harris, J., concurring in part and dissenting in part).

The majority then reasoned that, unless status refers to present asylum status, "there would be no need for Congress to use the word 'status' at all." App. 12a. But it would have been grammatically awkward, and likely incorrect, to omit the word "status" and

allow the Attorney General to adjust to "the status of an alien lawfully admitted for permanent residence … any alien granted asylum." After all, the thing being adjusted is the noncitizen's *status*—not the noncitizen himself.

Other textual cues suggest that "status" refers to something other than "current asylum status." Congress's use of the word "any" in "the status of *any* alien granted asylum" dissociates a noncitizen's "status" from whether he was "granted asylum." While it might make sense to say that a noncitizen has the "status" of "*an* alien granted asylum," it makes no sense to say he has the "status" of "*any* alien granted asylum." The actual statutory phrase, naturally read, describes "any" noncitizens who share a common historical fact: they were once *granted* asylum, whether or not they currently have "asylum status" or are "asylees."

2. The majority's reliance on two phrases in the "neighboring provision of 8 U.S.C. § 1158(c)" is similarly misplaced. App. 13a. Section 1158(c) provides benefits to "an alien granted asylum" and states that "[a]sylum granted … may be terminated." 8 U.S.C. § 1158(c)(1)-(2). But neither of those phrases is identical to Section 1159(b), which reaches "*any* alien granted asylum." And both the majority and the government admitted that "granted asylum" refers to a past event rather than a present condition in Section 1159(b)(2). App. 15a (Section 1159(b)(2) "clearly … refers to a completed event"); *see* CA2 *Wassily* Gov't Br. 39, ECF 38 (similar); CA2 *Velasquez Arreaga* Gov't Br. 29-30, ECF 32 (similar). So Section 1158(c) at most suggests "granted asylum" can be used both ways.

How "granted asylum" is used in Section 1159(b), then, depends on context. And the Second Circuit majority offered little justification for favoring the "neighboring" provision of Section 1158, App. 13a, over Section 1159(b)'s own statutory home. That Section 1159(b)(2) uses the auxiliary verb "being" does not render it inapposite, *contra id.* at 15a, because an auxiliary verb is not necessary to make the word "granted" refer to a past event. Consider, for example, a benefit for "any person exposed to" certain toxins; that would not require continuing or present exposure. *Cf.* 38 U.S.C. § 1112(c)(1) (addressing "radiation-exposed veteran[s]"). And on the flip side, the majority itself used an auxiliary verb when reading the statutory phrase its way, finding "granted asylum" to mean to "presently *be* granted asylum." App. 12a (emphasis added). So the presence or absence of an auxiliary verb cannot be dispositive.

3. Nor does the post-enactment statutory note "buttress[]" the majority's reading; if anything, it undermines it. *Contra id.* at 16a.

In 1990, Congress exempted certain noncitizens from a then-existing numerical cap on adjustment applications, permitting adjustment so long as the noncitizen was "granted asylum before the date of the enactment of this Act (regardless of whether or not such asylum has been terminated …)." Immigration Act of 1990, Pub. L. No. 101-649, § 104(c)-(d), 104 Stat. 4978, 4985-86. The majority believed this note "suggests" that Section 1159(b) does not allow those whose asylum has been terminated to adjust, because otherwise the note would have been "unnecessar[y]." App. 17a-18a. But it is "just as plausible" that Congress merely "sought to clarify that § 1159(b) applies to all noncitizens granted asylum *before the*

date of the 1990 Act." *Id.* at 27a n.3 (Robinson, J., dissenting). In that case, the parenthetical is a belt-and-suspenders caution, confirming Congress's belief that noncitizens "granted asylum" who are eligible to adjust status under Section 1159(b) include those whose asylum was later terminated. *Cf. Boechler, P.C. v. Commissioner*, 596 U.S. 199, 206 (2022) (A "parenthetical" is "typically used to convey an 'aside' or 'afterthought.'"). At bottom, "this data point doesn't move the needle." App. 27a n.3 (Robinson, J., dissenting).

C. Any Ambiguity Must Be Resolved In Favor Of The Noncitizen Petitioners

For the reasons set forth above, the best reading of the statute is that any noncitizen "granted asylum" can adjust to LPR status under Section 1159(b) regardless of termination. A dozen jurists have nonetheless adopted diametrically opposed readings of the same language. *Supra* at 12-14. Some have expressly recognized the interpretive difficulty. App. 19a (Robinson, J., dissenting) ("This is a difficult case, as reflected by a circuit split on the question."); *Cela*, 75 F.4th at 366 (Harris, J., concurring in part and dissenting in part) ("To be sure, § 1159(b) is not a model of clarity, and I find this to be a difficult question of statutory construction ...."). And the BIA majority itself found ambiguity. *Matter of T-C-A-*, 28 I. & N. Dec. at 475-76. At the very least, then, the statutory provision is ambiguous—and any ambiguity must be construed in favor of the noncitizen petitioners.

It is well-established that any lingering ambiguity in a deportation statute must be construed "in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 & n.45

(2001) (citation omitted). Deportation and removal are "drastic measure[s]," *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (citation omitted), with "considerable" stakes "for the individual"—so courts "will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used," *Costello v. INS*, 376 U.S. 120, 128 (1964) (citation omitted).

In the past, there was, perhaps, some confusion on how to reconcile this rule of lenity with *Chevron*. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 397 (2017) (declining to decide "whether the rule of lenity or *Chevron* receives priority" in interpreting ambiguous immigration statutes because the statute at issue was unambiguous). *Loper Bright* resolves any such confusion, leaving only the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also Castillo v. Bondi*, 140 F.4th 777, 781 (6th Cir. 2025) (explaining that when "uncertainty clouds a deportation statute, 'the longstanding principle of construing' it 'in favor of the alien' kicks into gear" (quoting *Cardoza-Fonseca*, 480 U.S. at 449)).

III. The Question Presented Is Important And This Petition Is An Ideal Vehicle

The question presented is important. Without this Court's review, the Second Circuit's decision will lead to significant and anomalous consequences. And this petition presents an ideal vehicle to decide the issue.

A. The Question Presented Is Important

1. The question presented affects all noncitizens whose asylum has been terminated. Under the

Second Circuit's rule, they will be categorically ineligible for adjustment to LPR status under Section 1159(b) regardless of their circumstances. Unless they happen to be married to a U.S. citizen, they likely will lack any other basis to immediately adjust to LPR status. And because the most common basis for terminating asylum often precludes the grant of withholding of removal, *compare* 8 U.S.C. § 1158(b)(2), (c)(2)(B), *with id.* § 1231(b)(3)(B), those noncitizens will likely face removal to the same countries from which they fled or fear persecution. That is, the termination of asylum will often foreclose adjustment and virtually ensure their removal.

There are many reasons to think these harsh consequences are neither necessary nor intended.

First, the impact is not limited to the noncitizen whose asylum was terminated. Termination automatically extends to principal asylees' spouses and children. *See* 8 C.F.R. § 1208.24(d) (principal asylee's termination "shall result in termination of" derivative asylee's status). In 2023 (the most recent year with government data) alone, nearly 5,000 individuals received derivative asylum. Noah Schofield & Amanda Yap, *Asylees*: *2023*, at 1, Off. of Homeland Security Statistics (Oct. 2024), https://ohss.dhs.gov/sites/default/files/2024-10/2024_1002_ohss_asylees_fy2023.pdf. If the decision below stands, these innocent spouses and children—through no fault of their own—will be precluded from adjusting to LPR status and will face removal themselves.

Second, those granted asylum "can lose that status for a host of reasons," many of which are outside the control of the noncitizen. App. 26a (Robinson, J., dissenting). Asylum can be terminated, for example,

because the noncitizen was resettled elsewhere prior to arriving in the United States or due to an intervening bilateral agreement between the United States and another country. 8 U.S.C. § 1158(c)(2)(B)-(C), (b)(2)(A)(vi). And this is far from hypothetical: the United States recently signed several of these bilateral agreements. *See, e.g.*, 90 Fed. Reg. 51376-86 (Nov. 17, 2025) (bilateral agreement with Ecuador); 90 Fed. Reg. 42597-601 (Sept. 3, 2025) (bilateral agreement with Uganda); Press Release, U.S. Dep't of State, *Signing of a Safe Third Country Agreement with Paraguay* (Aug. 14, 2025), https://www.state.gov/releases/office-of-the-spokesperson/2025/08/signing-of-a-safe-third-country-agreement-with-paraguay (bilateral agreement with Paraguay); 90 Fed. Reg. 31670-76 (July 15, 2025) (bilateral agreement with Guatemala); 90 Fed. Reg. 30076-86 (July 8, 2025) (bilateral agreement with Honduras). Noncitizens whose asylum was terminated for these reasons will be ineligible for adjustment too.

Third, even if a noncitizen's asylum is terminated due to a criminal conviction, *see* 8 U.S.C. § 1158(c)(2)(B), discretion to adjust to LPR status in appropriate circumstances remains important. For one thing, even relatively minor criminal conduct may support termination. Although termination is limited to convictions for "particularly serious crime[s]," *id.* § 1158(b)(2)(A)(ii), the definition of a "particularly serious crime," for purposes of asylum termination, includes any "aggravated felony," *id.* § 1158(b)(2)(B)(i). And the "'aggravated felony'" category is both notoriously capacious—paradoxically including "'misdemeanors'"—and often "not clear." *Padilla*, 559 U.S. at 377-79 (Alito, J., concurring in the judgment) (citations omitted); *see United States v.*

Pacheco, 225 F.3d 148, 149-50, 153-54 (2d Cir. 2000) (reluctantly concluding that a misdemeanor conviction for stealing a $10 video game, with a one-year suspended sentence, qualified as an "aggravated felony"), *cert. denied*, 533 U.S. 904 (2001).

Plus, "the statutory structure" already "takes account of" criminal convictions through the admissibility requirement in Section 1159(b)(5) and the waiver provision in Section 1159(c). App. 29a (Robinson, J., dissenting). Even in cases involving more serious criminal conduct, adjustment still has an important role to play. Take Wassily's case: even though the IJ terminated his asylum based on his conviction, the same IJ found he still had a "well-founded fear of persecution" based on his Coptic Christian faith. *Id.* at 53a-54a. Citing humanitarian concerns such as religious persecution and family unification, the IJ waived inadmissibility under Section 1159(c) and granted adjustment to LPR status. *Id.* at 51a-58a.

2. The Second Circuit's decision also makes the outcome of a noncitizen's case "depend entirely on the order in which the two petitions—for termination of asylum and for adjustment of status—are considered." *Id.* at 29a (Robinson, J., dissenting). Consider the following scenario: a noncitizen granted asylum is placed in removal proceedings. He applies to the IJ for adjustment of status under Section 1159(b) as a defense to removal. The government, in turn, asks the IJ to terminate the noncitizen's asylum under Section 1158(c)(2). In that scenario, the BIA has explained that an IJ has discretion to decide the termination motion before the application for adjustment, or vice versa. *See Matter of V-X-*, 26 I. & N. Dec. 147, 149 n.1 (B.I.A. 2013) (IJs

may, but need not, decide adjustment before termination).

Within the Fifth Circuit, the timing does not matter; noncitizens can adjust their status before or after termination of asylum under *Siwe*. But within the Second and Fourth Circuits, the sequencing is now dispositive: a decision on termination controls whether adjustment of status is available. That gives the government a compelling incentive to push for early termination—and overworked IJs a compelling incentive to accede to such requests.

The decision below attempted to turn that sequencing into a positive, reasoning that an IJ could "defer[] ruling on a motion to terminate asylum status in favor of first adjudicating an application for adjustment of status." App. 16a. But that just underscores that the Second Circuit's understanding of the statute is flawed. Again, take Wassily's case, where the IJ terminated his status *right before* finding him eligible for adjustment. *Compare id.* at 46a-50a (terminating asylum status), *with id.* at 51a-58a (granting adjustment). On the Second Circuit's logic, Wassily could have received adjustment if the IJ had just swapped a few paragraphs of the decision around. That "incongruous" result makes nonsense of the statutory scheme and has nothing to commend it. *Id.* at 29a (Robinson, J., dissenting).

B. This Petition Is An Ideal Vehicle

This petition presents an ideal vehicle for the Court's review. The Second Circuit thoroughly addressed the question presented and squarely resolved it. There were no alternative grounds for decision. And for Wassily in particular, resolution of the question presented is outcome-determinative.

The Court's prior denial of the petition in *Cela* does not warrant a different result for several reasons. *First*, the circuit split has now deepened and produced another carefully reasoned decision—and dissent. That is exactly the development the government suggested might be forthcoming. *See Cela* SG Br. 16. To the extent these then-pending Second Circuit cases counseled against review in *Cela*, their resolution counsels in favor of review here.

Second, the denial in *Cela* came before this Court overruled *Chevron* in *Loper Bright*. At that time, there was an unresolved question about the relationship between the rule of lenity and *Chevron* when it came to resolving statutory ambiguity. To the extent that unanswered question posed a wrinkle to fully resolving the question presented, that is no longer the case. After *Loper Bright*, the rule of lenity controls.

Third, the government posited in *Cela* that a decision in the petitioner's favor would be "unlikely to affect the outcome of [his] case" because the IJ "would be unlikely to grant a discretionary waiver" and "adjust petitioner's status." *Cela* SG Br. 16. And it argued that "[t]his Court's resources are better spent on case in which its judgment is likely to change the result." *Id.* That is this case. The IJ already granted a discretionary waiver to Wassily and adjusted his status. *See supra* at 6-7. If the Court were to grant and reverse, its judgment would "change the result."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 12, 2026

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Tamer S. WASSILY, Petitioner,

v.

Pamela BONDI, United States Attorney General, Respondent.

Byron E. Velasquez Arreaga, Petitioner,

v.

Pamela Bondi, United States Attorney General, Respondent.

Docket No. 22-6247
August Term 2023
Docket No. 23-6289

Argued: May 22, 2024

Decided: August 7, 2025

Before: Wesley, Park, and Robinson, Circuit Judges.

Judge Robinson dissents in a separate opinion.

Wesley, Circuit Judge:

A noncitizen claiming persecution in his or her country of nationality may seek asylum in the United States, either by affirmatively applying for asylum or by raising a claim for asylum in removal proceedings. If granted asylum, a noncitizen is protected from removal and authorized to work in the United States and to travel abroad. *See* 8 U.S.C. § 1158(c)(1). The spouse or children of an applicant for asylum may also be granted asylum status and accompany or follow to

join the original applicant in the United States. *See id.* § 1158(b)(3).

Beyond these benefits, a grant of asylum also opens a path to citizenship. Under 8 U.S.C. § 1159(b), a noncitizen who "has been physically present in the United States for at least one year after being granted asylum" may apply for lawful permanent resident status. *Id.* § 1159(b). Assuming other conditions are met, 8 U.S.C. § 1159(b) provides that the Secretary of Homeland Security or the Attorney General "may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum." *Id.* Once granted lawful permanent resident status, a noncitizen may ultimately apply for citizenship through naturalization. *See generally id.* § 1427.

These petitions for review, argued in tandem, ask whether noncitizens seeking adjustment to lawful permanent resident status under 8 U.S.C. § 1159(b) must maintain their current asylum status or whether noncitizens may adjust even if their asylum status has been terminated. More specifically, they ask whether a noncitizen seeking adjustment under 8 U.S.C. § 1159(b) must currently be "granted asylum" to adjust to lawful permanent resident status, or whether it is enough that a noncitizen was "granted asylum" at some point in the past, notwithstanding subsequent termination of that grant of asylum. Adopting the former reading, the Board of Immigration Appeals ("BIA") concluded that petitioners Tamer Wassily and Byron Velasquez Arreaga could not adjust to lawful permanent resident status because their asylum status had been terminated. We agree that the plain text of 8 U.S.C. § 1159(b) allows only noncitizens with current asylum

status to adjust to lawful permanent resident status and therefore deny the petitions for review.

BACKGROUND

I. Tamer Wassily

Tamer Wassily, a native and citizen of Egypt, entered the United States on a visitor visa in 1993. He overstayed his visa and was placed in removal proceedings. Wassily then applied for asylum, claiming persecution in Egypt for his Coptic Christian beliefs; Wassily was granted asylum in 2000.

In 2004, Wassily was convicted of third-degree stalking, in violation of New York Penal Law § 120.50, and child endangerment, in violation of New York Penal Law § 260.10. Because of those convictions, the Department of Homeland Security ("DHS") moved to reopen Wassily's removal proceedings in order to terminate his asylum status. The Immigration Judge ("IJ") granted the motion and terminated Wassily's asylum status, finding that Wassily's conviction for third-degree stalking was a "particularly serious crime."[1] The IJ subsequently denied Wassily's renewed application for asylum, as well as his application for withholding of removal and relief under the Convention Against Torture ("CAT"); the IJ ordered Wassily removed to Egypt.

Wassily appealed to the BIA; he also moved to remand, arguing that his counsel before the IJ was ineffective by failing to request Wassily's adjustment

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[1] Under 8 U.S.C. § 1158(c)(2), "[a]sylum granted under [8 U.S.C. § 1158(b)] . . . may be terminated if the Attorney General determines that" a noncitizen, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(c)(2)(B), 1158(b)(2)(A)(ii).

to lawful permanent resident status prior to the termination of his asylum status.[2] After the BIA rejected his ineffective assistance of counsel claim and dismissed his appeal, Wassily filed a petition for review in this Court. We granted Wassily's petition for review, reasoning that "remand [was] required for the BIA to reconsider whether the IJ was entitled to rely on the [presentence report]" in concluding that Wassily had been convicted of a particularly serious crime. *Wassily v. Holder*, 523 F. App'x 783, 785 (2d Cir. 2013) (summary order).[3] We did not find any error in the agency's denial of deferral of removal under the CAT. *Id.* at 785–86.

On remand, the IJ again determined that Wassily's third-degree stalking conviction was a particularly serious crime, therefore terminating Wassily's asylum status and rendering him ineligible for withholding of removal. Despite terminating Wassily's asylum status, the IJ found that Wassily was eligible to adjust to lawful permanent resident status under 8 U.S.C. § 1159(b) because "[t]he [Immigration and Nationality Act] does not contain an explicit requirement that [an] applicant for adjustment of status under [8 U.S.C. § 1159(b)] have continued asylee status to be eligible for adjustment." *Wassily v. Bondi*, No. 22-6247, Certified Admin. R. at

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[2] More specifically, Wassily argued that his prior attorney's "failure to request that Mr. Wassily be allowed to pursue adjustment of status prior to his asylee status being terminated" was an "egregious" error. *Wassily v. Bondi*, No. 22-6247, Certified Admin. R. at 778.

[3] We also concluded that the BIA abused its discretion by denying Wassily's motion to remand without adequate explanation. *See Wassily*, 523 F. App'x at 786.

99. The IJ then granted Wassily's application for adjustment.

DHS appealed that decision to the BIA. While that appeal was pending, the BIA decided *Matter of T-C-A-*, 28 I. & N. Dec. 472 (B.I.A. 2022). In *Matter of T-C-A-*, the BIA concluded that only a noncitizen with current asylum status can adjust to lawful permanent resident status under 8 U.S.C. § 1159(b). *See* 28 I. & N. Dec. at 479. In other words, the BIA held that "an applicant for adjustment of status under" 8 U.S.C. § 1159(b) must "possess asylee status at the time of adjustment and thus an applicant whose asylee status has been terminated cannot adjust to lawful permanent resident status under [that] provision." *Id.* On petition for review of that decision, the Fourth Circuit agreed. *See Cela v. Garland*, 75 F.4th 355, 361–65 (4th Cir. 2023).

The BIA looked to *Matter of T-C-A-* and concluded that Wassily was ineligible to adjust to lawful permanent resident status because his asylum status had been terminated. Finding "no other controlling issues" to address, the BIA sustained DHS's appeal and ordered Wassily removed to Egypt.[4] *Wassily v. Bondi*, No. 22-6247, Certified Admin. R. at 4–5.

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[4] In addition to challenging the agency's reading of 8 U.S.C. § 1159(b), Wassily also asks that we review the agency's determination that his third-degree stalking conviction was a particularly serious crime. As the Government argues, however, Wassily did not appeal the IJ's decision on that issue or argue it to the BIA; the BIA found that this argument had been waived. Wassily's challenge to the particularly serious crime determination is not exhausted and not before us. *See Ud Din v. Garland*, 72 F.4th 411, 419–20 (2d Cir. 2023) ("[W]e have generally treated [8 U.S.C.] § 1252(d)(1)'s issue exhaustion

II. Byron Velasquez Arreaga

Byron Velasquez Arreaga, a native and citizen of Guatemala, entered the United States in 1995. The following year, he was granted asylum.

Velasquez Arreaga then was convicted of multiple criminal offenses, including, as relevant here, a 2015 conviction for driving while intoxicated, *see* N.Y. Veh. & Traf. Law § 1192(2) & (3), and a 2018 conviction for aggravated driving while intoxicated, *see id.* § 1192(2-a)(a).[5] In February 2019, the United States Citizenship and Immigration Services ("USCIS") notified Velasquez Arreaga that it intended to terminate his asylum status because the 2018 conviction was a particularly serious crime. DHS then commenced removal proceedings, charging that Velasquez Arreaga was removable as a nonimmigrant who had remained in the United States for longer than permitted. *See* 8 U.S.C. § 1227(a)(1)(B). Velasquez Arreaga contested that charge, and DHS then lodged a superseding charge, contending that Velasquez Arreaga was removable because he did not possess a valid entry document at the time of application for admission. *See id.* § 1182(a)(7)(A)(i)(I).

The IJ concluded that Velasquez Arreaga's 2015 and 2018 convictions were particularly serious crimes, both individually and together, and

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requirement as mandatory." (internal quotation marks and citation omitted)).

[5] Velasquez Arreaga's 2018 conviction for aggravated driving while intoxicated required proof that Velasquez Arreaga operated a vehicle with a blood alcohol level of .18% or higher and had two prior convictions for driving while intoxicated within the last ten years. *See* N.Y. Veh. & Traf. Law § 1192(2-a)(a); *Velasquez Arreaga v. Bondi*, No. 23-6289, Certified Admin. R. at 18.

terminated his asylum status. Velasquez Arreaga subsequently sought to adjust to lawful permanent resident status under 8 U.S.C. § 1159(b). The IJ, however, granted DHS's motion to pretermit Velasquez Arreaga's application, finding that he was ineligible to adjust because his asylum status had been terminated—that is, reaching the opposite reading of 8 U.S.C. § 1159(b) from the IJ in Wassily's case. In June 2020, the IJ denied Velasquez Arreaga's renewed application for asylum, as well as his applications for withholding of removal and relief under the CAT, and ordered him removed to Guatemala.

After an unsuccessful appeal to the BIA, Velasquez Arreaga filed a petition for review in this Court. While that petition for review was pending, the parties agreed to remand the case on the grounds that the BIA relied on since-abrogated precedent in determining that Velasquez Arreaga's 2018 conviction was final for immigration purposes and for the agency to further consider whether Velasquez Arreaga's 2015 conviction was itself a particularly serious crime. After the New York Appellate Division, Second Department affirmed Velasquez Arreaga's 2018 conviction, *see People v. Velasquez-Arreaga*, 198 A.D.3d 933, 152 N.Y.S.3d 850 (2d Dep't 2021), the parties stipulated that the conviction had become final and requested that the BIA issue a decision consistent with its prior order. The BIA obliged, and Velasquez Arreaga filed this petition for review.[6]

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[6] Although the BIA decided *Matter of T-C-A-* before it reissued its decision, the reissued decision did not rely on *Matter*

DISCUSSION

We review the BIA's determinations of law *de novo*. *See Nwozuzu v. Holder*, 726 F.3d 323, 326 (2d Cir. 2013). In a case involving an agency's interpretation of a statute, we use the "traditional tools of statutory construction" to "resolve statutory ambiguities" and "determine the best reading of the statute." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–01, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024).[7]

I. Statutory Framework

Asylum is a category of discretionary relief available to a noncitizen who qualifies as a "refugee" under 8 U.S.C. § 1101(a)(42)(A). *See* 8 U.S.C. § 1158(b)(1)(A). As relevant here, a "refugee" under 8 U.S.C. § 1101(a)(42)(A) is a "person who is outside any

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of T-C-A- in rejecting Velasquez Arreaga's application for adjustment of status.

[7] Previously, we deferred to the BIA's reasonable interpretation of an ambiguous statute under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Nwozuzu*, 726 F.3d at 326–27. Although *Chevron*'s deferential review framework was overruled by *Loper Bright*, *Loper Bright* nevertheless acknowledged that "Congress has often enacted [ ] statutes" that authorize an agency "to exercise a degree of discretion." 603 U.S. at 394–95, 144 S.Ct. 2244. In those circumstances, a court must "recogniz[e] constitutional delegations, fix[ ] the boundaries of the delegated authority, and ensur[e] the agency has engaged in reasoned decisionmaking within those boundaries." *Id.* at 395, 144 S.Ct. 2244 (alteration adopted) (internal quotation marks and citations omitted). Because we conclude that the plain text of 8 U.S.C. § 1159(b) allows only noncitizens with current asylum status to adjust to lawful permanent resident status, we do not reach the Government's argument that "[t]he immigration laws include such" discretionary statutes. *Wassily v. Bondi*, No. 22-6247, Dkt. 70.1 at 2.

country of such person's nationality" who is "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A). A noncitizen "granted asylum under [8 U.S.C. § 1158(b)]" is protected from removal and allowed to work in the United States and to travel abroad with prior authorization. *Id.* § 1158(c)(1).

A grant of asylum does not, however, "convey a right to remain permanently in the United States." *Id.* § 1158(c)(2). Instead, "[a]sylum granted under [8 U.S.C. § 1158(b)] . . . may be terminated if the Attorney General determines" that a noncitizen, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." *Id.* § 1158(c)(2)(B), 1158(b)(2)(A)(ii).[8] If a noncitizen's "asylum granted under [8 U.S.C. § 1158(b)]" is terminated, the noncitizen is subject to removal from the United States. *See id.* § 1158(c)(2)–(3).

Once "granted asylum," a noncitizen may apply to adjust to lawful permanent resident status. Under 8 U.S.C. § 1159(b), the Secretary of Homeland Security or Attorney General "may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum" who applies for

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[8] In addition to providing that a grant of asylum may be terminated if a noncitizen is convicted of a particularly serious crime, 8 U.S.C. § 1158(c)(2) lists several other grounds on which a grant of asylum may be terminated. *See* 8 U.S.C. § 1158(c)(2)(A)–(E).

adjustment and meets certain requirements. *Id.* § 1159(b). Those requirements include: the noncitizen must "ha[ve] been physically present in the United States for at least one year after being granted asylum"; "continue[ ] to be a refugee within the meaning of [8 U.S.C. § 1101(a)(42)(A)] or a spouse or child of such a refugee"; not be "firmly resettled in any foreign country"; and be admissible "as an immigrant . . . at the time of examination for adjustment" to lawful permanent resident status, except as provided by 8 U.S.C. § 1159(c). *Id.* § 1159(b)(1)–(5).

Under 8 U.S.C. § 1159(c), "the Secretary of Homeland Security or the Attorney General may waive" certain grounds of inadmissibility "with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."[9] *Id.* § 1159(c). Thus, although a noncitizen generally must be currently admissible when applying for adjustment to lawful permanent

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[9] Section 1159(c) operates in "[c]oordination with section 1182," 8 U.S.C. § 1159(c), which in turn lists a number of grounds on which a noncitizen may be deemed "ineligible to be admitted to the United States," *id.* § 1182(a). Section 1159(c) specifically provides that certain inadmissibility grounds are inapplicable to noncitizens seeking adjustment to lawful permanent resident status, *see id.* § 1182(a)(4) (noncitizen likely to become a public charge); *id.* § 1182(a)(5) (employment-related qualifications); *id.* § 1182(a)(7)(A) (documentation requirements for immigrants), and that other grounds cannot be waived for noncitizen applicants, *see id.* § 1182(a)(2)(C) (involvement in controlled substance offenses); *id.* § 1182(a)(3)(A)–(C), (E) (certain national security and foreign policy considerations). Because a noncitizen granted asylum "is not subject to admissibility grounds at the time of the asylum grant, the adjudication of the adjustment application may be the first instance that inadmissibility grounds are considered." 7 USCIS Policy Manual, pt. m, ch. 3 (2025).

resident status, 8 U.S.C. § 1159(c) gives the Secretary of Homeland Security or the Attorney General some discretion to waive this requirement for a noncitizen seeking adjustment.

II. "Granted Asylum" Means Current Asylum Status

These petitions for review turn on the meaning of "the status of any alien granted asylum"—in particular, the word "granted." Wassily and Velasquez Arreaga maintain that "granted" should be read as a past-tense verb. That is, they argue that any noncitizen who has ever been "granted" asylum is eligible to adjust to lawful permanent resident status, even if the noncitizen's asylum status was subsequently terminated. The Government reads "granted" as describing a present condition, such that a noncitizen must currently be "granted asylum" to be eligible to adjust to lawful permanent resident status under 8 U.S.C. § 1159(b).

In our view, 8 U.S.C. § 1159(b) allows only noncitizens with current asylum status to adjust to lawful permanent resident status.[10] As with any question of statutory interpretation, we start with the text. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 74, 143 S.Ct. 665, 214 L.Ed.2d 434 (2023).

Section 1159(b) refers to "the status of an alien lawfully admitted for permanent residence" and "the

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[10] Because we independently conclude that 8 U.S.C. § 1159(b) precludes a noncitizen with terminated asylum status from adjusting to lawful permanent resident status, we reject Wassily's argument that the BIA impermissibly applied *Matter of T-C-A-* retroactively. *See generally Marquez v. Garland*, 13 F.4th 108, 111 (2d Cir. 2021) ("[J]udicial holdings interpret existing law and thus operate retroactively.").

status of any alien granted asylum." 8 U.S.C. § 1159(b). We agree with the Fourth Circuit's observation in *Cela* that "the ordinary meaning of 'status' signals a present condition," 75 F.4th at 364—in particular, a legal condition.[11] It would be odd to say that someone maintains the present legal condition of having once been granted asylum at some point in the past, even though that grant of asylum was later terminated. The more natural reading of "the status of any alien granted asylum" is that a noncitizen must presently be granted asylum to adjust to lawful permanent resident status under 8 U.S.C. § 1159(b).

In fact, if Congress intended to permit anyone previously granted asylum to become a lawful permanent resident, as the dissent suggests, there would be no need for Congress to use the word "status" at all. And we reject statutory constructions that would render a word "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

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[11] *See, e.g.*, *Status*, Webster's Third New International Dictionary (1981) ("[T]he condition (as arising out of age, sex, mental incapacity, crime, alienage, or public station) of a person that determines the nature of his legal personality, his legal capacities, and the nature of the legal relations to the state or to other persons into which he may enter."); *Status*, Black's Law Dictionary (5th ed. 1979) ("The legal relation of [an] individual to [the] rest of the community."); *Status*, Oxford English Dictionary, https://www.oed.com/dictionary/status_n?tab=meaning_and_use#20924305 (last visited Aug. 6, 2025) ("The fact or position of belonging to a group which is subject to certain legal rights or limitations; the legal classification corresponding to this; a person's legal condition with regard to freedom of movement or action, citizenship, the age of majority, etc.").

Any lingering uncertainty about the meaning of "granted" in 8 U.S.C. § 1159(b) is settled by considering "nearby statutory provisions." *See Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178, 185, 142 S.Ct. 941, 211 L.Ed.2d 586 (2022). A closer—or even a cursory—look at the neighboring provision of 8 U.S.C. § 1158(c) confirms our reading of 8 U.S.C. § 1159(b). As noted above, 8 U.S.C. § 1158(c) provides that "an alien granted asylum under [8 U.S.C. § 1158(b)]" is protected from removal and permitted to work in the United States and travel abroad. *See* 8 U.S.C. § 1158(c)(1). But that section further provides that "[a]sylum granted under [8 U.S.C. § 1158(b)] . . . may be terminated," and that can then lead to the noncitizen's removal. *Id.* § 1158(c)(2)–(3).

Section 1158(c) consistently uses "granted" to refer to then-existing asylum status: first, to describe the benefits available to "an alien granted asylum," and second, to refer to the consequences of terminating that "[a]sylum granted."[12] Read in that context, section 1159(b)'s reference to "the status of any alien granted asylum" is best understood as simply extending another benefit to a noncitizen with current asylum status: the opportunity to adjust to lawful permanent resident status.[13] That reading

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[12] *See also, e.g.*, 8 U.S.C. § 1158(b)(3)(A) ("A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien."); *id.* § 1158(b)(3)(B) ("An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection . . . .").

[13] In *Siwe v. Holder*, 742 F.3d 603 (5th Cir. 2014), the Fifth Circuit held that a noncitizen "whose asylum has been

also best reflects "the statutory scheme as a whole," *see Soliman v. Subway Franchisee Advert. Fund Tr., LTD.*, 101 F.4th 176, 181 (2d Cir. 2024)—namely, a statutory framework that contemplates that a noncitizen claiming persecution in his or her country of nationality may first obtain a grant of asylum, then adjust to lawful permanent resident status, and ultimately apply for citizenship.

Wassily and Velasquez Arreaga nevertheless maintain that 8 U.S.C. § 1159(b) cannot require current asylum status because other, differently worded provisions in 8 U.S.C. § 1159 require a noncitizen to meet some other "present" qualification. The dissent likewise maintains that 8 U.S.C. § 1159 "expressly includes continuing status requirements where applicable[ ] and [ ] does not apply one to individuals 'granted asylum.' " Dissenting Op. at 109–10.

Besides assuming its conclusion—that the phrase "granted asylum" *does not* impose a continuing status requirement—the dissent's argument cannot overcome the clear meaning of the statutory text. True, other parts of 8 U.S.C. § 1159 use varying language to require that a noncitizen seeking adjustment to lawful permanent resident status maintain some other current condition.[14] Those

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terminated[ ] is not prohibited from applying for adjustment of status" under 8 U.S.C. § 1159(b). 742 F.3d at 612. The Fifth Circuit did not, however, consider the language of 8 U.S.C. § 1159(b) in light of 8 U.S.C. § 1158(c). Accordingly, we decline to follow the Fifth Circuit's reading of 8 U.S.C. § 1159(b).

[14] *See* 8 U.S.C. § 1159(a)(1)(A) (noncitizen admitted as a refugee "whose admission has not been terminated" may adjust to lawful permanent resident status); *id.* § 1159(b)(3) (noncitizen applying for adjustment must "continue[ ] to be a refugee within

provisions—none of which speaks of a "granted" status—cast no doubt on what 8 U.S.C. § 1158 and § 1159 make clear: "[G]ranted asylum" means current asylum status. Indeed, for all its references to various other statutory provisions, the dissent barely acknowledges the text of 8 U.S.C. § 1158, except to dismiss it as a "breadcrumb[ ]." *Id.* at 113. If the dissent had some theory as to why the phrase "granted asylum" would mean one thing in 8 U.S.C. § 1158 but something entirely different in 8 U.S.C. § 1159, surely it would have said something more.

Wassily and Velasquez Arreaga similarly find no support in 8 U.S.C. § 1159(b)(2). Although a noncitizen must "ha[ve] been physically present in the United States for at least one year after being granted asylum" to be eligible to adjust to lawful permanent resident status, *see* 8 U.S.C. § 1159(b)(2), the inclusion of "being" before "granted" in that provision clearly demonstrates that the use of "granted" in 8 U.S.C. § 1159(b)(2), unlike its use in the prefatory clause of 8 U.S.C. § 1159(b), refers to a completed event rather than a current status.

The statutory waiver provision of 8 U.S.C. § 1159(c) gets Wassily and Velasquez Arreaga no further. Section 1159(c) provides that the Secretary of Homeland Security or the Attorney General, in granting lawful permanent resident status, may waive the requirement of admissibility "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.*

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the meaning of [8 U.S.C. § 1101(a)(42)(A)] or a spouse or child of such a refugee"); *id.* § 1159(b)(5) (noncitizen applying for adjustment under 8 U.S.C. § 1159(b) must be admissible "at the time of examination for adjustment").

§ 1159(c). Wassily and Velasquez Arreaga maintain that because the grounds for termination of asylum and inadmissibility "substantially overlap," *see, e.g.*, Velasquez Arreaga Reply Br. at 22, categorically barring noncitizens with terminated asylum status from applying for adjustment of status would limit the Secretary's or Attorney General's discretionary waiver authority under 8 U.S.C. § 1159(c). Similarly, the dissent contends that its reading of 8 U.S.C. § 1159(b) "best preserves" the discretionary waiver authority of 8 U.S.C. § 1159(c). Dissenting Op. at 114.

Wassily and Velasquez Arreaga concede, however, that the grounds for inadmissibility and the grounds for termination of asylum status are not coextensive. Moreover, the BIA has held that an IJ can defer ruling on a motion to terminate a noncitizen's asylum status pending an application for adjustment under 8 U.S.C. § 1159(b). *See Matter of K-A-*, 23 I. & N. Dec. 661, 665 (B.I.A. 2004). In other words, even though current asylum status is required to adjust under 8 U.S.C. § 1159(b), section 1159(c) continues to vest the Secretary or Attorney General with discretion to waive the admissibility requirement, including in cases when an IJ defers ruling on a motion to terminate asylum status in favor of first adjudicating an application for adjustment of status. We are not free to alter the plain meaning of 8 U.S.C. § 1159(b) based on the nebulous idea that some greater degree of waiver authority under 8 U.S.C. § 1159(c) would be preferable as a matter of policy—a request better addressed to Congress.

Finally, this reading of 8 U.S.C. § 1159(b) is buttressed by the Immigration Act of 1990. The Immigration Act of 1990 added a statutory note to 8 U.S.C. § 1159, titled "Adjustment of Certain Former

Asylees," which provides that the adjustment provision of 8 U.S.C. § 1159(b) "shall also apply to an alien[ ] . . . who was granted asylum before the date of the enactment of this Act (*regardless of whether or not such asylum has been terminated* under section 208(b) of the Immigration and Nationality Act)" and "who is no longer a refugee because of a change in circumstances in a foreign state." Pub. L. No. 101–649, § 104(d), 104 Stat. 4978, 4985 (1990) (emphasis added).[15] That is, the statutory note specifically allowed certain noncitizens to apply for adjustment of status under 8 U.S.C. § 1159(b), "regardless of whether or not" their asylum status had been "terminated under [8 U.S.C. § 1158(b)]." *Id.* Congress's express articulation of this exception suggests that 8 U.S.C. § 1159(b) does not, as a general matter, allow noncitizens whose asylum status has been terminated to adjust to lawful permanent resident status. *See generally Nwozuzu*, 726 F.3d at 327 ("[W]here 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

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[15] The legislative record of the Immigration Act of 1990 reflects legislators' concerns that then-recent political regime changes in foreign countries might prevent noncitizens who were granted asylum from adjusting to lawful permanent resident status. *See, e.g.*, 136 Cong. Rec. 27133 (1990) (statement of Rep. Dan Rostenkowski) ("It is incongruous that the otherwise welcome demise of a repressive regime in an asylee's home country should make it virtually impossible for the asylee to remain in the United States for failure to prove a continuing well-founded fear of persecution. Yet, under current law, this change in circumstances in the homeland permits the [Immigration and Naturalization Service] to deny adjustment to permanent resident status, to terminate asylee status, and to initiate deportation proceedings.").

Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987))). Otherwise, that note would have unnecessarily repeated what remained silently true under 8 U.S.C. § 1159(b).

At bottom, Velasquez Arreaga, Wassily, and the dissent all advance an interpretation of 8 U.S.C. § 1159(b) that makes little sense: A noncitizen convicted of a particularly serious crime, and whose asylum status was terminated as a result, would categorically be treated the same as a noncitizen with current asylum status when applying to adjust to lawful permanent resident status. The termination of the noncitizen's asylum status would simply be irrelevant. It would be one thing if this peculiar result were required by the statute. Unsurprisingly, though, such a counterintuitive interpretation of the statutory scheme can be reached only by disregarding the clear meaning of the statutory text.

For these reasons, 8 U.S.C. § 1159(b)'s reference to "the status of any alien granted asylum" must be read consistently with 8 U.S.C. § 1158(c)'s references to "an alien granted asylum" and "[a]sylum granted under [8 U.S.C. § 1158(b)]." In each case, asylum "granted" refers to current asylum status. Because Wassily's and Velasquez Arreaga's asylum status was terminated, they were not eligible to adjust to lawful permanent resident status under 8 U.S.C. § 1159(b).

CONCLUSION

For the reasons set forth above, we **DENY** the petitions for review.

Beth Robinson, Circuit Judge, dissenting:

By statute, "The Secretary of Homeland Security or the Attorney General . . . may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum" who meets various requirements. 8 U.S.C. § 1159(b). At issue is whether a noncitizen who was granted asylum which was later terminated qualifies as "any alien granted asylum" eligible to apply for adjustment to lawful permanent resident ("LPR") status if otherwise qualified. *Id.*

This is a difficult case, as reflected by a circuit split on the question. *See Siwe v. Holder*, 742 F.3d 603, 608, 612 (5th Cir. 2014) (concluding based on the "plain language of the statute" that a noncitizen whose asylum has been terminated is eligible to apply for adjustment of status under § 1159(b)); *Cela v. Garland*, 75 F.4th 355, 364–65 (4th Cir. 2023) (concluding that "§ 1159(b) unambiguously precludes [a noncitizen] whose asylum status has been terminated from adjusting to lawful permanent resident status"). But in my view, the majority gets it wrong.

The text of the statute supports the conclusion that a noncitizen granted asylum is not categorically ineligible to seek adjustment of status under § 1159(b) following termination of the asylum. Most importantly, the statute expressly includes continuing status requirements where applicable, and it does not apply one to individuals "granted asylum." 8 U.S.C. § 1159(b). Moreover, the statutory scheme relating to adjustment of status—particularly Congress' allocation of discretion to waive certain disqualifications in the adjustment-of-status process—reinforces this conclusion. For these

reasons, as explicated more fully below, I conclude that the best understanding of § 1159(b) is that it encompasses "any" noncitizen "granted asylum," regardless of whether the asylum was subsequently terminated. *Id.*

I. Statutory Text

Like the majority, I begin with the text of the statute. *King v. Time Warner Cable Inc.*, 894 F.3d 473, 477 (2d Cir. 2018) ("Every exercise in statutory construction must begin with the words of the text.").[1] Unlike the majority, I don't think the "more natural reading" of the phrase "any alien granted asylum" is that it excludes noncitizens granted asylum where that asylum has subsequently been terminated. Maj. Op. at 106–07. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *see also Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 220, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) ("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind.").

Plus, if Congress had intended "any alien granted asylum" to mean "any asylee," or any noncitizen "who continues to be subject to asylum protections," it could have said so. "Nowhere in this section does Congress require that [a noncitizen's] asylum, once granted, still must be in effect at the time [the noncitizen]

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[1] In quotations from caselaw and the parties' briefing, this dissent omits all internal quotation marks, footnotes, and citations, and accepts all alterations, unless otherwise noted.

applies for adjustment of status: Such a requirement is conspicuously absent. To conclude otherwise would be to contravene the Supreme Court's exhortation that we add no unwritten requirements to the text." *Siwe*, 742 F.3d at 608; *see also Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."); *compare* 8 U.S.C. § 1159(b) ("The Secretary of Homeland Security or Attorney General . . . may adjust . . . the status of any individual granted asylum"), *with* Maj. Op. at 106 ("[G]ranted asylum" means "presently be granted asylum").

But I would not hang my hat on a bare assessment of the contested phrase standing alone. In interpreting the text of a statute, we don't consider the specific terms at issue "in isolation." *King*, 894 F.3d at 477. "[R]ather, we look to the statutory scheme as a whole and place the particular provision within the context of that statute." *Id.*

A review of § 1159 tells us in no uncertain terms that when Congress intended to require continuity of a predicate status as a precondition to adjustment to LPR status, it said so in plain terms. And it did not do so in § 1159(b)'s provision authorizing "any alien granted asylum" to apply for adjustment of status. Instead, the statute expressly requires that noncitizens who are granted asylum and then seek to adjust to lawful permanent resident status maintain their status as *refugees*, not their status as *asylees*. Before drilling down further on these points, I step back briefly to provide an overview of the relevant scheme.

The Immigration and Nationality Act ("INA") establishes distinct paths to admission for refugees

admitted to the United States from foreign countries pursuant to 8 U.S.C. § 1157 and those who apply for and are granted asylum while in the United States pursuant to § 1158. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987).[2] As relevant here, the term "refugee" includes "any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A).

The grounds for *terminating* the status of refugees admitted pursuant to § 1157 and those granted asylum pursuant to § 1158 are likewise distinct. The refugee status of a noncitizen admitted pursuant to § 1157 may be terminated "if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) . . . at the time of . . . admission." *Id.* § 1157(c)(4). But a noncitizen granted asylum pursuant to § 1158 may lose that asylum protection if the Attorney General determines the individual no longer meets the definition of a refugee, committed certain offenses or is a danger to the country, firmly resettled in another country, may safely be removed to another country by agreement, availed themselves of the protection of

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[2] We refer here to the statutory codifications of the INA, as amended by the Refugee Act of 1980. Section 1157 of Title 8 codifies INA § 207; section 1158 codifies INA § 208; and section 1159 codifies INA § 209. *See* Refugee Act of 1980, Pub. L. 96-212, sec. 201, §§ 207–209, 94 Stat. 102, 103–105 (1980).

their country of origin, or acquired new nationality and "enjoys the protection" of their new country. *Id.* § 1158(c)(2). In short, the bases for terminating asylum status under § 1158 are far broader than the bases for terminating the refugee status of noncitizens admitted pursuant to § 1157, and individuals who still qualify as *refugees* may nevertheless lose the protection of *asylum* under § 1158 for reasons unrelated to whether they face persecution in their country of origin.

Finally, and most relevant here, refugees admitted under § 1157 and those granted asylum under § 1158 follow different routes to LPR status. *See id.* § 1159. Section 1159(a) establishes a path to lawful permanent resident status for any noncitizen admitted to the United States under § 1157—

> (A) whose admission *has not been terminated* by the Secretary of Homeland Security or the Attorney General pursuant to such regulations as the Secretary of Homeland Security or the Attorney General may prescribe,
>
> (B) who has been physically present in the United States for at least one year, and
>
> (C) who has not acquired permanent resident status.

Id. § 1159(a)(1) (emphasis added).

By contrast, with respect to noncitizens granted asylum under § 1158,

> The Secretary of Homeland Security or the Attorney General . . . may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

> (1) applies for such adjustment,
>
> (2) has been physically present in the United States for at least one year after being granted asylum,
>
> (3) *continues to be a refugee* within the meaning of section 1101(a)(42)(A) of this title or a spouse or child of such a refugee,
>
> (4) is not firmly resettled in any foreign country, and
>
> (5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this chapter *at the time of examination* for adjustment of such alien.

Id. § 1159(b) (emphases added).

Review of the statutory section at issue here, § 1159, thus teaches us that Congress can and does specify when a noncitizen must maintain a predicate status in order to be potentially eligible for adjustment of status. It did so *three times* within § 1159. In § 1159(a) it expressly limited the path to lawful permanent resident status to a noncitizen admitted under § 1157 "whose admission *has not been terminated*." *Id.* § 1159(a)(1) (emphasis added). And in § 1159(b) it limited the path to lawful permanent resident status for a noncitizen granted asylum to a noncitizen who "continues to be a refugee" and is admissible "at the time of examination." *Id.* §§ 1159(b)(3), 1159(b)(5). 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 purposely in the disparate inclusion or exclusion." *Mahdawi v. Trump*, 136 F.4th 443, 454 (2d Cir. 2025).

To steal an apt summary from Judge Harris, dissenting in *Cela v. Garland*:

> This was not just a Congress that knew how to say—if it wanted to—that a noncitizen once granted asylum would remain eligible for adjustment only if he "continued to be" an asylee, *cf.* § 1159(b)(3), or if he was an asylee "at the time of examination for adjustment of status," *cf.* § 1159(b)(5). This was a Congress downright preoccupied with the timing question in front of us now, and against that background, its failure to specify that asylee status must be current under § 1159(b) can only be understood as a purposeful omission.

75 F.4th at 367 (Harris, J., dissenting).

This understanding is bolstered by the Department of Justice's implementing regulations, which specify that § 1159(b) applies to any individual "who *has been* granted asylum," rather than to any individual who is currently protected by asylum. 8 CFR § 1209.2(a)(1) (emphasis added); *see also D.S. by and through M.S. v. Trumbull Bd. of Educ.*, 975 F.3d 152, 163 (2d Cir. 2020) (explaining that a statute's implementing regulations may "support[ ]" the "clear" language of a statute).

That doesn't mean that all bets are off once an individual is granted asylum, regardless of subsequent termination of that protection. But the critical *continuing* status for purposes of adjustment to lawful permanent resident status under § 1159(b) is the noncitizen's continuing status as a *refugee*. And, of course, the individual whose asylum has been terminated but who is eligible to apply for adjustment of status must still qualify for the adjustment in all

other respects, including satisfying the requirements for admissibility. 8 U.S.C. § 1159(b)(5).

Contrary to the BIA's suggestion in its own analysis of the central question in this case, this understanding of the statute does not give individuals who were granted and then lost their asylum an incongruous advantage over refugees admitted pursuant to § 1157 whose refugee status has been terminated. *See Matter of T-C-A-*, 28 I. & N. Dec. 472, 479–80 (B.I.A. 2022). Remember, the only statutory basis for revoking the refugee status of an individual admitted under § 1157 is that the noncitizen "was not in fact a refugee" when they were admitted. 8 U.S.C. § 1157(c)(4). Requiring continuity of status under these circumstances thus guards against granting an LPR status adjustment to individuals who didn't actually qualify as refugees upon admission. By contrast, individuals granted asylum under § 1158 can lose that status for a host of reasons unrelated to their status as refugees. *See id.* § 1158(c)(2). Given that, it is not at all incongruous to allow individuals whose asylum has been terminated to seek adjustment to LPR status; in doing so, they still have to establish that, asylum or not, they continue to be *refugees*. *See id.* § 1159(b)(3).

I don't deny that some textual breadcrumbs in the statutory structure could lead to a different conclusion. The majority has highlighted them here—the notion that once someone's asylum is revoked they have no "status" to adjust, and the use of "granted asylum" to suggest a present status in § 1158(c). Maj. Op. at 106–07. That's what makes this a hard case. But in my view, the specific inclusion of multiple continuity requirements in the very same statutory section as the phrase at issue

here coupled with the omission of such a requirement with respect to individuals "granted asylum" overwhelms these other textual clues.[3]

II. Statutory Scheme

My understanding of the statute also jibes better with the broader statutory scheme by maintaining the balance Congress struck in affording the Attorney General or the Secretary of Homeland Security discretion to waive certain grounds of inadmissibility in considering requests for adjustment of status—

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[3] The majority also leans on a statutory note in the Immigration Act of 1990 regarding § 1159. The note, titled "Adjustment of Certain Former Asylees," provides that the adjustment provision of 8 U.S.C. § 1159(b) "shall also apply to an alien . . . who was granted asylum before the date of the enactment of this Act (regardless of whether or not such asylum has been terminated under [8 U.S.C. § 1158])" and "who is no longer a refugee because of a change in circumstances in a foreign state." Pub. L. No. 101–649, sec. 104(d), 104 Stat. 4978, 4985 (1990). The Act also increased the then-existing cap on adjustments of status under § 1159(b) from 5,000 to 10,000. *Id.* sec. 104(a)(1). The majority interprets this note as expanding the reach of § 1159(b) to noncitizens whose asylum has been terminated on a time-limited, one-off basis, signaling that the default understanding is that § 1159(b) is available only to individuals who continue to be protected by asylum. Maj. Op. at 108–09. This inscrutable note clearly *does* create a one-time exception to the ordinary operation of § 1159(b) for individuals who are no longer *refugees* due to a change of circumstances in the countries from which they have taken refuge. But as to the parenthetical cited by the majority, it seems just as plausible that Congress recognized that noncitizens who have been granted asylum may be eligible for adjustment of status *whether or not their status has been terminated*, and accordingly sought to clarify that § 1159(b) applies to all noncitizens granted asylum *before the date of the 1990 Act*, even if their status was terminated before that date. In the end, this data point doesn't move the needle.

including grounds based on many criminal convictions—in order to assure family unity or promote the public interest.

Again, an overview. Subject to an exception, one of the requirements for awarding LPR status to a noncitizen "granted asylum" is that the noncitizen be "admissible." 8 U.S.C. § 1159(b)(5). Section 1182(a) lists classes of noncitizens who are inadmissible. *See id.* § 1182(a). The exception to this admissibility requirement is set forth in § 1159(c), which makes some grounds of inadmissibility under § 1182(a) inapplicable to requests for adjustment of status under § 1159, and confers on the Secretary of Homeland Security and the Attorney General the discretion to waive most other grounds of inadmissibility under § 1182(a), including inadmissibility based on many criminal convictions, in order to promote humanitarian purposes, family unity, or the public interest. *See id.* § 1159(c); *see also id.* § 1182(a)(2) (identifying criminal convictions that can lead to inadmissibility). So Congress' scheme expressly contemplates that some noncitizen refugees with criminal convictions, including for potentially serious crimes, may nevertheless be eligible for LPR status, and it empowers the Attorney General or Secretary to weigh the public interest, including the interest in family unity, against an otherwise disqualifying conviction.

The majority's interpretation deprives the Attorney General or Secretary of that discretion in cases in which asylum has been terminated. So noncitizens like Petitioners here, who lose their asylum due to conviction for a "particularly serious crime," *id.* §§ 1158(c)(2)(B),1158(b)(2)(A)(ii), would be *categorically* ineligible for adjustment to LPR status,

and the Attorney General and Secretary would have no discretion to make an exception in the public interest. That's true even though the same noncitizens would be eligible to seek LPR status notwithstanding those convictions, and the Attorney General and Secretary would have discretion to make an exception in the public interest, if the noncitizens' asylum had not been terminated. It's an incongruous result.

And it means that the Attorney General's and Secretary's authority to grant LPR status, and the options available to a noncitizen asylee facing termination of asylum even though the noncitizen remains a refugee, depend entirely on the order in which the two petitions—for termination of asylum and for adjustment of status—are considered. That, too, is incongruous.

As it turns out, the better interpretation based on the text of the statute also best preserves the balance Congress struck by affording the Attorney General and Secretary discretion to extend LPR status to noncitizens who are refugees who have committed crimes that might otherwise be disqualifying.

The majority suggests that this interpretation "makes little sense" because it leaves noncitizens whose asylum has been terminated on account of a criminal conviction in the same shoes as noncitizens with asylum. Maj. Op. at 109. But in an important respect, these two categories of noncitizens do stand in the same shoes: both have been found to be refugees. To the extent that the two classes differ—members of one group have been convicted of particularly serious crimes—the statutory structure takes account of that fact: Most noncitizens who have been convicted of particularly serious crimes are

presumptively inadmissible and thus ineligible for adjustment of status, 8 U.S.C. §§ 1159(b)(5), 1182(a)(2), *unless* their crimes of conviction fall within the class of crimes for which inadmissibility may be waived for purposes of adjustment of status, and *unless* the Attorney General or Secretary chooses to waive that inadmissibility "for humanitarian purposes, to assure family unity, or . . . in the public interest," *id.* § 1159(c). There is nothing insensible about that structure. Insofar as it aligns with Congress' intent on multiple axes, and retains Executive Branch discretion to promote family unity, humanitarian goals, and the public interest, it makes far more sense than a reading that categorically strips the Attorney General and Secretary of their discretion.

* * *

For these reasons, I conclude that § 1159(b) provides a mechanism for refugees granted asylum pursuant to § 1158 to adjust to LPR status regardless of whether their asylum has been terminated—as long as they remain refugees and otherwise qualify for adjustment to LPR status. Accordingly, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of October, two thousand twenty-five.

Tamer S Wassily,

Petitioner,

v.

Pamela Bondi, United States Attorney General,

Respondent.

ORDER

Docket No: 22-6247

Petitioner Tamer S Wassily has filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagen Wolfe, Clerk

/s/ *Catherine O'Hagen Wolfe*

[emblem omitted]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of October, two thousand twenty-five.

Byron E. Velasquez Arreaga,

Petitioner,

v.

Pamela Bondi, United States Attorney General,

Respondent.

ORDER

Docket No: 23-6289

Petitioner Byron E. Velasquez Arreaga has filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagen Wolfe, Clerk

/s/ *Catherine O'Hagen Wolfe*

[emblem omitted]

[JA3-5]

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF: Tamer S. WASSILLY, A026-102-429 Respondent	**FILED** Apr 27, 2022

ON BEHALF OF RESPONDENT: Marissa A Prianti, Esquire
ON BEHALF OF DHS: Fen Lu, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS

On Appeal from a Decision of the Immigration Court, New York, NY

Before: Goodwin, Appellate Immigration Judge

GOODWIN, Appellate Immigration Judge

The Department of Homeland Security ("DHS") appeals an Immigration Judge's decision dated October 21, 2019, granting the respondent's application for adjustment of status in conjunction with a waiver of inadmissibility under section 209(b), (c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1159(b), (c).[1] The respondent, a native and

[1] As an initial matter, we observe that the Immigration Judge found the respondent statutorily ineligible for asylum and withholding of removal under sections 208(b)(l)(A) and 241(b)(3)(A) of the INA, 8 U.S.C. §§ 1158(b)(l)(A), 123l(b)(3)(A), because of his conviction fur a particularly serious crime (IJ at

citizen of Egypt, opposes the appeal. DHS's appeal will be sustained, the Immigration Judge's decision will be vacated as to adjustment of status, and the respondent will be ordered removed.

We set forth the uncontested procedural history for clarity. The respondent was born in 1974, arrived in the United States in 1993 on a visitor's visa, and filed an application for asylum in 1998 on account of his Coptic Christian religion; asylum was granted in 2000 (IJ at 1; Exhs. 2, R1).[2]

Subsequently, in 2004, the respondent was convicted under New York Penal Code sections 120.50(3), and 260.10(01) for stalking in the third degree, and endangering the welfare of a child, respectively (IJ at 2-3; Exhs. R2, R4). In 2007, DHS motioned to reopen this case and terminate asylum (IJ at 2-3; Exhs. R2, R3, R9, R11). The Immigration Judge reopened, concluded the respondent's stalking conviction was for a particularly serious crime, and on September 3, 2008, terminated the respondent's asylee status and denied the respondent's

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5-7). Section 208(b)(2)(A)(ii) of the INA, 8 U.S.C. § 1158(b)(2)(A)(ii). However, as neither party has meaningfully challenged the denial of these applications, we consider the opportunity to do so to have been waived on appeal. *See Matter of Y-I-M-*, 27 I&N Dec. 724, 729 n.2 (BIA 2019). Further, the United States Court of Appeals for the Second Circuit found no error with the original denial of deferral of removal under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) ("CAT"). As such, we need not address the denial of that form of relief as it is not before us.

[2] All citations to the IJ decision are to the 2019 decision, unless otherwise noted.

applications fur withholding of removal under the INA and CAT (IJ at 2-3; Exhs. R4, R9, R11). In 2010, the Board dismissed the appeal. In 2013, the Second Circuit dismissed the appeal as to CAT, but granted the petition for review as to asylum and withholding of removal and the case was remanded (IJ at 2-3; Exhs. RB1, RB2).

Upon remand, the Immigration Judge again found the respondent ineligible for asylum and withholding of removal on the basis that his stalking conviction for a particularly serious crime, but separately found that the respondent was eligible to adjust his status to that of a lawful permanent resident under section 209(b) with a waiver under section 209(c), and granted that application (IJ at 5-10).

On appeal, DHS argues that the respondent is ineligible to apply for adjustment of status under section 209(b) and thus may not seek a section 209(c) waiver, because he was not "granted asylum" at the time he sought adjustment (*Compare* DHS Br. at 8-11 *with* Respondent's Br. at 3-8).

While we appreciate the considered decision of the Immigration Judge, and the briefs of both parties on appeal, subsequent to this appeal, the Board issued its decision in *Matter of T-C-A-*, 28 I&N Dec. 472 (BIA 2022). Therein, the Board held that an applicant for adjustment of status under section 209(b) of the INA, 8 U.S.C. § 1159(b), must possess asylee status at the time of adjustment, and that he cannot adjust to lawful permanent resident status under this provision if his status has been terminated. *Id.* at 474-480. This case resolves the arguments of both parties on appeal pertaining to 209(b) eligibility. *Id.* at 476 ("Both the statute and regulation require applicants to possess an initial 'status' before they

may adjust to lawful permanent resident status. We conclude that this initial 'status' is asylee status." (citation omitted)). Here, the Immigration Judge terminated asylee status prior to the respondent's filing an application for adjustment of status under section 209(b) of the INA (IJ at 5-7). As this case is both binding and directly applicable, and there is no contravening case law from the Second Circuit, the respondent is therefore ineligible to apply fur adjustment of status.

As there are no other controlling issues, we need not address the other arguments presented on appeal. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (stating that an agency is not required to make findings on issues which are unnecessary to the result reached).

Accordingly, the following orders will be entered.

ORDER: DHS's appeal is sustained.

FURTHER ORDER: The respondent is round ineligible for adjustment of status under section 209(b) and ineligible fur a waiver under section 209(c), and the Immigration Judge's October 21, 2019, decision is vacated as to adjustment of status.

FURTHER ORDER: The respondent is ordered removed to Egypt based on the charges in the Notice to Appear.

[JA92-102]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

File No.: A 026-102-429

In the Matter of **WASSILLY, Tamer S., aka WASSILY, Tamer** Respondent	:	**IN REMOVAL PROCEEDINGS**

CHARGE:	INA § 237(a)(J)(B)	Visa Overstay
APPLICATIONS:	INA § 208	Asylum
	INA § 241(b)(3)	Withholding of Removal
	INA § 209(b)	Adjustment of Status
	INA § 209(c)	Waiver of Inadmissability

ON BEHALF OF THE RESPONDENT	ON BEHALF OF DHS
Disha Chandiramani, Esq. Bretz & Coven, LLP	Fen Lu, Esq. Assistant Chief Counsel

305 Broadway, Suite 100 New York, NY 10007	290 Broadway New York, NY 10007

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Tamar S. Wassilly ("Respondent") is a forty-five-year-old male native and citizen of Egypt. (Ex. 1). He was admitted to the United States ("U.S.") on a B-2 visitor's visa at New York, New York, on November 13, 1993, with authorization to remain in the U.S. until May 11, 1994. On February 12, 1998, Respondent filed for asylum, claiming he was persecuted in Egypt on account of his Coptic Christian religion. (Ex. 2). The asylum officer referred his case to the Immigration Court, and on June 25, 1998, the legacy Immigration and Naturalization Service ("INS"), served Respondent a Notice to Appear ("NTA") via regular mail.[1] The NTA alleges, *inter alia*, that Respondent remained in the U.S. beyond May 11, 1993, and charged him with removability pursuant to section 237(a)(l)(B) of the Immigration and Nationality Act ("INA"), as a nonimmigrant who overstayed his authorized period of admission. (Ex. 1).

Respondent admitted the factual allegations and conceded the charge of removability contained in the NTA. After conducting a merits hearing on August 11, 2000, I granted Respondent's application for asylum. (Ex. R1). On March 22, 2004, Respondent

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[1] As of March 1, 2003, the Homeland Security Act of 2002 dissolved INS and transferred its enforcement responsibilities to the Department of Homeland Security ("DHS"). Pub. L. No. 107-296, 116 Stat. 2135.

was convicted of stalking in the third degree, in violation of New York Penal Law ("NYPL") § 120.50(3), and endangering the welfare of a child in violation of NYPL § 260.10(01). (Ex. R2, Tab A). Based on these convictions, on February 15, 2007, DHS moved to reopen Respondent's removal proceedings and terminate his asylum status. (Ex. R2). On April 10, 2007, I granted DHS's motion to reopen. (Ex. R3). On December 19, 2007, I issued a written decision finding that Respondent's conviction under NYPL § 120.50(3) was for a particularly serious crime, but indicated that I would consider Respondent's applications for relief. (Ex. R9). On February 12, 2008, Respondent filed an amended application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). (Ex. R11, Tab A). Thereafter, I held a full merits hearing regarding his eligibility for such relief. Id.

On September 3, 2008, I denied Respondent's applications for relief. Respondent filed a timely appeal with the Board of Immigration Appeals ("BIA"). On June 14, 2010, the BIA affirmed my decision and dismissed Respondent's appeal. Respondent filed a timely appeal with the Second Circuit Court of Appeals ("Second Circuit"), and the Second Circuit remanded his case to the BIA on May 1, 2014.[2] On June 4, 2014, the BIA remanded for me to: "reconsider whether the [R]espondent's conviction is for a particularly serious crime [without referring to] the presentence report in making that determination." (Ex. RB1 at 2). The BIA also directed

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[2] The Second Circuit found no error with my denial of deferral of removal under the CAT, therefore I will not address this form of relief in this opinion.

that Respondent should be given the opportunity to apply for adjustment of status. Id.

On September 6, 2017, Respondent filed a Form I-485, Application to Register for Permanent Residence or Adjust Status ("adjustment of status"), and Form I-602, Application by Refugee for Waiver of Excludability ("I-602 waiver"). (Ex. RC3, Ex. RC4). On May 22, 2019, Respondent and his sister, Sally Wassily ("Ms. Wassily"), provided testimony in support of his applications for adjustment of status and I-602 waiver.

For the reasons that follow, I find that Respondent's conviction for stalking in violation of NYPL § 120.50(3) is for a particularly serious crime. Respondent's asylum status will therefore be terminated. I also deny Respondent's application for withholding of removal pursuant to INA § 241(b)(3), but grant his applications for adjustment of status pursuant to INA § 209(b) and waiver of inadmissibility pursuant to INA § 209(c).

II. NEW AND RELEVANT EXHIBITS[3]

Exhibit 1:	NTA, issued June 22, 1998;
Exhibit 2:	Respondent's asylum application, sworn May 11, 1998;
Exhibit R1:	Order of the Immigration Judge granting Respondent's application for asylum, issued August 11, 2000;

[3] There were filings that received duplicative exhibit numbers markings throughout the course of these proceedings. For the sake of clarity, the exhibits have been remarked as listed above.

Exhibit R2:	DHS's motion to reopen removal proceedings, Tab A, dated February 15, 2007;
Exhibit R3:	Decision and Order of the Immigration Judge granting DHS's motion to reopen, issued April 10,2007;
Exhibit R4:	Evidence of Respondent's criminal history, Tabs A-E, filed July 24, 2007;
Exhibit R5:	Respondent's submission, received October 1, 2007;
Exhibit R6:	Letter from Respondent's employer, received October 6,2007;
Exhibit R7:	DHS's memorandum of law, Tab A, received November 14,2007;
Exhibit R8:	Respondent's submission, received November 27, 2007;
Exhibit R9:	Decision of the Immigration Judge, issued December 19,2007;
Exhibit R10:	Respondent's submission, Tabs A-C, received December 26, 2007;
Exhibit R11:	Respondent's submission, Tabs A-B, received February 20, 2008;

Exhibit R12:	Letter to U.S. Department of State, dated February 22, 2008;
Exhibit R13:	Respondent's submission, dated April 1, 2008;
Exhibit R14:	Country conditions on Egypt, received April 28, 2008;
Exhibit RB1:	BIA remand order, dated June 4, 2014;
Exhibit RB2:	Second Circuit opinion, dated May 1, 2014;
Exhibit RC2:	Order of the Immigration Judge, dated August 8, 2017;
Exhibit RB3:	Respondent's submission. Tab A, received October 21, 2016;
Exhibit RC3:	Respondent's Form I-602, Application by Refugee for Waiver of Excludability, received September 6, 2017;
Exhibit RB4:	DHS's memorandum, filed November 21, 2016;
Exhibit RC4:	Respondent's Form I-485, Application to Register for Permanent Residence or Adjust Status, received September 6, 2017;
Exhibit RB5:	Respondent's submission, Tabs B-E, received January 31, 2018;

Exhibit RB6:	Respondent's witness list, received January 31, 2018;
Exhibit RB7:	Respondent's submission, Tab F;
Exhibit RB8:	Respondent's submission, Tab G, received August 28, 2018;
Exhibit RB9:	Respondent's submission, Tab H, received February 7, 2019;
Exhibit RB10:	Respondent's Form I-693, Report of Medical Examination and Vaccination Record, received May 22, 2019; and
Exhibit RC10:	Respondent's submission, Tab I, received April 8, 2019.

III. TESTIMONY SUMMARY

The following section represents a summary of the relevant testimonies and not findings of fact. See Huang v. Holder, 677 F.3d 130, 137 (2d Cir, 2012) ("[T]he [Immigration Judge] should take pains to make clear what part of his or her determination is fact-finding").

A. Respondent

Respondent was born on January 1, 1974, in Egypt. He last entered the U.S. in 1993. Respondent works in shipping at a factory that makes police badges, and has worked there for nineteen years. Respondent testified that he lives with his brother, sister, and mother. He does not have any family left in Egypt. He stated that he is concerned about going back to Egypt because he has no family there, will not

be able to find work, and will not have anyone to support him. Also, he testified that Muslims are killing Coptic Christians in Egypt. Respondent is a Coptic Christian and goes to church every Sunday with his family. Respondent stated that he becomes anxious easily; however, he does not receive regular treatment for anxiety.

Further, Respondent was arrested twice in the U.S. He stated that he was first arrested in Port Chester, New York. He stated that "they" thought he was opening the zipper of his pants; however, he was not opening up his zipper, but rather was just straightening up his pants. Respondent was arrested a second time in 2004 at "the Galleria." Respondent testified that he was arrested as "they" thought he was stalking a female, but he was listening to music and was not stalking her,

B. Respondent's Sister-Sally Wassily ("Ms. Wassily")

Ms. Wassily is Respondent's sister and testified that she has lived with Respondent her whole life. She stated that Respondent has worked at a police badge company for the past nineteen years. Ms. Wassily has a son who has special needs. She testified that Respondent is very close to her son. Respondent has been around children on multiple occasions and has never had an issue.

Ms. Wassily testified that she is aware that Respondent was arrested twice in the U.S. She stated that he was last arrested in 2004 and has had no interactions with law enforcement since. Ms. Wassily believes that Respondent is maturing and will not encounter law enforcement in the future. Further, she stated that the stalking victim was around

seventeen years old. She testified that her brother is friendly and did not have bad intentions when speaking to the victim at "the Galleria." Ms. Wassily testified that Respondent used to have problems with alcohol; however, he has not drank alcohol since 2004.

IV. LEGAL STANDARDS AND ANALYSIS

A. The witnesses were credible and Respondent sufficiently corroborated his adjustment of status and I-602 waiver applications.

For applications filed on or after May 11, 2005, I must determine Respondent's credibility by "the totality of the evidence and all relevant factors." Matter of S-B-, 24 I&N Dec. 42,42-43 (BIA 2006); see also INA § 240(c)(4)(C). A credibility determination may be based on: the demeanor, candor, or responsiveness of the applicant or witness; the inherent plausibility of the account; the consistency between oral and written statements; the internal consistency of such statements; the consistency of such statements with other evidence of record; and any inaccuracy or falsehood in such statements, "without regard to whether an inconsistency, inaccuracy, or falsehood, goes to the heart of the applicant's claim"; or any other factor. See INA § 240(c)(4)(C).

An alien requesting relief from removal bears the evidentiary burden of proof and persuasion in connection with any application. INA § 240(c)(4). Moreover, the applicant must provide corroborating evidence requested by the Immigration Judge pursuant to INA § 240(c)(4)(B), unless it cannot be reasonably obtained. See Matter of Almanza-Arenas, 24 I&N Dec. 771, 774 (BIA 2009).

For purposes of this decision, I find that Respondent testified credibly during the May 22, 2019 hearing. Respondent submitted documentation establishing that he suffers from intellectual disorder, mild. (Ex. RB9). Therefore, as a safeguard, I give full credit to Respondent's testimony. See. e.g., Matter of J-R-R-A-, 26 I&N Dec. 609 (BIA 2015).

Further, I find Respondent's sister, Ms. Wassily, to be credible. Her testimony was consistent, forthcoming, and plausible. I also find that Respondent provided extensive corroborating evidence, including identification documents, certificates of disposition, and tax filings. (Exs. RB5-RB10). Therefore, after carefully reviewing the record, I find that Respondent testified credibly and provided sufficient corroborating evidence to support his applications.

B. Respondent is not eligible for asylum pursuant to INA § 208 because his conviction for NYPL § 120.50(3) is a particularly serious crime.

An applicant is not eligible for asylum if he has been convicted, by a final judgment, of a particularly serious crime. INA § 208(b)(2)(A). "The Attorney General (or his agents) may determine that a crime is particularly serious for purposes of the asylum statute . . . even though it is not an aggravated felony." Nethagani v. Mukasey, 532 F.3d 150, 156 (2d Cir. 2008); see also INA § 208(b)(2)(B)(ii). If the Immigration Judge determines that an applicant has been convicted of a particularly serious crime, the applicant necessarily constitutes a danger to the community, Flores v. Holder, 779 F.3d 159, 167 (2d Cir. 2015) (citing Nethagani, 522 F.3d at 154 n.l). Therefore, the proper focus for determining whether

a crime is particularly serious is on the nature of the crime and not the likelihood of future serious misconduct. Matter of N-A-M-, 24 I&N Dec. 336, 342 (BIA 2007).

In "determin[ing] whether the crime was particularly serious" the Immigration Judge should consider "(1) the nature of the conviction, (2) the circumstances and underlying facts of the conviction, (3) the type of sentence imposed, and (4) whether the type and circumstances of the crime indicate that the alien will be a danger to the community," Nethagani, 532 F.3d at 155 (citing Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992)). The judge should first determine whether "the elements of the offense . . . potentially bring the crime into a category of particularly serious crimes." N-A-M-, 24 I&N Dec. at 342. If not, "the individual facts and circumstances of the offense are of no consequence" and the applicant is not barred from asylum. N-A-M-, 24 I&N Dec. at 342.

In this case, the elements of the crime, NYPL § 120.50(3), do potentially bring the crime into a category of particularly serious crimes. Under NYPL § 120.50(3), an individual is guilty of stalking in the third degree when:

> [he or she] . . . with intent to harass, annoy or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnapping, unlawful imprisonment or death of such person or a member of such person's immediate family.

NYPL § 120.50(3). Considering that the Second Circuit has found that crimes against persons are more likely to be particularly serious than crimes against property, and that to be convicted, the offender's conduct must likely cause the victim to fear, among other outcomes, serious injury, a sexual offense, or death, I find that the elements of this crime do indeed potentially bring this crime into a category of particularly serious crimes. See Nethagani, 532 F.3d at 155, Matter of Mendoza Osorio, 26 I&N Dec. 703,712 (BIA 2016), N-A-M-, 24 I&N Dec. at 343; see also Matter of L-S-, 22 I&N Dec. 645, 649 (BIA 1999). Therefore, I will consider all reliable information in making my determination regarding whether Respondent's violation of NYPL § 120.50(3) is itself a particularly serious crime. See N-A-M-, 24 I&N Dec. at 342 (if a judge finds the elements of a crime "potentially bring the offense within the ambit of a particularly serious crime," the judge may consider all reliable information to make a particularly serious crime determination, "including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction").

The circumstances and underlying facts of the conviction in this case strongly support a finding that this is a particularly serious crime. The record of conviction in this case is comprised of a certificate of disposition and a plea colloquy. (Ex. R7, Tab A, Ex. R2, Tab A). The certificate of disposition establishes that Respondent pled guilty to NYPL § 120.50(3). (Ex. R7, Tab A). The plea colloquy establishes that the Respondent, under oath, pled guilty to stalking. (Ex. R2, Tab A). Respondent subsequently specifically admitted that he stalked a

sixteen year old girl and had sexually explicit conversations with her. Id. at 12. During this plea hearing, the court asked Respondent several times if he understood the proceedings, what was being asked of him, and if he was pleading guilty freely and voluntarily.[4] Id. at 6,11-12. The circumstances and underlying facts of the case are further aggravated by the fact that the victim was sixteen years old and that, by Respondent's own admission, he was intoxicated during the commission of this crime. Thus, I find that these circumstances strongly support a finding that this crime is particularly serious.

The probationary nature of the sentence imposed does not necessarily indicate a particularly serious crime, however the sentence does not always reflect

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[4] During the 2008 merits hearing, Respondent testified that he had not actually committed the acts he pled guilty to, but that he only pled guilty because he wanted to get out of jail, that his attorney advised him to plead guilty, and that he did not swear to not having been promised any benefits in exchange for his guilty plea. The transcript from his plea colloquy however, establishes that Respondent was placed under oath before being asked these questions. (Ex. R2, Tab A). Presented with this inconsistency between his testimony and the record. Respondent changed his testimony and stated instead that at the time of his plea colloquy, he did not remember being promised any benefits in exchange for his guilty plea. As I noted in my September 3, 2008 decision, I did not find Respondent's testimony during that hearing credible. I also found that Respondent's explanations of the inconsistencies between his testimony and plea colloquy, which were elicited upon being confronted with inconsistencies, were attempts to preserve his credibility. See Majidi v. Gonzales, 430 F.3d 77, 80-81 (2d Cir. 2005) (an applicant's explanations need not be credited unless those explanations would compel a reasonable fact-finder to do so).

the severity of the crime. See Matter of R-A-M-, 25 I&N Dec. 657, 662 (BIA 2012), *quoting* N-A-M- (finding the nature of applicant's crime—child pornography—so condemnable that the length of the sentence is less significant to the analysis). I find that the circumstances of the crime outlined above are sufficiently serious to outweigh the relative leniency of the sentence. Whether Respondent is a danger to the community based on the type and circumstances of this crime is unclear, though I note with concern that Respondent violated several of his probation requirements, including being discharged from his sex offender treatment program for a failure to progress in treatment. (Ex. R4, Tab A). Thus, these last two elements are not dispositive. I find that the nature of the conviction, along with the circumstances and underlying facts of the conviction, necessitate a finding that this is a particularly serious crime. Therefore, Respondent is statutorily ineligible for asylum. INA § 208(b)(2)(A). Accordingly, his asylum status is terminated.

C. Respondent is statutorily ineligible for withholding of removal pursuant to INA § 241(b)(3) because his conviction under NYPL § 120.50(3) is a particularly serious crime.

As explained above, I find that Respondent's conviction under NYPL § 120.50(3) constitutes a particularly serious crime. Aliens convicted of particularly serious crimes are ineligible for withholding of removal under INA § 241(b)(3). See INA § 241(b)(3)(B)(ii); see also N-A-M-, 24 I&N Dec. at 337-38. Therefore, Respondent's application for relief under INA § 241(b)(3) is denied.

D. Respondent is eligible to adjust his status under INA § 209(b) as he merits a favorable exercise of discretion for a waiver pursuant to INA § 209(c).

An alien who has been granted asylum in the U.S., if otherwise eligible, may adjust his status to that of a lawful permanent resident ("LPR"). INA § 209(b). I may adjust the status of a person granted asylum to that of an LPR if he: (1) applies for adjustment; (2) has been physically present in the U.S. for at least one year after being granted asylum; (3) continues to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such a refugee, (4) is not firmly resettled in any foreign country, and (5) is admissible at the time of examination for adjustment of status. Id.; INA § 209(b).

1. Application for Adjustment of Status

The first requirement of INA § 209(b) is that Respondent must apply for adjustment of status. Respondent has filed Form I-485, Application to Register Permanent Residence or Adjust Status. (Ex. RC4). Therefore, Respondent has satisfied this prong of INA § 209(b).

2. Physical Presence

The second requirement of INA § 209(b) is that Respondent be physically present in the U.S. for at least one year after being granted asylum. Respondent was granted asylum on August 11, 2000 under INA § 208(a), and has been physically present in the U.S. for almost twenty years since this grant. (Ex. R1). Therefore, Respondent has satisfied this prong of INA § 209(b).

3. Refugee Pursuant to INA § 101(a)(42)(A)

The third requirement of INA § 209(b) is that Respondent continues either to be a refugee within the meaning of INA § 101(a)(42)(A) or a spouse or child of such a refugee. Pursuant to INA § 101(a)(42)(A), a refugee is a "person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that county because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

I note that although I terminated Respondent's asylee status, this termination does not impact his eligibility for adjustment of status. The INA does not contain an explicit requirement that the applicant for adjustment of status under INA § 209(b) have continued asylee status to be eligible for adjustment. See INA § 209(b)(3). Adjustment of status under INA § 209(a) requires a refugee admitted under INA § 207 and applying to adjust their status under INA § 209(a) to maintain their status, but the INA contains no analogous requirement clause for adjustment of status under INA § 209(b). See § 209(a)(1)(A) (making eligible "[a]ny alien who had been admitted to the United States under section 207 . . . whose admission has not been terminated. . ."); INA § 209(b)(l)-(5). Rather, Respondent need only continue to meet the definition of a refugee under INA § 101(a)(42)(A). See INA § 209(b)(3). Here, I terminated Respondent's asylee status because he was convicted of a particularly serious crime. See INA § 208(b)(2)(A). Respondent was convicted of stalking in the third degree in violation of NYPL

§ 120.50(3) and was ordered to serve three years of probation. (Ex. B5, Tab D). I terminated Respondent's asylee status because of his conviction for a particularly serious crime, not because he ceased to possess a well-founded fear of persecution. Respondent was previously granted asylum based on his well-founded fear of persecution should he be returned to Egypt, and no evidence has been submitted to suggest that country conditions have changed so extensively as to eradicate the source of his fear.

Notably, the most recent U.S. Department of State Human Rights Report for Egypt ("2018 DOS Report") states that terrorist organizations caused arbitrary and unlawful deprivation of life, by conducting deadly attacks at places of worship. (2018 DOS Report at 2).[5] Further, the U.S. Department of State's International Religious Freedom Report for Egypt ("2018 Religious Freedom Report") states in Egypt "Islam is the religion of the state." (2018 Religious Freedom Report at 1). The government officially recognizes Christianity; however, Coptic Christians continued to suffer violence in Egypt. *Id.* In 2016 and 2017 bombings occurred at Coptic churches in Cairo, Alexandria, and Tanta, which killed more than eighty people. *Id.*

Further, the Egyptian government has not effectively prosecuted perpetrators of violence, as authorities responded to attacks against Christians

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[5] I take administrative notice of the most recent Department of State Human Rights Report and International Religious Freedom Report for Egypt. See Shao v. Mukasey, 546 F.3d 138, 166-68 (2d Cir. 2008); Yang v. McElroy, 277 F.3d 158,162-63 & n.4 (2d Cir. 2002).

through arbitration sessions rather than prosecution. *Id.* Moreover, "religious freedom and human rights activists said government officials' sometimes did not extend procedural safeguards or rights of due process to members of minority faiths." *Id.* at 11. Violent attacks against Christians continue in Egypt. This past year armed assailants attacked three buses carrying Christian pilgrims to a monastery, killing seven and wounding nineteen. *Id.* at 2. Further, there have been reported incidents of mob action against, and collective punishment of, Christians. *Id.* at 17. For instance, Muslim residents in Upper Egypt, "protested Christian religious services held in an unlicensed church, and looted four Christian-owned houses before setting them on fire. The attack injured two Coptic villagers." *Id.*

Consequently, I find that Respondent, a Coptic Christian, continues to meet the definition of a refugee and satisfies this element of eligibility of adjustment of status under INA § 209(b). See INA§ 101(a)(42)(A).

4. No Firm Resettlement

The fourth requirement of INA § 209(b) is that Respondent not be firmly resettled in another country. Respondent has not resettled in any country and has maintained his residence in the U.S.

5. Admissible at Examination for Adjustment of Status

The fifth requirement of INA § 209(b) is that Respondent be admissible at the time of examination for adjustment of status. In this case, Respondent is not admissible to the U.S. and thus requires an INA § 209(c) waiver to satisfy the final statutory

requirement for adjustment of status. See INA § 209(b)(5).

An INA § 209(c) waiver is discretionary and may be granted for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." Id. The discretionary analysis of this waiver requires balancing favorable and unfavorable factors that may include family ties within the U.S.; residency of long duration in this country; employment history; existence of value and service to the community; proof of genuine rehabilitation of a criminal record; evidence attesting to a Respondent's good or bad character; and the nature and underlying circumstances of inadmissibility grounds. See Matter of C-V-T, 22 I&N Dec. 7, 11 (BIA 1998); Matter of Marin, 16 I&N Dec. 581, 587 (BIA 1978), abrogated on other grounds by Matter of Edwards, 20 I&N Dec. 191 (BIA 1990); see also Chan v. Gantner, 464 F.3d 289, 295 (2d Cir. 2006).

Aliens who have committed violent or dangerous crimes will not be granted such a waiver unless the applicant "clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship." Matter of Jean, 23 I&N Dec. 373, 383 (A.G. 2002). Depending on the gravity of the underlying offense, however, a showing of such hardship may still be insufficient. Id. at 384. Although the crime committed by Respondent did not involve violent conduct, I find that it is a dangerous offense because it requires that the victim "reasonably fear physical injury or serious physical injury" and because the victim in this case was a minor. However, I find that Respondent has established that his removal would result in exceptional and extremely unusual hardship. In

making this determination, I have considered the following factors: 1) Respondent's lengthy residence in the U.S. which now exceeds twenty-five years; 2) his lack of family ties in Egypt and his substantial family ties in this country as well as his reliance on his family; 3) Respondent's adherence to a religious minority in Egypt which has been and continues to be subjected to violent attack and severe discrimination, and 4) Respondent's intellectual disorder which will likely increase his vulnerability to harm. See Ex. RB-9. Having made a threshold determination that Respondent has established the requisite level of hardship, I must determine whether a favorable exercise of discretion is warranted.

Respondent has established numerous positive equities. He submitted evidence that he pays taxes and a letter of support from his employer, for whom he has worked for the past nineteen years. (Ex. RB5, Tab E, Ex. RB10). Further, Respondent has lived in the U.S., with his family, for almost thirty-years. He is a Coptic Christian and received asylum in 2000 based on his well-founded fear of persecution in Egypt on account of his religion. As noted above, Respondent's removal to Egypt would likely cause him to experience significant hardship as he has no family there and is a member of a minority religion in Egypt.

Although an extremely close case, I find that Respondent's positive equities outweigh the adverse factors in the record. Respondent has a significant criminal history and has committed a particularly serious crime. In 1998, he pled guilty to disorderly conduct in violation of NYPL § 240.20(7), and in 2004, he pled guilty to stalking in the third degree in violation of NYPL § 120.50(3) and to endangering the

welfare of a child in violation of NYPL § 260.10(1). (Ex. RB5, Tab D). Respondent's testimony suggests that he fails to take responsibility for his actions, or indeed acknowledge any wrongdoing on his part. While I found Respondent competent to provide testimony, I recognize that his intellectual disorder may play a role in his failure to express remorse. Id. With regard to rehabilitation, however, Respondent has not reoffended since 2004. A lengthy period during which an alien has not reoffended is a significant indicator of rehabilitation.

I find that humanitarian considerations weigh in favor of a discretionary grant. Respondent still qualifies as a refugee as he has a well-founded fear of persecution in Egypt on account of his religion. Further, all of Respondent's family reside in the U.S. and family unification is a significant positive factor in this case. In this case, by a narrow margin, I find that the favorable discretionary factors in this record outweigh the adverse factors. However, I caution Respondent that any future criminal conduct will likely result in his removal from the United States. Accordingly, I grant Respondent's application for a waiver under INA § 209(c).

After a careful review of the record, the following Orders are entered:

ORDERS

IT IS HEREBY ORDERED that Respondent's asylee status be **TERMINATED**;

IT IS FURTHER ORDERED that Respondent's applications for asylum under INA § 208(a) and withholding of removal under INA § 241(b)(3), be **DENIED**;

IT IS FURTHER ORDERED that Respondent's application for an INA § 209(c) Waiver be **GRANTED**; and

IT IS FURTHER ORDERED that Respondent's application for adjustment of status under INA §209(b) be **GRANTED**.

10-21-19	/s/ Douglas Schoppert
Date	Douglas Schoppert Immigration Judge

[Handwritten note omitted]

[stamp omitted]

[JA694-95]

U.S. Department of Justice Executive Office for Immigration Review Falls Church, Virginia 20530	Decision of the Board of Immigration Appeals

File: A026 102 429 - New York, NY Date: Jun -4 2014

In re: TAMER S. WASSILLY

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Brian N. Wolf, Esquire

ON BEHALF OF DHS: David Shteingart
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(l)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] –
In the United States in violation of law

APPLICATION: Asylum; withholding of removal; remand[1]

This case is presently before us pursuant to a May 3, 2013, decision of the United States Court of Appeals for the Second Circuit granting the

[1] There is no request for protection under the Convention Against Torture (CAT) before us on remand as the court upheld the Immigration Judge's denial of CAT protection. The court also upheld the Immigration Judge's determination that the respondent did not demonstrate past persecution.

respondent's petition for review, and remanding the case.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application for relief was filed after May 11, 2005, and thus is subject to the statutory amendments made by the REAL ID Act. *Matter of S-B-,* 24 I&N Dec. 42 (BIA 2006).

The procedural history of this case is as follows. On September 3, 2008, the Immigration Judge denied the respondent's application for asylum, withholding of removal, and for protection under the Convention Against torture. The respondent appealed the Immigration Judge's decision. While the respondent's appeal was pending, he filed a motion to remand the proceedings to the Immigration Court pursuant to *Matter of Compean,* 24 I&N Dec. 710 (A.G. 2009), based on his prior counsel's deficient performance and so that he might apply for adjustment of status. In a decision dated June 14, 2010, the Board dismissed the respondent's appeal and denied his motion to remand.

The Second Circuit has requested that the Board: (1) re-consider whether the Immigration Judge was entitled to rely on the pre-sentence report (where the Immigration Judge also relied on alien's plea colloquy); and if not, (2) whether the respondent's conviction for stalking in the third degree under New York Penal Law section 120.50(3) is a particularly serious one based on the plea colloquy or other reliable information. Given the court's order, the

proceedings will be remanded for the Immigration Judge to reconsider whether the respondent's conviction is for a particularly serious crime. Given the evidence presented, the Immigration Judge, however, should not use the pre-sentence report in making that determination. *See Dickson v. Ashcroft,* 346 F.3d 44 (2d Cir. 2003). Given the Board's limited fact-finding ability, a remand to the Immigration Judge is warranted for further fact-finding and analysis of the respondent's claim. *See Matter of S-H,* 23 I&N Dec. 462 (BIA 2002). On remand, the Immigration Judge should address the issues raised in the remand and enter a further order regarding the respondent's applications for relief. The parties may submit additional reliable evidence. If the Immigration Judge concludes that the respondent's crime is not a particularly serious crime, then the respondent's asylee status should be reinstated.

The court also found that the respondent was prejudiced by his former counsel's failure to apply for adjustment of status, and disagreed with the Board's conclusion concerning the respondent's eligibility for adjustment of status. Therefore, on remand, the respondent should be given the opportunity to apply for adjustment of status.

Accordingly, the following order shall be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings in accordance with the court's order, and for the entry of a new decision.

/s/ John Guendelsberger
FOR THE BOARD

[JA749-52]

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

File: A026 102 429 – New York, NY Date: Jun 14 2010

In re: TAMER S. WASSILY

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Amanda Gray, Esquire

ON BEHALF OF DHS: Ada G. Guillod
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture; remand

The respondent, a native and citizen of Egypt, appeals from an Immigration Judge's decision dated September 3, 2008, denying his application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture ("CAT"), 8 C.F.R. §§ 1208.16-1208.18. While the respondent's appeal was pending, he filed a motion to remand the proceedings to the Immigration Court under *Matter of Compean* 24 I&N Dec. 710 (A.G. 2009), based on his prior counsel's deficient

performance and so that he may apply for adjustment of status. The motion to remand will be denied, and the appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-, 2*3 I&N Dec. 462 (BIA 2002). There is clear error in a factual finding when the reviewing Board member or panel is left with the definite and firm conviction that a mistake has been made. *See Matter of R-S-H-,* 23 I&N Dec. 629, 637 (BIA 2003). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-,* 24 I&N Dec. 493 (BIA 2008).

Since the respondent's asylum application was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act.[1] *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). Hence, the amendments made by the REAL ID Act to section 208(b)(1)(B) of the Act apply to this case.

The respondent's deficient performance of counsel claim, based on his former counsel's failure to request that the respondent be allowed to pursue adjustment of status prior to termination of his asylee status consistent with *Matter of K-A-,* 23 I&N Dec. 661 (BIA 2004), does not warrant reopening of these proceedings. We note that the Attorney General vacated the decision cited by the respondent in his motion to remand. *Matter of Compean, Bangaly & J-E-C-,* 25 I&N Dec. 1 (A.G. 2009), *vacating* 24 I&N

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1 *See* I.J. at 15.

Dec. 710 (A.G. 2009). Pending rulemaking procedures, the Board was directed to "apply the pre-*Compean* standards to all pending and future motions to reopen based upon ineffective assistance of counsel, regardless of when such motions were filed." Accordingly, we apply the standards articulated in *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988). The respondent fails to meet his burden of establishing that subject counsel's alleged failings were "egregious?" *Changxu Jiang v. Mukasey,* 522 F.3d 266, 270 (2d Cir. 2008) ("[t]he BIA properly determined that Jiang did not make a showing of ineffective assistance of counsel because he did not establish that his prior counsel's handling of the case was so egregious that his hearing was rendered unfair"). The respondent has failed to demonstrate that competent counsel would have acted otherwise, and that he was prejudiced by his prior counsel's performance. *See Romano v. INS,* 399 F.3d 109, 112 (2d Cir. 2005). Further, the Second Circuit has held that an attorney's "strategic decisions" in asylum proceedings cannot be the basis for an ineffective assistance claim. *Changxu Jiang v. Mukasey, supra,* at 270. Lastly, on the evidence before us, it does not appear that the respondent would be prima facie eligible for adjustment of status.

An alien convicted of a "particularly serious crime" is ineligible for withholding of removal under either section 241(b)(3) of the Act or the CAT. *See* section 241(b)(3)(B)(ii) of the Act; 8 C.F.R. § 1208.16(d)(2). However, deferral of removal under the CAT remains available to such an alien. 8 C.F.R. § 1208.17(a).

Whether a criminal offense qualifies as a particularly serious crime is a question of law that we review de novo, 8 C.F.R. § 1003.1(d)(3)(ii). As the

respondent was not sentenced to a term of imprisonment of at least 5 years, the offense does not automatically qualify as a particularly serious crime. Accordingly, we look first to the statutory elements of his crime to determine whether it was particularly serious. *Matter of N-A-M-,* 24 I&N Dec. 336, 342 (BIA 2007). 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. *Id.* at 342-43. Conversely, if the offense elements clearly do not define a particularly serious crime, then the section 241 (b)(3)(B)(ii) preclusion is inapplicable and no further inquiry into the factual circumstances of the crime is permitted. *Id.* at 342. However, there are situations where examination of the offense elements will establish only that the offense is *potentially* a particularly serious crime, *id* at 342; that is, that some offenses in violation of the statute are particularly serious crimes while others may not be. Once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, the burden is on the applicant to come forward with evidence to establish mitigating facts that would preclude such a designation in the particular case. *See* 8 C.F.R. §§ 1208.16(d)(2) and 1240.8(d) (indicating that where a ground for mandatory denial of an application for relief may apply, the applicant bears the burden of proving by a preponderance of the evidence that the ground is inapplicable). In seeking to meet this burden, the respondent may adduce any reliable information, including conviction records and sentencing information, as well as other information outside the confines of a record of conviction. *Matter*

of N-A-M-, supra. However, factors that are subsequent and unrelated to the commission of the offense, such as rehabilitation, bear only on sentencing and are irrelevant to a determination of whether a crime is "particularly serious?" *Matter of N-A-M-, supra,* at 343 (citing *Matter of Y-L-, A-G-, & R-S-R-,* 23 I&N Dec. 270, 273-74, 277-78 (A.G. 2002)).

We affirm the Immigration Judge's determination that the respondent's "conviction for stalking in the third degree under NYPL section 120.50(3) constitutes a particularly serious crime." *See* I.J. at 16. The Immigration Judge properly considered details contained in the pre-sentencing report in making the finding that:

> The repugnant and terrifying nature of the threats against the victim are further aggravated by the fact that the victim was sixteen years old and the fact that, by [the] [r]espondent's own admission, he was often intoxicated during the commission of this crime.

See I.J. at 17, As the respondent has been convicted of a particularly serious crime, he is therefore ineligible for asylum and withholding of removal under the Act, as well as, withholding of removal under the CAT. *See* section 241(b)(3)(B)(ii) of the Act; 8 C.F.R. § 1208.16(d)(2).

To qualify for deferral of removal under the CAT, an applicant must demonstrate that it is more likely than not that he will suffer "torture" in Egypt. For an act to constitute "torture" within the meaning of the CAT it must be:

> (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted;

> (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions.

Matter of J-E-, 23 I&N Dec. 291, 297 (BIA 2002); *see also* 8 C.F.R. § 1208.18(a). The Immigration Judge denied the respondent's application for deferral of removal under the CAT after finding that the respondent failed to carry his burden of proof (I.J. at 18-21). *See* 8 C.F.R. § 1208.17. We adopt and affirm the Immigration Judge's decision for the reasons stated therein. Given the record before the Immigration Judge, we conclude that there is no error in his denial of protection. In this regard, the respondent's claim is based on a claim of assumptions and speculation (*e.g.*, that the authorities in Egypt will have an interest in him based on his activities in this country, that they will become aware of his return to Egypt, that they will subject him to treatment amounting to torture, that the Egyptian government will not protect him). *See* 8 C.F.R. § 1208.18 ("Torture is an extreme form of cruel and inhuman treatment. . . ."); *Matter of J-F-F-,* 23 I&N Dec, 912 (A.G. 2006) (eligibility for deferral of removal under Convention Against Torture cannot be established by stringing together a series of suppositions where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen); *Matter of M-B-A-,* 23 I&N Dec. 474, 479-80 (BIA 2002).

The respondent has failed to establish how the Egyptian authorities would have knowledge of any of the following: (1) that he is a former asylee; (2) his activities in the United States; or (3) that he has

damaged Egypt's reputation abroad. The respondent has therefore failed to establish that it is more likely than not that he will be subjected to torture at the hands of the Egyptian authorities. The respondent has also failed to establish that it would not be reasonable for him to relocate within Egypt. *See* 8 C.F.R. § 1208.16(b)(3)(l). The respondent's arguments regarding the likelihood of torture are speculative and not based on evidence in the record. *See Matter of J-F-F-, supra,* at 917 (applicant fails to carry burden of proof if evidence is speculative or inconclusive).

Accordingly, the following orders shall be entered.

ORDER: The motion to remand is denied.

FURTHER ORDER: The respondent's appeal is dismissed.

/s/ Hugh G. Mullane

FOR THE BOARD

[JA1013-34]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
26 FEDERAL PLAZA, ROOM 1237
NEW YORK, NY 10278

File No.: A26-102-429

In the Matter of **WASSILLY, Tamer S.** Respondent	:	**IN REMOVAL PROCEEDINGS**

CHARGE:	INA § 237(a)(1)(B)	Visa Overstay
APPLICATION:	8 C.F.R. § 1208.16©	Convention Against Torture

ON BEHALF OF THE RESPONDENT	ON BEHALF OF THE DHS
David A. Barnett, Esq. Frenkel, Hershkowitz, & Shafran, LLP 16 East 34th Street New York, NY 10016	David Shteingart, Esq. Assistant Chief Counsel 26 Federal Plaza, Rm. 1130 New York, NY 10278

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Tamer S. Wassily ("Respondent") is a thirty-four-year-old male native and citizen of Egypt. He was admitted into the United States on a B-2 visitor's visa at New York, New York, on November 13, 1993, with authorization to remain in the United States until May 11, 1994. On February 12, 1998, Respondent applied for asylum, claiming that Muslims persecuted him in Egypt on account of his Coptic Christian religion. [Ex. 2.] Thereafter, on June 25, 1998, the former Immigration and Naturalization Service ("INS"),[1] served Respondent a Notice to Appear ("NTA") via regular mail. The NTA alleges, *inter alia,* that Respondent remained in the United States beyond May 11, 1993, and charges him with removability under section 237(a)(1)(B) of the Immigration and Nationality Act ("INA"), for overstaying his authorized period of admission. [Ex. 1.] Respondent admitted the allegations and conceded the charge contained in the NTA. After conducting a merits hearing, on August 11, 2000, I granted Respondent's application for asylum. [Ex. R1.]

On March 22, 2004, Respondent was convicted of stalking in the third degree in violation of section 120.50(3) of the New York Penal Law ("NYPL"), and endangering the welfare of a child in violation of NYPL section 260.10(01). [Ex. R2, Attach. 2.] Based

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[1] As of March 1, 2003, the Homeland Security Act of 2002 dissolved INS and transferred its enforcement responsibilities to the Department of Homeland Security ("DHS"). Pub. L. No. 107-296, 116 Stat. 2135.

on these convictions, on February 15, 2007, DHS moved to reopen Respondent's removal proceedings and terminate his asylum status. [Ex. R2.] On April 10, 2007, I granted DHS's motion to reopen. [Ex. R3.] Then, on December 19, 2007, I rendered a written decision finding that Respondent's conviction under NYPL section 120.50(3) was for a particularly serious crime, but indicated that I would consider Respondent's application for relief. [Ex. R9.] On February 12, 2008, Respondent filed an amended application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). [Ex. R11, Attach. A.] Thereafter, I held a full merits hearing regarding his eligibility for such relief. [Ex. R11, Attach. A.]

II. Exhibits

Along with the testimony given under oath before me, the following documents were marked as exhibits and included in the record of the proceedings:

Exhibit 1: Form I-862, Notice to Appear (served June 25, 1998).

Exhibit 2: Form I-589, Application for Asylum and for Withholding of Deportation (sworn May 11, 1998) '

- **Attachment A:** Addendum
- **Attachment B:** Handwritten request for asylum
- **Attachment C:** Handwritten addendum
- **Attachment D:** Form G-325A of Madlein Metias Wassily,

Respondent's mother

Attachment E: Form I-94

Attachment F: Egyptian passport

Attachment G: Birth Certificate (born Jan. 1, 1974)

Attachment H: Birth Registration (born Jan. 1, 1974)

Attachment I: Extract of Successful Candidate (dated Dec. 8, 1991)

Attachment J: Certificate of Baptism (baptized Sept. 6, 1974)

Attachment K: Letter from the Church of Virgin Mary (dated Oct. 6, 1991)

Attachment L: Background materials

Exhibit 3: Background materials

Exhibit 4: U.S. Department of State, Egypt - Profile of Asylum Claims and Country Conditions, Released by the Bureau of Human Rights and Labor (Dec. 1997)

Exhibit 5: Evidence of Respondent's criminal conviction in the State of New York, County of Westchester, in the Village of Port Chester

Attachment A: Certificate of Conviction under NYPL section

240.20(7) (convicted Sept. 24, 1998)

Attachment B: Information sheet (dated May 28, 1998)

Attachment C: Supporting deposition (dated May 28, 1998)

Exhibit 6: New York Hospital – Cornell Medical Center, Initial Evaluation (evaluated June11, 1999)

Exhibit 7: Handwritten letter from Dr. Botros, M.D. (dated July 12, 1999)

Exhibit 8: Letter from Dr. Retik, M.D. (dated Oct. 13, 1999)

Exhibit 9: New York Hospital – Cornell Medical Center, letter and progress notes (dated Oct. 14, 1999)

Exhibit 10: Evidence of Respondent's psychiatric treatment

Attachment A: Letter from Dr. Botros, M.D. and Dr. Apfeldorf, M.D. (dated Sept. 9,1999)

Attachment B: Handwritten letter from Dr. Retik, M.D.

Attachment C: Letter from Dr. Retik, M.D. (dated Jan. 10, 2000)

Exhibit 11: Letter from Dr. Retik, M.D. (dated Jan. 28, 2000)

Exhibit 12:	Letter from Dr. Retik, M.D. (dated Aug. 2, 2000)	
Exhibit R1:	Order of the Immigration Judge granting Respondent's application for asylum (dated Aug. 11, 2000)	
Exhibit R2:	DHS's Motion to Reopen (dated Feb. 15, 2007)	
	Attachment A:	Transcript of Plea, State of New York, County of Westchester, City of White Plains (dated Mar. 22, 2004)
Exhibit R3:	Decision of the Immigration Judge granting DHS's Motion to Reopen (dated Apr. 10, 2007)	
Exhibit R4:	Evidence of Respondent's criminal history (filed July 24, 2007)	
	Attachment A:	Petition for violation of probation
	Attachment B:	Letter from Heather Genovese, MS (dated Aug. 28, 2006)
	Attachment C:	Duplicate of Ex. 5, Attach. A
	Attachment D:	Duplicate of Ex. 5, Attach. C
	Attachment E:	Duplicate of Ex. 5, Attach. B

Exhibit R5:	Affidavit of Dr. Paul Marshall, Ph.D., Senior Fellow of the Center of Religious Freedom, Hudson Institute (dated Sept. 25, 2007)	
Exhibit R6:	Letter from Lee Galparin, General Manager, Smith & Warren	
Exhibit R7:	DHS's Memorandum of Law (filed Nov. 14, 2007)	
	Attachment A:	Certification of record of the White Plains City Court (dated Aug. 26, 2004)
	Attachment B:	Pre-Plea/Pre-Sentence Report
Exhibit R8:	Respondent's Reply and Motion to Administratively Close Removal Proceedings (filed Nov. 27, 2007)	
	Attachment A:	Supreme Court Update, Ali v. Achim, 468 F.3d 462 (7th Cir. 2006) (cert. granted) (questioning whether an offense must be an aggravated felony to constitute a particularly serious crime)
	Attachment B:	Mayer Brown's pending matters in the U.S. Supreme Court, Ali v. Achim,

		468 F.3d 462 (7th Cir. 2006)
Exhibit R9:	Decision of the Immigration Judge (dated Dec. 19, 2007)	
Exhibit R10:	Respondent's Supporting Documents (filed Dec. 26, 2007)	
	Attachment A:	Duplicate of Ex. R5
	Attachment B:	U.S. Department of State, Egypt - Int'l Religious Freedom Report 2007, Released by the Bureau of Human Rights, and Labor
Exhibit R11:	Respondent's Submission of Evidence (filed Feb. 20,2008)	
	Attachment A:	Amended Form I-589, Application for Asylum and for Withholding of Removal (dated Feb. 12, 2008)
	Attachment B:	Updated Affidavit of Dr. Paul Marshall, Ph.D., Senior Fellow of the Center of Religious Freedom, Hudson Institute (dated Jan. 21, 2007)
Exhibit R12:	Request for Review by the Department of State (dated Feb. 22, 2008)	

Exhibit R13:	Updated Affidavit of Dr. Paul Marshall, Ph.D., Senior Fellow of the Center of Religious Freedom, Hudson Institute (dated Mar. 27, 2008)
Exhibit R14:	Amnesty International, Egypt - Systematic Abuses in the Name of Security, Published by International Secretariat (Apr. 2007)

III. Testimonial Evidence

A. Respondent:

On February 25, 1999, Respondent appeared before me and testified during direct examination that he was born in Egypt on January 1, 1974, that he is twenty-five years old, and that he is a Christian. Respondent said that he came to the United States with his family in the summer of 1993, and that none of his family members reside in Egypt. He also stated that he resides in Port Chester, New York with his mother. His father is deceased.

Testifying about his life in Egypt, Respondent stated that he did not graduate high school. He also stated that, while he works as a busboy in the United States, he did not work in Egypt because when he sought employment, the prospective employers told him, "there is no work for you." Respondent believes the employers did not want to hire him because he is Christian. On Sundays and Fridays, Respondent attended services at the Church of Mother Mary because those are the days of God. After the service, Respondent attended a meeting with the congregation, during which the congregants spoke about the word of God for one to two hours.

Respondent testified that while he was on his way to church during the summer of 1993, some Muslim people accosted him in the street and told him that he had to marry a veiled Muslim woman. The attackers threatened to harm both Respondent and his sister if Respondent did not comply with their demand. Respondent took the attackers' threat seriously, and was afraid for his and his sister's safety, but did not contact the police because he learned from watching the television that they do not protect Christians. Additionally, he said that Muslims also accosted his sister in the street during the summer of 1993, in that they frightened and almost hit her. Respondent knows that the Muslims attacked his sister because after the attack, she ran home crying. Respondent testified that he heard from his friends who are still in Egypt that the situation is worsening for Christians, thus, he is afraid he will be beaten if he returns to Egypt.

On April 28, 2008, Respondent appeared before me and testified during direct examination that he remembers the circumstances that led to his conviction for stalking. He stated that in 2004 or 2006, on a Monday or Tuesday, he went to the mall to visit his friend, Carlos, who was working on the phones on the second floor. Respondent had visited Carlos at the mall two or three times before. While Respondent was riding up the escalator, he saw the girl he was later convicted of stalking, Angela, eating with an older female. He did not speak with Angela at that time, but looked at her, just as he was looking at everyone else while he was riding up the escalator. Respondent claimed that he did not know Angela, but had seen her and talked to her when she was working

as a salesperson for Sam Goody, a music store, where he often purchased CDs and movies.

Between 7:30pm or 8:00pm on the same day as Respondent saw Angela from the escalator, Respondent testified, he learned her name when they had a conversation outside of the mall while he was waiting for the bus. Respondent stated that the conversation, which lasted for approximately five to ten minutes, began when Angela, who was smoking a cigarette, offered one to him. Respondent believed Angela was approximately twenty years old. He never asked her how old she was, but formed this belief based on her face, her makeup and nail polish, and the fact that she smokes. Respondent claimed that he and Angela discussed music, and that he told her he likes dance and trance music, but that Angela did not share with him what style of music she listens to. He also stated that during his conversation with Angela, he never once made any sexual reference, threatened her, offered a ride home, or suggested that he wanted to see her again. According to Respondent, the conversation ended because Angela had to go back to work, and that she did not appear angry or upset. That was the only time he saw Angela outside of the mall Respondent said. Later that night, mall security arrested him when he was speaking with Carlos on the second floor. Respondent stated that he had no idea why he was being arrested, and that he did not ask because he was afraid and confused.

Respondent further testified that he learned that he was being charged with stalking and endangering the welfare of a minor when he was imprisoned. His attorney informed him those charges were brought against him because he was harassing a woman and trying to kill her. Respondent claims that he was

"shocked and surprised," because he did not know why Angela would make such allegations against him, and added, "that is not who I am."

After his arrest, Respondent remained in jail for two months. He was offered a bond of $100,000.00, but was unable to pay that sum. He described jail as "scary," and that he cried while he was imprisoned. One frightening incident that Respondent recalled was that the swat team raided his cell due to a drug related problem, that they had guns, and that they were ready to shoot.

Respondent testified that he pled guilty to two charges of endangering the welfare of a minor sixteen years of age or younger, and that the charges included stalking and threatening a minor. He claims that he did not learn Angela's age until he was in court, and that he was surprised. Respondent said that Angela was not in court, and that he did not see the older woman she was eating with on the day of his arrest. He stated that he pled guilty because he was too afraid to remain in jail any longer, he was promised an immediate release upon his guilty plea, and because he would not be required to pay a fine under the bargain.

During cross-examination, Respondent testified that he was arrested twice—in 2004 and in 1998. He was arrested in 1998 because some girls on the street thought he was trying to unzip his pants. Respondent stated, however, that he was not trying to, and did not expose himself. He claims he was detained, but never went to court or was convicted in connection with that charge. Instead, Respondent voluntarily sought psychiatric treatment in an attempt to learn to control his sexual compulsion. Respondent

terminated his therapy because he felt that he had improved.

At the time Respondent was arrested in 2004, he was working for a company called Smith & Warren, where he made badges. Although Smith & Warren was located in White Plains, New York, and was not near the Galleria Mall, Respondent testified that he would go to the mall daily to shop for movies and music, and to walk around. Respondent also went to the Galleria Mall daily in order to visit his friends, like Carlos. He stated that on the date of his arrest, Carlos was expecting his visit.

Respondent testified that he never obtained Angela's telephone number. He also testified that he does not recall telling the police, or anyone else that Angela gave him her telephone number. When asked why his pre-sentence report indicates that he told the police he obtained her telephone number, Respondent stated that the report was incorrect.

Additionally, Respondent stated that at the time he was arrested for endangering the welfare of a child he was drinking a small bottle of vodka on a daily basis. He drank because he loves to drink. Respondent stated that he would become intoxicated when drinking, but that he was not intoxicated often because he was working. Moreover, Respondent stated that on the day of the arrest, he had drunk his daily bottle of vodka prior to going to the mall, and that he was intoxicated. Yet, he stated that he knows "what's going on" when he is intoxicated.

Respondent further testified that he never called Angela at home, and only spoke to her on the telephone one time when he called Sam Goody to inquire about new CDs and movies, and she answered

the telephone. The reason Respondent called Sam Goody, rather than going to the store, was that while it was too late to go to the store, but there was a new CD on the market and he wanted to know whether Sam Goody carried it. He knew the telephone number for Sam Goody because it was printed on all of his receipts. Moreover, Respondent stated that he did not tell Angela who he was when they were speaking on the telephone. Asked why the pre-sentence report indicates he harassed Angela for three months, making calls in which he told her he was masturbating and threatened to rape and kill her, Respondent said that he never made any such calls and that he could not say such things because Angela was at a place of business. Additionally, he stated that he never made any comments about her attire, that she was always wearing work clothes when he saw her, and that there was nothing special about what she wore. He also claimed never to have told her he knew about her family or that her father should start making her funeral arrangements. He added that he does not know why Angela would have suddenly turned against him.

Furthermore, Respondent stated that he spoke with Angela every time he was in Sam Goody, but that she always approached him. Angela wore a name tag, and Respondent told her that his name was Tom. He told Angela his name because he thought that they could be friends based on the fact that she would always approach him, treat him nicely, and answer his music related questions. He never asked her to be his friend though, and did not do anything to pursue the friendship.

Respondent also testified that he does not remember being asked during his plea colloquy

whether he admits following, staring at, and having sexually explicit conversations with a sixteen-year-old girl. He also claims that he only admitted committing those acts because he wanted to get out of jail immediately, and because his attorney advised him to admit to those acts, but that he did not actually do any of the things he admitted to. While Respondent remembers testifying that he had not been promised any benefits in exchange for his guilty plea, he first stated that he was not sworn when he made that statement. Then, when informed that his plea colloquy indicates he was placed under an oath, Respondent changed his testimony saying that, at the time, he did not remember being promised any benefits. He also remembers testifying that he was pleading guilty because he was guilty, but claims that he only said that because his attorney told him to say so, even though he was not actually guilty.

For his crime, while Respondent testified that the court did not place any sex offender conditions on him, he was sentenced to serve three years of probation. While Respondent first stated that he never violated any of his conditions of probation, he then admitted that one of his conditions of probation was not to leave Westchester County, and that he left Westchester accidentally. His other conditions of probation included that he was supposed to keep a journal, and that he was not allowed to associate with children under eighteen years of age.

During re-direct, Respondent testified that he believes that anyone who commits a crime and is sent back to Egypt will be tortured and killed if the Egyptian government is aware of the crime. As a result, he is afraid that if he returns to Egypt, government officials will capture, torture, and kill

him. He also testified that he attends church every Sunday, identifies himself as a Christian, and tries to abide by the dictates of his faith.

Upon re-cross, Respondent testified that his drinking does not interfere with his job. He has been working for the same company for eight years. However, he said that he used to work as a bus boy, but was fired because he had a bottle of wine in his locker.

B. Madlain Metias:

On February 25, 1999, Madlain Metias appeared before me and testified during direct examination that Respondent is her son, and that he lived with her when he was growing up. She entered the United States on two occasions; first, in 1981, and most recently in 1994. When she came the United States in 1981, she only remained for three months, and she brought Respondent with her.

Ms. Metias also stated that, like Respondent, she is a Coptic Christian, She attends church every Sunday that she is not working, which is two or three times per month. Her church is located in Spring Valley, New Jersey and the priest is named Jacob. During the services, which last two hours, Ms. Metias eats bread, drinks wine, and goes to the priest if there is something she wants to confess. She said that her favorite prayer is as follows: "Our Father in Heaven, may Your name be blessed, and Your will be done, on the earth. Give us our daily bread and forgive us our sins, as we also forgive those who sinned against us." Additionally, there are many pictures of saints in her church, including pictures of the Virgin Mary and St. John. She also stated that her religion's most important holidays are Christmas and Easter.

Moreover, Ms. Metias testified that Respondent went to high school, currently works as a busboy, and believes in Christ. She also explained that in 1993, a group of "Muslim Brothers" followed, threatened, and told Respondent he had to marry a veiled Muslim woman, and, as a result, he is always afraid and lost his ability to understand. Due to his fear, Ms. Metias explained, Respondent mistakenly wrote on his asylum application that he entered the United States in November of 1993, although he actually entered during the summer of 1993. She also stated that, due to Respondent's fear, she wanted to bring Respondent to see a doctor, but did not have the opportunity to do so because, around that time, Respondent's father died. She added that Respondent was affected by his father's death, in that he became "tired psychologically," and cried a lot. She believes Respondent still suffers from his father's loss because he "can't think at all."

According to Ms. Metias' testimony, when she lived in Egypt she used to take Respondent to church on Fridays and Sundays. The service in Egypt was between two and two-and-a-half hours long. After the service, Respondent attended the church's youth meeting.

With regard to her status in the United States, Ms. Metias stated that she applied for her green card in June of 1998. Ms. Metias does not remember if anyone in her family applied for asylum when they were in the United States in 1981.

C. Dr. Paul Marshall, Ph.D,:

On March 12, 2008, Dr. Marshall appeared before me telephonically and testified that he obtained a Ph.D. in political theory from York University. He is

senior fellow at the Hudson Institute's Center for Religious Freedom, which is a think tank in Washington D.C. comprised of sixty to seventy fellows working on public policy. As a fellow, Dr. Marshall publishes books about several countries, including Egypt. He has written two books specifically on Copts and five other books containing chapters on Egypt. Additionally, Dr. Marshall has lectured regarding Egyptian country conditions in various United States universities, including the University of Oklahoma and Yale. He has also lectured about Egypt's conditions at training sessions for the former INS and current DHS, as well at congressional hearings. Furthermore, Dr. Marshall has testified before the Executive Office for Immigration Review ("EOIR") approximately 100 times in the last eleven years. He learns and keeps apprised of Egypt's conditions by traveling to Egypt on a yearly basis, meeting with journalists, human rights attorneys and Coptic clergy, by monitoring the media, such as United States and Egyptian newspapers, and by speaking with an individual stationed in Egypt who is on retainer with the Hudson Institute. He was in Egypt most recently for fact-finding purposes in January 2008. Dr. Marshall further testified that he spent ten years working on human rights issues in Egypt. Based on this information, I qualified Dr. Marshall to testify as an expert.

Dr. Marshal] testified that he has not met with Respondent, but has read his affidavit. He is aware that Respondent was convicted of stalking and endangering the welfare of a minor. He also knows that Respondent is a former asylee, and asserted that the conditions under which he was previously granted asylum still exist. Dr. Marshall bases his assertion

on four factors. The first is that because Egyptians are required to carry identity documents, the authorities would discover and punish him for his past problems with Muslim extremists. Second, Respondent could be convicted under Egyptian law section 80(d), which criminalizes and punishes individuals for damaging Egypt's reputation abroad. Third, Copts are subject to more police abuse than non-Copts. Fourth, having been in the United States for fifteen years and being a Christian, Respondent will be considered to be allied with the enemy Christian West, which is perceived as being responsible for the war in Iraq and for attacking Arab Muslims. Viewing these factors cumulatively, Dr. Marshall believes Respondent would likely be detained, which would render it highly probable that Respondent be abused or tortured.

Turning to the second factor, Dr. Marshall opined that Respondent could be charged under section 80(d) because he was convicted of a sexual offense in the United States. He also testified that Respondent could be charged under section 80(d) if the Egyptian government found out Respondent was an asylee and made allegations against the government. The penalty for a violation of section 80(d) ranges from six months to five years imprisonment. The actual time of imprisonment may be much longer because Egyptian police often detain people for lengthy periods without arresting them. If Respondent is detained, it is highly likely that he will fall victim to abuse. Dr. Marshall also stated that, if detained, it is likely Respondent will be tortured, as several agencies and groups which monitor Egyptian country conditions are unanimous in using terms such as "common," "endemic," "pervasive," "frequent," and the

like when reporting about torture in prisons. Dr. Marshall clarified that by "torture," he means suspending victims from the ceiling, beating them with metal rods, administering electric shocks to them, dousing them in cold water, burning them with cigarettes, and whipping them.

During cross-examination Dr. Marshall clarified that, officially, torture is illegal in Egypt, as Egypt is a signatory to the CAT. In fact, Egyptian law provides for the imprisonment of torturers. Asked what he would think if he learned that those who authorize torture are subject to a three to ten year imprisonment, Dr. Marshall said that he would not be surprised. He also stated that he would not be surprised to learn that any death resulting from torture was deemed intentional murder and punishable by life imprisonment according to Egyptian jurisprudence.

Dr. Marshall also testified that although Copts are disfavored in Egypt, some Copts are appointed judges. However, he stated that when considering all of the senior positions in the Egyptian government, as a whole, Copts are under represented. He explained that ten to fifteen percent, or seven to eleven million, of the Egyptian population is Coptic. Thus, Copts can be found in every strata of society, even among the extremely wealthy. However, most Copts are poor.

Additionally, Dr. Marshall testified that that there are Coptic churches in Egypt. While Dr. Marshall stated that he does not know how the Egyptian government finds out about Egyptian citizens' criminal convictions and asylum claims abroad, he knows that government officials question people returning to Egypt. If a returnee were to deny having been convicted or having applied for asylum abroad,

Dr. Marshall did not know how the government would learn of such convictions or applications. However, Dr. Marshall testified that he heard of an individual who sought asylum in Canada, was deported to Egypt, and upon his return, was picked up, taken into custody by Egyptian security on the grounds that he had been in previous trouble in Egypt and that he had criticized the Egyptian government in seeking asylum. Dr. Marshall has seen pictures of that individual with marks across his back, that appear to have been caused by a beating with a rod or whip. Although Dr. Marshall has Egyptian friends who return to Egypt temporarily to visit their families, he does not know anyone has returned to Egypt permanently.

Upon being informed that the Egyptian government has reportedly taken positive steps regarding sectarian violence, for instance, prosecuting police officers for their participation in one such episode in April of 2006, Dr. Marshall stated that such information does not alter his view or testimony. He added that he is aware of the April 2006 sectarian violence, and that while the Egyptian government generally does not adequately protect Copts or punish the police, the government took remedial action in that particular case because its circumstances were widely known, and the government wanted to avoid further embarrassment. Dr. Marshall elaborated that one day in April 2006, Copts were attacked in three separate churches within a span of thirty minutes, and that funerals held on the following day resulted in riots which drew international media attention. While the Egyptian government ultimately found one man responsible for all of the attacks, some people believe that his

conviction is a cover-up, because the churches were spaced too widely apart for one person to have attacked them within thirty minutes of each other.

Dr. Marshall testified further that he has discussed the detention of Coptic Christians with Egyptian government officials. According to his testimony, the officials claim that the agencies and organizations reporting country conditions exaggerate the problems and conditions in Egyptian prisons. They allegedly also state the prison conditions are "fine," and that if any abuse does occur therein, the individuals responsible for such abuse are punished.

On re-direct, Dr. Marshall testified that the Egyptian government would consider Respondent's offense a serious offense because it is a sexual offense, and because it is a serious offense in the United States. Dr. Marshall explained that people who are convicted of serious offenses are likely to be detained and tortured. Moreover, Dr. Marshall stated that his friend, Saad Eddin Ibrahim, was imprisoned in Egypt because he intended to write about treatment of Copts in Egypt. Furthermore, Dr. Marshall stated that because Egypt has been operating under emergency law since 1981, the government may detain people without charge for up to forty-five days, and that such period of detention may be renewed by simply transferring a detainee to a new prison. Dr. Marshall knows of cases where detainees were held without charge for up to one year. Aside from the likelihood of being harmed by the police, prison conditions in Egypt are poor in that detainees are subject to abuse by other prisoners, are fed bad food, and may suffer ill heath, as the medical treatment in prisons is poor. Finally, because Respondent is a Copt, he risks being

attacked by Islamic extremist prisoners, as it is not common for the government to segregate Christians and Islamic extremists in detention.

IV. Applications for Asylum, Withholding of Removal Under INA Section 241(b)(3), and Withholding of Removal Under the Convention Against Torture ("CAT")

A. Legal Standards

I. Credibility

Before determining whether the Respondent meets the statutory criteria required for withholding of removal and CAT relief, I must address the credibility of his testimony in its entirety. Matter of O–D–, 21 I. & N. Dec. 1079, 1081 (BIA 1998). The applicant's own testimony will suffice to carry his burden of proof, provided that such testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. Matter of Dass, 20 I. & N. Dec. 120, 124 (BIA 1989); 8 C.F.R. § 1208.13(a). Furthermore, the applicant may be given the "benefit of the doubt" if there is some ambiguity regarding an aspect of his asylum claim. Matter of Y–B–, 21 I. & N. Dec. 1136, 1139 (BIA 1998). Additionally, the applicant may be found credible even if he cannot recall specific facts. See, e.g., Matter of B–, 21 I. & N. Dec. 66, 70-71 (BIA 1995) (explaining aliens who fled persecution may have difficulty remembering exact dates when testifying, and such failure to provide precise dates may not indicate deception).

The REAL ID Act of 2005[2] amended various sections of the INA to the adjudication of asylum, withholding of removal, and CAT applications. Pub. L. No. 109–13, Div. B, 119 Stat. 231 (2005). I have not applied these provisions in this matter because respondent's initial application for asylum was filed prior to the date of enactment of the REAL ID Act.

ii. Asylum

(a) Statutory Eligibility

In order to demonstrate statutory eligibility for relief, an applicant is required to prove that he is a "refugee." INA § 208(b)(1). In order for the applicant to prove his "refugee" status, he must demonstrate that he falls within the scope of the following:

> [P]erson who is outside any country of such person's nationality . . . and is unable or unwilling to return to, and is unable and unwilling to avail himself or herself to the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(A).

If an applicant establishes that he has suffered past persecution, his well-founded fear of future persecution is presumed, unless rebutted by DHS. 8 C.F.R. § 1208.13(b)(1)(I). If an applicant fails to prove past persecution, he must demonstrate that there is a

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[2] The REAL ID Act was enacted on May 11, 2005, and applies to asylum, withholding of removal, and CAT applications initially filed on or after that date with either an asylum officer or an IJ. Matter of S–B–, 24 I. & N. Dec. 42, 45 (BIA 2006).

"reasonable possibility" he will suffer future persecution in the country of removal. INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

(b) Discretion

An applicant who establishes statutory eligibility for asylum still bears the burden of demonstrating that he merits a grant of asylum as a matter of discretion. INA § 208(b)(1); see also Cardoza-Fonseca, 480 U.S. at 428 (noting that the Attorney General is not required to grant asylum to everyone who meets the refugee definition). In determining whether a favorable exercise of discretion is warranted, both favorable and adverse factors should be considered. Matter of Pula, 19 I. & N. Dec. 467, 473 (BIA 1987). IJs should consider humanitarian factors, such as age, health, and family ties when exercising their of discretion. Matter of H–, 21 I. & N. Dec. 337, 347–48 (BIA 1996) (citing Matter of Pula, 19 I. & N. Dec. 467). The danger of persecution should outweigh all but the most egregious adverse factors. Matter of Pula, 19 I. & N. Dec. at 474.

iii. Withholding of Removal Under INA Section 241(b)(3)

Under INA section 241(b)(3), the applicant bears the evidentiary burden of proof and persuasion with respect to withholding of removal. Matter of Acosta, 19 I. & N. Dec. 211, 214–15 (BIA 1985), modified, Matter of Mogharrabi, 19 I. & N. Dec. 439, 446–47 (BIA 1987); 8 C.F.R. §§ 1208.13(a), 1208.16(b) (2004). To satisfy his burden of proof, the applicant must demonstrate that, if returned to his country, his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3); see

also Zhang v. INS, 386 F.3d 66, 71 (2d Cir. 2004). To make this showing, the applicant must establish a "clear probability" of persecution, meaning it is "more likely than not" that he will be subject to persecution on account of a protected ground if returned to the country from which he seeks withholding of removal. Cardoza-Fonseca, 480 U.S. 421 (1987). However, the applicant need not show he merits a favorable exercise of discretion. Additionally, there is no statutory time limit for bringing a withholding of removal claim.

iv. Relief Under the Convention Against Torture

An applicant for relief under the CAT bears the evidentiary burden of proof. 8 C.F.R. § 1208.16(c)(2); 8 C.F.R. § 1208.17(d)(4) (providing that the applicant must establish eligibility for deferral of removal). He first must demonstrate that he will "more likely than not" be subject to torture in the country of removal. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); Pub. L. 105-277 (1998); 8 C.F.R. § 1208.16; 8 C.F.R. § 1208.17; 8 C.F.R. § 1208.18; see also Matter of M–B–A–, 23 I. & N. Dec. 474, 477–78 (BIA 2002). Moreover, in order for any harm the applicant will suffer to constitute "torture," he must also prove it would involve the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official. 8 C.F.R. § 1208.18(a)(1).

B. Analysis

I. Respondent's Testimony Was Not Credible and the Documentary Evidence in the Record Contradicted His Testimonial Claims

I find that Respondent's testimony regarding his criminal convictions was so dishonest, that it casts doubt on the veracity of his testimony as a whole.

Respondent testified that he was arrested for the first time in 1998 because some girls he encountered on the street incorrectly believed he was attempting to expose himself. He further testified that the 1998 arrest did not result in a conviction. However, Respondent's testimony is inconsistent with the record, which contains a certificate of conviction indicating that on September 24, 1998, Respondent was convicted of disorderly conduct in violation of NYPL section 240.20(7). [Ex. 5.] Moreover, Respondent testified that after the arrest, he underwent voluntary psychiatric treatment to learn to control his sexual compulsion. Yet, his doctor's notes reflect he did not discuss his compulsion until months into treatment, and only did so on his doctor's prompting after Respondent's brother requested a letter stating that Respondent was undergoing treatment for his compulsion. [Ex. 9.]

Similarly, Respondent denies engaging in any criminal conduct with respect to his 2004 convictions. He stated that his interactions with Angela were brief, limited to discussions about movies and music, and only took place over the telephone or at the mall where she was employed. He further testified that he never made any sexual references or threatened Angela during their conversations, and that he was

"shocked and surprised" about the accusations against him. However, during his plea colloquy, Respondent admitted that he "followed, stared at and placed in fear for her safety and had sexually explicit conversations with sixteen-year-old girl." [Ex. R2, Attach. A, at 12.] Asked why he would have admitted committing those acts if he did not, Respondent stated that he wanted to get out of jail and that his attorney advised him to do so, then stated that he did not swear to not having been promised any benefits in exchange for his guilty plea. Yet, the transcript from his plea colloquy shows that Respondent did swear to tell the truth. [Ex. R2, Attach. A., at 4.] Presented with this inconsistency between his testimony and the record, Respondent changed his testimony and stated instead that at the time of his plea colloquy, he did not remember being promised any benefits in exchange for his guilty plea. I do not find Respondent's explanation of the inconsistencies between his testimony and his plea colloquy credible, and find instead that his explanations, which were elicited upon being confronted with inconsistencies, were attempts to preserve his credibility. See Majidi v. Gonzales, 430 F.3d 77, 80–81 (2d Cir. 2005) (an applicant's explanations need not be credited unless those explanations would compel a reasonable fact-finder to do so).

Respondent also testified that he was only sentenced to probation in connection with his 2004 convictions and that the criminal court did not place any sex offender conditions on him. Again, the record undermines his testimony, as the plea transcript shows that the court stated that Respondent's sentence "include[s] sex offender conditions," and that his attorney advised him of the conditions. [Ex. R2,

Attach. A, at 3-4.] Furthermore, the record contains evidence that such sex offender conditions included, *inter alia,* that he remain within the court's jurisdiction, that he participate in and successfully complete a sex offender treatment program, and that he not be alone with any child under eighteen years of age. [Ex. R4, Attach. A.] Additionally, Respondent was re-sentenced to and placed under probation for an additional nine months due to his violation of the aforementioned sex offender conditions [Ex. R4, Attach. A.] Thus, I find it hard to believe that Respondent was unaware of his sex offender conditions, and find that he testified that he was not placed under any such conditions in an attempt to minimize his culpability and distance himself from a "sex offender" label.

Based on the foregoing, I find Respondent's testimony not be credible, as it was inconsistent with the record. See Matter of S–M–J–, 21 I. & N. Dec. at 729 (testimony is not considered credible when it is inconsistent).

ii. Respondent is Barred from Asylum Due to His Conviction for a Particularly Serious Crime

Respondent is subject to a mandatory denial of his application for asylum because his conviction for stalking in the third degree under NYPL section 120.50(3) constitutes a particularly serious crime. See INA § 208(b)(2)(A)(ii). I recognize that Respondent's crime is not an aggravated felony under INA Section 101(a)(43). Nevertheless, the Second Circuit recently held in Nethagani v. Mukasey, 532 F.3d 150, 156 (2d Cir. 2008), that IJs "may determine that a crime is particularly serious for purposes of the

asylum statute . . . even though it is not an aggravated felony."

To determine whether Respondent's conviction is for a particularly serious crime, I must use the factors set forth in Matter of Frentescu, 18 I. & N. Dec. 244 (BIA 1982), superceded by statute on other grounds. See Nethagani, 532 F.3d at 155 (applying Frentescu factors). These factors include; (1) the nature of the conviction; (2) the circumstances and underlying facts of the conviction; and (3) the type of sentence imposed. See Matter of Frentescu, 18 I. & N. Dec. at 247. Notably I need not determine whether Respondent is a danger to the community.[3] See Matter of N–A–M–, 24 I. & N. Dec. 336, 342 (BIA 2007); see also Matter of Caballe, 19 I. & N. Dec. 357 (BIA 1996) ("the proper focus . . . is on the nature of the crime and not the likelihood of future misconduct). Furthermore, if "the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered" in making the determination. Matter of N–A–M–, 24 I. & N. Dec. 336, 342 (BIA 2007).

I find that the elements, or nature of, Respondent's statute of conviction bring it within the ambit of a particularly serious crime because it occurs when:

> A person . . . with intent to harass, annoy, or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to

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[3] I note, however, that Respondent's failure to take responsibility for his actions and his attempts to minimize his culpability evidence a lack of rehabilitation, and thus, that he may pose continuing harm to the community. See Part IV(B)(I).

> reasonably fear physical injury, or serious physical injury, the commission of a sex offense against, or the kidnapping, unlawful imprisonment or death of such person or a member of such person's immediate family.

NYPL § 120.50(3); see Matter of Frentescu, 18 I. & N. Dec. at 247; Matter of N–A–M–, 24 I. & N. Dec. at 342. The statute under which Respondent was convicted is for a crime against a person. In this case the effect of such crime is particularly terrifying and damaging to the victim, given that she was only sixteen years old. Therefore, I may look to all reliable information in assessing the severity of Respondent's crime, "including the conviction records and sentencing information, as well as other information outside the confines of the record of conviction." Matter of N–A–M–, 24 I. & N. Dec. at 342; see also Matter of L–S–, 22 I. & N. Dec. 645, 654–56 (BIA 1999) (looking beyond the elements of the crime and examining the actual circumstances of the crime).

The pre-sentence report contains disturbing details of the acts underling Respondent's convictions. Respondent stalked the victim for three months and made numerous calls to her, during which he told her "he was masturbating and that he wanted to rape her." [Ex. R7, Attach. B, at 3.] Respondent also threatened the victim's life over the course of several months, and stated that her family should "start making [her] funeral arrangements." [Ex. R7, Attach. B, at 3.] He also obtained "personal information regarding the victim (such as how many siblings she had) and used this [information] when telephoning her" in order to instill further fear in her. [Ex. R7, Attach. B, at 3.] The repugnant and terrifying nature of the threats against the victim are further

aggravated by the fact that the victim was sixteen years old and the fact that, by Respondent's own admission, he was often intoxicated during the commission of this crime. [Ex. R2, Attach. A, at 8 (admitting to stalking a sixteen-year-old girl); Ex. R7, Attach. B, at 3 (stating, "I did do what I was charged with but I was drunk.")]

Lastly, I recognize that Respondent was not sentenced to a term of imprisonment, and was only ordered to serve probation and to comply with several sex offender conditions. [Ex. R4, Attach. A; Ex. R7, Attach. A.] However, as explained in Matter of N–A–M–, 22 I. & N. Dec. at 342, "the sentence imposed is not the most accurate or salient factor to consider when determining the seriousness of an offense" because it involves factors unrelated to the commission of the offense. Accordingly, as in N–A–M–, 22 I. & N. Dec. at 343, I find that Respondent's offense is particularly serious in spite of the fact that he was not sentenced to a term of imprisonment.

In sum, I find that the nature and underlying facts of Respondent's conviction render his crime particularly serious. Therefore, I find that Respondent is statutorily barred from asylum, and deny his application for such relief.

iii. Respondent is Barred from Withholding of Removal Under INA section 241(b)(3) Due to His Conviction for a Particularly Serious Crime

As explained above, I find that Respondent's conviction under NYPL section 120.50(3) constitutes a particularly serious crime. See Part IV(B)(ii) supra. Aliens convicted of particularly serious crimes are

ineligible for withholding of removal under INA section 241(b)(3). See INA § 241(b)(3)(B)(ii); see also Matter of N–A–M–, 24 I. & N. Dec. at 337–38 ("a particularly serious crime need not be an aggravated felony"). Therefore, Respondent's application for relief under INA section 241(b)(3) is denied.

iv. Respondent is Barred from Withholding of Removal Under the CAT Due to His Conviction for a Particularly Serious Crime and Failed to Carry His Burden of Proof With Respect to Deferral of Removal

Respondent claims that considering the following factors in the aggregate, he will more likely than not be tortured in Egypt: because he is required to carry an identity document in Egypt, government officials will learn of and punish him for his past problems with Muslims; due to his request for asylum and conviction for a sexual offense in the United States, he could be convicted under Egyptian law section 80(d), for damaging Egypt's reputation abroad; as a Copt, he is more likely to suffer police abuse than non-Copts; and because he has resided in the United States for fifteen years and is a Christian, he will be considered an ally of the enemy Christian West, which is viewed as responsible for the war in Iraq and for attacking Arab Muslims. [Ex. 2, Attachs. A–C; Ex. R5; R11, Attachs. A–B; Ex. RI3.] Having considered the documentary and testimonial evidence, I will now assess whether Respondent has met his burden of proof with respect to his application for relief under the CAT.

Preliminarily, I note that there is a dual system for relief under the CAT. The first form of relief under

CAT is withholding of removal, which permits withholding in a manner similar to the law under INA section 241(b)(3). 8 C.F.R. § 1208.16©. However, there are several grounds for mandatory denial of withholding of removal under the CAT, including conviction for a particularly serious crime. 8 C.F.R. § 1208.16(d)(2). The second form of relief under CAT, deferral of removal, remains available to applicants who are barred from withholding. 8 C.F.R. § 1208.17; see Matter of Jean, 23 I. & N. Dec. 373, 376 n.7 (A.G. 2002) (asserting, "an alien's criminal history is irrelevant in examining his or her entitlement to *deferral* of removal"). Notably, however, an applicant granted deferral of removal is subject to streamlined termination where DHS has evidence undermining the likelihood that the applicant would be subject to torture in the country of removal. 8 C.F.R. § 1208.17(d). Here, because Respondent's conviction under NYPL section 120.50(3) was found to be for a particularly serious crime, the only remaining form of relief available to him under the CAT is deferral of removal. See Part IV(B)(ii) supra.

The regulations require that, in assessing whether Respondent proved that he would more likely than not be tortured in Egypt, I consider all evidence relevant to the possibility of future torture. 8 C.F.R, § 1208.16(c)(3). Relevant evidence includes, but is not limited to: (1) evidence that Respondent suffered past torture; (2) evidence that Respondent could relocate to the another part of Egypt where he is not likely to be tortured; (3) evidence of gross, flagrant or mass violations of human rights; and (4) any other relevant information regarding country conditions. Id. at (i)–(iv). First, while I previously granted Respondent's application for asylum, the harm he suffered—being

accosted and threatened by Muslims on account of his Coptic Christian religion—is not severe enough to rise to the level of torture. 8 C.F.R. § 1208.18(a)(1) ("Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person"). Moreover, even if the past harm Respondent suffered were sufficiently severe, he failed to demonstrate that it was inflicted by, at the instigation of, or with the consent or acquiescence of a public official. Id. As to the second factor, however, I recognize that Respondent claims he would be targeted by Egyptian police. 8 C.F.R. § 1208.16(3)(ii). Third, as Dr. Marshall pointed out, the evidence on background country conditions is consistent in describing the use of torture in Egyptian prisons to be pervasive. [Ex. 4, at 4; Ex. R5, at 8, ¶ 31.1; Ex. 10, Attach. A, at 8, ¶ 31.1; Ex R11, Attach. B, at 5, ¶ 26; Ex. R13, at 8, ¶ 31; Ex. R14, at 6.] Fourth, I accept Dr. Marshall's testimony that Respondent could be convicted under Egyptian Law 80(d), and that if he were imprisoned he might suffer more harassment than other prisoners guards because he is a Copt and because would be considered an ally of the enemy Christian West.

Nevertheless, the fact that torture is systemic in Egyptian prisons, and that Copts and those perceived to be allied with the enemy Christian West might be more attractive targets for such torture, does not establish that Respondent would more likely than not be tortured in Egypt. See Matter of J–E–, 23 I. & N. Dec. 291, 303 (BIA 2002) (standing alone, even a pattern of gross, flagrant or mass violations of human rights does not suffice to show that an applicant would more likely than not be tortured in the country

of removal). Instead, Respondent must show that he will personally be at risk of torture in the country of removal. Id. However, I find that the evidence regarding whether Respondent personally would more likely than not be tortured in Egypt to be tenuous, as Respondent seeks to carry his burden by stringing together a series of suppositions.

As explained in Matter of J–F–F–, 23 I. & N. Dec. 912, 917–18 (A.G. 2006), a CAT applicant cannot cany his burden by "stringing together a series of suppositions." Instead, the CAT applicant he must show "that each step in the hypothetical chain of events is more likely than not to happen." Matter of J–F–F–, 23 I. & N. Dec. at 917–18. Here, for Respondent to prove he will more likely than not be tortured he must prove all of the following: he will more likely than not be discovered by Egyptian officials; Egyptian officials will more likely than not find out that he sought asylum, resided in, and was convicted for a serious offense in the United States; based on their knowledge of Respondent's background and interactions with the United States, Egyptian officials will more likely than not charge and imprison Respondent under Egyptian Law section 80(d); and upon imprisonment, Egyptian officials will more likely than not torture Respondent because he is a Copt.

In examining the record for evidence, I recognize that Dr. Marshall testified that Respondent could be convicted for under Egyptian Law section 80(d), because by applying for asylum and by being convicted for a serious offense in the United States, he maybe found to have damaged Egypt's reputation. Dr. Marshall's testimony is insufficient for Respondent to carry his burden of proof, as he must

prove that the preceding steps in his hypothetical chain of events are more likely than not to occur. See Matter of J–F–F–, 23 I. & N. Dec. at 917–18. Yet, Respondent failed to prove the initial steps of his hypothetical chain—that is, that he will more likely than not be discovered by Egyptian police or that upon discovering him that they will more likely than not find out about his interactions with the United States government. In fact, Dr. Marshall testified that he does not know how the Egyptian government learns of its citizens' criminal convictions and asylum claims abroad. While Dr. Marshall believes the government might elicit such information from its citizens when questioning them upon their return to Egypt, he testified that, if a returnee denies being convicted or having made asylum applications abroad, he is not sure how the government would learn of it.

Dr. Marshall testified that he knows of a case in which an Egyptian man who applied for asylum in Canada, when returned to Egypt, was detained. Yet, a single incident of detention and harm is far from sufficient to establish the Egyptian government routinely discovers, detains, and tortures returnees. Therefore, this single case fails to prove that Respondent would more likely than not be detained upon his return to Egypt, or that upon his detention, he would more likely that not be tortured.

Moreover, I find Khouzham v, Ashcroft, 361, F.3d 161 (2d Cir. 2004), where the Second Circuit granted an applicant's petition for review of the denial from CAT deferral, distinguishable. In Khouzham, the Second Circuit was concerned that the petitioner would more likely than not be discovered by the Egyptian police, and thus be detained and tortured,

because there were "serious reasons to believe" he had committed, and was wanted for murder. Id. at 166, 170–71. By contrast, here the record lacks any evidence that the Egyptian government is specifically looking for the Respondent. While there is evidence that certain private individuals previously harmed Respondent, neither Respondent nor Dr. Marshall offered any evidence that the Egyptian government might know of or punish Respondent for those problems. In fact, Respondent testified that he never informed the police of his problems. Therefore, unlike in Khouzham, the record does not establish it is more likely than not that upon his return, the Egyptian government will capture, detain, or torture him.

Lastly, Dr. Marshall testified that Christians and those viewed as allied with the Christian West are often subject to disparate treatment, persecution, and if in a detained setting, might be targeted for proportionally more torture than other prisoners. Nonetheless, evidence of disparate treatment or persecution are insufficient to prove Respondent would more likely than not be tortured in Egypt. Moreover, even assuming it is true that if jailed. Respondent would face a greater likelihood of torture than other prisoners due to his religion and his fifteen-year residency in the United States, the record lacks sufficient evidence that he would more likely than not be imprisoned. Furthermore, while Dr. Marshall's reports explain that the Egyptian Constitution forbids Christians from witnessing, evangelizing, or proselytizing, and that Christians have been arrested for witnessing, Respondent has not offered any evidence to establish he ever engaged in such behavior, or that he would if returned to Egypt. [Ex. R5, at 6, ¶ 22 R10, at 6, ¶ 22; Ex. R13, at

6, ¶ 22.] Thus, Respondent has failed to prove that he would more likely than not be tortured based on his religion or perceived association with the Christian West.

Based on the foregoing, I find that Respondent has failed to carry his burden of proof to establish that he would more likely than not be tortured if returned to Egypt.

V. Conclusion

Accordingly, after a careful review of the record, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the charge of removability under INA section 237(a)(1)(B) is **SUSTAINED.**

IT IS FURTHER ORDERED that Respondent's status as an asylee under INA section 208 is **TERMINATED.**

IT IS FURTHER ORDERED that the Respondent's application for withholding of removal under INA section 241(b)(3) is **DENIED.**

IT IS FURTHER ORDERED that Respondent's application for withholding of removal under the Convention Against Torture is **DENIED.**

IT IS FURTHERED ORDERED that Respondent's application for deferral of removal under the Convention Against Torture is **DENIED.**

IT IS FURTHER ORDERED that the Respondent be removed to **EGYPT.**

Date: 9-3-08

/s/ Douglas B. Schoppert
Douglas B. Schoppert
Immigration Judge

[AR9-12]

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF: Byron E. VELASQUEZ ARREAGA, A073-422-455 Respondent	FILED Mar 23, 2023

ON BEHALF OF RESPONDENT: Aaron J. Aisen, Esquire

ON BEHALF OF DHS: J. Christopher Moellering, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS
On Remand from a Decision of the United States Court of Appeals for the Second Circuit

Before: Grant, Appellate Immigration Judge; Mahtabfar, Appellate Immigration Judge; Mullane, Appellate Immigration Judge

Opinion by Appellate Immigration Judge Grant
Appellate Immigration Judge Mullane, dissents without opinion

GRANT, Appellate Immigration Judge

This proceeding is currently before the Board on remand from the United States Court of Appeals for the Second Circuit based on a joint stipulation to remand this proceeding to the Board. On

September 1, 2022, the respondent and the Department of Homeland Security ("DHS") filed a joint stipulation requesting that the Board admit additional evidence relevant to this proceeding, conceding that the respondent's 2018 conviction is final for immigration purposes, and requesting that the Board issue a decision consistent with its prior decision affirming the Immigration Judge's June 1, 2020, decision ordering him removed from the United States. We grant the joint stipulation's requests and dismiss the appeal for the following reasons.[1]

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, discretion, or judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

In separate decisions by different Immigration Judges during the respondent's removal proceedings below, the respondent's asylee status was terminated, he was found removable, his application for adjustment of status under section 209(b) of the Immigration and Nationality Act ('INA"), 8 U.S.C. § 1159(b), was pretermitted, and his request for protection from removal under the regulations implementing the Convention Against Torture ("CAT")[2] was denied. The respondent challenges all

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[1] To resolve any issues of timeliness, we will consider this matter on appeal pursuant to 8 C.F.R. § 1003.1(c).

[2] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994).

of these decisions on appeal, which we will address in turn.

We affirm the Immigration Judge's termination of the respondent's status as an asylee (Exh. 9 at 5). The respondent was granted asylum in the United States from Guatemala in 1996 (IJ June 1, 2020, at 2; Exh. IB). An asylee may not be removed from the United States "unless and until his asylum status is terminated." *Matter of V-X-*, 26 I&N Dec. 147, 149 (BIA 2013). An Immigration Judge may terminate a respondent's grant of asylum during removal proceedings. 8 C.F.R, §§ 1208.24(f), (g). Termination of an asylum grant during removal proceedings can happen for different reasons based on distinct preconditions--relevant to the respondent, it requires that the DHS serve the respondent with a notice of intent to terminate asylum and a determination that he was convicted of a "particularly serious crime." *See* sections 208(c)(2)(B) and (b)(2)(A)(ii) of the INA, 8 U.S.C. §§ 1158(c)(2)(B), (b)(2)(A)(ii); 8 C.F.R. §§ 1208.24(a)(2), (f)-(g). The DHS served the respondent with the termination notice and the Immigration Judge determined that the respondent's 2015 and 2018 convictions for Driving While Intoxicated and Aggravated Driving While Intoxicated, respectively, were particularly serious crimes (Exh. 9 at 4-5; Exhs. 2, 5). We adopt and affirm the Immigration Judge's particularly serious crime determination (Exhs. 2-3. 5). *Matter of Burbano*. 20 I&N Dec. 872, 874 (BIA 1994).

On appeal, the respondent first makes a number of procedural challenges to the Immigration Judge's termination of his asylum status, none of which is persuasive (Respondent's Br. at 7-9, 12-13). *See Matter of Arambula-Bravo*, 28 I&N Dec. 388, 390-92

(BIA 2021) (a notice to appear that does not specify the time and place of a respondent's initial removal hearing does not deprive the immigration court of jurisdiction); *Matter of V-X-*, 26 I&N Dec. at 149 (holding that "ordinarily issues of removability and eligibility for relief from removal should be deferred until a threshold determination is made regarding the termination of asylum status.").

The respondent also challenges the substance of the Immigration Judge's termination of his asylum status, arguing that: 1) she erred in her conclusion that his 2015 and 2018 Driving While Intoxicated convictions are particularly serious crimes; and 2) that his 2018 conviction is on direct appeal—and thus not final for immigration purposes—meaning that it cannot count against him as a particularly serious crime (IJ October 10,2019, at 1; Exhs. 2,5; Respondent's Br. at 9-11.13-14). We have disposed of 1) above already. As for 2), the respondent and DHS now stipulate that the respondent's 2018 conviction is final for immigration purposes under *Brathwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021). Joint Stipulation at 4, Exh. A, Sept. 1, 2022. Thus, the respondent's asylee status was properly terminated.

Turning to the issue of removability, we affirm the Immigration Judge's decision to sustain the charge under section 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C, § 1182(a)(7)(A)(i)(I) (IJ June 1,2020, at 1; Exhs. 1 A, 1B). That section applies to any immigrant who lacks a valid entry document at the time of application for admission. *See Matter of M-D-C-V-*, 28 I&N Dec. 18, 20 (BIA 2020). The respondent argues that he was not an applicant for admission and was not amenable to a charge of inadmissibility (as opposed to one of removability), but we have held squarely to the

contrary (Respondent's Br. at 15-16). *See* section 101 (a)(15) of the INA, 8 U.S.C. § 1101(a)(15) (defining "immigrant"); section 235(a)(1) of the INA, 8 U.S.C. § 1225(a)(1) (defining any alien who arrives or is present in the United States as an "applicant for admission"); *Matter of M-D-C-V-*, 28 I&N Dec. at 18-20 (interpreting section 212(a)(7)(A)(i)(I)); *Matter of V-X-*. 26 I&N Dec. at 152 (holding that asylees in removal proceedings where the DHS seeks to terminate the grant of asylum are properly charged under section 212 of the INA). Thus, the respondent himself established his inadmissibility when he admitted to the allegations in the Notice to Appear (IJ June 1,2020. at 1; Exhs. 1A, IB).[3]

The respondent next challenges the Immigration Judge's pretermission of his application for adjustment of status, which we affirm (Exhs. 9, 21, 23; Respondent's Br. at 17-18). Once the respondent was no longer an asylee, he was ineligible to adjust under section 209(b). *See Matter of L-T-P-*, 26 I&N Dec. 862,864 (BIA 2016) ("The threshold question for determining the respondent's eligibility for adjustment of status under [section 209(b)] of the Act is whether he...was granted asylee status under section 208."); *cf Matter of C-J-H-*, 26 I&N Dec. 284, 285 (BIA 2014) (concluding that asylees who have adjusted their status under section 209(b) are no longer asylees, and thus ineligible for readjustment under that section); *Matter of K-A-*. 23 I&N Dec. 661, 663-64 (BIA 2004).

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[3] The respondent was initially charged under section 237 of the INA, 8 U.S.C. § 1227, but the DHS submitted a superseding Notice to Appear containing the section 212 charge discussed here (Exhs. 1, 1A, IB, 6-7)

The respondent asserts on appeal that the initial Immigration Judge ruled to the contrary that he *was* eligible to pursue his application for adjustment of status and argues that the ruling of a subsequent Immigration Judge pretermitting his application was a violation of the "law of the case" doctrine (Respondent's Br. at 17-18). We disagree. In support of his argument, the respondent cites to *Operating Policies and Procedures Memorandum 18-01: Change of Venue*, authored by then Chief Immigration Judge MaryBeth Keller on January 17, 2018. *See https://www.justice.gov/eoir/page/file/1026726/download*. Although the OPPM indicates that the law of the case doctrine is well-established and generally applies in removal proceedings, the Memorandum is limited to cases involving changes of venue. *See OPPM 18-01* at 3 ("the law of the case doctrine, as stated in this section, shall apply in COV circumstances."). In this case, the initial ruling was not a final grant of adjustment, but rather a determination that the respondent could still pursue it; the initial Immigration Judge—who found that the respondent's crimes were particularly serious—reminded the respondent that he still needed to demonstrate his eligibility as a matter of discretion; and, the initial Immigration Judge relied on case law that is not binding in the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises (Exh. 9) (*citing Siwe v. Holder*, 742 F.3d 603 (5th Cir. 2014)).

Finally, we adopt and affirm the Immigration Judge's denial of the respondent's request for CAT protection. *Matter of Burbano*, 20 I&N Dec. 872,874 (BIA 1994). The respondent does not challenge the Immigration Judge's findings of fact on appeal, and

we agree with the Immigration Judge's legal conclusions (IJ June 1, 2020, at 4-6; Respondent's Br. at 19). Accordingly, the following orders will be entered.

ORDER: The requests listed in the joint stipulation dated September 1, 2022, are granted, and exhibit A attached to the joint stipulation is admitted into evidence without objection.

FURTHER ORDER: The appeal is dismissed.

[AR38-42]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of August, two thousand twenty-one.

Before: William J. Nardini,
Circuit Judge.

A073-422-455

Byron E. Velasquez Arreaga,

Petitioner,

v.

Merrick B. Garland, United States Attorney General,

Respondent.

ORDER

Docket No. 21 - 6018

[stamp omitted]

The parties have filed a stipulation dismissing this petition for review, with each party to bear its own costs and fees, and remanding the matter to the Board of Immigration Appeals.

The stipulation is SO ORDERED. All pending motions are denied as moot.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ *Catherine O'Hagen Wolfe*

[emblem omitted]

No. 21-6018

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BYRON E. VELASQUEZ ARREAGA,
Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,
Respondent

JOINT STIPULATION TO REMAND TO THE BOARD OF IMMIGRATION APPEALS
Agency No. A073-422-455

WHEREAS Petitioner challenges a December 11, 2020 decision of the Board of Immigration Appeals ("Board") wherein the Board dismissed Petitioner's appeal challenging the termination of his asylee status based on two Driving While Intoxicated ("DWI") convictions, which it determined, both individually and in the aggregate, constituted particularly serious crimes;

IT IS HEREBY STIPULATED AND AGREED, by and between the parties:

1. Relying on *Matter of J.M. Acosta*, 27 I&N Dec. 420, 432-33 (BIA 2018), which has since been abrogated by this Court in *Brathwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021), the Board upheld the Immigration Judge's determination that Petitioner's 2018 and 2015 convictions for DWI constituted particularly serious crimes,

notwithstanding Petitioner's assertion that the 2018 conviction was not final for immigration purposes because it was on direct appeal in New York State at the time of the Board's decision.[1]

2. Given that the Immigration Judge, as affirmed by the Board, appears to have considered the various particularly serious crime factors in the aggregate based on both DWI offenses, this matter shall be remanded to the agency for further consideration of whether the 2015 conviction, by itself, constitutes a disqualifying particularly serious crime. Remand will also allow the agency to consider any other issue or argument it deems relevant to questions surrounding Petitioner's asylee status and removability and the Immigration Judge's jurisdiction in this case. Petitioner anticipates requesting the opportunity to fully brief these issues on remand.

3. By entering into this stipulation. Respondent does not make any representation or admission concerning the merits of the instant petition for review. *See Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir. 2006) (recognizing that "an agency may request a remand (without confessing error)" in order to conduct further investigation, provide further explanation, or reconsider its decision or prior position) (internal quotation marks and citation omitted).

4. Based on the foregoing, undersigned counsel for the parties stipulate that the matter should be

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[1] Based on information available to Petitioner's counsel, it appears that Petitioner's appeal is no longer pending before the New York State Appellate Division.

remanded. Nothing in this stipulation and order limits the ability of Petitioner to file a new petition for review of any further order issued by the Board. Petitioner is not detained.

5. The Court should therefore remand this matter to the Board, with each party bearing its own costs, expenses, and attorney's fees.

Dated: August 13, 2021

BY:

/s/ Rachel G. Skaistis
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Attorneys for Respondent

[AR47-50]

U.S. Department of Justice Executive Office for Immigration Review Falls Church. Virginia 22041	Decision of the Board of Immigration Appeals

File: A073-422-455 – Batavia, NY Date: DEC 11 2020

In re: Byron E. VELASQUEZ ARREAGA

IN REMOVAL PROCEEDINGS

APPEAL[1]

ON BEHALF OF RESPONDENT: Hollis Ann DeAbreu, Esquire

ON BEHALF OF DHS: Peter Marche
Assistant Chief Counsel

APPLICATION: Removability; adjustment of status; Convention Against Torture

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's June 1, 2020, decision ordering him removed from the United States. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous"

[1] To resolve any issues of timeliness, we will consider this matter on appeal pursuant to 8 C.F.R. § 1003.1(c).

standard. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, discretion, or judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

In separate decisions by different Immigration Judges during the respondent's removal proceedings below, the respondent's asylee status was terminated, he was found removable, his application for adjustment of status under section 209(b) of the Immigration and Nationality Act, 8 U.S.C. § 1159(b), was pretermitted, and his request for protection from removal under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) (CAT) was denied. The respondent challenges all of these decisions on appeal, which we will address in turn.

We affirm the Immigration Judge's termination of the respondent's status as an asylee (Exh. 9 at 5). The respondent was granted asylum in the United States from Guatemala in 1996 (IJ June 1, 2020, at 2; Exh. IB). An asylee may not be removed from the United States "unless and until his asylum status is terminated." *Matter of V-X-*, 26 I&N Dec. 147, 149 (BIA 2013). An Immigration Judge may terminate a respondent's grant of asylum during removal proceedings. 8 C.F.R. §§ 1208,24(f), (g). Termination of an asylum grant during removal proceedings can happen for different reasons based on distinct preconditions—relevant to the respondent, it requires that the DHS serve the respondent with a notice of intent to terminate asylum and a determination that he was convicted of a "particularly serious crime." *See* sections 208(c)(2)(B) and (b)(2)(A)(ii) of the Act, 8

U.S.C. §§ 1158(c)(2)(B), (b)(2)(A)(ii); 8 C.F.R. §§ 1208.24(a)(2), (f)-(g). The DHS served the respondent with the termination notice and the Immigration Judge determined that the respondent's 2015 and 2018 convictions for Driving While Intoxicated and Aggravated Driving While Intoxicated, respectively, were particularly serious crimes (Exh. 9 at 4-5; Exhs. 2, 5). We adopt and affirm the Immigration Judge's particularly serious crime determination (Exhs. 2-3, 5). *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994).

On appeal, the respondent first makes a number of procedural challenges to the Immigration Judge's termination of his asylum status, none of which is persuasive (Respondent's Br. at 7-9, 12-13). *See Matter of Bermudez-Cota*, 27 I&N Dec. 441, 444-45 (BIA 2018) (holding that jurisdiction properly vests in an Immigration Court once a charging document is filed); *Matter of V-X-*, 26 I&N Dec. at 149 (holding that "ordinarily issues of removability and eligibility for relief from removal should be deferred until a threshold determination is made regarding the termination of asylum status.").

The respondent also challenges the substance of the Immigration Judge's termination of his asylum status, arguing that: 1) she erred in her conclusion that his 2015 and 2018 Driving While Intoxicated convictions are particularly serious crimes; and 2) that his 2018 conviction is on direct appeal—and thus not final for immigration purposes—meaning that it cannot count against him as a particularly serious crime (IJ October 10, 2019, at 1; Exhs. 2, 5; Respondent's Br. at 9-11, 13-14). We have disposed of 1) above already. As for 2), a conviction is presumed final for our purposes "once the DHS has established

that a respondent has a criminal conviction at the trial level and that the time for filing a direct appeal has passed." *Matter of J.M. Acosta*, 27 I&N Dec. 420, 432-33 (BIA 2018) (discussing the procedure for determining the finality of a conviction for immigration purposes). The presumption is rebuttable, provided that the respondent presents evidence showing that an appeal has been timely filed (including by extension or permissive filing) and that the appeal "relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings." *Id.* at 432. Here, the respondent provided a court order showing that the New York Appellate Division granted him an extension to file an appeal, and that it had accepted his imperfect filing of "moving papers" as such (Exh. 15 at Tab C). However, the Appellate Division order does not illuminate the substance of the appeal, the respondent does not describe its contents, and the record does not otherwise reveal its basis. We agree with the Immigration Judge that the respondent has not rebutted the presumption that his 2018 conviction is final (IJ October 10, 2019 at 1). In any event, the respondent's 2015 Driving While Intoxicated conviction is not on appeal, which as we discussed above, is also a particularly serious crime. Thus, the respondent's asylee status was properly terminated.

Turning to the issue of removability, we affirm the Immigration Judge's decision to sustain the charge under section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I) (IJ June 1, 2020, at 1; Exhs. 1A, 1B). That section applies to any immigrant who lacks a valid entry document at the time of application for admission. *See Matter of M-D-C-V-*, 28 I&N Dec. 18, 20 (BIA 2020). The respondent argues that he was

not an applicant for admission and was not amenable to a charge of inadmissibility (as opposed to one of removability), but we have held squarely to the contrary (Respondent's Br. at 15-16). *See* section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15) (defining "immigrant"); section 235(a)(1) of the Act, 8 U.S.C. § 1225(a)(1) (defining any alien who arrives or is present in the United States as an "applicant for admission"); *Matter of M-D-C-V-*, 28 I&N Dec. at 18-20 (interpreting section 212(a)(7)(A)(i)(I)); *Matter of V-X-*, 26 I&N Dec. at 152 (holding that asylees in removal proceedings where the DHS seeks to terminate the grant of asylum are properly charged under section 212 of the Act). Thus, the respondent himself established his inadmissibility when he admitted to the allegations in the Notice to Appear (IJ June 1, 2020, at 1; Exhs. 1A, 1B).[2]

The respondent next challenges the Immigration Judge's pretermission of his application for adjustment of status, which we affirm (Exhs, 9, 21, 23; Respondent's Br. at 17-18). Once the respondent was no longer an asylee, he was ineligible to adjust under section 209(b). *See Matter of L-T-P-*, 26 I&N Dec. 862, 864 (BIA 2016) ("The threshold question for determining the respondent's eligibility for adjustment of status under [section 209(b)] of the Act is whether he . . . was granted asylee status under section 208."); *cf. Matter of C-J-H-*, 26 I&N Dec. 284, 285 (BIA 2014) (concluding that asylees who have adjusted their status under section 209(b) are no

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[2] The respondent was initially charged under section 237 of the Act, 8 U.S.C. § 1227, but the DHS submitted a superseding Notice to Appear containing the section 212 charge discussed here (Exhs. 1, 1A, 1B, 6-7).

longer asylees, and thus ineligible for readjustment under that section); *Matter of K-A-*, 23 I&N Dec. 661, 663-64 (BIA 2004).

The respondent asserts on appeal that the initial Immigration Judge ruled to the contrary that he *was* eligible to pursue his application for adjustment of status and argues that the ruling of a subsequent Immigration Judge pretermitting his application was a violation of the "law of the case" doctrine (Respondent's Br. at 17-18). We disagree. In support of his argument, the respondent cites to *Operating Policies and Procedures Memorandum 18-01: Change of Venue*, authored by then-Chief Immigration Judge MaryBeth Keller on January 17, 2018. *See https://www.justice.gov/eoir/page/file/1026726/download*. Although the OPPM indicates that the law of the case doctrine is well-established and generally applies in removal proceedings, the Memorandum is limited to cases involving changes of venue. *See OPPM 18-01* at 3 ("the law of the case doctrine, as stated in this section, shall apply in COV circumstances."). In this case, the initial ruling was not a final grant of adjustment, but rather a determination that the respondent could still pursue it; the initial Immigration Judge—who found that the respondent's crimes were particularly serious—reminded the respondent that he still needed to demonstrate his eligibility as a matter of discretion; and, the initial Immigration Judge relied on case law that is not binding in the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises (Exh. 9) (citing *Siwe v. Holder*, 742 F.3d 603 (5th Cir. 2014)).

Finally, we adopt and affirm the Immigration Judge's denial of the respondent's request for CAT

protection. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The respondent does not challenge the Immigration Judge's findings of fact on appeal, and we agree with the Immigration Judge's legal conclusions (IJ June 1, 2020, at 4-6; Respondent's Br. at 19). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $813 for each day the respondent is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

/s/ Joan B. Geller
FOR THE BOARD

[AR131-36]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BATAVIA, NEW YORK

File: A073-422-455 June 1, 2020

In the Matter of

BYRON E. VELASQUEZ ARREAGA RESPONDENT	))))	IN REMOVAL PROCEEDINGS

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT: HOLLIS DEABREU BELGRAVE

ON BEHALF OF DHS: J. CHRISTOPER MOELLERING

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department of Homeland Security initiated removal proceedings against the respondent by filing a Notice to Appear initially back in March of 2019. The original charges were sustained as an overstay in July 1, 2019. However, a superseding Notice to Appear was filed on July 29, 2019 with the charges

212(a)(7)(A)(i)(I) and that charge was sustained on August 26, 2019.

The respondent filed an I-589 on April 22, 2020. The respondent has numerous convictions that are particularly serious crimes. Therefore, his form of relief being sought is limited to deferral of removal under the Convention against Torture. The respondent had initially entered the United States in 1995 and had received asylee status back in 1996. After a series of convictions, the respondent's asylee status was terminated, and his application for adjustment of status and wavier under 209 were pretermitted, hence, the filing of the I-589 on April 22, 2020.

The respondent testified that his father was part of the military commission in Guatemala back in 1995, and that as part of the military commission he was involved in recruitment of soldiers and movement of arms and ammunition. The respondent testified that a group of guerillas approached the respondent in 1995 and asked him to join them, and that they wanted information regarding things that the respondent's father may know, and if he joined them that he would reap great benefits, money, houses, whatever. The respondent testified that he said he did not want to join them, and they said, well, you need to think about it.

The respondent then was approached again by this group of guerillas asking the same thing, and the respondent, again, declined. The respondent testified that at that time, they kidnapped him and took him to a place far away and kept him for approximately three hours. During that time, they beat him, and, at one point, used a large knife to cut the left side of his face above his eyebrow. The respondent continued to

refuse to join them. The respondent testified that when he was released, they dumped him and in an unknown place, and he went to a place near the border, that the bleeding stopped and his face healed.

The respondent testified that he told his father about the first time he was approached by the guerillas, but he did not tell his father about the second time that he was approached and kidnapped, that he simply fled the country.

The respondent testified that the reason his original I-589 filed back in 1996 is different in that the original I-589 said that he refused to join the guerillas because of his religion and does not mention his father is because someone else who helped him fill this out told the respondent that the fact that he was injured would be sufficient without all the extra detail. The respondent was asked about his religion claim, and the respondent stated that, yes, one of the reasons he did not want to join the guerillas is because he believed in God and did not want to hurt anyone else. The respondent testified that he is afraid to return to Guatemala because the same people that used to part of the guerillas are now part of the cartel and would recognize him and still come after him.

The Court finds that the discrepancies in the respondent's answers are not fatal to his asylum claim. The respondent testified credibly in today's hearing and any discrepancies are sufficiently minimal that they do not take away the respondent's credibility.

An applicant for deferral of removal under the Convention against Torture bears the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country of

removal. Torture is defined as the intentional infliction of severe physical or mental pain or suffering based on discrimination of any kind, or for the purpose of obtaining information or a confession, or to punish for an act or suspected act, or to intimidate or coerce any person or third party. There is also a requirement to show that a government actor must consent or acquiesce or instigate the torture or breach his or her legal responsibility to intervene to prevent such torture because they are unwilling or unable to oppose it if inflicted by a third party.

In assessing whether it is more likely than not that the applicant will be tortured in the proposed country of removal, the Court may consider evidence of past torture, evidence the applicant could relocate to a part of the party of removal where he is not likely to be tortured, evidence of gross, flagrant or mass violations of human rights within the country of removal, or other relevant information. An applicant cannot string together a series of suppositions, and the applicant must show specific grounds indicating that he would be personally at risk.

In the instant case, the respondent's application does not meet the burden for deferral of removal under the Convention against Torture. First of all, the original asylum grant was just that, an asylum grant. The burden of proof is much lower than in a CAT claim. Therefore, the Court cannot rely on a previous grant.

Also, the Court finds that while it does not condone the actions of the guerillas, the respondent's past harm does not rise to the level of torture. Having a wound from being harmed does not automatically mean torture. The respondent did not need medical care or chose not to get it, and stated himself that the

wound healed itself. While it does not make sense to this Court why the respondent did not go to his father after being attacked, even considering the respondent's credible testimony, there has not been torture in the past. The government in Guatemala has changed and has made several changes in light of the end of the civil war. Several of the former intelligence chiefs and people in the public ministry that were involved in indigenous conflicts in the civil war have had charges placed against them, and the government appears to be working to rid itself of the corruption not only that has lasted from the civil war but also that just on a general level such as on July 16 the public ministry brought charges against more than 50 persons including 10 members of congress for receiving kick-backs from construction and medical supply procurement and for awarding public jobs by irregular means.

As the Department mentioned, in 1996 the Peace Accords were signed. And as in Matter of A-B- and Matter of M-E-V-G- and Matter of S-E-G-, the fear of the cartel is not sufficient to meet the respondent's burden. The government definitely is struggling with issues within its country, but as Matter of J-F-F- notes a lack of resources is regrettable, but it does not constitute torture under the regulations.

The respondent states that he has heard that there are many problems in his hometown. At the same time, the respondent states he does not have a home anywhere in Guatemala. Therefore, there is nothing to show that the respondent cannot relocate if he has issues in his hometown. There is nothing in the record to show that the government would either consent to or look the other way if someone tried to torture the respondent.

In regards to the respondent's claim that he would be targeted because he has been diagnosed with COVID-19 positive, the government does not consent to treatment that COVID-positive deportees have received and, in fact, as the Department noted in the article under Exhibit 25, Tab H, talks about how the government is working for ways to make sure that the deportees are welcome back in without discrimination and local community leaders are also doing the same. Therefore, there is nothing in the record to support that the respondent would be singled out, would be tortured, and that the government would permit it based on the respondent's COVID-19 positive status.

Therefore, based on the fact that the respondent has not suffered past torture, that the country conditions have dramatically changed, that a fear of cartel is not sufficient in light of Guatemala's efforts to control the cartels and discrimination and corruption, and that the government has not shown acquiescence and is not turning a blind eye to local communities' reactions to COVID-positive returnees, the respondent has not met his burden to show that he warrants a grant of deferral under the Convention against Torture.

Therefore, it is hereby ordered that the respondent's application for asylum is denied. The respondent's application for withholding of removal is denied. The respondent's application for withholding of removal under the Convention against Torture is denied, and the respondent's application for deferral of removal under the Convention against Torture is denied. And the respondent is ordered removed to Guatemala.

Date: June 1,2020

AIKMAN, SUSAN, F
Immigration Judge

[AR603-05]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BATAVIA, NEW YORK

In the Matter of: **VELASQUEZ ARREAGA, Byron** **A # 073 422 455** Respondent	:	***Detained*** **IN REMOVAL PROCEEDINGS**

CHARGES: INA § 237(a)(1)(B)	Remaining in U.S. beyond time permitted
APPLICATIONS: INA § 209	Adjustment of Status of Refugee/Asylee

ON BEHALF OF RESPONDENT	***ON BEHALF OF DHS***
Brenda Cisneros Vilchis, Esq ECBA Volunteer Lawyers Project, Inc. 8 South Lyon Street Batavia, NY 14020	Sydney Probst, ACC. DHS Assistant Chief Counsel 4250 Federal Drive Batavia, NY 14020

ORDER OF THE IMMIGRATION JUDGE

COMES NOW the Court, in response to respondent's pending applications for Adjustment of Status and

Waiver via INA §209, which is opposed by the Department of Homeland Security ("DHS"). After review of the record of proceedings, the Court **PRETERMITS** respondent's applications for adjustment of status and waiver relief:

1. That, on July 1, 2019, the Court sustained the charges of removability under sections 237(a)(1)(B) of the Immigration and Nationality Act ("INA"), as contained in the Notice to Appear ("NTA"). Ex. 1. The Court designated Guatemala as the country of removal at the suggestion of DHS.
2. That respondent was admitted to the United States on or about March 5, 1996 as an asylee under INA §208.
3. That USCIS issued a Notice of Intent to Terminate Asylum to respondent on February 13, 2019, because of respondent's criminal convictions.
4. That the Court terminated respondent's asylee status as of July 1, 2019.
5. That the Court denied respondent's motion to reconsider the termination of his asylee status on August 20, 2019.
6. That respondent has filed motions to continue his individual hearing to request relief under INA §209 and adjust his status to Lawful Permanent Resident.
7. That DHS opposes the motion to continue the hearing and submitted a Motion to Pretermit respondent's adjustment of status application.

I. Analysis

INA §209 governs the adjustment of status for refugees and asylees. INA §209 corresponds to 8 CFR §1209.1 and 8 CFR §1209.2. Since respondent was admitted as an asylee, the Court will focus on 8 CFR §1209.2, Adjustment of Status of Alien Granted Asylum. Subsection (a)(1) of 8 CFR §1209.2 states "[e]xcept as provided in paragraph (a)(2) or (a)(3) of this section, the status of any alien who has been granted asylum in the United States may be adjusted to that of an alien lawfully admitted for permanent resident…"

Subsection (2) of 8 CFR §1209.2 states "[a]n alien, who was granted asylum in the United States prior to November 29, 1990 (regardless of whether or not such asylum has been terminated under section 208(b) of the Act), and is no longer a refuges due a changed in circumstances in the foreign state where he or she feared persecution, may also have his or her status adjusted by the director to that of an alien lawfully admitted for permanent residence even if he or she is no longer able to demonstrate that he or she continue to be a refugee within the meaning of section 101(a)(42) of the Act…"

Lastly, subsection (3)(b) of 8 CFR §1209.2 states "...[a]n applicant who is inadmissible to the United States under section 212(a) of the Act, may, under section 209(c) of the Act, have the grounds of admissibility waived by the director...for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

Respondent relies on *Siwe v. Holder*, 742 F.3d 603 (5th Cir. 2014) to bolster his claim that he is entitled to apply for adjustment of status as a person "who has

been granted asylum in the United States." In *Siwe*, the 5th Circuit opined that the phrase "who has been granted asylum" is to be read as anyone who has been granted asylum in the past including those who have had their status terminated. The Court in *Siwe* looks at the caveat carved out by 8 CFR §1209(2) and states since Congress did not carve out an exception for terminated asylees, they must mean anyone who has ever been granted. However, a reading of the Agency notes on the Final Rule found in 57 FR 42883-01, 1992 WL 225611(F.R.) undercuts this finding. The 1992 Final Rule adjusts the resident status allowed each year under 209(b) of the INA from 5000 to 10000 adjustments. Most importantly the Final Rule states "[t]he law also provides for the adjustment of certain aliens who have been granted asylum but who county conditions changed so that they no longer continue to be refugees within the definition of section 101(a)(42) of the Immigration and Nationality Act. This provision applies to asylees who were or would be qualified for adjustment as of November 28, 1990…" Prior to this change, a refugee or asylee who could lose their status solely due to a change in their country conditions. In other words, the caveat concerning "whether or not such asylum has been terminated" was to address a portion of the population that were left in a legal gray area if there were changed country conditions. This caveat was not designed to say all other refugees and asylee that have ever been granted status can apply for adjustment notwithstanding the current status they hold. A person who has been granted status, on its face, is a person who has been granted status. Full stop. There is no reasonable reading that would include adding something along

the lines of notwithstanding the termination of their status.

In *Siwe*, the Court also stated that reading the statute any way other than through its analysis would nullify the waiver available in 8 CFR §1209(b). This line of reasoning misses the full breadth of the waiver statute. A person can be granted asylee or refugee status and yet, when it comes time for the person to adjust, the person may be inadmissible for a number of reasons that do not include termination of their asylum status. The grounds of inadmissibility for a grant of asylee or refugee status are extremely narrow compared to the grounds of inadmissibility for a grant of adjustment of status. A person who has been admitted as an asylee and remains an asylee can apply for adjustment of status and still need a waiver. The Court in *Siwe* made a leap in reasoning that excluded the myriad of possibilities still viable under INA §209(c) waiver. It is also noteworthy that the Board of Immigration Appeals have held that the termination of asylee status bars adjustment under INA §209 and that no other Circuit has adopted the reasoning in *Siwe*.

Accordingly, after a careful review of the record, the following Orders will be entered:

ORDERS

IT IS HEREBY ORDERED that the Respondent's application for Adjustment of Status be PRETERMITED.

2/14/2020	*/s/ Susan F. Aikman*
Date	Susan F. Aikman United States Immigration Judge

* * *

8 U.S.C. § 1157

§ 1157. Annual admission of refugees and admission of emergency situation refugees

* * *

(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status of alien, spouse or child

(1) Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter.

(2)(A) A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 1101(a)(42) of this title, be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the

appropriate subsection under which the refugee's admission is charged.

(B) An unmarried alien who seeks to accompany, or follow to join, a parent granted admission as a refugee under this subsection, and who was under 21 years of age on the date on which such parent applied for refugee status under this section, shall continue to be classified as a child for purposes of this paragraph, if the alien attained 21 years of age after such application was filed but while it was pending.

(3) The provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be granted only on an individual basis following an investigation. The Attorney General shall provide for the annual reporting to Congress of the number of waivers granted under this paragraph in the previous fiscal year and a summary of the reasons for granting such waivers.

(4) The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) of this title at the time of the alien's admission.

* * *

8 U.S.C. § 1158

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In General

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's

burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(ii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

* * *

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

8 U.S.C. § 1159

§ 1159. Adjustment of status of refugees

(a) Inspection and examination by Department of Homeland Security

(1) Any alien who has been admitted to the United States under section 1157 of this title—

(A) whose admission has not been terminated by the Secretary of Homeland Security or the Attorney General pursuant to such regulations as the Secretary of Homeland Security or the Attorney General may prescribe,

(B) who has been physically present in the United States for at least one year, and

(C) who has not acquired permanent resident status,

shall, at the end of such year period, return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 1225, 1229a, and 1231 of this title.

(2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c)) as an immigrant under this chapter at the time of the alien's inspection and examination shall, notwithstanding any numerical limitation specified in this chapter, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States.

(b) Requirements for adjustment

The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

(1) applies for such adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of section 1101(a)(42)(A) of this title or a spouse or child of such a refugee,

(4) is not firmly resettled in any foreign country, and

(5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this chapter at the time of examination for adjustment of such alien.

Upon approval of an application under this subsection, the Secretary of Homeland Security or the Attorney General shall establish a record of the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application.

(c) Coordination with section 1182

The provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking adjustment of status under this section, and the Secretary of Homeland Security or the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or

subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

8 C.F.R. § 1208.24

§ 1208.24 Termination of asylum or withholding of removal or deportation

* * *

(d) *Termination of derivative status.* The termination of asylum status for a person who was the principal applicant shall result in termination of the asylum status of a spouse or child whose status was based on the asylum application of the principal. Such termination shall not preclude the spouse or child of such alien from separately asserting an asylum or withholding of deportation or removal claim.

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8 C.F.R. § 1209.2

§ 1209.2 Adjustment of status of alien granted asylum.

The provisions of this section shall be the sole and exclusive procedure for adjustment of status by an asylee admitted under section 208 of the Act whose application is based on his or her asylee status.

(a) *Eligibility*. (1) Except as provided in paragraph (a)(2) or (a)(3) of this section, the status of any alien who has been granted asylum in the United States may be adjusted to that of an alien lawfully admitted for permanent residence, provided the alien:

(i) Applies for such adjustment;

(ii) Has been physically present in the United States for at least one year after having been granted asylum;

(iii) Continues to be a refugee within the meaning of section 101(a)(42) of the Act, or is the spouse or child of a refugee;

(iv) Has not been firmly resettled in any foreign country; and

(v) Is admissible to the United States as an immigrant under the Act at the time of examination for adjustment without regard to paragraphs (4), (5)(A), (5)(B), and (7)(A)(i) of section 212(a) of the Act, and (vi) has a refugee number available under section 207(a) of the Act.

If the application for adjustment filed under this part exceeds the refugee numbers available under section 207(a) of the Act for the fiscal year, a waiting list will be established on a priority basis by the date the application was properly filed.

(2) An alien, who was granted asylum in the United States prior to November 29, 1990 (regardless of whether or not such asylum has been terminated under section 208(b) of the Act), and is no longer a refugee due to a change in circumstances in the foreign state where he or she feared persecution, may also have his or her status adjusted by the director to that of an alien lawfully admitted for permanent residence even if he or she is no longer able to demonstrate that he or she continues to be a refugee within the meaning of section 101(a)(42) of the Act, or to be a spouse or child of such a refugee or to have been physically present in the United States for at least one year after being granted asylum, so long as he or she is able to meet the requirements noted in paragraphs (a)(1)(i), (iv), and (v) of this section. Such persons are exempt from the numerical limitations of section 209(b) of the Act. However, the number of aliens who are natives of any foreign state who may adjust status pursuant to this paragraph in any fiscal year shall not exceed the difference between the per country limitation established under section 202(a) of the Act and the number of aliens who are chargeable to that foreign state in the fiscal year under section 202 of the Act. Aliens who applied for adjustment of status under section 209(b) of the Act before June 1, 1990, are also exempt from its numerical limitation without any restrictions.

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