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Immigration Litigation Bulletin

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IMMIGRATION REFORM AND SECURITY: LITIGATING SERVICE AND ENFORCEMENT

The 2005 OIL Conference "Immigration Reform and Security: Litigating Service and Enforcement" was held March 29-31, 2005, at the Wyndham San Diego at Emerald Plaza. Attendees enjoyed three days of sessions on topics including Border Enforcement, Litigating District Court Cases, Criminal Aliens, and Asylum.

Conference attendees included over 125 attorneys and judges from the Office of Immigration Litigation, the United States Attorneys' offices, the Executive Office for Immigration Review, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, the Office of Special Investigations, the Department of Homeland Security (Office of General Counsel, Immigration and Customs Enforcement, Citizenship and Immigration Services, and Customs and Border Protection), and the Department of State. We were also joined this year by a ten-member delegation from the Canadian Department of Justice and by the Mexican Deputy Consul General in San Diego. The View from the Courts panel featured Immigration Judge Robert Barrett from San Diego, Board of Immigration Appeals Member Lauri Filppu, United States District Judge Barry Ted Moskowitz (S.D. Cal)., and Ninth Circuit Judge Diarmuid O'Scannlain.

Watch for a broadcast of the OIL conference on JTN soon.

Many attendees enjoyed a tour of the United States-Mexico border led by Border Patrol Officers from the Public Information Office for the Border Patrol in San Diego. The San Diego Sector consists of more than 7,000 square miles and 66 linear miles of territory, though it is the smallest Border Patrol sector geographically. The tour began with a DVD presentation. Attendees learned about the change in crossing rates and routes before and after Operation Gatekeeper (launched October 1, 1994).

This year's conference was filmed for the Justice Television Network by Executive Producer Tim Carrier and Production Manager Beth Rickenbacker. After editing, the program will air on JTN soon.

A limited supply of conference materials (CD and booklet) are available. To order, send your name and mailing address to OIL's Director of Training Francesco Isgro at Francesco.isgro@usdoj.gov. Materials will also be posted on both OIL websites.

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BIA Procedures

In 2002, the Attorney General published new rules in an effort to improve case management at the Board of Immigration Appeals ("Board" or "BIA"). As part of the reform, the new rules instituted major changes in areas such as the Board's standard of review of the immigration judge's findings of fact, the consideration of new facts following appeal to the Board, and expanded single-member decision-making. Recently, an increasing number of briefs filed by aliens have attempted to challenge Board decisions based on the new rules. Many of these challenges reflect a fundamental misunderstanding of the new procedures. For example, aliens claim that the Board's standard of review, especially in asylum cases, is now much more limited. An examination of the regulation and the published comments to the final rules, however, demonstrates that this is not necessarily the case.

Changing Standards of Review at the Board

Historically, the Board has exercised the power to conduct *de novo* review over the decisions of immigration judges. *See, e.g., Matter of Vilanova-Gonzalez*, 13 I&N Dec. 399, 402 (BIA 1969) (Board has authority to engage in *de novo* review of the record and make its own independent findings on questions of fact and law, irrespective of

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those made below); *see also Matter of B-*, 7 I&N Dec. 1 (BIA 1955). Using that standard, the Board could review not only the legal conclusions made by immigration judges but also the factual findings based on its own independent examination of the record below.

In 2002, however, the Attorney General substantially curtailed the Board's review power over an immigration judge's findings of fact, granting such findings substantial deference. *See* Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878-881 (Aug. 26, 2002). The new regulations, which became effective on September 25, 2002, specifically provide that: (1) the Board will review the immigration judge's "findings of fact," including those relating to credibility, using a "clearly erroneous" standard; (2) all other issues arising from the decision of immigration judges – including questions of law, discretion, and judgment – are to be reviewed *de novo*; (3) all questions arising in appeals from decisions of "Service officers" will be reviewed *de novo.* 8 C.F.R. § 1003.1(d)(3). Under the new regulations, the Board has retained only limited fact-finding ability on appeal; it can still take administrative notice of "commonly known facts," such as current events, or "the contents of official documents," which presumably includes State Department country reports. Id. § 1003.1(d)(3)(iv). If the Board finds that the immigration judge has not conducted an adequate factual analysis of the record, the Board is limited to remanding the case for further findings of fact. *Id.; see also Matter of S-H-*, 23 I&N Dec. 462, 466 (BIA 2002) (remanding case to the immigration judge due to deficient fact finding).

Based on this change in the standard of review, petitioners in asylum cases now seek to challenge the Board's decision to find *de novo* that the alien failed to prove either past persecution or a well-founded fear of future persecution on account of a protected ground. The basic contention is that such a determination by the Board violates the 2002 regulatory change in the Board's powers of review. Although there is little doubt that an immigration judge's factual findings are conclusive unless "clearly erroneous," aliens have contended that findings, such as whether an asylum applicant demonstrated an element of asylum, arguably are more akin to a conclusion of law (or at least a mixed question of law and fact) that the Board may review *de novo*. Such contentions are misguided, running contrary to the plain language of the published comments to the final rules.

The 2002 reforms require an alien to move to remand to present new evidence.

In defending against such a challenge, the first order of business is to determine whether the regulatory change even applies: if the Board's decision was issued before the effective date of the regulation – September 25, 2002 – then the new standard of review does not govern the case and the Board may review the record *de novo*. *See Wang v. Ashcroft*, 368 F.3d 347, 349 (3rd Cir. 2004). Next, the government should argue that the comments to the final rules explicitly delineate situations where the *de novo* standard of review applies, including to elements of an asylum claim. The comments state: "The 'clearly erroneous' standard' does not apply to determinations of matters of law, nor to the application of legal standards, in the exercise of judgment or discretion. This includes judgments as to whether the facts established by a particular alien amount to 'past persecution' or a 'well-founded fear of future persecution.'" Procedural Reforms To Improve Case Management, 67 Fed. Reg. at 54890 (emphasis added).

To further refine the analysis, the government may argue that, based on the facts as found by the Immigration Judge, the Board can find that the alien has failed to prove that he suffered past persecution or had a well-founded fear of future persecution, because such authority is within the powers granted to the Board under 8 C.F.R. § 1003.1(d). In essence, the government would argue that the Board did not review the immigration judge's factual findings *de novo*, but instead conducted a permissible *de novo* review of whether the alien met the burden of proof for asylum. This type of analysis should be sufficient to defeat most challenges based on the Board's review powers following the regulatory changes made by 8 C.F.R. § 1003.1(d)(3).

Submission of New Evidence Following Appeal to the Board

Under the 2002 changes, any alien seeking to raise new evidence, while the case is pending on appeal to the Board, has to do so by means of a motion to remand the case to the immigration judge for consideration of the new evidence. See 8 C.F.R. § 1003.1(d)(3)(iv) ("A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand."). The preamble explains this new regulation as follows: it "generally prohibits the introduction and consideration of new evidence in proceedings before the Board, except for taking administrative notice of commonly known facts such as current events." *See* Board Procedural Reform Regulations, 67 Fed Reg. 54878, 54896-97 (August 26, 2002). "Where it is established that an appeal cannot be properly resolved without further findings of fact, other than those established by administrative notice, the Board will remand the proceeding to the immigration judge." *Id*. Accordingly, in all cases

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where new evidence is submitted on appeal to the Board, the Board must order the case remanded to the immigration judge for consideration of the case in light of the new evidence. *See Singh v. INS*, 315 F.3d 1186, 1191 (9th Cir. 2003) (BIA may insist on compliance with its rules of procedure).

Three Types of Single-Member BIA Decisions

The 2002 procedural reforms also created a "streamlined" alternative to the traditional three-member review of appeals by the Board in the form of a single-member Board decisions. See 8 C.F.R. § 1003.1(e)(4) and (5). A practical consequence of this change in review involves the types of streamlined decisions being issued by the Board, which in turn impacts the level of judicial review conducted by the court (*i.e.*, whether judicial review will reach the immigration judge's decision or stop at the Board's decision). Post 2002, the Board has refined its single-member decisions to reflect a variety of decision types, each of which reflects a different form of Board review. *See* 8 C.F.R. § 1003.1(e)(4) and (5). For practical purposes, such single-member decisions may be classified into three forms: (1) an affirmance without opinion of the immigration judge's decision pursuant to 8 C.F.R. § 1003.1(e)(4); (2) a short order affirmance and/or modification, usually pursuant to *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994), of the immigration judge's decision; and (3) a short order affirmance in part and rejection in part of the immigration judge's decision pursuant to 8 C.F.R. § 1003.1 (e)(5).

Where the Board issues a single-member decision in the form of an affirmance without opinion, citing 8 C.F.R. § 1003.1(e)(4), courts will review the immigration judge's decision. *See, e.g., Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003) (rejecting a due process challenge to the Board's use of single-member decisions, in part, on the ground that the court will review the immigration judge's decision directly). The second type of single-member decision involves cases where the Board affirms the result or modifies the decision of the immigration judge, ignoring aspects of the decision below such as the adverse credibility finding, under the auspices the Board's decision in *Matter of Burbano, supra*. Here, judicial review extends to both the decision of the Board and the immigration judge. *See, e.g., Batalova v. Ashcroft*, 355 F.3d 1246, 1254 (10th Cir. 2004) (alien's due process rights not violated when single BIA member, affirmed and expressly adopted, with one modification, the IJ's decision citing *Matter of Burbano*). Finally, the Board has recently issued short order, single-member decisions, where it affirms in part, and rejects in part the immigration judge's decision pursuant to 8 C.F.R. § 1003.1(e)(5). Although novel, such decisions have been upheld against a due process challenge, most recently by the Sixth Circuit. *See Gishta v. Gonzales*, --- F.3d ----, 2005 WL 783330 (6th Cir. 2005). In such a case judicial review would extend to both the decision of the Board and the immigration judge to the extent affirmed by the Board.

A Board decision which has been referred to the Attorney General is non-final and without effect.

Although not an exhaustive examination of all the issues that may be raised based on the 2002 procedural changes, this brief review touches on the most common arguments being raised as of the date of this publication. In the future, when more novel or inventive procedural challenges arise, further installments of this topic may be published.

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AG/BIA

Attorney General Rules That Referred Decisions From The Board Are Non-Final While Pending Review

On December 1, the Attorney General determined in ***Matter of E-L-H-***, 23 I&N Dec. 700 (A.G. 2004), that a Board decision which has been referred to the Attorney General is non-final and without effect, and the referral operates as an automatic stay without a need for any further action by the Attorney General. The Board had previously suggested that under 8 C.F.R. § 1003.1(g), Board decisions, unless stayed by an affirmative act of the Attorney General or the Board itself, become effective immediately upon issuance and, unless they were so stayed, had to be executed by the DHS and immigration judges even after being certified to the Attorney General and while pending review. The Attorney General clarified that section 1003.1 (g) gives binding effect to a final decision of the Board, and thus did not apply to a decision pending on a referral (emphasis in original). However, if a Board decision has been certified, the decision is neither final nor effective during the pendency of the Attorney General's review (or for a later period, if the Attorney General so decides), and a Board decision may not be executed while it is not final, unless the Attorney General specifically orders otherwise.

Board Holds That Alien May Apply For 212(c) Waiver In Conjunction With An Application For Adjustment Of Status

On March 9, the Board issued its precedent decision in ***Matter of Azurin***, 23 I&N Dec. 695 (BIA 2005), holding that an alien who, prior to the 1996 amendments made to former

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section 212© of the INA, pled guilty under section 212(c) in conjunction with an application for adjustment of status, despite regulatory changes relating to the availability of section 212(c) relief. The Board concluded that: (1) the alien did not need section 212(c) relief to waive either the firearms or aggravated felony charges in order to adjust his status, because such convictions did not preclude a showing of admissibility for purposes of an adjustment application where there was no corresponding ground of inadmissibility for those crimes in the statute; and (2) the alien could apply for a 212(c) waiver, thereby waiving his inadmissibility on the basis of his conviction for a crime involving moral turpitude despite any recent regulatory changes, because the language found in currently existing regulations at 8 C.F.R. § 1240.49(a) specifically indicates that various waivers of inadmissibility are intended to accompany an adjustment application. Combined with the fact that the alien is eligible for a 212(c) waiver under the holding in ***INS v. St. Cyr***, 533 U.S. 289 (2001), the Board remanded the case to afford the alien the opportunity to submit his section 212(c) waiver request with his application for adjustment of status.

Attorney General Rules That A Firearms Offense Expunged Under California Law Remains A Conviction For Immigration Purposes.

On January 18, the Attorney General determined in ***Matter of Marroquin,*** 23 I&N Dec. 705 (A.G. 2005), that an alien whose firearms conviction was expunged pursuant to section 1203.4 of the California Penal Code had been "convicted" for immigration purposes. During the pendency of Marroquin's appeal to the Board, the state court granted his motion to reduce his conviction to a misdemeanor, and his guilty plea was set aside and vacated. On appeal to the Board, Marroquin argued that he no longer had a firearms conviction to sustain the charge of removability. The Board granted his appeal, but referred its decision to the Attorney General. In concluding that Marroquin's conviction remained viable for immigration purposes, the Attorney General noted that the state expungement law served to ameliorate certain of the punitive consequences attending a court's legally valid finding of guilt, but in no way undermined the original judgment. He also observed that, aside from the Ninth Circuit's treatment of a narcotics offense which would qualify within the Federal First Offender Act, courts of appeals have approved of a statutory interpretation of "conviction" that covered vacated convictions and deferred adjudications. The Attorney General accordingly held that the federal definition of "conviction" encompassed convictions, other than those involving first-time simple possession of narcotics, that have been vacated or set aside pursuant to an expungement statute for reasons that do not go to the legal propriety of the original judgment and that continue to impose some restraints or penalties upon the defendant's liberty.

The state expungement law ameliorated some of the punitive consequences attending the legal finding of guilt, but in no way undermined the original judgment.

In addition, on the same day, in ***Matter of Luviano***, 23 I&N Dec. 718 (A.G. 2005), the Attorney General relied on his precedent decision in ***Matter of Marroquin***, 23 I&N Dec. 705 (A.G. 2005), to conclude that Luviano's conviction for a firearms offense that had been expunged under the same California state provision nevertheless remained a conviction under federal immigration law.

Board Holds That An Alien Removable On The Basis Of A Conviction For Sexual Abuse Of A Minor Is Ineligible For A Section 212(c) Waiver

On April 6, the Board issued its precedent decision in ***Matter of Blake***, 23 I&N Dec. 722 (BIA 2005), holding that an alien who is removable as a result of his conviction for sexual abuse of a minor is ineligible for a waiver under former section 212(c) because the aggravated felony ground of removal with which he was charged had no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Immigration and Nationality Act. The Board rejected the alien's argument that his conviction was analogous to the crime involving moral turpitude provision under section 212(a) because, although there may be considerable overlap between the two offenses, the "sexual abuse of a minor" was not substantially equivalent to the crime involving moral turpitude provision. While the coverage of the offenses described need not be a perfect match in order to be "statutory counterparts," the Board held that the ground of inadmissibility must address essentially the same category of offenses under which the removal charge is based in order for the alien to be eligible for a waiver of inadmissibility under former section 212(c).

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ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Bulletin, or if you have any ideas for improving this publication, please contact Francesco Isgro at:

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Summaries Of Recent Federal Court Decisions

Abandonment of LPR Status

The Sixth Circuit, in ***Hana v. Gonzales***, 400 F.3d 472 (6th Cir. March 14, 2005) (Martin, *Batchelder*, Jordan), vacated the Board's order finding petitioner had abandoned her LPR status by spending most of her time in Iraq over a four-and-a half year period. Petitioner, a native of Iraq, was granted LPR status in 1992. After two months in the U.S., petitioner returned to Iraq and continued her employment with the Central Bank of Iraq. She returned to the U.S. in October 1994 with $10,000 in jewelry and money so that she could purchase a home and car. In December 1994, petitioner returned to Iraq to attend to her mother-in-law and resumed her job at the Central Bank. Petitioner returned to the U.S. in December 1996 and was questioned at the airport. She admitted that she had never worked or paid taxes in the U.S., had no property in the U.S. and had worked in Iraq, and INS charged her with excludability as an immigrant without a valid visa.

At her hearing, the IJ determined petitioner's trips to Iraq were "temporary visits abroad" and thus her LPR status was intact. INS appealed and the Board reversed, finding that petitioner had lived in the U.S. for only three months in a four-and-a-half year period and during that time she was working and living in Iraq, thus her trips to Iraq were not temporary and petitioner had abandoned her LPR status.

The Sixth Circuit disagreed, finding that it was petitioner's intent to facilitate her family members' joining her in the U.S., not to abandon her LPR status. The court noted that it was clear that petitioner's failure to put down roots in the U.S. was due almost entirely to her desire to help her loved ones safely flee a brutal totalitarian regime and to care for her mother-in-law. The court noted that an alien's intent cannot be examined in a vacuum, and must take into account the circumstances the alien faces. Accordingly, the court vacated the Board's order and remanded for termination of removal proceedings.

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The court noted that an alien's intent cannot be examined in a vacuum, and must take into account the circumstances the alien faces.

Aggravated Felony

In ***McDonald v. Gonzales***, 400 F.3d 684 (9th Cir. March 2, 2005) (Ferguson, Noonan, *Hawkins*), the Ninth Circuit granted the petition for review of the Board's order affirming the IJ's decision that petitioner was removable for having committed voter fraud. Petitioner, legal permanent resident, applied for a Hawaii driver's license and registered to vote. In doing so, she checked a box indicating she was a U.S. citizen because at the time she was not sure if she was a citizen. When petitioner received a voter registration postcard in the mail, she indicated she was not a citizen and returned the card. When petitioner received a Notice of Voter Registration in the mail, she believed she was being allowed to vote even though she was not a citizen. Petitioner then voted in the 1996 primary and general elections. While applying for naturalization in 1997, petitioner stated that she had voted in the last election, and was placed in removal proceedings. INS asserted that petitioner had voted in violation of Hawaii law, H.R.S. § 19-3.5(2). During the hearing, the IJ excluded an expert witness proposed by petitioner who would have testified regarding *mens rea* and petitioner's offense. The IJ held that there was substantial evidence that petitioner knowingly voted when she was not entitled to vote and found her removable. The Board affirmed without opinion.

The court held that Hawaii law required a knowing and willful violation, which petitioner did not have. The court noted that petitioner perhaps should have known, or was negligent in believing that she could vote, but this was not the same as knowing and willful. The court found that because petitioner did not have the requisite *mens rea*, she did violate the law. Accordingly, the IJ's finding of removability was incorrect and the court granted the petition for review.

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In ***Patel v. Ashcroft***, 401 F.3d 400 (6th Cir. March 8, 2005) (Siler, Cole, C*lay*), the Sixth Circuit dismissed the petition for review of the Board's decision denying petitioner relief from the IJ's determination that he was removable for having committed an aggravated felony. Petitioner, a native and citizen of India, was ordered removed on the grounds that his conviction for aggravated criminal sexual abuse under 720 Ill. Comp. Stat. 5/12-16 constituted an aggravated felony as well as a crime of moral turpitude. Petitioner sought relief under former INA § 212(c), arguing that his conviction in 1989 was prior to the passage of IIRIRA, thus he was eligible for relief pursuant to *St. Cyr*. The IJ denied relief, and the Board agreed, determining that petitioner was precluded from seeking relief because his conviction was the result of a trial, not a guilty plea. The Board assumed *arguendo* that if petitioner's crime was not an aggravated felony, he was still not eligible because he had not lived continuously in the U.S. for seven years prior to committing the offense.

On appeal, the court found that it had jurisdiction to consider the limited question of whether petitioner's offense was an aggravated felony. The

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court held petitioner's offense was a crime of violence and therefore an aggravated felony. Accordingly, the court held that the Board did not err in affirming the IJ's removal order and dismissed the petition for lack of jurisdiction.

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In ***Richards v. Ashcroft***, 400 F.3d 125 (2d Cir. March 3, 2005) (Jacobs, *Sotomayor*, Hall), the Second Circuit held that a conviction for forgery in the second-degree constituted an aggravated felony and affirmed the district court's denial of petitioner's habeas petition. Petitioner, a Jamaican national, was convicted of second-degree forgery under Connecticut General Statute § 53a-139. INS placed petitioner in removal proceedings based on the forgery conviction, as well as an earlier conviction for third-degree assault on the grounds that both crimes constituted aggravated felonies. The IJ determined that both convictions were for removable offenses, and the Board dismissed petitioner's appeal, finding that both offenses constituted aggravated felonies. Petitioner sought habeas review of the removal order.

The court noted that while petitioner had not been convicted of "forgery" under the common law definition requiring the false making of a writing, the definition of "aggravated felony" includes offenses relating to forgery. The court held that petitioner's conviction for second-degree forgery was unarguably an offense "relating to forgery" and was therefore an aggravated felony. Accordingly, the court affirmed the judgment of the district court.

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In ***Tapucu v. Gonzales***, 399 F.3d 736 (6th Cir. March 9, 2005) (Gilman, *Sutton*, McKeague), the Sixth Circuit vacated the Board's order that petitioner was removable as an alien smuggler. Petitioner, a native of Turkey and LPR, took a weekend trip to Canada with three friends. Upon returning to the American border, immigration officials determined that one of the friends, a Canadian citizen, did not have authority to re-enter the country. They then concluded that petitioner was a "smuggler" of aliens because he was the driver of the car and did not correct his friend when his friend told the officers that he lived in Canada. The IJ also concluded that petitioner was a smuggler of aliens and ordered him removed. The Board affirmed without opinion.

A smuggling offense requires something more than openly presenting an alien to border officials with accurate identification and citizenship papers.

The court held that petitioner did not knowingly assist an alien to enter the United States in violation of the law. First, petitioner testified that he thought his friend could re-enter the country, and, second, a smuggling offense requires something more than openly presenting an alien to border officials with accurate identification and citizenship papers. Accordingly, the court vacated the IJ's decision and remanded for further proceedings.

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The Sixth Circuit in ***Uritsky v. Gonzales***, 399 F.3d 728 (6th Cir. March 7, 2005) (*Norris*, Gibbons, Todd), held that despite receiving probation and a designation of a "youthful trainee" under Mich. Comp. Laws. §§ 762.11-16, petitioner's conviction for third degree sexual conduct in violation of Mich. Comp. Laws § 750.520(a) constituted an aggravated felony. When petitioner, a native of Ukraine and a citizen of Israel, was seventeen, he had intercourse with a girl of fourteen and subsequently pleaded guilty to third degree sexual conduct. Petitioner was placed on two years of probation and assigned to "youthful trainee" status. Petitioner was charged with removability on the grounds that his offense constituted an aggravated felony. Petitioner argued that his status as a youthful trainee meant that a conviction had not been entered against him. The IJ terminated proceedings and the Board reversed, finding that a conviction is not vacated under Michigan law until an individual completes his or her probation, and that "youthful trainee" status could be revoked at any time. Thus, the Board ordered petitioner removed.

The Sixth Circuit agreed, finding that the Michigan youthful trainee designations represent convictions for immigration purposes. The court held that while Congress did not intend for findings of juvenile delinquency to be considered "convictions," it did intend that proceedings akin to expungement of deferred adjudications should count. Accordingly, the court found petitioner's guilty plea to third degree sexual conduct constituted a conviction and affirmed the Board's order.

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Asylum and Withholding of Removal

In ***Al-Fara v. Gonzales***, — F.3d —, 2005 WL 857029 (3rd Cir. April 14, 2005) (Rendell, *Cowen*, Schwarzer), the Third Circuit denied the petition for review of the Board's order denying petitioner's applications for asylum and withholding of deportation. Petitioner, a Palestinian, sought asylum on the grounds he had to flee Gaza following the 1967 war with Israel, and that while petitioner could enter Jordan, his wife could not and his U.S. citizen children could only enter on tourist visas. The IJ denied petitioner's application for asy-

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lum, finding that it was the conditions of unrest and battle brought about by the 1967 war, and not any personalized persecution, that prompted petitioner's flight from Gaza. The IJ noted that while petitioner may have been "stateless," statelessness alone does not warrant a grant of asylum, and found petitioner's fear of persecution to be unfounded. The Board affirmed without opinion.

The court held that substantial evidence supported the IJ's decision that petitioner did not qualify for asylum. The court held that petitioner's encounters with Israeli forces in 1967 did not rise to the level of "persecution," and that the incidents occurred during a period of war. Furthermore, the court found petitioner's fear of future persecution to be unfounded as thirty-eight years had passed since the 1967 war and thirty years had passed since the Israelis last asked about petitioner's whereabouts. Accordingly, the court denied the petition for review.

The court found substantial evidence supporting the IJ's decision, notably petitioner's failure to mention her rape until her removal hearing and her ability to travel both in and out of Ethiopia without further incident.

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In ***Ali v. Gonzales***, 401 F.3d 11 (1st Cir. March 17, 2005) (Boudin, *Torruella*, Howard), the First Circuit affirmed the denial of asylum, withholding of removal, and CAT protection. Petitioner, a native and citizen of Ethiopia, overstayed her visa and sought asylum, withholding of removal and CAT protection on the ground that she had been persecuted due to her connection with the Ethiopian Labor Union Party ("ELUP"). Petitioner alleged that in 1993 she had been kidnaped, beaten, threatened, and raped by three men who wanted to know of her involvement with the ELUP. She stated that she did not mention the rape in her asylum interview because she did not want to talk about it. Petitioner testified that she returned to work following the incident, and lived in the same area until she left Ethiopia in 1999. In 1997, petitioner traveled to India and the Phillippines for three weeks but did not ask for asylum or refugee status in either of those countries. The IJ denied petitioner relief or protection, and denied her subsequent motion to reconsider. Petitioner appealed both the IJ's initial decision and his denial of her motion to reconsider. The Board affirmed the IJ's original order and found that the IJ lacked jurisdiction to consider the motion to reconsider.

On appeal, the First Circuit upheld the IJ's adverse credibility determination. The court found substantial evidence supporting the IJ's decision, notably petitioner's failure to mention her rape until her removal hearing and her ability to travel both in and out of Ethiopia without further incident. Similarly, the court found petitioner's ability to live in the same house for six years after the rape without incident undercut her claim of a well-founded fear of future persecution. Thus, the court affirmed the Board's order denying petitioner relief.

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In ***Etchu-Njang v. Gonzales***, 403 F.3d 577 (8th Cir. April 8, 2005) (Wollman, Magill, *Colloton*), the Eighth Circuit denied the petition for review of the Board's order denying asylum, withholding of removal, and cancellation of removal. Petitioner, a native and citizen of Cameroon, sought asylum based on his association with the SDF, a political party which opposed the ruling party in Cameroon, and cancellation of removal on the basis that his U.S. citizen daughter would be subject to FGM if removed to Cameroon. The IJ denied relief, finding petitioner's testimony concerning his asylum claim to be incredible. The judge noted that petitioner had stated his involvement with SDF was limited to paying dues and attending meetings, that he had joined the party when he arrived in the U.S., and that there was no evidence showing his brother and father had been persecuted on account of their membership with SDF. The IJ also questioned whether petitioner's daughter would actually be subjected to FGM and denied cancellation of removal. The Board affirmed without opinion. Petitioner appealed, raising for the first time an ineffective assistance of counsel argument relating to his cancellation application.

The Eighth Circuit found that petitioner failed to establish a well-founded fear of persecution based on political affiliation if he returned to Cameroon. The court noted that petitioner's claim of ineffective assistance of counsel was not raised before the BIA, thus the court lacked jurisdiction to address it. Furthermore, the court noted that if the issue could be considered, cancellation of removal is discretionary and even if petitioner could show that his first counsel was deficient, he could not state a claim for a violation of any due process rights. Accordingly, the court denied the petition for review.

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In ***Huang v. Gonzales***, — F.3d —, 2005 WL 851498 (7th Cir. April 14, 2005) (Kanne, Wood, *Williams*), the Seventh Circuit granted the petition for review of the Board's summary affirmance of an IJ's adverse credibility determination. Petitioner, a native of China, sought asylum on the basis of her membership in an illegal Catholic church. Petitioner testified that when school officials discovered she was Catholic, they would not allow her to attend high school and that government officials raided her home and arrested several practitioners. The IJ repeatedly interrupted petitioner's testimony

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to question her about Catholic doctrine and rituals. The IJ then denied petitioner's application because her answers contained what he believed to be inaccurate information, she was unable to describe the church she attended in Chicago or her reasons why she did not attend regularly, and because she failed to mention the alleged persecution in her initial immigration interview. The Board summarily affirmed.

The court found it quite troubling that the IJ repeatedly interjected himself into the proceedings, far exceeding his role of developing the record. The court found the IJ's questioning was based on his own assumptions about Catholicism rather that any information contained in the record. Furthermore, petitioner did not regularly attend church in Chicago because she was living in a Hispanic neighborhood and the services were conducted only in Spanish, and that the church she did attend had services only in English. The court found that the IJ exceeded his proper role in questioning petitioner and that his conduct during the hearing tainted his credibility finding. Accordingly, the court vacated and remanded for further proceedings.

The court found petitioner's airport interview to be reliable and part of a sound basis for finding petitioner's asylum claim as incredible.

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In ***Jamal-Daoud v. Gonzales***, – F.3d –, 2005 WL 832070 (7th Cir. April 12, 2005) (*Flaum*, Easterbrook, Wood), the Seventh Circuit affirmed the Board's denial of asylum, withholding of removal, and CAT protection. Petitioner, a native and citizen of Iraq, stated in his airport interview that he left Iraq due to the embargo situation, that he had never been persecuted by the government of Iraq, and he did not fear future persecution. Petitioner applied for asylum, alleging he was an Assyrian Christian and member of the Chaldean Church. Petitioner alleged that his father was arrested several times and that petitioner had been beaten and spat at when he refused to testify against his father. Petitioner acknowledged that he gave inconsistent answers at his airport interview, but alleged that he was scared. The IJ denied all relief and protection, finding petitioner had failed to provide persuasive evidence of persecution. The Board affirmed without opinion.

The Seventh Circuit found petitioner's airport interview to be reliable and part of a sound basis for finding petitioner's asylum claim as incredible. The court noted that the interview was conducted with a translator, there was no indication that petitioner did not understand the questions, and that petitioner responded with significant detail. Furthermore, the court held that petitioner's claims for withholding of removal and CAT protection failed on the merits and affirmed the Board's order.

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In ***Jishiashvili v. Gonzales***, 402 F.3d 386 (3d Cir. April 1, 2005) (*Rendell*, Aldisert, Magill), the Third Circuit, in a "close call," found there was insufficient evidence to support the IJ's adverse credibility determination and remanded with instructions to further develop the record. Petitioner, a native and citizen of Georgia, sought asylum on the ground that he feared persecution on account of his mixed ethnicity, his mother being Abkhazian and his father being Georgian. Petitioner testified that he was conscripted into the Georgian army and refused to serve when deployed to Abkhazia and was subsequently placed in solitary confinement and beaten. Petitioner further testified that after he was discharged from the military, he was interrogated and beaten by the police when he was unable to provide information concerning two of the patrons of his fitness club with regards to an assassination attempt on the Georgian president, and his club was later burned down. The IJ denied relief, finding it implausible that the police would have focused so closely on petitioner concerning the assassination attempt on the president, that it was implausible that the police would have burned down his fitness club, and on the basis of the vague and general testimony concerning his military service. The Board affirmed without opinion.

The Third Circuit disagreed. The court noted that petitioner and the two suspect club patrons shared the same last name, therefore the police focus was not implausible. The court further noted that the general and vague testimony concerning petitioner's military service was immaterial since id did not relate to petitioner's claim of asylum. Accordingly, the court could not agree with the IJ's conclusion that petitioner had not presented sufficiently plausible evidence and therefore remanded for further development of the record.

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The Ninth Circuit, in ***Karouni v. Gonzales***, 399 F.3d 1163 (9th Cir. March 7, 2005) (Goodwin, *Pregerson,* Tallman), granted the petition for review of the Board's order affirming the IJ's decision denying asylum and withholding of removal. Petitioner, a native of Lebanon, sought asylum on the grounds that he had a well-founded fear of persecution because he was a homosexual, suffering from AIDS, and a Shi'ite. Petitioner submitted documentation illustrating the Lebanese government's opposition to homosexuality, including news reports of homosexuals being arrested and attempts at "rehabilitation." Petitioner stated in his application that his cousin, who was also a homosexual, was shot to death,

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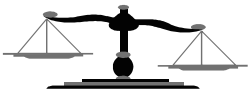

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allegedly because he was a homosexual

Petitioner also stated that his partner was arrested and beaten by militia and he never saw him again. Petitioner further testified that he had been "outed" and that the police knew he was a homosexual. Furthermore, petitioner testified that there was no one from whom to seek treatment for AIDS in Lebanon without confirming that he was infected and therefore confirming suspicions that he was a homosexual. The IJ denied asylum and withholding on the grounds that petitioner failed to demonstrate past persecution nor a well-founded fear of future persecution. The IJ found petitioner's testimony concerning his fear of persecution was "full of supposition and devoid of supporting facts." The Board summarily affirmed.

The court found no difference between an individual being persecuted for being a homosexual and being persecuted for engaging in homosexual acts.

On appeal, the court rejected the government's argument that petitioner would not persecuted because of his status as a homosexual, but rather on account of his committing future homosexual acts, and that petitioner could avoid persecution by abstaining from homosexual acts. The court found that the Lebanese authorities already believed that petitioner had committed homosexual acts in the past, and that the government's position argued that petitioner should "relinquish an integral part of his human freedom." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

The court found no difference between an individual being persecuted for being a homosexual and being persecuted for engaging in homosexual acts. Furthermore, the court found that the IJ's determination that petitioner lacked a well-founded fear of future persecution was not supported by substantial evidence. The court noted that the murder of petitioner's cousin, as well as petitioner's belief that he had been "outed," established evidence that petitioner had a subjective and objective fear of persecution. The court held that the record demonstrated that the Lebanese government was a credible threat to homosexuals. Accordingly, the court reversed the IJ's finding that petitioner did not have a well-founded fear of future persecution and remanded the case to the Board to determine if petitioner was eligible for withholding of removal.

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In ***Iao v. Gonzales***, 400 F.3d 530 (7th Cir. March 9, 2005) (*Posner*, Manion, Wood), the Seventh Circuit granted the petition for review of the Board's decision affirming without opinion the IJ's order finding petitioner ineligible for asylum. Petitioner, a native of China, sought asylum on the grounds that she practices Falun Gong which is outlawed in China and the government persecutes practitioners. Petitioner alleged that the police repeatedly visited her home and delivered a summons commanding petitioner to report to the police station. The IJ denied relief on the grounds that petitioner had failed to provide substantial evidence that she was a follower of the movement, her testimony concerning the police visits was inconsistent, and her testimony at the asylum interview that she went into hiding and never returned home was contrary to her removal hearing testimony. The Board affirmed without opinion.

The court held that the IJ's opinion could not be viewed as reasoned. The court noted that if petitioner had practiced Falun Gong in China, as she testified she did, or if she attempted to practice it upon returning to China, she would face a substantial likelihood of persecution. The court noted that there are no requirements for Falun Gong membership and that it would be possible for anyone to start doing the exercises and declare himself or herself a bona fide adherent to Falun Gong. While this may have significant immigration implications to the United States, Congress has not authorized DHS or DOJ to control immigration by denying asylum applications in unreasoned decisions. Accordingly, the court vacated the IJ's order and remanded for further proceedings.

In ***Lolong v. Gonzales***, 400 F.3d 1215 (9th Cir. March 18, 2005) (*Fletcher*, Noonan, Thomas), the Ninth Circuit granted the petition for review of the Board's denial of petitioner's application for asylum. Petitioner, an Indonesian native of Chinese descent, was studying in the United States in May 1998 when the worst anti-Chinese rioting in Indonesia's history occurred. After learning that one of her friends had been raped and her uncle severely beaten, petitioner applied for asylum. The IJ granted relief, finding petitioner's fear of future persecution on account of her ethnicity to be both subjectively and objectively reasonable. On appeal, the Board reversed.

The court found compelling evidence which established that petitioner had a well-founded fear of future persecution on account of her Chinese ethnicity were she to be returned to Indonesia. The court noted the history and severity of anti-Chinese violence in Indonesia and found that petitioner would be particularly at risk because she was a Christian and a woman. Accordingly, the court granted the petition for review and remanded so the Attorney General could exercise his discretion to grant petitioner asylum.

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In ***Medina v. Gonzales***, — F.3d —, 2005 WL 851691 (2d Cir. April 14, 2005) (Leval, Cabranes, *Katzmann*), the Second Circuit denied the

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petition for review of the Board's determination that petitioner gave false testimony. Petitioner, a native of the Philippines, sought asylum and withholding of deportation on the grounds that she had been persecuted by the Communist Party for refusing to broadcast anti-government, pro-Communist propaganda when she worked for a broadcasting company. On cross-examination, it became clear that petitioner had fabricated her story of political persecution, and petitioner admitted that her statement was false. The IJ held that while petitioner had satisfied the continuous physical presence and extreme hardship requirements for suspension eligibility, she could not establish good moral character due to her false testimony. The Board affirmed. Petitioner appealed, arguing that false statements given under oath during an asylum interview cannot qualify as "false testimony" under 8 U.S.C. § 1101(f)(6).

Any alien who makes false oral statements under oath during an asylum interview with the subjective intent of obtaining immigration benefits is *per se* ineligible for suspension due to want of "good moral character."

The court found the INA to be ambiguous to this specific issue, but determined that the Board's construction of "false testimony" was permissible. As a result, the court held that any alien who makes false oral statements under oath during an asylum interview with the subjective intent of obtaining immigration benefits is *per se* ineligible for suspension of deportation due to want of "good moral character." Finding that petitioner gave "false testimony," the court denied the petition for review.

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In ***Muhanna v. Gonzales***, 399 F.3d 582 (3rd Cir. March 3, 2005) (Ambro, Van Antwerpen, *Shadur)*, the Third Circuit granted petitioner's petition for review of the Board's order affirming an IJ's decision that petitioner filed a frivolous asylum application. Petitioner, a native of Jordan, married an American citizen and entered the U.S. as a conditional permanent resident. Two years later petitioner divorced his wife. Because he failed to file a joint application for the removal of the conditions on his residency during his marriage, petitioner applied for a good faith marriage waiver, which was denied. Petitioner was placed in removal proceedings on the grounds that his conditional status had terminated. Petitioner conceded removability but asked the IJ to review the denial of his waiver. Petitioner also applied for asylum, withholding of removal, and CAT protection based on the conflict between Israeli and Palestinian forces in the Middle East.

The IJ questioned the petitioner as to whether the fear asserted as the basis for his asylum application predated his marriage and whether a stabbing incident has occurred prior to his marriage. After initially stating that he had not been stabbed and then that he had been stabbed while breaking up a fight, petitioner testified that he had been stabbed by his employer and had lied earlier in the hearing because he was afraid that if his employer discovered his testimony he would be harmed if sent back to Jordan. The IJ halted the proceedings and made a finding that petitioner's application was frivolous based on the inconsistency between his hearing testimony and his asylum application as to the stabbing incident. The IJ found petitioner ineligible for the good faith marriage waiver and asylum and denied his applications for withholding and CAT protection, finding petitioner to be incredible. The Board affirmed without opinion.

The court held that because the IJ imposed the frivolousness finding on petitioner's immigration prospects without giving him ample opportunity to present his case, the IJ thereby denied him due process. The court noted that the inconsistency in petitioner's testimony did not necessarily support a finding that the application was false, but rather tended only to show that petitioner was not credible at one point during the hearing. The court held that the frivolousness finding could not stand and that petitioner must be given a full and fair hearing. Similarly, the court found the IJ's adverse credibility finding was not based on substantial evidence. Accordingly, the petitioner for review was granted and the case remanded for a full hearing.

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In ***Nahrvani v. Gonzales***, 399 F.3d 1148 (9th Cir. March 7, 2005) (Fletcher, Hansen, *Rawlinson*), the Ninth Circuit denied the petition for review of the Board's affirmance of the IJ's denial of petitioner's request for asylum from Iran and withholding of removal and protection under the CAT as to Germany. Petitioner, a native of Iran, sought relief on the grounds that he had been arrested, jailed for two years, and tortured as the result of his participation in an anti-government demonstration. Petitioner then fled to Germany where he was granted political asylum and permanent residency. While living in Germany, petitioner converted to Christianity and renounced his Iranian citizenship. As a result, petitioner alleged that officials from the Iranian Consulate were "chasing" him and stealing his possessions. The IJ determined that, due to his Christian beliefs, petitioner would face persecution if returned to Iran. While the IJ denied petitioner asylum because he was firmly resettled in Germany, the IJ granted petitioner's request for withholding of removal and CAT protection from Iran. The Board affirmed the IJ's denial of asylum without opinion.

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The court held that the IJ did not err in finding that petitioner had firmly resettled in Germany. Petitioner was granted permanent residency and renounced his Iranian citizenship in an attempt to gain German citizenship. Accordingly, the court found that petitioner's request for asylum must be denied. With regard to Germany, the court found that petitioner suffered only anonymous and ambiguous threats and only minimal property damage. Petitioner also failed to demonstrate that the alleged acts were committed by the government or forces beyond the government's control. Thus, the court denied the petition for review.

The Ninth Circuit held that a husband is statutorily eligible for withholding of removal solely by virtue of the fact that his wife was involuntarily sterilized pursuant to a coercive population control program.

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In ***Perez v. Loy***, 356 F.Supp.2d 172(D. Conn. Feb. 17, 2005) (Underhill), the district court vacated petitioner's final order of removal and remanded for further consideration. Petitioner, a 65 year old native of Columbia, was convicted of importing heroin and was placed in removal proceedings on the ground that her controlled substance offense constituted an aggravated felony. The IJ preterminated petitioner's applications for asylum and withholding of removal, finding her aggravated felony conviction rendered her ineligible for relief. Petitioner appealed and the BIA remanded to determine if the conviction was for a "particularly serious crime" and if petitioner was a "danger to the community." The IJ found petitioner's conviction was a "particularly serious crime" and denied her application for CAT protection on the ground that petitioner failed to demonstrate she would be tortured if removed. The Board dismissed the appeal and petitioner filed a writ of habeas corpus arguing her crime was not "particularly serious," and that the IJ and Board used the incorrect legal standard when considering the "acquiescence" of government officials under CAT.

With to regard to whether importing heroin constitutes a particularly serious crime, the court held that by failing to consider petitioner's dangerousness to the community, the BIA applied the wrong legal standard to the application for withholding of removal at the time of its decision. Nevertheless, the court found that petitioner would not be eligible for withholding of removal under the current standard for narcotics offenses set forth in *Matter of Y-L-*. In addressing petitioner's CAT claim, the court held that petitioner need show only that government officials "know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it" and that there is no additional requirement of official "consent or approval." The court held that BIA did not apply the correct legal standard in finding that petitioner "must demonstrate that the Colombian officials are willfully accepting of the narcotics organizations' torturous activities." Accordingly, the court vacated the Board's final order of removal.

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In ***Qu v. Gonzales***, 399 F.3d 1195 (9th Cir. March 8, 2005) (*Reinhardt*, Wardlaw, Paez), the Ninth Circuit held that a husband is statutorily eligible for withholding of removal solely by virtue of the fact that his wife was involuntarily sterilized pursuant to a coercive population control program. Petitioner, a native and citizen of China sought asylum, withholding of removal and CAT protection on the grounds that his wife had been forcibly and involuntarily sterilized pursuant to China's birth control policy. The IJ denied petitioner relief on the grounds that petitioner did not testify credibly and had no future fear of persecution. The Board affirmed finding petitioner remained in China for eleven years after the sterilization and had no reason to fear returning to China until September 2000 when the government discovered his religious activities. Petitioner appealed the Board's finding that he was ineligible for withholding of removal.

The court held that involuntary sterilization irrevocably strips persons of one of the important liberties we possess as humans: our reproductive freedom. Therefore, the court found that one who has suffered involuntary sterilization, either directly or because of the sterilization of a spouse, is entitled, without more, to withholding of removal. The court held that the BIA erred in not granting petitioner this relief and thus granted the petition for review.

In ***Saldarriaga v. Gonzales***, 402 F.3d 461 (4th Cir. March 29, 2005) (*Wilkinson*, Williams, Traxler), the Fourth Circuit affirmed the Board's decision denying asylum. Petitioner, a native of Columbia, claimed that he had been employed by an informant for the DEA, and he feared he would be targeted by drug dealers if returned. The IJ found petitioner had demonstrated a well-founded fear of reprisal by drug dealers and that the retaliation would be on account of a political opinion. The Board reversed, finding it implausible that petitioner would face retaliation on account of a protected statutory ground.

On appeal, the Fourth Circuit affirmed. The court found no evidence that petitioner's employment by a DEA informant was grounded in principle, inspired by altruism, or intended to advance a cause, as a political opinion applicant must show. While the court appreciated petitioner's desire to remain outside Columbia and away from the drug trade, being involved in the drug wars of a foreign country is not the

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same thing as being persecuted on account of a political opinion.

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In a *per curiam* decision in ***Sepulveda v. Gonzales***, 401 F.3d 1226 (11th Cir. March 2, 2005) (Black, Hull, Pryor), the Eleventh Circuit denied the petition for review of the Board's order affirming without opinion the IJ's denial of asylum and withholding of removal. Petitioner, a native of Columbia, sought asylum on the grounds that her political ideology placed her in conflict with guerrillas. Petitioner testified that she took part in negotiations between guerrillas and their hostages' families, and as a result received threatening phone calls. A bomb was detonated in a mailbox at a restaurant where petitioner worked and petitioner believed that it was related to her political activities.

The court held that the evidence did not show that the alien's notoriety as an activist would outlast her four-year absence from Columbia.

The IJ denied petitioner's applications, finding she had not suffered past persecution, that she failed to demonstrate a reasonable possibility of persecution if returned to Columbia, and that she failed to show that internal flight alternatives were unavailable to her. The Board affirmed without opinion.

On appeal, the court found that the alleged threats and bombing were not sufficient evidence to overturn the IJ's decision. The court noted that while evidence may permit a conclusion that the bombing may have been directed at petitioner on account of her political activity, it did not compel such a conclusion. Moreover, the threatening phone calls did not rise to the level of past persecution. Furthermore, the court found insufficient evidence that petitioner had a well-founded fear of future persecution. The court held that the evidence did not show that her notoriety as an activist would outlast her four-year absence from Columbia. While petitioner may have subjectively feared returning to Columbia, her fear was not objective. Thus, the court denied the petition for review.

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In a *per curiam* decision in ***Toure v. Ashcroft***, 400 F.3d 44 (1st Cir. Feb. 3, 2005) (Tourruella, Campbell, Lipez), the First Circuit affirmed the Board's order denying petitioner's applications for asylum, withholding of removal, and CAT protection. Petitioner, a native of Guinea, requested relief on the basis of her political opinion. Petitioner testified that her father had been imprisoned and tortured, and that she had been beaten by soldiers because they spoke out against the government and were members of a political group called the Reunion for the People of Guinea ("RPG"). Petitioner never mentioned RPG or her political affiliation in her asylum application. Petitioner alleged that her father had been shot and killed by soldiers, however the death certificate she provided indicated he died in the hospital as the result of an accident. Petitioner further alleged that if removed, she would be subject to FGM.

Petitioner also testified at the removal hearing for her husband. The IJ in petitioner's husband's hearing found petitioner had given false testimony and was therefore not a credible witness. The IJ in petitioner's hearing denied her applications for asylum and withholding of removal, finding she was not a credible witness and failed to prove past or a well-founded fear of future persecution. In making his adverse credibility determination, the IJ relied on petitioner's inconsistent testimony concerning RPG, the discrepancy concerning petitioner's father's death, and petitioner's prior false testimony. The IJ also found petitioner had presented no evidence that she would be tortured and denied CAT protection. The Board summarily affirmed.

The court found the IJ's adverse credibility determination was supported by substantial evidence, noting that petitioner's false testimony under oath illustrated a propensity to dissemble under oath. Furthermore, the court held that petitioner had no due process right to representation by counsel when she testified at her husband's deportation hearing. Lastly, the court found that petitioner had failed to demonstrate that it was more likely than not that she would be tortured if she were removed to Guinea as FGM is illegal. Accordingly, the court affirmed the Board's decision denying petitioner all relief and protection.

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Cancellation of Removal

In ***Ortiz-Cornejo v. Gonzales***, 400 F.3d 610 (8th Cir. March 11, 2005) (Melloy, *Bowman*, Benton), the Eighth Circuit reversed and remanded the Board's order denying petitioner's application for cancellation of removal. Petitioner, a native and citizen of Mexico entered the U.S. without inspection in 1987. In April 1996, petitioner returned to Mexico to visit his parents, and in May 1996 twice was stopped attempting to reenter the U.S. and was allowed to voluntarily depart. He successfully reentered in May or June of 1996. Petitioner was placed in removal proceedings in 2001, conceded removability, and sought cancellation of removal. The IJ denied relief, finding the border stops in 1996 interrupted interrupted continuous physical presence. The Board summarily affirmed.

The court held that while voluntary departure under threat of deporta-

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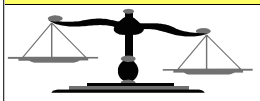

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tion may serve to interrupt the continuous physical presence requirement, the record contained no evidence that petitioner was expressly threatened with deportation when he voluntarily departed. Without evidence that petitioner's departure was under an express threat of removal, the record did not show that petitioner's continuous physical presence was interrupted. Thus, the court remanded to the Board for further proceedings.

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Citizenship

In ***Minasyan v. Gonzales***, 401 F.3d 1069 (9th Cir. March 22, 2005) (*Reinhardt*, Hall, Wardlaw), the Ninth Circuit concluded that petitioner was a derivative citizen and therefore was not subject to removal as an aggravated felon. Petitioner, a native of Armenia, entered the U.S. as a refugee with his family when he was eight. He obtained LPR status when he was ten. When he was fourteen, his parents separated and his mother assumed sole custody. The next year petitioner's mother became a U.S. citizen. After his eighteenth birthday, petitioner pleaded guilty to first degree burglary and attempted first degree burglary. Petitioner was subsequently placed in removal proceedings where he claimed derivative citizenship from his mother. The IJ ordered the INS to adjudicate petitioner's Application for Certificate of Citizenship, and the INS denied the application. The IJ ordered petitioner removed and the Board affirmed.

On appeal, the Ninth Circuit noted that petitioner was under the age of eighteen when his mother naturalized and therefore the only issue was whether his parents' separation constituted a "legal separation." Turning to California law, the court held that a separation in the "legal sense" occurred when the parents were "living separate and apart" and there had been a "final rupture of the marital relationship." Cal. Civ. Code §§ 82-84, 90-92 (1951). Accordingly, the court found that petitioner derived citizenship from his mother and therefore was not removable.

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The court held that a separation in the "legal sense" occurred when the parents were "living separate and apart" and there had been a "final rupture of the marital relationship."

In ***Smart v. Ashcroft***, 401 F.3d 119 (2d Cir. March 9, 2005) (*Walker*, Sack, Hall), the Second Circuit denied the petition for review of the Board's order finding the derivative citizenship statute applicable to foreign-born children of alien parents who naturalize did not discriminate against petitioner because he was adopted. Petitioner's adoptive mother naturalized the year before he was adopted and his adoptive father the year after. Petitioner did not reside with either parent at the time they naturalized Petitioner was admitted as a legal permanent resident and twelve years later was convicted of attempted robbery in the second degree. He was placed in removal proceedings based on his conviction for an aggravated felony. At his hearing, petitioner's sole defense to removal was that he had derived citizenship from his adoptive parents, both of whom were naturalized before petitioner's eighteenth birthday pursuant to 8 U.S.C. § 1432(b). Petitioner acknowledged that he was precluded from achieving derivative citizenship because he was not residing with his adoptive parents at the time they naturalized. Petitioner contended that the statute unconstitutionally deprived him of equal protection because it treats adopted and biological children differently. The IJ concluded that constitutional issues were beyond his jurisdiction and ordered petitioner removed. The Board affirmed without opinion.

The court noted that 8 U.S.C. § 1432(b) was repealed in 2000 by the Child Citizenship Act ("CCA"). While the CCA eliminated the requirement that adopted children reside with their adoptive parents at the time of their naturalization, the CCA was not retroactive and petitioner was no longer under the age of eighteen at the time of its enactment. With respect to the equal protection challenge, the court held that the government's interest in deterring immigration fraud was sufficient to withstand a rational basis challenge.

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In ***Solis-Espinoza v. Gonzales***, 401 F.3d 1090 (9th Cir. March 23, 2005) (*Reinhardt*, Noonan, Clifton), the Ninth Circuit determined petitioner was not born out of wedlock, and therefore was a citizen and not subject to removal. Petitioner, a native of Mexico, was raised in the U.S. by his biological father, an LPR, and his father's wife, a U.S. citizen. Petitioner's father and his wife were married at the time of petitioner's birth, although the wife is not petitioner's biological mother. When petitioner was thirty-three years old, he was convicted of felony possession of methamphetamine for sale. Petitioner was placed in removal proceedings for having been convicted of an aggravated felony, and he argued that he was a U.S. citizen. The IJ originally determined that petitioner derived citizenship from his father's wife, finding a blood relationship was not necessary to legitimate a child born to a couple during the course of marriage. The Board reversed, finding petitioner was born out of wedlock because his father was not married to his mother at the time of his birth. On remand, the IJ ordered petitioner removed and the Board affirmed without opinion.

On appeal, the Ninth Circuit, following *Scales v. INS*, 232 F.3d 1159

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(9th Cir. 2000), held that the "blood (relationship" requirement applied only to a child born out of wedlock. Turning to California Civil Code § 230, the court found that a child who was acknowledged by the father and accepted into the family by the father's wife was legitimate. Thus, the court concluded that petitioner had derived citizenship from his father's wife and therefore was not removable.

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Crimes Involving Moral Turpitude

In ***Padilla v. Gonzales***, 397 F.3d 1016 (7th Cir. Feb. 22, 2005) (*Kanne*, Wood, Williams), the Seventh Circuit dismissed a petition for review of the Board's order affirming the determination that obstruction of justice and sexual abuse were crimes involving moral turpitude. Petitioner, a native of Mexico, pleaded guilty to criminal sexual abuse of a minor in violation of. Ill.Rev.Stat., ch. 38, § 12-15 (a)(1) and later obstruction of justice in violation of Ill.Rev.Stat., ch. 38, § 31-4 (a). Petitioner also pleaded guilty to driving with a revoked license and aggravated driving under the influence of alcohol. Upon returning from abroad, petitioner was placed in removal proceedings on the basis that he was inadmissable for having committed a crime of moral turpitude. The IJ found that all four of petitioner's crimes involved moral turpitude and that the petty-offense exception did not apply because petitoner had been convicted of more than one crime. On appeal, the Board reversed the IJ's decision that aggravated driving under the influence and driving with a revoked license were crimes of moral turpitude, but affirmed the IJ's order on the basis that obstruction of justice and sexual abuse were crimes of moral turpitude.

Aiding and abetting is simply one means of committing a single crime, and thus was a theory of liability.

The court found petitioner's argument that obstruction of justice does not involve moral turpitude because it is *malum prohibitum* but not inherently immoral had no merit because obstruction of justice requires specific intent. The court held that, while obstruction of justice lacks the element of fraud, petitioner's crime did involve dishonesty or lying and thus implicated moral turpitude. Accordingly, the court found petitioner to be inadmissible and dismissed his petition for review.

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Criminal Offenses

The Ninth Circuit, in ***U.S. v. Garcia***, 400 F.3d 816 (9th Cir. March 11, 2005) (Goodwin, Magill, *Rymer*), affirmed the District Court's order finding aiding and abetting alien smuggling to be a different theory of liability rather than a separate offense. Petitioner was charged with bringing two undocumented aliens into the U.S. for private financial gain and transporting them within the U.S. Petitioner was also charged with aiding and abetting with respect to each count. Petitioner filed a pretrial motion to dismiss on grounds of duplicity and asked that the jury be required to agree whether petitioner was guilty as a principal or as an aider and abettor. The district court declined to give such an instruction, reasoning that aiding and abetting is not a separate and distinct offense, but rather a different theory of liability for the substantive offense. Petitioner was found guilty on all counts.

On appeal, the court held that aiding and abetting is simply one means of committing a single crime, and thus was a theory of liability. The court found that the jury's verdict reflected agreement that petitioner committed the particular offenses of bringing illegal aliens to, and transporting them within, the U.S. and it did not matter whether some jurors found that petitioner performed these acts himself and others that he intended to help someone else who did. Accordingly, the court affirmed the district court's ruling.

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In a *per curiam* decision in ***U.S. v. Remoi***, — F.3d —, 2005 WL 845884 (3d Cir. April 13, 2005), (Nygaard, Mckee, Chertoff), the Third Circuit affirmed the district court's order convicting respondent of knowingly preventing and hampering his deportation under a final order of removal. Remoi was lawfully admitted to the U.S. as a student at Rutgers University until he was expelled based upon convictions for two counts of criminal sexual contact. He was ordered removed and filed a habeas petition, but did not obtain a stay of removal. Remoi physically resisted efforts to place him on an airplane and was subsequently convicted of knowingly preventing and hampering his departure. His sentence was adjusted upward based on his previous convictions for criminal sexual contact which the court determined were "crimes of violence."

The court dismissed Remoi's argument that the INS agents induced him to commit the crime by warning him against resistence to removal and by rejecting his unlawful request not to be removed. The court reasoned that his illogical argument amounted to a claim that by enforcing the law, the agents prompted him to break it. Furthermore, the court was not persuaded by Remoi's contention that his convictions for criminal sexual contact were not "crimes of violence," because the offenses exploited the victims' helplessness but did not involve any actual force. The court found that "forcible" was not limited to "physical" force, therefore respondent's sexual contact

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with physically helpless victims was a "crime of violence." Accordingly, the court affirmed the district court's judgment.

Denaturalization

In ***U.S. v. Hansl***, — F.Supp.2d —, 2005 WL 803445 (S.D.Iowa April 8, 2005), the district court granted the government's motion for summary judgment and revoked respondent's citizenship. Respondent, a native of Germany, applied for a visa to enter the U.S. under the Refugee Relief Act of 1953. However, on his application, respondent neglected to mention the fact that during the Second World War, he served in the Death's Head Battalion of the SS at two Nazi concentration camps. The government sought to denaturalize Hansl of his citizenship on the ground that he assisted in the persecution of persons because of their race, religion or national origin. Hansl argued that he did not "personally" advocate or assist in the persecution of the prisoners at the concentration camps and therefore remained eligible for citizenship.

After reviewing the record, the court found ample evidence that Hansl personally advocated or assisted in persecution. The court noted that he admitted that, as a guard at the concentration camps, his duty was to prevent prisoners from escaping and to inform them that he would shoot them if they tried to escape. Defendant also admitted to assisting in the search for an escaped prisoner who was later shot. The court found that defendant personally undertook these actions and thus personally assisted in persecution within the meaning of the RRA. Finding he was ineligible to receive a visa under the RRA, the court found respondent was never lawfully admitted to the U.S. and his citizenship was illegally procured.

Fourth Amendment

In ***Muehler v. Mena***, 125 S.Ct. 1465 (March 22, 2005), the Supreme Court held that police officers executing a search warrant need no independent reasonable suspicion in order to question occupants a home about their immigration status. Respondent was detained in handcuffs while petitioners executed a search warrant of the premises and was questioned about her immigration status. Petitioner sued the officers under 42 U.S.C. § 1983, alleging the detainment and questioning violated the Fourth Amendment. The district court found in her favor and the Ninth Circuit affirmed.

The Supreme Court held that neither the use of handcuffs nor the inquiry into respondent's immigration status constituted a Fourth Amendment violations.

The Supreme Court held that neither the use of handcuffs nor the inquiry into respondent's immigration status constituted a Fourth Amendment violations. The Court, following its precedent in *Michigan v. Summers,* 452 U.S. 692 (1981), held that officers executing a search warrant for contraband had the authority to detain occupants of the premises while a proper search is conducted and that minimizing the risk of harm to officers is a substantial justification for detaining an occupant during a search. Furthermore, the Court held that the officers did not need independent reasonable suspicion in order to question respondent. The Court held that because respondent's initial detainment was lawful, there was no additional seizure within the meaning of the Fourth Amendment, and therefore no justification for inquiring about immigration status was required. Accordingly, the Court vacated the circuit court's decision and remanded for further proceedings.

Habeas Corpus

In ***Excellent v. Ashcroft***, 359 F.Supp.2d 333 (S.D.N.Y. March 8, 2005) (Marrero), the District Court dismissed petitioner's habeas claim for lack of jurisdiction. Petitioner, a Haitian national and lawful permanent resident, was placed in removal proceedings based on a drug conviction. Petitioner was denied cancellation of removal and ordered removed in 1996. In February 2004, DHS arrested petitioner on an outstanding immigration warrant and he has been in detention since that time. Petitioner filed the instant habeas petition while in DHS custody in Louisiana. At the time of this decision, petitioner was detained in Texas.

The court noted that petitioner filed his petition while detained in Louisiana, and was currently detained in Texas. Thus, the court found that none of the respondents directly controlled DHS facilities in either location and had no immediate physical control over him. Consequently, the court found it was without jurisdiction over petitioner's challenge to his confinement. Thus, the court dismissed the petition without prejudice.

In ***Gerve v. BICE***, — F.Supp.2d —, 2005 WL 712473 (D.Conn. March 29, 2005), the district court found it was without jurisdiction to entertain petitioner's habeas petition due to his failure to exhaust administrative remedies. Petitioner, a Haitian citizen, was granted asylum in 1996 based on his status as a political supporter of Jean Bertrand Aristide. In 1997, petitioner pleaded guilty to sale of narcotics/ hallucinogens in violation of Connecticut General Statutes § 21a-277(a). While he was not sentenced to a prison term, he apparently remained in, or reentered, state custody where he was released to BICE. Petitioner was placed in removal proceedings on the ground that he had been convicted of an aggravated felony. The IJ ordered petitioner removed and pretermitted his applica-
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tions for asylum and withholding of removal. Petitioner did not appeal to the Board, rather he filed a habeas petition arguing that changed circumstances in Haiti since the ouster of Aristide would result in his torture or death.

The district court found that it lacked jurisdiction because petitioner had failed to appeal the IJ's decision to the Board and thus failed to exhaust his administrative remedies. The court noted that even if it had jurisdiction, it could not find that petitioner was eligible for asylum because of his conviction of a controlled substance violation.

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In ***Gorsira v. Chertoff***, — F.Supp.2d —, 2005 WL 831779 (D.Conn. April 11, 2005), the district court held that INA section 1252 (b)(5) does not bar its consideration of a nationality claim raised in a habeas petition, and that the text of section 1252(b)(5) does not suggest that a transfer to the court of appeals is required or appropriate. Petitioner, a native of Guyana, was convicted of threatening in the second degree and narcotics possession. He filed a habeas petition in which he claimed derivative citizenship based on his mother's naturalization. The district court determined that Gorsira's paternity had never been established by legitimation under the laws of Guyana. Therefore, as a child born out of wedlock whose paternity had not been established by legitimation, petitioner derived citizenship when his mother naturalized. The government moved for reconsideration, relying on 8 U.S.C. § 1252(b)(5) to argue that the district court should have transferred the petition to the Court of Appeals because it raised a nationality claim.

After reviewing Second Circuit case law and reconsidering the statutes at issue, the court held that it retained jurisdiction over a nationality claim in the habeas petition, finding that section 1252(b)(5) only applied to cases on direct review. The court acknowledged that the government had already filed an appeal in the case, and that it would not have gotten to the Court of Appeals any faster by transfer than by appeal.

The court held that it retained jurisdiction over a nationality claim in the habeas petition, finding that section 1252(b)(5) only applied to cases on direct review.

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In ***Mejia v. Ashcroft***, 360 F.Supp.2d 647 (D.N.J. March 14, 2005) (Martini), the District Court held that the mandatory detention of an alien without an opportunity for a bond hearing did not violate petitioner's due process rights. Petitioner, a citizen of the Dominican Republic, entered without inspection and was ordered deported *in absentia* in 1990. In 1992, he was convicted of possession with intent to sell cocaine. In 1994, petitioner was admitted into the U.S. under his own name, however he failed to disclose his prior convictions in his visa application. In 2004, petitioner was detained upon his return from a brief trip to the Dominican Republic and was charged with inadmissibility based on his prior convictions, his prior fraudulent procurement of admission, and his lack of valid entry documents. Petitioner filed a habeas petition arguing that his mandatory detention violated his Fifth Amendment rights because his convictions predated the enactment of IIRIRA.

The court held that petitioner's due process arguments were disposed of by the Supreme Court's opinion in *Demore v. Kim,* 538 U.S. 510 (2003), which provided that the mandatory detention of certain criminal aliens was constitutional. The court dismissed petitioner's equal protection argument, finding numerous justifications for the disparate treatment of returning and non-returning LPRs rationally related to the legitimate government interest in providing a disincentive for departed criminal aliens to attempt reentry. Accordingly, the court dismissed the habeas petition and denied all relief.

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Labor Certification

In ***Daylily Farms, Inc. v. Chao***, 357 FSupp.2d 356 (D.Mass. Feb. 22, 2005) (O'Toole), the district court dismissed plaintiffs' action concerning the Labor Department's certification procedures. Plaintiffs, owners and operators of businesses on Martha's Vineyard, brought suit arguing that the Labor Department's certification practices were inequitable and violated their due process rights. Plaintiffs argued that the requirement that employers request certification no earlier than 120 days prior to the commencement of employment was unfair to employers seeking summer help as the visas were issued on a first-come, first-served basis and therefore employers seeking winter or spring employment were given preference.

The court found that there was no indication that any preference was purposely intended or that the various regulatory processes were designed to effectuate one. Furthermore, the court held that even in the distinction were intended, it would be permissible so long as it rested on some rational predicate. The court found that the plaintiffs proffered no basis for finding irrational the Labor Department's determination that the prospect of short-term swings in local labor conditions make it advisable to conduct the inquiry within four months of the proposed commencement of employment. Accordingly, the court dismissed the plaintiffs' action.

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Motions to Reopen/Reconsider

In ***Alarcon-Chavez v. Gonzales***, 403 F.3d 343 (5th Cir. March 14, 2005) (Jones, *Wiener*, Clement) the Fifth Circuit reversed the Board's decision affirming without opinion the IJ's denial of petitioner's motion to reopen. Petitioner, a citizen of Cuba, was paroled into the U.S. and applied for asylum, withholding of removal, and CAT protection. Petitioner appeared timely for several hearings but was twenty minutes late for his asylum hearing due to traffic difficulties. The IJ issued an *in absentia* removal order and refused to proceed with the hearing despite being notified that petitioner had arrived. Petitioner filed a motion to reopen which was denied by the IJ on the basis that petitioner did not establish "exceptional circumstances." The Board affirmed without opinion.

The court found that when there is only a slight tardiness, the IJ is still either on the bench or recently retired and close by, and the alien's arrival is still within business hours, it is an abuse of discretion to treat such slight tardiness as a non-appearance.

The court held that it was legal error, and therefore an abuse of discretion, to hold that petitioner's twenty-minute tardiness constituted a failure to appear. The court found that when there is only a slight tardiness, the IJ is still either on the bench or recently retired and close by, and the alien's arrival is still within business hours, it is an abuse of discretion to treat such slight tardiness as a non-appearance. Accordingly, the court granted the petition for review and remanded to allow petitioner to present his claims.

In ***Allabani v. Gonzales***, 402 F.3d 668 (6th Cir. March 28, 2005) (*Martin*, Batchelder, O'Meara), the Sixth Circuit affirmed the orders of the Board denying petitioner's application for asylum and withholding of removal, as well as the denial of his motion to reopen. Petitioner, a native and citizen of norther Yemen, sought relief on the grounds that he was arrested and tortured three times by the Yemeni government. The IJ denied relief, finding petitioner had failed to submit documentation to support his application, that there was no evidence of the government-opposed organizations in which petitioner claimed membership, and petitioner had failed to establish past persecution or a well-founded fear of future persecution.

Petitioner, through counsel, appealed to the Board. Petitioner's counsel failed to submit a brief in support of the appeal. The Board dismissed and petitioner, through new counsel, filed a motion to reopen alleging ineffective assistance of counsel. The Board denied the motion, finding petitioner's counsel's representation did not constitute ineffective assistance of counsel because petitioner had failed to show his eligibility for asylum.

On appeal, the Sixth Circuit affirmed. The court agreed with the Board's finding that while petitioner's counsel was clearly ineffective, because petitioner failed to establish prima facie eligibility for asylum, his counsel's performance could not be considered prejudicial. While petitioner submitted additional evidence to the Board, the court found that it did not show he had been arrested, detained, or tortured, and did not prove the existence of, or petitioner's membership in, the political organizations in which he claimed membership.

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In ***Borges v. Gonzales***, 402 F.3d 398 (3rd Cir. March 30, 2005) (Barry, Fuentes, Becker), the Third Circuit held the 180-day time limitation for filing a motion to reopen can be equitably tolled and can be tolled for fraud. Petitioner was placed in removal proceedings as a visa overstay. Petitioner hired Entra America, an immigration services company, to provide him with representation. Petitioner failed to appear at his removal hearing, allegedly because Entra told him if he went to court without an attorney, he would be deported, and because he had a pending application for adjustment of status, he did not need to attend his hearing. The IJ ordered him removed *in absentia*.

Petitioner received a letter from the INS telling him to report for deportation. Petitioner was told by Entra that the *in absentia* order had been taken care of and that a motion to reopen would be filed. The motion was denied, however petitioner did not receive a copy of the decision. Two years later petitioner contacted Entra to make sure he would be able to reenter the U.S. if he left. He was then notified that the order of removal had not been vacated. Entra agreed to file a second motion to reopen, but never did. When petitioner called Entra, he was told that the motion was still under consideration.

Petitioner obtained new counsel and filed a second motion to reopen, alleging that he had been defrauded by Entra. Petitioner argued that the 180-day period for filing a motion to reopen should be tolled until the date he learned of the fraud. The IJ denied the motion as untimely and because petitioner failed to comply with the *Lozada* requirements for an ineffective assistance of counsel claim. The Board dismissed the appeal, finding that an ineffective assistance of counsel claim does not qualify as an exception to the 180-day requirement for filing a motion to reopen. The Board did not address petitioner's argument that the 180-day requirement could be tolled for fraud.

The Third Circuit held that the

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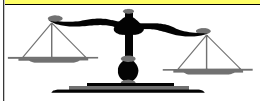

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180-day time limit is appropriately considered as analogous to a statute of limitations and, thus, subject to equitable tolling, and that it can be tolled for fraud. Noting that a finding of fraud is a factual determination to be made by the Board, the court remanded for further proceedings to determine if fraud had occurred.

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In ***DeAraujo v. Ashcroft***, 399 F.3d 84 (1st Cir. Feb. 23, 2005) (Selya, *Campbell*, Lipez), the First Circuit dismissed a petition for review of the Board's denial of a motion to reopen. Petitioner, a native of Portugal, was convicted of assault and battery with a deadly weapon and was placed in removal proceedings as an aggravated felon. The IJ ordered him removed and the state court subsequently vacated petitioner's conviction. Petitioner successfully moved to reopen and INS amended the charging document, alleging petitioner was removable on account of a prior assault conviction as well as a controlled substance conviction. The IJ ordered petitioner removed, finding the assault conviction was a crime of violence and pretermitted an application for cancellation of removal based on the drug convictions. The Board summarily dismissed petitioner's appeal for failure to file a brief. Petitioner's motion to reconsider was denied as numerically barred. Petitioner again filed a motion to reopen when his drug convictions were vacated. The Board denied the motion, finding that while the conviction was vacated, it was not vacated on the ground that he was not factually guilty. Petitioner appealed, arguing his assault conviction was not an aggravated felony and that the Board abused its discretion in failing to reopen his proceedings.

The Third Circuit held that the 180-day time limit is analogous to a statute of limitations and, thus, subject to equitable tolling, and it can be tolled for fraud.

The court determined that it lacked jurisdiction as to the aggravated felony ground because no petition for review was filed. The court noted that while petitioner sought review of the Board's order denying his motion to reopen, he did not address the aggravated felony claim. Because the court concluded that it lacked jurisdiction with regard to the aggravated felony claim, petitioner remained removable on that ground and the court found it lacked jurisdiction to reach his other claims on direct review.

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In ***Santos-Salazar v. Department of Justice***, 400 F.3d 99 (2d Cir. March 1, 2005) (*Kearse*, Sack, Hall), the Second Circuit dismissed the petition for review of the Board's decision denying a motion to reconsider. Petitioner, a citizen of the Dominican Republic, was convicted of attempted criminal possession of a controlled substance in the third degree pursuant to N.Y. Penal Law § 220.16. Petitioner was placed in removal proceedings on the grounds that he was an alien present in the U.S. without being lawfully admitted and an alien convicted of a controlled-substance offense. The IJ found petitioner was subject to removal and ineligible for relief; the Board affirmed without opinion. Petitioner filed a motion to reopen which was denied by the Board, and subsequently moved for reconsideration of that denial. The Board denied reconsideration, finding no error in the denial of the motion to reopen and that petitioner was ineligible for relief on account of his controlled substance violation.

On appeal, the Second Circuit, following its holding in ***Durant v INS***, held that because it would lack jurisdiction to review over the underlying order of removal and the order denying petitioner's motion to reopen, it also lacked jurisdiction to review the Board's order denying the motion to reconsider because reviewing the motion to reconsider would indirectly provide a vehicle for challenging the order of removal. Accordingly, the court dismissed the petition for review.

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In ***Zhao v. Gonzales***, -- F.3d --, 2005 WL 590829 (5th Cir. March 15, 2005) (*Smith*, Garza, Vance), the Fifth Circuit granted the petition for review and reversed the Board's order denying a motion to reconsider. Petitioner, a native of China, applied for asylum on the ground that he was a practitioner of Falun Gong. While the IJ found petitioner's testimony to be credible, he found petitioner had failed to establish either past persecution or a well-founded fear of future persecution and the Board affirmed. Petitioner filed a motion to reconsider, arguing that the IJ improperly excluded certain documents he presented and sought to introduce additional documents concerning the treatment of Falun Gong practitioners in China. The Board denied reconsideration and petitioner appealed.

The court found that the Board did not abuse its discretion in refusing to admit the unauthenticated documents as they had been excluded by the IJ and the petitioner had failed to contest that ruling on direct appeal. However, the court found that the Board abused its discretion in failing to allow petitioner to introduce the 2002 Country Reports. With regard to petitioner's asylum claim, the court found no error in the IJ's determination that petitioner had failed to demonstrate past persecution. On the subject of a well-founded fear of future persecution, the court found the petitioner to be a practitioner of Falun Gong and that he was sought by the local authorities. Coupled with the Country Report stating that China in-

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tended to crack down on Falun Gong practitioners, the court found petitioner had a subjective fear of future persecution which was objectively reasonable. Thus, the court found the Board abused its discretion and reversed the Board's order.

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Naturalization

In ***Alkenani v. Barrows***, 356 F.Supp.2d 652 (N.D.Tex. Feb. 14, 2005) (Kaplan), the district court denied petitioner's motion for a hearing on his application for naturalization. Petitioner's application had been deferred pending the receipt of arrest records and court disposition records related to a 1996 arrest on traffic warrants. Petitioner failed to provide the INS with a police clearance letter, therefore INS found that he could not meet his burden of establishing "good moral character" and denied his application. Petitioner appealed to the Dallas District Director, and was eventually provided a clearance letter. At his hearing, petitioner was told that his application would be taken under advisement pending a criminal background check and that it was uncertain when his case would be approved. Nine months later, petitioner filed this suit seeking a hearing on his application for naturalization pursuant to 8 U.S.C. § 1447 (b) or, in the alternative, a writ of mandamus requiring respondent to adjudicate his application.

While respondents had a clear duty to process petitioner's application within a reasonable time, the fifteen-month delay in deciding the appeal was not unreasonable.

The court held that petitioner was ineligible for relief under § 1447 (b) because he was appealing from a denial determination under § 1447 (a). The court noted it was unaware of any statute which authorizes a *de novo* hearing on a naturalization hearing in federal district court while a 1447(a) appeal is pending. The court noted that while respondents had a clear duty to process the application within a reasonable time, the fifteen-month delay was not unreasonable. Accordingly, the court denied the petition.

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Right to Counsel

In ***Biwot v. Gonzales***, — F.3d —, 2005 WL 851219 (9th Cir. April 14, 2005) (Fletcher, *McKeown*, Gould), the Ninth Circuit concluded petitioner had been denied his statutory right to counsel. Petitioner, a citizen of Kenya, was charged by INS with failure to maintain his student status. Petitioner appeared at his July 3, 1999 hearing without counsel and was granted a continuance until July 9, leaving him only two days to secure counsel. He was granted an extension until July 15. Petitioner was unable to secure counsel and the IJ proceeded with the hearing, ultimately determining petitioner was removable and ineligible for relief. Petitioner said he would not appeal, but later filed an appeal. The Board ignored petitioner's two letters explaining his desire to apply for asylum, and dismissed the appeal for lack of jurisdiction as a result of petitioner's waiver of appeal.

The court noted that IJs must provide aliens with reasonable time to locate counsel and permit counsel to prepare for the hearing. The court held that the continuances totaling five working days were insufficient to allow petitioner to secure counsel. The court held that the IJ's denial of a third continuance was an abuse of discretion because it was tantamount to a denial of counsel. The court noted that although IJs may not be required to undertake Herculean efforts to afford the right to counsel, at a minimum they must inquire whether the petitioner wishes counsel, determine a reasonable period for obtaining counsel, and assess whether any waiver of counsel is knowing and voluntary.

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Voluntary Departure

In ***Barrios v. Gonzales***, 399 F.3d 272 (3rd Cir. Feb. 25, 2005) (Nygaard, *Garth*, Pollak), the Third Circuit granted the petition for review of the denial of adjustment of status. Petitioner, a native of Chile, was found removable and granted voluntary departure and the Board affirmed. Prior to his voluntary departure date, petitioner married a USC who filed an I-130 on his behalf. Petitioner filed a motion to reopen eight days before his voluntary departure period expired. The Board denied the motion two months later on the ground that an alien who fails to comply with a voluntary departure order is barred from applying for adjustment of status barring "exceptional circumstances." Relying heavily on its decision in *Matter of Shaar*, the Board held that the pendency of a request for relief failed to constitute an "exceptional circumstance."

The Third Circuit disagreed, holding that a motion to reopen that has not been intentionally delayed and was filed *prior to the date of voluntary departure,* but not acted upon, falls within the "exceptional circumstances" exception. Furthermore, the court, following *Azarte v. Ashcroft*, held that the voluntary departure period is tolled while the Board considers a motion to reopen in both pre and post-IIRIRA cases.

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CASES SUMMARIZED

OIL NEWS

Director Thom Hussey has announced the selection of James "Beau" Grimes as Senior Litigation Counsel. Beau joins SLC Mary Jane Candaux on Assistant Director Mark Walters' team. Before joining OIL, Mr. Grimes served for six years as a Judge Advocate in the U.S. Navy, serving as a trial defense counsel and an appellate government counsel at Norfolk, Virginia and Washington, D.C.

Kristin Edison joined OIL recently through the Honors Program. She earned her J.D. from the Washington College of Law at American University in May 2004. Ms. Edison also received her M.A. in International Affairs from its School of International Service. She worked at OIL as a law clerk in the fall of 2004. Ms. Edison graduated *magna cum laude* from Indiana University, Indiana, where she received degrees in French and Political Science and was a member of *Phi Beta Kappa*.

Two OIL attorneys became parents in recent months. Senior Litigation Counsel Blair O'Connor and his wife Kristin welcomed their first child, daughter Keira Anne O'Connor ,on April 11th. OIL attorney Shahira Tadross and her husband Shanon Marks welcomed second daughter ,Eleni Samaar Tadross-Marks, on March 24th. Eleni joins big sister Lydia, who is 2.

Francesco Isgro has returned to OIL after a detail to serve as Senior Counsel to the Deputy Attorney General. He has resumed his responsibilities as editor of the Immigration Litigation Bulletin and as OIL's Director of Training.

On April 29, 2005, OIL attorney John Davis retired after 32 years of government service and 10 years at OIL. Prior to OIL, Mr. Davis worked in the Land and Natural Resources Division, for the Unemployment Compensation Board, Neighborhood Legal Services, and the Federal Power Commission.

OIL also wishes a fond farewell to Senior Litigation Counsel Hugh Mullane who transferred to the Office of Legal Policy and Senior Litigation Counsel Julia Doig Wilcox who leaves for the Office of General Counsel at the Department of Homeland Security.

The goal of this monthly publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

"To defend and preserve the Executive's authority to administer the Immigration and Nationality laws of the United States"

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