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# IMMIGRATION LAW—MIXED FEELINGS ON MIXED PETITIONS TO REOPEN REMOVAL PROCEEDINGS: THE NECESSITY BEHIND REQUIRING A TEST TO DETERMINE APPLICABILITY OF THE CHANGED COUNTRY CONDITIONS EXCEPTION

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IMMIGRATION LAW—MIXED FEELINGS ON MIXED PETITIONS TO REOPEN REMOVAL PROCEEDINGS: THE NECESSITY BEHIND REQUIRING A TEST TO DETERMINE APPLICABILITY OF THE CHANGED COUNTRY CONDITIONS EXCEPTION

*Matthew Minniefield\**

*The Federal Courts of Appeals have created a circuit split regarding “mixed petitions” to reopen removal proceedings. Mixed petitions, those brought under both a change in the petitioner’s personal circumstances and a change in the country conditions of the country of removal, need to be allowed in specific, but not all, situations.*

*The upward trend in quantity of removal proceedings over the past decade and beyond has created a surge of removal proceedings that even a properly trained and funded set of immigration courts would have difficulty handling. The immigration courts in the United States are both under-funded and oftentimes under-qualified to properly adjudicate the decisions.*

*When a petitioner brings an appeal to the appropriate Federal Court of Appeals, one hopes the final resolution would exemplify fair and uniform application of the particular statute. Instead, the Federal Courts of Appeals have created a split that leaves practitioners, aliens, and even immigration judges and the Board of Immigration Appeals (BIA) in the dark as to whether they should hear mixed petitions to reopen removal proceedings.*

*A test that removes some of the discretion from the immigration judge and provides the immigration judges and immigration courts with a definite and succinct set of rules when a mixed petition can be brought will remove part of the injustice recently created by the immigration courts.*

INTRODUCTION

Li Zhang, a citizen of China, was attempting to remain in the United States even though she had already been ordered removed by both an

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immigration judge and the BIA in June of 2004.<sup>1</sup> After her removal proceedings, she remained in the United States for seven years.<sup>2</sup> During this time, Li Zhang had converted her faith to Catholicism because her husband (who himself fled China for fear of persecution after attending an underground church) was Catholic; she was baptized on December 25, 2011, and both of her children were also baptized.<sup>3</sup> She and her family attended a Catholic church habitually.<sup>4</sup> Zhang's husband had his removal withheld; she, however, was not as fortunate.<sup>5</sup>

While Zhang admitted her petition to reopen her removal proceedings was clearly both time- and number-barred by the applicable statute, she attempted to persuade the court to allow her to utilize the related exception found in the same statute.<sup>6</sup> The court, however, found her claims "rest[ed] primarily on a change in personal circumstances . . . and, accordingly, [the BIA] correctly denied her motion to reopen as time- and number-barred."<sup>7</sup>

Cipto Chandra faced a similar situation to Li Zhang's; namely, he untimely moved the BIA to reopen his removal proceedings based on persecution he would face for being a Christian.<sup>8</sup> Strikingly similar to Li Zhang, Chandra did not become a Christian until after his removal proceedings concluded.<sup>9</sup> At first, Chandra's outcome was similar to Li Zhang's—the BIA denied the motion to reopen.<sup>10</sup> Chandra did not meet the time limitation and the BIA determined the changes to Chandra's personal circumstances could not give rise to a change in country conditions as required by the Immigration and Nationality Act.<sup>11</sup> The conclusion of the case is where Chandra's differs from Li Zhang's.<sup>12</sup>

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1. For the facts pertinent to this portion of the introduction, see *Li Zhang v. Att'y Gen. of the United States*, 543 F. App'x 277 (3rd Cir. 2013).

2. *Id.* at 278.

3. *Id.* at 279.

4. *Id.*

5. *See id.* at 279–80 (“[Li Zhang’s] husband was granted withholding of removal . . . although the record in this case does not reflect the reasons behind the decision in his case.”).

6. *Id.* at 281. *See* Immigration and Nationality Act §§ 240(c)(7)(A), (c)(7)(C)(i)–(ii), 8 U.S.C. §§ 1229a(c)(7)(A), (c)(7)(C)(i)–(ii) (2016); 8 C.F.R. § 1003.2(c)(2) (2016).

7. *Li Zhang*, 543 F. App'x at 281.

8. For the facts pertinent to the second portion of the introduction, see *Chandra v. Holder*, 751 F.3d 1034 (9th Cir. 2014).

9. *Id.* at 1035. Chandra was ordered removed in 2001, had his asylum petition denied in 2002, had his appeal dismissed by the BIA in 2003, and had his petition for review denied by the Court of Appeals for the 9th Circuit in 2005. However, he remained in the country, converted to Christianity, and attended church regularly. *Id.*

10. *Id.* at 1036.

11. *Id.* at 1036; 8 C.F.R. §§ 1003.2(c)(2), 1003.2(c)(3)(iii) (2016); Immigration and Nationality Act §§ 240(c)(7)(C)(i)–(ii), 8 U.S.C. §§ 1229a(c)(7)(C)(i)–(ii) (2016).

12. *Chandra*, 751 F.3d at 1036.

Chandra won his appeal, with the court “hold[ing] that a petitioner’s untimely motion to reopen may qualify under the changed conditions exception in 8 C.F.R. § 1003.2(c)(3)(ii), even if the changed country conditions are made relevant by a change in the petitioner’s personal circumstances.”<sup>13</sup> This decision, allowing a mixed petition to reopen removal proceedings under the statutory exemption offered for changed country conditions, opened the door for analysis into what circumstances should lead to allowing a mixed petition.

Unfortunately, there is consistent criticism of immigration adjudication.<sup>14</sup> Beyond the reported bias and prejudice,<sup>15</sup> inconsistencies for grant rates in asylum decisions both between immigration courts and among immigration judges in the same courtroom have become unmistakably apparent.<sup>16</sup> Studies of immigration adjudication found, outrageously, that an asylum applicant’s chances of being free from persecution relied on “a spin of the wheel of chance,” where results differed based on the immigration judges or asylum officers assigned to each case.<sup>17</sup> For any system of American jurisprudence to fall prey to bias or unfair reasoning would be a “crisis,” but this criticism is especially concerning in immigration law, which has such a grand effect on an individual’s life.<sup>18</sup> Adding to this crisis are situations where the Federal Courts of Appeals, which are already overwhelmed by appeals from decisions of immigration courts and the BIA,<sup>19</sup> cannot reach a consensus on a matter such as whether mixed petitions are allowed to be brought under the changed country conditions exception.<sup>20</sup> Compounding this, immigration judges have consistently been overworked for the past

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13. *Id.* at 1038.

14. *See, e.g.*, Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

15. *Id.* *See also* Ann M. Simmons, *U.S. Is Reviewing Behavior of Immigration Judges*, BALT. SUN (Feb. 12, 2006), [http://articles.baltimoresun.com/2006-02-12/news/0602120159\\_1\\_judges-appellate-courts-attorney-general](http://articles.baltimoresun.com/2006-02-12/news/0602120159_1_judges-appellate-courts-attorney-general).

16. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296, 332 (2007) (analyzing data from the immigration courts, the BIA, and the Courts of Appeals, and finding disparate decisions among them).

17. *Id.* at 378.

18. Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOKLYN L. REV. 467, 470 (2008).

19. *See, e.g.*, John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y. L. SCH. L. REV. 13, 14–15 (2006–07); Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 INTERPRETER RELEASES 2005, 2005–07 (Dec. 19, 2005).

20. *See* *Rei Feng Wang v. Lynch*, 795 F.3d 283 (1st Cir. 2015) (holding the First Circuit need not take a position on the current circuit split regarding mixed petitions since it could make its determination on other grounds).

decade, and only recently has the United States government taken steps to correct this.<sup>21</sup>

In essence, there is an area of law that affects an extremely large number of people, carries a potential punishment that is as strict as a non-citizen may face, and is adjudicated by judges who are notoriously biased and unfair, with rules on which the Federal Courts of Appeals cannot agree. To say there is an issue to be addressed and fixed is an understatement.

This Note will first discuss the background of immigration proceedings generally, since the need for a test for mixed petitions stems not only from the current split among the Federal Courts of Appeals, but also from the underlying issues in the immigration courts. This Note will further address the organizations, people, and actual process of the proceedings involved. Then, this Note will detail some of the specific requirements of motions to reopen removal proceedings.

Next, this Note will shift its focus to the current landscape of immigration proceedings. It is apparent through this lens that immigration reform, such as Operation Streamline, has created a surge in the number of cases improperly decided by the immigration courts and thus appealed to the Federal Courts. Once in the Federal Courts, these cases are often overturned, thus leading to splits such as the one regarding mixed petitions to reopen removal proceedings.

This Note next investigates the means by which some discretion can be removed from the immigration courts, concluding that a test is required to resolve the current circuit split. The next section of this Note determines this test would be better suited with rules over standards. Lastly, this Note proposes an employable test the immigration courts and the BIA should apply in determining whether to consider mixed petitions to reopen removal proceedings under the changed country conditions exception to the ninety-day statutory limit.

## I. A GUIDE TO REMOVAL PROCEEDINGS

Before embarking on a discussion of flaws in the immigration system,<sup>22</sup> including mixed petitions themselves, one must grasp the basics

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21. See Mark Noferi, *Bi-Partisan House Bill Recommends Largest Increase Ever in Immigration Judges*, IMMIGR. IMPACT (May 21, 2015), <http://immigrationimpact.com/2015/05/21/bi-partisan-house-bill-recommends-largest-increase-ever-in-immigration-judges/> (“Each immigration judge was handling over 1,400 ‘matters’ a year on average at the end of FY 2014 . . . The resulting backlog—which has increased 163% since 2003—has led to average hearing delays of over a year-and-a-half . . .”).

22. For the purposes of this Note immigration reform will focus on motions to reopen removal proceedings. Frankly, a Note addressing every area of immigration law ripe for reform would be an encyclopedia. See LaJuana Davis, *Reconsidering Remedies for Ensuring*

of immigration enforcement and the procedures that the administrative bodies in charge of enforcement must follow. In exploring these procedures, this Note advances the principal theme that the procedural aspect of immigration law is flawed and needs to be reformed.

#### A. *The Organizations Involved*

The Department of Homeland Security (“DHS”)<sup>23</sup> and the Department of Justice (“DOJ”) share the enforcement of immigration and naturalization laws.<sup>24</sup> The DHS is further broken down into various subdivisions to handle enforcement.<sup>25</sup> Lawful immigration, for example, is handled through the United States Citizenship and Immigration Services.<sup>26</sup> Other divisions of the DHS are in charge of enforcement regarding aliens who are removable or inadmissible.<sup>27</sup> The Immigration and Customs Enforcement (“ICE”) division of the DHS contains agents, officers, and attorneys who act as the police and prosecutor for the government with respect to aliens that are alleged to be subject to removal.<sup>28</sup>

The Executive Branch handles the immigration judges, their courtrooms, and the proceedings regarding removal and other immigration matters.<sup>29</sup> Since immigration proceedings involve matters of foreign relations, the pronouncement of whether to allow or inhibit an individual to immigrate is more appropriately left to the Executive than the Judiciary.<sup>30</sup> Adjudication for disputed removal proceedings is handled through the DOJ.<sup>31</sup> Within the DOJ, the Executive Office for Immigration Review (“EOIR”) handles immigration matters.<sup>32</sup> “Specifically, under delegated authority from the Attorney General, EOIR interprets and

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*Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 137–38 (noting there is a general accord as to the nature of United States immigration system being broken and in need of serious reform).

23. See Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a) (2016) (outlining the authority and responsibilities of the Department of Homeland Security).

24. See Immigration and Nationality Act § 103(g), 8 U.S.C. § 1103(g) (2016) (outlining the authority and responsibilities of the Department of Justice).

25. Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a) (2016).

26. *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERV., <http://www.uscis.gov/about-us/what-we-do> (last updated July 14, 2015).

27. See *infra*, Part I.C. regarding what determines removability and inadmissibility.

28. *What We Do*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/overview> (last visited October 24, 2015).

29. Benedetto, *supra* note 18, at 473.

30. *Id.* at 471.

31. Immigration and Nationality Act § 103(g), 8 U.S.C. § 1103(g) (2016).

32. See 8 C.F.R. § 1003.0 (2007) (establishing the EOIR as the division within the DOJ to handle immigration matters).

administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings.”<sup>33</sup> More than 235 immigration judges conduct administrative proceedings in fifty-eight immigration courts functioning within the Office of the Chief Immigration Judge (“OCIJ”), a component of the EOIR that hears cases including removal proceedings.<sup>34</sup>

The BIA, an appellate component to the EOIR, handles appeals from decisions of the immigration judges.<sup>35</sup> The BIA is the highest administrative tribunal regarding immigration law in the nation, and certain cases decided by the BIA are precedential.<sup>36</sup> If individuals intend to seek review of a decision by the BIA, they may do so in a federal court.<sup>37</sup> Finally, the BIA also has the authority to discipline immigration attorneys within administrative proceedings.<sup>38</sup> A third component of the EOIR, the Office of the Chief Administrative Hearing Officer (“OCAHO”), hears non-removal proceedings like those that involve “illegal hiring of unauthorized workers, document fraud, and unfair immigration-related employment practices.”<sup>39</sup>

The OCIJ also controls a self-auditing process to ensure proper procedure by immigration judges.<sup>40</sup> A complaint against an immigration judge can be initiated in two ways: it may be initiated by an individual or group filing a written or oral complaint, or the OCIJ may itself become aware of information warranting discipline via referrals from other components of the agency, internal reviews, or news releases.<sup>41</sup> Discipline ranges from as little as a reprimand to as severe as removal from federal service.<sup>42</sup> Corrective actions are generally imposed progressively, beginning with the least severe first and increasing toward more severe discipline if a problem persists.<sup>43</sup> If a problem is severe in the first

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33. *Organization, Mission and Functions Manual*, DEP’T OF JUST. (Sept. 29, 2014), <http://www.justice.gov/jmd/organization-mission-and-functions-manual-executive-office-immigration-review#content> (signed by Eric H. Holder, Jr. May 16, 2013).

34. *EOIR at a Glance*, DEP’T OF JUST. (Sept. 9, 2010), <http://www.justice.gov/eoir/eoir-at-a-glance>.

35. *Id.*

36. *Id.*

37. *Id.*

38. 8 C.F.R. § 292.3 (2011).

39. *EOIR at a Glance*, *supra* note 34.

40. *Summary of OCIJ Procedure for Handling Complaints Against Immigration Judges*, DEP’T OF JUST. (May 17, 2010), <http://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/IJComplaintProcess.pdf>.

41. *Id.*

42. *Id.*

43. *Id.*

instance, a serious disciplinary action may be warranted.<sup>44</sup> The official deciding whether discipline is warranted (typically the Deputy Chief Immigration Judge) will consult the factors listed in *Douglas v. Veteran's Administration*,<sup>45</sup> which include

the nature and seriousness of the conduct, the immigration judge's length of service and past disciplinary record, mitigating circumstances, the likelihood of repeat occurrence absent action by the Agency, the impact of the offense on the reputation of the agency, and the consistency of the penalty with similar instances of misconduct.<sup>46</sup>

While the EOIR works toward efficient and fair administration of justice,<sup>47</sup> immigration judges have long been criticized for their biased and inappropriate handling of cases.<sup>48</sup>

### B. *The People Involved*

During the 1980s, the initial years of the EOIR, the appointed immigration judges all fit the same model: white males between 40-60 years of age, typically a former employee of the Immigration and Naturalization Service ("INS") in a prosecutorial capacity (though currently, immigration judges fit a more diverse background).<sup>49</sup> The Attorney General appoints immigration judges subject to the supervision and control of the Attorney General.<sup>50</sup> Previously, the EOIR assessed candidates for the position and forwarded its approvals to the Office of the Deputy Attorney General for final approval that occurred almost regularly.<sup>51</sup>

Recently, the trend has reversed itself: the Attorney General will

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44. *Id.*

45. 5 M.S.P.B. 313 (MSPB 1981).

46. *Summary of OCIJ Procedure for Handling Complaints Against Immigration Judges*, *supra* note 40.

47. *See Fiscal Years 2008-2013 Strategic Plan*, DEP'T OF JUST. (Jan. 2008) <http://www.justice.gov/sites/default/files/eoir/legacy/2008/01/23/EOIR%20Strategic%20Plan%202008-2013%20Final.pdf> (stating one of the goals of the EOIR, aside from the prevention of crime and terrorism, is to promote justice through impartial and prompt adjudication). This goal is so important, it is considered the "foundation for th[e] agency's strategic planning effort." *Id.*

48. *See Simmons*, *supra* note 15 (expressing a concern with the actions of immigration judges ranging from relying on expert testimony from an individual who didn't speak the language a document was written in to a judge calling himself "Tarzan" in a case wherein a Ugandan woman who was raped was named "Jane").

49. Benedetto, *supra* note 18, at 472.

50. Immigration and Nationality Act § 101(b)(4), 8 U.S.C. § 1101(b)(4) (2016).

51. Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, LEGAL TIMES (May 28, 2007), <http://www.truth-out.org/archive/item/70836-doj-made-immigration-judgeships-political>.



handpick an individual, and the EOIR will refrain from objecting to the candidate, even in spite of his or her lack of any experience or background in immigration law.<sup>52</sup> In fact, between 2004 and 2007, a report found that half of the immigration judges selected had no previous experience in immigration law.<sup>53</sup> This process differs from judge selection in other areas of the law, such as federal judges, state judges, or even administrative law judges.<sup>54</sup> Federal judges are first nominated by the President and then undergo other inquiries before confirmation in the Senate.<sup>55</sup> State judges are either appointed or elected depending on state-specific structures.<sup>56</sup> Administrative law judges are selected by the U.S. Office of Personnel Management and must meet certain criteria, like seven years of litigation or trial experience, as well as pass an administrative law judge examination.<sup>57</sup> Competency on the immigration bench is naturally important. The number of competent immigration judges serving in the immigration courts is even more important considering the fact that an “[immigration judge] often makes the ultimate determination of an immigrant’s fate.”<sup>58</sup>

### C. *The Process and Proceedings Involved*

Removal proceedings in the United States are quite complex.<sup>59</sup> Under federal law, an immigration judge is the first decision maker in ruling whether a non-citizen is removable.<sup>60</sup> “Removability,” as it has been coined, is a determination of whether or not the government is within its legal bounds in excluding or deporting a non-citizen or “alien.”<sup>61</sup> An alien, for purposes of removal proceedings, is an individual who is not a citizen of the United States. Whether the person is in the United States legally or illegally is not of consequence to the phrase.<sup>62</sup>

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52. *Id.*

53. Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007.

54. Benedetto, *supra* note 18, at 472.

55. *Id.*

56. *Id.* at 473.

57. *Id.* at 477–78.

58. *Id.* at 475.

59. Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1813 (2013).

60. See Immigration and Nationality Act § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2016) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”).

61. See Immigration and Nationality Act § 240(e)(2), 8 U.S.C. 1229a(e)(2) (2016) (providing the definition for “removable”).

62. See Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2016).

### 1. Removal Proceedings

The issuance of a Notice to Appear (“NTA”) initiates a removal proceeding.<sup>63</sup> An NTA provides the alien with the nature of the proceeding, the legal authority the government has to bring the proceedings, the acts that caused the initiation of the proceeding, as well as contact information requests, and the date and time of the proceeding.<sup>64</sup> Over forty different employment positions within the DHS may issue NTAs.<sup>65</sup> Filing of the charging document (which includes an NTA) with an immigration court commences the case and the immigration court retains jurisdiction over the proceeding.<sup>66</sup>

The first appearance for a respondent in front of the immigration judge is for a Master Calendar Hearing.<sup>67</sup> This hearing provides respondents with knowledge of their right to an attorney (at no expense to the government).<sup>68</sup> During the Master Calendar Hearing, other hearings are scheduled to determine the merits of the case, take pleadings, and determine the destination country should the alien be determined removable, among other things.<sup>69</sup>

Next, a respondent needs to attend an individual calendar hearing, which is an evidentiary hearing on the merits of contested matters such as applications from relief of removability.<sup>70</sup> An evidentiary hearing is held before the immigration judge wherein the judge has full discretion to conclude whether the respondent is removable.<sup>71</sup>

An alien is removable based on a violation of one of two sections: inadmissible aliens under Section 212 of Immigration and Nationality Act, 8 U.S.C. § 1182,<sup>72</sup> or deportable aliens under Section 237 of Immigration and Nationality Act, 8 U.S.C. § 1227.<sup>73</sup> While both aliens who are “deportable” and aliens who are “inadmissible” may face removal

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63. Immigration and Nationality Act § 239(a), 8 U.S.C. § 1229(a) (2016).

64. *Id.*

65. 8 C.F.R. § 239.1(a) (2016).

66. 8 C.F.R. § 1003.14(a) (2016).

67. *Immigration Court Practice Manual*, DEP’T OF JUST. at 67 (Feb. 4, 2016), [http://www.justice.gov/sites/default/files/pages/attachments/2015/05/20/practice\\_manual\\_revised.pdf](http://www.justice.gov/sites/default/files/pages/attachments/2015/05/20/practice_manual_revised.pdf).

68. *Id.* at 67–68.

69. *Id.*

70. *Id.* at 79.

71. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 371–72 (2006).

72. Immigration and Nationality Act § 212, 8 U.S.C. § 1182 (2016).

73. Immigration and Nationality Act § 237, 8 U.S.C. § 1227 (2016). *See* Koh, *supra* note 59, at 1814 (clarifying the distinction between aliens being removable because of deportation or inadmissibility).

proceedings, the procedures may differ.<sup>74</sup> Deportable aliens are those who are already in the United States as unauthorized immigrants.<sup>75</sup> Inadmissible aliens are those who are attempting to enter the United States and are deemed inadmissible.<sup>76</sup> Both deportable and inadmissible aliens may face removal proceedings to order the alien to leave the country.<sup>77</sup> Statistically, the number of removable aliens in the United States is distributed evenly between the two groups.<sup>78</sup> Besides, removability (whether based on deportation or inadmissibility), while seemingly discretionary based on the level of scrutiny applied by immigration judges, is in reality a legal question since “incorrect removability determinations may lead to the execution of removal orders that lack a legal basis altogether.”<sup>79</sup> Contesting removability, whether by moving to reopen removal proceedings or otherwise, remains one of the most important processes any alien will face.

The burden of proof for removability depends on whether the respondent is being characterized as inadmissible or deportable.<sup>80</sup> For aliens who are in removal proceedings as being inadmissible, the burden falls on the alien to show, “by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.”<sup>81</sup> The government carries the burden in cases of deportability, where “the [U.S. Citizenship and Immigration] Service has the burden of establishing

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74. See Koh, *supra* note 59, at 1814–15; Richard Frankel, *Illegal Emigration: The Continuing Life of Invalid Deportation Orders*, 65 SMU L. REV. 503, 507 (2012).

75. Koh, *supra* note 59, at 1814–15.

76. *Id.* “Admission” is defined as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” Immigration and Nationality Act § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2016).

77. Koh, *supra* note 59, at 1814–15.

78. See *Modes of Entry for the Unauthorized Migrant Population*, PEW RES. CTR. (May 22, 2006), <http://www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/> (showing that in 2006 approximately 45% of undocumented immigrants were individuals that entered the United States legally and overstayed their visa); *but see* Jens M. Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Nov. 19, 2015), <http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/> (showing that the unauthorized immigrant population in the United States was increasing until 2007 when it leveled off, which demonstrates the statistics from the 2006 study *may* no longer be relevant).

79. Koh, *supra* note 59, at 1818. See also Frankel, *supra* note 74 (addressing the issue of more than one thousand deportation decisions overturned each year by the federal circuit courts, and the subsequent ramifications the now external aliens face).

80. *Cf.* Immigration and Nationality Act § 240(c)(2)(B), 8 U.S.C. § 1229a(c)(2)(B) (2016) (explaining when the alien carries the burden); Immigration and Nationality Act § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2016) (explaining when the government carries the burden).

81. Immigration and Nationality Act § 240(c)(2)(B), 8 U.S.C. § 1229a(c)(2)(B) (2016).

by clear and convincing evidence . . . the alien is deportable.”<sup>82</sup> The proceeding concludes with an immigration judge determining whether the alien is removable.<sup>83</sup> Following a determination of removability, the immigration judge must determine whether the alien may move to remain in the country via other means of discretionary relief.<sup>84</sup> This evidentiary hearing, though not the final hearing to which an applicant is entitled, carries the utmost importance for certain individuals as it is the only time an applicant can present evidence for his or her claim for relief.<sup>85</sup> If, after this first step, it is determined that the respondent is not inadmissible or deportable, the removal proceedings end and the respondent legally remains in the United States.<sup>86</sup>

If the respondent or alien is determined to be inadmissible or deportable, the second step is for the immigration judge to decide if the alien is qualified to remain in the United States under some form of discretionary relief.<sup>87</sup> The factual circumstances of the respondent are the weightiest evidence for the immigration judge at this point.<sup>88</sup>

Aliens who fear persecution if they are removed to the country that was designated during the Master Calendar Hearing generally have three options for discretionary relief from the removal proceeding: asylum,<sup>89</sup> withholding of removal,<sup>90</sup> and relief pursuant to the Convention Against Torture (“CAT”).<sup>91</sup> Any alien, irrespective of status, may apply for asylum.<sup>92</sup> The asylum applicant carries the burden to show that such an individual is within a particular “race, religion, nationality, [has] membership in a particular social group, or [has a] political opinion [that] was or will be at least one central reason for persecuting the applicant.”<sup>93</sup>

Although an asylum application may be denied, if granted it provides the applicant with the enormous possibility of becoming a Lawful

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82. Immigration and Nationality Act § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2016).

83. Immigration and Nationality Act § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A) (2016).

84. Immigration and Nationality Act § 240(c)(4), 8 U.S.C. § 1229a(c)(4) (2016).

85. See Ramji-Nogales, et al., *supra* note 16, at 326 (“For [individuals that raise an asylum claim after being placed in removal proceedings], the immigration court hearing is the only opportunity they will have to present evidence in support of their case.”).

86. Immigration and Nationality Act § 240(c)(1), 8 U.S.C. § 1229a(c)(1) (2016).

87. Legomsky, *supra* note 71, at 371–72.

88. See Immigration and Nationality Act § 240(c)(4), 8 U.S.C. § 1229a(c)(4) (2016) (requiring the alien to meet the burden necessary and sustain credibility).

89. Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2016).

90. Immigration and Nationality Act § 241, 8 U.S.C. § 1231(b)(3) (2016); see also 8 C.F.R. § 208.16(b) (2000).

91. 8 C.F.R. § 208.16(c) (2000).

92. Immigration and Nationality Act § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2016).

93. Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2016).

Permanent Resident (“LPR”) of the United States.<sup>94</sup> There are four necessities to being granted asylum. First, an applicant must prove he or she is a refugee within the meaning of Section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A),<sup>95</sup> which means the applicant must show persecution or a well-founded fear of persecution in the country from which they came.<sup>96</sup> Next, the applicant’s fear of persecution must be related to one of the five statutorily defined grounds: race, religion, nationality, membership in a particular social group, or political opinion.<sup>97</sup> Third, the alien must “demonstrate[] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.”<sup>98</sup> Finally, the Secretary of Homeland Security and the Attorney General retain discretion of whether to grant asylum.<sup>99</sup> If the applicant can prove that they will be tortured if a removal is not withheld, they may remain in the United States under CAT relief.<sup>100</sup>

Another discretionary form of relief an alien may seek, when he or she does not meet the above threshold, is under a cancellation of a removal order.<sup>101</sup> Being ordered removed does not preempt an alien from continuing to attempt to cancel removal.<sup>102</sup> Permanent residents and non-permanent residents face different requirements for this form of relief.<sup>103</sup> As with most areas of immigration law, an applicant for cancellation of a removal order must also pass the immigration judge’s discretionary

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94. See Immigration and Nationality Act § 209(2), 8 U.S.C. § 1159(2) (2016) (stating that an applicant who was granted permission to remain in the United States via asylum, and has remained in the United States for one year will be examined by the DHS, and if found to be admissible, will be granted Lawful Permanent Resident Status).

95. Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2016).

96. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2016).

97. Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2016).

98. Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2016).

99. See Immigration and Nationality Act § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2016) (using language that the entities involved “*may* grant asylum” (emphasis added)).

100. 8 C.F.R. § 1208.16(c) (2000); see also 8 C.F.R. § 1208.18 (2000) (providing the definition of torture and the application process).

101. Discretionary since the statute articulates that the Attorney General *may* provide the relief. Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b (2016).

102. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 573 n.8 (2010).

103. See Immigration and Nationality Act § 240A(a)–(b), 8 U.S.C. § 1229b(a)–(b) (2016) (requiring permanent residents be lawfully admitted for not less than five years, resided in the United States for seven continuous years after admittance, and not have been convicted of an aggravated felony; while non-permanent residents must have resided in the United States continuously for not less than ten years, be a person of good moral character, not been convicted of statutorily defined offenses, and “establish[] that removal would result in exceptional and extremely unusual hardship” to a citizen or LPR “spouse, parent, or child” of the applicant).

judgment.<sup>104</sup> An alien who does not meet these forms of discretionary relief, and is removable, may not remain in the United States.<sup>105</sup> Indeed, certain aliens face expedited proceedings for committing aggravated felonies,<sup>106</sup> and aliens who have been ordered removed and then illegally reenter the United States will have their previous removal order reinstated without the possibility of reopening or reviewing the previous removal order.<sup>107</sup> However, aliens who have been ordered removed via regular removal proceedings and have not violated this removal order by reentering the United States, such as motions to reconsider and motions to reopen the removal proceedings.<sup>108</sup>

## 2. Recourse after the Conclusion of Removal Proceedings

After the issuance of a final administrative order, either party may make a motion to reopen the removal proceedings based on new facts or circumstances.<sup>109</sup> Aliens are allowed one swing of the bat, and must do so within a relatively short period of time, in an attempt to reopen removal proceedings decided by an immigration judge or the Board of Immigration Appeals.<sup>110</sup>

Due to the public preference of finality to proceedings, motions to reopen removal proceedings have long been disfavored.<sup>111</sup> However, wrongful removal proceedings have proved to be not only existent and pervasive, but create a complex and oftentimes impossible road to citizenship for the alien.<sup>112</sup> As a result, federal courts “reverse deportation

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104. See Immigration and Nationality Act § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (2016) (requiring any applicant of relief or protection from removal to establish that they merit a favorable exercise of discretion).

105. Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b (2016).

106. Immigration and Nationality Act § 238, 8 U.S.C. § 1228 (2016).

107. Immigration and Nationality Act § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2016).

108. Immigration and Nationality Act § 240(c)(6)–(7), 8 U.S.C. § 1229a(c)(6)–(7) (2016).

109. Immigration and Nationality Act § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2016).

110. See Immigration and Nationality Act § 240(c)(7)(A), (c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(A), (c)(7)(C)(i) (2016) (“An alien may file one motion to reopen proceedings under this section,” and “the motion to reopen shall be filed within ninety-days of the date of entry of a final administrative order of removal.”).

111. See *I.N.S. v. Doherty*, 502 US 314, 323 (1992) (stating motions to reopen are similar to petitions to rehear a case or motions for a new trial brought under the guise of newly discovered evidence, only worse, since “as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”); *Matter of Coelho*, 20 I&N Dec. 464, 18 (BIA 1992); see also *Hang Chen v. Holder*, 675 F.3d 100, 105 (1st Cir. 2012) (“[We] disfavor motions to reopen removal proceedings because they run the risk of frustrating ‘the compelling public interests in finality and the expeditious processing of proceedings.’” (quoting *Guerrero-Santana v. Gonzales*, 499 F.3d 90, 92 (1st Cir. 2007))).

112. See Frankel, *supra* note 74.

orders at substantially higher rates than for other appeals.”<sup>113</sup> This overwhelming rate of reversal is even more concerning when factored together with the fact that 72,000 (almost half) of all federal prosecutions are for either illegal entry or illegal re-entry, costing the United States well over one billion dollars.<sup>114</sup> Reopening the removal proceeding is one of the ways aliens can ensure the immigration judge or Board of Immigration Appeals gets the answer correct earlier, thus preventing *some* of the inordinate costs associated with implementation of immigration law.

A motion to reconsider requests that the adjudicator re-examine the earlier decision in light of a change in the law or an argument of fact or law that the immigration judge overlooked or misconstrued.<sup>115</sup> “A motion to reopen is a traditional procedural mechanism in immigration law with a basic purpose that has remained constant—to give aliens a means to provide new information relevant to their cases to the immigration authorities.”<sup>116</sup> Motions to reopen removal proceedings allow an alien to bring forth new evidence not previously available to be heard by the immigration judge or BIA.<sup>117</sup> On account of perceived abuses of the system of filing motions to reopen and reconsider, Congress directed the Attorney General to issue regulations, which proposed limitations on how long after an order had been issued a petitioner may move to reopen or reconsider and how many motions a petitioner may make.<sup>118</sup> At this point, Congress intended to limit motions to reconsider and reopen to one per movant within a time limit of twenty days from the date of the final determination.<sup>119</sup> In 1996, after public comment on the matter, the finalized regulations restricted movants to only one motion to reopen, which must be made within ninety-days.<sup>120</sup> Thereafter, Congress

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113. *Id.* at 504–05.

114. Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 67–68 (2012).

115. Immigration and Nationality Act § 240(c)(6), 8 U.S.C. § 1229a(c)(6)(C) (2016).

116. *Meza-Vallejos v. Holder*, 669 F.3d 920, 924 (9th Cir. 2012) (internal quotation marks and citation omitted); *see also* 8 U.S.C. § 1229a(c)(7) (2016). Petitioners may also bring motions to reopen removal proceedings by bringing a new application for relief based on new evidence that was not discoverable prior to the previous hearing, so long as such evidence is material. 8 C.F.R. § 1003.2(c)(1) (2016).

117. Immigration and Nationality Act § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2016).

118. Anne J. Greer & Teresa L. Donovan, *Immigration Law in Motion—The Changing Landscape of Motions for Continuance, Change of Venue, Reopening, Remand, and Reconsideration Before the Immigration Judges, Board of Immigration Appeals, and the Federal Circuit Courts*, 07-10 IMMIGR. BRIEFINGS 1 (2007) (citing Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 stat. 5066 (1990)).

119. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 101-955 at 133 (1990) (Conf. Rep.).

120. Executive Office for Immigration Review; *Motions and Appeals in Immigration Proceedings*, 61 Fed. Reg. 83, 18900 (April 29, 1996).

incorporated the above restrictions in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>121</sup>

Congress allows a broad range of specific exceptions to the number and time restrictions currently on motions to reopen removal proceedings.<sup>122</sup> However, there is one exception that applies to all individuals; this exception is often referred to as the changed country conditions exception.<sup>123</sup> Under this exception,

[t]here is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the county to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.<sup>124</sup>

As evidenced by the language of the statute, the changed country conditions exception only applies in a situation happening in the country where a person is being removed.<sup>125</sup> The statute does not apply to changed personal circumstances, whereby a person changes his or her own circumstances in such a way that would lead to persecution in the country of removal.<sup>126</sup> The statute does not apply to changed personal circumstances. A change solely in a person's conditions of a person and not in the country of removal does not lift the time limitation allowed under reopening removal proceedings.<sup>127</sup>

A different issue appears altogether when the changes are both to personal circumstances *and* to country conditions, a situation that is often called a "mixed petition."<sup>128</sup> The courts of appeals are currently split in how to proceed in situations where a petitioner brings a motion that

121. Now codified at Immigration and Nationality Act § 240(c)(6)–(7).

122. *See, e.g.*, Immigration and Nationality Act § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv) (2016) (stating specific situations and instances which the time and number bar of reopening removal proceedings will not apply including: battered spouses, children, and parents).

123. Immigration and Nationality Act § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii) (2016).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See, e.g.*, Ming Chen v. Holder, 722 F.3d 63, 66–67 (1st Cir. 2013); Xiu Zhen Zheng v. Holder, 548 F. App'x. 869, 870 (4th Cir. 2013); Yu Yun Zhang v. Holder, 702 F.3d 878, 879–80 (6th Cir. 2012); Khan v. Att'y Gen. of U.S., 691 F.3d 488, 497–98 (3d Cir. 2012); Almaraz v. Holder, 608 F.3d 638, 640 (9th Cir. 2010); Mei Ya Zhang v. U.S. Att'y Gen., 572 F.3d 1316, 1319 (11th Cir. 2009) (per curiam); Qi Hua Li v. Holder, 354 F. App'x. 46, 48 (5th Cir. 2009) (per curiam); Wei v. Mukasey, 545 F.3d 1248, 1255–56 (10th Cir. 2008); Yuen Jin v. Mukasey, 538 F.3d 143, 155 (2d Cir. 2008); Zhong Qin Zheng v. Mukasey, 523 F.3d 893, 895 (8th Cir. 2008); Cheng Chen v. Gonzales, 498 F.3d 758, 759–60 (7th Cir. 2007).

128. *See* Rei Feng Wang v. Lynch, 795 F.3d 283, 879 (1st Cir. 2015).



involves a mixed petition.<sup>129</sup> Under the current circuit split, some jurisdictions will allow a petitioner to bring a mixed petition for reopening removal proceedings beyond the ninety-day limitation set by the statute, since a sincere change in personal circumstances that occurs simultaneously with changed country conditions should not bar foreclose statutory protection.<sup>130</sup> Other jurisdictions have held that if the country conditions are only made relevant because of a change to the petitioner's personal circumstances, the country conditions exception should not apply.<sup>131</sup> Further, some courts of appeals have directly declined to answer the question<sup>132</sup> and others have indirectly "shown their cards."<sup>133</sup> The split creates ambiguity in an area of law that needs no more, and as such a resolution should be adopted by all of the Federal Courts of Appeals.

## II. THE UNFORTUNATE FACTS: A HIGH QUANTITY OF LOW QUALITY DECISIONS

In fiscal year 2013, the United States removed over 435,000 aliens either through the Immigration and Customs Enforcement ("ICE") or the United States Bureau of Customs and Border Protection.<sup>134</sup> An unfortunate result of these large amounts of removal proceedings is an outpouring of individuals who are "former longtime legal residents whose familial, cultural, and community ties lie primarily in the United States."<sup>135</sup> Many of those removed for criminal convictions have been

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129. *Id.* (stating the First Circuit need not and will not address which side of the circuit split it will fall on regarding mixed petitions).

130. *See* *Shu Han Liu v. Holder*, 718 F.3d 706, 709 (7th Cir. 2013) ("[I]f [petitioner's] conversion [to Christianity] was sincere . . . [was there no] basis . . . for treating her differently from someone who had converted to Christianity before coming to the United States?"); *Chandra v. Holder*, 751 F.3d 1034, 1038 (9th Cir. 2014) ("[A] petitioner's untimely motion to reopen may qualify under the changed conditions exception in 8 C.F.R. § 1003.2(c)(3)(ii), even if the changed country conditions are made relevant by a change in the petitioner's personal circumstances."); *Yu Yun Zhang* 702 F.3d 878; *Xue Xian Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009).

131. *See* *Khan*, 691 F.3d at 498 ("[W]here an alien intentionally alters his or her own circumstances, knowing that he or she has been ordered removed from the United States, [the exception] does not properly apply.").

132. *See* *Rei Feng Wang*, 795 F.3d at 287 ("[W]e need not take a position on this and do not decide whether rejecting a petition because it is mixed would be an abuse of discretion.").

133. *See* *Yuen Jin v. Mukasey*, 538 F.3d 143, 155 (2nd Cir. 2008) ("[A petitioner is not allowed] to disregard their removal orders and remain in the United States long enough to change their personal circumstances (e.g., by having children or practicing persecuted religion) and initiate new proceedings via a new asylum application.").

134. John F. Simanski, *Immigration Enforcement Actions: 2013*, DEP'T OF HOMELAND SECURITY 5 (Sept. 2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf).

135. Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 140 (2010).

longtime residents of the United States and were removed for non-violent criminal convictions.<sup>136</sup> In fact, since the beginning of the Obama administration, nearly two-thirds of those removed for criminal convictions committed minor traffic violations, other minor infractions, or had no criminal history at all.<sup>137</sup>

Compounding the sheer volume of removal orders is the fact that many of these orders are poorly executed in a poorly administered appeal process.<sup>138</sup> First, the use of expedited proceedings without the opportunity to appeal has increased every year since 2007.<sup>139</sup> Second, even if the petitioner is given the chance to appeal the immigration judge's decision, "Operation Streamline" has stripped administrative reliability for review. Under this program, the BIA may now employ the use of single judge "panels" to rubber stamp immigration judges' decisions without a *de novo* review of the facts with a bare, unexplained affirmance.<sup>140</sup> The United States government saw an opening and tried to force more individuals out in a timely fashion; a Senate bill in 2014 attempted to triple the number of daily deportees under "Operation Streamline" to 210 per day.<sup>141</sup>

A legal concern that affects this many individuals, in a matter that disallows them the very meaning of justice, needs to be consistent and fair to be just. Asking immigration judges to apply reliable and dependable discretion in immigration proceedings is difficult enough given the landscape of immigration courts, and the increased quantity of proceedings under Operation Streamline, yet the Federal Courts of Appeals have faltered in any attempt to resolve continuing discretion under the landscape of motions to reopen removal proceedings.

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136. See *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses*, HUM. RTS. WATCH at Part I. Background: US Deportation Policy for Immigrants with Criminal Convictions (June 16, 2015), <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses#page> (finding between 1997 and 2007, seventy-two percent of those removed for criminal convictions were convicted of nonviolent offenses and twenty percent were in the United States legally).

137. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (April 6, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?>.

138. *Id.*

139. *Id.*

140. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, Final Rule, 67 Fed. Reg. 54,879 (Aug. 26, 2002).

141. Joshua Partlow, *Under Operation Streamline, Fast-Track Proceedings for Illegal Immigrants*, WASH. POST (February 10, 2014), [https://www.washingtonpost.com/world/the\\_americas/under-operation-streamline-fast-track-proceedings-for-illegal-immigrants/2014/02/10/87529d24-919d-11e3-97d3-f7da321f6f33\\_story.html](https://www.washingtonpost.com/world/the_americas/under-operation-streamline-fast-track-proceedings-for-illegal-immigrants/2014/02/10/87529d24-919d-11e3-97d3-f7da321f6f33_story.html).

### A. *Operation Streamline and Other Concerns*

Shuffle the masses in, read the charges to multiple individuals (sometimes upwards of sixty)<sup>142</sup> at a time, enter plea deals for less jail time leading to deportation, rinse, repeat. Operation Streamline is the “solution” provided for an already crowded immigration court docket.<sup>143</sup> While not directly correlated to motions to reopen removal proceedings, Operation Streamline is indicative of the public policy and current social feelings towards immigration policy in the United States.<sup>144</sup> Its proponents often rely on the fact that those affected by Operation Streamline are criminals. “You can say ‘these poor people’ and all this other stuff, but they’re still criminals.”<sup>145</sup> Statements like this miss the true mark of what determines an immigrant’s criminal status, which in many cases is attempting to enter the United States in the first place.<sup>146</sup> An unfortunate side effect, among many, is that many defenses for individuals—such as not being fit for trial, having a claim for citizenship, or having a claim for asylum—are rarely brought up under Operation Streamline.<sup>147</sup>

Statistically speaking, both sides have opinions on whether Operation Streamline is even working. Supporters point to the decreased number of detainees and arrests in the geographic areas that employ Operation Streamline.<sup>148</sup> Opponents, however, find flaws in these statistics based on a decrease in border arrests by the Border Patrol and Detention and Removal Operations across the board; the areas utilizing operation streamline saw a decrease in arrests prior to Operation Streamline even being used.<sup>149</sup> In the political sphere, many liberals oppose and many conservatives support Operation Streamline. President

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142. Keller, *supra* note 114, at 127. The Ninth Circuit has ruled that such mass guilty pleas violate Rule 11 of the Federal Rules of Criminal Procedure. *U.S. v. Roblero-Solis*, 588 F.3d 692, 700 (9th Cir. 2009).

143. Partlow, *supra* note 141.

144. *See id.* (explaining the disconnect between those who strongly support immigration reform to increase deportations and those who oppose).

145. *Id.*

146. *Id.*

147. *Executive Office for United States Attorneys: Oversight Hearing Before the H. Subcomm. of Commercial and Admin. Law*, 110th Cong. 10 (June 25, 2008) (amended written statement of Heather E. Williams, First Assistant Fed. Public Defender Ariz.), [http://judiciary.house.gov/\\_files/hearings/pdf/Williams080625.pdf](http://judiciary.house.gov/_files/hearings/pdf/Williams080625.pdf). *See also* Keller, *supra* note 114, at 129 (“How, in minutes, can counsel determine if the client is a derivative U.S. citizen and therefore innocent of the crimes to which the client is pleading guilty? Or whether the client has a mental illness that prevents the knowing waiver of rights?”).

148. S. Res. 104, 114th Cong. (2015).

149. Williams, *supra* note 147, at 17 (citing Thomas Hillier, Statement to the Senate Judiciary Committee and the Senate Committee on Homeland Security & Governmental Affairs (April 22, 2008)).

Barack Obama's administration has recently made an effort to diminish the effects of Operation Streamline,<sup>150</sup> while United States Senators Jeff Flake and John McCain have attempted to remove any policies that prevent prosecution under Operation Streamline.<sup>151</sup>

As a result of "procedural shortcuts," the number of illegal entry and re-entry cases prosecuted by the federal government is nearly the same as all other crimes combined.<sup>152</sup> Regardless of the future political landscape of Operation Streamline, a process of expediting removal proceedings is imperative to a large group of individuals and erroneous to another.<sup>153</sup> The effect of this program is clear: individuals are deported at unprecedented rates without proper proceedings and proper legal representation protecting their rights.<sup>154</sup> This leads to the deported individuals becoming labeled as "criminals," and when they attempt to re-enter the United States, supporters of Operation Streamline will be able to point to this classification of "criminal" as the reason we need to keep Operation Streamline in place.<sup>155</sup> The effect of Operation Streamline will ultimately create a positive trend of facts and data showing the necessity of keeping Operation Streamline in place; it is a self-perpetuating system.

#### B. *Overtured: An All Too Common Phrase*

Immigration orders are reviewable in the federal courts (most often the Federal Courts of Appeals). Immigration reform faces another substantial issue in the staggering number of deportation orders that are subsequently reversed or overturned.<sup>156</sup> "Federal courts . . . reverse deportation orders at substantially higher rates than for other appeals."<sup>157</sup> In some circuits, the reversal rate for deportation orders is as high as twenty to forty percent.<sup>158</sup> One of the causes of this increasing number is the BIA streamlining.<sup>159</sup> After these new regulations regarding the BIA that went into effect in 2005, the BIA increased its decisions from 2,000

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150. See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–84 (2013) (discussing the Obama administration's insistent "prosecutorial discretion" toward immigration law in declining to enforce certain laws).

151. Senators Jeff Flake and John McCain introduced a Senate Resolution, which stated the success of Operation Streamline and sought to force the Executive Branch to remove any prohibition against Operation Streamline. S. Res. 104, 114th Cong. (2015).

152. Keller, *supra* note 114, at 129–30.

153. See Delahunty & Yoo, *supra* note 150, at 783–84; S. Res. 104, 114th Cong. (2015).

154. See Williams, *supra* note 147.

155. Keller, *supra* note 114, at 138.

156. Frankel, *supra* note 74, at 504–05.

157. *Id.*

158. *Id.* at 522.

159. See *supra*, Part II.A.

per month to 4,000 per month.<sup>160</sup> Further, “[t]he percentage of BIA decisions in which it ruled against the alien . . . increased substantially, from 75% in 2001, to 94–98% for the years 2002 through 2004.”<sup>161</sup> Naturally, this leads to an increased number of petitions to the Federal Courts of Appeals.<sup>162</sup> This increase also resulted in a considerable rise in the number of deportation orders that were reversed.

The orders have severe consequences of forcing an individual out of a country they consider home. The orders are being brought so often that they are now clogging up Federal Courts of Appeals, and yet the orders are being reversed more often than any other crime. Yet discretion is left in the hands of over-worked and under-trained individuals, such as immigration judges and members of the BIA. Therefore, the Federal Courts of Appeals need to properly instruct those courts in how to handle every situation, including mixed petitions to reopen removal proceedings.

### III. RESOLVING ISSUES WITH NON-DISCRETIONARY MEANS

The current landscape of immigration law includes immigration judges that are over-worked and under-qualified.<sup>163</sup> Yet, most immigration proceedings involve at least some form of discretion, and often complete discretion, on the part of the immigration judge.<sup>164</sup> In order to fix this broken system,<sup>165</sup> underlying issues must be resolved first. One of these is motions to reopen removal proceedings based on mixed petitions. The Federal Courts of Appeals have not come to an agreement on whether mixed petitions should consider the changed country conditions exception to the ninety-day limitation.<sup>166</sup> This disagreement adds confusion and uncertainty to an already complex area of law that is comprising individuals lacking the merit to uphold the law.<sup>167</sup> This Note will address this area of uncertainty by providing a non-discretionary solution that can be applied in all cases where a petitioner seeks the

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160. John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 19–20 (2006–07).

161. Frankel, *supra* note 74, at 524.

162. Palmer, *supra* note 160, at 19–20.

163. *See supra* Part I.B (discussing the current workload of immigration judges and the appointment process’ lack of experience in applicants and ultimate appointments).

164. *See supra* Part I.C.1 (discussing the proceedings overall, and specifically addressing areas in which the Attorney General, through immigration judges, retains discretion in making determinations).

165. As discussed in Part I. of the Note, the immigration system could use a complete overhaul far beyond the scope of this Note, but this Note will not attempt to be a fix-all.

166. *See Rei Feng Wang v. Lynch*, 795 F.3d 283, 286–87 (1st Cir. 2015) (holding that the First Circuit need not take a position on the current circuit split regarding mixed petitions since it could make its determination on other grounds).

167. *See supra* Part I.B.

changed country condition exception to the ninety-day limitation while bringing a mixed petition. In order to reach that succinct and narrow solution, however this Note must address several preliminary issues to bring the solution into context.

A. *Miles Apart: The Third Circuit and Ninth Circuit . . . and the Sixth, Seventh, Eleventh and Second Circuits, Too*

The Federal Court of Appeals for the Ninth Circuit held that an abuse of discretion occurs when the BIA's decision to deny a motion to reopen removal proceedings is "arbitrary, irrational or contrary to law."<sup>168</sup> According to this circuit, a decision is "arbitrary, irrational, or contrary to law" when a petitioner brings a motion to reopen removal proceedings beyond the ninety-day statutory limit based on the changed country conditions exception, and the BIA fails to consider those changed country conditions.<sup>169</sup>

The government argued in *Chandra* that the petitioner failed to meet the changed country conditions exception because his changed personal circumstances are what made the changed country conditions relevant.<sup>170</sup> The government and the BIA, in the lower proceeding, read the language of Section 240 of the Immigration and Naturalization Act to mean that the only condition able to lift the ninety-day limitation is one of pure changed country conditions.<sup>171</sup> The appeals court took a more liberal approach to the statute; "[t]he plain language of 8 C.F.R. § 1003.2(c)(3)(ii) does not preclude an untimely motion where a change in the petitioner's personal circumstances is a necessary predicate to the success of the motion."<sup>172</sup>

Ultimately, the Federal Court of Appeals for the Ninth Circuit agrees with its sister courts in the Sixth, Seventh, and Eleventh Circuits in requiring the BIA to consider mixed petitions.<sup>173</sup> The balancing test the

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168. *Azanor v. Ashcroft*, 364 F.3d 1013, 1018 (9th Cir. 2004).

169. *Id.*; *Chandra v. Holder*, 751 F.3d 1034, 1036 (9th Cir. 2014).

170. *Chandra*, 751 F.3d at 1036.

171. *Id.* at 1035.

172. *Id.* at 1036. The change in personal circumstances cannot be the only reason for bringing the untimely motion; it must be brought under a changed country condition that may or may not be made relevant based on changed personal circumstances. *See Najmabadi v. Holder*, 597 F.3d 983, 991 (9th Cir. 2010) (stating a personal choice to become politically active was a personal change not giving rise to the changed country condition exception).

173. *See Shu Han Liu v. Holder*, 718 F.3d 706, 709 (7th Cir. 2013) (holding "if her conversion was sincere, [there was no] basis . . . for treating her differently from someone who had converted to Christianity before coming to the United States[.]"); *Yu Yun Zhang v. Holder*, 702 F.3d 878, 879–80 (6th Cir. 2012) (stating that "separate but simultaneous changes distinguish the[] facts from a purely personal change in circumstances."); *Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009) (holding the BIA wrongly concluded that the petition was brought because of the birth of children, changed personal circumstances, instead

Court applied is one between immigrants changing personal circumstances to serve their self-interest and the right of an individual freely to choose whatever religion the individual would like to practice.<sup>174</sup>

The United States Court of Appeals for the Third Circuit took a much different approach regarding mixed petitions, opining that if allowed to bring mixed petition motions to reopen removal proceedings, petitioners will abuse the system.<sup>175</sup> Further, it appears the court intended to prevent individuals who remain in the United States after being ordered removed another chance at succeeding in remaining in the country.<sup>176</sup> The United States Court of Appeals for the Second Circuit seems to apply the same approach.<sup>177</sup>

The disconnect between the Federal Courts of Appeals lies in the divide between the two principles of immigration: letting “good” people in, and keeping “bad” people out. Courts that allow mixed petitions likely base their decision on a notion that no individual should be forced to return to a country wherein that individual will face some form of persecution.<sup>178</sup> The petitioners may change their personal circumstances to meet the changed country condition exception, but that is a large risk with little guarantee.

On the other hand, the courts that are against mixed petitions may be persuaded by the fact that allowing such would lead to stalling on the part of the petitioner. Motions to reopen are disfavored because “every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”<sup>179</sup> The solution posited by this Note is to create a test that removes some of the discretion from the immigration judge and BIA.

If a petitioner brings a motion to reopen removal proceedings beyond the ninety-day statutory limitation, based on both changes in personal circumstances and changed country conditions, the immigration court should apply a test to determine whether the individual meets the exception. Providing immigration courts with a concrete set of rules to

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of the increase in a one-child policy, changed country conditions).

174. *Chandra*, 751 F.3d at 1039.

175. *See Khan v. Att’y Gen. of U.S.*, 691 F.3d 488, 498 (3d Cir. 2012) (“where an alien intentionally alters his or her own circumstances, knowing that he or she has been ordered removed from the United States, 8 U.S.C. § 1229a(c)(7)(C)(ii) does not properly apply.”).

176. *Li Zhang v. Att’y Gen. of U.S.*, 543 F. App’x. 277, 285 (3d Cir. 2013).

177. *See Yuen Jin v. Mukasey*, 538 F.3d 143, 155 (2d Cir. 2008) (“to disregard their removal orders and remain in the United States long enough to change their personal circumstances (e.g., by having children or practicing a persecuted religion) and initiate new proceedings via a new asylum application” is not permitted).

178. Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2016).

179. *INS v. Doherty*, 502 U.S. 314, 323 (1992).

utilize in decision-making will benefit an over-worked system as strained as the immigration courts.<sup>180</sup> This way, an abuse of discretion is easier to determine by examining whether the immigration judge or BIA sufficiently applied the test.

B. *The Standard of Review for Denial of Motions to Reopen Removal Proceedings Creates Ambiguity that Must Be Resolved by a Test*

The federal judiciary applies an abuse of discretion standard to determine whether the BIA correctly concluded a motion to reopen removal proceedings.<sup>181</sup> This standard balances the interest in finality with fairness.<sup>182</sup> While administrative agencies, such as the BIA, are envisioned as competent adjudicators in a specific and limited area of law, judicial review brings independence to the administrative process.<sup>183</sup> A federal judge has more general knowledge of all things legal, and many removal and asylum cases are in fact questions of law and fact, not discretion.<sup>184</sup>

In cases that involve something as important, vital, and potentially catastrophic as deportation, the interests in judicial fairness are paramount.<sup>185</sup> “Our legal system can tolerate occasional unfairness when the stakes are trivial, but claims that affect truly significant interests demand a more meticulous brand of justice.”<sup>186</sup> Immigration proceedings, because of the complexity of the laws at issue and the grand nature of what is at stake, require legal assistance in a way most administrative proceedings do not.<sup>187</sup>

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180. See *supra* Part II.

181. *Doherty*, 502 U.S. 314. This standard of review provides more discretion to the BIA than the standard used when the BIA denies an asylum claim at an original hearing. See Hugh G. Mullane, *Political Asylum: Determining Standards of Review*, 6 GEO. IMMIGR. L.J. 87, 100 (1992).

182. See *Doherty*, 502 U.S. 314 (holding motions to reopen are disfavored in the interest of finality since every extension works to the advantage of the alien seeking to not be removed); *INS v. Abudu*, 485 U.S. 94, 108 (1987) (“If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case.”) (citation omitted); Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1215–16 (1989) [hereinafter *Political Asylum*] (“The concern has been that motions to reopen permit an endless string of procedural maneuvers calculated only to stall removal.”).

183. *Political Asylum*, *supra* note 182, at 1209.

184. *Id.* at 1208–10. The immigration judges are also constantly presented situations involving human hardship, creating a tough skin to human suffering, so to speak, that federal judges will not have fostered. *Id.* at 1210.

185. *Id.* at 1209.

186. *Id.*

187. *Davis*, *supra* note 22, at 140.



Additionally, individuals in removal proceedings typically lack access and information regarding legal avenues of response, thus increasing an already-important component in light of the fact that an incorrect move procedurally has such high ramifications.<sup>188</sup>

Noncitizens may attend the most important adversarial proceeding of their lives with little understanding of what is required of them to avoid removal. In some areas of the country, overwhelming dockets result in chaotic proceedings in which undocumented persons must show—sometimes in fifteen minutes or less—why they should not be removed from the United States.<sup>189</sup>

Because of this lack of access and political independent power, aliens and individuals seeking asylum or facing removal orders need the judiciary for protection of rights, both basic and complex in nature.<sup>190</sup> Also, an individual removed by order without a fair and just trial, adjudicated on the merits of the case and equally assessed when compared with other similarly situated individuals, will undoubtedly bring resentment toward the American system home.<sup>191</sup> This leads to animosity in the rest of the world toward American immigration policies.<sup>192</sup>

Beyond the reasons above for broad judicial review is the overarching notion that immigration judges could draft properly-reasoned decisions knowing that an “active” federal judiciary would review the decision.<sup>193</sup> The federal court would apply its generalist knowledge of law to the present facts and statutes to independently determine whether the immigration tribunal came to the correct conclusion.<sup>194</sup> This interest loses all power and application if the federal courts have not resolved whether to allow a certain type of motion to reopen. An immigration judge, in drafting a decision regarding a mixed petition, may abuse his or her discretion inadvertently because the federal courts have not come to a consistent conclusion on whether such a petition should be allowed. Therefore, it is necessary to remove ambiguity in these cases, and create a test the judge should use in determining when a mixed petition brought

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188. See Legomsky, *supra* note 182, at 1208 (explaining that aliens are “politically powerless” and “[u]nable to vote or hold office”); see also Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977) (explaining the inability of aliens to vote in an historical context and arguments for those rights).

189. Davis, *supra* note 22, at 137.

190. Legomsky, *supra* note 182, at 1208.

191. See *id.* at 1210 (“The unsuccessful asylum applicant who perceives procedural unfairness will bring that message home. Our treatment of aliens can shape foreign impressions of the American justice system.”).

192. See *id.*

193. *Id.* at 1210–11.

194. *Id.* at 1211.

beyond the ninety-day statutory limit will be addressed and when the petition fails procedurally.

C. *A Test Addressing Specific Rules that Must be Met in Order for Mixed Petitions to be Brought under the Changed Country Conditions Exception Will Create Uniformity in an Area of Law that Desperately Needs It*

First, this Section discusses why a set of standards would not suffice in an area of law with factual discrepancies. Then, it examines why a set of rules, hard and bright-line procedures, would benefit immigration judges, the BIA, and the aliens who are petitioning for reopening removal proceedings.

The distinction between standards and rules is engraved in every law students' mind, whether directly or indirectly, from the reading of their first case in law school. While not easily defined, rules and standards operate on opposite ends of a scale or continuum.<sup>195</sup> A prime example of a rule is as follows: "Any driver who travels on a highway at faster than fifty-five miles per hour commits the offense of speeding."<sup>196</sup> A judge determining whether an individual has violated the rule of law of speeding need not inquire into any facts beyond what would prove the rule broken, that the driver was operating a motor vehicle at a speed faster than fifty-five miles per hour on a highway.<sup>197</sup>

Indeed, a standard could be used instead to determine the offense of speeding. For example, "[a]ny driver who travels unreasonably fast, considering road conditions and traffic patterns, commits the offense of speeding."<sup>198</sup> Here, the judge has a more discretionary approach to take in determining whether an offense of speeding has occurred; the judge must first determine what is reasonable, and then move on to the analysis of whether this driver was within that range.<sup>199</sup>

The trade-off is readily apparent: rules create predictable and uniform decisions at the cost of over- and under-inclusiveness.<sup>200</sup> Standards allow judges to make case-by-case determinations and modifications but do so in a way that leads to unpredictable results and

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195. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561–62 (1992).

196. Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 OKLA. CITY U. L. REV. 559, 562 (2010) (citing Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000)).

197. *Id.* at 562.

198. *Id.* at 563 (citing Korobkin, *supra* note 196).

199. *Id.*

200. See *id.*; Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 402 (1985).

unfair treatment of potentially similar fact patterns.<sup>201</sup>

Indeed, in a legal situation where facts are so important, like the ones described in the Introduction to this Note,<sup>202</sup> standards would be ineffective. In the same way as the judges discussed in the Introduction came to differing views regarding whether to allow mixed petitions, so too could judges come to different views regarding a standard such as, if the alien was reasonable in changing their personal circumstances, a mixed petition based on material changed country conditions is allowed.<sup>203</sup> Further, discretion is already found in the immigration judge's decision of whether or not to allow a petitioner to bring a motion to reopen their removal proceedings.<sup>204</sup> A Federal Court of Appeals, when reviewing a decision by the BIA or an immigration judge, is simply looking for an abuse of discretion.<sup>205</sup> By adding more discretion to the process without resolving the actual issue of non-uniformity, the test would merely create a murky situation.

Finally, under an economic analysis, courts must move towards whichever form of a test promotes efficiency.<sup>206</sup> Further, there is a cost-benefit tradeoff between rules and standards regarding the quantity of application: the more often a test will be applied, the more beneficial the costlier rule will be.<sup>207</sup> As illegal re-entry and removal proceedings continue to top the list of prosecuted crimes in the United States,<sup>208</sup> it is becoming clearer that immigration courts should adopt a set of *rules* for determining whether an alien is allowed to reopen their removal proceedings based on changes to both their personal circumstances and country conditions should be allowed.<sup>209</sup>

#### D. *The Burden Shift Proposal*

The primary role of this test is to decrease discretion of judges in

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201. Morse, *supra* note 196, at 563.

202. See *supra* Introduction.

203. See *Li Zhang v. Att'y Gen.*, 543 F. App'x. 277 (3rd Cir. 2013); *Chandra v. Holder*, 751 F.3d 1034, 1035 (9th Cir. 2014).

204. Immigration and Nationality Act § 240, 8 U.S.C. § 1229a (2016).

205. See *Rei Feng Wang v. Lynch*, 795 F.3d 283, 286 (1st Cir. 2015) (“We review the BIA’s denial of a motion to reopen for abuse of discretion.”); *I.N.S. v. Doherty*, 502 U.S. 314 (1992).

206. Morse, *supra* note 196, at 567.

207. Kaplow, *supra* note 195, at 563–64.

208. See *Illegal Reentry Becomes Top Criminal Charge*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 10, 2011), <http://trac.syr.edu/immigration/reports/251/>; see also Frankel, *supra* note 74, at 503.

209. See Morse, *supra* note 196, at 567 (“[B]ecause the development of a rule is more costly than a standard but the application of a standard is more costly than the application of a rule, the frequency of application affects the choice of forms.”).

order to alleviate unjust results without providing a loophole for individuals that do not meet the changed country condition exception. In order to create a balance between the two, a burden shift will be utilized. Similar to the inherent difficulties found in proving employment discrimination,<sup>210</sup> proving a person changed some circumstance of their life for reasons other than a potential removal proceeding will be difficult. As a trade-off, the burden shift could be used to lessen the unbalance these difficulties provide.<sup>211</sup>

In a mixed petition to reopen, the government would argue the changed personal circumstances of the petitioner are the reason the changed country conditions apply, and thus should be barred.<sup>212</sup> This would shift the burden to the petitioner who would need to fulfill the test as described below<sup>213</sup> and thus show the changed personal circumstances should not prevent a changed country condition exception from applying.<sup>214</sup> The burden would then shift one final time back to the government to show that the changes in personal circumstances were in fact only made to meet the changed country condition exception, and, as a matter of policy, should not apply.<sup>215</sup>

#### E. *Determinative Factors to Resolve the Circuit Split*

Since a test is intended to remove some of the discretion from an under-trained and over-worked court system, it must be succinct.<sup>216</sup>

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210. See Barrett S. Moore, *Shifting the Burden: Genuine Disputes and Employment Discrimination Standards of Proof*, 35 U. ARK. LITTLE ROCK L. REV. 113, 114 (2012).

211. *Id.*

212. See Immigration and Nationality Act § 240, 8 U.S.C. § 1229a (2016). The statute does not explicitly show this burden to exist. The burden can be implied from the fact that no courts allow a change in personal circumstances to provide the same exception allowed for changed country conditions. See, e.g., *Ming Chen v. Holder*, 722 F.3d 63, 66–67 (1st Cir. 2013); *Xiu Zhen Zheng v. Holder*, 548 F. App'x. 869, 870 (4th Cir. 2013); *Yu Yun Zhang v. Holder*, 702 F.3d 878, 879–80 (6th Cir. 2012); *Khan v. Att'y Gen.*, 691 F.3d 488, 497–98 (3d Cir. 2012); *Almaraz v. Holder*, 608 F.3d 638, 640 (9th Cir. 2010); *Zhang v. U.S. Att'y Gen.*, 572 F.3d 1316, 1319 (11th Cir. 2009) (per curiam); *Qi Hua Li v. Holder*, 354 F. App'x. 46, 48 (5th Cir. 2009) (per curiam); *Wei v. Mukasey*, 545 F.3d 1248, 1255–56 (10th Cir. 2008); *Yuen Jin v. Mukasey*, 538 F.3d 143, 155 (2d Cir. 2008); *Zhong Qin Zheng v. Mukasey*, 523 F.3d 893, 895 (8th Cir. 2008); *Cheng Chen v. Gonzales*, 498 F.3d 758, 760 (7th Cir. 2007). As a result, the government carries the initial burden of proving the exception to the ninety-day and one motion statutory limit on reopening removal proceedings should not apply.

213. See *infra* Part III.E.

214. See Immigration and Nationality Act § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2016).

215. See *Hang Chen v. Holder*, 675 F.3d 100, 105 (1st Cir. 2012) (“Courts disfavor motions to reopen removal proceedings because they run the risk of frustrating the compelling public interests in finality and the expeditious processing of proceedings.”). See also *INS v. Doherty*, 502 U.S. 314, 323 (1992) (“[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”).

216. See *supra* Part II.

“While the BIA has substantial discretion to grant or deny motions that fulfill . . . basic prerequisites [set by INS regulations or BIA precedent], it is without discretion, when it deals with motions made by the parties, to ignore existing regulatory requirements.”<sup>217</sup> Succinctness, while it may lead to under-inclusiveness as addressed previously,<sup>218</sup> will provide a better landscape for practitioners and aliens alike.

Finally, the test should not lose sight of the fact that the ninety-day statutory limit is in place for a reason, and therefore any expansion on the changed country condition exception must do its best to prevent the possibility of aliens bringing motions to reopen simply to keep their case alive in order to remain in the country.<sup>219</sup> Similar to the reason motions to rehear a trial are disfavored, immigration proceedings carry the same fears, only more apparent, “where . . . every delay works to the advantage of the deportable alien.”<sup>220</sup> For that reason, the test should include determinative factors to guide the immigration judge’s decision in a predictable way that fulfills the need of finality in removal proceedings,<sup>221</sup> but also reaches a decision on mixed petitions that does not discriminate against the aliens bringing such motions.<sup>222</sup>

#### 1. The First Determinative Factor: Voluntariness

In order to meet the purpose of the statute<sup>223</sup> without providing an indirect road to faux-permanent non-resident status via consistent motion practice, the first determinative factor involves voluntariness when bringing mixed petitions to reopen removal proceedings. For an act to be voluntary, it must be done or given by choice, in other words, because someone wanted to and not because they were forced to.<sup>224</sup> Voluntary acts are “[d]one by design or intention” while voluntary statements are “[u]nconstrained by interference [or] not impelled by outside

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217. *Johnson v. Ashcroft*, 378 F.3d 164, 169 (2d Cir. 2004).

218. *See supra* Part III.C.

219. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (discussing, prior to the introduction of the time and number bar currently on motions to reopen removal proceedings, that there were at least three grounds the BIA could deny a motion to reopen based on the substance of the motion: “failure to establish a prima facie case,” “failure to introduce previously unavailable, material evidence,” or “the movant would not to the discretionary grant of relief.”).

220. *Id.*

221. *See Hang Chen v. Holder*, 675 F.3d 100, 105 (1st Cir. 2012).

222. *See, e.g.*, 22 U.S.C. § 6401(a)(5)–(7) (2016) (providing Congress’s policy on persecution of individuals based on the religious freedom an individual should have); 22 U.S.C. § 6401(b)(5) (2016) (stating that the policy of the United States is to stand with the persecuted).

223. Immigration and Nationality Act § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii) (2016).

224. *Voluntary*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

influence.”<sup>225</sup> Of course, definitions in the legal world are often more convoluted than those applied in the realm of literature.<sup>226</sup> While the term “voluntary” does not appear in the definitions section of the Immigration and Nationality Act,<sup>227</sup> it does appear in later sections dealing with loss of nationality.<sup>228</sup> In order for an individual to lose his or her nationality in the United States, they must do one of the enumerated items within the section “with the *intention* of relinquishing United States nationality.”<sup>229</sup>

The application within the context of utilization should define the term voluntary. For example, the test proposed in this Note applies the term voluntary as: *any mixed petition brought by a petitioner, wherein the changed personal circumstances were not voluntarily changed by the petitioner, shall be allowed the changed country conditions exception to the ninety-day limit.*

Therefore, the definition used by the Merriam-Webster’s Collegiate Dictionary above is satisfactory. This regulatory addition to prevent mixed petitions gives the petitioner more time in the country. If the petitioner’s changed personal circumstances caused an applicable changed country condition exception without the petitioner’s intent, there is no intent to circumvent the ninety-day statutory limit on motions to reopen removal proceedings.

To better portray the first prong of the test, consider the following two examples. First, suppose a woman was ordered removed from the United States to a province in China that recently began to persecute individuals for having more than one child after the United States ordered her removed.<sup>230</sup> If someone forced this alien into pregnancy via rape, her personal circumstances involuntarily changed. Similarly, consider a male who ordered removed from the United States to a country that now persecutes individuals for homosexuality. When this individual entered the United States, he believed he was heterosexual, but has since discovered he is attracted to individuals of the same sex.<sup>231</sup> This would again be an involuntary change in personal circumstances.

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225. *Voluntary*, BLACK’S LAW DICTIONARY (10th ed. 2014).

226. *See, e.g.*, Raina Nortick, Note, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 *FORDHAM L. REV.* 2153, 2161 (2007) (explaining the Chinese government can use psychological means to convince a woman not to have a second child, but as long as the ultimate steps to a clinic to abort the child are done under the women’s own will, the entire decision is voluntary).

227. Immigration and Nationality Act § 101, 8 U.S.C. 1101 (2016).

228. Immigration and Nationality Act § 349, 8 U.S.C. 1481 (2016).

229. *Id.* (emphasis added).

230. *See, e.g.*, *Jiang v. U.S. Att’y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009).

231. This Note is not the place to argue whether an individual is born homosexual or becomes homosexual. The example provided merely shows application of the above prong of the test.

## 2. The Second Determinative Factor: Necessity

The second determinative test involves whether the petitioner changed personal circumstances out of necessity. While this may create some discretion in the immigration judge's decision, a well-defined term provides a greater probability of fair and uniform decision-making. Something is of necessity when it is "in such a way that it cannot be otherwise"<sup>232</sup> or "[t]hat is needed for some purpose or reason; essential."<sup>233</sup> This definition is not nearly as clear-cut as the one provided for voluntary and needs clarification to achieve uniformity. Again, putting the word into the context of the proposed rule: *a petitioner whose personal circumstances changed only out of necessity for the safety of themselves or a family member, should be allowed the changed country conditions exception.* Further, the subsection under which one finds motions to reopen removal proceedings lends some assistance.<sup>234</sup> The subsection titled asylum removes the ninety-day limitation for individuals bringing such a motion under Section 240 of the Immigration and Nationality Act.<sup>235</sup> Therefore, a petitioner changed personal circumstances out of necessity if the petitioner acted *solely* to prevent harm to themselves or a member of their immediate family.

## 3. Applying the Test to Li Zhang

Li Zhang was the alien in the introduction who was deported and not allowed to move to reopen her removal proceedings. To exemplify the test we will use her case. First, Li Zhang would propose that her mixed petition should allow her to reopen removal proceedings based on her changed country condition. The government would argue that it was she that changed the personal circumstances (in her case, religion) and as a result the exception does not apply. If Li Zhang can bring forth reliable evidence that shows her changes were not made in an effort to stay in the country, but were legitimate changes she made (like the fact that her family was Catholic, her husband had already converted while in China, and her children were now converted), the court should allow her mixed petition to fall under the changed country conditions exception.

## CONCLUSION

The immigration courts have proved through the surge of cases they hear that some of their discretion may not be in the interest of its assigned

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232. *Necessity*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

233. *Necessary*, BLACK'S LAW DICTIONARY (10th ed. 2014).

234. Immigration and Nationality Act § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii) (2016).

235. *Id.*

statutes. Recent reports state immigration judges may be under-qualified for the positions they hold.<sup>236</sup> Further, the task of hearing more cases than any other type of judge in the United States over-burdens them.<sup>237</sup> As the number of cases heard by a set of immigration judges rose, so too did the number of cases heard by and reversed or overturned by the Federal Courts. One area wherein this is readily apparent involves petitions to reopen removal proceedings based on changed circumstances.

Without a test to determine when to allow mixed petitions to reopen removal proceedings, the immigration courts have full discretion to determine whether or not an individual may bring a claim under the changed country conditions exception to the ninety-day statutory limit on motions to reopen removal proceedings. Even the Federal Courts of Appeals are unable to come to a uniform decision, and they are not nearly as overburdened by an extensively large docket. Therefore, a test that asks whether the petitioner's change in personal circumstances was voluntary and necessary will provide the immigration judges with a uniform rule for deciding these types of motions.

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236. Liptak, *supra* note 14.

237. Noferi, *supra* note 21.