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Immigration Litigation Bulletin

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NINTH CIRCUIT FINDS FGM DERIVATIVE ASYLUM CLAIM EXHAUSTED WHERE BIA ADOPTED IJ'S OPINION ADDRESSING ISSUE

In ***Abebe v. Gonzales***, __F.3d__, 2005 WL 3556910 (9th Cir. Dec. 30, 2005) (6 to 5, Clifton for majority, Tallman for partial dissent), a divided en banc Ninth Circuit held that petitioners had exhausted their asylum claim based on their U.S. citizen daughter's fear of female genital mutilation (FGM), because the BIA had adopted the IJ's decision rejecting the FGM argument.

> **"Where the BIA cites *Burbano* and does not express disagreement with any part of the IJ's decision, the BIA adopts the IJ decision in its entirety."**

The principal petitioner and his wife are natives and citizens of Ethiopia. The petitioner entered the United States on January 1, 1990, on a J-1 student visa. He did not return home when his visa expired. Instead, his wife joined him on February 22, 1993. On July 13, 1993, petitioner filed an affirmative application for asylum, listing his wife as a derivative applicant. While that application was pending petitioners had two children a son and a daughter, born in 1994 and in 1996, respectively. Subsequently, the asylum application was denied and petitioners were placed in removal proceedings.

Before the IJ petitioner argued that if returned to Ethiopia he would be persecuted on account of his political opinion and that his daughter would be subject to FGM. On November 17, 1997, the IJ denied the asylum application, rejecting both basis underlying the asylum claim. On July 2, 2002, the BIA adopted and affirmed the IJ's decision citing *Matter of Burbano*, 20 I&N Dec. 872 (1994). On August 13, 2004, a split-panel of the Ninth Circuit concluded that petitioner had failed to establish a well-founded fear of persecution on account of political opinion or that the daughter would be subject to FGM. That opinion was vacated when the Ninth Circuit granted petitioner's request for rehearing *en banc.*

The Ninth Circuit rejected the government's contention that it did not have jurisdiction to consider the FGM claim because petitioner had neither men-

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SEVENTH CIRCUIT CRITICIZES ADJUDICATION OF IMMIGRATION CASES

In ***Benslimane v. Gonzales,*** __F.3d__, 2005 WL 3193641 (*Posner*, Ripple, Rovner), a case challenging the denial of a request for a continuance, Judge Posner, writing for the court, took the opportunity to explain that "the tension between the judicial and administrative adjudications" of immigration cases as reflected in recent courts opinions, was "not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standards of judicial review of administrative decisions. It is due to the fact that the adjudication of those cases at the administrative level has fallen below the minimum standards of legal justice."

Noting that the courts' criticism of the "Board and immigration judges

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THIRD CIRCUIT REVIEWS AAO'S DENIAL OF ADJUSTMENT APPLICATION AND FINDS VACATED CONVICTION NOT A "CONVICTION" UNDER INA §101(A)(48)(A)

In ***Pinho v. Gonzales***, __F.3d__, 2005 WL 3470037 (Roth, McKee, *Fisher*) (3d Cir. December 20, 2005), the Third Circuit found jurisdiction to review a denial of adjustment by the Administrative Appeals Office ("AAO"), and held that a vacated criminal conviction was no longer a "conviction" for immigration purposes where the conviction had been vacated because of ineffective assistance of counsel.

The petitioner, a citizen of Portugal, pleaded guilty in 1992 of possession of cocaine. Prior to his plea, petitioner sought admission into New Jersey's "Pre-Trial Intervention" program ("PTI"), which allows first time offend-

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ers to have their proceedings suspended for up to thirty-six months. At the end of the program, the judge can either dismiss the indictment, postpone proceedings further, or restore proceedings. At the time petitioner entered his plea, he was not eligible for PTI because he also had been indicted for possession with intent to distribute cocaine on or near a school property. This ineligibility rule was invalidated by the N.J. Supreme Court in 1999.

In 1997, after serving his sentence, petitioner represented by new counsel, applied for post conviction relief contending that he had received ineffective assistance of counsel in connection with his rejection from the PTI. The state did not file an answer to petitioner's motion. At a subsequent hearing, the court observed that since petitioner had been accepted into the PTI program, the judgment of conviction would be vacated.

In January 2000, petitioner applied for adjustment based on his marriage to a United States citizen. An INS District Director denied that application finding petitioner inadmissible under 8 U.S.C. § 212(a)(2)(A)(i)(II), as an alien who had been convicted of a controlled substance violation, based on petitioner's 1992 guilty plea to possession of cocaine. The INS relied on *Matter of Roldan*, 22 I&N Dec. 512 (1999), where the BIA had held that an alien remains convicted for immigration purposes "notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure." The AAO subsequently affirmed that decision on July 25, 2002.

On December 31, 2003, petitioner and his wife filed a complaint with the district court contending that the denial of adjustment was unlawful because the state conviction could no longer be a bar to petitioner's eligibility. Petitioner argued that under *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), the BIA drew a distinction between convictions vacated because of an alien's subsequent participation in a rehabilitation program, and conviction vacated because of an underlying substantive or constitutional defect. Consequently, petitioner contended that he no longer had a "conviction" because it had been vacated on the ground of ineffective assistance of counsel and not because he had participated in a rehabilitative program. The district court determined that the conviction was valid for immigration purposes, expressing its suspicion that petitioner's ineffective assistance claim was simply an attempt to engineer a better position on his adjustment application.

> **"We hold that an AAO decision is final where there are no deportation proceedings pending in which the decision might be reopened or challenged."**

Jurisdiction of the Court

Preliminarily, the Third Circuit addressed the question of whether the district court had the jurisdiction to review the AAO's denial of an application for adjustment. The court held that the court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 704 to review the determination of petitioner's statutory eligibility for adjustment because the agency's action was final, it adversely affected petitioner, and the action was non-discretionary. The court found that the AAO decision was final because there were no other procedures that petitioner could invoke. The possibility that at some point petitioner could be subject to removal proceedings where he could renew the application for adjustment did not render the decision "tentative or interlocutory." "We hold that an AAO decision is final where there are no deportation proceedings pending in which the decision might be reopened or challenged," said the court. The court also found that the AAO decision adversely affected petitioner because he could not obtain employment authorization and as a consequence could not obtain a driver's license. Finally, the court held that the AAO's determination of statutory eligibility was purely a legal question and did not implicate agency discretion.

Is a Vacated Conviction a Conviction for Immigration Purposes?

Under INA § 101 (a)(48)(A) a "conviction" exists where a "formal judgment of guilt of the alien" has been entered by a court, or if the adjudication of guilt has been withheld, the alien will nonetheless stand "convicted" if he has pleaded or been found guilty or admitted sufficient facts to support a finding of guilt, and the judge has imposed some penalty upon him. In *Rodriguez-Ruiz*, 22 I&N Dec. 22 I&N Dec.1378 (BIA 2000), the BIA held that alien was no longer "convicted" because unlike in the *Roldan* case, the provision under which it had been vacated was neither an expungement statute nor a rehabilitative statute." Subsequently, in *Matter of Pickering*, the BIA held that a conviction vacated explicitly in order to prevent deportation or other federal immigration consequence remained in force under the definition.

The Third Circuit, although noting that the "the BIA has not explained precisely why it thinks substantive vacaturs do not fit the 101 (a)(48)(A) definition," nonetheless found the distinction between substantive and rehabilitative *vacaturs* reasonable under *Chevron* because of the BIA's longstanding, consistent practice of drawing this distinction. The court held, however, that to determine the underlying basis for the *vacatur*, the agency must apply a categorical test. "First, the agency must look to the order itself. If the order explains the court's reasons for vacating the conviction, the

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CHALLENGES TO THE INTENSIVE SUPERVISION APPEARANCE PROGRAM (ISAP), A NEW ICE ALTERNATIVE TO DETENTION

In the wake of the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), the Department of Homeland Security's Immigration and Customs Enforcement ("ICE") has been developing new strategies for reducing the high absconder rate among aliens subject to final orders of removal. *Zadvydas* held that six months of post-order detention is presumptively reasonable, while the government makes efforts to accomplish removal. However, beyond that six month period, the statute does not authorize continued detention of aliens whose removal is not significantly likely in the reasonably foreseeable future. Without such detention authority, the government must release aliens who pose a significant flight risk, or a danger to the community, where the alien demonstrates that his or her removal cannot be accomplished in the foreseeable future. ICE's alternatives to detention programs have been developed, in part, to enhance ICE's ability to effectively supervise aliens who must be released pursuant to the *Zadvydas* decision. In addition, the programs encompass aliens not subject to mandatory detention, who are still litigating their removal cases.

ICE's alternatives to detention programs have been developed, in part, to enhance ICE's ability to effectively supervise aliens who must be released pursuant to the *Zadvydas* decision.

One such program, the Intensive Supervision Appearance Program ("ISAP") is currently being piloted in eight cities. The ISAP program was initiated in June 2004, specifically to address concerns about high absconder rates among aliens in removal proceedings, or subject to a final order of removal. In February 2003, the Department of Justice's Inspector General had found that INS was successful in removing only thirteen percent of non-detained aliens with final removal orders. In face of such low removal rates, Congress appropriated $3 million to ICE to develop "alternatives to detention to promote community-based programs for supervised release." *See* H.R. Conf. Rep. 108-10 (2003). ICE responded with the ISAP pilot program, as well as electronic monitoring programs which are now being implemented nationwide.

ISAP involves three distinct phases of supervision: intense, intermediate, and regular. During the intense phase, which typically lasts thirty days, the alien is subject to a curfew which is developed with the alien's input, to ensure that it does not interfere with employment and other obligations. The alien's presence in his home during curfew hours may be confirmed via ankle bracelet and/or random telephone calls to the residence, as well as unscheduled visits to the alien's home. During ISAP's "intermediate" and "regular" phases, the intensity of supervision is gradually reduced, as the alien demonstrates his willingness to comply with the program.

ISAP currently is being challenged on statutory and constitutional grounds in *Lepesh, et al. v B.I., Inc.*, C.A. No. 04-1815, in the United States District Court for the District of Oregon. The *Lepesh* petitioners characterize supervision under ISAP as a form of "home detention" and assert that it exceeds ICE's statutory detention authority, as applied to post-order aliens, and violates their substantive and procedural due process rights. Petitioners also assert that unscheduled home visits under ISAP constitute unreasonable searches and seizures, in violation of the Fourth Amendment. Petitioners' complaints appear to be confined to ISAP's intense phase, particularly, the electronic monitoring, curfews, and unscheduled home visits during that phase.

The government, in its habeas return filed on December 15, 2005, countered petitioners' statutory argument by pointing out that supervision under ISAP falls far short of "detention," as that term is used in the INA, and instead is permissible supervision authorized by 8 U.S.C. § 1231(a)(3). The government agreed that ISAP, like any other form of supervision, encompasses some restraints on liberty. However, the term "detention" ordinarily refers to confinement in a correctional or other facility, and not the myriad other possible forms of restraints upon an individual's liberty, such as a periodic in-person reporting obligation, a curfew, or requirement to stay within a certain radius. The INA and the caselaw both support this limited interpretation of "detention." Absent some indication that Congress intended "detention" to mean something broader in the immigration context, "the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982); *see also Ardestani v. INS*, 502 U.S. 129, 135-36 (1991) ("The strong presumption that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed") (citations omitted). No such contrary intent is expressed in the INA or its legislative history and thus, petitioners' statutory argument should fail.

The government further argued that ISAP presents no substantive due process problem, particularly in view of the fact that petitioners cannot assert a fundamental liberty interest in freedom from supervision, while they await removal from the United States. On this score, the government pointed out that the

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ISAP CHALLENGED

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Supreme Court has consistently declined to subject immigration detention statutes and regulations to heightened scrutiny. *See, e.g., De-More v. Kim*, 538 U.S. 510 (2003) ("[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least restrictive means to accomplish its goal"); *Reno v. Flores*, 507 U.S. 292, 303 (1993) (holding that INS regulation restricting release of unaccompanied juvenile aliens only to a parent or legal guardian, absent exceptional circumstances, was constitutional because it was "rationally connected" to a legitimate government interest). It would be anomalous to hold that aliens who have been ordered removed from the United States have a fundamental liberty interest in freedom from supervision under the ISAP program, when those who are still litigating their removal case, and are confined to a detention facility, do not. Accordingly, the government asserted that the ISAP's constitutionality is subject only to rational basis review, which it readily withstands.

Placed in the proper analytical framework, it becomes obvious why petitioners' substantive due process challenge must fail. ISAP directly serves the legitimate, and indeed compelling, government interest in reducing the alarmingly high absconder rate in the population of non-detained aliens in removal proceedings, or subject to a final order of removal. In fact, in its short history, ISAP has been extremely successful in discouraging program participants from turning fugitive, and improving removal rates. Recent reports show that 79 percent of ISAP participants who were terminated from ISAP with final orders of removal had either complied with their final orders (36 percent), or were still in the removal process (43 percent). That shows a dramatic improvement over the thirteen percent removal rate for non-detained aliens found in the Inspector General's February 2003 report. ISAP's promising record during its first year of operation has not gone unnoticed by Congress, which, in September 2005, appropriated $10 million for ICE to expand alternatives to detention, including ISAP.

In its short history ISAP has been extremely successful in discouraging program participants from turning fugitive, and improving removal rates.

With regard to petitioners' procedural due process claim, the government pointed out that not one named petitioner has attempted to utilize the ISAP grievance procedure; however, other program participants have done so, and have arrived at satisfactory resolutions of their complaints. Finally, the government argued that petitioners cannot state a Fourth Amendment claim, based on ISAP's unscheduled home visit requirement, because the home visit is not a "search" within the meaning of the Fourth Amendment and instead is a minimally invasive condition of supervision necessary to reduce the risk of flight and to alert DHS of an alien's actual flight as soon as possible after it has occurred. *See Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (characterizing the need to closely supervise probationers as a "special need" permitting the government to impinge upon an individual's privacy in a manner "that would not be constitutional if applied to the public at large."); *Wyman v. James*, 400 U.S. 309, 317-18 (1971) (concluding that a welfare caseworker's required home visit, for the purpose of determining whether to continue benefits was not a search within "the Fourth Amendment meaning of that term."). The primary purposes of the home visit, which lasts only five to fifteen minutes, are: (1) to ensure that the alien is living at the address he provided as his place of residence; (2) to ensure that the alien is not obviously in the process of absconding; and (3) to ensure that the electronic monitoring equipment, if any, is in place and functioning. Thus, Fourth Amendment concerns are not implicated.

The legal issues raised in *Lepesh* are questions of first impression, as electronic monitoring and other features of the ISAP program are relatively new forms of immigration supervision. The parties are currently engaged in discovery, and a trial is set for February 14, 2006.

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agency's inquiry must end there. If the order does not give a clear statement of reasons, the agency may look to the record before the court when the order was issued. No other evidence of reasons may be considered." Here, the court found that the vacatur was for substantive and not solely for rehabilitative purposes because both the pleading and the vacatur referred to the ineffective assistance of counsel claim. Therefore, under *Matter of Pickering*, petitioner no longer had a conviction under § 101(a)(48)(A).

The court rejected the government's contention that the vacatur order was not based on the ineffective assistance of counsel claim. Applying another test, said the court, would require speculation about the motives for judges' actions other than those reasons that appear on the record. The court noted that the government could have avoided this problem by interpreting INA § 101(a)(48)(A) to mean that "as a matter of federal law, all vacated convictions remain 'convictions.'"

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LITIGATING ASYLUM CASES

Second Step In An Asylum Case: Make Sure The Asylum Applicant Is Claiming Persecution Of Himself or Herself – Not Someone Else – And Be Sure To Distinguish Between Principal And Derivative Asylum Applicants

As the last column showed, the first step in an asylum case is to make sure the applicant is applying for asylum from his or her "country of nationality," or if no country of nationality, the country of "last habitual residence." This is because the first core principle in our law is that asylum provides protection against persecution in one's home country – not someplace else.

The second core principle in our law is that asylum and withholding of removal provide protection against persecution of the applicant himself or herself – not someone else. This is codified in regulations which have the force and effect of law and bind the courts.

Asylum and withholding of removal provide protection against persecution of the applicant himself or herself – not someone else.

Principal Or Primary Asylum Applicants

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An alien is eligible for asylum only if he or she qualifies as "refugee," 8 U.S.C. § 1158(b)(1), which is defined by statute as "a person" who is unable or unwilling to return to the country of nationality "because of [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

A host of regulations make asylum in the United States "applicant specific" – meaning the applicant qualifies for asylum based on past or future persecution of himself or herself – not someone else. 8 C.F.R. 1208.3 (requiring the "asylum applicant" to file for asylum, which is also considered an application for withholding of removal); 8 C.F.R. § 1208.13(b) (stating that the "applicant" may qualify as a refugee if "he or she has suffered past persecution" or "he or she has a well-founded fear of future persecution"); *id.* § 1208.13(b)(1) (creating a rebuttable presumption of a well-founded fear of future persecution if "the applicant" can establish "he or she has suffered persecution in the past"); *id.* § 1208.13(b)(1)(i)(A) (stating that this presumption is overcome if the government establishes "the applicant no longer has a well-founded fear of persecution" because of a fundamental change in circumstances or "the applicant" could relocate elsewhere); *id.* § 1208.13(b)(2)(i)(A)-(C) (defining a "well-founded fear of persecution" in terms of fear of the applicant); id. § 1208.13(b)(2)(ii) (limiting eligibility if "the applicant c[an] avoid persecution by relocating to another part of the applicant's country").

Derivative Asylum Applicants

Congress has created "derivative asylum" to permit a "spouse" or "child" of an alien who is granted asylum to derive asylum from him or her. 8 U.S.C. § 1158(b)(3) (stating that a "spouse" and minor "child" may, if not otherwise eligible for asylum, "be granted the same status as [an alien granted asylum] if accompanying, or following to join, such alien."). Regulations permit an asylum "applicant" to list his spouse and children as derivatives on the asylum application, 8 C.F.R § 1208.3, and like the statute permit a "spouse" or "child" to derive asylum from the "principal alien." 8 C.F.R. §§ 1208.21 (a)-(c), (d), (g).

Thus, a spouse and child of an asylum applicant have two choices: (1) they can file asylum applications in their own right claiming persecution of themselves, or (2) they can be listed as derivatives of an asylum applicant who is the person actually applying for asylum, in which case they get asylum only if the applicant qualifies.

This core distinction between a principal applicant (who must establish persecution of himself or herself on account of one of the 5 grounds to qualify for asylum) and derivative applicants (a spouse or child who is tagging along on another alien's application) can often be overlooked, misunderstood, or conflated and lumped together by adjudicators, litigators, and the courts.

Therefore, always make sure in assessing your case – and writing your facts – that you understand who is the actual asylum applicant and whether a spouse and child are merely seeking asylum as derivatives, or are independently applying for asylum in their own right by filing their own applications. If you have a case where the adjudicator missed these distinctions between principal and derivative applicants, lumping their claims together as one asylum claim – which is contrary to our law – you may have a case that requires remand for correct analysis and application of the law.

Withholding Of Removal Applicant

Like asylum, withholding of removal is applicant- specific. It is only available for a clear probability of future persecution of the applicant – not someone else. 8 U.S.C. § 1231(b)(3) (statute providing that withholding of removal is available if an "alien's life or freedom would be threatened" because of his race, religion, nationality, membership in a particular social group, or political opinion); 8 C.F.R. §§ 1208.16(b),(b)(2) (regulations requiring "the applicant" to prove that "his or her life or freedom would be threatened," meaning it is "more likely than not" [clear probability] that "he or

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she would be persecuted" on account of race, religion, nationality, et cetera); *id*. § 1208.16(1)(i) (creating a presumption of future threat to life or freedom if "the applicant is determined to have suffered past persecution"); *id*. §§ 1208.16(1)(i)(A), (B) (permitting rebuttal of this presumption if the government can show a fundamental change in circumstances such that "the applicant's life or freedom would not be threatened" or the "applicant" could avoid future threat "to his or her life or freedom" by relocating).

No Derivative Withholding Of Removal

Unlike asylum, there is no statute or regulation permitting derivative withholding of removal for a spouse or child of an alien who has been granted withholding of removal. *Adjudicators, litigators, and courts can overlook this law, particularly in the Ninth Circuit where there is inconsistent case law about whether such relief exists – with some cases recognizing that there is no derivative withholding of removal, and other cases erroneously ordering the agency to grant such relief.*

If you have a case where an alien is claiming derivative withholding of removal for a spouse or child, you should make sure the adjudicators held there is no such relief; that it is *ultra vires*, and contrary to our law. If the adjudicators overlooked this law, you may need to consider remand for clarification or correct application of the law.

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NINTH FINDS FGM ISSUE EXHAUSTED

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tioned that issue in his Notice of Appeal to the BIA nor had he articulated an argument in his brief. Relying on *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005), the court said that where the BIA cites *Burbano* and does not express disagreement with any part of the IJ's decision, the BIA adopts the IJ decision in its entirety. "The BIA's express adoption of the IJ's decision which explicitly discussed the FGM ground is 'enough to convince us that the relevant policy concerns underlying the exhaustion requirement–that an administrative agency should have a full opportunity to resolve a controversy or correct its own errors before judicial intervention-have been satisfied here,'" said the court. Accordingly, it held that petitioner's FGM argument was not barred due to failure to exhaust.

On the merits, the court found that it was "uncertain" whether the IJ had applied the correct standard in evaluating the fear of persecution based on FGM. It noted that the IJ in his oral decision had concluded that FGM "is not a likely to be a threat" to petitioner's daughter if her family is returned to Ethiopia. "Under *Cardoza-Fonseca* an alien who demonstrates only a ten percent chance of future persecution may prevail in a claim for asylum," said the court. Here, the court found that substantial evidence did not "support a finding that there was less than a ten per percent chance [that petitioner's daughter] would be subjected to FGM in Ethiopia." The court also found that documentary evidence supported petitioners's contention "that they had an objectively reasonable fear that [their daughter] would be subjected to FGM if the family were returned to Ethiopia." In particular, the court found that the Department of State Report for 1994, indicating that women are able to prevent their daughters from being subjected to circumcision by relatives "should not have been sufficient to persuade a reasonable fact finding that there was less than ten percent change that [petitioners' daughter] would be subjected to FGM if the family were returned to Ethiopia." Accordingly, the court reversed the denial of asylum based on the FGM claim, and stated that, it would not reach the issue of "whether Petitioners, parents of a U.S. citizen child likely to face persecution in her parents' native country, may derivatively qualify for asylum. That was not a ground relied upon or even discussed by the IJ or the BIA in this case." The court affirmed the denial of asylum based on petitioner's fear of persecution on account of political opinion.

The majority opinion drew a sharp dissent on the issue of whether petitioner had exhausted his FGM-based asylum claim. The dissenters would have found that, "[b]y neglecting to raise the FGM issue in their counseled Notice of Appeal, or to challenge the decision of the Immigration Judge (IJ) within their counseled brief to the BIA, the Petitioners did not put the BIA on notice of their claim or give the agency 'a full opportunity to resolve [the] controversy or correct its own errors before judicial intervention.'" The dissenters would have held that "[w]e cannot intervene in the administrative process if the BIA was not first given such an opportunity; therefore, we do not have jurisdiction over the FGM claim." The dissenters also noted that *Tchoukhrova*, the case relied upon by the majority on the issue of exhaustion, was wrongly decided and should have been overruled. Finally, the dissenters accused the majority that "by sleight of hand" [it] assumed that "parents of United States citizen child are nonetheless entitled to claim derivative asylum relief based on the possibility that their citizen child would be subjected to FGM." The dissenters would have held that "parents cannot claim an unrecognized form of derivative relief when they themselves cannot establish entitlement to asylum."

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2005 DECISIONS OF THE ATTORNEY GENERAL AND BIA

Ed. Note: Summaries are listed in reverse chronological order.

■ ***Matter of Cota-Vargas***, 23 I&N Dec. 849 (BIA 2005)

A trial court's decision to modify or reduce an alien's criminal sentence *nunc pro tunc* is entitled to full faith and credit by the Immigration Judges and the BIA, and such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for effecting the modification or reduction. *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), clarified; *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), distinguished.

■ ***Matter of Ramos***, 23 I&N Dec. 843 (BIA 2005)

(1) Under the attorney discipline regulations, a disbarment order issued against a practitioner by the highest court of a State creates a rebuttable presumption that disciplinary sanctions should follow, which can only be rebutted upon a showing that the underlying disciplinary proceeding resulted in a deprivation of due process, that there was an infirmity of proof establishing the misconduct, or that discipline would result in injustice.

(2) A practitioner who has been expelled may petition the BIA for reinstatement after 1 year, but such reinstatement is not automatic and the practitioner must qualify as an attorney or representative under the regulations.

(3) The Government is not required to show that an attorney has "appeared" before it, because any attorney is a "practitioner" and is therefore subject to sanctions under the attorney discipline regulations following disbarment.

(4) Where the respondent was disbarred by the Supreme Court of Florida as a result of his extensive unethical conduct, expulsion from practice before the Board, the Immigration Courts, and the Department of Homeland Security is an appropriate sanction.

■ ***Matter of Smriko***, 23 I&N Dec. 836 (BIA 2005)

(1) Removal proceedings may be commenced against an alien who was admitted to the United States as a refugee under INA § 207, 8 U.S.C. § 1157 (2000), without prior termination of the alien's refugee status.

(2) The respondent, who was admitted to the United States as a refugee and adjusted his status to that of a lawful permanent resident, is subject to removal on the basis of his convictions for crimes involving moral turpitude, even though his refugee status was never terminated.

■ ***Matter of Perez Vargas***, 23 I&N Dec. 829 (BIA 2005)

Immigration Judges have no authority to determine whether the validity of an alien's approved employment-based visa petition is preserved under INA § 204(j), 8 U.S.C. § 1154(j) (2000), after the alien's change in jobs or employers.

■ ***Matter of E-L-H-***, 23 I&N Dec. 814 (BIA 2005)

A precedent decision of the Board of Immigration Appeals 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. *Matter of E-L-H-*, 22 I&N Dec. 21 (BIA 1998), reaffirmed.

■ ***Matter of Avilez-Nava***, 23 I&N Dec. 799 (BIA 2005)

(1) Where an alien departed the United States for a period less than that specified in INA § 240A(d)(2), 8 U.S.C. § 1229b(d)(2)(2000), and unsuccessfully attempted reentry at a land border port of entry before actually reentering, physical presence continued to accrue for purposes of cancellation of removal under section 240A(b)(1)(A) 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.

(2) The respondent's 2-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.

■ ***Matter of Ortega-Cabrera***, 23 I&N Dec. 793 (BIA 2005)

(1) Because an application for cancellation of removal under INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2000), 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 of Immigration Appeals.

(2) To establish eligibility for cancellation of removal under INA § 240A(b)(1), an alien must show good moral character for a period of 10 years, which is calculated backward from the date on which the application is finally resolved by the Immigration Judge or the Board.

■ ***Matter of A-H-***,23 I&N Dec. 774 (A.G. 2005)

(1) The Attorney General denied asylum in the exercise of discretion to a leader-in-exile of the Islamic Salvation Front of Algeria who was associated with armed groups that committed widespread acts of persecution and terrorism in Algeria, because the United States has significant interests

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in combating violent acts of persecution and terrorism, and it is inconsistent with these interests to provide safe haven to individuals who have connections to such acts of violence.

(2) Terrorist acts committed by the armed Islamist groups in Algeria, including the bombing of civilian targets and the widespread murders of journalists and intellectuals on account of their political opinions or religious beliefs, constitute the persecution of others.

(3) A person who is a leader-in-exile of a political movement may be found to have "incited, assisted, or otherwise participated in" acts of persecution in the home country by an armed group connected to that political movement where there is evidence indicating that the leader (1) was instrumental in creating and sustaining the ties between the political movement and the armed group and was aware of the atrocities committed by the armed group; (2) used his profile and position of influence to make public statements that encouraged those atrocities; or (3) made statements that appear to have condoned the persecution without publicly and specifically disassociating himself and his movement from the acts of persecution, particularly if his statements appear to have resulted in an increase in the persecution.

(4) The phrase "danger to the security of the United States" means any nontrivial risk to the Nation's defense, foreign relations, or economic interests, and there are "reasonable grounds for regarding" an alien as a danger to the national security where there is information that would permit a reasonable person to believe that the alien may pose such a danger.

(5) The Attorney General remanded the record for further consideration by the BIA of the questions whether (1) there is sufficient evidence to indicate that the respondent "incited, assisted, or otherwise participated in the persecution" of others; (2) deference should be given to the credibility findings of the Immigration Judge; (3) there are "reasonable grounds for regarding [the respondent] as a danger to the security of the United States"; (4) the respondent presently faces a threat to his life or freedom if removed to Algeria; and (5) the respondent presently faces a likelihood of being tortured in Algeria.

2005 Attorney General and BIA Decisions

■ ***Matter of Brieva***, 23 I&N Dec. 766 (BIA 2005)

(1) The offense of unauthorized use of a motor vehicle in violation of section 31.07(a) of the Texas Penal Code is a crime of violence under 18 U.S.C. § 16 (b) (2000) and is therefore an aggravated felony under INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2000).

(2) An alien who is removable on the basis of his conviction for a crime of violence is ineligible for a waiver under former INA § 212(c), 8 U.S.C. § 1182 (c) (1994), because the aggravated felony ground of removal with which he was charged has no statutory counterpart in the grounds of inadmissibility under INA § 212(a), 8 U.S.C. § 1182 (a) (2000).

■ ***Matter of Shanu***, 23 I&N Dec. 754 (BIA 2005)

(1) The phrase "date of admission" in INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227 (a)(2)(A)(i) (2000), refers to, among other things, the date on which a previously admitted alien is lawfully admitted for permanent residence by means of adjustment of status.

(2) An alien convicted of a single crime involving moral turpitude that is punishable by a term of imprisonment of at least 1 year is removable from the United States under INA § 237(a)(2)(A)(i) if the crime was committed within 5 years after the date of any admission made by the alien, whether it be the first or any subsequent admission.

■ ***Matter of Lovo***, 23 I&N Dec. 746 (BIA 2005)

(1) The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), does not preclude, for purposes of Federal law, recognition of a marriage involving a postoperative transsexual, where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.

(2) A marriage between a postoperative transsexual and a person of the opposite sex may be the basis for benefits under INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000), where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage a valid heterosexual marriage.

■ ***Matter of A-M-***, 23 I&N Dec. 737 (BIA 2005)

(1) Absent specific reasons for reducing the period of voluntary departure initially granted by the Immigration Judge at the conclusion of removal proceedings, the BIA will reinstate the same period of time for voluntary departure afforded to the alien by the Immigration Judge. *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), modified.

(2) The respondent, whose asylum application was not filed within a year of his arrival in the United States, failed to demonstrate his eligibility for an exception to the filing deadline or for any other relief based on his claim of persecution in Indonesia, but the 60-day period of voluntary departure granted to him by the Immigration Judge was reinstated.

■ ***Matter of X-K-***, 23 I&N Dec. 731 (BIA 2005)

An alien who is initially screened for expedited removal under section INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A) (2000), as a member of the class of aliens designated pursuant to the authority in INA § 235(b)(1)(A)(iii), but who is subsequently placed in removal proceedings under INA § 240, 8 U.S.C. § 1229a 2000), following a positive credible fear determination, is eligible

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for a custody redetermination hearing before an Immigration Judge unless the alien is a member of any of the listed classes of aliens who are specifically excluded from the custody jurisdiction of Immigration Judges pursuant to 8 C.F.R. § 1003.19(h)(2)(i).

■ ***Matter of Blake***, 23 I&N Dec. 722 (BIA 2005)

An alien who is removable on the basis of his conviction for sexual abuse of a minor is ineligible for a waiver under former INA § 212(c), 8 U.S.C. § 1182(c) (1994), because the aggravated felony ground of removal with which he was charged has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act, 8 U.S.C. § 1182(a) (2000). *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991), distinguished.

■ ***Matter of Luviano-Rodriguez***, 23 I&N Dec. 718 (A.G. 2005)

An alien whose firearms conviction was expunged pursuant to section 1203.4 of the California Penal Code has been "convicted" for immigration purposes. *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005), followed.

■ ***Matter of Marroquin-Garcia***, 23 I&N Dec. 705 (A.G. 2005)

(1) The federal definition of "conviction" at INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2000), encompasses convictions, other than those involving first-time simple possession of narcotics, that have been vacated or set aside pursuant to an expungement statute for reasons that do not go to the legal propriety of the original judgment, and that continue to impose some restraints or penalties upon the defendant's liberty.

(2) An alien whose firearms conviction was expunged pursuant to section 1203.4 of the California Penal Code has been "convicted" for immigration purposes.

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Applies § 208(a) Prohibition Against Direct Review Of Asylum Application 1-Year Time Bar To Review Of BIA's Denial Of Reconsideration On Same Issue**

In ***Mehilli v. Gonzales***, __F.3d__, 2005 WL 3491017 (1st Cir. Dec. 22, 2005) (Boudin, Stahl, *Lynch*), the First Circuit held that INA § 208(a), 8 U.S.C. § 1158(a), which forbids direct review of the decision that an asylum application is time-barred, applies equally to review of the BIA's denial of reconsideration on the same issue. The principal petitioner, with his wife and three children, is a native of Albania. Petitioner claimed that he entered the U.S. on December 5, 2000, using a fraudulent passport. Petitioner's entry date was disputed before the IJ who ultimately determined that petitioner was not credible and had not established his arrival date. Accordingly, the IJ determined that petitioner had not timely filed his asylum application and that there were no extraordinary circumstance to exempt him from that requirement.

Nonetheless, the IJ held in the alternative, that petitioner was not credible and even if credible he had not proved persecution. Petitioner claimed that he had been an active member of the Albania's Democratic Party and when the Socialist Party came to power they took over his bakery. However, he was still receiving compensation even up to the time of the hearing. Petitioner also testified about several incident including one where unknown assailants attempted to kidnap his son. When BIA affirmed the IJ's decision, petitioner did not seek judicial review. Instead, he filed a motion to reconsider which the BIA subsequently denied.

In finding that it lacked jurisdiction to review the untimely filed asylum application, the court said that "recognition of jurisdiction in these circumstances would circumvent both the purposes of the jurisdictional limitation and the purposes of reconsideration." The court also found as "frivolous" petitioner's argument that the adverse credibility finding raised a colorable constitutional claim as to bring the timeliness issue within the REAL ID Act exception. Finally, the court found that the BIA properly denied the motion to reconsider the withholding and CAT claim.

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■ **First Circuit Holds That Cambodian Couple Failed To Show Past Or Future Persecution**

In ***Ang v. Gonzales*** __F.3d__, 2005 WL 3211154 (*Selya*, Lynch, Smith) (1st Cir. December 1, 2005), the First Circuit, upheld the BIA's denial of asylum, withholding of removal, and protection under the Convention Against Torture. The principal petitioner, a Cambodian citizen who worked at American embassy, testified that he was also affiliated with FUNCINPEC, an opposition party. IJ found petitioner's testimony not credible and that petitioner and had not met his burden of establishing fear of future persecution because a regime change had occurred in Cambodia and the opposition party was now part of government.

The First Circuit held that the IJ adequately considered alien's hybrid claim that he had a well-founded fear of future persecution in Cambodia because of his affiliation with opposition political party and his membership in social group that supported American presence in Cambodia. The court noted, however, that former employees at the American Embassy who supported Americans "potentially could form the basis of a particular social group." The court found that threats that petitioner allegedly received while working at the United States embassy in Cambodia did not compel a finding of past persecution

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supporting asylum request. Even if petitioner had subjective fear of future persecution if he were to return to Cambodia, the court also found that he could not establish objectively reasonable basis for that fear due to changed country conditions. Finally, the court rejected petitioner's contention that the court should grant humanitarian asylum, finding that establishing a rule that courts had such power "would rip a mammoth hole in the fabric of the immigration laws."

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SECOND CIRCUIT

■ Second Circuit Affirms BIA's Denial Of Asylum And Withholding Of Removal To Applicant From Albania

In ***Damko v. INS***, 430 F.3d 626 (2d Cir. 2005) (Winter, *Cabranes*, Pooler), the Second Circuit deferred to the BIA's construction of the term "persecution" to include "economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom." It also affirmed the denial of asylum and withholding finding that substantial evidence supported the BIA's determination that the economic deprivations suffered by the petitioner were not so severe as to threaten her life or freedom.

The petitioner, an Albanian citizen, testified that because in 1973 she had acted as an interpreter for some visiting relatives from the United States, she had been detained and interrogated by the security agents of the Communist Party. Subsequently she had been expelled from the university before she should obtain an engineering degree and as a result confined to an industrial job, which she also eventually lost. The court held that "in order to be an act of economic persecution, the behavior in question must threaten death, imprisonment or the infliction of substantial harm or suffering." The court found that under these facts, she had not suffered past persecution, and had failed to articulate any claim as to future persecution.

> "In order to be an act of economic persecution, the behavior in question must threaten death, imprisonment or the infliction of substantial harm or suffering."

In a concurring opinion, Judge Pooler would not have deferred to the BIA's interpretation of "economic persecution" because the BIA had not clearly decided the issue, and the court's standard was in conflict with *Cardoza-Fonseca* which requires a lower level of proof.

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■ Second Circuit Determines That It Takes More Than Subjective Intent Of Alien To Derive Citizenship From Naturalization Of His Mother

In ***Ashton v. Gonzales***, 431 F.3d 95 (2d Cir. 2005) (*Walker*, Calabresi, Straub), the Second Circuit dismissed the petitioner's appeal of the BIA's decision ordering him removed as an aggravated felon. The petitioner, a native of Trinidad and Tobago, claimed derivative citizenship pursuant to INA § 321(a), 8 U.S.C. § 1432 (a) (repealed), from the naturalization of his mother, contending that he told his mother after she naturalized but before his eighteenth birthday that he decided to reside here permanently. Petitioner became an LPR in March 2000, when he was 20 years old.

The court held that a mere subjective intent to reside permanently was insufficient to satisfy the derivative citizenship requirement of permanent residence, and that there must be some objective official manifestation, not necessarily a lawful one, of the child's permanent residence. "We believe that there must be some objective official manifestation of the child's permanent residence, but we express no view as to what would satisfy § 321(a)'s requirements other than that petitioner fails to meet that standard here," said the court.

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THIRD CIRCUIT

■ The Statutory Language "Assisted in Persecution" Means the Same Thing in the Displaced Persons Act of 1948 and the Holtzman Amendment of 1978

In ***Szehinskyj v. Atty. Gen. of U.S.***, 2005 WL 3370572 (3rd Cir. Dec. 13, 2005) (Sloviter, *Fisher*, and Greenberg), the Third Circuit held that a determination in prior denaturalization proceedings, that immigrant, as concentration camp guard during World War II, had "assisted in persecution" within meaning of Displaced Persons Act (DPA), presented the identical issue, for purposes of collateral estoppel, as in removal proceedings. The petitioner entered the United States in 1950 and was naturalized in 1958. He was denaturalized on July 24, 2000, following trial on the issue of whether he had illegally procured entry into the United States in 1950 under the Displaced Persons Act of 1948. After petitioner had exhausted his appeals, the government instituted removal proceedings under the Holtzman Amendment, Pub.L. No. 95-549, 92 Stat. 2065 (1978), which provides for the exclusion and removal of any alien "who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with [Nazi Germany or its allies] ordered, incited, assisted, or otherwise participated in the persecution of any per-

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son because of race, religion, national origin, or political opinion." 8 U.S.C. § 1182(a)(3)(E). At those proceedings, the government moved to estop petitioner from challenging the removal order on the grounds that the identical issue had been litigated in the district court in the denaturalization trial, and that the conditions for application of collateral estoppel had been met. The IJ granted the motion, and found petitioner to be removable. The BIA affirmed without opinion

The court held that because petitioner "has been fairly adjudicated to have assisted in Nazi persecution under a statute whose provisions are identical to those of the Holzman Amendment, he is estopped from relitigating that issue in these removal proceedings."

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FOURTH CIRCUIT

■ Court Finds Jurisdiction To Review Denial Of Motion To Remand To Apply For Cancellation

In ***Obioha v. Gonzales***, __F.3d__, 2005 WL 3312762 (4th Cir. Dec. 8, 2005) (King, *Gregory*, Harwell (sitting by designation)), the Fourth Circuit held that the BIA properly denied petitioner's motion to remand because petitioner had not shown prima facie eligibility for cancellation and had failed to seek cancellation at her removal hearing.

The petitioner, a native of Nigeria entered the United States 1986 to complete her medical residency at a U.S. hospital. In 1999, when she applied for naturalization, the former INS discovered that she had perpetrated a marriage fraud to obtain a lawful permanent resident status. When placed in removal proceedings, petitioner admitted to the fraud but sought cancellation of removal under 8 U.S.C. § 1229b(a), which requires that the alien be "lawfully admitted for permanent residence." At that time, petitioner did not seek cancellation as a nonpermanent resident under 8 U.S.C. § 1229b(b). Subsequently, finding that petitioner's status had been obtained by fraud, the IJ pretermitted the application for cancellation and granted voluntary departure. While petitioner's appeal was pending, the BIA held in *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003), that an alien who procures LPR status by fraud is ineligible for cancellation under § 1229b (a). Because Koloamatangi appeared eligible for cancellation for non-LPRs, the BIA remanded that case to the IJ.

> "Because the BIA exercised its discretion to grant reopening in one situation does not mean, ipso facto, that the BIA must make the same discretionary allowance here."

In light of *Koloamatangi*, petitioner filed a one-page motion to remand her case to the IJ, so that she too could apply for cancellation for non-LPRs under § 1229b(b). Subsequently, the BIA adopted and affirmed the IJ's decision as to the denial of cancellation and denied the motion to remand because failed to establish prima facie eligibility and petitioner had failed to seek the relief at her removal hearing.

The Fourth Circuit preliminarily rejected the government's contention that it lacked jurisdiction to review the discretionary denial of the motion to remand. The court held that the authority for motions to remand arises from regulation and consequently is not subject to the "gatekeeper" provision under 8 U.S.C. § 1252(a)(2)(B)(I). The court noted that while the government's position was "a plausible reading" of the statute, there was no contrary legislative intent to restrict access to judicial review.

The court also pointed out, that other circuits had reached a similar conclusion. On the merits, the court found that the BIA did not abuse its discretion in denying the motion, and "because the BIA exercised its discretion to grant reopening in one situation does not mean, ipso facto, that the BIA must make the same discretionary allowance here. The court also rejected petitioner's argument that the denial of her motion violated her due process rights, finding that "an alien does not have a legal entitlement to discretionary relief."

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FIFTH CIRCUIT

■ Asylum Applicant Who Claimed To Be Practitioner of Falun Gong Found Not Credible

In ***Zhang v. Gonzales***, __F.3d__, 2005 WL 3214455 (5th Cir. Dec. 1, 2005) (Reavley, Higginbotham, *Garza),* the Fifth Circuit affirmed the denial of asylum based on an adverse credibility finding. The applicant, a Chinese national, claimed that he had been detained and beaten for 20 days as a result of practicing Falun Gong in a front yard. He testified that on one occasion following his arrest by the police, who took him to the police station, he was forced to promise never to practice Falun Gong. The IJ denied his application for asylum, withholding, and CAT stating that "the court just, quite frankly, doesn't believe this story and believes it's probably cooked up or, at the very least, exaggerated." The IJ also noted that the testimony was "simplistic, virtually identical to his written statement." On appeal, the petitioner argued "truth is simple." The court found no compelling evidence that the petitioner was a practitioner or that he had suffered persecution. "Without a credible showing that he is a practitioners of Falun Gong, [petitioner] can-

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not meet his burden of proving past or future mistreatment on the basis" of a protected ground, said the court. The petitioner also complained that he did not have time to prepare because of confusion about the hearing date. As to this contention, the court found that the petitioner failed to raise the due process claim, thereby waiving the objection on appeal.

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SEVENTH CIRCUIT

■ Seventh Circuit Holds That Alien Who Defrauded His Employer Of More Than $20,000 Was Not Convicted Of An Aggravated Felony Offense

In ***Knutsen v. Gonzales***, 429 F.3d 733 (7th Cir. 2005) (Posner, Rovner, *Williams*), the Seventh Circuit rejected the BIA's determination that a long-time lawful permanent resident was subject to removal based on his federal bank fraud conviction, and remanded for further proceedings. The court held that, in calculating the "loss to the victim," the agency erroneously included amounts that the alien admitted to defrauding his employer, but that were outside the scope of the count of the indictment to which the alien had pled guilty.

The court ruled that the indictment did not charge an overarching fraudulent scheme, and rejected the government's argument that a stipulation in the alien's plea agreement as to the losses stemming from relevant conduct sufficed to establish that the additional losses that were outside the count of the indictment could be aggregated in determining whether the conviction was classified as an aggravated felony.

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■ Seventh Circuit Holds The Vienna Convention Confers The Right To Notify The Alien's Consulate For Assistance With Legal Proceedings

In ***Jogi v. Voges***, 425 F.3d 367 (7th Cir. 2005) (Ripple, Rovner, *Wood)*, the Seventh Circuit held that the district court has subject matter jurisdiction under the Alien Tort Statute to hear plaintiff's claim against county law enforcement officers who had failed to inform him of his right under the Vienna Convention on Consular Relations to notify his consulate of his arrest.

The court found that Article 36 of the Vienna Convention was self-executing (without further legislation or analogous domestic measures), and that it conferred individually enforceable rights.

After the plaintiff had pled guilty to the charge of aggravated battery, he served six years in prison, and was subsequently removed to India without of being advised of his right under the Vienna Convention. The court found that Article 36 of the Vienna Convention was self-executing (without further legislation or analogous domestic measures), and that it conferred individually enforceable rights, without requiring the plaintiff to meet the "shockingly egregious violation" standard.

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■ Seventh Circuit Reverses BIA's Denial Of Withholding Of Removal To Tibetan National

In ***Lhanzom v. Gonzales***, 430 F.3d 833 (7th Cir. 2005) (Manion, *Rovner*, Sykes), the Seventh Circuit reversed the BIA's denial of withholding of removal to an applicant who claimed that she was a Tibetan Buddhist. The IJ found that petitioner had missed the deadline for filing an asylum claim and denied withholding and CAT based on an adverse credibility finding. The credibility finding was based on inconsistencies found among applicant's pre-hearing statement, her testimony and her father's testimony.

The Seventh Circuit, after dissecting each of the inconsistencies, said: "We see nothing in the record that impugns petitioner's credibility." Because the government had conceded that if petitioner were credible she would meet the standard for showing persecution and that the Chinese government continues to persecute Tibetan Buddhists, the court granted withholding and CAT.

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■ Adverse Credibility Findings Reversed Because Not Supported By Substantial Evidence

In ***Durgac v. Gonzales***, 430 F.3d 849 (7th Cir. 2005) (Kanne, *Wood*, Sykes) , the Seventh Circuit reversed the adverse credibility findings underlying the denial of asylum requested by a Kurdish university student from Turkey. The petitioner claimed that he was detained and beaten by the Turkish security services because he had formed a Kurdish study group in late 2000 after returning from a four-month visit in the U.S. The IJ denied asylum giving six reasons why applicant was not credible. The court dissected each of the reasons and found the finding was not supported by substantial evidence. On remand, said the court, if the applicant is found to be credible, "then the IJ must determine whether an 18-day detention coupled with blindfolding, underfeeding, and multiple beatings amounts to past persecution, and if so, whether the government can rebut the presumption that would arise of a well-founded fear of future persecution."

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■ **Eighth Circuit Holds No Appellate Review Of Denial Of Hardship Waiver Or Agency Finding That Asylum Application Untimely Filed**

In ***Ignatova v. Ashcroft***, 430 F.3d 1209 (8th Cir. 2005) (*Murphy,* Arnold, Gruender), the Eighth Circuit affirmed the BIA's denial of petitioner's applications for hardship waiver of removability, asylum, withholding of removal, relief under Convention Against Torture, and voluntary departure. The court held that it lacked jurisdiction to review both the denial of a hardship waiver that had been based on a adverse credibility finding, and the BIA's decision that petitioner's asylum application was untimely. The court also held that there was substantial evidence to support the IJ's determination that petitioner had filed a frivolous asylum claim, and that evidence supported the finding that alien was removable.

The court held that it lacked jurisdiction to review both the denial of a hardship waiver that had been based on a adverse credibility finding, and the BIA's decision that petitioner's asylum application was untimely.

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EIGHTH CIRCUIT

■ **Eight Circuit Vacates BIA's Decision Denying Asylum To Chinese Couple With Two U.S. Born Children**

In ***Yang v. Gonzalez***, 427 F.3d 1117 (8th Cir. 2005) (Bye, *Heaney*, Colloton), the Eighth Circuit vacated the BIA's denial of asylum. The court found the evidence established that asylum applicants had well-founded fear of future persecution based on China's coercive population control policies if removed to China with two American-born children.

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■ **Asylum Applicant Found Not Credible Given His Inability To Prove His Citizenship**

In ***Shuaibu v. Gonzalez***, 425 F.3d 1142 (8th Cir. 2005) (Murphy, Heaney, Melloy), the Eighth Circuit affirmed the BIA's removal order finding the petitioner's testimony not credible. The petitioner claimed he was a Liberian citizen seeking asylum and withholding due to his fear of future persecution on account of his family's political opinion. The court employed a substantial evidence standard and found the IJ's determination supported the adverse credibility finding, where the petitioner claimed fear of future persecution in Liberia without providing corroborating evidence to show that he is a Liberian citizen. Petitioner's counterfeit Liberian birth certificate, coupled with his own admission of having been born and holding citizenship in Ghana, further discredited his Liberian citizenship claim. The court found the IJ's determination was not unsupported where the alien's testimony was the core of the case, and his minimal, sketchy, ill-supported evidence could not sustain any form of relief.

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■ **Alien Who Was Erroneously Granted Adjustment Of Status Despite Disqualifying Criminal Conviction Was Not "Lawfully Admitted For Permanent Residence"**

In ***Arellano-Garcia v. Gonzales,*** 429 F.3d 1183 (8th Cir. 2005) (Wollman, Lay, *Hansen*), the Eighth Circuit held that the government's mistaken grant of lawful permanent residence status to petitioner in 1990 did not preclude the government from subsequently denying him relief under former INA § 212(c) on the ground that he was not lawfully admitted for permanent residence. The court deferred to the BIA's "reasoned statutory interpretation and conclusion that he never 'lawfully' acquired the status through [the government's] mistake."

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NINTH CIRCUIT

■ **Ninth Circuit Holds That Unlawful Sexual Intercourse With A Minor Is Not A "Crime Of Violence"**

In ***Valencia v. Gonzales***, 431 F.3d 673 (9th Cir. 2005) (O'Scannlain, Cowen, *Bea*), the Ninth Circuit denied the alien's petition for rehearing, withdrew a prior published decision, and substituted a new opinion, holding that the California felony offense of unlawful sexual intercourse with a minor is not an "aggravated felony." The court ruled that the alien's offense, in which the victim was under 18 years of age and the perpetrator was more than three years older, was not a "crime of violence" involving a substantial risk that force would be used in the commission of the offense. The court left undisturbed other circuit authority which holds that such an offense constitutes "sexual abuse of a minor," which is an aggravated felony.

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■ **Ninth Circuit Holds That Petitioner's Mother's Date of Admission Could Be Imputed To Him For Purposes Of Qualifying For Cancellation of Removal**

In ***Cuevas-Gaspar v. Gonzales,*** 430 F.3d 1013 (9th Cir. 2005) (Gould, *Tashima*, Fernandez), the Ninth Circuit held that a Mexican citizen qualified for cancellation of removal for permanent residence despite lacking the seven years continuous physical presence requirement. At age 19, peti-

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tioner committed a crime that terminated his period of continuous residence after accruing only five years of residence. His mother had accrued 12 years of lawful status. The court applied the principle from its circuit precedent that a minor alien's parent's domicile may be imputed to the minor for purposes of satisfying the seven-year "lawful unrelinquished domicile" requirement for qualifying for relief under former section 212(c). The court also found that, under the categorical approach, petitioner's conviction for being an accomplice to residential burglary under Washington law was not a CIMT. In a dissenting opinion, Judge Fernandez would have found that petitioner had been convicted of a CIMT.

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■ **Ninth Circuit Upholds Denial Of Asylum And Withholding Of Deportation To Applicants From Bangladesh**

In ***Gomes v. Gonzales***, 429 F.3d 1264 (9th Cir. 2005) (Wallace, Silverman, *Callahan*), the Ninth Circuit affirmed the BIA's denial of asylum and withholding of deportation to a family from Bangladesh who are members of the Catholic faith. The petitioners had been previously denied asylum and withholding by the BIA on June 1996, but never sought review of that decision. Instead in September 1996, the petitioners filed a motion to reopen with the BIA contending that conditions in Bangladesh had deteriorated since 1995 for Christians. The motion to reopen was granted, further hearings were held, but ultimately the BIA again denied their asylum request based on, *inter alia*, insufficient evidence of a pattern of discrimination by Muslim extremists against Christians.

The court found no compelling evidence to reverse the BIA's finding that there was no pattern or practice of persecution of Christians or Catholics in Bangladesh. The court also held that it was barred from reviewing the issue of past persecution because it was decided by the BIA on its first decision which was not subjected to judicial review.

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Summaries Of Recent Federal Court Decisions

TENTH CIRCUIT

■ **Tenth Circuit Rules That It Lacks Jurisdiction To Review Determinations Of Extreme Cruelty And Adverse Credibility In Special Rule Cancellation Case**

In ***Perales-Cumpean v. Gonzales***, 429 F.3d 977 (10th Cir. 2005) (Hartz, *Anderson*, Tymkovich), the Tenth Circuit held that it lacked jurisdiction to review the BIA's conclusion that petitioner was not subjected to "extreme cruelty" in a case arising under the cancellation of removal "special rule" provisions for battered spouses and children. "The decision whether the verbal abuse in a given case constitutes 'extreme cruelty' is just the sort of non-algorithmic decision that requires a non-reviewable 'judgment call' by the Attorney General,'" said the court. The court added that "[t]here is no hard-and-fast rule to distinguish 'extreme cruelty' from other, less severe, forms of cruel behavior. Such decisions are committed to agency discretion, and we cannot review them. The court expressly disagreed with the Ninth Circuit's contrary view in *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003).

"The decision whether the verbal abuse in a given case constitutes 'extreme cruelty' is just the sort of non-algorithmic decision that requires a non-reviewable 'judgment call' by the Attorney General.'"

The court further ruled that it did not have jurisdiction to review the BIA's determination that the alien was not credible, citing statutory language which reserves to the "sole discretion" of the Attorney General determinations regarding the weight and credibility of evidence submitted in connection with "special rule" cancellation applications. "Judicial review is precluded, because we lack jurisdiction to review any 'decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General,'" held the court, citing 8 U.S.C. § 1252(a)(2)(B)(ii).

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ELEVENTH CIRCUIT

■ **Failure to Participate in a Public Naturalization Ceremony Does Not Satisfy the Statutory Prerequisites of Citizenship**

In ***Tovar-Alvarez v. U.S. Attorney General***, 427 F.3d 1350 (11th Cir. 2005) (Anderson, Carnes, Hull) (*per curiam),* the Eleventh Circuit affirmed the IJ's order of removal where the petitioner was not naturalized at the time of his conviction. The petitioner, a Mexican native, was charged removable after he was convicted of an aggravated felony. The petitioner argued the government should be equitably estopped from asserting that he is an alien due to the INS's failure to process his naturalization application within 120 days.

The court rejected petitioner's equitable estoppel argument, stating the INS's failure to process petitioner's application timely did not rise to the level of affirmative government misconduct. Additionally, the court found the petitioner had not taken the oath of allegiance thereby failing to satisfy the statutory prerequisites of citizenship.

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SEVENTH CIRCUIT CRITICIZES ADJUDICATION OF IMMIGRATION CASES

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[has] frequently been severe," the Seventh Circuit pointed out that different panels of the court have reversed the Board "in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits."

The court's written explanation was a post script to a mostly one-way exchange which occurred during oral argument between the government attorney and Judge Posner. The audio recording of that argument became fodder for immigration-related internet blogs, and shortly thereafter the topic of an article published in the November issue of the Columbia Journalism Review. As reported by the National Law Journal "during a testy September argument" in the case, Judge Posner asked the government attorney, "Does the Department of Justice have any idea what is happening to your cases in this court? It is a complete breakdown of this immigration adjudication process."

The case of *Benslimane* is not an unusual case. Benslimane, a citizen of Morocco, entered the United States in 1998 as a visitor, but never departed when his visa expired. Instead, when he was placed in removal proceedings in February 2003, he indicated that two months earlier he had married a U.S. citizen who had already dutifully filed a visa petition application (I-130) on his behalf. It's not clear from the decision whether this was a last-minute marriage that had occurred after Benslimane was served with a Notice to Appear before an immigration judge.

The filing of an I-130 serves to establish the existence of a particular relationship between a petitioner and the beneficiary, here the U.S. citizen wife and Benslimane respectively. The USCIS would normally review such an application to determine the validity of relationship and if necessary to investigate the bona fides of a marriage. In this case, it appears that the USCIS informed Benslimane that it would take 26 months to be granted an interview on the visa application.

Normally, an I-130 application based on such spousal relationship will be accompanied by an application for adjustment of status (I-485). However, there may be situations where it would be preferable to go abroad to get the immigrant visa following the approval of the I-130. Additionally, not all aliens are eligible to adjust their status in the United States and must return to their home countries to obtain the visa.

In this case, the IJ indicated that had the petitioner filed with the court the visa petition and the application for adjustment, the IJ could have continued the removal hearing until the visa petition had been adjudicated. Nonetheless, the IJ continued the hearing for 90 days and asked the ICE attorney to find out its status. At the resumed hearing held in May 2003, the ICE attorney informed the IJ that she had no information on the status of the I-130 as that application was being adjudicated by USCIS. Once again the IJ continued the hearing for 60 days and told Benslimane to submit the I-485 to the immigration court.

At the resumed hearing Benslimane did not submit the I-485 as requested by the IJ. Instead, he requested a further continuance pending the adjudication of the I-130. The IJ denied the request and, based on Benslimane's admission of removability, entered an order of removal. Benslimane then appealed the denial of continuance to the BIA and submitted a copy of the Form-1485. The BIA affirmed that decision and subsequently Benslimane sought review by the Seventh Circuit.

The Seventh Circuit held that the BIA's affirmance of the IJ's denial of the continuance request was arbitrary because the application for adjustment had already been filed with the Department of Homeland Security, and the petitioner was merely awaiting an adjudication of the visa petition. "An immigration judge cannot be permitted, by arbitrarily denying a motion for a continuance without which the alien cannot establish a ground on which Congress has determined that he is eligible to seek to remain in this country, 8 U.S.C. §§ 1151(b)(2)(A)(i), 1255(a), to thwart the congressional design," said the court.

The court rejected the government's argument that it could not review a discretionary denial of continuance, finding that in this particular case "the denial of the motion had the effect of a substantive ruling on the application to adjust," and noting that "hereafter" it will "generally reopen the deportation proceedings in such cases unless clear ineligibility is apparent in the record." The court declined to address the applicability of the judicial review bar provided in 8 U.S.C. § 1252(a)(2)(B)(ii).

By Francesco Isgro, OIL

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TENTH ANNUAL IMMIGRATION LITIGATION CONFERENCE

Planning is underway for the Tenth Annual Immigration Litigation Conference. Although the date and location of the conference have not been finalized, OIL is seeking your suggestions as to what topics should be addressed at the conference. Please send your suggestions to:

francesco.isgro@usdoj.gov

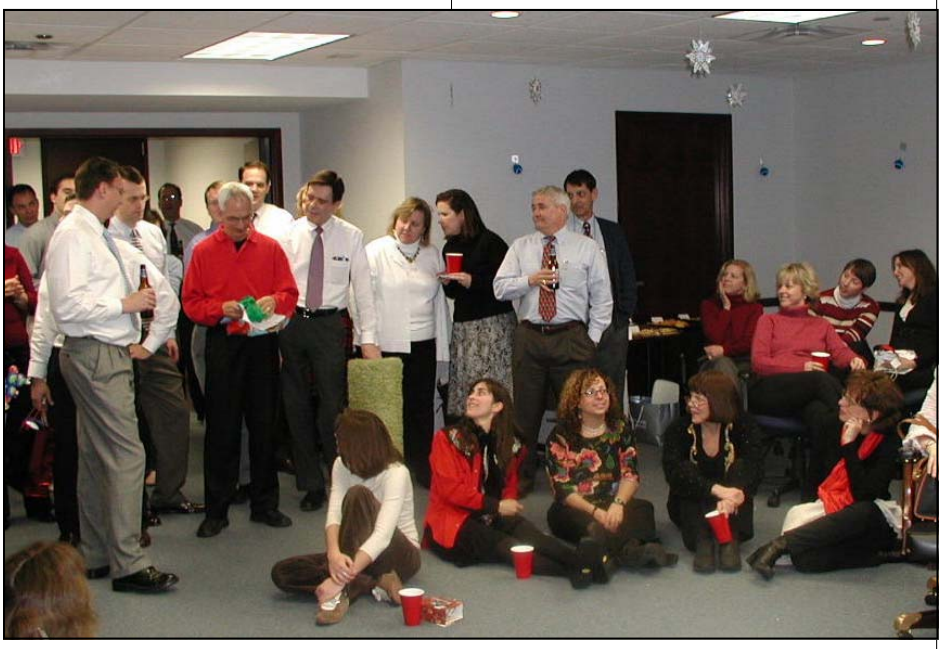
INSIDE OIL

Welcome to new OIL Attorney and former OIL detailee, **Don G. Scroggin**. Mr. Scroggin is a graduate of Harvard University and Yale Law School. Prior to joining the Department's Tobacco Litigation Team, Mr. Scroggin was a partner with the firm of Gabeler, Battochi & Griggs in McLean, Virginia.

INSIDE DHS

Dr. Emilio T. Gonzalez has been sworn in as the Director of U.S. Citizenship and Immigration Services (USCIS), an Undersecretary rank position within DHS.

Julie L. Myers has been sworn in as the Assistant Secretary of Homeland Security for Immigration and Customs Enforcement (ICE).



An anxious Barry Pettinato opens his "White Elephant"

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 Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

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

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