



# FINAL REGULATION CREATES NEW CRIMES-BASED BARS TO ASYLUM

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## I. Introduction

On October 21, 2020, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) published its final version of a rule that sets out wide-ranging and draconian bars to applying for asylum. See 85 Fed. Reg. 67202, amending 8 CFR §§ 208.13(c), 208.16, 1208.13(c), and 1208.16.

The new bars also appear to be bases to terminate an asylum grant pursuant to INA § 208(c)(2), 8 USC § 1158(c)(2), although that should apply only if the person's asylum application was filed on or after the effective date of the regulation, which currently is the subject of litigation. The bars are not a basis to terminate refugee status. See FAQs # 3, 4.

This final rule is essentially the same as the proposed regulation that was published on December 19, 2019. DHS and DOJ declined to make any of the substantive changes that experts and advocates suggested in over 580 comments.

There are two limits on the applicability of this regulation:

- *Preliminary Injunction blocks implementation.* A lawsuit challenging the rule was filed in the Northern District of California, *Pangea Legal Services, et al v. U.S. Dep't of Homeland Security*, Case No. 3:20-cv-07721. On November 19, 2020, the Northern District of California issued a temporary restraining order, enjoining the government from implementing and enforcing the new rule nationwide until pending a decision on a preliminary injunction. On November 24, 2020, the Northern District of California issued an order converting the temporary restraining order to a preliminary injunction. Accordingly, the government remains enjoined from implementing and enforcing the new rule pending final disposition of the pending litigation. Information about the litigation, including the complaint, is available at [https://nipnl.org/our\\_lit/impact/2020\\_02Nov\\_lit-pangea-v-dhs.html](https://nipnl.org/our_lit/impact/2020_02Nov_lit-pangea-v-dhs.html). See FAQs # 1-3.
- *Effective dates.* The regulation has effective date provisions, which currently are not in effect due to the injunction. If the government were to prevail in the lawsuit, it might name a new effective date or it might try to impose the November 20, 2020 date retroactively. In this advisory we will refer to November 20, 2020 as the effective date.

The regulation provides that it will take effect on November 20, 2020 and that it will apply only to asylum applications filed on or after November 20, 2020. For those applications, the regulation will apply only to convictions (or in the case of the conduct-based bar, conduct) that occurred on or after November 20, 2020.<sup>1</sup> In other words, if the asylum application was filed before November 20, 2020, none of the new bars apply, regardless of date of conviction or conduct. If the application was filed on or after November 20, 2020, then the bars apply, but only to convictions or conduct that occurred on or after that date. See FAQs #1-3.

**Criminal Defenders** must act conservatively and assume that the regulation will be upheld, even though we have reason to hope that it will not. That means that noncitizens who need to apply for asylum must try to avoid convictions that will trigger the below bars. Because these bars are so broadly defined, this may be difficult (and when it comes to domestic violence cases, nearly impossible). Conviction of any felony, any

<sup>1</sup> See 8 CFR §§ 208.13(c)(6) (first line) and (6)(i), 1208.13(c)(6) (first line) and (6)(i).

controlled substance offense, a single DUI with injury, a DUI with a DUI prior (regardless of injury), and public benefits fraud all are bars. Domestic violence and child abuse offenses are very difficult because the bar can be based on the actual conduct rather than the elements of the offense; see FAQ # 8, 9. These cases may require a sharp assessment of the client's priorities, even more than "regular" crim/imm decisions do. How important is it for this person to remain eligible for asylum? If they do not have a strong asylum case, should they take risks in the criminal case in hopes of avoiding a bar? What other options do they have in removal proceedings? This is a good time to get immigration attorney input.

## II. Key Elements of the Final Rule

The new rule:

- ⇒ Creates seven (7) new "additional limitations" barring asylum<sup>2</sup>. This includes six (6) new categories of conviction-based bars and one (1) new conduct-based bar.
- ⇒ The new bars also appear to constitute bases for termination of asylum under INA § 208(c)(2)(B), although that should apply only where the asylum application was filed on or after 11/20/20. The new bars are not bases to terminate refugee status. See FAQs # 3, 4.
- ⇒ Evaluates whether a conviction is for domestic violence, stalking, or child abuse based on the asylum adjudicator's findings regarding the underlying facts of the criminal case, rather than the elements of the offense.<sup>3</sup> See FAQ # 8.
- ⇒ Imposes new rules governing when post-conviction relief (PCR) is considered effective.<sup>4</sup> That standard could be read to impose a new substantive requirement that is in conflict with the immigration definition of conviction as defined by precedent. See FAQ # 10.
- ⇒ Eliminates the automatic review of denials of asylum based on discretion<sup>5</sup>;
- ⇒ Takes effect on November 20, 2020. Applies only to asylum cases where the application was filed on or after November 20, 2020, and then only to convictions or conduct that occurred on or after that date.<sup>6</sup> This Advisory will refer to the effective date as November 20, 2020, the date cited in the regulation. But the rule has not yet been implemented, and if the government prevails in litigation it might or might not designate a new effective date. See FAQ # 1, 2.
- ⇒ Applies to asylum cases before USCIS and the Immigration Court. See 8 CFR §§ 208.13(c), 208.16 (governing affirmative applications) and §§ 1208.13(c), 1208.16 (governing applications before an immigration judge).

<sup>2</sup> See 8 CFR § 208.13(c)(6). The same text and citations apply to the new bars to asylum in affirmative applications and in removal proceedings at 8 CFR § 1208.13(c).

<sup>3</sup> See 8 CFR §§ 208.13(c)(5), 1208.13(c)(5).

<sup>4</sup> See 8 CFR §§ 208.13(c)(7)(v), (8), (9), 1208.13(c) (7)(v), (8), (9).

<sup>5</sup> The rule does this by eliminating 8 CFR §§ 208.16(e), 1208.16(e).

<sup>6</sup> See 8 CFR §§ 208.13(c)(6) (first line) and (6)(i), 1208.13(c)(6) (first line) and (6)(i).

### III. Analysis of the New Final Rule

#### A. New Convictions and Conduct Bars

These are “additional limitations” barring asylum, added to 8 CFR §§ 208.13(c), 1208.13(c). To come within these bars, the convictions or conduct must have occurred, *and* the asylum application must have been filed, on or after the effective date, November 20, 2020.

1. **Federal Conviction for Illegal Reentry, or for Smuggling, Transporting, or Harboring**, where the conviction occurs on or after the effective date (11/20/2020). A conviction for smuggling, harboring, or transporting is a bar even if the applicant committed the offense in order to help their own spouse, child, or parent to flee persecution.<sup>7</sup>
2. **Conviction for Assisting “Criminal Street Gang” Activity**. Convicted on or after the effective date (11/20/2020) for conviction of “a crime” if the adjudicator “knows or has reason to believe the offense was committed in support, promotion, or furtherance of activity of a criminal street gang, as defined either under the jurisdiction where the conviction occurred or at 18 USC § 521(a).”<sup>8</sup>

NOTE: Under this vague definition, an offense can be a bar even if it has no element relating to gangs, as long as the adjudicator has “reason to believe” that the offense was “in support” of a gang. See discussion of defense strategies at FAQ # 6.

3. **Conviction of DUI with Injury**. Convicted of a felony or misdemeanor on or after the effective date (11/20/2020) for driving while intoxicated, impaired, or under the influence of alcohol or drugs, as defined under the jurisdiction where the conviction occurred, “in which such impaired driving was a cause of serious bodily injury or death of another person”.<sup>9</sup>
4. **Conviction of DUI, After a Prior DUI Conviction** (regardless of injury). Convicted of a “second or subsequent” felony or misdemeanor on or after the effective date (11/20/2020) for driving while intoxicated, impaired, or under the influence of alcohol or drugs, as defined under the jurisdiction where the conviction occurred, *after* previously having been convicted of such an offense. The prior conviction can have taken place before November 20, 2020, and it did not have to serve as a predicate offense in the prosecution of the second or subsequent offense.<sup>10</sup>

<sup>7</sup> See 8 CFR §§ 208.13(c)(6)(i), 1208.13(c)(6)(i), regarding conviction for illegal re-entry under INA § 276, 8 USC § 1326, or for smuggling, transporting or harboring under INA § 274(a)(1)(A) or 274(a)(2), 8 USC § 1324(a)(1)(A), (2).

<sup>8</sup> See 8 CFR §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii).

<sup>9</sup> See 8 CFR §§ 208.13(c)(6)(iii), 1208.13(c)(6)(iii).

<sup>10</sup> See 8 CFR §§ 208.13(c)(6)(iv), 1208.13(c)(6)(iv).

NOTE: Arguably a California “wet reckless” conviction under Vehicle Code §§ 23103 and 23103.5 is not to a bar to asylum under this category, because it does not meet the definition of driving while intoxicated, impaired, or under the influence. For California defenders, a plea to straight reckless driving, VC § 23103, is best – but a wet reckless also might preserve asylum eligibility and it is worth trying for. Immigration advocates must be prepared for DHS to argue that a wet reckless is a bar. See FAQ #7.

5. **Conviction of Domestic Violence, Stalking, or Child Abuse, Neglect, or Abandonment**, with an exception for some victims of domestic violence.<sup>11</sup>

- a. Convicted on or after effective date (11/20/2020) of “a crime that ***involves conduct amounting to***” a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or “a domestic assault or battery offense,” a term that includes:
- A “**misdemeanor** crime of domestic violence” as described at 18 USC §§ 921(a)(33) or 922(g)(9), or a “crime of domestic violence” as described at 34 USC § 12291(a)(8), or
  - “**Any crime based on conduct** in which the [noncitizen] harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight,” upon someone with whom the noncitizen shares a “domestic relationship.”
    - Domestic relationship is defined to mean that the noncitizen is the current or former spouse, parent of child, current or former cohabitant as a spouse, similarly situated to a spouse under local domestic or family violence laws, any other person who is protected from the applicant’s acts under federal, state, tribal, or local domestic or family violence laws.
    - The adjudicator *may consider the underlying conduct of the crime*, and is not limited to the facts found by the criminal court or in the record of conviction.

NOTE: The conviction does not need to be one that would trigger deportability under the domestic violence ground at INA § 237(a)(2)(E), 8 USC § 1227(a)(2)(E). For example, a conviction for simple battery committed against a spouse, such as California Penal Code § 243(e), is not a deportable crime of domestic violence, but it could be a “domestic violence” bar to asylum, if the adjudicator found that the underlying facts meet the description in the new bar. Defenders might be able to help by creating specific factual bases for pleas. See FAQ # 8, 9.

- b. **EXCEPTION** for some victims of domestic violence: Where an asylum applicant with a domestic violence or stalking conviction is described in INA § 237(a)(7)(A), 8 USC 1227(a)(7)(A), because they are not the primary perpetrator of violence in the relationship and they meet other

<sup>11</sup> See 8 CFR § 208.13(c)(6)(v); 8 CFR § 1208.13(c)(6)(v).

requirements<sup>12</sup>, they are not barred from asylum. The § 237(a)(7)(A) waiver does not apply to conviction for child abuse.

## 6. Conviction of any Felony or Certain Misdemeanors

- a. **Any felony conviction** under federal, state, tribal, or local law, on or after the effective date (11/20/2020).<sup>13</sup> “Felony” is defined as an offense that either has a potential sentence of more than a year, or is defined as a felony under the convicting jurisdiction.<sup>14</sup>
- b. **Certain misdemeanor convictions** under federal, state, tribal, or local law, on or after the effective date (11/20/2020), involving the following:<sup>15</sup>
  - **Conviction for possession or use of false or fraudulent identity documents or authentication features, EXCEPT** where the conviction resulted from use of the document to board a “common carrier” (e.g., airplane, bus), the document related to the applicant’s eligibility to enter the United States, the document was used to depart a country from which the applicant has claimed fear of persecution, and the claim was made without delay upon self-presentation to immigration upon arrival at a U.S. Port of Entry; **or**
  - **Conviction for possession or trafficking of a controlled substance or paraphernalia**, other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, **or**
  - **Conviction for receipt of certain public benefits without lawful authority**, e.g., conviction for welfare fraud. Public benefits is broadly defined.<sup>16</sup>

## 7. Conduct Bar: Adjudicator Knows or Has Reason to Believe that the Applicant Engaged in Acts of Battery or Extreme Cruelty in a domestic relationship, as defined in 8 CFR § 204.2(c)(1)(vi), on or after 11/20/2020.<sup>17</sup> See discussion at FAQ # 9.

- a. This requires conduct only; no conviction is required.
- b. Because of this, the bar might include acts of juvenile delinquency.
- c. This definition of battery or extreme cruelty (8 CFR § 204.2(c)(1)(vi)) is the one used for applicants under VAWA, and it **includes a wide range of physical or emotional abuse**. Clients

<sup>12</sup> They must not be or have been the primary perpetrator of domestic violence in the relationship, and (1) must have acted in self-defense; or (2) must have violated a protective order implemented to protect them; or (3) were arrested for or convicted of a crime where serious bodily injury did not result and the crime was connected to them being a victim of domestic violence.

<sup>13</sup> See 8 CFR §§ 208.13(c)(6)(vi)(A), 1208.13(c)(6)(vi)(A).

<sup>14</sup> See definition of felony at 8 CFR §§ 208.13(7)(i), 1208.13(7)(i).

<sup>15</sup> See 8 CFR §§ 208.13(c)(6)(v)(B), 1208.13(c)(6)(v)(B).

<sup>16</sup> This includes unlawful receipt of “Federal public benefits, as defined in 8 U.S.C. 1611(c)” or receipt of similar public benefits from a state, tribal, or local entity. See 8 CFR §§ 208.13(c)(vi)(B)(2), 1208.13(c)(vi)(B)(2).

<sup>17</sup> See 8 CFR §§ 208.13(c)(6)(vii), 1208.13(c)(6)(vii).

should understand this broad definition and be prepared to respond to questions about a relationship, even if they do not have a history of domestic violence charges.

- d. Authorities may ask questions based on rap sheets that show DV charges were filed, even if they did not result in a conviction; a probation condition, or family court finding; a statement by a witness, etc. Or officers may simply ask applicants open-ended questions about this.
- e. The definition of a domestic relationship is a current or former spouse, parent of child, current or former cohabitant as a spouse, similarly situated to a spouse under local domestic or family violence laws, any other person who is protected from the applicant's acts under federal, state, tribal, or local domestic or family violence laws.
- f. **EXCEPTION:** The bar does not apply if the asylum applicant is described in INA § 237(a)(7)(A), 8 USC § 1227(a)(7)(A), because they are not the primary perpetrator of violence in the relationship and they meet other requirements.<sup>18</sup> The § 237(a)(7)(A) waiver does not apply to conviction for child abuse.

## B. Further Definitions of Offenses<sup>19</sup>

1. "Felony" means any crime defined as such under the federal, state, tribal, or local jurisdiction of conviction, OR any crime punishable by more than one year of imprisonment
2. "Misdemeanor" means any crime defined as such under the federal, state, tribal, or local jurisdiction of conviction, OR any crime punishable not punishable by more than one year of imprisonment
3. An offense or conviction is deemed to include any **attempt, conspiracy, or solicitation** to commit the offense

## C. New Rules on Effectiveness of Post-Conviction Relief (PCR)

The regulation<sup>20</sup> creates a disturbing standard for evaluating post-conviction relief. No order vacating or altering a conviction or sentence will have immigration effect unless the adjudicator determines that:

"the order was not entered for rehabilitative purposes or for purposes of ameliorating immigration consequences of the conviction or sentence." Such orders are presumed to be for the purpose of ameliorating immigration consequences if:

- (1) The order is entered after the initiation of removal proceedings; or
- (2) The person moved for the order more than one year after date of original order of conviction or sentencing.

<sup>18</sup> They must not be or have been the primary perpetrator of domestic violence in the relationship, and (1) must have acted in self-defense; or (2) must have violated a protective order implemented to protect them; or (3) were arrested for or convicted of a crime where serious bodily injury did not result and the crime was connected to them being a victim of domestic violence.

<sup>19</sup> See 8 CFR §§ 208.13(c)(7), 1208.13(c)(7).

<sup>20</sup> See 8 CFR §§ 208.13(c)(7)(v)-(9), 1208.13(c)(7)(v)-(9).

It further provides that the adjudicator “is authorized to look beyond the face” of any such order to determine whether these requirements were met, and whether the order should be given effect under this section.

NOTE: See discussion of defense strategies at FAQ # 10. The new section makes it even more critical for counsel for post-conviction relief to ensure that *the court order as well as any filings or documents that they submit emphasize and clearly state that the court’s order is based on legal error*. Advocates should be prepared in case some adjudicators misinterpret this language.

#### D. Eliminates the Automatic Reconsideration of Discretionary Denials of Asylum

Eliminates the automatic review of a discretionary denial of asylum by the adjudicator, by removing and reserving paragraph (e) from 8 CFR §§ 208.16 and 1208.16.

## IV. Frequently Asked Questions

### FAQ #1. Can the government currently enforce the new bars?

No. The government is currently enjoined from enforcing the new rule pending disposition of the litigation. See FAQ#3 for more information.

### FAQ #2. How do the effective dates work, according to the regulation?

1. *Which asylum applications are subject to the new bars?* Only applications filed on or after November 20, 2020. (This section refers to the November 20, 2020 effective date, but the litigation could result in a new effective date being designated, if the government prevails and the regulation is allowed to be implemented.)
2. *For those applications, when does a conviction need to have occurred in order to trigger one of the new bars?* Only convictions that occurred on or after November 20, 2020, will trigger the bars based on having a conviction – and then, only if the asylum application was filed on or after November 20, 2020.
3. *Does the date of the underlying incident matter?* For the conviction-based bars, the date of conviction controls, not the date of the conduct. However, there is one bar related to domestic violence, that does not require a conviction. For that bar, the conduct must have occurred on or after November 20, 2020.
4. *How do the effective dates apply to termination of asylee status under the new bars?* See FAQ #4 regarding termination of status. Under the language of the regulation, the initial application for asylum must have been filed, and the conviction and/or conduct must have occurred, on or after November 20, 2020. Based on this, these bars should only apply to termination of asylum applications that were filed on or after November 20, 2020.

*Example:* Alex filed his I-589 in October 2020. In December 2020 he was convicted of state welfare fraud, which is an offense listed in the new bars. However, the new bars do not apply to him because he filed his application before 11/20/2020.

What if instead Alex was convicted of welfare fraud in October 2020, and filed the application in December 2020? Alex is subject to the new bars, but that particular conviction does not trigger a bar because it occurred before 11/20/2020.

What if Alex had been granted asylum in 2019 and he was convicted of welfare fraud in December 2020? Under the plain language of the regulation, advocates would assert that this would not terminate his asylee status, because he filed his I-589 before 11/20/2020.

### **FAQ #3. What impact does the current litigation have on effective dates?**

On November 2, 2020, in the Northern District of California, advocates filed a lawsuit to challenge the Administration's final rule expanding criminal bars to asylum, *Pangea Legal Services, et al v. U.S. Dep't of Homeland Security*, Case No. 3:20-cv-07721. On November 19, 2020, the Northern District of California issued a temporary restraining order enjoining implementation of the new rule. On November 24, 2020, the Northern District of California converted the temporary restraining order into a preliminary injunction, enjoining implementation and enforcement of the new rule pending final disposition of the litigation. As of this writing, the Initial Case Management Conference is set for January 22, 2021.

The status of the injunction and the effective date may change in the future. The injunction blocks the government from “implementing” and “enforcing” the new rule but does not specifically address the effective date. If a court later rules in favor of the government, there is some risk that the original effective date could apply. Or, the government might set a new effective date to avoid legal confusion. Should the original effective date resurface, advocates will argue that applications filed while an injunction is in place, and convictions incurred and conduct that occurred, should not trigger the bars.

The suit was filed by the National Immigration Project of the National Lawyers Guild, Immigrant Defense Project, the Harvard Immigration & Refugee Clinic, and the law firm of Sidley Austin, LLP, on behalf of the following nonprofit immigration legal service providers: Pangea Legal Services, Dolores Street Community Services, Capital Area Immigrant Rights Coalition (CAIR), and Catholic Legal Immigration Network, Inc. (CLINIC). Information about the litigation, including the complaint and the Order Granting Plaintiffs’ Motion for Temporary Restraining Order, is available at [https://nipnlg.org/our\\_lit/impact/2020\\_02Nov\\_lit-pangea-v-dhs.html](https://nipnlg.org/our_lit/impact/2020_02Nov_lit-pangea-v-dhs.html).

### **FAQ #4. Do the new bars implicate termination of asylee or refugee status?**

Yes, they do for asylee status, but not for refugee status. Pursuant to INA § 208(c)(2)(B), “Asylum granted under subsection (b) . . . may be terminated if the Attorney General determines that— the alien meets a condition described in subsection (b)(2).” The new bars are all “additional limitations” to asylum eligibility pursuant to INA § 208(b)(2)(C), so they all fall under subsection (b)(2). Accordingly, each of the new “additional limitations” would give rise to grounds for asylum termination. However, this only should apply to asylee status that was based on an application filed on or after the effective date (which was designated as November 20, 2020 and now is unclear; see FAQs # 1, 2, above.)

The new rule does not implicate termination of refugee status. Although refugees are generally subject to removal under INA § 237, criminal convictions or conduct incurred after admission do not constitute bases for termination of refugee status. The INA only permits termination of refugee status in cases where it is

determined that the noncitizen did not meet the definition of “refugee” under the INA. See INA § 207(c)(4) (“The refugee status of any alien . . . may be terminated by the Attorney General . . . if the Attorney General determines that the alien was not in fact a refugee within the meaning of [INA] section 101(a)(42) at the time of the alien’s admission.”)

## FAQ #5. What categories of crimes trigger the bars?

The bars are set out at 8 CFR §§ 208.13(6)(c), 1208.13(6)(c). They are:

### 1. **Conviction** on or after the effective date of:

- Any felony offense
- DUI with injury
- DUI with a prior DUI (the prior can be from before 11/20/2020)
  - We do not yet know whether a California wet reckless will avoid this bar
- Possession or use of false identity documents
  - Narrow exception for using documents to board a carrier to escape persecution, if one turns oneself in immediately upon arrival to the United States
- Possession or sale of a controlled substance or paraphernalia
  - Exception for a single incident involving possession of 30 grams or less of marijuana
- Wrongful use of public benefits
- A crime that “involves conduct amounting to” a crime of domestic violence, a crime of child abuse, neglect, or abandonment, or a crime of stalking
  - This includes an expanded definition of a crime of domestic violence
  - The adjudicator can consider underlying conduct, and the conviction would not need to qualify as a deportable offense under the domestic violence ground
  - Exception for a person who is not the primary perpetrator or violence and meets other requirements set out in INA 237(a)(7), 8 USC 1227(a)(7).
- Gangs. A “crime” that the adjudicator “knows or has reason to believe the offense was committed in support, promotion, or furtherance of activity of a criminal street gang” as defined under the convicting jurisdiction or at 18 USC 521(a).
- Federal conviction for:
  - Transporting, harboring, or smuggling, even to help close family escape persecution.
  - Illegal re-entry after removal

2. **Conduct**, without requirement of a conviction, committed on or after the effective date:

- Adjudicator knows or has reason to believe that the applicant engaged in acts of battery or extreme cruelty as defined at 8 CFR § 204.2(c)(1)(vi) (the extremely broad definition that is used for VAWA), in a domestic relationship.

3. **Effective date**: While the regulation set the effective date as November 20, 2020, the regulation did not go into effect at that time due to a temporary restraining order, which was converted into a preliminary injunction as of November 24, 2020. See FAQs # 1, 2, and 3, above.

## FAQ #6. How is the gang-related crime bar defined?

The new asylum bar applies to a person who:

has been convicted on or after such date of a Federal, State, tribal, or local crime that the [adjudicator] knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18.

8 CFR §§ 208.13(c)(6)(ii), 1208.13(c)(6)(ii). This definition seems to apply to *any* type of conviction, whether or not the offense itself relates to gang activity. For example, based on the plain language of the regulations, a misdemeanor theft conviction could be a bar to asylum if there is sufficient evidence that the crime was committed to support gang activity, so long as the alleged “gang” fits the definition of a criminal street gang either in the jurisdiction where the conviction occurred or in 18 USC § 521(a). Section 521(a)<sup>21</sup> defines criminal street gang as:

“criminal street gang” means an ongoing group, club, organization, or association of 5 or more persons--

- (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);
- (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and
- (C) the activities of which affect interstate or foreign commerce.

States have their own, differing definitions of a criminal street gang. For example, Section 186.22 of the California Penal Code defines a criminal street gang to include an association of three or more people and

<sup>21</sup> Subsection (a) refers to 18 USC § 521(c), which sets forth:

(c) **Offenses**.--The offenses described in this section are--

- (1) a Federal felony involving a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which the maximum penalty is not less than 5 years;
- (2) a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another;
- (3) a Federal offense involving human trafficking, sexual abuse, sexual exploitation, or transportation for prostitution or any illegal sexual activity; and
- (4) a conspiracy to commit an offense described in paragraph (1), (2), or (3).

incorporates a more expansive list of offenses that the group may be engaged in, casting a wider net than the federal definition.

Despite the apparently very broad reach of this provision, advocates may argue that the ultimate disposition of the criminal case should control, such that if there are no gang enhancements or other information about the crime being related to gang activity, this bar should not apply. Further, advocates can challenge whether the adjudicator truly has “reason to believe” that the crime was committed in support of a criminal street gang by citing to prior case law interpreting the “reason to believe” standard in other immigration law contexts to require that the government have “reasonable, substantial, and probative evidence.”<sup>22</sup>

### **FAQ #7. Should a “wet reckless” conviction under California Vehicle Code §§ 23103.5 and 23103, or similar offenses under other state laws, be considered “driving under the influence” (DUI) under the new bars?**

**Bottom line.** There are strong arguments that a California “wet reckless” offense does not meet the definition of DUI that is set out in the new bars to asylum. For criminal defenders with clients charged with driving under the influence in California, the best option is to obtain a reckless driving conviction, California Vehicle Code (Cal. VC) § 23103, which unquestionably is not a bar. But, if that is not possible, try hard to get a wet reckless, which is much safer than a DUI conviction. However, immigration advocates should be prepared to dispute a DHS assertion that wet reckless does come within the new bars.

**Discussion.** The new bars to asylum include convictions on or after November 20, 2020 of an “offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs).”<sup>23</sup> This discussion will refer to that offense as a “DUI.”

Arguably, a conviction under Cal. VC §§ 23103.5, for reckless driving “involving” a drug or alcohol, is not a DUI for purposes of the new bar, because § 23103.5 has no requirement that drug or alcohol intake impair the person’s driving in any way, while the definition in the new bar does require this.

Section 23103.5 penalizes reckless driving “involving” drugs and/or alcohol; it often is referred to as a “wet reckless.” It is sometimes made available as a plea option for people charged with a DUI under Cal. VC § 23152, especially if their conduct was a first offense or not very serious. Section 23103.5 provides:

- (a) If the prosecution agrees to a plea of guilty or nolo contendere to a charge of a violation of Section 23103 in satisfaction of, or as a substitute for, an original charge of a violation of Section 23152, the prosecution shall state for the record a factual basis for the satisfaction or substitution, including whether or not there had been consumption of an alcoholic beverage or ingestion or administration of a drug, or both, by the defendant in connection with the offense. The statement shall set forth the facts that show whether or not there was a

<sup>22</sup> See, e.g., *Matter of Rico*, 16 I&N Dec. 181, 185-6 (BIA 1977); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000); see also *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979); *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government’s knowledge or reasonable belief that an individual has trafficked in drugs must be based on “credible evidence”).

<sup>23</sup> See 8 CFR §§ 208.13(c)(6)(iii)-(iv), 1208.13(c)(6)(iii)-(iv). One bar is based on conviction of such an offense that causes death or injury, and the other bar is based on conviction of such an offense where there was a prior such conviction.

consumption of an alcoholic beverage or the ingestion or administration of a drug by the defendant in connection with the offense.

Section 23103.5 does not require an admission or finding that the person drove *while intoxicated or impaired*, or that the person's consumption of the substance was related to, or the cause of, the reckless driving. Rather, the prosecutor must state facts showing whether or not the person consumed a drug and/or alcohol. Compare this to the California driving under the influence statute, Cal. VC § 23152, which requires a person to be *under the influence*. "A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities *are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person*, using ordinary care, under similar circumstances."<sup>24</sup>

Section 23103.5 requires no impairment or adverse effect. Thus, it does not meet the definition of "an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred," as required under the bar.

### FAQ #8. How do the bars define a conviction of a crime of domestic violence?

The definition in the bar<sup>25</sup> includes conviction of a "misdemeanor crime of domestic violence" as described at 18 USC §§ 921(a)(33) or 922(g)(9), and a "crime of domestic violence" as described at 34 USC § 12291(a)(8). It is not immediately clear what these statutory references add, given the breadth of the following definition.

The bar also includes conviction of any crime where the *underlying conduct* meets a broad definition:

any crime based on conduct in which the [noncitizen] harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person" with whom the noncitizen shares a "domestic relationship.

This is very different from the definition of a deportable "crime of domestic violence" under the domestic violence deportation ground. The elements of a deportable crime of domestic violence must meet the definition of a "crime of violence" under 18 USC § 16(a).<sup>26</sup>

Here, the elements-based test of the categorical approach does not apply. "The adjudicator may consider the underlying conduct of the crime, and is not limited to the facts found by the criminal court or in the record of conviction." Further, the definition of a crime of violence is quite different. USCIS may assert that the bar includes a conviction where the underlying conduct does not involve any force or threat of force (harass, intimidate); conduct that is a mere "offensive touching" (causing even a slight physical pain); and reckless use of force – none of which are included in 18 USC § 16(a). The definition of a domestic relationship tracks the definition set out in the deportation ground.

**Criminal defenders.** We hope that this regulation will be permanently enjoined and ultimately withdrawn, but for now we must do what we can in the face of this overbroad regulation. Because the conviction is judged by

<sup>24</sup> Judicial Council of California Criminal Jury Instructions, CALCRIM No. 2110 (2020), [https://www.courts.ca.gov/partners/documents/CALCRIM\\_2020.pdf](https://www.courts.ca.gov/partners/documents/CALCRIM_2020.pdf) (emphasis added).

<sup>25</sup> See 8 CFR §§ 208.13(c)(6)(v), 1208.13(c)(6)(v).

<sup>26</sup> See INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

underlying conduct rather than elements of the offense, we cannot create an automatically “safe” plea here, for example by negotiating a plea to California PC § 243(e). While that is never a *deportable* crime of domestic violence based on its elements, it can be a crime of domestic violence that *bars asylum* under the new rule, based on the underlying conduct in the case. Furthermore, even if you can avoid *any* conviction, the person still potentially can be barred under the new conduct-based ground that includes committing “extreme cruelty” in a relationship, under an extremely broad description.

If the defendant needs to maintain eligibility for asylum (which many undocumented people do), in order of preference, some defense strategies include:

- (1) Explain the need for asylum to the DA and try to negotiate continuing the plea hearing so that the client can voluntarily complete tasks such as counseling, restitution, etc., in exchange for dropping the charges, or for one of the below dispositions. If desired, the defendant could spend time in custody pre-trial.
- (2) Plead to an offense against a specific other victim who does not share a protected domestic relationship, such as the ex-spouse’s new love interest, the police, a neighbor, etc. Stipulate facts that do not involve a protected party.
- (3) Try to plead to a different and unrelated offense that the client also committed, such as theft (but not, e.g., DUI or drug possession, which also are bars to asylum). Seek pretrial diversion for the alternate offense, if permitted.
- (4) In all cases involving a conviction, try to create a factual basis or written plea agreement that names specific conduct that does not involve the protected party, or at least does not involve harassment, intimidation, slight pain, etc.

### **FAQ #9. How is the conduct ground, engaging in battery or extreme cruelty in a domestic situation, defined and how might it be encountered?**

This is defined by the VAWA standard, set out at 8 CFR § 204.2(c)(1)(vi):

**Battery or extreme cruelty.** For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence...

**Defenders:** Because this is a conduct-based ground, it is not possible for you to wholly prevent this finding. But see discussion of case goals for defenders at FAQ #8, above, which may assist the person.

## FAQ #10. How is post-conviction relief treated and how can advocates respond?

**Bottom Line:** The section in the regulation on the effect of post-conviction relief appears to conflict with controlling BIA and federal court precedent – or at least it could be read that way. Post-conviction relief counsel and immigration advocates should prepare now.

**Post-Conviction Relief Counsel:** Even more than before, *you must include in the judge’s order, and in all filing papers and documents that you submit in the case, a clear statement of and emphasis on the fact that the order is based on a particular legal error.* The new regulation gives the adjudicator permission to look behind the judge’s order and go through the record of the case, to evaluate whether the order might be for the “purpose” of ameliorating immigration consequences, and/or whether the judge properly issued the order. One can discuss immigration consequences in the order and filing papers (and of course one must if they are a factor in the legal error), but the core finding and emphasis should focus on the legal error.

**Immigration advocates.** If and when the regulation takes effect, the government might argue that it is not enough to show that the court order was based on legal error; one also must show that the real “purpose” for which the immigrant sought the order was not to ameliorate immigration consequences. That is not a valid legal standard, but the regulation is written in a confusing way so that an adjudicator might assert this. If the regulation goes into effect, keep track of how cases are going in your area, and consider the below discussion and other arguments. If you are working with post-conviction relief counsel, be sure that they understand the goal of obtaining a court order the clearly is based on legal error.

**Discussion.** In considering the problems with the regulation, there are two points to keep in mind.

First, the BIA and all federal courts have held that a criminal court vacatur that is based on a legal error in the underlying proceeding (instead of on rehabilitative or similar factors) has effect for immigration purposes. These decisions interpret the statutory definition of a conviction, which applies throughout the INA. See INA § 101(a)(48)(A) (“The term ‘conviction’ means ....”). Section 101(a)(48)(A) requires an adjudication of guilt, and all authorities agree that this refers to a *legally valid* adjudication. “Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a ‘conviction’ within the meaning of section 101(a)(48)(A).” *Matter of Pickering*, 23 I&N Dec. 621, 623 (BIA 2003). The person’s motivation for bringing the action – that they face adverse immigration consequences based on the conviction – is irrelevant. See, e.g., *Pickering*, 23 I&N Dec. at 623, citing *Matter of Rodriguez Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000). The legal error that is the basis for the vacatur can relate to immigration consequences. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356 (2010) (defense counsel’s failure to competently advise regarding immigration consequences violates the Sixth Amendment and can serve as a basis to legally invalidate the conviction); *Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006) (vacatur of a conviction based on the criminal court’s error in failing to give the required immigration advisal at plea has immigration effect).<sup>27</sup>

<sup>27</sup> In *Matter of Thomas and Thompson*, 27 I&N Dec. 674, 690 (2019), n. 2, the AG overruled *Rodriguez-Ruiz* and *Adamiak* in part, “to the extent that they suggest that the Full Faith and Credit Act applies to proceedings before immigration judges and the Board,” while reaffirming *Matter of Pickering*. See also the asylum regulations at 8 CFR §§ 208.13(c)(9) and 1208.13(c)(9), providing that the adjudicator can look beyond the vacatur order at the record, to see if requirements were met.

Second, noncitizens often do not discover that their conviction causes immigration penalties until long after the criminal case is over. Unless one has defense counsel who has correctly analyzed and advised on immigration consequences, the immigration consequences often are invisible at the criminal hearing; in fact, the defendant may be wrongly advised that there are no such consequences. Absent competent advice, the noncitizen typically discovers the immigration consequences only years later when they interact with the immigration system, such as when they submit an application, are placed in removal proceedings, or travel outside the United States. See, e.g., *Matter of Pickering*, *supra* (Mr. Pickering was convicted in 1980, applied for adjustment in 1993, became aware of adverse immigration consequences of the conviction, and applied for post-conviction relief, which was granted in 1997).

In sharp contrast to the law and reality discussed above, the regulation provides:

(7)(v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the [immigration judge or officer] determines that—

- (A) The court issuing the order had jurisdiction and authority to do so; and
- (B) The order was not entered for rehabilitative purposes or **for purposes of ameliorating the immigration consequences** of the conviction or sentence.

(8) For purposes of paragraph (c)(7)(v)(B) of this section, **the order shall be presumed to be for the purpose of ameliorating immigration consequences** if:

- (i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or
- (ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.

(9) An [adjudicator] is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

8 CFR §§ 208.13(c)(7)(v)-(9), 1208.13(c)(7)(v)-(9) (emphasis added).

This section should be struck down because (1) it says nothing about legal error, which is the applicable standard; (2) it provides that the adjudicator must find that the criminal court order was not entered “for purposes of ameliorating the immigration consequences of the conviction or sentence”, and then creates a presumption that the order was entered for that purpose if it was issued after removal proceedings began, or if the person did not move to vacate until a year or more after the conviction occurred. In other words, the presumption indicates that a key factor in judging whether the vacatur should be given immigration effect is the noncitizen’s reason for seeking it (as indicated by their timing in filing the motion), as opposed to the court’s finding of legal error.

The presumption should be struck down because it is arbitrary and irrational. There is no connection between when or why a person seeks a vacatur, and the validity of the state court's finding of legal error. Everyone who moves to vacate a conviction does so to avoid some harm, e.g., to avoid jail time, immigration consequences, or loss of job or housing opportunities. None of these motivations undercut the validity of a court's finding of legal error. Further, conditioning the presumption on the timing of the court or immigrant seeking the relief turns the reality of immigrant post-conviction relief on its head. Through no fault of their own, immigrants often discover the immigration consequences of a conviction only after removal proceedings have begun, or some other event occurred long after the conviction. Making this factor into a negative presumption makes no sense.

Still, while this presumption is arguably illegal, it is only a presumption. It can be overcome as long as counsel presents clear evidence that the court vacated the conviction based on legal error and in accordance with the law of the jurisdiction.

The greater problem is that some adjudicators might read the presumption as *changing the legal standard* for when a vacatur has immigration effect. The regulation provides that the vacatur will not have effect if it was "for purposes of ameliorating the immigration consequences." It does not define what that phrase means, except that it creates a presumption that the disqualifying event happened if the order was linked in time to removal proceedings. It never mentions legal error. An officer could decide that the presumption helps to define "for purposes of ameliorating the immigration consequences" to mean the person's motivation in bringing the suit, which is to avoid immigration consequences. Under that interpretation, the presumption might not be overcome by the court's finding of error; the adjudicator might also require proof that the noncitizen's motive was not to avoid immigration consequences.

That would be an impermissible test. As discussed above, it would conflict with all authority interpreting post-conviction relief and the definition of conviction at INA § 101(a)(48)(A). In addition, if this issue arises, advocates can point out that the Supplementary Information to the regulation states that the presumption can be overcome by a showing of legal error:

Regarding commenters' concerns about the creation of a rebuttable presumption against the validity of an order modifying, clarifying, or altering a judgment or sentence, the Departments reiterate that this is merely a presumption. Individuals will be able to overcome the presumption by providing evidence that the modification, clarification, or vacatur was sought for genuine substantive or procedural reasons.

*Procedures for Asylum and Bars to Asylum Eligibility*, 85 FR 67202-01 (October 21, 2020).

Hopefully, this asylum regulation will never come into effect. But even if this regulation does not apply, it is possible that the government will include similar erroneous language in another context relating to post-conviction relief.

## Appendix: 8 CFR § 208.13, 208.16

### 8 CFR § 208.13

#### Establishing asylum eligibility.

- (a) Burden of proof.
  - \* \* \*
- (b) Eligibility.
  - \* \* \*
- (c) Mandatory denials
  - (1) Applications filed on or after April 1, 1997.
    - \* \* \*
  - (2) Applications filed before April 1, 1997.
    - \* \* \*
  - (3) Additional limitation on eligibility for asylum.
    - \* \* \*
  - (4) Additional limitation on eligibility for asylum.
    - \* \* \*
  - (5) Non-binding determinations.
    - \* \* \*

#### [NEW SECTIONS FROM FINAL RULE]

- (6) ***Additional limitations on eligibility for asylum.*** For applications filed on or after November 20, 2020, an alien shall be found ineligible for asylum if:
  - (i) The alien has been convicted on or after such date of an offense arising under sections 274(a)(1)(A), 274(a)(2), or 276 of the Act;
  - (ii) The alien has been convicted on or after such date of a Federal, State, tribal, or local crime that the asylum officer knows or has reason to believe was committed in support, promotion, or furtherance of the activity of a criminal street gang as that term is defined either under the jurisdiction where the conviction occurred or in section 521(a) of title 18;
  - (iii) The alien has been convicted on or after such date of an offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law, in which such impaired driving was a cause of serious bodily injury or death of another person;
  - (iv)(A) The alien has been convicted on or after such date of a second or subsequent offense for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the conviction occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard to whether the conviction is classified as a misdemeanor or felony under Federal, State, tribal, or local law;

- (B) A finding under paragraph (c)(6)(iv)(A) of this section does not require the asylum officer to find the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense. The asylum officer need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired as those terms are defined under the jurisdiction where the convictions occurred (including a conviction for driving while under the influence of or impaired by alcohol or drugs).
- (v)(A) The alien has been convicted on or after such date of a crime that involves conduct amounting to a crime of stalking; or a crime of child abuse, child neglect, or child abandonment; or that involves conduct amounting to a domestic assault or battery offense, including a misdemeanor crime of domestic violence, as described in section 922(g)(9) of title 18, a misdemeanor crime of domestic violence as described in section 921(a)(33) of title 18, a crime of domestic violence as described in section 12291(a)(8) of title 34, or any crime based on conduct in which the alien harassed, coerced, intimidated, voluntarily or recklessly used (or threatened to use) force or violence against, or inflicted physical injury or physical pain, however slight, upon a person, and committed by:
- (1) An alien who is a current or former spouse of the person;
  - (2) An alien with whom the person shares a child in common;
  - (3) An alien who is cohabiting with or has cohabited with the person as a spouse;
  - (4) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or
  - (5) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government.
- (B) In making a determination under paragraph (c)(6)(v)(A) of this section, including in determining the existence of a domestic relationship between the alien and the victim, the underlying conduct of the crime may be considered and the asylum officer is not limited to facts found by the criminal court or provided in the underlying record of conviction.
- (C) An alien who was convicted of offenses described in paragraph (c)(6)(v)(A) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i) through (ii) of the Act.
- (vi) The alien has been convicted on or after such date of—
- (A) Any felony under Federal, State, tribal, or local law;
  - (B) Any misdemeanor offense under Federal, State, tribal, or local law involving:
    - (1) The possession or use of an identification document, authentication feature, or false identification document without lawful authority, unless the alien can establish that the conviction resulted from circumstances showing that the document was presented before boarding a common carrier, that the document

related to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry;

- (2) The receipt of Federal public benefits, as defined in 8 U.S.C. 1611(c), from a Federal entity, or the receipt of similar public benefits from a State, tribal, or local entity, without lawful authority; or
  - (3) Possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.
- (vii) The asylum officer knows or has reason to believe that the alien has engaged on or after such date in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi), upon a person, and committed by:
- (A) An alien who is a current or former spouse of the person;
  - (B) An alien with whom the person shares a child in common;
  - (C) An alien who is cohabiting with or has cohabited with the person as a spouse;
  - (D) An alien similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or
  - (E) Any other alien against a person who is protected from that alien's acts under the domestic or family violence laws of the United States or any State, tribal government, or unit of local government, even if the acts did not result in a criminal conviction;
  - (F) Except that an alien who was convicted of offenses or engaged in conduct described in paragraph (c)(6)(vii) of this section is not subject to ineligibility for asylum on that basis if the alien would be described in section 237(a)(7)(A) of the Act were the crimes or conduct considered grounds for deportability under section 237(a)(2)(E)(i)-(ii) of the Act.
- (7) For purposes of paragraph (c)(6) of this section:
- (i) The term "felony" means any crime defined as a felony by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime punishable by more than one year of imprisonment.
  - (ii) The term "misdemeanor" means any crime defined as a misdemeanor by the relevant jurisdiction (Federal, State, tribal, or local) of conviction, or any crime not punishable by more than one year of imprisonment.
  - (iii) Whether any activity or conviction also may constitute a basis for removability under the Act is immaterial to a determination of asylum eligibility.
  - (iv) All references to a criminal offense or criminal conviction shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

- (v) No order vacating a conviction, modifying a sentence, clarifying a sentence, or otherwise altering a conviction or sentence, shall have any effect unless the asylum officer determines that—
  - (A) The court issuing the order had jurisdiction and authority to do so; and
  - (B) The order was not entered for rehabilitative purposes or for purposes of ameliorating the immigration consequences of the conviction or sentence.
- (8) For purposes of paragraph (c)(7)(v)(B) of this section, the order shall be presumed to be for the purpose of ameliorating immigration consequences if:
  - (i) The order was entered after the initiation of any proceeding to remove the alien from the United States; or
  - (ii) The alien moved for the order more than one year after the date of the original order of conviction or sentencing.
- (9) An asylum officer is authorized to look beyond the face of any order purporting to vacate a conviction, modify a sentence, or clarify a sentence to determine whether the requirements of paragraph (c)(7)(v) of this section have been met in order to determine whether such order should be given any effect under this section.

#### 8 CFR § 208.16

#### Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal.

\* \* \*

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof.

\* \* \*

(c) Eligibility for withholding of removal under the Convention Against Torture.

\* \* \*

(d) Approval or denial of application.

#### [SECTION OMITTED BY NEW FINAL RULE:]

~~(a) **Reconsideration of discretionary denial of asylum.** In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country~~

## V. Appendix: 8 CFR § 1208.13, 1208.16

### 8 CFR § 1208.13

#### Establishing asylum eligibility.

- (a) Burden of proof. \* \* \*
- (b) Eligibility. \* \* \*
- (c) Mandatory denials
- (1) Applications filed on or after April 1, 1997. \* \* \*
- (2) Applications filed before April 1, 1997. \* \* \*
- (3) Additional limitation on eligibility for asylum. \* \* \*
- (4) Additional limitation on eligibility for asylum. \* \* \*
- (5) Non-binding determinations. \* \* \*

The new sections from the final rule, creating additional bars to asylum, are identical to those listed at 8 CFR 208.13(c)(6). Please see that language, above.

### 8 CFR § 1208.16

#### Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

- (a) Consideration of application for withholding of removal....
- (b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof....
- (c) Eligibility for withholding of removal under the Convention Against Torture....
- (d) Approval or denial of application....

[SECTION OMITTED BY NEW FINAL RULE:]

~~(e) Reconsideration of discretionary denial of asylum.~~ In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country.