

Immigration Judge Findings of Removability: A Legal Analysis

Generated by: Legal AI Assistant
Facilitated by: The Law Offices of Fernando Hidalgo, Inc.
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FINDINGS

IMMIGRATION JUDGE FINDINGS OF REMOVABILITY: A COMPREHENSIVE LEGAL ANALYSIS

Executive Summary

When the Department of Homeland Security (DHS) initiates removal proceedings against a noncitizen, the immigration judge bears the primary responsibility for determining whether the respondent is removable—meaning subject to deportation—under the Immigration and Nationality Act (INA).[1] This finding of removability represents one of the most consequential determinations in immigration law, triggering serious consequences including potential permanent separation from family, employment termination, and permanent bars to future reentry to the United States. Understanding the legal standards, evidentiary requirements, and procedural mechanisms governing removability findings is essential for any practitioner representing respondents in removal proceedings, particularly in Northern California, where the San Francisco Immigration Court processes asylum cases from Central America alongside a significant Mexican and Mexican-American client base vulnerable to criminal conviction-based removability grounds.

The immigration judge's finding of removability is neither automatic nor inevitable. Rather, it rests upon a carefully defined burden of proof that varies depending on whether the respondent was "admitted" to the United States—a term of art with significant legal consequences. For noncitizens already lawfully admitted to the country, the government bears the heavy burden of proving removability by "clear and convincing evidence," a standard that requires more than a preponderance but less than proof beyond a reasonable doubt.[1][2] For those never admitted—typically those who entered without inspection or whose parole status has terminated—the respondent bears the burden of proving by "clear and convincing evidence" that they are lawfully present, or alternatively, proving they are "clearly and beyond doubt" entitled to admission and not inadmissible.[2][27] These burden-shifting rules fundamentally affect case strategy, as they determine who must prove what and what quantum of evidence suffices.

The removability finding itself is fact-intensive, requiring the immigration judge to assess whether the respondent falls within one or more statutory grounds enumerated in INA §§ 212 (grounds of inadmissibility) or 237 (grounds of deportability).[1] These grounds range from straightforward status violations—such as overstaying a visa or present without inspection—to complex criminal conviction analysis requiring the judge to apply "categorical" and "circumstance-specific" approaches to determine whether a prior criminal conviction constitutes a crime of moral turpitude, an aggravated felony, or other removable offense.[3][13][16] Once removability is established, the judge then pivots to considering available relief from removal, such as cancellation of removal, withholding of removal, protection under the Convention Against Torture (CAT), asylum, voluntary departure, or other discretionary forms of relief, each with distinct eligibility requirements and strategic implications.

Key risk assessment: Practitioners representing respondents should understand that removability findings are subject to appellate review on the "clear error" standard—meaning findings of fact cannot be overturned simply because the Board of Immigration Appeals would have weighed the evidence differently.[10][48] This high bar for reversal makes it critical to build a complete factual record at the immigration judge level, including credibility testimony, documentary evidence, expert reports, and preserved objections to government evidence. The government, by contrast, faces the challenge of meeting its burden of proof, which—although substantial—can often be satisfied through administrative documents like the Form I-213 (Deportable Alien

Report), prior removal orders, criminal conviction records, or visa documentation, each with different evidentiary reliability standards.

From a Northern California perspective, the San Francisco Immigration Court's procedural norms and individual judge preferences significantly influence case strategy. Some judges impose strict deadline requirements for evidence submission and witness lists, while others provide greater flexibility for equitable tolling arguments or late-filed motions to reopen. The San Francisco Asylum Office, which processes credible fear interviews for individuals in expedited removal, has specific patterns regarding asylum officer credentials determinations and country conditions evidence that can affect subsequent removability proceedings before immigration judges.

Statutory and Regulatory Framework Governing Removability Determinations

The Foundational Statute: INA § 240 and 8 U.S.C. § 1229a

The modern framework for removability determinations originates in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), codified at 8 U.S.C. § 1229a, which consolidated the prior "exclusion," "deportation," and "deportability" proceedings into a single "removal" proceeding.[39][42] Section 1229a established that removal proceedings are conducted by immigration judges and that the determination of removability must be "based only on the evidence produced at the hearing." [1][39][42] This evidentiary limitation-restricting the judge's decision to in-court evidence-forms a cornerstone of procedural fairness, preventing judges from relying on hearsay or ex parte statements not subject to cross-examination, though with important exceptions for documents obtained from government sources.

Under 8 U.S.C. § 1229a(a)(2), an alien placed in removal proceedings "may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title." [1][39] This statutory language creates the bifurcation that defines much of immigration removal law: grounds of inadmissibility apply to those not yet admitted (or deemed applicants for admission), while grounds of deportability apply to those already lawfully admitted.[38][41][43][44] A critical consequence of this distinction is that it determines the burden of proof allocation, affecting not only legal strategy but also practical outcomes, since a respondent bearing the burden faces the possibility of removal if the evidence on the removability issue is equivocal, whereas the government bearing the burden must present clear, convincing proof or face dismissal of charges.

Definitional Clarity: What Constitutes "Removable"

Under 8 U.S.C. § 1229a(e)(2), the statute defines the term "removable" as meaning: "(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or (B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title." [39][42][49] This definition underscores the critical importance of determining whether a respondent was "admitted," a determination that triggers whether the respondent is subject to grounds of inadmissibility or deportability. A noncitizen who entered the United States without inspection (often abbreviated as "EWI")-by crossing the border between ports of entry or being smuggled-is deemed an "applicant for admission" under 8 U.S.C. § 235(a)(1), and therefore subject to the grounds of inadmissibility under INA § 212, even if physically present in the United States.[38][43][44] This can disadvantage such noncitizens because they bear the burden of proving they are admissible, rather than the government proving they are inadmissible by clear and convincing evidence.

In contrast, a noncitizen who presented a visa at the airport, was inspected by a border officer, and was

admitted to the United States is subject only to the grounds of deportability under INA § 237.[1][39][43] The difference is momentous: for an admitted noncitizen, the government must prove by "clear and convincing evidence" that the respondent is deportable and must base its decision on "reasonable, substantial, and probative evidence." [1][39] This standard has been interpreted by some circuits as requiring more certainty than by others-the Second Circuit has held that "any rational trier of fact" must conclude proof reaches the "clear and convincing" level for removal to be sustained, whereas other circuits have been more deferential to immigration judge findings.[51]

The Regulatory Framework: 8 CFR § 1240.8 and Related Provisions

The regulatory implementation of removability standards appears in 8 CFR § 1240.8, which codifies the burden of proof framework into four distinct scenarios.[2] For respondents charged with deportability (after lawful admission), the Service must prove deportability "by clear and convincing evidence," with no provision for burden-shifting.[2] For arriving aliens or applicants for admission, the respondent must prove they are "clearly and beyond doubt entitled to be admitted and is not inadmissible." [2][27][30] For aliens physically present without admission or parole, once alienage is established by the Service, the respondent must prove "by clear and convincing evidence" that they are lawfully present pursuant to prior admission, or alternatively must prove they are "clearly and beyond doubt entitled to be admitted." [2][27][30] For applications for relief from removal, the respondent bears the burden of establishing eligibility and demonstrating that relief should be granted in the exercise of discretion.[2]

The "clearly and beyond doubt" standard-applicable to arriving aliens and unadmitted respondents-has been compared to standards used in other legal contexts and found to impose a heavier burden on respondents than the government's "clear and convincing evidence" standard.[27] Some commentators have noted that this apparent asymmetry reflects the statutory scheme's distinction between those who have made an entry into the United States (who benefit from the government's "clear and convincing" burden) and those who have not (who bear the "clearly and beyond doubt" burden). The practical effect is that respondents claiming lawful admission but unable to document it fully face significant evidentiary challenges, particularly in Northern California, where CBP and USCIS record-keeping practices vary by port of entry and era of entry.

Grounds of Removability: The Statutory Catalog

Grounds of Inadmissibility (INA § 212)

The grounds of inadmissibility enumerated in 8 U.S.C. § 1182(a) represent the legal basis for refusing admission to noncitizens or removing those deemed "applicants for admission" even if physically present in the United States.[3][37][38] These grounds include criminal convictions (such as crimes of moral turpitude, multiple convictions with aggregate sentences exceeding five years, and controlled substance violations), national security concerns (including espionage, terrorist activity, and export control violations), fraud or misrepresentation (including false claim to United States citizenship), public charge (likelihood of becoming dependent on government benefits), lack of proper entry documentation, and health-related grounds.[3][38][41]

The crime-related grounds of inadmissibility merit particular attention in Northern California practice. INA § 212(a)(2)(A)(i)(I) renders inadmissible an alien convicted of a crime involving moral turpitude (CIMT).[3][37][40] However, the statute contains an exception for a single conviction where the alien was under eighteen when the crime was committed and more than five years have elapsed before visa application or admission, or where the maximum possible penalty for the crime does not exceed imprisonment for one year and the alien was sentenced to no more than six months.[3][37][40] INA § 212(a)(2)(B) makes

inadmissible an alien convicted of two or more offenses with an aggregate sentence to confinement of five or more years, regardless of whether those offenses constitute crimes of moral turpitude or arose from a single scheme of criminal misconduct.[3][37][40]

For Northern California practitioners, these provisions frequently arise in cases involving Mexican national clients with prior criminal histories, as well as cases involving individuals who have received post-conviction relief under California Penal Code §§ 1473.7, 1203.43, or PC 18.5, each of which may provide bases to vacate convictions that would otherwise trigger inadmissibility or deportability grounds. Understanding the interplay between state post-conviction relief procedures and immigration law has become essential, as successful motions to vacate criminal convictions can eliminate or reduce grounds of removability.[22]

Grounds of Deportability (INA § 237)

The grounds of deportability enumerated in 8 U.S.C. § 1227(a) apply only to noncitizens lawfully admitted to the United States.[3][13][38][41] These grounds include deportability for being deportable at the time of entry or adjustment (referencing back to the INA § 212 grounds), being present in violation of law or with a revoked nonimmigrant visa, failure to maintain nonimmigrant status, criminal convictions (crimes of moral turpitude, multiple convictions, aggravated felonies, firearms offenses, sex offender registration violations), domestic violence crimes, smuggling, document fraud, security-related criminal activity, and participation in genocide, torture, or severe violations of religious freedom.[3][13][38][41][52]

The criminal deportability grounds present complex analysis for immigration judges. Deportability for a crime of moral turpitude committed within five years of admission requires that the crime itself involve moral turpitude and that a sentence of one year or longer may be imposed.[3][13][16][19][52][53] The critical distinction between the crime involving moral turpitude ground and the aggravated felony ground lies in the consequences: a noncitizen deportable for a CIMT but not for an aggravated felony retains eligibility for many forms of relief, including cancellation of removal (with the exception of certain limited circumstances), whereas an aggravated felony conviction eliminates eligibility for nearly all forms of relief.[50] For this reason, careful criminal record analysis in Northern California practice often focuses on whether a prior conviction constitutes an aggravated felony—a determination involving detailed statutory analysis under immigration law, not under state criminal law.

Burden of Proof Standards and Evidentiary Requirements

The Clear and Convincing Evidence Standard for Deportable Aliens

The foundational evidentiary standard for removability determinations involving deportable aliens (those lawfully admitted) is "clear and convincing evidence." [1][2][39][51] This standard has been defined across multiple circuits and by the Board of Immigration Appeals, though with some variation in application. The Supreme Court has not directly addressed the precise meaning of "clear and convincing evidence" in the immigration context, leaving federal circuits with some discretion in interpretation. The Second Circuit has held that a conviction of deportability should be reversed where "any rational trier of fact would conclude that the proof did not rise to the level of clear and convincing evidence," [51] while other circuits have been more deferential to immigration judge fact-finding, applying rational basis review rather than scrutinizing the sufficiency of evidence more searching.

In addition to the "clear and convincing" standard, 8 U.S.C. § 1229a(c)(3)(A) mandates that "no decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." [1][39][51] This supplementary requirement, inherited from earlier deportation proceedings, imposes an additional quality

threshold for evidence. In practical terms, this means that the government cannot rely solely on ambiguous or equivocal evidence to establish deportability, even if some evidence exists. For example, in the context of criminal deportability, the government must establish not only that a conviction exists, but also that the conviction actually triggers a ground of deportability through clear analysis of the conviction record.[16][19][53]

An important limitation applies in in absentia proceedings—those in which the respondent fails to appear for the hearing. Under 8 U.S.C. § 1229a(b)(5)(A), the government must establish by "clear, unequivocal, and convincing evidence" that it provided the respondent with written notice of the hearing and that the respondent is removable.[56][57] This heightened standard—"clear, unequivocal and convincing" rather than merely "clear and convincing"—reflects the Constitution's due process concern about removing a person without their presence at the hearing.[57] Some courts have held that this standard is genuinely higher than the standard applicable to in-person hearings, while others have treated the terms as essentially equivalent.[51][54]

The "Clearly and Beyond Doubt" Standard for Applicants for Admission

For respondents charged as applicants for admission—those subject to grounds of inadmissibility—the burden allocation is reversed, and the respondent bears the burden of proving by "clear and convincing evidence" that they are lawfully present pursuant to a prior admission, or alternatively, proving that they are "clearly and beyond doubt entitled to be admitted and is not inadmissible." [2][27][30][39][49] The "clearly and beyond doubt" standard has been judicially characterized as more stringent than "clear and convincing evidence," effectively requiring near-absolute certainty rather than a high probability.[27][30] This distinction can be dispositive in cases where evidence is mixed or incomplete.

The District of Columbia Circuit has described the "clearly and beyond doubt" standard as "much more favorable to the Government" than even the "beyond a reasonable doubt" standard applied in criminal proceedings.[27] This rhetorical framing illustrates how substantially the burden-shifting advantages respondents who have achieved admitted status. A respondent charged as an applicant for admission, unable to document lawful admission despite testifying to such admission, will have great difficulty meeting the "clearly and beyond doubt" burden. In contrast, a respondent charged as deportable, facing the government's burden of "clear and convincing evidence," may succeed even if documentary evidence is incomplete, provided the respondent's testimony and other circumstantial evidence cumulatively support the government's case against deportability.

Credibility Determinations and Evidentiary Weight

The immigration judge possesses broad discretion to assess the credibility of the respondent and all witnesses, a determination that can prove dispositive in removability proceedings. Under 8 U.S.C. § 1229a(c)(4)(C), the immigration judge may base a credibility determination on the respondent's or witness's "demeanor, candor, or responsiveness," the "inherent plausibility" of the account, consistency between written and oral statements, and consistency with other evidence of record, "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." [1][39][49] This statute, enacted as part of the REAL ID Act of 2005, eliminated the prior requirement that inconsistencies be material to the applicant's claim in order to support an adverse credibility finding.

An important procedural protection exists: if the immigration judge makes an adverse credibility finding, the respondent's credibility is presumed to be rebutted on appeal, but only if the judge makes an "explicit" finding regarding credibility.[1][8][39][49] Where the immigration judge's decision is silent on credibility or merely expresses general doubt, the respondent benefits from a "rebuttable presumption of credibility on appeal,"

meaning the Board of Immigration Appeals cannot second-guess the judge's implicit acceptance of testimony without clear error.[1][8][39][49][56] This procedural protection explains why practitioners often insist that immigration judges make detailed, explicit credibility findings at the conclusion of the hearing, to establish a clear record for appeal and to ensure that the appellate standard of review is properly engaged.

The Board of Immigration Appeals reviews credibility determinations under the "clear error" standard, a highly deferential standard that requires the Board to find that the immigration judge's determination would be clearly wrong based on the entire evidence record.[10][23][48] This means that even if the Board might have weighed evidence differently or found a witness more or less credible, it cannot reverse unless the immigration judge's credibility determination is unsupported by evidence or internally inconsistent with the record as a whole.[10][48]

The Procedural Framework: From Notice to Appeal

Initiation: The Notice to Appear and Master Calendar Hearing

Removal proceedings formally commence when the Department of Homeland Security files a Notice to Appear (Form I-862) with the immigration court after serving it on the respondent.[15][17] The Notice to Appear must identify the nature of the proceedings, the legal authority for the proceedings, the acts or conduct alleged to be violations, the specific charges and statutory provisions allegedly violated, the respondent's rights to representation and the availability of pro bono services, and the consequences of failing to appear.[17] The respondent is entitled to at least ten days between service of the Notice to Appear and the first hearing, unless the respondent waives this period by signing a "Request for Prompt Hearing." [15]

The first hearing in removal proceedings is the Master Calendar Hearing, a brief, largely procedural hearing where the immigration judge reviews the Notice to Appear, ensures the respondent understands their rights, and addresses preliminary matters such as representation, pleadings, scheduling, and the identification of relief from removal the respondent intends to pursue.[15][18] The Master Calendar Hearing typically lasts five to twenty minutes and is not the forum for adjudication of removability or relief; rather, it serves a gatekeeping and scheduling function. At the Master Calendar Hearing, an unrepresented respondent will be advised of their right to counsel at no government expense and provided with a list of pro bono legal service providers in the jurisdiction.[15][18] If the respondent remains unrepresented at a subsequent Master Calendar Hearing, the immigration judge may permit proceedings to continue or may continue the matter to allow the respondent additional time to obtain counsel, depending on the judge's discretion and local practice norms.[15]

During the Master Calendar Hearing, the respondent (through counsel or pro se) enters "pleadings" responding to the government's charges-essentially admitting or denying the factual and legal allegations in the Notice to Appear. The respondent also designates a country of removal, states what applications for relief, if any, will be filed, identifies and narrows the legal and factual issues, estimates the time needed for the individual hearing, and requests interpretation services if needed.[15] These pleadings are critical because they frame the issues the immigration judge will address. If the respondent pleads removable (concedes the government's charges), the proceeding moves directly to the relief phase; if the respondent denies removability, the case proceeds to an Individual Calendar Hearing (also called a "merits hearing") where both sides present evidence on removability.

The Individual Calendar Hearing: Adjudication of Removability and Relief

The Individual Calendar Hearing is the evidentiary hearing at which the immigration judge determines

removability and, if the respondent is found removable, whether any form of relief from removal should be granted.[55][56][58] The hearing is recorded but not transcribed unless a party requests and pays for transcription.[15] The immigration judge typically conducts the hearing in a controlled manner, with opening statements from both sides (the DHS attorney and the respondent/respondent's attorney), presentation of evidence by both parties, cross-examination of witnesses, and closing statements.[55][58] The hearing may last from a few hours to multiple days, depending on the complexity of the case and the amount of evidence to be presented.

Evidence in removal proceedings is subject to a broad admissibility standard: evidence is admissible if it is "material and relevant to any issue in the case." [11][55] Federal Rules of Evidence do not apply in immigration court.[5][11][55] Rather, immigration judges may admit any evidence that is probative of relevant matters and whose admission is fundamentally fair, so as not to deprive the respondent of due process.[11][21][55] This means hearsay documents, affidavits, and unsworn statements are generally admissible, though the immigration judge may accord them less weight than live testimony subject to cross-examination. An important limitation exists: the judge's decision "shall be based only on the evidence produced at the hearing," [1][39][56] meaning the judge cannot rely on matters outside the hearing record.

At the conclusion of the Individual Calendar Hearing, the immigration judge issues a decision on removability. The decision may be rendered orally immediately after the hearing concludes or may be reduced to written form at a later date.[15][55][56] The decision must include findings of fact and conclusions of law, though the statute does not require formal enumeration of findings.[52] If the immigration judge determines the respondent is not removable, the proceeding terminates. If the immigration judge determines the respondent is removable, the judge must inform the respondent of the right to appeal and the consequences of failing to depart under the removal order.[1][39][55]

Post-Decision Motions and Appeal Procedures

Once the immigration judge has issued a final order, the respondent has the right to file a motion to reconsider (within 30 days, specifying errors of law or fact) or a motion to reopen (within 90 days for most circumstances, upon discovery of new evidence).[1][39][56] These motions are subject to strict requirements: a motion to reconsider must allege legal or factual error in the prior decision; a motion to reopen must support its allegations with affidavits or other evidence, must show the evidence is material and was not previously available, and (unless based on changed circumstances) must show the respondent was not previously given the opportunity to apply for the relief sought.[36][56][60]

If the respondent does not file a motion to reconsider or reopen (or if such motions are denied), the respondent may appeal to the Board of Immigration Appeals within 30 days of the final order by filing a Notice of Appeal with the immigration court.[10][48] The respondent should "reserve appeal" at the conclusion of the hearing by stating on the record that they intend to appeal, which prevents the removal order from becoming immediately final and avoids a mandatory 90-day detention period for processing removal.[10] After the BIA issues a decision on appeal, the respondent may seek judicial review in the federal court of appeals by filing a Petition for Review within 30 days.[20][23] However, federal courts of appeals have limited jurisdiction: they may review constitutional claims and questions of law, but not the BIA's application of law to fact, credibility determinations, or discretionary decisions unless they are outside the bounds of discretion.[20][23]

Standards of Review and the Clear Error Doctrine

The Board of Immigration Appeals applies different standards of review depending on the nature of the issue on appeal.[7][10][23][48] For factual findings, including credibility determinations, the BIA applies the "clear

error" standard, a highly deferential test that permits reversal only where the immigration judge's finding would be clearly erroneous based on the entire evidence record.[7][10][23][48] This standard means that even if the Board might have weighed the evidence differently or reached a different factual conclusion, it cannot reverse unless the immigration judge's finding is unsupported by evidence or internally inconsistent.[7][10][48] For pure questions of law, the BIA applies de novo review, meaning it reviews the immigration judge's legal conclusions without deference.[7][10][23][48] For mixed questions of law and fact-such as whether established facts satisfy a legal standard-the BIA may weigh evidence in a manner different from the immigration judge, but it must still address what facts were actually established at the immigration judge level.[7][10][45][48]

Understanding the standard of review is critical for practitioners constructing the appellate record. If a respondent's claim of removability turns on a factual dispute-such as whether the respondent entered without inspection, or whether a prior criminal conviction constitutes a crime of moral turpitude based on the actual facts of the offense-the respondent's primary opportunity to challenge the government's proof lies at the immigration judge level. If the immigration judge finds facts against the respondent, appellate reversal will be difficult absent clear error. This reality underscores the importance of vigorous cross-examination of government witnesses and thorough presentation of evidence at the merits hearing stage.

Statutory Grounds of Removability and Application Standards

Crimes of Moral Turpitude: Definition and Application

A crime of moral turpitude (CIMT) represents one of the most frequently litigated grounds of inadmissibility and deportability in Northern California practice, given the large population of noncitizens with prior criminal histories. However, "moral turpitude" is not defined in the statute; rather, it is a term of art developed through judicial interpretation. The BIA has held that a CIMT typically involves the intent to cause great bodily harm, defraud, or permanently deprive an owner of property, or in some cases, to act with lewd intent or recklessness.[53]

The determination of whether a particular conviction constitutes a CIMT involves a "categorical inquiry": the immigration judge must look to the statutory definition of the offense as written and determine whether it necessarily involves conduct constituting a CIMT, not whether the respondent's particular conduct satisfied the definition.[53] If the statute is "divisible"-meaning it reaches conduct that both does and does not involve moral turpitude-the judge may look to the record of conviction (including charging documents, plea agreements, and sentencing documents) to determine what specific offense the respondent was actually convicted of.[40][53] If the statute does not clearly define the offense in terms of moral turpitude elements, some circuits apply a "circumstance-specific" approach, examining the actual facts of the respondent's offense to determine whether it involved moral turpitude.[40][53]

For deportability purposes, a single conviction of a CIMT committed within five years of admission and for which a sentence of one year or longer may be imposed makes the respondent deportable.[13][19][52][53] The "within five years of admission" requirement means the crime must have been committed within five years after the respondent's lawful admission, not five years after conviction.[52] Two or more CIMT convictions, regardless of when committed after admission and regardless of sentence imposed, make the respondent deportable, unless the convictions arose from a single scheme of criminal misconduct (interpreted to mean charges arising from the very same incident).[13][19][52][53] The significance of the CIMT ground in Northern California practice stems partly from the frequency of criminal convictions in the client population and partly from the intersection with California post-conviction relief procedures that may vacate

convictions if the original conviction was entered without proper advisal of immigration consequences.

Aggravated Felonies: Consequences and Categorical Analysis

An "aggravated felony" is a term of art in immigration law that bears little relation to what state criminal law or common usage would describe as an "aggravated felony." [50] The statute itself does not use the term "felony" or require that the underlying offense be classified as a felony under state law. Rather, Congress has defined specific categories of offenses as "aggravated felonies" in INA § 101(a)(43), and this definition applies regardless of how the offense is classified under state law. [16][50] The consequence of an aggravated felony conviction is severe: the respondent becomes deportable, ineligible for asylum, withholding of removal, cancellation of removal, and nearly all other forms of relief, and faces permanent inadmissibility and enhanced penalties (up to 20 years imprisonment) if they illegally reenter after removal. [50]

For Northern California practitioners, the aggravated felony analysis often involves detailed statutory examination of the respondent's prior conviction, including crimes of violence (requiring an element of substantial risk of use of physical force), drug trafficking offenses, crimes of fraud or deceit involving loss to the victim exceeding \$10,000, and prostitution-related offenses, among others. [16][50] The Board of Immigration Appeals has developed extensive precedent on what constitutes a crime of violence, particularly analyzing state assault and battery statutes to determine whether they necessarily involve substantial risk of use of force. [16] The Ninth Circuit has reviewed many of these determinations and, in several instances, has rejected the BIA's categorical analysis as insufficiently protective of respondents' rights. [16]

Crimes of Violence and the Categorical Approach

A "crime of violence" is an aggravated felony when committed after the respondent's admission to the United States. The statutory definition of crime of violence appears in 18 U.S.C. § 16 and includes felonies involving substantial risk of use of force against a person or using explosives, threatening, attempting, or conspiring to commit such crimes. [16] The immigration judge's task is to apply a "categorical approach," examining whether the statutory definition of the offense necessarily involves conduct constituting a crime of violence, rather than examining the facts of the particular case. If the statute is divisible, the judge may examine the record of conviction to determine what specific offense was committed. This analysis can be highly technical, requiring careful comparison of state statute language with the federal definition in 18 U.S.C. § 16.

In the Ninth Circuit, which controls in Northern California, courts have been somewhat skeptical of overly broad applications of the crime of violence category. The Ninth Circuit has vacated BIA decisions characterizing certain California offenses as crimes of violence where the statute could be violated through conduct not necessarily involving force. [16] This jurisprudence creates opportunities for practitioners representing respondents with prior convictions, particularly California Penal Code § 245 assault with a deadly weapon charges, to challenge aggravated felony characterizations by distinguishing between the statutory elements and the actual facts of conviction.

Document Fraud and Misrepresentation Grounds

Deportability for document fraud under INA § 237(a)(3) applies to aliens subject to final order for violation of INA § 1324c (document fraud-presenting, possessing, or using false documents for immigration purposes). [13][41] Deportability for fraud and misrepresentation under INA § 237(a)(1)(F) applies to aliens described in INA § 212(a)(6)(C) (entering or attempting to enter through fraud or willfully misrepresenting a material fact to procure a visa or entry document). [13][41] These grounds differ from criminal grounds in that they do not require conviction of a separate crime; rather, they require only that the immigration judge determine, in the removal proceeding itself, that the respondent committed fraud or misrepresentation. This

places a potentially higher evidentiary burden on respondents, who must address allegations of fraudulent conduct without the benefit of a prior adjudication in criminal court.

Notably, fraud and misrepresentation grounds often intersect with the respondent's current removal proceeding, particularly in cases where the respondent obtained their current status through fraudulent means. A respondent who adjusted status through a fraudulent marriage, for example, could be found deportable even if the fraud was never separately prosecuted. This ground has significant implications for Northern California practice, where marriage fraud between noncitizens and U.S. citizens sometimes occurs, and where document fraud related to border crossing (using another person's documents, for example) is not uncommon among respondents from Mexico and Central America.

Security-Related Grounds of Removability

Under INA § 237(a)(4), noncitizens are deportable if they engage in specified security-related criminal activity, including espionage, violations of export control laws, crimes endangering public safety or national security, or activity aimed at opposing or controlling the U.S. government by force or violence.[6][13][41] These grounds are rarely invoked in typical removal proceedings but become critical in cases involving national security concerns, terrorism allegations, or involvement with designated terrorist organizations. The procedural protections available in security-based removals may be limited, and classified evidence may be used against the respondent with restricted disclosure rights.[6]

For Northern California practitioners, security grounds occasionally arise in cases involving respondents from countries designated as state sponsors of terrorism, respondents with alleged connections to terrorist organizations, or respondents involved in certain types of export violations. The government's burden of proof remains "clear and convincing evidence" even in security cases, but the use of classified or sensitive evidence may complicate the respondent's ability to effectively cross-examine government witnesses or present contradictory evidence.

San Francisco-Specific Context and Northern California Practice

San Francisco Immigration Court: Judicial Preferences and Procedural Norms

The San Francisco Immigration Court, located at multiple addresses (100 Montgomery Street, Suite 800; 630 Sansome Street, 4th Floor; and a Concord Hearing Location at 1855 Gateway Blvd., Suite 850), processes removal cases from the five-county Northern District of California, covering a population with heavy representation from Central American asylum seekers, Mexican nationals, and longtime Bay Area residents with mixed-status families. The court's docket reflects the composition of the Northern California population: significant representation of Guatemalan, Salvadoran, Honduran, and Mexican clients, a meaningful H-1B tech worker population, DACA recipients subject to removal proceedings, and noncitizens with long-term presence in the Bay Area and documented equities.

Individual San Francisco immigration judges have developed discernible procedural preferences that affect case strategy. Some judges strictly enforce filing deadlines and evidentiary submission requirements stated at the Master Calendar Hearing, while others apply more flexible standards, particularly where equitable tolling or other equitable considerations come into play. Some judges request detailed written motions on substantive issues like removability challenges, while others accept oral argument and motions. Some judges permit liberal continuances to allow respondents to obtain counsel or develop evidence, while others push cases toward resolution more expeditiously. Practitioners in San Francisco should develop relationships with the individual judges before which they practice and understand their patterns regarding evidence submission,

witness scheduling, and decision issuance timelines.

The San Francisco Asylum Office: Credible Fear and Interview Procedures

The San Francisco Asylum Office, which processes affirmative asylum applications and conducts credible fear interviews for individuals in expedited removal, has established patterns regarding interview structure, documentary evidence expectations, and country conditions consideration. Individuals who fail their credible fear interview with the asylum officer and who appeal to an immigration judge may have their "reasonable fear" determination reviewed by the immigration judge in limited proceedings, though the immigration judge's standard of review differs from the full merits review available to those passing credible fear screening.[25][28]

For practitioners representing respondents who have survived credible fear screening and are proceeding to full removal proceedings before an immigration judge, understanding the asylum officer's interview notes, determinations, and reasoning can inform strategy at the merits hearing. An asylum officer's negative credibility assessment at the credible fear stage may influence the immigration judge, even though the immigration judge conducts a de novo review of the asylum claim. Similarly, country conditions evidence presented to the asylum officer can be supplemented or contested at the merits hearing, allowing respondents to strengthen their claims on appeal or to address gaps in the government's evidence regarding country conditions.

Intersection with California State Criminal Law and Immigration Consequences

Northern California practitioners routinely encounter the intersection of state criminal law and immigration consequences, particularly given California's recent statutory reforms designed to mitigate immigration consequences of criminal convictions. California Penal Code § 1473.7 permits vacation of convictions if the conviction was obtained without proper advisal of immigration consequences or the conviction was invalid due to ineffective assistance of counsel regarding immigration consequences.[22] California Penal Code § 1203.43 permits reduction of certain felonies to misdemeanors, eliminating some deportability grounds.[22] California Penal Code § 18.5 implements Proposition 47, permitting reduction of certain drug convictions to misdemeanors, potentially eliminating drug trafficking grounds of deportability and inadmissibility.[22]

The availability of post-conviction relief under California law has become a critical strategic tool for practitioners representing noncitizens facing removability based on prior criminal convictions. A successful motion to vacate a conviction under PC § 1473.7 or to reduce a felony to a misdemeanor under PC § 1203.43 can eliminate a ground of removability entirely, rendering removal proceedings moot. This has created an incentive for immigration attorneys and criminal defense attorneys to coordinate strategy, filing motions to vacate or reduce convictions in criminal court before the immigration court issues a final removal order. However, practitioners must be cautious about the timing and scope of post-conviction relief motions, as a conviction modification filed after removal proceedings commence may not toll appeal deadlines or prevent removal while the post-conviction motion is pending.[22]

California Values Act and ICE Enforcement Cooperation Limitations

California Penal Code § 1229.3 (the California Values Act) and related state law provisions limit state and local law enforcement cooperation with federal Immigration and Customs Enforcement (ICE). These limitations affect the enforcement environment in Northern California, potentially reducing the likelihood that immigration cases will be referred to ICE as a result of local law enforcement encounters. However, the California Values Act does not prevent ICE from independently investigating noncitizens or from making arrests based on federal immigration enforcement priorities. Practitioners should understand the local

enforcement environment in their jurisdiction, including which law enforcement agencies maintain cooperation agreements with ICE and which have established sanctuary policies restricting ICE cooperation.

Practical Application: Removability Determinations in Specific Contexts

Criminal Conviction-Based Removability in Northern California

Criminal conviction-based removability determinations represent a substantial portion of San Francisco Immigration Court's caseload. The analysis typically proceeds in stages: first, identifying the statutory ground of removability (CIMT, aggravated felony, drug trafficking, crime of violence, etc.); second, determining whether the prior conviction actually satisfies the statutory elements; and third, if removable on the criminal ground, considering available relief (cancellation of removal for LPRs, discretionary waivers under INA § 212(h), or mitigation through post-conviction relief).

For a respondent lawfully admitted to the United States who is charged with deportability based on a prior conviction, the government bears the burden of proving removability by clear and convincing evidence. The government typically establishes this through documents: the criminal conviction record, charging documents, plea agreements, and sentencing documents. The respondent may challenge the characterization of the conviction by presenting contrary evidence or argument regarding what the conviction actually constitutes under immigration law. For example, a respondent charged with a CIMT conviction may introduce evidence that the crime, as actually committed, did not involve moral turpitude (such as a shoplifting case where no deception or intent to permanently deprive was present, despite the statute theoretically permitting such an interpretation). Similarly, a respondent charged with an aggravated felony conviction may dispute that the prior statute reaches conduct constituting a crime of violence, by distinguishing the statutory definition from the federal definition in 18 U.S.C. § 16.

Status Violation Removability: Overstays and Present Without Inspection Cases

Removability based on status violations (overstaying a visa or being present without inspection) represents a substantial category of cases in Northern California. For a respondent charged with presence without inspection under INA § 212(a)(6)(A), if the government has established alienage and the respondent claims a prior lawful admission, the respondent bears the burden of proving by clear and convincing evidence that they are lawfully present pursuant to that prior admission.^{[2][27][30]} This frequently requires documentary evidence of a prior admission (passport with entry stamp, Form I-94, or other official documentation), supplemented by testimony and other corroborating evidence.

For respondents charged with overstaying a nonimmigrant visa under INA § 237(a)(1)(C), the government typically proves overstay through USCIS or CBP records showing the respondent's admitted visa status and the expiration date, coupled with evidence of the respondent's continued presence after the visa expired (such as residence records, employment records, or testimony). The respondent's admission of continued presence after visa expiration is typically dispositive on the removability issue; the key strategic consideration then shifts to eligibility for relief, such as cancellation of removal (if the respondent has accumulated ten years of continuous presence, good moral character, and an immediate family member who would suffer exceptional and extremely unusual hardship).

Asylum-Based Cases and Removability of Asylum Seekers

In cases where a respondent has applied for asylum and the application is denied, the respondent does not necessarily become automatically removable—rather, the government must prove removability on the underlying ground of removal that was the basis for the asylum application. For example, a respondent who

entered without inspection and sought asylum based on persecution fears is charged with being present without inspection under INA § 212(a)(6)(A). If the asylum application is denied, the underlying removability charge (presence without inspection) remains, and the government must still prove it by the applicable standard (the respondent must prove clear and convincing evidence of a prior lawful admission, or must prove clearly and beyond doubt entitlement to admission).

However, the asylum application itself becomes a mechanism for the respondent to contest removability. If the respondent can establish past persecution, a presumption of well-founded fear arises, which supports eligibility for asylum and withholding of removal, even if the underlying removability charge would be conceded. Thus, the removability determination in asylum cases often becomes secondary to the relief determination, with the respondent's primary strategy focused on establishing eligibility for protection rather than on defeating the removability charge.

Relief from Removal and the Discretionary Phase

Cancellation of Removal: Requirements and Strategic Implications

Once an immigration judge has determined that a respondent is removable, the judge must consider whether any form of relief from removal should be granted.[1][39][55] The most common form of relief sought in removal proceedings is cancellation of removal, which is available to both lawful permanent residents and to non-LPRs in distinct and mutually exclusive statutory categories. For lawful permanent residents under INA § 240A(a), the respondent must show five years of lawful permanent residence, seven years of continuous physical presence in the United States, good moral character, and absence of certain criminal convictions, with removal resulting in exceptional and extremely unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child.[3][32][35]

For non-LPRs under INA § 240A(b), the requirements are more demanding: the respondent must show ten years of continuous physical presence before service of the Notice to Appear, good moral character throughout that period, absence of certain criminal convictions, and removal resulting in "exceptional and extremely unusual hardship" to a U.S. citizen or LPR spouse, parent, or child.[3][32][35] The "exceptional and extremely unusual hardship" standard is interpreted narrowly, requiring the respondent to demonstrate hardship beyond what would typically flow from family separation. The Board of Immigration Appeals has held that the standard is not satisfied by mere financial hardship, emotional hardship from separation, or even significant health challenges of a family member, absent extraordinary circumstances such as severe disability or unusual medical needs that cannot be addressed in the country of removal.[3][32][35]

The strategic significance of cancellation of removal lies partly in its exclusive nature: a respondent who is granted cancellation of removal is issued a green card and remains in the United States. No other form of relief provides such permanence. However, the high bar for establishing "exceptional and extremely unusual hardship" means that many respondents fail to qualify, and the discretionary phase of the removal proceeding may focus on alternative relief, such as voluntary departure, withholding of removal, or Convention Against Torture protection.[3][26][32]

Withholding of Removal and Convention Against Torture Protection

Withholding of removal under INA § 241(b)(3) is available to respondents who can establish that it is "more likely than not" (a 51% probability or greater) that they would be persecuted in their country of removal on account of a protected ground (race, nationality, religion, political opinion, or particular social group), absent an exception such as having persecuted others or having been convicted of a particularly serious

crime.[9][12][31] The burden is higher than for asylum (which requires only a 10% probability of persecution), but withholding may be available to respondents ineligible for asylum due to the one-year filing deadline, prior asylum denials, or criminal convictions that bar asylum eligibility.[9][12][31]

Convention Against Torture protection under INA § 241(b)(3) requires establishing that it is "more likely than not" that the respondent would be tortured in their country of removal, with torture defined narrowly as intentional infliction of severe physical or mental pain by a government official or person acting with government acquiescence.[9][31] CAT protection is a more limited form of relief than withholding, as it may not provide a path to permanent residence and may be revoked if country conditions improve. However, CAT protection remains available even to respondents with criminal convictions that would bar asylum or withholding, making it a backstop form of relief for those with serious criminal histories but colorable torture claims.

Voluntary Departure: Strategic Advantages and Risks

Voluntary departure under INA § 240B is available at two stages: "pre-conclusion voluntary departure" granted before the final hearing on relief, requiring only that the respondent has been in the United States for less than three months before the Notice to Appear, has not been convicted of an aggravated felony or certain crimes, and meets other eligibility requirements, with up to 120 days permitted to depart;[26][29] and "post-conclusion voluntary departure" granted after the immigration judge concludes proceedings, requiring clear and convincing evidence of means to depart, intention to depart, good moral character for at least five years, and at least one year presence before the Notice to Appear.[26][29]

The strategic calculus around voluntary departure is complex.[26][29] Accepting voluntary departure avoids a formal removal order, which may preserve eligibility for future reentry through waiver or other mechanisms. However, voluntary departure requires waiving all other requests for relief and waiving the right to appeal, and if the respondent fails to depart within the designated period, the voluntary departure automatically converts to a removal order.[26][29] For respondents with strong relief claims-such as asylum applicants with credible persecution claims-accepting voluntary departure may be strategically unwise. For respondents with no viable relief claims but with family members or employment ties in the United States, voluntary departure may be appealing if they believe they can depart voluntarily and maintain family connections through future immigration channels.

Recent Legal Developments and Procedural Changes (January 2025 - February 2026)

Expanded Expedited Removal

As of January 2025, the Trump administration has expanded expedited removal to its full statutory extent, permitting expedited removal of undocumented noncitizens apprehended anywhere in the United States who cannot prove two years of continuous presence and who entered without inspection or had parole status revoked.[25] Under expanded expedited removal, individuals may be deported in as little as one day without a full immigration court hearing, subject only to credible fear or reasonable fear screening.[25][28] This expansion has significant consequences for Northern California, where many individuals apprehended in the interior of the country by ICE may be subject to expedited removal rather than standard § 240 removal proceedings.

For practitioners, expanded expedited removal creates new procedural challenges: individuals placed in expedited removal must receive credible fear interviews and, if they pass the credible fear threshold, are referred to immigration court for limited proceedings on whether to grant asylum, withholding of removal, or

CAT protection.[25][28] The expedited removal regime is still subject to constitutional due process requirements, including adequate notice and reasonable opportunity to present claims of protection, but the compressed timeline and limited scope of review differ substantially from standard § 240 removal proceedings.[25][28]

Prosecutorial Discretion and Enforcement Trends

As of January 2026, prosecutorial discretion mechanisms-including the former Doyle memorandum permitting DHS attorneys to decline to pursue removal cases-no longer apply or are adhered to by DHS.[12] This change eliminates a prior strategic tool available to respondents with compelling humanitarian circumstances or equitable factors that might justify DHS dismissal of charges. Going forward, respondents must focus on relief from removal rather than prosecutorial discretion to avoid removal.

Conclusion and Strategic Synthesis

The immigration judge's finding of removability represents a critical juncture in removal proceedings, determining whether a noncitizen faces deportation and what procedural protections and relief options remain available. The statutory framework creates a carefully calibrated burden of proof system that varies depending on whether the respondent was admitted to the United States, the specific ground of removability alleged, and whether proceedings involve status violations or criminal convictions. The evidentiary standards-clear and convincing evidence for deportable aliens, clearly and beyond doubt for applicants for admission-determine the probability distribution of proof required and create strategic advantages and disadvantages for the government and respondent respectively.

For practitioners in Northern California, removability determinations must be contextualized within the local practice norms of the San Francisco Immigration Court, the procedural tendencies of individual judges, and the substantive law constraints imposed by Ninth Circuit precedent. The intersection of state criminal law and immigration consequences creates opportunities for post-conviction relief strategies that may eliminate grounds of removability entirely. The availability of multiple forms of relief-cancellation of removal, withholding of removal, Convention Against Torture protection, and voluntary departure-provides varied strategic options depending on the respondent's circumstances, criminal history, family ties, and perceived likelihood of success on the relief claim.

Practitioners should approach removability determinations systematically: first, understanding the burden of proof allocation based on the respondent's admission status; second, evaluating the government's evidence on removability and identifying weaknesses or ambiguities; third, developing a factual record through the respondent's testimony, documentary evidence, and witness testimony that supports respondent's position on removability or establishes equitable factors supporting relief; and fourth, preserving issues for appeal by ensuring clear findings on credibility, specific objections to government evidence, and detailed arguments on contested legal issues.

The removability determination is not inevitable and is not irreversible. With careful attention to evidentiary standards, strategic presentation of evidence, and thorough preservation of the record, practitioners can successfully challenge removability findings, obtain favorable relief decisions, or establish a record supporting appellate reversal of adverse removability determinations.

References

- [1] 8 U.S.C. § 1229a
- [2] 8 C.F.R. § 1240.8
- [3] Federal Bar Association, Overview of Removability Panel for FBA ILS 2019
- [4] 8 C.F.R. Part 240
- [5] Brennan Center for Justice, The Immigration Court System, Explained
- [6] MyAttorney USA, Section 237 Deportability Statutes: Security and Related Grounds
- [7] American Immigration Council, Standards of Review Applied by the Board of Immigration Appeals
- [8] Immigrant Legal Resource Center, Challenging an Immigration Judge's Adverse Credibility Finding.pdf)
- [9] Immigration Equality, Withholding of Removal
- [10] Immigrant Legal Resource Center, Identifying Issues for a BIA Appeal
- [11] EOIR Benchbook, Evidence
- [12] American Immigration Council, The Difference Between Asylum and Withholding of Removal
- [13] 8 U.S.C. § 1227
- [14] Charles International Law, How to Conduct Discovery in Immigration Court
- [15] EOIR, 4.15 - Master Calendar Hearing
- [16] MyAttorney USA, Section 237 Deportability Statutes: Criminal Grounds
- [17] EOIR, 4.2 - Commencement of Removal Proceedings
- [18] EMP Law, What to Expect at Your Master Hearing in Immigration Court
- [19] Justia, When Criminal Convictions Are Legal Grounds for Deportation
- [20] American Immigration Council, Finality of Removal Orders for Judicial Review Purposes
- [21] KFK&L Law, Removal Proceedings: A Right of Cross-Examination
- [22] Immigrant Legal Resource Center, Crimes
- [23] Ninth Circuit, A. Jurisdiction and Standards of Review
- [24] Ninth Circuit, E. Due Process in Immigration Proceedings
- [25] Forum Together, Fact Sheet: Expanded Expedited Removal
- [26] National Immigrant Justice Center, Voluntary Departure Quick-Start Guide
- [27] MyAttorney USA, Burden of Proof in Removal Proceedings for Inadmissible Respondents
- [28] ICE Portal, A Guide to Summary Removal Proceedings and Fear Interviews508.pdf)
- [29] EOIR, Information on Voluntary Departure
- [30] TRACREPORTS, Burdens of Proof in Removal Proceedings

- [31] Immigration Equality, The One-Year Filing Deadline
- [32] ICE Portal, A Guide to 10-Year Cancellation of Removal
- [33] EOIR, 5.6 - Motions to Reopen
- [34] 8 C.F.R. Part 208 - Procedures for Asylum and Withholding of Removal
- [35] EOIR, EOIR-42B - Application for Cancellation of Removal and Adjustment
- [36] EOIR, 5.7 - Motions to Reopen
- [37] Federal Bar Association, REMOVABILITY AND RELIEF: A BROAD OVERVIEW
- [38] Immigrant Legal Resource Center, Chapter 1 - Inadmissibility & Deportability
- [39] 8 U.S.C. § 1229a
- [40] Clinic Legal, Grounds of Inadmissibility and Deportability
- [41] North Carolina Defender Manual, 3.2 Deportability vs. Inadmissibility
- [42] 8 U.S.C. § 1229a - Cornell Law School
- [43] MyAttorney USA, Lawful Admission
- [44] Immigrant Legal Resource Center, Chapter 1: Introduction to Removal Proceedings
- [45] EOIR, Volume 24 - Precedent Decisions
- [46] Marina Shepelsky, Lawful Status vs. Admission - USCIS 2025
- [47] 8 C.F.R. Part 240 - Voluntary Departure, Suspension of Deportation
- [48] Immigrant Legal Resource Center, Identifying Issues for a BIA Appeal
- [49] 8 U.S.C. § 1229a - OLRC Home
- [50] American Immigration Council, Aggravated Felonies: An Overview
- [51] Immigrant Legal Resource Center, Chapter 1 - Crimes Involving Moral Turpitude
- [52] 8 C.F.R. Part 1240 Subpart A - Removal Proceedings
- [53] Immigrant Legal Resource Center, § N.7 Crimes Involving Moral Turpitude
- [54] Norton Tooby, 5.24 A. Clear, Convincing and Unequivocal Evidence
- [55] EOIR, 4.16 - Individual Calendar Hearing
- [56] 8 U.S.C. § 1229a - Cornell Law School
- [57] Immigration Litigation, Practice Advisory: IN ABSENTIA ORDERS
- [58] CCAB, How do I Prepare for My Individual Hearing in Immigration Court
- [59] EOIR, Office of the Chief Immigration Judge - Stipulated Orders
- [60] EOIR, 5.9 - Motions to Reopen In Absentia Orders