



# Immigration Litigation Bulletin

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## Second Circuit resurrects *Francis* and rejects BIA's § 212(c) comparability test

Ten years after Congress barred aliens convicted of an aggravated felony from obtaining § 212(c) relief, the Second Circuit held in *Blake v. Carbone*, \_\_\_F.3d\_\_\_, 2007 WL 1574760 (2d Cir. June 1, 2007) (Parker, Wesley, Hall), that the relief remains available to aliens whose underlying aggravated felony offenses could form the basis for exclusion under INA § 212(a) as a crime of moral turpitude. The court felt bound by its thirty-year old decision in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), where, on the basis of an equal protection analysis, it had expanded the sweep of § 212(c) to include aliens who had never left the United States.

**"While hindsight may pin much of this confusion on *Francis*, we are bound to finish what our predecessors started."**

This latest case involved the consolidated petitions for review filed by an alien convicted of sexual abuse of a minor, two aliens who had been convicted of first degree manslaughter and murder respectively, and one alien who had been convicted of federal racketeering. Each of them had been charged with deportability under INA § 237(a)(2)(A)(iii), as aliens convicted of an aggravated felony after admission. However, because of subsequent administrative and judicial decisions that considered the impact of legislation, first limiting 212(c) relief (AEDPA 1996), and then entirely abolishing it (IIRIRA 1996), petitioners' cases remained in litigation. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held, *inter alia*, that despite the repeal of § 212(c), certain criminal aliens who pleaded guilty be-

fore the statutory changes remained eligible for the relief. Subsequently, DHS promulgated a rule to implement *St. Cyr*. 69 Fed. Reg. 57826 (Sept. 28, 2004). One provision of the rule effectively codified a series of BIA precedent decisions dating to 1984 that made § 212(c) relief available only for those charges of deportability for which there is a comparable ground of inadmissibility.

Following *St. Cyr* and the implementing regulation, the BIA applied the "comparability test" in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). *Blake*, who subsequently became the lead petitioner in

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## Refusal to pay "war tax" to FARC not persecution

In *Rivera v. U.S. Attorney General*, 487 F.3d 815 (11th Cir. 2007) (Pryor, Kravitch, Alarcon), the Eleventh Circuit held that petitioners, whose persecutors had murdered members of their family for their refusal to pay a "war tax" to the FARC guerilla group, were not persecuted "on account of" their political opinion. The petitioners, natives of Colombia, belonged to a politically active family of business owners. Because of their economic condition, the FARC asked them to pay a "war tax." The family received death threats and the guerilla killed petitioner's father and brother. Petitioner fled Colombia with his other

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## Second Circuit overrules Blake

(Continued from page 1)

this consolidated petition for review, had entered the United States as an LPR in 1987. In 1992 he pled guilty under New York State law, to sexual abuse of a minor. As a result of that conviction he was ordered removed for having been convicted of an aggravated felony. Ultimately, the BIA held that Blake was ineligible for § 212(c), because the aggravated felony offense of sexual abuse of a minor has no statutory counterpart in the grounds of inadmissibility under section INA § 212(a). The BIA rejected Blake's contention that since most convictions for sexual abuse of a minor would likely be crimes involving moral turpitude, the moral turpitude ground of inadmissibility should be considered a comparable ground.

The Second Circuit found "no reason to defer to the BIA's interpretation of the statutory counterpart rule." First, however, it rejected Blake and the other petitioners' contention that the statutory counterpart rule could not have had an impermissible retroactive effect because it "does nothing more than crystallize the agency's preexisting body of law." Second, it rejected petitioners' argument that Congress intended all LPRs convicted of an aggravated felony to receive a § 212(c) waiver. "Our role in statutory interpretation is limited to the plain language enacted by Congress," said the court. Finally, the court concluded that it was bound by its earlier interpretation in *Francis*, and would not give deference to the BIA's interpretation because the language of § 212(c) "lacks ambiguity." The court explained that it had "construed 212(c) to avoid its unconstitutional application in *Francis*. That choice having been made long ago, the obligation to properly implement the decision rests squarely on us. Were we to do otherwise – defer to an agency's determination of equal protection – we would abdicate our dual responsibilities to uphold the Constitution and to ensure the executive and leg-

islative branches' compliance therewith."

Accordingly, the court then considered whether *Francis*' holding that LPRs should receive similar treatment under § 212(c) regardless of whether they are in deportation or exclusion proceedings was followed by the BIA when it found petitioners statutorily ineligible for the relief. The court explained that eligibility for relief in *Francis* "turned on whether the lawful permanent resident's offense could trigger § 212(c) were he in exclusion proceedings, not how his offense was categorized as a ground of deportation." Thus, held the court, "if the offense that renders a lawful permanent resident deportable would render a similarly situated lawful permanent resident excludable, the deportable lawful permanent resident is eligible for a waiver of deportation." The court explained as an example that not all aggravated felonies need be CIMTs nor does a CIMT need be an aggravated felony. Rather, we look at the particular acts to see if they are considered *malum in se*, and if so that would be a CIMT.

Finally, the court recognized that its holding was at odds with that reached by several other circuits. "Were we to approve of these other courts' formulaic approach – limiting ourselves only to the language in the relevant grounds of deportation and exclusion – we would be ignoring our precedent that requires us to examine the circumstances of the deportable alien, rather than the language Congress used to classify his or her status," explained the court.

In conclusion, the court observed that "the past thirty years have highlighted the difficulties that arise when constitutionally problematic legislation is juxtaposed with judicial stitchery and administrative attempts at coalescing the two." The court acknowledged that "while hindsight might pin much of the confusion on *Francis* we are bound to

finish what our predecessors started." Accordingly, the court remanded the cases to the BIA to determine whether petitioners' underlying offenses could form the basis for exclusion under § 212(a) as a crime involving moral turpitude and if so, for the BIA to consider the merits of their § 212(c) applications.

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## "War tax" not persecution

(Continued from page 1)

brother and came to the United States. In his application for asylum, he claimed that he would be persecuted if returned to Colombia because he owed the war tax. He presented articles about the FARC practice of extorting money from middle and upper-class businessmen. The IJ denied asylum and withholding finding that the behavior of the FARC was more consistent with its pattern of criminally motivated extortion than political persecution. The BIA affirmed without opinion.

The court affirmed concluding that the record did not compel a finding that petitioners were either persecuted or had a well-founded fear of future persecution on account of a political opinion. The court noted that in this case the FARC did not deviate from its usual practices, it never asked petitioner or any member of his family to cease their political activities, and committed violence against his family only after they refused to pay the war tax. The court concluded that there was substantial evidence to support the IJ's finding that the motive of the FARC for persecuting petitioners' family was to raise funds for its war against the Colombian government. There was no evidence, said the court to compel "the finding that the FARC demanded that the petitioners' family pay a war tax as a political litmus test."

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## Summary Disposition of Petitions for Review from Denials of Motions to Reopen or Reconsider in the Ninth Circuit

The decisions by the Board of Immigration Appeals that are on review in the Ninth Circuit often include decisions denying an alien's motion to reopen or to reconsider. In a random survey of 89 consecutive petitions for review filed in the Ninth Circuit in late June and early July of 2006, I discovered that 24 of them sought review of the Board's denial of a motion to reopen, reconsider, or reissue (27%). Since the Board's decisions in these cases are often based on routine statutory or regulatory grounds (such as untimeliness or the number bar), these cases lend themselves to summary disposition before briefing.

However, the Board often denies motions to reopen or reconsider on several grounds or addresses other issues, such as ineffective assistance of counsel claims. I wanted to examine how far the Ninth Circuit was willing to go in granting summary affirmances in the more complicated cases, so as to put our resources in preparing such motions to the most effective use. In addition, I wanted to determine whether the Ninth Circuit was dismissing petitions for review of denials of motions to reopen or reconsider (again, prior to briefing) pursuant to its recent decision in *Fernandez v. Gonzales*, 439 F.3d 592, 600 (9th Cir. 2006) (holding that the court lacks jurisdiction to review the denial of a motion to reopen in cancellation of removal cases "where the question presented is essentially the same discretionary issue originally decided" regarding whether the alien had established the necessary hardship under 8 U.S.C. § 1229b(b)(1)(D)).

### Summary Affirmances

In an attempt to get a workable group of cases, I looked at the summary affirmances reported in OIL's weekly internal litigation reports for January, February, March, and April 2007. Of 57 summary affirmances

by the Ninth Circuit reported in those months, 34 of those decisions involved denials of motions to reopen or reconsider. The discussion below relies on those 34 decisions, as well as on one decision reported to me in response to an email request I sent officewide. Of these 35 decisions, 29 involved pro se petitioners. Because my time frame was limited, the decisions involved only certain panels, with the following distribution:

JJ. Leavy, Gould, Clifton – 11 decisions  
 JJ. Goodwin, Tashima, Thomas – 8  
 JJ. Goodwin, McKeown, Fisher – 7  
 JJ. Canby, Trott, Fisher – 7  
 JJ. Silverman, Paez, Bybee – 1  
 JJ. O'Scannlain, Graber, Bea – 1

I originally intended to do a more random survey looking at all filed cases for a certain period of time, in order to obtain information regarding cases in which motions for summary affirmance were denied as well as granted. However, after my initial random survey of 89 cases filed in June and early July 2006, I determined that such a project would be too time consuming. Accordingly, the results obtained below are skewed by the fact that I do not have information for how often motions for summary affirmance are denied in certain types of cases and therefore may not be truly representative of the Ninth Circuit's decision-making.

### The Ninth Circuit Standard for Summary Affirmances

The Ninth Circuit's Local Rules provide that, "if the court determines . . . that it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings the court may, after affording the parties an opportunity to show cause, issue an appropriate dispositive order." Ninth Cir. R. 3-6

(b); see also *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) ("Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all concerned.").

### Standard of Review of Denials of Motions to Reopen or Reconsider

The decision to grant or deny a motion to reopen or reconsider "is within the discretion of the Board." 8 C.F.R. § 1003.2(a). This court reviews the Board's denial of a motion to reopen or reconsider for an abuse of discretion. *INS v. Doherty*, 502 U.S. 314, 324 (1992); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (motion to reopen or remand); *Oh v. Gonzales*, 406 F.3d 611, 612 (9th Cir. 2005) (motion to reconsider). Under this standard, the court must affirm the Board's denial of a motion to reopen or reconsider unless the decision is "arbitrary, irrational, or contrary to law." See *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124 (9th Cir. 2000) (citing *Watkins v. INS*, 63 F.3d 844, 847 (9th Cir. 1995)). In general, it is not an abuse of discretion for the Board to apply statutory or regulatory requirements consistent with its past practice. See *AndriAsian v. INS*, 180 F.3d 1033, 1046 (9th Cir. 1999) ("It is the failure to abide by its own regulations that renders the BIA's decision 'contrary to law' . . . and therefore an abuse of discretion.") (internal citation omitted).

### Denials Because the Motion is Time or Number Barred

#### 1. In general

The Immigration and Nationality Act ("INA") provides that a motion to reconsider must be filed within 30 days of the Board's decision. INA § 240(c)(6)(B), 8 U.S.C. § 1229a(c)(6)(B); see also 8 C.F.R. § 1003.2(b)(2).

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## SUMMARY DISPOSITIONS IN THE NINTH CIRCUIT

(Continued from page 3)

A motion to reopen must be filed within 90 days of the decision sought to be reopened. INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i); see also 8 C.F.R. § 1003.2(c)(2). Only one motion to reopen and one motion to reconsider may be filed for any given decision, except in certain limited circumstances. INA §§ 240(c)(6)(A), (7)(A), 8 U.S.C. §§ 1229a(c)(6)(A), (7)(A); 8 C.F.R. §§ 1003.2(b)(2), (c)(2). See *Malty v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004) (“Ordinarily, a petitioner seeking to reopen his deportation proceedings must file a motion within ninety days of the date upon which the final administrative decision was rendered and may file only one motion to reopen. 8 C.F.R. § 1003.2(c)(2).”).

The Ninth Circuit routinely grants motions for summary affirmance in these cases. Thus, of the 35 summary affirmances I examined, 25 were cases in which the Board denied the motion to reopen or reconsider solely because it was either untimely (13 cases) or numerically barred (13 cases). (In one case, the Board denied the motion on both grounds.) In addition, in 9 of these 25 cases, the Ninth Circuit summarily affirmed where the Board’s decision also involved its determination that what the alien had labeled a motion to reopen was more properly deemed a motion to reconsider, or vice versa, a slightly more complicated but nevertheless fairly straightforward issue. Finally, in three cases, the Ninth Circuit also declined either expressly or implicitly to review the Board’s refusal to reopen the case *sua sponte*.

Summary affirmance motions should therefore be filed in such cases. In such motions, it should suffice to state the appropriate statutory and regulatory requirements and then simply argue that it is not an abuse of discretion for the Board to apply those requirements to deny Petitioner’s motion. See *Ekimian v. INS*, 303 F.3d 1153, 1156 (9th Cir. 2002) (upholding Board’s denial of motion to

reopen as untimely).

### 2. Where Changed Country Conditions Are Raised

In some cases, the alien acknowledges to the Board that his motion to reopen is temporally or numerically barred but seeks an exception to those limitations on the ground that changed country conditions have arisen in the country to which he was ordered removed. The INA provides that an exception to the limitations on motions to reopen exists if, *inter alia*, “the basis of the motion is to apply for relief under sections 1158 [asylum] or 1231(b)(3) [withholding of removal] of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.” 8 U.S.C. § 1229a(c)(7)(C)(ii); see also 8 C.F.R. § 1003.2(c)(3)(ii); *Malty*, 381 F.3d at 945 (requiring circumstances to “have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a [prima facie case of a] well-founded fear of future persecution”).

In five of the cases I examined, the Board rejected the alien’s claim that the conditions in his country had materially changed, and the court summarily affirmed. (In one of these cases, the Board also rejected the alien’s request that the time limitation be equitably tolled. See discussion in next paragraph.) One case involved India, one El Salvador, and three were motions to reopen based on claims that new evidence of torture in Mexico had arisen. These examples suggest that it is worthwhile to file summary affirmance motions in cases involving motions to reopen asserting changed

conditions, especially in cases asserting new evidence of torture in Mexico.

### 3. Where Equitable Tolling is Raised

An alien may also raise an ineffective assistance of counsel claim and then request equitable tolling of the time or number limitations for motions to reopen or reconsider based on that claim. The Ninth Circuit does apply equitable tolling in certain circumstances. See *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) (holding that the statute of limitations to reopen an order of deportation “is equitably tolled where the alien’s late petition is the result

of the deceptive actions by a notary posing as an attorney”). In two of the cases I looked at, the court summarily affirmed the Board’s refusal to equitably toll the deadline for ineffective assistance of counsel. In one case, the Board had held that the alien had not exercised sufficient due diligence, as required by *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003), where the alien had filed a complaint with the bar about his attorney shortly after the original Board decision and then waited four years before filing his motion to reopen.

In the second case, which the Ninth Circuit summarily affirmed *sua sponte*, the Board found both that the alien had not established that his three prior attorneys’ assistance was ineffective and also that he had not exercised due diligence by waiting more than two years after he learned of the alleged ineffective assistance before filing a motion to reopen. If your case presents an equally clear example of lack of due diligence, or perhaps multiple prior counsel, a motion for summary affirmance may be warranted.

## SUMMARY DISPOSITIONS IN THE NINTH CIRCUIT

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### Denials of Motions to Reconsider Based on Failure to Identify Error of Law or Fact

The Board also may deny a motion to reconsider for failure to specify an “error of fact or law in the prior decision” and to be “supported by pertinent authority.” INA § 240(c)(6)(C), 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. § 1003.2(b)(1); *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004) (“A petitioner’s motion to reconsider must identify a legal or factual error in the BIA’s prior decision.”). Failure to identify such an error was the basis for the Board’s denial of the motion to reconsider in two of the summary affirmances I examined. Straightforward motions for summary affirmance, citing the above authority, should therefore be considered in these cases.

#### Dismissals

As indicated above, in March 2006, the Ninth Circuit held that it lacked jurisdiction to review the denial of a motion to reopen in cancellation of removal cases where the only question presented “is essentially the same discretionary [hardship] issue originally decided.” *Fernandez*, 439 F.3d at 600. I reviewed the dismissals reported in the litigation reports for January-April 2007 and found that six cases had been dismissed pursuant to *Fernandez* prior to any briefing (four involving motions to reopen, two involving motions to reconsider). The petitioners in five of these six cases were pro se, and four different panels were represented (one panel, Judges Goodwin, Tashima, and Thomas, accounting for three of the decisions).

Although this group is not a large one, one particular finding is notable.

Motions for summary affirmance or dismissal may be warranted even where the Board’s decision incorporates denials of more than one request for relief, or is based on several different grounds.

The *Fernandez* court stated that the jurisdictional bar applied only when the new evidence presented with the motion to reopen was “cumulative” of evidence presented in the original case, and not where the alien is “presenting a *basis* for relief that was not previously denied in the exercise of the agency’s unreviewable discretion,” such as “a newly-discovered, life-threatening medical condition afflicting a qualifying relative.” 439 F.3d at 601 (emphasis in original). In the sample I looked at, the court declined to review four cases where the new evidence presented with the motion to reopen did *not* pertain to the specific allegations of hardship previously made. Specifically, it declined to review

cases: (1) where the Board held that the “new evidence [regarding a child’s articulation problems] appears unlikely to change the result in the case” (no articulation problem had previously been alleged); (2) where the alien “failed to show a reasonable likelihood” that her new child and her newly-lawful-permanent-resident father would suffer exceptional and extremely unusual hardship upon removal; (3) where the new evidence (that her husband had abandoned her) was not previously unavailable; and (4) where one of the petitioners had recently married a United States citizen and therefore now had a qualifying relative. Accordingly, motions to dismiss based on *Fernandez* should be considered in cases presenting denials of motions to reopen or reconsider a hardship cancellation determination.

#### Additional Comments

The above discussion is not meant to be exclusive of other circumstances in which a motion for summary disposition of a petition for re-

view of a denial of a motion to reopen or reconsider is warranted. In particular, motions for summary affirmance or dismissal may be warranted even where the Board’s decision incorporates denials of more than one request for relief, or is based on several different grounds. For example, in the summary affirmances I examined, one of the motions to reopen (not included in the discussion above) was denied on the basis that the alien had departed the United States pursuant to his prior order of removal, meaning that his motion to reopen was barred under 8 C.F.R. § 1003.2(d). In addition, the Board also held that the change of law cited by the alien did not warrant reopening because its decision was correct at the time it was made. This case was summarily affirmed. As another example, the Board denied a motion seeking both reopening and reconsideration of a denial of cancellation of removal on the grounds, respectively, that no error of law or fact existed, and that the new evidence was previously available and did not show any compelling needs on the part of the alien’s qualifying relatives. This case was also summarily affirmed.

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### EOIR Proposes Codes of Judicial Conduct For IJs and for BIA members

EOIR has published a Notice proposing codes of judicial conduct for immigration judges and for members of the Board of Immigration Appeals. 72 Fed. Reg. 35511 (June 28, 2007). According to the Commentary, these codes are being promulgated “in order to maintain and promote the highest ethical standards” of the Immigration Judge Corps and of the Board of Immigration Appeals. EOIR is seeking public comment on the codes before final publication. Comments should be submitted not later than July 30, 2007.

## FURTHER REVIEW PENDING: Update on Cases & Issues

### Asylum – Particular Social Group

The Solicitor General has filed a petition for certiorari in **Gao v. Gonzales**, 440 F.3d 62 (2d Cir. 2006). The question presented is:

Whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that women whose marriages are arranged can and do constitute a “particular social group” of “women sold into forced marriages,” and that the alien would suffer “persecution” “on account of” that status.

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### Asylum – Population Control Policy

The Second Circuit heard *en banc* arguments on March 3, 2007, in **Lin**, 02-4611, **Dong**, 02-4629, and **Zou** 03-40837, 416 F.3d 184 (2d Cir. 2005), consolidated cases. One of the questions before the court is:

Whether the BIA reasonably construed IIRIRA Section 601(a)'s definition of "refugee" to: (a) include a petitioner whose legally married spouse was subject to an involuntary abortion or sterilization, see *Matter of C-Y-Z*, 21 I&N Dec. 915 (BIA 1977); and (b) not include a petitioner whose claim is derivatively based on any other relationship with a person who was subject to such a procedure, unless the petitioner has engaged in “other resistance” to a coercive population control program, see *Matter of S-L-L*, 24 I&N Dec. 1 (BIA 2006).

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### Asylum—Adverse Credibility

On June 18, 2007, the Ninth Circuit *en banc* heard oral arguments in **Suntharalinkam v. Gonzales**, 458 F.3d 1634 (9th Cir. 2006). The ques-

tion presented is whether numerous minor discrepancies cumulatively add up to support an adverse credibility determination, and were those discrepancies central to the asylum claim of a Sri Lankan alien suspected as being a Tamil Tiger terrorist.

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### Asylum—Disfavored Group

On May 11, 2007, the Solicitor General filed an opposition to a petition for certiorari in **Sanusi v. Gonzales**, 188 Fed. Appx. 510 (7th Cir. July 24, 2006). The question presented is whether an alien who has demonstrated membership in a disfavored group must also show individual singling out for persecution to establish it is more likely than not that life or freedom would be threatened.

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### REAL ID Act – Jurisdiction To Review Untimely Filed Asylum Application

In **Ramadan v. Gonzales**, 479 F.3d 647 (9th Cir. 2007), the Ninth Circuit held that the REAL ID Act permits review of the application of law to undisputed facts, and that the court has jurisdiction to review a decision not to consider an untimely filed asylum application.

The 9th Circuit has *sua sponte* requested the parties to file supplemental briefs on whether the case should be heard *en banc*. The revised decision upon panel rehearing had stated that no further petitions for rehearing or rehearing *en banc* will be entertained. The government supplemental brief was filed on June 5, 2007.

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### Jurisdiction – Sua Sponte Reopening

In **Tamenut v. Gonzales**, 477 F.3d 580 (8th Cir. 2007), the Eighth Circuit held that it was required under its precedent, **Recio-Prado v. Gonzales**, 456 F.3d 819 (8th Cir. 2006), to take jurisdiction over the BIA's discretionary decision not to *sua sponte* reopen a case.

On May 1, 2007, the government filed a petition for rehearing *en banc* contending that the court's holding that it has jurisdiction to review a BIA's denial of *sua sponte* reopening, is inconsistent with the relevant regulatory language, and is contrary to the overwhelming weight of precedent from other circuits.

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### Constitution – Denial of 212(c) Relief Violates Equal Protection Clause

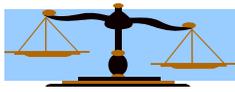
On November 29, 2005, the government filed a petition for rehearing *en banc* in **Cordes v. Gonzales**, 421 F.3d 889 (9th Cir. 2005), where the Ninth Circuit held that the denial of § 212(c) relief violated equal protection. The court reasoned that petitioner was similarly situated to an alien who pled guilty when the crime was a deportable offense, who was eligible for § 212(c) relief at the time he pled, and who therefore relied on the expectation of obtaining § 212(c) relief.

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### BIA—Power to Issue Removal Order

On April 30, 2007, the Solicitor General filed an opposition to a petition for certiorari in **Lazo v. Gonzales**, 462 F.3d 53 (2d Cir. 2006). The question presented is whether an IJ finding of removability is an “order of removal.”

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## Summaries Of Recent Federal Court Decisions

### FIRST CIRCUIT

#### ■ First Circuit Lacks Jurisdiction To Review Agency's Determination That Asylum Application Was Untimely Filed

In *Pan v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1633660 (1st Cir. June 7, 2007) (Torruella, Selya, Cyr), the First Circuit dismissed for lack of jurisdiction a denial of asylum based on an untimely filed application. The court also held that petitioner's conclusory challenge to the standard of proof the IJ had applied did not present a colorable due process issue sufficient to confer jurisdiction on the court, notwithstanding the jurisdictional bar in 8 U.S.C. § 1158(a)(3).

Petitioner, a native of China, sought asylum, withholding of removal, or protection under CAT by claiming to be a religious refugee. Petitioner claimed that he fled from China on August 26, 2001, when the Chinese government interrogated and beat him based on his affiliation with a home church. After the beating, petitioner alleged that government officials handcuffed him to a pole and left him to stand overnight in the rain. He also says that authorities forced other members of the home church into a labor camp shortly after his departure from China. Petitioner affirmatively filed an asylum application on May 28, 2002. The former INS denied the request based on adverse credibility and on untimely grounds and, following an asylum hearing, an IJ denied all the petitioner's applications due to the adverse credibility determination. The BIA summarily affirmed the IJ's decision.

The First Circuit held that it lacked jurisdiction under 8 U.S.C. § 1158(a)(2)(b) to review the denial of asylum on untimely grounds. The court rejected petitioner's argument that the jurisdictional bar did not apply because the IJ had made a colorable legal error by applying an unduly strict standard of proof to the timeliness

determination. Specifically, the court noted that the controlling statute required petitioner to show "by clear and convincing evidence" that he had submitted a timely application.

On the merits of the withholding claim, the court found the IJ's adverse credibility determination to be a "specific and well-articulated litany of identified inconsistencies in the petitioner's story." Considered cumulatively, these inconsistencies amounted to a valid adverse credibility finding. The court, therefore, found that the denial of petitioner's claim for withholding of removal was supported by substantial evidence on the record. The court also found that petitioner had abandoned his CAT claim since he had failed to make a reasoned argument to support it.

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#### ■ Fifth Motion To Reopen Frustrates Execution Of Removal Order

In *Lemus v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1616401 (1st Cir. June 6, 2007)(Selya, Lipez, Newman), the First Circuit upheld a denial of a fifth motion to reopen where the asylum seeker from Guatemala sought reopening based on changed country conditions without addressing the underlying adverse credibility finding.

Petitioner entered the United States as a visitor on May 8, 1993. The former INS instituted removal proceeding against petitioner on June 1, 1999 when she overstayed her visit. Petitioner conceded her removability but sought asylum and withholding of removal on account of her prior political activity in Guatemala. The IJ made an adverse credibility determination, denied petitioner's applications, and ordered her removed. When the petitioner appealed to the BIA, but failed to

submit a timely brief, the BIA affirmed the IJ's decision. Petitioner did not seek judicial review of the BIA's decision, but rather then filed five consecutive motions to reopen the proceedings. The BIA denied her motions.

Preliminarily, the First Circuit reaffirmed the importance of preserving the limitations on when and how many motions to reopen are filed to protect judicial efficiency because, "motions to

"The aphorist tells us that hope springs eternal, but entreaties for judicial relief founded on hope alone, unaccompanied by any semblance of respectable factual or legal support, should not be encouraged."

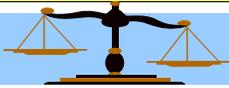
reopen removal proceedings are disfavored as contrary to the compelling public interests in finality and the expeditious processing of proceedings." The court acknowledged the exception to these rules when the motions to reopen are based on changed circumstances. However, here it found that petitioner violated the limitations without qualifying for the exception because her proffered evidence merely contradicted the original BIA's assessment of country conditions. The court was critical of petitioner's "incessant stream of motions to reopen" that operated to delay the execution of her removal order for five and one-half years. "The aphorist tells us that hope springs eternal, but entreaties for judicial relief founded on hope alone, unaccompanied by any semblance of respectable factual or legal support, should not be encouraged," said the court.

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#### ■ First Circuit Affirms Adverse Credibility Determination Against Indonesian Asylum Applicant

In *Mewengkang v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1519541 (1st Cir. May 25, 2007) (Torruella, Tashima, Lipez), the court affirmed an IJ's adverse credibility determination and denial of asylum to an alien from Indo-

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nesia claiming persecution on account of his Christian faith. The IJ had cited four discrepancies in making his adverse credibility determination: petitioner's failure to mention in his asylum application that he had a second child and that he had previously been employed in the U.S., petitioner's failure to consistently describe a violent encounter with the Muslim builder's union, and petitioner's claim that he was not aware he could apply for asylum despite having availed himself of other U.S. immigration laws - such as a visa lottery. The court found that the inconsistencies provided substantial evidence for the adverse credibility determination. The court noted that the petitioner had failed to offer plausible explanations for the discrepancies, saying only that his immigration consultant must have made a mistake and that portions of his asylum application had been mistranslated.

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### ■ IJ Properly Found That Petitioner Failed To Establish That He Lacked Notice Of His Interview On An I-751 Petition

In *Feliz v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1519538 (1st Cir. May 25, 2007) (Lynch, Stahl, Howard), the court found that an IJ properly denied petitioner's request for a continuance so that he could refile his I-751 petition to remove the conditions on his permanent residency. The court also found that the IJ properly refused to terminate the removal proceedings because petitioner had not demonstrated "good cause" for failure to appear at his I-751 interview.

Petitioner, a native and citizen of the Dominican Republic, was granted conditional residency based on his marriage to a U.S. citizen. When the INS scheduled an interview with petitioner and his wife to remove the conditions, petitioner's wife failed to ap-

pear. The INS scheduled a second interview, but both petitioner and his wife failed to appear for the second interview. Consequently, petitioner's permanent resident status was terminated and he was placed in removal proceedings. Petitioner then claimed that he and his wife had no notice of the second interview date. However, the IJ continued the hearing because petitioner's wife was not present to testify on whether she had received notice. At the continued hearing, petitioner again appeared without his wife. When asked why the wife failed to appear, petitioner stated that he wasn't aware her attendance was required and, in the alternative, that his wife had arthritis and "cold weather was bad for her." The IJ found that petitioner failed to establish lack of notice and ordered the petitioner removed. The BIA affirmed without opinion.

Before the First Circuit, petitioner argued that the IJ erred by failing to grant him a continuance at his first removal hearing so that he could refile his I-751 petition and that the IJ improperly found him removable. The court rejected both claims. First, the court found that petitioner had never requested a continuance at the first removal hearing. Second, the court found that the IJ properly found petitioner removable as he had failed to show that he had "good cause" for failing to appear at his I-751 petition interview. Petitioner had argued that his wife's poor health constituted good cause for her failure to appear at the interview. However, the court found that petitioner had never previously proffered his wife's health as an excuse for missing the interview. Conversely, petitioner had only stated that his wife's health caused her to miss his removal hearing and that a lack of notice constituted her failure to appear at the interview. Because there was

no evidence that the NTA did not reach petitioner, the court held that there was no lack of notice and petitioner was therefore removable. The court did not reach petitioner's challenge to the BIA's streamlined decision and whether it had jurisdiction to review the streamlining procedure because the IJ's decision was proper.

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"Due process does not require continuous opportunities to attack executed removal orders years beyond an alien's departure from the country."

### ■ First Circuit Holds That Congress Did Not Implicitly Abrogate 8 CFR § 1000.23(b)(1) By Enacting IIRIRA

In *Pena-Muriel v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1696124 (1st Cir. June 13, 2007) (Boudin, Campbell, Lipez), the

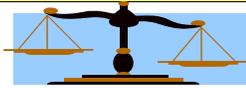
court held that IIRIRA's amendments to the INA did not express Congress' intent to repeal 8 C.F.R. § 1000.23(b)(1) barring motions to reopen by aliens who have departed the United States. The court also held that a deportation order remains constitutionally valid even when the criminal conviction on which it is based has since been vacated. "Due process does not require continuous opportunities to attack executed removal orders years beyond an alien's departure from the country," said the court.

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### ■ First Circuit Holds That A Self-Described "Non-political" Petitioner Failed To Show Persecution On The Basis Of Her Political Opinion

In *Babani v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1793132 (1st Cir. June 22, 2007) (Torruella, Newman, Lynch) (per curiam), the court affirmed an IJ's

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denial of asylum to Albanian petitioners based on failure to show persecution on a protected ground. The petitioners had claimed they were persecuted by the Socialist Party in Albania, citing instances where the police had attacked their son, attacked the husband, and searched their home while attempting to rape petitioner. An IJ found petitioners' testimony as to these events not credible. Further, the IJ found that even if credible, the petitioners had not shown these attacks were on account of a protected ground. The BIA affirmed and the court upheld the decision. The court did not reach the credibility determination because it held that the IJ correctly determined that petitioners failed to demonstrate persecution on the basis of a protected ground. The court explained that petitioners had offered no evidence that the attacks occurred on the basis of political opinion. Indeed, the court said, "according to [petitioner]'s own characterization, she was 'virtually non-political.'" Moreover, the court found evidence that petitioners' desire to immigrate to the U.S. may have been motivated more by want of being able to live with their children residing in the U.S. rather than to escape persecution.

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### SECOND CIRCUIT

#### ■ Similarities Between Affidavits Submitted In Separate Asylum Proceedings May Support An Adverse Credibility Finding

In *Ye v. Gonzales*, \_\_\_ F.3d\_\_\_, 2007 WL 1630127 (2d Cir. June 6, 2007) (Calabresi, Sack, Wesley), the Second Circuit held that in determining the credibility of asylum applicant an IJ may consider "inter-proceedings" similarities, such as similarities between affidavits submitted by another applicant at a separate asylum hearing.

Petitioner entered the United States from China in April 2002. When placed in removal proceeding in January 2003, she filed an application for asylum, withholding of removal, and protection under CAT. Petitioner's husband informed the IJ that a law firm helped him with his immigration case, and his wife with her asylum application.

Petitioner testified that she underwent two forced abortions before she escaped from China. At the end of petitioner's hearing, the IJ noted that he had heard another asylum case that was similar to petitioner's asylum application. The IJ obtained a version of the other asylum application, and after pointing out twenty-three "strikingly similar" portions of the two affidavits, gave petitioner's counsel an opportunity to explain these similarities. Although counsel responded that mistranslation could explain the similarities, he was unable to offer any proof suggesting the translations were not accurate and did not offer any evidence showing that petitioner's narrative was not plagiarized. Based on this, the IJ found that petitioner submitted a fabricated application for asylum and that she did not meet her burden of proof. The IJ ordered petitioner removed and the BIA summarily affirmed.

The Second Circuit drew two implications in its holding on this issue of inter-proceeding similarities. First, it found that when an IJ meticulously follows procedural safeguards, a reviewing court can confidently defer to reasonable inferences of fabricated applications that an IJ draws from their proceedings. Second, the court held that it should view an IJ's adverse credibility finding skeptically when the IJ adopts a less rigorous approach to investigating the inter-proceeding similarities. The court

found that the IJ's treatment of petitioner's case followed the required procedural safeguards, noting his diligence in comparing the two affidavits and his fulfillment of the notice requirements, as outlined in *Ming Shi Xue v. Board of Immigration Appeals*, which gave petitioner's counsel ample opportunity to explain the similarities. 439 F.3d 111, 125 (2d Cir. 2006).

The Second Circuit held that in determining the credibility of an asylum applicant an IJ may consider "inter-proceedings" similarities.

The court explicitly noted that its holding did not impose specific procedural safeguards for the IJ in deciding adverse credibility based on inter-proceeding similarities, and requested that the BIA define such appropriate guidelines.

The court declined to consider petitioner's CAT claim because she had failed to exhaust

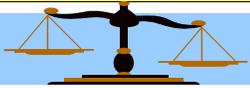
the issue of potential future torture for leaving China illegally.

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#### ■ Second Circuit Remands Case For Determination Whether "Changed Country Conditions" Exist, Including Whether Children Born In United States After Removal Order Entered Are Evidence Of Changed Conditions

In *Chen v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1718552 (2d Cir. June 14, 2007) (Walker, Calabresi, Cote) (*per curiam*), the court remanded a Chinese petitioner's asylum claim for consideration of the documents identified in *Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), but more specifically to petitioner, to determine whether she could only submit a portion of the *Guo* documents and still make a claim for asylum, and whether she could establish changed country conditions on the basis of changed personal conditions occurring after she was ordered to depart.

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Petitioner sought reopening because since she had been ordered removed she had two U.S. born children that she claimed would cause her to be forcibly sterilized if returned to China. The BIA denied the motion, finding that petitioner had not made the requisite showing of changed country conditions to warrant reopening her untimely motion. Specifically, the BIA found that petitioner had only demonstrated changed personal conditions and that the evidence submitted did not show a change in Changle City policy, but rather a continuation of the penalty of forced sterilization.

The Second Circuit remanded the case so that it could be considered with the BIA's determination of the veracity of the *Guo* documents. The court recognized, however, that petitioner had submitted only 2 of the 3 documents that it had previously found warranted a remand in *Guo*. Therefore, the court said, should the BIA determine the *Guo* documents to be authentic, it should also determine whether petitioner has submitted sufficient evidence to warrant reopening where she failed to submit the third document that actually labels sterilization as the punishment for family-planning violations.

Because the court could not determine what exactly the BIA meant by holding that the evidence was simply a "continuation" of policy and not a changed policy, the court also asked the BIA's remand to consider whether the *Guo* documents actually demonstrate changed country conditions. Finally, the court also remanded for a determination of whether "a petitioner whose changed *personal* conditions [] can rely on those changed country conditions in an untimely motion to reopen where the underlying change in personal conditions postdated his order to depart."

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### ■ Second Circuit Holds That A Motion For Stay Does Not Automatically Stay A Period For Voluntary Departure

In *Iouri v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1512420 (2d Cir. May 24, 2007) (Sotomayor, Raggi, Hall), the court affirmed an IJ's adverse credibility determination and held that filing a petition for review does not automatically toll the period for voluntary departure. The court also refused to apply *nunc pro tunc* relief to a request to toll the voluntary departure period.

Petitioners, natives and citizens of the Ukraine, applied for asylum claiming persecution of their Orthodox Christian beliefs. An IJ denied asylum finding that the principal petitioner's testimony was not credible. Specifically, the IJ found that petitioner had not provided hospital records to corroborate a claimed 1991 beating and hospitalization and that petitioner's wife testified that a second attack occurred in the street when petitioner stated it had occurred in their apartment. Petitioner's wife also testified as to a fourth incident of persecution that petitioner never mentioned.

The BIA affirmed the adverse credibility determination and granted voluntary departure. On the last day of the voluntary departure period, petitioners filed a petition for review along with a request for stay of deportation. After the expiration of the voluntary departure period, petitioners filed a motion to reopen for adjustment of status based on an approved immediate relative petition. The BIA denied the motion because petitioners' failure to depart statutorily barred the adjustment of status. Petitioners filed a petition for review of this BIA decision as well and the petitions for review were consolidated.

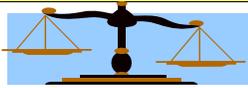
The Second Circuit affirmed both decisions of the BIA. The court upheld the adverse credibility determination because "the IJ clearly set forth specific and cogent reasons for his adverse credibility finding." The court did not consider petitioners' argument that the passage of time and their advanced age should have been a factor in assessing their credibility because they failed to exhaust this argument. The court also upheld the BIA's finding that petitioners were statutorily barred from adjustment of status due to failure to depart. The court rejected petitioners' argument that their motion for stay of deportation should be construed as a motion to stay the voluntary departure period. In rejecting this argument, the

"Whereas a stay of deportation is aimed at preventing forcible removal, a stay of voluntary departure is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded."

court agreed with the First and Seventh Circuits that an explicit motion for a stay of the voluntary departure period was needed because "[t]he relief sought by a stay of deportation is different from that sought by a stay of voluntary departure. Whereas a stay of deportation is aimed at preventing forcible removal, a stay of voluntary departure is a way for the alien to extend the benefits of the privilege of voluntary departure beyond the date the alien was initially afforded." The court noted that this decision was contrary to holdings in the Ninth and Eighth Circuits. Finally, the court refused to adjudicate *nunc pro tunc* petitioners' request for extension of the voluntary departure period because that particular remedy is to be applied only in "certain exceptional cases." Petitioners' case was not exceptional, in the court's view, because they had no excuse for failing to file a motion requesting extension of voluntary departure.

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### ■ Second Circuit Holds That Eligibility For § 212(c) Relief Does Not “Expunge” An Alien’s Conviction For An Aggravated Felony For The Purposes Of Seeking Cancellation Of Removal

In *Peralta-Taveras v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1469423 (2d Cir. May 22, 2007) (Parker, Raggi, Wesley) (*per curiam*), the court held that because petitioner had been convicted of an aggravated felony after the repeal of § 212(c), he was ineligible for cancellation of removal. The court rejected petitioner’s claim that eligibility for a § 212(c) waiver cancelled out his aggravated felony convictions for the purposes of cancellation of removal.

Petitioner was an LPR convicted of aggravated felonies both pre-IIRIRA and post-IIRIRA. When placed in removal proceedings, petitioner sought 212(c) relief and cancellation of removal for lawful permanent residents. An IJ denied both claims for relief. The IJ reasoned that petitioner was ineligible for cancellation of removal due to his aggravated felony convictions and because cancellation of removal cannot be granted simultaneously with 212(c). The BIA affirmed.

Before the Second Circuit, petitioner argued that he was eligible for cancellation of removal because the cancellation statute was ambiguous as to whether simultaneous relief was prohibited and that because he was eligible for 212(c) relief his aggravated felony convictions “ceased to be aggravated felonies that make him removable.” The court rejected both arguments. First, the court held that “[t]he grant of a 212(c) waiver does not expunge the underlying offense or its categorization as an aggravated

felony.” Thus, the court found petitioner ineligible for cancellation of removal because of his aggravated felony convictions. In so holding, the court joined the Third, Fifth, Eighth, and Ninth Circuits. Second, the court held that “granting one form of relief precludes the other, whether or not the applications are simultaneous.” Moreover, the court said, “[s]ection 240A(c)(6) expressly precludes cancellation of removal for aliens who have previously received relief under 212(c).”

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### ■ Second Circuit Affirms BIA’s Holding That Petitioner Was Ineligible for § 212(c) Relief Because Her Initial Adjustment Of Status Was Not Lawful

In *De La Rosa v. DHS*, \_\_\_F.3d\_\_\_, 2007 WL 1695087 (2d Cir. June 13, 2007) (Miner, Katzmann, Murtha) (*per curiam*), the court affirmed the agency’s denial of § 212(c) relief to petitioner on the basis that petitioner had not been lawfully admitted for permanent residence.

Petitioner, a citizen of the Dominican Republic, had previously adjusted her status to that of a lawful permanent resident pursuant to the provision of the IRCA providing amnesty to aliens who, for one, had entered the U.S. prior to January 1, 1982. Petitioner sought § 212(c) relief after she was placed in removal proceedings for a felony drug conviction. At her removal hearing, petitioner testified that she had entered the U.S. in 1987. When the IJ noted that this was in tension with her adjustment of status, petitioner changed her tune and stated in a subsequent hearing that she had, in fact, entered the U.S. via Puerto Rico in 1980. The IJ did not believe petitioner’s testi-

mony and held that petitioner did not qualify for § 212(c) relief as a permanent resident because she had not lawfully obtained her permanent residence. The BIA affirmed.

Before the Second Circuit, petitioner argued that the IJ erred in determining that she had not been lawfully admitted for purposes of § 212(c). The court, however, deferred to the IJ’s interpretation and upheld the decision to deny relief. The court stated that the IJ and BIA reasonably interpreted § 212(c)’s requirement of “lawfully admitted for permanent residence” - in particular the term “lawful” - to mean that the original adjustment to permanent resident complied with governing law. Because petitioner failed to show that she had complied with the substantive legal requirements when adjusting her status, the court held she was not entitled to § 212(c) relief.

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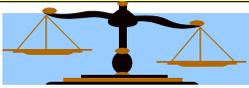
### ■ Second Circuit Holds That Board May Take Administrative Notice Of Internet News Reports, But Must Provide Alien Opportunity To Rebut

In *Chhetry v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1759472 (2d Cir. June 20, 2007) (Walker, Straub, Parker) (*per curiam*), the court vacated the BIA’s decision denying an alien’s motion to reopen based on changed country conditions. The court held that even though the BIA did not abuse its discretion when it took administrative notice of changed country conditions based on news articles found on yahoo.com, the BIA exceeded its allowable discretion when it failed to give the alien the opportunity to rebut the inferences it drew from the noticed facts as applied to the alien’s particular situation.

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The Second Circuit held that “the grant of a § 212(c) waiver does not expunge the underlying offense or its categorization as an aggravated felony.”

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### ■ Untimely Petition For Review Barred Court From Considering Merits Of BIA's Decision.

In *Nwogu v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1745882 (2d Cir. June 19, 2007) (Winter, Calabresi, Sotomayor) (per curiam), the court held that an alien's failure to timely file a petition for review from a BIA decision dismissing his administrative appeal as untimely precluded the court from considering the merits of the BIA's decision. The court further held that, because the alien failed to raise any arguments concerning the BIA's denial of his motion to reconsider (for which the petition for review was timely), any such arguments were waived.

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### THIRD CIRCUIT

### ■ Spouse Of A Persecuted Alien Can "Stand In The Shoes" Of The Persecuted Spouse To Assert His Claim

In *Chen v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1760658 (3d Cir. June 20, 2007) (McKee, Aldisert, Restanifn), the court held that a husband could base his persecution claim on his wife's claim of persecution under China's coercive birth control policy.

Petitioner and his wife requested asylum on the basis that his wife feared a forced abortion or sterilization under China's coercive population control policy due to birth of the couple's first child in the U.S. An IJ held that petitioner "could stand in his wife's shoes" and had established eligibility for asylum. The IJ denied the wife's claim as untimely, however, but granted her derivative asylum. The BIA reversed holding that petitioner had

failed to show that China uniformly punishes those in violation of the coercive birth control policy with forced sterilization. Further, the BIA stated that it was uncertain how a child born abroad was treated in China.

The Third Circuit preliminarily held that it lacked jurisdiction to consider the wife's claim that the IJ erred in finding her untimely asylum application excused by exceptional circumstances. The court then held that petitioner could stand in the shoes of his wife to assert his persecution claim. The court reasoned that the plain language of 8 U.S.C. § 1101(a)(42) - the provision describing

"In a great many cases, forced abortion or involuntary sterilization of one spouse will directly affect the reproductive opportunities of the other spouse, and so the BIA is not unreasonable in considering the loss to the second spouse."

forced sterilization or abortion as persecution - was ambiguous, and that the BIA's interpretation of that provision in *Matter of S-L-L*, 24 I & N Dec. 5 (BIA 2006), extending it to spouses of those persecuted was reasonable and required *Chevron* deference. The court explained that "in a great many cases, forced abortion or involuntary sterilization of one spouse will directly affect the reproductive opportunities of the other spouse, and so the BIA is not unreasonable in considering the loss to the second spouse." The court then reversed the BIA's decision because its language in this particular case improperly required petitioner to prove persecution as "an assured fact" rather than whether a reasonable person would fear persecution.

Judge McKee dissented and would have held that the plain language of 8 U.S.C. § 1101(a)(42) expressed Congress' intent that only the "person" actually experiencing the forced sterilization has a claim for persecution, and thus the husband could not stand in the shoes of his wife.

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### FOURTH CIRCUIT

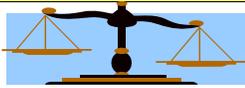
### ■ Fourth Circuit Holds That Psychological Harm Alone Does Not Amount To Persecution

In *Niang v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1676066 (4th Cir. June 12, 2007) (Niemeyer, Williams, Ellis), the court held that a Senegalese petitioner could not claim persecution based on psychological harm alone and could not claim derivative asylum based on the possibility of her daughter suffering persecution.

Petitioner, a native and citizen of Senegal, sought asylum based on her claim that if she were returned to Senegal she would suffer psychological persecution because her daughter would be forced to undergo FGM. She also argued that the possibility of her daughter undergoing FGM established her eligibility for asylum as a derivative refugee. An IJ denied the asylum claim as untimely and withholding of removal and protection under CAT for failure to establish persecution on a protected ground. Further, the IJ refused to recognize derivative asylum. The BIA affirmed.

Before the Fourth Circuit, petitioner argued that the BIA erred in denying her claim for withholding of removal because the psychological harm she would suffer as a result of her daughter's prospective FGM could not be persecution. The court rejected this argument, citing the language of 8 U.S.C. § 1231(b)(3)(A), the withholding statute, to hold that "an applicant cannot rely solely on psychological harm or a threat of such harm to others, but must also establish injury or a threat of injury to the applicant's person or freedom." The court explicitly refused to join the Sixth Circuit's decision in *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004), allowing a parent to seek asylum where the child faced persecution, stating that "*Abay* is unpersuasive because its holding is an unwarranted

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expansion of the statutory definition of persecution.” Finally, the court refused to allow petitioner to seek a derivative claim for asylum based on her daughter’s fear of persecution because the withholding statute specifically requires “the alien’s life or freedom be threatened.” Judge Williams dissented because he would not have established a per se rule that psychological harm cannot be persecution.

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### FIFTH CIRCUIT

#### ■ Statute Prohibiting Unlawful Transport Of Persons Is A Crime Involving Moral Turpitude

In *Fuentes-Cruz v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1739514 (5th Cir. June 18, 2007) (Higginbotham, Davis, Wiener) (*per curiam*), the court held that a conviction under a Texas law barring the unlawful transport of persons was a crime involving moral turpitude (“CIMT”) because the statute required proof of concealing victims from law enforcement. The court dismissed the petition for review because, under 8 U.S.C. § 1252(a)(2)(C), the CIMT barred further review of the alien’s removal order.

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#### ■ Fifth Circuit Defers To BIA’s Statutory Interpretation, But Affords Nunc Pro Tunc Relief Opportunity To Alien

In *Romero-Rodriguez v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1584226 (5th Cir. June 4, 2007) (King, Garza, Owen), the Fifth Circuit deferred to the BIA’s interpretation of the immigration statute and held that the relevant date for determining whether an alien’s term of imprisonment exceeds five years (so as to be ineligible for relief under former section 212(c)) was the date the Board denied the application following reopening. The court, however, held

that the Board improperly applied its own *nunc pro tunc* authority, and remanded the case for the Board to consider the alien’s request that the Board accept his section 212(c) application *nunc pro tunc*.

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#### ■ Fifth Circuit Lacks Jurisdiction To Review Denial Of Inadmissibility Hardship Waiver

In *Said v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1584256 (5th Cir. June 4, 2007) (Reavley, Jolly, Benavides), the Fifth Circuit dismissed the petition for lack of jurisdiction because petitioner did not raise a constitutional claim or question of law in his challenge to his denial of a § 212(i) waiver, 8 U.S.C. § 1182(i).

Petitioner had not sought review of the BIA’s earlier decision that he was removable for procuring his lawful permanent resident status by fraud when he failed to disclose that criminal charges were pending against him. After a remand and further proceedings his eligibility for a discretionary waiver based on an approved I-130, the BIA rejected his appeal based solely on the hardship determination. In the Fifth Circuit, the alien challenged both the materiality of the misrepresentation and the denial of the hardship waiver. But because the BIA denied the appeal solely on the unreviewable no-hardship finding, and the alien had not sought review of the underlying decision on material misrepresentation, the court found it had no jurisdiction.

The Fifth Circuit preliminarily noted that under the REAL ID Act its subject-matter jurisdiction was limited to constitutional claims and questions of law that were exhausted before the BIA. It rejected petitioner’s contention

that it had jurisdiction to review the BIA’s decision denying him a discretionary waiver under 8 U.S.C. § 1182 (i) and voluntary departure, finding that the statute clearly specifies that “this sort of discretionary decision is not reviewable by this court unless it presents a constitutional claim or an administratively exhausted question

A denial of voluntary departure the “sort of discretionary decision [that] is not reviewable by this court unless it presents a constitutional claim or an administratively exhausted question of law.”

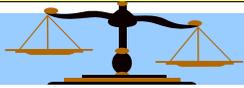
of law.” The court found that petitioner failed to raise any argument in his appeal that the BIA or IJ legally or constitutionally erred in applying the standard for extreme hardship. Petitioner’s argument that his misrepresentation was not material was untimely because he had not sought judicial review of the original BIA decision. Accordingly, the court dismissed the petition for lack of subject-matter jurisdiction.

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#### ■ Fifth Circuit Holds That Showing A Good Faith Marriage Is Not Required For An Extreme Hardship Waiver In Seeking To Remove Conditions On Resident Status.

In *Waggoner v. Gonzales*, \_\_\_F.3d \_\_\_, 2007 WL 1548934 (5th Cir. May 30, 2007) (Smith, Benavides, Prado), the Fifth Circuit held that an alien who gains conditional permanent resident status by marriage to a United States citizen and after a divorce seeks to remove the conditions under INA § 216(c)(4)(A), 8 U.S.C. § 1186a(c)(4)(A), on the ground that she would suffer extreme hardship if she were removed to her home country, is not required to demonstrate that her marriage was entered in good faith. The court rejected the agency’s interpretation of the statute that required a showing of a good faith marriage because the plain language of the subsection dealing with the ex-

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trema hardship waiver did not expressly require such a showing.

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### ■ Alien Who Misrepresented His Address To Immigration Authorities Did Not Lack Good Moral Character

In *Gonzalez-Maldonado v. Gonzales*, \_\_F.3d\_\_, 2007 WL 1518661 (5th Cir. May 25, 2007) (Jones, Jolly, Stewart), the Fifth Circuit reversed the BIA's determination that the alien lacked good moral character because, in an earlier asylum interview, he had misrepresented that his attorney's address was his own. The court held that the misrepresentation was not made with the subjective intent to deceive immigration authorities for the purpose of favorably affecting the outcome of proceedings, a necessary prerequisite to a finding that an alien lacks good moral character for purposes of cancellation of removal for non-permanent residents.

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## SIXTH CIRCUIT

### ■ Remand Renders BIA Decision Non-final

In *Martinez-Marroquin v. Gonzales*, \_\_ F.3d \_\_, 2007 WL 1582955 (6th Cir. June 4, 2007)(Gibbons, Cook, Cleland (sitting by designation)), the Sixth Circuit granted the government's motion to remand case. The petitioner sought review of the BIA's decision denying his motion to reopen based on his claim that he had not received the Notice to Appear. In granting the motion for remand, the Sixth Circuit noted that, although "the effect of a remand is to render the BIA's decision nonfinal and hence not judicially reviewable," it does not preclude the petitioner's right to judicial review. The court cautioned the peti-

tioner that he will be required to file a new timely petition for review if the BIA does not rule in his favor on the remand.

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### ■ Sixth Circuit Holds That A Showing Of Prejudice Is Required To Establish A Due Process Violation

In *Garza-Moreno v. Gonzales*, \_\_ F.3d\_\_, 2007 WL 1595379 (6th Cir. June 5, 2007) (Cook, Rogers, Dowd), the Sixth Circuit dismissed for lack of jurisdiction a denial of cancellation and rejected on the merits petitioners' due process claim and their claim that the BIA abused its discretion by refusing to administratively close case.

Petitioners entered the United States illegally in the early 1990's and now have four United States citizen children. In 2001 petitioners were placed in removal proceedings where they conceded removability, but filed applications for cancellation of removal. The IJ denied the applications, and the BIA affirmed. The BIA also denied petitioners' motion to reconsider.

Petitioners first claimed that the proceedings before the IJ denied them due process. They claimed they received unsigned copies of the IJ's order, that the equipment used to record the hearing before the IJ was unreliable, and that the agency failed to provide them with an accurate transcript of the hearing before the IJ. The court readily rejected petitioners' first two complaints, dismissing them as possible technical problems that did not amount to constitutional defects. The court then considered the alleged transcript problem, citing *Warner v.*

*Ashcroft*, 381 F. 3d 534, 539 (6th Cir. 2004), where it had held that "the petitioner has the burden to prove prejudice [in order] to establish a due process violation in an immigration hearing." The court, citing to *Ortiz-Salas v. INS*, 992 F.2d 105, further held that to establish prejudice petitioners had to show that an accurate transcript would have changed the outcome of the case. The court found that petitioners failed to show that the "sixty-seven

Petitioners failed to show that the "sixty-seven indiscernible notations" could have changed the outcome of the case, and thus failed to establish prejudice

indiscernible notations" could have changed the outcome of the case, and thus failed to establish prejudice. Consequently, petitioners could not establish a due process violation.

The court then held that under section 306 of IIRIRA it lacked jurisdiction to review decisions concerning cancellation of removal. Finally, the court found

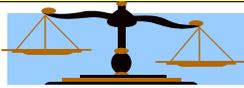
that it had jurisdiction to review the BIA's refusal to administratively close the case. However, it found no abuse of discretion because the BIA had established that it would not use administrative closure if it is opposed by either of the parties and DHS did not agree to administrative closure in this case.

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### ■ Sixth Circuit Holds That Alien Did Not Receive A Fair Hearing On His Asylum Application Due To Immigration Judge's Conduct

In *Elias v. Gonzales*, \_\_F.3d\_\_, 2007 WL 1713323 (6th Cir. June 15, 2007) (Merritt, Griffin, Lawson (sitting by designation)) (*per curiam*), the court remanded petitioner's asylum claim because the IJ presiding over his removal hearing expressed such severe bias and hostility that it tainted the entire proceeding.

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Petitioner, a native and citizen of Iraq, applied for asylum claiming persecution in his homeland as a Chaldean Christian. His removal hearing was presided over by Immigration Judge Chase, an IJ who has now been removed from the bench and was the subject of a Second Circuit request to the Justice Department to have the BIA review all IJ Chase hearings for bias. In petitioner's case, IJ Chase determined that petitioner was not credible, had filed a frivolous asylum application, and had participated in persecution as a member of the Iraqi military. The adverse credibility determination was based on discrepancies in dates that petitioner had testified to and petitioner's general evasive and non-responsive answers. The BIA affirmed, noting that the IJ had an "intemperate" attitude but finding that it did not deprive petitioner of due process.

The Sixth Circuit reversed the adverse credibility determination because of "the conduct of the IJ during the hearing and its effect on the petitioner's ability to testify accurately." The court explained that "the IJ repeatedly addressed petitioner in an argumentative, sarcastic, and sometimes arguable insulting manner that went beyond fact-finding" which created a "substantial uncertainty as to whether the record below was fairly and reliably developed." The court cited numerous comments by the IJ that it found demonstrated bias. For example, the court stated that "the judge likened petitioner's conduct to the movie characters Indiana Jones or Jackie Chan, stating that the description [of events] seems 'more like something out of an action adventure movie than anything akin to reality.'" The court cited other examples but ultimately remanded the case so that petitioner could have a "fair hearing" before a different IJ.

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### SEVENTH CIRCUIT

#### ■ BIA Erred By Concluding That Asylum Applicant's Fear Of FGM In A Cameroon Province Was Not Objectively Reasonable.

In *Agbor v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1518522 (7th Cir. May 25, 2007) (Flaum, Kanne, *Williams*), the Seventh Circuit held that the BIA's reasons for denying asylum, withholding of removal, and CAT protection did not stand up to scrutiny because reports, including those issued by the State Department, demonstrated that the alien's fear of FGM in the Southwest Province of Cameroon was objectively reasonable. In particular, the court was critical of the BIA's point that the government of Cameroon officially opposes FGM and that it has endorsed efforts of NGOs to end the practice. "The BIA may not simply seize on a few 'flowery bromides' of governmental concern over human rights violations when the remainder of the report describes incidents of persecution consistent with a petitioner's claim," said the court. Accordingly, the court remanded for further proceedings.

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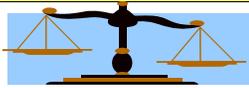
#### ■ Petitioner was Not Denied Due Process When She Admitted The Truthfulness Of A Prior Statement She Claimed Had Been Coerced

In *Alimi v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1611646 (7th Cir. June 6, 2007) (Bauer, Posner, *Ripple*), the Seventh Circuit rejected petitioner's claims of due process violations because she did not establish that her removal proceeding failed to comply with applicable statutory standard.

Petitioner, an ethnic Albanian, became a lawful permanent resident in 2000 through her husband, who is a United States citizen. In February 2001, petitioner traveled to Macedonia to assist her nephew's wife in entering the United States by posing as petitioner's daughter, who is a United States citizen. Immigration officials questioned both women on the return entry with the assistance of a telephone interpreter. According to the immigration officer's records, petitioner admitted her intention to assist her nephew's wife enter the country by fraudulently using her daughter's passport. Immigration officials placed petitioner in removal proceedings, charging her with engaging in fraud to procure an immigration benefit and smuggling another alien into the United States in violation of the law.

At the initial merits hearing, the court interpreter and petitioner could not clearly communicate since they spoke different Albanian dialects and the IJ terminated the hearing early. Before closing the hearing, petitioner's attorney objected to entering the airport interview into evidence since it was potentially tainted by translation problems and because the interviewing officers failed to inform petitioner of her right to counsel during the questioning. The IJ recommended that the interviewing officer be present at the next hearing. Although the officer was not present at the following hearing, the IJ denied the government's motion for continuance and proceeded. In her testimony, petitioner testified consistently with her airport interview and the IJ admitted petitioner's airport statement, concluding that her testimony had not established that the statement either was coerced or was translated improperly. The IJ found petitioner removable on the basis of the premeditated smuggling charge, as proven by petitioner's testimony. He also deter-

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mined that the government failed to sustain its burden of proof on the fraud charge because petitioner had sought no immigration benefit for herself from the misrepresentations.

On appeal to the BIA, petitioner claimed that her airport interview should not have been admitted because of the language barrier, the denial of her right to counsel, and potential coercion by the interviewing officers. She also claimed that, since her nephew's wife was eventually admitted to the United States, her assistance in the initial attempt should not result in petitioner's removal. The BIA affirmed the IJ's decision, noting that petitioner's testimony before the IJ supported the airport statement. The BIA also rejected petitioner's contention that she didn't engage in any affirmative acts of assistance, and stated that it had no authority to waive the alien smuggling charge because the alien had been admitted to the United States under a waiver that was not available to the petitioner.

The Seventh Circuit rejected petitioner's claim that the IJ's failure to rule on the admissibility of the airport statement deprived her of due process because she failed to challenge the decision before the BIA. It also found that petitioner failed to demonstrate a statutory right to the interviewing officer's presence, or to show that the officer's absence resulted in a proceeding that was fundamentally unfair and prejudicial. The court distinguished petitioner's case from its previous ruling in *Balogun v. Ashcroft*, where it held that an alien's answers to questions should be considered less reliable than verbatim accounts or transcript if there is a language barrier. 374 F.3d 492, 505 (7th Cir. 2004). Unlike the *Balogun* case, where the alien's testimony contradicted his airport testimony, the court pointed out that petitioner's testimony supported her airport interview. Ultimately, the court found that petitioner failed to make a substantial argument that she was denied a constitutional

right to due process in her removal proceeding, or that the proceedings failed to comply with the applicable statutory standards.

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### ■ Seventh Circuit Reverses Adverse Credibility Finding Because It Was Based On Immaterial Discrepancies Which Petitioner Had Adequately Explained

In *Tandia v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1487407 (7th Cir. May 23, 2007) (*Ripple*, Manion, Kanne), the court reversed an adverse credibility determination because the IJ relied on immaterial inconsistencies and failed to accept petitioner's reasonable explanations for lack of corroborating documents.

Petitioner, a native and citizen of Mauritania, claimed he was persecuted on account of his race, tribal affiliation, and political opinion. Specifically, petitioner claimed that his opposition to the Mauritanian government's requirement that public schools teach in Arabic instead of French resulted in two prolonged detentions where he was beaten. To corroborate his claims, petitioner provided his own testimony, the testimony of his uncle, affidavits from his cousin, an opposition party membership card, and the State Department reports on Mauritania. During his own testimony, petitioner gave inconsistent dates as to when he switched from public to private school and when he restarted his political activities after release from his first detention. Further, he testified that he would be also be persecuted for the act of leaving Mauritania, which the IJ found implausible due to petitioner's ability to obtain a Mauritanian passport, albeit via bribery. Based on the inconsistencies and implausibility, the

IJ found petitioner not credible. Moreover, the IJ found that petitioner failed to provide corroborating documents for his arrests and beatings. The BIA affirmed.

The Seventh Circuit reversed. The court held that "the IJ's reasons for discrediting his testimony concern only insignificant details in the ac-

The court noted that under the REAL ID Act it would not have been able to review an IJ's determination that corroborating evidence was available but had not been provided.

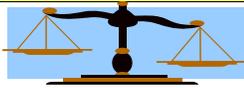
count he gave of his persecution" and that "the central points of [petitioner's] testimony were consistent." Further, the court found that petitioner had explained the inconsistencies in his testimony. The court also found that petitioner's claim that he would be persecuted for leaving Mauritania was not implausible as the passport petitioner obtained was a result of bribery and not "official approval of his plans." Finally, the court also held that the IJ failed to address the explanations petitioner gave for his lack of corroborating documents, i.e., that his arrests were not documented because no charges were ever levied and that he did not seek medical treatment because he didn't trust government-run hospitals. The court noted that under the REAL ID Act it would not have been able to review an IJ's determination that corroborating evidence was available but had not been provided, but found the IJ in this case made no explicit finding regarding the availability of evidence.

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### ■ Asylum Claim Remanded To Consider Whether Economic Penalties Imposed By China On Citizens Not In Compliance With Its One-Child Policy Amount To Persecution

In *Xiu Ling Chen v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1661584 (7th Cir. June 11, 2007) (*Easterbrook*,

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Flaum, Ripple), the court remanded a Chinese asylum claim so that the BIA could consider whether financial exactions are routinely used to impoverish citizens refusing to comply with China's one-child policy. The court also remanded the case so that it may be considered in light of the Second Circuit's remand instruction in *Shou Yung Guo v. Gonzales*, 462 F.3d 109 (2d Cir. 2006).

Petitioner, a citizen of China, claimed asylum on the basis that she would be forcibly sterilized if returned to China as a result of having two children in the U.S. Petitioner provided evidence that despite China's official policy banning forced sterilization of citizens in violation of the one-child policy, some Chinese officials still practiced forced sterilization. The IJ and BIA rejected this contention using the State Department's Report that China switched from physical to financial instruments to enforce its population control policy. However, the Seventh Circuit remanded the case to determine whether the financial instruments used by China amount to persecution. The court cited the BIA's recent decision in *Matter of T-Z*, 24 I & N Dec. 163 (BIA May 9, 2007), concluding that "government sanctions that reduce an applicant to an impoverished existence may amount to persecution even if the victim retains the ability to afford the bare essentials of life." The court stated that the BIA "needs to decide (a) what financial exactions normally are used in Fujian, and (b) how these consequences should be classified under the legal standard that separates inducement and encouragement (allowed) from 'force' (which our law treats as persecution)."

In addition, the court instructed

that the BIA "also must consider evidence now before it as a result of *Shou Yung Guo*" as the Attorney General did not reserve the right to have "offensive nonmutual issue preclusion" apply to other circuits.

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### ■ Seventh Circuit Affirms Adverse Credibility Finding Due To Material Discrepancies In An Indian Petitioner's Testimony

In *Singh v. Gonzales*, \_\_F.3d\_\_, 2007 WL 1487470 (7th Cir. May 23, 2007) (Posner, Flaum, Evans), the court affirmed an IJ's finding that petitioner's testimony that he was persecuted on account of his Sikh religion was not credible.

Petitioner, a native and citizen of India, sought asylum in the U.S. on the basis of persecution of his Sikh beliefs by the Indian government. An IJ denied asylum based on the fact that petitioner had testified that he was part of a group called the Khalistan Commando Force, a group which the IJ found to be a national security threat. On appeal, the BIA remanded for a more specific determination of the national security threat. Before a second IJ, petitioner gave testimony that contradicted his asylum application and affidavits. Specifically, petitioner claimed that he had never been a member of the Khalistan Commando Force. When asked to explain the contradiction, petitioner gave confusing, incoherent responses. Based on this and other discrepancies, and petitioner's failure to follow the tenants of Sikhism and produce any sort of identifying documentation, the IJ found petitioner not credible and denied the claim. The IJ also found that petitioner's asylum application was untimely. The BIA affirmed.

Before the Seventh Circuit, petitioner claimed the discrepancies were due to mistranslation and that his failure to observe Sikh religious tenants should not be used to question his faith and political opinion. The court rejected petitioner's arguments and upheld the IJ's adverse credibility finding. The court stated that "[i]t fell to [petitioner] to explain the discrepancy, and he offered little other than confusing oral testimony and vague theories about a malicious or careless translation in a situation where hard evidence was needed. Affidavits cannot be set aside the moment the oath-taker alleges he did not understand or was not paying attention." The court also noted that it lacked jurisdiction to consider petitioner's arguments that he asylum application was timely.

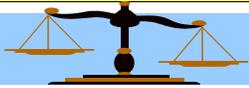
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## EIGHTH CIRCUIT

### ■ Eighth Circuit Rules That Refusal To Admit Expert Testimony Violated Due Process

In *Tun v. Gonzales*, \_\_F.3d\_\_, 2007 WL 1461410 (8th Cir. May 21, 2007) (Melloy, Benton, Shepherd), the Eighth Circuit held that it did not have jurisdiction to review the BIA's determination that asylum relief was unavailable because petitioner failed to file a timely asylum application. However, with respect to the claims for withholding of removal and CAT, it held that the improper exclusion of evidence by the IJ coupled with unreliable translation denied petitioner a fair hearing in violation of his Fifth Amendment rights. Specifically, the court found that the IJ erred in excluding physician's testimony which would have corroborated petitioner's claims that he was abused and tortured in Burma; IJ erred in excluding a county conditions report from a facially unobjectionable expert who could not be present at the hearing as the government

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failed to put forth any reason to impugn his qualifications or to suspect he was biased and failed to identify any ground upon which cross-examination was required. While isolated instances of mistranslation do not provide a basis for relief, said the court, relief was justified in this case because of the seriousness of the errors and the IJ's and BIA's reliance on the mistranslations. Accordingly, the court remanded the case with instructions that the BIA give proper consideration to the medical evidence and assure adequate translation.

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### NINTH CIRCUIT

#### ■ Ninth Circuit Holds That BIA Erred By Concluding It Lacked Jurisdiction Over Alien's Motion To Reopen After Her Departure Under An Exclusion Order

In *Reynoso-Cisneros v. Gonzales*, \_\_\_ F.3d 2007 WL 1630179 (9th Cir. June 7, 2007) (Pregerson, Reinhardt, Tashima) (*per curiam*), the Ninth Circuit found that the BIA had jurisdiction to consider a motion to reopen filed by an alien who reentered the United States following her departure at the completion of removal proceedings.

Petitioner is a native and citizen of Mexico. After she was placed in exclusion proceedings and deported, she re-entered and filed a motion to reopen with the BIA. Petitioner claimed that a change in law made her eligible for a waiver of inadmissibility under former INA §212(c). The BIA denied petitioner's motion because it found that she lacked jurisdiction under 8 C.F.R. § 1002.2(d), which precludes any alien who is subject to exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States from submitting a motion to reopen or reconsider.

The court ruled that the case was governed by its decision in *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), which involved regulations governing motions to reopen filed with an Immigration Judge, while the regulation in the instant case involved regulations governing motions to reopen filed with the BIA. The court held that the regulation did not preclude jurisdiction over motions to reopen filed by aliens who had been lawfully removed after the completion of immigration proceedings.

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#### ■ Ninth Circuit Holds That Spouse Of Woman Who Underwent Forced Abortion Is Eligible For Asylum And Entitled To Withholding

In *Tang v. Gonzales*, \_\_\_ F.3d \_\_\_, 2007 WL 1614878 (9th Cir. June 6, 2007) (Trott, Wardlaw, W. Fletcher), the Ninth Circuit held that the term "forced abortion" under the refugee definition includes "compelling, obligating or constraining by mental, moral, or circumstantial means, in addition to physical restraints."

Petitioner and his wife are natives and citizens of China. Although China's population control policies prohibited them from registering for marriage, they were living together "as husband and wife" when petitioner and his wife discovered they were pregnant in 1980. The company petitioner's wife worked for discovered her pregnancy when she underwent the mandatory gynecological examination. Since she was underage, the company required her to have an abortion. According to petitioner's testimony, company officials took his wife to an abortion clinic and aborted the baby without anesthesia.

In 1991, petitioner's company

sent him to work on a construction project in Guam. When he overstayed his visa he was placed in removal proceedings. Petitioner conceded removability, but requested asylum, withholding, and CAT protection. Although the IJ found petitioner credible, he denied the application for asylum and withholding of removal because the petitioner's wife did not demonstrate resistance and because petitioner did not go into hiding with his wife, petitioner's situation does not meet

The term "forced abortion" under the refugee definition include "compelling, obligating or constraining by mental, moral, or circumstantial means, in addition to physical restraints."

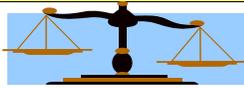
the requirements for a forced abortion. The BIA conducted a de novo review, and upheld the IJ's decision.

The Ninth Circuit rejected what it considered the IJ's narrow interpretation of the definition of "force" as applied to forced abortions. It noted that in *Ding v.*

*Ashcroft*, 387 F.3d 1131, 1140 (9th Cir. 2004), it had held that "an asylum applicant need not demonstrate that she was physically restrained during an abortion procedure to show that the procedure was forced." In that case the court found that the term "forced" is a much broader concept, which includes compelling, obligating, or constraining by mental, moral, or circumstantial means, in addition to physical restraint." Thus the fact petitioner's wife was not physically forced to have an abortion does not preclude her from meeting the requirements for asylum.

The court also disagreed with the IJ's determination that the abortion was not "forced" because the employer ordered the abortion, as opposed to government officials. The court found that the record showed that the Chinese government relies on participation from

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many entities, including employers, to effectively implement its population control system and that, although an employer ordered the abortion, the action conforms to official Chinese population control policies. Based on its rejection of the IJ's three main objections to terming petitioner's claim a "forced abortion," the court found that petitioner's wife did undergo a forced abortion and remanded the case for the AG to exercise discretion in deciding whether to grant asylum.

Finally, the court also ruled that victims of forced abortion, like individuals subjected to forced sterilization, are entitled to withholding and that the alien, as the partner of a woman who underwent a forced abortion, was entitled to withholding as a matter of law.

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### ■ Ninth Circuit Rules That Attempt To Amend Habeas Petition After Removal Did Not Revive Original Petition, Which Was Mooted By Alien's Removal

In *Abdala v. INS*, \_\_F.3d\_\_, 2007 WL 1584589 (9th Cir. June 4, 2007) (Silverman, Wardlaw, Bybee), the Ninth Circuit dismissed as moot an appeal from a habeas denial where the petitioner who challenged the length of his detention was subsequently deported, and his petition did not seek to redress any collateral consequences arising from his removal.

The petitioner is a native citizen of Somalia who entered the United States in 1997. That same year, petitioner was convicted in California for the "unlawful taking of a vehicle," and sentenced to 181 days imprisonment and three years probation. Two years later, in 1999, he was convicted in

federal court of conspiracy to destroy government property. At this point, the INS took petitioner into custody and subsequently an IJ ordered him removed to Somalia. Petitioner did not appeal that order.

On September 11, 2000, petitioner filed a habeas petition, asserting that the government detained him at the INS facility beyond the statutorily prescribed 90-day maximum period. One month later, he sought to

An habeas petition is moot unless there exists a "collateral consequence" that may be redressed by a successful petition.

enjoin his removal to Somalia. In the interim, petitioner was deported to Somalia, and the district court subsequently denied his request for a temporary restraining order. On November 20, 2000, petitioner amended his habeas petition, claiming that his removal to Somalia violated 8 U.S.C. § 1231(b) because DHS failed to obtain the Somali government's permission to repatriate him and that, since Somalia does not have a "functioning central" government, he could not be deported to a "non-country." The district court denied the amended petition, based on *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005), where the court held that Somalia's inability to accept Jama did not preclude his removal from the United States.

The Ninth Circuit preliminarily stated that a habeas petition is moot unless there exists a "collateral consequence" that may be redressed by a successful petition. The court then found no collateral consequences to petitioner's original petition since he was deported six weeks subsequent to his petition, resolving his complaints about the length of the detention. The court then ruled petitioner's original claim moot, since "as of the date of his deportation, there was no extant controversy for the district

court to act upon." The court affirmed the district court's denial of petitioner's attempt to amend his original petition because he was no longer in INS custody at the time he sought to amend.

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### ■ Ninth Circuit Holds That Restitution Reducing "Loss to the Victim" Below \$10,000 Threshold Does Not Preclude Underlying Crime From Being An Aggravated Felony

In *Kharana v. Gonzales*, \_\_F.3d\_\_, 2007 WL 1531822 (9th Cir. May 29, 2007)(Wallace, D.W. Nelson, McKeown), the Ninth Circuit held that an alien's restitution payment, which she claimed reduced the "loss to the victim" below the \$10,000 statutory threshold set forth in 8 U.S.C. § 1101(a)(43)(M)(i), does not preclude the criminal offense from constituting an aggravated felony. The alien pleaded guilty to fraudulently appropriating more than \$10,000, and the court concluded that she repaid the money only after her scheme was discovered and only after she was prosecuted.

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### ■ Ninth Circuit Holds That Exclusion Proceedings Resulting In An Order Of Deportation Interrupt An Alien's Continuous Physical Presence

In *Landin-Zavala v. Gonzales*, \_\_F.3d\_\_, 2007 WL 1518854 (9th Cir. May 25, 2007) (Farris, Gould, Duffy), the court affirmed an IJ's determination that petitioner's order of exclusion and deportation from the U.S. interrupted his continuous physical presence for purposes of cancellation of removal.

Petitioner was apprehended by the former INS when attempting to

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enter the U.S. and placed in exclusion proceedings. An IJ ordered petitioner excluded. Several days after his deportation, petitioner reentered the U.S. and was again caught by the INS at the border but allowed to voluntarily return to Mexico. A few days after his return to Mexico, petitioner again illegally entered the U.S. The INS caught him a years later and placed him in removal proceedings. An IJ rejected his application for cancellation of removal finding that petitioner's continuous physical presence was interrupted by his deportation to Mexico and by his voluntary departure from the U.S. The BIA affirmed without opinion.

Before the Ninth Circuit, petitioner argued that because his order of removal resulted from exclusion proceedings and not removal proceedings, he did not make an entry into the U.S. and therefore was never deported. The court rejected this argument, stating "the formal exclusion order, stating that Petitioner was both 'excluded' and 'deported,' ends the inquiry." Distinguishing the case from *Tapia* and *Ibarra-Flores*, the court said that "[p]etitioner was not merely turned around at the border but had been through formal exclusion proceedings before an immigration judge and ordered excluded a month earlier."

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### ■ Ninth Circuit Holds That Prison Time Served Under Sentence Enhancement Can Bar § 212(c)

In *Saravia-Paguada v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1462240 (9th Cir. May 21, 2007) (*Gould*, Rawlinson, Covello), the court held that the time served by petitioner pursuant to a recidivist enhancement of his sen-

tence was properly considered in determining whether or not petitioner was eligible for § 212(c) relief. The court also rejected the argument that applying the Immigration Act of 1990, which created the bar to the alien's 1998 felony conviction had an impermissibly retroactive effect.

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### ■ Ninth Circuit Holds That Claims For Ineffective Assistance Of Counsel Must Be Exhausted Before An Administrative Agency

"Permitting [petitioner] to present his ineffective assistance of counsel claim for the first time before the district court would allow him to bypass the administrative scheme that is in place to deal with claims such as [petitioner]'s."

In *Puga v. Chertoff*, \_\_\_F.3d\_\_\_, 2007 WL 1500308 (9th Cir. May 24, 2007) (Wallace, Nelson, McKeown), the court held that an alien cannot claim ineffective assistance of counsel in his petition for review without first exhausting the claim before the BIA.

Petitioner, a native and citizen of Mexico, filed a writ of habeas corpus with a district court claiming his prior counsel ineffectively represented him by filing a frivolous asylum application on his behalf. The district court dismissed the case for lack of jurisdiction and transferred it to the Ninth Circuit. The Ninth Circuit dismissed the case for failure to exhaust administrative remedies. The court held that because petitioner had not initially presented the claim in a motion to reopen before the BIA, it would not hear the claim in the first instance. The court said that "[p]ermitting [petitioner] to present his ineffective assistance of counsel claim for the first time before the district court would allow him to bypass the administrative scheme that is in place to deal with claims such as [petitioner]'s." The court cited to the policies behind the administrative exhaustion requirement and stated

that because petitioner's claim of ineffective assistance of counsel "relate[d] to attorney conduct that occurred prior to and during the removal proceeding, [] the BIA [was] the appropriate body to first pass on the claims in order to generate a proper record for review." Finally, the court also noted petitioner's failure to comply with *Matter of Lozada*.

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### ■ Ninth Circuit Dismisses Challenge To 8 C.F.R. § 316.10(b)(3)(iii) As An Ultra Vires Application Of Congress' Denaturalization Statutes

In *United States v. Dang*, \_\_\_F.3d\_\_\_, 2007 WL 1500310 (9th Cir. May 24, 2007) (Hawkins, Tashima, Thomas), the court rejected petitioner's challenge to 8 C.F.R. § 316.10(b)(3)(iii), a regulation pertaining to the assessment of good moral character in naturalization proceedings, and held that the regulation was promulgated pursuant to explicit authority from Congress.

Prior to being given the oath, but after the INS accepted her application for naturalization, petitioner was arrested for arson, willful injury to a child, and other crimes relating to a fire she set in her van while her child was still inside it. Out on bail, petitioner took the naturalization oath and indicated on a form that she had committed no crimes since filing her application. Petitioner was later convicted for her crimes prompting the government to seek to denaturalize petitioner on the basis that her citizenship was illegally procured. However, because it turned out that petitioner's daughter was actually the one who filled out the form with the misrepresentation, the government sought leave to amend the charges to include a charge under 8 C.F.R. § 316.10(b)(3)(iii), a regulation providing that the government need only show that unlawful acts were committed prior

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to the oath of naturalization for which a conviction was obtained in order to denaturalize petitioner for lack of good moral character. Petitioner opposed the amendment, arguing that it was not accompanied by an affidavit of good cause, was barred by laches, and failed to state a cause of action. When a district court granted the motion to amend and ultimately revoked her citizenship, petitioner appealed to the Ninth Circuit reiterating her prior arguments in addition to claiming that 8 C.F.R. § 316.10(b)(3)(iii) was *ultra vires* because 8 U.S.C 1107(f)(3) specifically limits an unfavorable moral character determination based on criminal activity to people who were convicted of crimes prior to taking the oath.

The Ninth Circuit rejected petitioner's claim that the regulation was *ultra vires*, holding that its promulgation was a proper exercise of the authority given to the agency by Congress. The court held that the regulation was properly promulgated to enact 8 U.S.C. § 1101(f), stating that "[s]ection 1101(f)'s catch-all provision, stating that 'other reasons' can be considered in determining that a person is not of good moral character, demonstrates a gap that 'Congress explicitly left for the agency to fill.'" The court further explained, "[b]ecause the authorizing statute covers conduct both legal and illegal, and literally invites the agency to expand the list of acts warranting adverse moral character determinations, [] it cannot be reasonably argued that the regulation at issue here is arbitrary or capricious."

Finally, the court easily rejected challenges to the regulation as vague, overbroad, and facially in violation of the Uniformity Clause. The court also found that the district court did not abuse its discretion in allowing the government leave to amend the complaint and that an affidavit of good cause is only required at the initiation of a denaturalization proceeding and

not for each subsequent amendment.

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### ■ Ninth Circuit Holds That A Negative Inference Alone Does Not Constitute Substantial Evidence To Support An IJ's Denial Of Asylum

In *Singh v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1677963 (9th Cir. June 12, 2007) (Fletcher, Rawlinson, Henderson), the court reversed a decision of an IJ denying petitioner's asylum application for petitioner's failure to produce his Canadian immigration file. The IJ had drawn an adverse inference from petitioner's refusal to allow the Canadian government to release his records and the court stated that in addition to making the negative inference the IJ should have made a credibility determination as well.

Petitioner, a native and citizen of India, entered the U.S. through Canada whereupon he sought asylum claiming persecution of his Sikh beliefs. Petitioner testified as to numerous instances where he claimed the Indian police beat and detained him. However, when asked to give his consent for the Canadian government to release his immigration files, petitioner refused to give consent, claiming that he feared the agent that helped him procure his false passport to enter into Canada would kill him. Based on the petitioner's refusal to consent, the IJ used a negative inference to undermine all of petitioner's testimony and other evidence of persecution, reasoning that the contents of the Canadian immigration file may contain evidence contradictory to the information provided to the court.

"We hold that the inference alone - more an artifact of legal reasoning than a factual finding - does not constitute 'substantial evidence' sufficient to support the denial."

The BIA affirmed without opinion.

The Ninth Circuit reversed. The court held that "[w]hile the IJ could properly draw a negative inference, he could not stop there. The IJ had to either use the inference to explicitly make an adverse credibility finding, or, under the law of our Circuit, treat all [petitioner]'s testimony as true, and analyze the merits of his claim. We hold that the inference alone - more an artifact of legal reasoning than a factual finding - does not constitute 'substantial evidence' sufficient to support the denial." The court explained that the IJ's use of the negative inference was the "functional equivalent of demanding corroborating evidence" and that would "conflict with our rule that 'once an applicant's testimony is deemed credible

[] no further corroboration is required." Judge Rawlinson dissented, finding that the majority mischaracterized the case as one where the IJ required corroborating evidence despite the presence of credible testimony, rather than a case where the IJ was unable to assess petitioner's credibility due to obstruction.

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### ■ Polygraph Evidence Does Not Constitute New Evidence For The Purposes Of A Motion To Reopen

In *Goel v. Gonzales*, \_\_\_F.3d\_\_\_, 2007 WL 1704152 (9th Cir. June 14, 2007) (Schroeder, Trott, Feess) (*per curiam*), the court held that polygraph results do not constitute new, previously unavailable evidence for purposes of a motion to reopen. The court further held that polygraph evidence only demonstrates a subjective fear of persecution and does nothing to prove an objectively reasonable of persecution. The court stated that "[w]e do not necessarily preclude the discre-

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tionary consideration of polygraph evidence by an IJ or the BIA at earlier stages of a removal proceeding. But we do hold that polygraph evidence cannot serve as the basis for reopening."

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### ■ Ninth Circuit Holds That Grandchildren Are Not Qualifying Relatives For Purposes Of Cancellation Of Removal

In *Moreno-Morante v. Gonzales*, \_\_F.3d\_\_, 2007 WL 1775209 (9th Cir. June 21, 2007) (Fletcher, Siler, Hawkins), the court held that a Mexican alien who is the legal custodian and guardian of his grandchildren may not qualify for cancellation of removal based on the alleged hardship to them resulting from his removal. The court rejected the alien's claim that his grandchildren qualify as his children under the Immigration and Nationality Act's "orphan" provision, which was enacted to facilitate the adoption of alien children. It further held that Congress specifically precluded a functional approach to determining whether, in this context, a particular person may be considered a "child."

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### ■ Ninth Circuit Holds That Restitution Reducing "Loss to the Victim" Below \$10,000 Threshold Does Not Preclude Underlying Crime From Being An Aggravated Felony

In *Kharana v. Gonzales*, \_\_F.3d\_\_, 2007 WL 1531822 (9th Cir. May 29, 2007) (Wallace, D.W. Nelson, McKeown), the Ninth Circuit held that an alien's restitution payment, which she claimed reduced the "loss to the victim" below the \$10,000 statutory threshold set forth in 8 U.S.C. § 1101(a)(43)(M)(i), does not preclude the criminal offense from constituting an aggravated felony. The

alien pleaded guilty to fraudulently appropriating more than \$10,000, and the court concluded that she repaid the money only after her scheme was discovered and only after she was prosecuted.

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## ELEVENTH CIRCUIT

### ■ Eleventh Circuit Held That Substantial Evidence Supported The BIA's Determination That Petitioner Was Not Persecuted On Account Of Political Opinion Warranting Denial Of Asylum Application

In *Rodriguez Morales v. U.S. Attorney General*, \_\_F.3d\_\_, 2007 WL 1615893 (11th Cir. June 6, 2007) (Tjoflat, Birch, Hull) the Eleventh Circuit in a *per curiam* decision held that Colombian petitioner was not eligible for asylum and withholding of removal because he failed to show a sufficient nexus between his political opinion and his alleged persecution. Because the authorities were helpful in protecting him against the FARC guerillas, the court further held that the record did not compel a finding that the government acquiesced to any alleged torture as required for CAT relief.

The petitioner, a well-known Colombian dentist, alleged that, when he was in Colombia, members of the FARC asked him to become part of their group and deliver dental services to their members. He claimed that they were planning to kill him if he continued to refuse to cooperate and that the Colombian police provided him with protection. Still feeling threatened, he left Colombia with his family, came to the United States, and applied for asylum. The IJ, affirmed by the BIA, denied him asylum reasoning that a guerilla group's attempt to coerce a person into performing a service does not constitute past persecution based on a protected ground. The court agreed holding

that the record did not compel a finding of a nexus between petitioner's alleged persecution and his actual or imputed political opinion. The court further noted that even if the FARC threatened petitioner because of his political opinion, the group also threatened him simply because of his refusal to provide dental services. On this basis, the record did not compel the reversal of the IJ's decision.

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### ■ BIA Abused Its Discretion When It Refused To Reopen Removal Proceedings When Petitioner Presented Evidence That Chinese Government Considers Foreign Born Children For Purposes Of The Chinese One-Child Policy

In *Yaner Li v. U.S. Attorney General*, \_\_F.3d\_\_, 2007 WL 1731109 (11th Cir. June 18, 2007) (Anderson, Barkett and Pryor), the Eleventh Circuit, in a *per curiam* decision, held that the BIA abused its discretion when it refused to reopen petitioner's removal proceedings based on previously unavailable evidence of changed conditions in China. The court found that the evidence presented by the petitioner "clearly satisf[ie]d" the criteria for a motion to reopen" and that the BIA erroneously determined that petitioner failed to establish a Chinese policy of persecuting women with two foreign-born children. The court found no evidence that either the Chinese national government or the Fujian officials distinguish between parents of children born abroad and parents of children born in China, and concluded that the BIA abused its discretion when it denied the motion to reopen after petitioner presented material and previously unavailable evidence establishing a prima facie case of eligibility for asylum and withholding of removal.

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## OIL participates at USCIS Fifth Annual Conference

A number of OIL attorneys, including Director **Thom Hussey**, Deputy Director **David McConnell**, and assistant Directors, **Linda Wernery** and **Michelle Latour**, among others,

participated at the USCIS Office of Chief Counsel Fifth Annual Conference held in Newport Beach, California on June 25-28, 2007.



The “Coordinating Litigation with OIL and the USAO” panel moderated by Kelli Duehning (left), with David McConnell, Sheila Fisher, and D. Allen Kenny

## Inside OIL

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with a B.A. in Psychology and English from University of Wisconsin, Madison. He then worked at a commercial real estate development firm in San Francisco. He is a graduate of the William Mitchell College of Law, and earned an LL.M in International and Comparative Law at The George Washington University Law School.

**Jeffrey Meyer** graduated from the University of Michigan and received his JD from Wayne State University Law School. He joined the Department as an Honors Program attorney in the Tax Division, Civil Trial Section and later joined Tax Appellate. Most recently, he served in the Civil Rights Division.

**Greg Kelch** is a graduate of Penn State University and the George Washington University Law School. He started his legal career as an Army Judge Advocate, where he served with the First Infantry Division in Germany and at the Defense Appellate Division in Arlington, Virginia.

Most recently, Greg was the General Counsel at the DOJ Tax Division.

**Joan Hogan** is a graduate of Santa Clara University and Gonzaga University Law School. She also earned an LL.M. from Georgetown University Law Center. Prior to joining OIL and since 1993, she was an attorney in the Antitrust Division responsible for criminal, and civil antitrust enforcement and at one time was detailed to the U.S. Attorney's Office in Alexandria, Virginia.



About 200 OILers and attorneys from client agencies attended the OIL Annual Picnic held at the June 7th National's game against the Pittsburgh Pirates. The picnic was a great success but the Nationals dropped the ball losing 3-2.

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## INSIDE OIL

Congratulations to the following OIL Senior Litigation Counsels who have been promoted to Assistant Directors: **Barry Pettinato, Mary Jane Can-deaux, and Carl McIntyre.**

Welcome on board to the following attorneys who joined OIL in June:

**Sunah Lee** received a B.A. in Government from the University of Virginia, and a J.D. from American University, Washington College of Law, where she participated in the International Human Rights Law Clinic. She has worked as a Judicial Law Clerk at the Miami Immigration Court and as an Attorney Advisor at the Office of the Chief Immigration Judge.

**Justin Constantine** graduated from James Madison University and the University of Denver School of Law. He served as a Judge Advocate in the U.S. Marine Corps from 1998 to 2004. After that he was a legal advisor at ICE for two years. Most recently he deployed to Iraq with the Marine Corps as a Civil Affairs officer where he led a team of eight Marines in the Al-Anbar Province.

**Arthur Rizer** joined the Department in 2005 and worked at EOIR for two

years, save for a one year tour as an Infantryman in Fallujah, Iraq with the Army. Before coming to DOJ he worked as a judicial law clerk for the Honorable Judge Kosik, United States District Court for the Middle District of Pennsylvania and worked for the Washington Attorney General's Office, working on child abuse

and neglect cases. Arthur graduated from Gonzaga Law School in 2003. Before attending law school he attended the Washington State Police Academy and worked as a Peace Officer for three years.

**Aliza Bessie Alyeshmerni** graduated

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L to R: Justin Constantine, Aliza Alyeshmerni, Sunah Lee, Greg Kelch, Jeffrey Meyer, Arthur Rizer

The **Immigration Litigation Bulletin** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended 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>.

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.

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](mailto:francesco.isgro@usdoj.gov).



*“To defend and preserve  
the Executive’s  
authority to administer the  
Immigration and Nationality  
laws of the United States”*

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