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Immigration Litigation Bulletin

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REVIEW OF CONSTITUTIONAL CLAIMS AND QUESTIONS OF LAW UNDER THE REAL ID ACT

In the REAL ID Act, Congress enacted new subsection 242(a)(2)(D) of the Immigration and Nationality Act (INA), providing for direct judicial review in the courts of appeal of "constitutional claims or questions of law" that would otherwise be barred by certain INA provisions restricting jurisdiction to review removal orders. See REAL ID Act of 2005, Pub. L. 109-13, Div. B, 119 Stat. 231, section 106(a)(1)(A)(iii) (May 11, 2005). Specifically, Congress stated that "[n]othing in subparagraph (B) or (C)" of section 242(a)(2), "or in any other provision of this [Immigration and Nationality] Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."

This provision became effective immediately upon the REAL ID Act's enactment, and applies regardless of whether the final order of removal, deportation or exclusion was issued "before, on, or after" the enactment date. *Id.* at section 106(b). The provision's adoption raises several interesting questions which this article endeavors to address, regarding both the specific statutory review-precluding provisions that Congress meant to cover, and the meaning of the language "constitutional claims or questions of law" itself.

> A question would appear to be one of "law" if it inquires into the meaning of statutory language in the context of undisputed or assumed facts.

Background: IIRIRA and *St. Cyr*

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended the INA to create several

(Continued on page 3)

REINSTATEMENT CASE TO BE HEARD EN BANC BY NINTH CIRCUIT

On September 12, the Ninth Circuit granted the government's petition for rehearing en banc and vacated the panel's decision in ***Morales-Izquierdo v. Ashcroft,*** 388 F.3d 1299 (*Reinhardt*, D.W. Nelson, Thomas) (9th Cir. 2005), where the panel had struck down as *ultra vires* the reinstatement regulation under 8 C.F.R. § 241.8. The regulation prescribes procedures for an immigration officer to summarily reinstate a prior removal order against a recidivist alien who has illegally reentered the country after previously having been removed or voluntarily departed under a removal order.

The petitioner illegally entered the United States in 1990 and four years later he was ordered deported

(Continued on page 2)

OIL'S DEPUTY DIRECTOR DAVID M. MCCONNELL RECEIVES ATTORNEY GENERAL'S AWARD FOR EXCELLENCE IN MANAGEMENT

OIL's Deputy Director for Operations, David M. McConnell, received the Attorney General's Award for Excellence in Management in recognition of his exceptional and extraordinary management of immigration litigation at the Attorney General's 53rd Annual Awards Ceremony, held

(Continued on page 2)

OIL'S ELEVENTH ANNUAL IMMIGRATION LAW SEMINAR WILL BE HELD ON OCTOBER 24-28, IN WASHINGTON, D.C. SEE PP. 21-22

Highlights Inside

DAVID MCCONNELL

(Continued from page 1)

at Constitution Hall on August 31 2005. In presenting the award, Paul R. Corts, the Assistant Attorney General for Administration stated as follows:

> Mr. McConnell has ensured that the Office of Immigration Litigation has operated at the highest levels of efficiency and effectiveness. He has enabled the Department to respond successfully to the critically important challenge of our Nation's immigration docket. Over the past three years, the number of new cases received by the Office of Immigration Litigation has increased 39, 59, and 22 percent respectively, expanding the immigration docket by more than 15,000 new matters each year.
>
> Mr. McConnell's exceptional management has extended far beyond the distribution and defense of many new immigration cases. He has implemented initiatives and reforms to increase the productivity of the Department's immigration litigators, and he has reached out to client agencies and the courts to ensure litigation efficiencies. Mr. McConnell has been that rare and valuable manager that makes organizations successful, people productive, and colleagues happy to work together.

Mr. McConnell is a graduate of the University of Virginia and the Wake Forest University School of Law. He joined OIL in September 1990 and became an Assistant Director in June 1996. In 1999 he was appointed Deputy Director in charge of operations. Prior to joining OIL Mr. McConnell was an attorney with the Solicitor's Office of the United States Department of Labor, Division of Mine Safety and Health.

REINSTATEMENT RULE BEFORE NINTH

(Continued from page 1)

in absentia. In 1998, the INS located the petitioner in California and executed his deportation order. Subsequently, the petitioner again reentered illegally and, in 2001 applied for adjustment of status based on his marriage to a United States citizen. In 2003, when petitioner appeared for his adjustment he was served with a denial of the application, along with a Notice of Intent To Reinstate his prior deportation under INA § 241(a)(5) and 8 C.F.R. § 241.8. He then filed a petition for review.

The reinstatement procedure accounts for 40% of all removals nationwide, and two-thirds of nationwide reinstatements take place in the Ninth Circuit.

The Ninth Circuit panel unanimously granted the petition and construed the summary reinstatement procedures to be *ultra vires* to the procedures for conducting initial removal proceedings under INA § 240. Applying *Chevron,* the panel stopped at step one of the analysis, and concluded that the summary reinstatement procedure is inconsistent with the plain language and structure of the INA.

In its petition for rehearing *en banc*, the government argued, *inter alia*, that the panel's decision has a significant adverse impact on the government's ability to remove tens of thousands of illegal aliens in the Ninth Circuit without undue delay. "The reinstatement procedure which has been struck down is the means by which the Government removed over 98,000 illegal aliens in the Ninth Circuit in the last three years – 42,000 illegal aliens in 2004 alone. The reinstatement procedure accounts for 40% of all removals nationwide, and two-thirds of nationwide reinstatements take place in the Ninth Circuit."

The government also warned that "the decision threatens to clog crowded immigration judge dockets, stretch the Government's detention capacity for illegal aliens, and could cause the release of thousands of illegal aliens from detention pending completion of their removal proceedings, who are then likely to abscond."

The government also argued that the panel's decision squarely conflicts with the decision by the First Circuit in *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004), the only other circuit to decide the validity of the summary reinstatement procedure. In *Lattab* the court concluded, after applying step two of *Chevron*, that it was "reasonable to interpret the INA, as amended, as giving the government authority to craft a streamlined procedure for the reinstatement of earlier deportation orders."

By Francesco Isgro, OIL

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EXPEDITED REMOVAL EXPANDED

DHS has expanded the expedited removal (ER) authority from three to nine U.S. Customs and Border Protection (CBP) Border Patrol Sectors, implementing this policy across the entire southwest border. The ER administrative process is aimed at reducing the number of illegal aliens from countries other than Mexico who have spent less than 14 days in the United States and who are apprehended within 100 miles of the border. "Expanding Expedited Removal gives Border Patrol agents the ability to break the cycle of illegal migration. The use of this authority will allow DHS the ability to gain greater control of our borders and to protect our country against the terrorist threat," stated DHS Secretary Chertoff.

JUDICIAL REVIEW UNDER THE REAL ID ACT

(Continued from page 1)

restrictions on judicial review of removal orders, particularly for criminal aliens. For example, new section 242(a)(2)(C) of the INA prohibited any court from reviewing removal orders issued against aliens removable for having committed enumerated criminal offenses, including, *inter alia,* aggravated felonies, controlled substance offenses, firearms offenses, and certain types of multiple crimes involving moral turpitude. However, in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held in a 5-4 decision that notwithstanding section 242(a)(2)(C)'s sweeping preclusive language, it only covered direct petitions for review in the courts of appeals, and did not preclude criminal aliens from obtaining habeas corpus review of their removal orders in district courts under 28 U.S.C. § 2241.

Congress acted to avoid the constitutional Suspension Clause concerns cited in *St. Cyr*, while making unmistakably clear that criminal and non-criminal aliens alike were to receive a single "bite of the apple" of judicial review of their removal orders.

The Court reached this result as a matter of statutory construction, relying on the jurisdictional bar's omission of language expressly referencing habeas jurisdiction, but it did so against a backdrop of constitutional concerns that it believed would be raised under the Suspension Clause if section 242(a)(2)(C) were construed as barring even habeas review. At the same time, the Court emphasized that the scope of the habeas review that would remain for criminal aliens was "far narrower" than the scope of the traditional APA-style judicial review that would have been available to them in an appellate petition for review, in that habeas review had historically extended only to constitutional claims and questions of law. 533 U.S. at 312. The Court also acknowledged that, without raising any constitutional questions, Congress could provide an adequate substitute for habeas review through direct review in the courts of appeals of issues that otherwise would fall within the scope of habeas jurisdiction, if it so chose. *Id.* at 314 n.38.

The Enactment of New § 242(a)(2)(D)

In the REAL ID Act, Congress took the Supreme Court up on its invitation to provide criminal aliens with an adequate alternative to district court habeas review.

The new legislation added express coverage of section 2241 habeas jurisdiction to many of the INA's jurisdictional restrictions on judicial review of removal orders, including the bar for criminal aliens at INA § 242(a)(2)(C), while simultaneously conferring upon the courts of appeals -- through new INA § 242(a)(2)(D) -- the authority to review (even for otherwise "barred" aliens) the kinds of issues that had fallen within the scope of the formerly available habeas review -- i.e., "constitutional claims" and "questions of law." Congress thereby acted to avoid the constitutional Suspension Clause concerns cited in *St. Cyr*, while making unmistakably clear that criminal and non-criminal aliens alike were to receive a single "bite of the apple" of judicial review of their removal orders, through the exclusive remedy (except in expedited removal cases under INA § 235(b)(1)) of a petition for review in the appropriate court of appeals. *See Grass v. Gonzales*, 418 F.3d 876, 878-79 (8th Cir. 2005); *Elia v. Gonzales*, 418 F.3d 667, 672-73 & n.5 (6th Cir. 2005); *Bonhometre v. Gonzales*, 414 F.3d 442, 445-46 (3rd Cir. 2005); H. Conf. Rep. No. 109-72 at 172-76 (May 3, 2005). This plain legislative intent should inform all endeavors to ascertain new section 242(a)(2)(D)'s meaning and scope.

The Particular Review Preclusions Covered by § 242(a)(2)(D)

Perhaps the first step in analyzing section 242(a)(2)(D) is to ask: which particular restrictions on judicial review have become subject to the new exception for constitutional and legal questions (putting aside for the moment the inquiry into what precisely is a "constitutional" or "legal" question)? The answer provided by the statute is that the exception applies to INA § 242(a)(2)(B) (precluding review of certain discretionary decisions), § 242(a)(2)(C) (the "criminal alien" bar discussed above), and all other review restrictions in the INA except those set forth in other parts of section 242. *See, e.g., Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005).

Thus, for example, constitutional and legal questions are now reviewable notwithstanding the bar at INA § 208(a)(3) on review of determinations relating to the timeliness of asylum applications -- because section 208 falls within a part of the INA outside of section 242 -- but they are not exempted from the "final order of removal" requirement at INA § 242(a)(1), the 30-day deadline for petitions for review at section 242(b)(1), or the exhaustion requirement at section 242(d)(1) -- because those provisions fall within a part of section 242 other than subparagraphs (a)(2)(B) and (a)(2)(C).

This result is consistent with the absence of any indication in the REAL ID Act or its legislative history that Congress intended to relieve aliens from the obligation of complying with the *procedural* requisites for judicial review that comprise the bulk of section 242. Likewise, and again because of the pertinent restriction's location within a part of section 242 other than subparagraphs (a)(2)(B) and (C), section 242 (a)(2)(D)'s exception for constitutional and legal claims does not ap-

(Continued on page 4)

REVIEW UNDER REAL ID

(Continued from page 3)

ply to section 242(e), which provides for "systemic" and individual habeas challenges to the review of expedited removal orders under INA § 235(b)(1), but only under highly narrowly defined circumstances. (Notwithstanding section 242(a)(2)(D)'s inapplicability, constitutional claims relating to expedited removal are reviewable under section 242(e)(2)'s limited habeas regime pursuant to the Supreme Court's holding in *Webster v. Doe*, 486 U.S. 592 (1988), that judicial review restrictions are presumed not to apply in a manner that would wholly preclude constitutional challenges unless Congress has expressly stated an intent to bar such challenges.) Further, given its reference to judicial review restrictions within "this Act," i.e., the INA, section 242(a)(2)(D)'s provision for review of constitutional and legal claims would not appear to cover those review restrictions that fall outside the INA altogether, such as the restrictions under the Nicaraguan and Central American Relief Act of 1997 (NACARA).

It is also important to remember that section 242(a)(2)(D) creates only an exception to judicial review bars set forth elsewhere, and does not create any bars itself. In other words, where no independent restriction on review exists, section 242(a)(2)(D) does not itself limit review to only constitutional claims or questions of law. For example, section 242(a)(2)(B)'s restriction on review of discretionary decisions has been held not to preclude review of threshold factual questions that are non-discretionary in nature, such as whether an alien has accrued the requisite "continuous physical presence" for cancellation of removal, *see Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002), and section 242(a)(2)(D)'s use of the words "constitutional" and "legal" does nothing to place such heretofore reviewable factual questions off-limits.

In enacting section 242(a)(2)(D), Congress intended only to ensure that review restrictions set forth elsewhere could be fully enforced without raising constitutional concerns, not to create additional restrictions that would not otherwise exist at all. Just as INA § 242(f)(1)'s limitation on injunctive relief has been held only to restrict jurisdiction and not to grant it, *see Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481-82 (1999), section 242(a)(2)(D) merely provides for exemptions from jurisdictional limitations, rather than creating new such limitations.

For similar reasons, section 242(a)(2)(D) would be of limited utility in addressing arguments by aliens that a jurisdictional restriction does not apply in the first place, for reasons wholly independent of the REAL ID Act. *See, e.g., Unuakhaulu v. Gonzales*, 416 F.3d 931 (9th Cir. 2005) (entering a holding -- with which OIL disagrees -- that section 242(a)(2)(C)'s bar on review for criminal aliens does not apply when relief or protection from removal has been denied for reasons not involving the criminal offense, and the agency has found the alien removable but has not expressly ordered him "removed" under the criminal grounds charged against him). That is, if a particular review restriction has been found not to apply at all, section 242(a)(2)(D's "constitutional" and "legal" exceptions to the restriction never have an opportunity to come into play, but essentially become irrelevant.

It is important to remember that section 242(a)(2)(D) creates only an exception to judicial review bars set forth elsewhere, and does not create any bars itself.

The Meaning Of a "Constitutional Claim" or "Question of Law"

In gleaning the substantive meaning of section 242(a)(2)(D)'s references to "constitutional claims" and "questions of law," it is important to remember that Congress's purpose in enacting an exemption from review preclusions for such matters was to restrict judicial review of removal orders to the courts of appeals while avoiding potential Suspension Clause problems and providing an adequate alternative to district court habeas review under 28 U.S.C. § 2241 and *St. Cyr* by providing the courts of appeals with authority to decide issues that otherwise would have been barred on petition for review, but would have fallen within the scope of habeas. *See* H. Conf. Rep. No. 109-72 at 175 ("[t]he purpose of section 106(a)(1)(A)(iii) [of the REAL ID Act, creating new INA § 242(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas . . ."). The inquiry thus essentially becomes: which questions would have been reviewable in district court on habeas corpus before the REAL ID Act's enactment? The Conference Report for the legislation endeavored to answer this question by defining a "question of law" as "a question regarding the construction of a statute," and explaining that under longstanding Supreme Court precedents, habeas review has been limited to "constitutional and statutory-construction questions, not discretionary or factual questions." *Id.*

That is, "while the reforms in section 106 would preclude criminals from obtaining review over non-constitutional, non-legal claims, it would not change the scope of review that criminal aliens currently receive, because habeas review does not cover discretionary or factual issues that do not implicate constitutional due process." *Id.*, *citing, inter alia, Heikkila v. Barber*, 345 U.S. 229, 236 (1953). "When a court is presented with a mixed question of law and fact," the Conference Committee stated, "the court should analyze it to the extent there are legal elements but should

(Continued on page 5)

REVIEW UNDER REAL ID ACT

(Continued from page 4)

not review any factual elements. Factual questions include those questions that courts would review under the 'substantial evidence' or [INA §] 242(b)(4)(B) standard, reversing only when a reasonable factfinder would be compelled to conclude that the decision below was erroneous." *Id.* at 175-76. *See also Kamara v. Attorney General*, 420 F.3d 202, 211 (3rd Cir. 2005) (stating that review under section 242(a)(2)(D) is limited to "pure questions of law" pursuant to *St. Cyr*, and to "issues of application of law to fact, where the facts are undisputed and not the subject of challenge") (internal quotations omitted); *Bakhtriger v. Ellwood*, 360 F.3d 414, 425 (3rd Cir. 2004) (recognizing in pre-REAL ID Act case that any available habeas review of questions of law cannot extend to factual or discretionary matters, or else "rivers of ink expended in [habeas] case law distinguishing between legal and factual questions would have been spilled for no reason").

Government attorneys should be alert to the danger that some courts may attempt to stretch the concept of a "question of law" to encompass "burden of proof" matters.

Under this analysis, a question would appear to be one of "law" if it inquires into the meaning of statutory language in the context of undisputed or assumed facts. Classic examples would include the question whether a statute was intended to apply "retroactively" to pre-enactment conduct (the "merits" question addressed in *St. Cyr*), or whether an undisputed conviction under a particular criminal provision constitutes an "aggravated felony." On the other hand, a question is not "legal" if it merely involves a determination reviewable for substantial evidence, such as a finding that an alien has failed to sustain his burden of proving eligibility for relief or protection from removal. That is, even if the historical events are not in dispute (such as when an alien is deemed credible), there might still be a non-legal issue. Questions regarding the weighing, balancing or sufficiency of evidence -- *i.e.*, the typical question reviewed under the substantial evidence standard -- are not legal questions. Thus, in *Hamid v. Gonzales*, 417 F.3d 642 (7th Cir. 2005), the Seventh Circuit determined that in cases involving criminal aliens covered by the bar on review at INA § 242(a)(2)(C), new section 242(a)(2)(D) does not permit adjudication of the "factual" question whether a reasonable factfinder would be compelled to conclude that an applicant for protection under the Convention Against Torture (CAT) established the requisite "likelihood" of torture. The court noted the absence of any indication that the agency misunderstood the applicable legal standard, and stated, "[u]nfortunately for Hamid, his argument that the IJ wrongly denied him CAT relief does not depend upon any constitutional issue or question of law. Rather, it comes down to whether the IJ correctly considered, interpreted, and weighed the evidence presented -- that is to say, whether the IJ's conclusion was based on substantial evidence." *Id.* at 647.

Likewise, in *Vasile v. Gonzales,* 417 F.3d 766 (7th Cir. 2005), the court held that the questions whether an asylum applicant had submitted his application within the statutory one-year filing period, and if not, whether changed or extraordinary circumstances existed to justify the delay, were respectively "factual" and "discretionary" rather than "legal," and thus were not exempted from the bar on judicial review of asylum "timeliness" determinations at INA § 208(a)(3). The court noted that timeliness must be demonstrated to the "satisfaction" of the Attorney General, *see* INA § 208(a)(2), and reasoned that "[p]ermissive language that refers to demonstrating something to the agency's 'satisfaction' is inherently discretionary." *Id.* at 768.

Nevertheless, government attorneys should be alert to the danger that some courts may attempt to stretch the concept of a "question of law" to encompass "burden of proof" matters. In *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3rd Cir. 2003), a pre-REAL ID Act case addressing the scope of (formerly available) habeas review, the Third Circuit found habeas jurisdiction to review a CAT applicant's claim that the immigration judge "wrongly applied the standard for relief. . . ." However, in its subsequent *Bakhtriger* decision, *supra*, that court recognized that any available habeas review of questions of law could not extend to factual matters reviewable for substantial evidence, including the "weight" or "sufficiency" of evidence. 360 F.3d at 420-25. This enables the Government to distinguish *Ogbudimkpa* as only permitting (otherwise barred) review when the "facts" are undisputed, and in turn recognizing that "factual" disputes can arise not only over historical events but also over the evidence's weighing, balancing and sufficiency, as found by Congress in the Conference Report for the REAL ID Act, discussed previously. Government attorneys should be vigilant in arguing that any analysis treating a "weight" or "sufficiency" question as "legal" would be incorrect and would contravene a long history of judicial precedents treating factual "burden of proof" matters as distinct from, and not falling within the contours of, a "legal" question.

Although the meaning of a "constitutional claim" covered by INA § 242(a)(2)(D) would appear to be a less complicated matter than the meaning of a "question of law," government attorneys should still be on the lookout for claims that purport to be "constitutional" but in reality are not "colorable" in that regard but instead constitute "abuse of discretion" claims in disguise. The most

(Continued on page 6)

REAL ID ACT

(Continued from page 5)

common example would probably be a claim that an immigration judge "violated due process" in weighing and assessing the evidence and equities so as to find a failure to establish the requisite "hardship" for cancellation of removal. Such "traditional abuse of discretion challenges recast as alleged due process violations do not constitute colorable constitutional claims that would invoke . . . jurisdiction" that would otherwise be foreclosed by a judicial review bar. *Martinez-Rosas v. Gonzales*, __F.3d__, 2005 WL 2174477 at *3 (9th Cir. Sept. 9, 2005). *See also, e.g., Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001).

Finally, government attorneys should take care to remind the courts that *if* the courts conclude that an alien's contention raises the kinds of "constitutional" or "legal" questions that fall within the scope of the habeas review formerly available under 28 U.S.C. § 2241 (notwithstanding any government arguments to the contrary), then they should further conclude that pursuant to the REAL ID Act, such review now must be conducted exclusively by the courts of appeals under new section 242(a)(2)(D). That is, courts should never conclude that section 242(a)(2)(D) is insufficiently broad to provide the courts of appeals authority to review issues that otherwise would be reviewable in district court on habeas corpus pursuant to *St. Cyr*. By definition, since Congress expressed a specific intent to have review under section 242(a)(2)(D) serve as an adequate and effective substitute for habeas review, any matter that would raise Suspension Clause concerns if not reviewable should automatically be held to fall within section 242(a)(2)(D)'s scope.

Any matter that would raise Suspension Clause concerns if not reviewable should automatically be held to fall within section 242(a)(2)(D)'s scope.

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Topical Index To Recent Federal Courts Decisions Under The REAL ID Act

Conversion of Habeas Appeals to Petitions for Review

Bonhometre v. Gonzales, 414 F.3d 442 (3d Cir. 2005) (treating habeas appeal as a petition for review); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005) (same); *see also Ishak v. Gonzales*, __ F.3d __, 2005 WL 2137774 (1st Cir. Sept. 6, 2005) (treating habeas appeal as "still 'pending' in the district court within the meaning of the REAL ID Act" and transferring petition to court of appeals to be treated as a petition for review); *Marquez-Almanzar v. Gonzales*, 418 F.3d 210 (2d Cir. 2005); *but see Rosales v. Bureau of Immigration & Customs Enforcement*, F.3d ____, 2005 WL 1952867 (5th Cir. Aug. 16, 2005) (per curiam) (continuing to assert appellate jurisdiction over habeas appeal and providing no discussion of whether case should be converted).

Scope of Review of Removal Orders in Courts of Appeals Required by REAL ID

Martinez-Rosas v. Gonzales, __ F.3d __, 2005 WL 2174477, at *3 (9th Cir. September 9, 2005) (distinguishing legal issues from non-legal issues); *Kamara v. US Attorney General*, __ F.3d __, 2005 WL 2063873, at *6 (3d Cir. 2005) (same); *Grass v. Gonzales*, 418 F.3d 876, 878 (8th Cir. 2005) (same); *Vasile v. Gonzales,* 417 F.3d 766, 768-69 (7th Cir. 2005) (same); *Hamid v. Gonzales,* 417 F.3d 642, 647 (7th Cir. 2005) (same); *see also Bakhtriger v. Elwood*, 360 F.3d 414, 425 (3d Cir. 2004) (pre-REAL ID case which has helpful language distinguishing between legal and factual claims); *but see Elia v. Gonzales*, 418 F.3d 667 (6th Cir. 2005) (noting that Court only had jurisdiction to review legal claims of criminal alien but then addressing alien's factual claims based on an equitable estoppel argument) (government has moved court to amend decision to make clear that there is no review over factual determinations).

No Jurisdiction in District Court Over Removal Orders

Ishak v. Gonzales, __ F.3d __, 2005 WL 2137774, at *5 (1st Cir. Sept. 6, 2005) ("The plain language of these amendments, in effect, strips the district court of habeas jurisdiction over final orders of removal, including orders issued prior to the enactment of the REAL ID Act . . . Congress now has definitely eliminated any provision for jurisdiction.").

Cases Previously Governed by the Transitional Rules for Judicial Review are Now Governed by 8 U.S.C, § 1252(a) Pursuant to REAL ID § 106(d)

Paripovic v. Gonzales, 418 F.3d 240, 241 (3d Cir. 2005); *Elia v. Gonzales*, 418 F.3d 667, 671-73 (6th Cir. 2005).

REAL ID Act §§ 101(e) and 101(g) Apply to Pending Cases

Rodriguez-Galicia v. Gonzales, __ F.3d __, 2005 WL 2108688, *9 (7th Cir. September 2, 2005) (REAL ID Act § 101(e)'s modification of the standards by which this Court reviews the agency's determination concerning the availability of corroborating evidence applies to pending cases); *Lin v. U.S. Dept. of Justice*, 416 F.3d 184, 188 (2d Cir. 2005) ("We note that the 1,000 person-per-year cap has been lifted by § 101(g) of the recently enacted REAL ID Act.").

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SUMMARIES OF BIA DECISIONS

■The Time Period For Good Moral Character For Cancellation Eligibility Ends With The Entry Of A Final Administrative Decision

In *Matter of Ortega-Cabrera*, 23 I.&N. Dec. 793 (BIA 2005), the Board held that to establish eligibility for cancellation of removal under 8 U.S.C. § 1229b(b)(1), an alien must show good moral character for a period of 10 years, calculated backward from the date on which the application is finally resolved by the immigration judge or the Board. The aliens entered the United States in 1991 with the aid of a smuggler. The immigration judge found that they were subject to removal under the alien smuggling provisions at 8 U.S.C. § 1182(a)(6)(E)(i), and that such violation also precluded a finding of good moral character under 8 U.S.C. § 1101(f)(3), because it occurred within the 10-year period preceding service of their Notice to Appear.

> A precedent decision of the Board applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the Board, Congress, or a Federal court.

The Board held that because an application for cancellation of removal is a continuing one for purposes of evaluating an alien's moral character, the period during which good moral character must be established ends with the entry of a final administrative decision by the immigration judge or the Board. Accordingly, the aliens were found eligible to apply for cancellation at the time of the immigration judge's 2003 decision, as well as the pendency of their appeal before the Board, because the 1991 smuggling incident occurred more than ten years prior to the issuance of the final administrative decision.

■Board Finds That A Precedent Decision It Issues Applies To All Proceedings Involving The Same Issue Until Altered Or Overturned By Relevant Authority

In *Matter of E-L-H-*, 23 I.&N. Dec. 814 (BIA 2005), the Board ruled that a precedent decision of the Board applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the Board, Congress, or a Federal court.

In its 1998 decision in this case, the Board denied the government's motion to reconsider the Board's determination that the aliens were eligible for asylum on the basis of a Board precedent decision that had been referred to the Attorney General for review. The Attorney General vacated that decision and remanded for further consideration in light of an intervening unpublished decision issued by the Attorney General.

Citing the plain language of 8 C.F.R. § 1003.1(g), as well as the different context and limited scope of that unpublished decision (which did not address the precedential effect of a published Board decision referred for Attorney General review), the Board reaffirmed it 1998 decision denying the government's motion to reconsider, and ruled that a Board precedent decision referred to the Attorney General pursuant to 8 C.F.R. § 1003.1(h) remains applicable to other cases with the same issue unless and until vacated, modified, or overruled by the Attorney General, the Board, Congress, or a Federal court.

■Board Holds Physical Presence Continues To Accrue For Purposes Of Cancellation Of Removal Absent Evidence Of A Formal Documented Process Establishing Inadmissibility

In *Matter of Avilez*, 23 I.&N. Dec. 799 (BIA 2005), the Board held that where an alien departed the United States for a period less than that specified by statute, and unsuccessfully attempted to reenter at a land border port of entry before actually reentering, physical presence continued to accrue for purposes of cancellation unless, during that attempted reentry, the alien was formally excluded or made subject to an order of expedited removal, was offered and accepted the opportunity to withdraw an application for admission, or was subjected to some other formal, documented process pursuant to which the alien was determined to be inadmissible to the United States.

The alien was stopped as she attempted to reenter this country after a short visit to Mexico. The alien admitted that she had no entry documents. An INS officer explained that she could not enter without such documents and escorted her to a door "back across the boarder." The alien illegally entered via the same port of entry two days later. The Board found that the alien's two week absence from the United States did not break her continuous physical presence where she was refused admission by an immigration official at a port of entry, returned to Mexico without any threat of the institution of exclusion proceedings, and subsequently reentered without inspection.

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EOIR ANNOUNCES IMMIGRATION JUDGE VACANCIES

EOIR is seeking applications for eight immigration judge positions. The announcement does not indicate where the vacancies are located but applicants are asked to provide a prioritized list of up to five immigration courts locations. The salary range is $109,770-$149,200.

Summaries Of Recent Federal Court Decisions

Editor's Note: In light of the sharp increase in the number of published court decisions, and the continuing outsourcing of briefs to USAs, we will be reporting published decisions arranged by federal circuit and not by topic. This should help attorneys quickly identify cases of interest in their particular circuit.

FIRST CIRCUIT

■ Nigerian Citizen's Application For Asylum, Withholding Of Removal, And CAT Protection Denied Based On Adverse Credibility

In *Akinfolarin v. Gonzales,* __F.3d__, 2005 WL 2216325 (1st Cir. September 13, 2005) (Boudin, *Lynch*, Howard), the First Circuit upheld the BIA's adverse credibility determination, citing numerous internal inconsistencies in petitioner's testimony, as well as discrepancies between her testimony and the documentary evidence submitted in support of her application. The petitioner claimed persecution by religious fanatics and testified that her brother had been killed by a member of that religious sect.

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■ BIA Did Not Abuse Its Discretion By Denying Untimely Motion To Reopen To Adjust Status Because Petitioner Had Flouted Immigration Laws

In *Roberts v. Gonzales*, F.3d__, 2005 WL 2137786) (1st Cir. September 6, 2005) (*Selya*, Dyk, Howard), the First Circuit affirmed the BIA's the denial of petitioner's motion to reopen because it was untimely. The petitioner, who came to the United States in 1994 and overstayed his B-2 visa and accepted employment without authorization, was granted voluntary departure in 1997, but never departed. In 2000, he married a United States citizen who petitioned the INS for a relative visa on his behalf, but he waited until 2003 (after the bar created by his failure to voluntarily depart expired) to move to reopen the 1997 proceedings to adjust his status. The court held that, although the deadlines for filing motions to reopen may be relaxed upon a showing of exceptional circumstances, a mere showing of eligibility for relief did not require a favorable exercise of the BIA's discretion, particularly when the applicant had thrice flouted the immigration laws.

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■ Asylum Denied To Azeri-Armenian Who Failed To Connect Past Violence To An Act Or Omission Of Armenian Government

In *Harutyunan v. Gonzales*, 421 F.3d 64 (1st Cir. 2005) (Boudin, *Selya*, Siler), the First Circuit affirmed the BIA's denial of asylum and withholding of removal . The petitioner claimed that he experienced attacks upon his person and his financial well-being due to his Azeri ethnicity and testified credibly that he was beaten on several occasions by a group of Armenians who made anti-Azeri slurs. However, the petitioner conceded that the police responded promptly, investigated the incidents, filed a report, and told the alien that they would bring the miscreants to justice. Because the petitioner was unable to sufficiently connect the acts of violence against him to the Armenian government, the court held that he had not suffered past persecution. The court also agreed the IJ's finding that petitioner did not prove a fear of future persecution on the basis that he had to undergo compulsory military service should he return to Armenia. "When the threat of violence afflicts all persons in a given situation, not just a particular social group or class, that threat will not support a finding of a well-founded fear of future persecution," said the court.

> "When the threat of violence afflicts all persons in a given situation, not just a particular social group or class, that threat will not support a finding of a well-founded fear of future persecution."

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■ First Circuit Affirms BIA's Denial Of Reopening To Moderate Muslims From Indonesia

In *Maryam v. Gonzales*, __F.3d__, 2005 WL 2089913 (1st Cir. August 31, 2005) (Seyla, *Lynch*, Lipez), the First Circuit affirmed the BIA's denial petitioner's motion to reopen. The court upheld the BIA's conclusion that evidence of increasing Islamic fundamentalism and violence against Christians in Indonesia did not establish a material change in circumstances giving rise to asylum eligibility for the petitioners in this case, who are moderate Muslims.

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■ Chinese Asylum Applicant Who Claimed Compulsory Abortion Found Not Credible Because He Had Failed To Mention Such Allegation In His Initial Interview

In *Tai v. Gonzales,* __F.3d__, 2005 WL 12089911 (1st Cir. August 31, 2005) (Selya, *Lynch*, Lipez) , the First Circuit affirmed the BIA's denial of asylum and refusal to consider the petitioner's ineffective assistance claim. The court ruled that petitioner's failure to state the central basis of the asylum claim in his initial interview adequately supported the BIA's adverse credibility determination. The court also found that the BIA appropriately refused to consider an ineffective assistance claim, reject-

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

ing petitioner's contention that he should have been "invited" to file a claim in compliance with *Lozada* requirements.

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■ First Circuit Affirms Denial Of Asylum To Ethiopian Alien Claiming Persecution On Account Of Her Membership In A Particular Ethnic Group

In ***Negeya v. Gonzales,*** 417 F.3d 78 (1st Cir. 2005) (Boudin, Torruella, *Selya*), the court upheld the BIA's denial of asylum and withholding of removal. The petitioner left Ethiopia after losing her job in 1996, and traveled to Egypt where she worked as a baby sitter/maid until 2000, when she traveled to the United States. The court determined that petitioner's claims that she would have no right to work or even to live a normal life in her homeland were not anchored in any factual foundation in the record, and that conditions have improved since the cessation of hostilities between Eritrea and Ethiopia in 1998, as reflected in a recent Country Report.

"An explicit death threat with perhaps one or more implicit ones" could establish past persecution.

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■ First Circuit Upholds BIA's Denial Of Asylum, Withholding Of Removal, And CAT To Albanian National

In ***Kasneci v. Gonzales,*** 415 F.3d 202 (Selya, *Lynch*, Lipez) (1st Cir. 2005), the court affirmed the BIA's denial of the Albanian petitioner's applications for asylum, withholding of removal, and CAT protection. The petitioner claimed that he suffered persecution in his home country in the form of attacks on him and his family's gas station because of his involvement with the Albanian Democratic Party. The court ruled that the petitioner was not credible in linking the gas station attacks to his political beliefs, and that his testimony was actually undercut by the documentary evidence he offered.

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■ First Circuit Remands To BIA For Agency Determination Of Past Persecution In Withholding Of Removal Case

In ***Un v. Gonzales***, 415 F.3d 205 (1st Cir. 2005) (Selya, *Coffin*, Lynch), the First Circuit remanded the case to the BIA for consideration of whether the petitioner was subject to past persecution in Cambodia. The court concluded that "an explicit death threat with perhaps one or more implicit ones" which the petitioner received while working as a guard for the United States Embassy in Cambodia could establish past persecution, which would require the government to demonstrate changed circumstances to rebut the presumption that it was more likely than not that the petitioner would be persecuted upon his return. The court dismissed the petitioner's claim for protection under the Convention Against Torture because he failed to raise the issue before the BIA.

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■ Chinese Asylum Applicant Fails To Establish Persecution on Account of Religion

In ***Zheng v. Gonzales***, 416 F.3d 97 (1st Cir. 2005) (Boudin, *Lynch*, Howard), the court affirmed the BIA's denial of asylum to a Chinese applicant who claimed persecution on account of his Roman Catholic religion. Petitioner's claim was based on a single incident in China involving the storming of petitioner's underground church by government officials. The court held that the record evidence did not demonstrate that the petitioner had suffered any mistreatment, noting that "the storming . . . was apparently targeted at the priest and seemed to have had nothing to do with [petitioner]." The court also found that the BIA's conclusion that the climate was generally not particularly oppressive was supported by substantial evidence.

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■ First Circuit Remands To BIA For Adequate Articulation Of Its Reasons For Denying Asylum Application

In ***Halo v. Gonzales***, 419 F.3d 15 (1st Cir. 2005) (Selya, *Lynch*, Lipez), the First Circuit vacated the BIA's order of removal. The IJ held that the petitioner lacked credibility and that he had not established past persecution or a well-founded fear of future persecution in Albania. The BIA did not adopt the adverse credibility determination, but instead ruled that the petitioner failed to establish either past or future persecution, even assuming his testimony to be credible. The court remanded the case and ordered the BIA to state the reasons for its order with "particularity and clarity."

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SECOND CIRCUIT

■ Waiver Of Inadmissibility Under § 212(h) And Expanded Definition Of Aggravated Felony Apply Retroactively Under The 1996 Amendments

In ***Guaylupo-Moya v. Gonzales,*** __F.3d__, 2005 WL 2194888 (2d Cir.

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

Sept. 12, 2005) (Kearse, Jacobs, *Straub*), the court affirmed the denial of a habeas corpus petition. The alien, a lawful permanent resident who pleaded guilty in December 1996 to the attempted rape of a minor, challenged an order of removal, arguing that he was entitled to a "compassionate hearing" for discretionary relief from deportation under INA § 212(h) based on international law. The court held that because Congress plainly intended the 1996 amendments, placing restrictions on § 212 (h) relief and expanding the definition of aggravated felony, to apply retroactively, such reforms displaced any inconsistent norms of customary international law or prior treaty obligations.

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■ Asylum Denied To Applicant Who Claimed Persecution On Account Of China's Coercive Population Control Policy Based On Children Born In The United States

In ***Huang v. INS***, __F.3d__, 2005 WL 206392303 (Jacobs, Sack, Raggi) (*per curiam*) the court determined that the petitioner did not have a well-founded fear of persecution under China's family planning policy simply by virtue of the fact that he had fathered two children since entering the United States illegally. The court did not hold that such a claim was not cognizable under the INA, but concluded that the petitioner did not provide sufficient evidence to establish that his fear was objectively well-founded, particularly in light of the fact that his claim was contradicted by the State Department Profile on Country Conditions in China.

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■ Second Circuit Reverses Denial Of Asylum To Chinese Citizen Claiming Persecution On Account Of An Imputed Political Opinion

In ***Gao v. Gonzales,*** __F.3d__, 2005 WL 2174405 (2d Cir. Sept. 9, 2005) (*Miner*, Sack, Spatt), the court rejected the IJ's denial of asylum. The petitioner's persecution claim was based on his operation of a book store in China that sold Falun Gong materials. The IJ denied asylum because petitioner testified that he was not a Falun Gong practitioner or sympathizer and that he sold Falun Gong materials only because it was profitable to do so. The court held that the petitioner would be entitled to asylum if he could show that he has a well-founded fear of persecution on account of a political opinion imputed to him by his persecutors, an analysis which the immigration judge failed to conduct. The court remanded the case for further proceedings.

> The court was troubled that the BIA had not ruled on this issue, noting "we are put in the position of examining a statute whose plain text is in tension with the construction that the BIA has given it."

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■ Second Circuit Concludes That The BIA Erred As A Matter of Law In Holding Untimely Petitioner's CAT Claim

In ***Guo v. U.S. Department of Justice,*** __F.3d__, 2005 WL 2143875 (2d Cir. September 7, 2005) (Wesley, Hall, Trager) (*per curiam*), the Second Circuit, affirmed the denial of asylum, withholding of removal, and suspension of deportation, but vacated the dismissal of petitioner's request for CAT protection. Under 8 C.F.R. § 208.18(b)(2) an alien whose removal order became final before March 22, 1999, must file his CAT claim before June 21, 1999. In this case, the court determined that, while the petitioner filed his CAT claim after June 21, 1999, his removal order did not become final before March 22, 1999, and, therefore, the deadline in 8 C.F.R. § 208.18(b)(2) did not apply.

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■ Parents Or Parents-In-Law Of Persons Subject To A Coercive Family Planning Policy Are Not Per Se Eligible For Asylum

In ***Yuan v. Gonzales,*** 416 F.3d 192 (2d Cir. 2005) (*Meskill*, Newman, Cabranes), the Second Circuit affirmed the BIA's determination that the parents or parents-in-law of persons subjected to China's coercive family planning policies are not per se eligible for asylum. The aliens left China after one of their daughters-in-law was forced to have an IUD implanted and another daughter-in-law was forced to undergo an abortion. The court held that the statute does not extend eligibility to parents or parents-in-law because the persecution of a couple's child does not impinge upon the parent's or parents-in-law's right to procreate. However, the court was troubled that the BIA had not ruled on this issue, noting "we are put in the position of examining a statute whose plain text is in tension with the construction that the BIA has given it, and then extrapolating the statute's application to new cases."

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■ Denial Of Asylum Reversed Where IJ Failed To Address Petitioner's Nationality

In ***Dhoumo v. BIA***, 416 F.3d 172 (2d Cir. 2005) (Pooler, Sotomayor, Chin) (*per curiam*), the petitioner claimed that he had inherited Chinese nationality from his parents, who were Tibetan refugees, even though he was born and raised in a Tibetan refugee camp in India. The court held that the IJ had failed to address the "threshold issue" regarding the petitioner's nationality before denying his applica-

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

tion for asylum and withholding of removal, and ordering removal to India.

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■ Asylum Denial Reversed Because BIA Failed To Consider Country Conditions Report As Corroboration Of Chinese Applicant Religious Persecution Claim

In *Chen v. Gonzales*, 417 F.3d 268 (2d Cir. 2005) (*Straub*, McLaughlin, Hall), the Second Circuit vacated the denial of asylum because it a significant "significant error" in the BIA's failure to consider the country condition report submitted by the petitioner that corroborated his testimony concerning his subjective fear of future persecution on account of his religion. The court remanded to the BIA for further proceedings, including a determination regarding the credibility of the petitioner's testimony.

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■ Untimely Motion To Reopen Denied Because Petitioner Did Not Establish Changed Circumstances

In *Zheng v. Gonzales*, 416 F.3d 129 (2d Cir. 2005) (Jacobs, Sack, Raggi) (*per curiam*), the court affirmed the BIA's denial of petitioner's untimely filed motion to reopen removal proceedings. The petitioner moved to reopen his deportation proceedings six years after the BIA had dismissed his appeal of an IJ's denial of his application for asylum for China. The court held that petitioner failed to establish changed circumstances based on his wife's arrival in the United States and pregnancy with a second child.

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■ Second Circuit Remands To BIA To Consider Whether An Unmarried Male May Qualify For Asylum Based On His Partner's Forced Abortion

In *Lin v. Gonzales*, 416 F.3d 184 (2d Cir. 2005) (Calabresi, *Katzmann*, Parker), the Second Circuit remanded three petitions for review involving the common issue of whether an unmarried male applicant for asylum may qualify as a "refugee" on the basis of his partner's forced abortion. The BIA had affirmed without opinion the IJs' determinations that the aliens did not qualify as refugees. The court held that the agency's decisions were not entitled to *Chevron* deference where the IJ had engaged in statutory construction, the BIA summarily affirmed, and the BIA had never adequately explained its rationale for spousal eligibility. In particular, the court noted that it could not give deference to the BIA's decision because "when a court of appeals is faced with a BIA's summary affirmance, the court has no way of knowing that the BIA has, in fact, adopted the IJ's particular construction of a statute when the court is asked to assess its reasonableness."

> "When a court of appeals is faced with a BIA's summary affirmance, the court has no way of knowing that the BIA has, in fact, adopted the IJ's particular construction of a statute when the court is asked to assess its reasonableness."

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■ Serving In The United States Military Does Not Confer "Non-Citizen National" Status

In *Marquez-Almanzar v. INS*, 418 F.3d 210 (2d Cir. 2005) (*Walker*, Miner, Cabranes), the court rejected petitioner's claim that he was not an "alien." The court held that service in the United States military, even during a period of hostility, was insufficient to confer "non-citizen national" status because an alien could not qualify as a United States national under the immigration statute by a manifestation of permanent allegiance to the United States.

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■ Second Circuit Determines Immigration Judge Erred In Evaluating Petitioners' Evidence And That BIA Abused Its Discretion In Denying Motion To Reopen

In *Poradisova v. Gonzales*, 420 F.3d 70 (2d Cir. 2005) (McLaughlin, *Straub*, Hall), the court remanded the consolidated petitions of the BIA's denial of the petitioners' request for asylum and subsequent motion to reopen. The court held that the IJ applied an inappropriately stringent standard when evaluating the petitioners' testimony that throughout their lives they were mistreated in Belarus because of their Jewish ethnicity. On the motion to reopen, the court held that the BIA failed in its duty to explicitly consider evidence of worsened country conditions submitted by the aliens.

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THIRD CIRCUIT

■ Reinstatement Provisions Are Impermissibly Retroactive As Applied To Aliens Who Re-Enter The United States Prior To Effective Date Of The 1996 Amendments

In *Dinnall v. Gonzales*, __F.3d__, 2005 WL 2098861 (3rd Cir. September 1, 2005) (Smith, *McKee*, Van Antwerpen), the Third Circuit vacated the government's order reinstating petitioner's final order of removal. The

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

court ruled that the reinstatement provisions are impermissibly retroactive because (1) they do not permit aliens to apply for discretionary relief; (2) the petitioner could have applied for such relief in the form of voluntary departure had he been placed in deportation proceedings when he re-entered the United States prior to the enactment of the 1996 amendments; and (3) although a grant of voluntary departure would still require that the petitioner leave the United States, he would not be forever precluded from applying for all discretionary relief as provided under a reinstated order.

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■ Case Transferred To District Court For *De Novo* Hearing On Factual Issue In Derivative Citizenship Case

In ***Joseph v. Gonzales***, 421 F.3d 224 (3rd Cir. 2005) (Sloviter, *McKee*, Weis), the Third Circuit found that genuine issues of material fact existed as to whether petitioner was the son of an alleged rape victim who subsequently became a naturalized U.S. citizen, as would entitle him to derivative citizenship. Petitioner's claim of derivative citizenship turned on whether the evidence demonstrated that the naturalized United States citizen in question was petitioner's mother or his sister. Citing *Agosto v. INS*, 436 U.S. 748 (1978), the court determined that this raised a genuine issue of material fact warranting a *de novo* hearing.

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■ Third Circuit Considers Direct Appeal from IJ's Decision And Holds That Simple Assault Under Pennsylvania State Law Is Not A Crime Of Violence

In ***Popal v. Gonzales***, 416 F.3d 249 (3rd Cir. 2005) (Fuentes, Van Antwerpen, *Becker*), the Third Circuit reversed the BIA's holding that petitioner's simple assault conviction in violation of the Pennsylvania criminal code constituted an aggravated felony offense as a crime of violence. The petitioner, a citizen of Afghanistan and an LPR, was convicted in June 2002, of simple assault and sentenced to twenty-three months' imprisonment. According to the complaint, petitioner shot a minor with a compressed air pistol.

Preliminarily, the court held that it had jurisdiction under the REAL ID Act to review all questions of law raised by the petition. The court then rejected the government's argument that petitioner had failed to exhaust his administrative remedies because he had not appealed the IJ's second, final order to the BIA. The court held that, "where a petitioner has raised only one claim before the IJ and the BIA, and where that claim has been fully and fairly litigated by the petitioner before the IJ and the BIA, the petitioner has exhausted that claim under 8 U.S.C. § 1252(d) and may present it to this Court." On the merits, the court held that petitioner's conviction did not constitute a crime of violence because it only required a *mens rea* of recklessness, and not the specific intent to use force.

The court acknowledged its holding "might seem to conflict with Congress's intent as expressed in the legislative history of 18 U.S.C. § 16 [defining a crime of violence]. But we believe that this apparent conflict is a mirage, caused by the fact that Pennsylvania has chosen to classify as simple assault offenses that the congressional drafters were unlikely to have had in mind."

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> **"When deficiencies in the BIA's decision make it impossible for us to meaningfully review its decision, we must vacate that decision and remand so that the BIA can further explain its reasoning."**

■ Denial of Asylum Reversed Where BIA Fails To Address Petitioner's Argument

In ***Vente v. Gonzales***, 415 F.3d 296(3rd Cir. 2005) (*Ambro*, Van Antwerpen, Shadur), the court reversed the BIA's denial of asylum to an applicant form Colombia. The court found that the BIA's findings were "wholly unsupported by the record and essentially ignore[d] the actual basis of [petitioner's] asylum claim." Petitioner's principal argument rested on the ground that he had been threatened by paramilitary groups affiliated with the Colombian government. "When deficiencies in the BIA's decision make it impossible for us to meaningfully review its decision, we must vacate that decision and remand so that the BIA can further explain its reasoning," said the court.

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■ New Jersey's Aggravated Assault On A Police Officer Statute Is Not A CIMT

In ***Partyka v. Gonzales,***417 F.3d 408 (3rd Cir. 2005) (Alito, Smith, *Rosenn*), the Third Circuit ruled that the immigration judge's holding that aggravated assault on a police officer in violation of New Jersey law categorically constitutes a crime involving moral turpitude rested on an erroneous interpretation of the state statute. Because the statute also punished negligently causing bodily injury to a police officer with a deadly weapon, and because such conduct did not connote moral turpitude, the court concluded that moral turpitude does not inhere in the least culpable conduct under the statute. Judge Alito concurred, but dissented from the decision not to remand the case to

(Continued on page 13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)
the BIA for a further explanation of its reasoning.

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■ Third Circuit Holds That Honduran "Street Children" Do Not Constitute A Cognizable Social Group

In ***Escobar v. Gonzales,*** 417 F.3d 363(3rd Cir. 2005) (McKee, Van Antwerpen, *Weis*), the Third Circuit held that homeless children in Honduras do not constitute a "particular social group" for purposes of asylum eligibility. The court determined that the characteristics of this group, consisting of poverty, homelessness, and youth, "are far too vague and all encompassing to be characteristics that set the parameters for a protected group within the scope of the Immigration and Nationality Act." "It may well be conceded that young individuals from Honduras face extremely depressing, bleak prospects," said the court. "But the record fails to show any realistic differences between these children and those of Guatemala or Sao Paulo or hundreds of other locations across the globe. Incidents of deprivation and suffering are, unfortunately, universal and not confined to one country. Thus a legitimate distinction cannot be made between groups of impoverished children who exist in almost every country."

"Incidents of deprivation and suffering are, unfortunately, universal and not confined to one country. Thus a legitimate distinction cannot be made between groups of impoverished children who exist in almost every country."

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■ State-Created Danger Doctrine Inapplicable In Immigration Context, But Case Remanded To Determine Whether Rebel Leaders Constitute "Public Officials"

In *Kamara v. Attorney General*, 420 F.3d 202 (3rd Cir. 2005) (*Sloviter*, Fisher, Pollak), the court held that the state-created danger doctrine has no place in immigration jurisprudence. The petitioner alleged persecution if returned to Sierra Leone from both the government and the rebel organization and a violation of substantive due process under the state-created danger doctrine if returned. The court determined the BIA's decision to be otherwise adequate but held that, if rebel leaders were found to be "public officials," the BIA had to consider the danger to petitioner from the government and from the rebel organization in the aggregate, not separately, and remanded with those instructions.

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FOURTH CIRCUIT

■ Fourth Circuit Concludes Fraudulent Use Of Credit Card Is Not A Theft Offense

In *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005) (Williams, *King*, Gregory), the Fourth Circuit reversed the BIA's holding that petitioner had been convicted of a theft offense qualifying as an aggravated felony. The petitioner had been convicted under a Virginia statute for fraudulent use of a credit card, after using someone else's credit card to obtain over $1,400 in goods or services. The court disagreed with the BIA's conclusion that the common definition of the term "theft" included fraud, and held that the BIA's interpretation would render "superfluous" a separate statutory provision specifically addressing fraud, as it would transform all fraud offenses into theft offenses.

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FIFTH CIRCUIT

■ Record Insufficient To Support The IJ's Aggravated Felony Offense Determination

In ***Omari v. Gonzales,*** __F.3d__, 2005 WL 1714364 (5th Cir. July 25, 2005) (*Garwood*, Smith, Clement), the Fifth Circuit reversed the Immigration Judge's conclusion that the alien's conviction for conspiring to commit interstate transportation of stolen property qualified as an aggravated felony offense involving fraud or deceit in which the loss to the victim(s) exceeds $10,000.00. Because the alien was convicted of violating a statute that required proof of fraud in some instances, but not in others, the court determined that the statute was divisible, and applied the modified categorical approach. The court held that the conviction materials were insufficient to support the claim that the alien's crime involved fraud, and set aside the aggravated felony offense determination.

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SIXTH CIRCUIT

■ Asylum Applicant's Submission Of Fraudulent Newspaper Article Sufficient To Support Adverse Credibility Finding

In ***Selami v. Gonzales*** , __F.3d__, 2005 WL 2240971 (6th Cir. Sept. 16, 2005) (Daugherty, *Moore*, McKeague), the Sixth Circuit upheld the IJ's denial of asylum based on an adverse credibility determination, as well as the conclusion that the applicant had filed a frivolous asylum application. The court held that the Albanian asylum applicant had submitted an obviously fraudulent newspaper article in support of the essential elements of his asylum claim, that he had failed to provide any explanation for the for-

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)

gery, and that the fraudulent article sufficiently supported the adverse credibility determination.

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■ IJ's Adverse Credibility Determination Is Not Supported By The Record Were Inconsistencies Were Minor Or Non-existent

In *Mece v. Ashcroft*, 415 F.3d 562 (6th Cir. 2005) (*Nelson*, Sutton, Wells), the court reversed the IJ's adverse credibility holding and remanded the case to the BIA, with instructions to assign it to a different IJ. The court ruled that the inconsistencies cited by the IJ to deny asylum were either non-existent or minor "nit-picking," and did not support an adverse credibility determination. The court also held that the numerous beatings and death threats the petitioner received at the hands of the police rose to the level of persecution.

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SEVENTH CIRCUIT

■ Seventh Circuit Determines That Wealthy Colombian Landowners Constitute A "Particular Social Group"

In *Orejuela v. Gonzales,* __F.3d__, 2005 WL 2155653 (7th Cir. September 8, 2005) (Posner, Evans, *Wood*), the Seventh Circuit reversed the BIA's denial of asylum and withholding of removal to an asylum applicant from Colombia. The IJ determined that death threats from a Colombian guerilla group were based on petitioner's wealth, which was insufficient to show persecution on account of a statutory ground, and the BIA affirmed without opinion. The court held that petitioners' status as "wealthy landowners" constituted a "particular social group" in the context of the Colombian class- and wealth-based internal conflict, and remanded to the BIA for further proceedings consistent with its opinion.

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■ Chinese Catholic Indonesian Woman Firmly Resettled In Singapore Where She Had Lived For Four Years

In *Firmansjah v. Gonzales,* __F.3d__, 2005 WL 2241002 (7th Cir. September 16, 2005) (Flaum, Manion, *Williams*), the court upheld the IJ's denial of asylum to a Chinese Catholic Indonesian woman because she had firmly resettled in Singapore before coming to the United States. The petitioner had lived in Singapore for four years before coming to the United States. She had indicated on her asylum application, filed several years later, that she had a Singapore residence permit and was entitled to return to Singapore for residence purposes. The court held that this evidence was sufficient to satisfy the government's initial burden of showing that the third country "has made some type of offer of permanent resettlement," and concluded that the petitioner had failed to come forward with sufficient evidence to rebut the presumption of firm resettlement thereby created.

> The evidence that petitioner had lived in Singapore for four years was sufficient to satisfy the government's initial burden of showing that the third country "has made some type of offer of permanent resettlement."

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■ Adverse Credibility Finding Not Supported By Substantial Evidence Where BIA Erroneously Identified Region Where Petitioner Lived

In *Ssali v. Ashcroft,* __F.3d__, 2005 WL 2218403 (7th Cir. September 14, 2005) (*Ripple*, Rovner, Wood), the court reversed the BIA's denial of asylum and vacated its denial of a motion to reopen. The petitioner who claimed to be from southern Uganda, testified that he had twice been detained and beaten on account of his support of the Democratic Party. The court held that the BIA's reliance on inconsistencies regarding the petitioner's Party membership was undermined by its erroneous description that the petitioner was from eastern Uganda. The court vacated the judgment of the BIA with respect to the motion to reopen because it granted the merits petition, but noted that it would have been disposed to grant the petitioner the motion to reopen.

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■ Colombian Military Supplier Not Entitled To Asylum Based On Allegations Of Threats By Guerillas

In *Hernandez-Baena v. Gonzales*, 417 F.3d 720 (7th Cir. 2005) (Easterbrook, Manion, *Rovner*), the court upheld the IJ's denial of asylum, withholding of removal, and CAT protection to a Colombian military supplier who claimed to have had suffered persecution on account of political opinion or imputed political opinion when the Revolutionary Armed Forces of Colombia (FARC) threatened his life because he refused to sell them military supplies. The court held that the two oral threats did not constitute past persecution, and that the threats were not "on account of" a political opinion but rather motivated by the alien's compliance with the law. The court rejected the claim that the Colombian government was unable or unwilling to protect the alien, noting *inter alia*, that "to reverse the IJ's decision, we would effectively have to conclude that the Colombian government is unable or

(Continued on page 15)

Summaries Of Recent Federal Court Decisions

(Continued from page 14)
unwilling to protect its citizens from FARC."

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■ **Adverse Credibility Finding Not Supported By Substantial Evidence Where IJ Misinterpreted Country Report**

In ***Dong v. Gonzales,*** __F.3d__, 2005 WL 2088403 (7th Cir. August 31, 2005) (*Wood*, Kanne, Williams), the Seventh Circuit held that the IJ's multiple reasons for denying withholding of removal to Chinese alien on the basis of adverse credibility were either not supported by the record, or were not central to the alien's persecution claim. The court also concluded that the IJ misinterpreted the State Department Country Reports, and relied too heavily on the fact that the petitioner had not applied for asylum at the airport, or within one year of her arrival in the United States.

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■ Denial Of Asylum To Ukranian National Reversed Because IJ Failed to Consider Evidence Supporting Petitioner's Claim

In ***Sosnovskaia v. Gonzales,*** 421 F.3d 589 (7th Cir. 2005) (Easterbrook, Ripple, *Williams*), the court reversed the BIA's denial of asylum and withholding of removal because petitioner had not received a fair trial, insofar as the IJ failed to consider evidence favoring his claim and instead had accepted a State Department report as dispositive of the future persecution issue. This was the second time that the IJ had ruled against the petitioner, the first time following a remand from the BIA. "The procedure that the IJ employed in this case is an affront to [petitioner's] right to be heard," wrote the court.

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■ **Denial Of Asylum To Pakistani National Reversed And Remanded To Permit BIA To Define "Persecution"**

In ***Sahi v. Gonzales,*** 416 F.3d 587 (7th Cir. July 25, 2005) (Bauer, *Posner*, Easterbrook), the Seventh Circuit, reversed the BIA's determination that the alien failed to establish a well-founded fear of persecution if he returned to Pakistan. The alien sought asylum on account of his Ahmadi religious sect, and claimed that he had been beaten by Orthodox Muslims and that the crops of his family's farm had been burned. The court held that remand was required in order that the BIA could define "persecution," for purposes of determining whether the alien had a well-founded fear of persecution on account of his religion. The court was troubled by the fact that the BIA had to date not defined key terms "in the immigration statute that the statutes themselves do not define, such as 'persecution on account of race, religion, nationality, membership in a particular social group, or political opinion'" and noted that "neither the parties' research nor our own has brought to light a case in which the BIA has defined "'persecution.'"

The court was troubled because the BIA had not defined key terms "in the immigration statute that the statutes themselves do not define, such as 'persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'"

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■ **Seventh Circuit Holds That It Lacks Jurisdiction Under The REAL ID Act To Review The Denial Of An Untimely Asylum Application**

In ***Vasile v. Gonzales***, 417 F.3d 766 (7th Cir. 2005) (Ripple, Rovner, *Wood*), the Seventh Circuit ruled that in light of the jurisdictional bar under INA § 208(a)(3), 8 U.S.C. § 1158(a)(3), it lacked jurisdiction to review the denial of an untimely asylum application or the determination that an alien failed to show extraordinary circumstances to excuse the late filing. Although the REAL ID Act permits review of legal claims in cases where the court would otherwise lack jurisdiction, the determination that an alien failed to show extraordinary circumstances to excuse the late filing of an asylum application was a discretionary, not a legal, determination. "Notwithstanding § 106(a) of the [REAL ID] Act, however, discretionary or factual determinations continue to fall outside the jurisdiction of the court of appeals entertaining a petition for review," said the court.

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■ **Asylum Denied Where Applicant Participated In Persecution Of Others While A Member Of A Local Police Force In India**

In ***Singh v. Gonzales***, 417 F.3d 736 (7th Cir. 2005) (Coffey, *Manion*, Williams), the court affirmed the IJ's determination that the petitioner, a police constable in Punjab, India, was ineligible for asylum or withholding of removal because he had participated in the persecution of other Sikhs. The court held that petitioner's activities went beyond mere membership in a police force where, although he never took part in any of the actual beatings, he took Sikhs into custody and transported them to the police station where he knew they would be subjected to unjustified physical abuse, and he participated in raids on the homes of Sikh families, guarding their homes to prevent escape while other officers were inside arresting and beating family members without cause.

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(Continued on page 16)

Summaries Of Recent Federal Court Decisions

(Continued from page 15)

■ Asylum Denied To Unmarried Chinese Woman who Was Refused Marriage License

In ***Li v. Gonzales***, 416 F.3d 681 (7th Cir. 2005) (Coffey, *Ripple*, Rovner), the court affirmed the denial of asylum because the petitioner did not show persecution or a well founded fear of persecution on account of a political opinion. The petitioner alleged that when she attempted to register for marriage while both she and her boyfriend were underage, the authorities learned of their admittedly illegal cohabitation and refused to issue the marriage license. The court found that the petitioner offered nothing to show that she had expressed a political opinion and there was no evidence that the government was motived by petitioner's political opinion as opposed to securing compliance with domestic law.

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■ Discrimination And Harassment Experienced By Bulgarian Asylum Applicant Did Not Amount to Persecution

In ***Mitreva v. Gonzales***, 417 F.3d 761 (7th Cir. 2005) (Easterbrook, *Rovner*, Wood), the Seventh Circuit upheld the BIA's denial of asylum an applicant from Bulgaria who claimed that she was discriminated against and harassed due to her Romani ethnicity. The court agreed with the BIA's determination that the discrimination experienced by the petitioner did not rise to the level of persecution. The court also held that even though it may have reached a contrary conclusion based on the evidence of the case, a reasonable fact finder could disagree and that the record did not compel the contrary conclusion that the petitioner was mistreated on account of her Romani ethnicity.

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■ Seventh Circuit Concludes That IJ Applied Impermissible High Standard To Petitioners' Economic Persecution Claim, And Remands Case

In ***Koval v. Gonzales,*** __F.3d__, 2005 WL 1950293 (7th Cir. August 16, 2005) (Posner, *Ripple*, Sikes), the Seventh Circuit reversed the BIA's denial of asylum. The petitioners claimed they left Ukraine due to economic persecution, and that they also feared future persecution on account of their Mormon faith. The court determined that the IJ erred in requiring the applicants to show that economic mistreatment would amount to a threat to their life or freedom in order to demonstrate past persecution. The court further held that the IJ deprived petitioners of a fair hearing by relying heavily on State Department country reports, while excluding the testimony of a former KGB officer.

> The court determined that the IJ erred in requiring the applicants to show that economic mistreatment would amount to a threat to their life or freedom in order to demonstrate past persecution.

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■ Seventh Circuit Rejects BIA's Denial Of Asylum To Ugandan National

In ***Nakibuka v. Gonzales***,421 F.3d 473 (7th Cir. 2005) (Cudahy, *Wood*, Sykes), the Seventh Circuit reversed the BIA's denial of asylum to an applicant who alleged that, as the housemaid of a politically active Ugandan family, she was tied up, beaten, and threatened with death. The court held that because neither the IJ nor the BIA considered the severity of the attack against the petitioner or the escalating nature of the events that followed it, the BIA's decision was not supported by substantial evidence.

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EIGHTH CIRCUIT

■ Eighth Circuit, Applying "Deferential Standard Of Review," Affirms Denial of Asylum To Applicant From Azerbaijan

In ***Samedov v. Gonzales,*** __F.3d__, 2005 WL 2124092 (8th Cir. Sept. 6, 2005) (*Arnold*, McMillian, Colloton) the Eighth Circuit affirmed the IJ's denial of asylum, withholding of removal, and CAT protection to Azeri applicant who claimed he had suffered past persecution and had a well-founded fear of future persecution on the basis of his Lezghin ethnicity. The court found that the IJ "provided a cogent reason for her misgivings about Mr. Samedov's account and for her conclusion that he lied" with respect to the most serious of the alleged incidents of past persecution. The court then held that, although "alternative inferences that would support the existence of a well-founded fear of persecution could be drawn from the evidence, the evidence does not compel such a conclusion. Therefore, using the deferential standard under which we review the IJ's decision, we affirm her finding that Mr. Samedov did not have a well-founded fear of persecution."

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■ Arriving Aliens In Removal Proceedings Are Ineligible To Apply For Adjustment Of Status

In ***Mouelle v. Gonzales***, 416 F.3d 923 (8th Cir. 2004) (Bye, *Beam*, Gruender), the Eighth Circuit upheld the BIA's denial of petitioners' motion to reopen removal proceedings because they were ineligible to apply for adjustment of status as "arriving aliens."

(Continued on page 17)

Summaries Of Recent Federal Court Decisions

(Continued from page 16)

The court concluded that the regulation at 8 C.F.R. § 1245.1(c)(8), which provides that arriving aliens in removal proceedings are ineligible to apply for adjustment of status, was not *ultra vires*. "The regulation does not . . . allow aliens arriving with advance parole to shed their arriving-alien status for the purpose of adjusting immigration status," said the court. The court expressly disagreed with the First Circuit decision in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), and held that the regulation was not contrary to the immigration statute governing adjustment of status, and was "reasonable in light of the legislature's revealed design."

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■ Asylum Denied To Applicant From Kenya On Basis Of Implausible Testimony And Lack Of Corroboration

In ***Ombongi v. Gonzales***, 417 F.3d 823 (8th Cir. 2005) (Bye, Heaney, *Melloy*) the court upheld the BIA's denial of asylum where the IJ had found petitioner's testimony implausible and his persecution claim uncorroborated. The court held that substantial evidence supported the adverse credibility determination, and that in any event, petitioner's credibility was undermined by his implausible explanation of his bigamous marriages in the United States.

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■ Attack On Female Petitioner By A Spurned Suitor Does Not Constitute Persecution

In ***Menjivar v. Gonzales***, 416 F.3d 918 (8th Cir. 2005) (Wollman, Gibson, *Colloton*), the Eighth Circuit affirmed an IJ's finding that the criminal action of a gang member was not "persecution" attributable to the government of El Salvador. The petitioner, who was found credible, testified that she had rejected the romantic advances of a gang member who later, while shooting at her, killed her grandmother. The court ruled that substantial evidence supported the IJ's conclusion that the petitioner had failed to establish persecution by a person the government was unable or unwilling to control, where the police responded to the incident as quickly as possible and the record supported an inference that the police continued to pursue the gang member. In this context, the court noted that "the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be a reasonable basis for inaction . . . Whether a government is 'unable or unwilling to control' private actors under these refined definitions of persecution is a factual question that must be resolved based on the record in each case."

> "The fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be a reasonable basis for inaction."

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■ Denial Of Asylum To Chinese Petitioner Reversed Where IJ and BIA Failed To Consider Significant Evidence In The Record

In ***Zheng v. Gonzales,*** 415 F.3d 955 (8th Cir. July 28, 2005) (*Bye*, Gibson, Gruender), the court reversed the denial of asylum and withholding of removal because the IJ's decision did not "analyze significant credible concrete evidence" that supported petitioner's claim. The court also faulted the BIA for its determination that petitioner had failed to demonstrate children born in the United States are treated the same as children born in China because it had failed to take into account the information provided by an expert's affidavit.

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■ That State Felony Drug Conviction Is Sufficient To Support Aggravated Felony Charge Of Removal

In ***Lopez v. Gonzales***, 421 F.3d 889 (8th Cir. 2005) (Melloy, Heaney, *Gruender*), the court upheld the BIA's determination that petitioner's state felony drug conviction, which was only punishable as a misdemeanor under federal law, was nevertheless sufficient to support a drug-trafficking aggravated felony charge of removal. The court also rejected petitioner's contention that the BIA's decision applied an impermissibly retroactive standard of permitting the offense to be punishable as a felony under either federal or state law.

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■ Eighth Circuit Affirms Denial Of Withholding To Peruvian Who claimed Persecution Because Of His Homosexuality

In ***Salkeld v. Gonzales,*** 420 F.3d 804 (8th Cir. 2005) (Murphy, *Bye*, Smith), the Eighth Circuit affirmed the denial of withholding of removal to a Peruvian alien who claimed that his homosexuality would subject him to persecution. The court held that homosexuality was not penalized by the Peruvian government, that specific instances of violence toward homosexuals were relatively sporadic, and that there were locations within Peru in which homosexuals may live safely. The court also affirmed the IJ's denial of petitioner's motion for a continuance, holding that pursuant to the REAL ID Act, it had jurisdiction to con-

(Continued on page 18)

Summaries Of Recent Federal Court Decisions

(Continued from page 17)

sider constitutional claims and questions of law relating to the denial of the continuance, but that there was no constitutional violation as the IJ's denial of the continuance was not arbitrary.

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NINTH CIRCUIT

BIA's Application Of Cancellation Hardship Standard Is Consistent With The Convention On The Rights Of The Child

In *Cabrera-Alvarez v. Gonzales*, __F.3d__, 2005 WL 2159038 (9th Cir. Sept. 8, 2005) (*Graber*, Gould, Pregerson), the Ninth Circuit held that, even assuming that the unratified Convention on the Rights of the Child has attained the status of customary international law and that its dictates are relevant to a proceeding involving deportation of a parent, the alien failed to demonstrate that the agency's interpretation or application of the cancellation of removal statute is inconsistent with the Convention. Specifically, the court stated that the agency's interpretation of the hardship standard, and its application of the standard in this case, were consistent with the "best interests of the child" principle articulated in the Convention on the Rights of the Child because the child's "best interests" "are merely the converse of 'hardship.'"

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■ **BIA Improperly Denied Motion To Reopen As Matter of Discretion Based On The Fugitive Disentitlement Doctrine**

In *Bhasin v. Gonzales*, __F.3d__, 2005 WL 2100447 (9th Cir. September 1, 2005) (*B. Fletcher*, Hawkins, Lay), the Ninth Circuit reversed the BIA's denial of petitioner's motion to reopen. The BIA had previously denied asylum, and petitioner was given a bag and baggage letter to leave the country. She ignored the letter and instead filed a motion to reopen presenting a declaration containing additional evidence not available at the time of her original hearing. The court held that the BIA abused its discretion by denying the motion to reopen as a matter of discretion based on the fugitive disentitlement doctrine because of questions relating to whether the alien received that letter, as well as the court's belief that there was no deliberate flouting of the immigration laws in her case.

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■ **Grand Theft From Person Is Not An Aggravated Felony**

In *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005) (*Tashima*, Fisher, Tallman), the Ninth Circuit withdrew its prior opinion and filed an amended opinion holding that grand theft from person in violation of section 487(c) of the California Penal Code does not facially qualify as an aggravated felony offense because one could be convicted as an aider and abetter, and that under recent Supreme Court precedent, it was unclear from the record that the alien pled guilty to all the elements of the generic offense of theft.

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■ **IJ Violated Petitioner's Right To A Fair Hearing Where Witnesses' Testimony Was Excluded**

In *Zolotukhin v. Ashcroft*, 417 F.3d 1073 (9th Cir. August 3, 2005) (Pregerson, *Gould*, Graber), the Ninth Circuit held that the evidence did not compel a conclusion that the BIA erred in denying asylum, but remanded for new proceedings because the alien was denied due process during the original hearing.

The court determined that the IJ's statements during the hearing that she did not believe the alien's testimony, as well as her refusal to allow the alien's grandmother to offer corroborative testimony or to permit telephonic testimony from an expert witness, violated petitioner's due process rights and warranted remand of the case. "The IJ's pre-judgment of the merits of petitioner's case led her to deny [petitioner] a full and fair opportunity to present evidence on his behalf, including that the IJ excluded the testimony of several key witnesses."

> Although there was no "direct evidence" that the petitioner had received a Canadian offer of residence, it was his burden to rebut the presumption that he had firmly resettled in Canada, given his experience in that country."

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■ **Asylum Denied To Applicant From FIJ Because He Failed To Rebut Presumption Of Firm Resettlement**

In *Maharaj v. Gonzales*, 416 F.3d 1088 (9th Cir. 2005) (Goodwin, *O'Scannlain*, Kleinfeld), the court affirmed the BIA's denial of asylum on the basis of firm resettlement. The petitioner had lived in Canada for four years where he and his wife received social insurance numbers, work authorization, free health care, and free education for their children. He then applied for asylum in Canada, but moved to the United States. The court held, relying on *Cheo v. INS*, 162 F.3d 1227 (9th Cir.1998), that although there was no "direct evidence" that the petitioner had received a Canadian offer of residence, it was his burden to rebut the presumption that he had firmly resettled in Canada,

(Continued on page 19)

Summaries Of Recent Federal Court Decisions

(Continued from page 18)
given his experience in that country.

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■ Summary Dismissal Procedures Do Not Violate Due Process

In ***Singh v. Gonzales***, 416 F.3d 1006 (9th Cir. 2005) (Wallace, *Bybee*, Rawlinson), the Ninth Circuit held that the summary dismissal procedures under 8 C.F.R. § 3.1(d)(2)(I) (2001) (providing for summarily dismissing an appeal for failure to state specific reasons or file a promised brief) did not violate petitioner's alien's due process rights. The BIA had summarily dismissed petitioner's appeal due to his failure to file a brief and failure to identify any errors in the IJ's decision. One year later, petitioner filed a motion to reopen alleging ineffective assistance of counsel. The BIA later dismissed the motion as untimely without considering the merits of that claim. After explaining how the court had "grappled with the BIA's summary dismissal procedures for nearly a quarter-century," it ruled that the BIA's summary dismissal procedures did not violate due process because the warnings regarding dismissal were clearly stated on the face of the appeal form. However, it remanded the case for consideration of the ineffective assistance of counsel claim.

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■ Ninth Circuit Sustains Equal Protection Challenge To Apply For Section 212(c) Waiver

In ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. August 10, 2005) (*Ferguson*, Noonan; Rymer (dissenting)), the Ninth Circuit held that legislation which distinguished between two groups of permanent resident aliens – those who pled guilty to offenses that, at time pleas were entered, were serious enough to permit their deportation and those who pled guilty to less serious offenses, that provided a basis for their deportation only in light of legislation enacted after the pleas were entered-served no rational purpose and violated equal protection. The statute allowed a discretionary waiver of removal only for the more serious offenders.

> While equity may well weigh in favor of allowing petitioner a shot at § 212(c) relief, as the majority says, "equal protection turns on irrational inequality, not inequity."

In a dissenting opinion, Judge Rymer would have found that petitioner was not similarly situated to those permanent residents who are entitled to § 212(c) relief under *St. Cyr*. He noted that while equity may well weigh in favor of allowing petitioner a shot at § 212(c) relief, as the majority says, "equal protection turns on irrational inequality, not inequity."

Contact: James Hunolt, OIL
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■ Sexual Battery In Violation Of California Law Is An Aggravated Felony

In ***Lisby v. Gonzales***,420 F.3d 930 (9th Cir. 2005) (*Schroeder*, Pregerson, Trott), the Ninth Circuit held that the crime of sexual battery under California Penal Code § 243.4(a) constituted an aggravated felony offense. Focusing on the wording of the statute, which requires the intimate touching of another person while that person is under unlawful restraint, the court determined that the offense involved a "substantial risk" that physical force against that person may be used within the meaning of a crime of violence.

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TENTH CIRCUIT

■ Tenth Circuit Affirms BIA's Construction Of "Social Group" as Applied to FGM Cases But Remands For Failure To Address Petitioner's Persecution Claim

In ***Niang v. Gonzales***, __F.3d__, 2005 WL 2160140 (10th Cir. Sept. 8, 2005) (Tacha, McWilliams, *Hartz*), the Tenth Circuit addressed for the first time the meaning of "membership in a particular social group" in the context of a Senegalese woman who sought asylum because she had been a victim of female genital mutilation (FGM). The petitioner, who entered the United States as a nonimmigrant in 1999, was apprehended while she was working as a security screener at the Denver International Airport. When placed in proceedings for overstaying her visa and for, *inter alia*, falsely representing herself as a U.S. citizen, she applied for asylum, withholding, and CAT protection. Petitioner claimed that when she was 25 years old her family beat her for refusing to consummate a marriage and then performed FGM on her so that "she wouldn't be able to commit adultery." The IJ, while finding that petitioner had been subject to FGM, found her account of how FGM occurred not credible and denied the requested reliefs. A single BIA member affirmed the adverse credibility finding and noted that FGM can provide basis for asylum.

Preliminarily, the court deferred to the BIA's construction of the term "social group" as defined in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). The court also cited *Matter of Kasing*, 21 I&N Dec. 357 (1996) (recognizing that FGM constitutes persecution) for

(Continued on page 20)

Recent Federal Court Decisions

(Continued from page 19)

the proposition that "a subjective punitive or malignant intent is not required to constitute persecution." In this case petitioner claimed that she was subjected to FGM because she was a female within a tribe practicing this ritual. The court found that, "applying the *Acosta* definition of *social group*, the female members of a tribe would be a social group," noting that "both gender and tribal membership are immutable characteristics," as identified in *Acosta*.

The court also noted that, while "there may be understandable concern in using gender as a group-defining characteristic," the focus should be "on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted 'on account of their membership.'" The court was not persuaded by that the BIA, "contrary to the language in *Acosta*, requires more than gender plus tribal membership to identify a social group." Moreover, the court also found that "opposition to FGM need not be proved to establish nexus," noting at the same time that it was not saying that "an adult's voluntary submission to FGM necessarily constitute persecution."

The court also found that "opposition to FGM need not be proved to establish nexus," noting at the same time that it was not saying that "an adult's voluntary submission to FGM necessarily constitute persecution."

The court then found that the BIA had sufficiently supported its determination that petitioner was not credible as to the alleged attack on her by her family resulting in female genital mutilation. However, because the BIA did not address petitioner's broader claim that she had suffered female genital mutilation on account of being a female member of the Tukulor Fulani tribe in Senegal, the court remanded for consideration of that issue. The court affirmed the denial of CAT protection based on the adverse credibility finding.

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■ Tenth Circuit Holds That It Has Jurisdiction To Review Non-Discretionary Determinations Regarding An Application For Cancellation Of Removal

In ***Sabido Valdivia v. Gonzales,*** __F.3d__, 2003 WL 2212319 (10th Cir. Sept. 13, 2005) (*Briscoe*, Anderson, Brorby), the Tenth Circuit dismissed in part and denied in part a petition for review from the BIA's denial of cancellation of removal. The court joined its sister circuits in determining that, notwithstanding the statutory bar on review of denials of discretionary relief, the court retains jurisdiction to review non-discretionary decisions made in denying cancellation, a form of discretionary relief. The court affirmed the immigration judge's denial of cancellation because the petitioner's absence from the United States for a period exceeding ninety days broke her continuous physical presence.

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■ Tenth Circuit Holds That It Lacks Jurisdiction To Review Denial Of Discretionary Relief Based On Both Discretionary And Non-Discretionary Reasons

In ***Ekasinta v. Gonzales***, 415 F.3d 1188 (10th Cir. 2005) (Ebel, Baldock, *Hartz*), the court ruled that it lacked jurisdiction to review a denial of cancellation of removal, special rule cancellation of removal, and adjustment of status, on grounds of statutory ineligibility and discretion. The court rejected petitioner's constitutional challenge to the streamlining procedures. Comparing affirmance without opinion to a "certiorari-like process," the court specifically disagreed with the Ninth Circuit opinion *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004), where that court held that it would be unconstitutional to look only to the IJ's opinion in determining circuit-court jurisdiction under § 1252 when the BIA has affirmed without opinion. "The constitution requires no more than a fair administrative proceeding, which Petitioner received in this case. Indeed, the Supreme Court has held that judicial review of the Government's expulsion of aliens is entirely a matter of legislative grace," said the court.

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ELEVENTH CIRCUIT

■ Case Remanded To BIA To Determine Whether Petitioner's Conduct Constitutes Resistance To China's Coercive Population Control Program

In ***Yang v. United States Attorney General,*** 418 F.3d 1198 (11th Cir. 2005) (Edmondson, Tjoflat, *Kravitch*), the Eleventh Circuit upheld the BIA's determination that the petitioner failed to prove asylum eligibility on account of an alleged sterilization attempt and her payment of a fine for violating China's family planning policy. Following the Third, Fourth, Seventh, and Ninth Circuits, the court remanded the case to determine whether petitioner's "kicking and screaming" during an injection procedure, two forced insertions of intrauterine devices, and her illegal removal of those devices amounted to "other resistance to a coercive population control program" as provided by the immigration statute.

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Federal Court Decisions

■ **Eleventh Circuit Holds That Its Lacks Jurisdiction Over The Attorney General's Determinations Made Under The Nicaraguan Adjustment And Central American Relief Act**

In *Ortega v. U.S. Attorney General*, 416 F.3d 1348 (11th Cir. 2005) (Hull, Wilson, Pryor) (*per curiam*), the Eleventh Circuit, on an issue of first impression, held that the unequivocal language of section 202(f) of the Nicaraguan Adjustment and Central American Relief Act deprived the court of jurisdiction to review the Attorney General's determination regarding whether the petitioner established that his status should be adjusted under that statutory provision.

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■ **Eleventh Circuit Holds Aggravated Battery Is a Crime Involving Moral Turpitude**

In *Sosa-Martinez v. Gonzales*, __F.3d__, 2005 WL 2001291 (11th Cir. August 22, 2005) (Carnes, *Hull*, Marcus), the Eleventh Circuit upheld the BIA's determination that petitioner's conviction for aggravated battery was a crime involving moral turpitude. The court held that an intentional battery that included, as an element of the offense either 1) great bodily harm, permanent disability, or permanent disfigurement, or 2) the use of a deadly weapon, constituted a crime of moral turpitude, and dismissed the petition for lack of jurisdiction.

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INDEX TO CASES SUMMARIZED IN THIS ISSUE

ELEVENTH ANNUAL IMMIGRATION LAW SEMINAR

The complete agenda for the seminar has been posted on the OIL web site. Subject to approval, CLE credit will be available. Those interested in attending should contact (francesco.isgro@usdoj.gov) by COB October 17.

There is no charge for attendance at the seminar though attendees are expected to cover their own travel expenses.

Among the topics that will be covered are: categories of admission, immigrants and non-immigrants; removal grounds, including security grounds of removal; aggravated felonies and definition of conviction; removal proceedings under § 240 and alternative forms of removal; BIA appeals and streamlining update; immigration reliefs, including cancellation, waivers, and adjustment; asylum, withholding of removal, and Convention Against Torture; due process issue in immigration proceedings; immigration enforcement: DHS perspective; REAL ID Act, judicial review of removal orders, and mandamus. A panel of representatives from the Ninth Circuit is scheduled to make a presentation on Tuesday, October 25th.

INDEX TO FEDERAL COURTS*

ELEVENTH ANNUAL IMMIGRATION LAW SEMINAR

The Office of Immigration Litigation will present its Eleventh Annual Immigration Law Seminar on October 24-28, 2005, in Washington, D.C. This is a basic immigration law course and is intended for government attorneys who are new to immigration law or who are interested in a comprehensive review of the law. See p. 21 for additional information.

INSIDE OIL

Congratulations to Senior Litigation Counsel, **Earle B. Wilson**, who has been appointed as an Immigration Judge in Miami. Mr. Wilson joined the Department in 1996, when he served a AUSA in Baltimore, and transferred to OIL in October 1998.

Congratulations to **Michelle Latour** and **Linda Wernery** who have been promoted to Assistant Directors.

Congratulations to the following OIL attorneys who have been promoted to Senior Litigation Counsel: **Bryan Beier**, **Carol Federighi**, **Cindy Ferrier**, **Steve Flynn**, **Leslie McKay**, **Bill Peachey**, and **Aviva Poczter.**

Congratulations to **Papu Sandhu** who was recently installed as an elder at the Capitol Hill Baptist Church.

OIL welcomes the following Department attorneys (pictured above) who have been detailed to OIL: **Janet A. Bradley** (TAX), **Surell Brady** (JMD), **Scott Chutka** (JMD), **John Cunningham** (CRIM), **Molly DeBusschere** (ATR), **Rhonda M. Dent** (CRT), **Christopher Dong** (FBI), **Merri Hankins** (DEA), **Diane Kelleher** (CIV), **Angela Liang,** (CRT), **Robert Richardson** (DEA), **Erika L. Ritt** (ATF), **Carolyn V. Sapla** (ATF), **John. F. Schmillen** (USTP), **Harold M. Sklar** (FBI), **Dennis M. Wong** (BOP).

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 the Office of Immigration Litigation 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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