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LITIGATION HIGHLIGHTS

Inside

EN BANC NINTH CIRCUIT UPHOLDS VALIDITY OF REINSTATEMENT STATUTE AND REGULATIONS

In ***Morales-Izquierdo v. Gonzales***, __F.3d__, 2007 WL 329132 (9th Cir. February 6, 2007) (Schroeder, Pregerson, Reinhardt, *Kozinski,* Rymer, Hawkins, Thomas, Graber, W. Fletcher, Gould, Bybee), the Ninth Circuit, in an *en banc* decision held that "the reinstatement statute and its implementing regulation comport with due process, and 8 C.F.R. § 241.8 is a valid interpretation of the INA." Consequently, "a previously removed alien who reenters the country illegally is not entitled to a hearing before an immigration judge to determine whether to reinstate a prior order of removal."

> ***"A previously removed alien who reenters the country illegally is not entitled to a hearing before an immigration judge to determine whether to reinstate a prior order of removal."***

The reinstatement regulation, 8 C.F.R. § 241.8, authorizes DHS immigration officers to reinstate a prior removal order without a hearing before an IJ when an alien has illegally reentered the country after a prior removal order. Until 1997, removal orders could only be reinstated by IJs. However, that year the Attorney General changed the applicable regulation to delegate his authority under INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), to immigration officers. The government informed the court that DHS estimates that immigration officers have issued approximately 211,000 reinstatement orders nationwide since 1999.

The petitioner, a Mexican citizen, had been previously removed from the United States in 1998 and in January 2001. Undaunted, he reentered the U.S. illegally a day after his last removal. Sometime between 1998-2001, he married a United States citizen who subsequently filed an I-130 relative visa petition. When petitioner and his wife met with the INS, petitioner was served with a notice of intent to reinstate his prior removal order and the I-130 application was denied. Petitioner then filed a review petition challenging the order of reinstatement.

Initially, a three-judge panel agreed with petitioner's contention that the reinstatement regulation was invalid and that the removal order could only

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Mixed question of law and fact is a "question of law" under the REAL ID Act

In ***Ramadan v. Gonzales,*** __F.3d__, 2007 WL 528715 (9th Cir. Feb. 22, 2007) (Pregerson, Hawkins, Thomas) (*per curiam*), the Ninth Circuit held that under the REAL ID Act it had jurisdiction to review petitioner's challenge to the IJ's determination that she had failed to show changed circumstances to excuse the untimely filing of her application for asylum because petitioner raised a "question of law."

The court had originally determined that the phrase "question of

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REINSTATEMENT PROCEDURES UPHELD

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be reinstated by an immigration judge. *See Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299, 1305 (9th Cir. 2004). That decision was vacated when the Ninth Circuit took the case *en banc*. *See Morales-Izquierdo v. Ashcroft*, 423 F.3d 1118 (9th Cir. 2005).

To determine the validity of 8 C.F.R. § 241.8, the court applied the *Chevron* two-step approach. Applying the first step, the court found that Congress had directly expressed its intent that the execution of a reinstatement of removal order need not be performed by an immigration judge. The court stated that the reinstatement statute at INA § 241 "makes no mention of a hearing before an immigration judge, or any other procedure. Most of the section is devoted to limiting the alien's rights and ensuring that the removal is carried out expeditiously." While Congress had not explicitly exempted reinstatement orders from requiring a hearing, the court found that "such failure hardly amounts to the kind of unambiguous expression of congressional intent that would remove the agency's discretion at *Chevron* step one. Far more telling is the fact that reinstatement and removal are placed in different sections." This said the court, "suggests that "reinstatement is a separate procedure not a species of removal" under INA § 240. The court also noted that "the scope of a reinstatement inquiry is much narrower than a removal proceeding, and can be performed like any ministerial enforcement action."

The court then proceeded to step two of the *Chevron* inquiry "in the abundance of caution" even though it was of the view that the case could "probably be decided under the first *Chevron* inquiry." Petitioner argued that the regulation was an impermissible construction of the reinstatement statute because a hearing before an IJ would avoid constitutional concerns and because Congress had previously "acquiesced" to requiring hearings in the reinstatement process. The court disagreed with both arguments. First, the court stated, "we have no authority to re-construe [a] statute, even to avoid potential constitution problems; we can only decide whether the agency's interpretation reflects a plausible reading of the statutory text." Second, the court said that "[a] finding of congressional acquiescence must be reserved for those rare instances where it is very clear that Congress has considered and approved of an agency's practice, lest the agency be improperly deprived of the very flexibility Congress intended to delegate. Such is not the case here."

> "While aliens have a right to fair procedures, they have no constitutional right to force the government to readjudicate a final removal order by unlawfully reentering the country."

Similarly, the court dismissed petitioner's argument that the agency's rule change was impermissibly inconsistent with its past practice because the new regulation was clearly justified by the need to implement IIRIRA. "The regulatory change here, was adequately explained" by the Attorney General said the court, and the legislative changes brought by IIRIRA provided an adequate justification to make that change.

Finally, the court dismissed petitioner's contention that the regulation was invalid because it violated various constitutional guarantees. The court held that the regulation did not violate petitioner's due process because he could point to no prejudice suffered by denial of a hearing, as he was ineligible for adjustment of status and was precluded from arguing defective notice by INA § 241(a)(5). Moreover, the court was satisfied that the regulation itself provides sufficient procedural due process safeguards.

The court also rejected the contention that DHS could not constitutionally reinstate a prior order of removal if the underlying removal proceeding itself violated due process. The court noted that a prior decision of the court in *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 963 (9th Cir. 2004), supported that proposition. "To the extent we so held in *Areola-Arreola*, we revisit that decision here and reverse field: Reinstatement of a prior removal order – regardless of the process afforded in the underlying order – does not offend due process because reinstatement of a prior order does not change the alien's rights or remedies," said the court. "The reinstatement order imposes no civil or criminal penalties, creates no new obstacles to attacking the validity of the removal order. . . and does not diminish petitioner's access to whatever path for lawful entry into the United States might otherwise be available to him under the immigration laws," explained the court. It concluded that "while aliens have a right to fair procedures, they have no constitutional right to force the government to readjudicate a final removal order by unlawfully reentering the country."

In a dissenting opinion, Judge Thomas, joined by Pregerson, Reinhardt, and, W. Fletcher, would have held that the regulation was contrary to the statute, and even if the statute was ambiguous, the regulation was invalid because it approached the "constitutional danger zone."

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Ed. Note: The *en banc* case was argued by former OIL's DAAG, Jonathan Cohn.

AG SPEAKS ON THE ROLE OF JUDGES AND HABEAS CORPUS

Ed. Note: The following are excerpts of remarks delivered by Attorney General Alberto Gonzales at the SMU Law School Dallas, Texas, on February 2, 2007. The Attorney General spoke, among other topics, about the role of judges and the jurisprudence of the habeas corpus.

. . . .

THE PROPER ROLE OF A JUDGE

Now, it is not enough for the courts to be strong and independent. Judges also must understand their role in our system of limited government.

I am concerned that some have lost sight of the Framers' vision of the role of the Judicial Branch. I do not believe they ever intended for the Judiciary — the Supreme Court or any court — to make policy. Remember Hamilton's famous words, again from the Federalist Papers: "The Judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."

In arguing that states should ratify the Constitution, Hamilton sought to allay the concerns of those who feared that courts would endanger the political accountability of lawmakers or Executive Branch officials. In effect, he said, "Don't worry, courts won't be capable of arrogating to themselves the power of law- or policy-making."

Judicial decisions have been obeyed historically in large part because the judgment of the federal Judiciary is respected. But it is perhaps underappreciated that when courts apply an activist philosophy that stretches the law to suit policy preferences, they reduce the Judiciary's credibility and authority.

In contrast, a judge who humbly understands the role of the courts in our tripartite system of government renders decisions based on neutral principles. He generally defers to the judgment of the political branches, and respects precedent — the collective wisdom of those who have gone before him. In so doing, that judge strengthens respect for the Judiciary, upholds the rule of law, and permits the People — through their elected representatives — to decide the issues of the day.

Chief Justice Roberts explained it well: "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire."

"I also am concerned about judges who imagine they see a constitutional solution to every societal ill."

When judges uphold laws enacted by Congress and actions taken by Executive Branch officials, they send a very clear message to the American people: "You have chosen this path, and it is presumed to be the right one because you have chosen it."

This makes for a strong democracy. It makes the People responsible for their choices. If our elected representatives make foolish decisions, we should not expect the judges to clean up the mess — we should vote Congress or the President out of office. That is the Constitution's method for keeping control in the hands of the People — and keeping our limited government limited.

I also am concerned about judges who imagine they see a constitutional solution to every societal ill. The Constitution is a very brief document. It defines the structure and authority of the federal government and protects a limited list of sacred rights. It does not, and was never intended to, address every legal issue — much less every policy question — that might arise.

Democracy is well-served when a court says, in effect, "the Constitution simply takes no position on this issue." That means that the Constitution, far from forcing one result on us, instead permits the People to choose the rule they think best. But constitutionalizing an issue takes it out of the democratic process. Some principles are outside the bounds of politics — we cannot establish a national church, for example. And courts must protect individuals from the tyranny of the majority — that's what the enumerated rights are for.

But beyond these parameters, courts must not stop a self-governing democracy like the United States from using the normal legislative process — the process the Constitution itself enshrines — to make the decisions of the day. Remember that members of Congress and Executive Branch officials take an oath to uphold the Constitution just as judges do. Courts that rush to invoke the Constitution to strike down the actions of the other branches sell short the wisdom and the prerogatives of the legislature, the President, and the people.

Activist judges —those who on a pretense substitute their own views for the will of the legislatures – can, of course, find some rationale to support any desired outcome. They can find some quote to support their viewpoint in legislative history. Or, from a footnote in an earlier decision, they can extrapolate a new principle despite what the language of the law itself says.

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AG SPEAKS ON JUDGES & HABEAS

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But in the end, distorting history or precedent to support a predetermined outcome weakens the Judiciary, undermines the rule of law, and harms our democracy.

Problems along these lines are not the fault of judges alone. Yes, judges must understand their proper role and strive not to subvert the democratic process. But leaders of the political branches should not pass the buck on difficult questions to the Judicial Branch because they are unwilling to make tough choices or because they don't have the votes to enact clear language to advance their policy agenda. Sure, reelection might be easier if the laws that Congress passes are uncontroversial because they are vague. But this is an abdication of duty, and this far-too-common occurrence puts the courts in an untenable position. If it is dangerous for judges to remove policy discussions from the political sphere, then the political branches themselves should avoid encouraging that tendency.

HABEAS CORPUS AS AN INTER-BRANCH ENTERPRISE

Throughout our Nation's history, the branches of our government often have struck the proper, constitutional balance in crafting and applying the law. I'd like to briefly discuss one example — the law of habeas corpus — where we have a tradition of proper allocation of authority among the branches, but in which a risk of upsetting the balance remains.

You have learned — or will learn—in your course in Federal Courts, that habeas corpus has a constitutional foundation, but that most of the law is statutory in nature.

The jurisprudence of habeas corpus has confused many law students — and lawyers — over the years. Some of the confusion has to do with the distinction between habeas corpus rights protected by the Constitution, and the habeas corpus rights protected by statute. This is an easy mistake to make, even though the Supreme Court has worked hard to make the distinction clear. In *Rasul v. Bush*, the case involving an enemy combatant held at Guantanamo, for example, the Court explicitly limited its holding to the habeas petitioners' statutory rights.

I want to step back for a minute to stress that habeas corpus is vital and cherished in either form. To say that they are different is not to say that either is unimportant.

"We call habeas corpus the 'Great Writ' for a reason—it is among the most cherished legacies of the Anglo-American legal tradition."

Turning first to the Constitution. The "Suspension Clause" reads as follows: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Constitution does not define the "Privilege of the Writ of Habeas Corpus." But the Framers didn't need to. We call habeas corpus the "Great Writ" for a reason — it is among the most cherished legacies of the Anglo-American legal tradition. Our Founding Fathers read Blackstone and history. Habeas corpus was not an obscure concept — it was a clear one, a bedrock principle of the common law.

The Constitution, in other words, presupposes — and protects — American citizens' right to access the Writ of Habeas Corpus as it existed under the common law in 1789. The Supreme Court has said as much. And Chief Justice Marshall, in the famous case of Ex Parte Bollman, also suggested that Congress authorized habeas review in the federal courts in the Judiciary Act of 1789, precisely because Congress felt a constitutional obligation to ensure the availability of habeas.

But the story does not end there. I have emphasized to you how all the branches of government affect the law — something surprisingly easy to miss in law school casebooks.

Habeas corpus is no exception. In addition to the constitutional protection of the ancient writ, Congress and the President working together can expand — and have expanded — the scope of statutory habeas corpus. As a result, statutory habeas corpus affords vastly greater protection than did the common law. The Judiciary, in turn, by obeying the statutes, guarantees habeas petitioners the rights that the elected branches want our citizens to have.

Statutory habeas corpus protections authorize the courts to probe more deeply, and in more circumstances, than does the core constitutional privilege. We can look to historic English and early American case law to understand the scope of constitutional habeas. But for petitioners who seek habeas review today, this is entirely academic — our democracy has extended federal habeas remedies far beyond the Constitution's guarantees, and beyond what Congress first authorized by statute in 1789. Federal courts are not tethered to the old common law cases when they must decide what new law contemplates —t hey are instead bound by more protective statutes.

Congress has always been faithful to the obligation our Constitution placed upon it — to preserve the ancient Great Writ. But the scope of statutory habeas can be and has been modified, restricted, or expanded depending on national needs and the political mood of the country. It is the political branches who decide and adjust the precise contours of statutory habeas from time to time. But in this process, petitioners have always received far more than they

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AG ON HABEAS

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could claim under the Constitution alone.

Today, our Nation remains engaged in the global War on Terror. The three branches of our government have been asked to think further about the availability of habeas corpus—not just for Americans, but for foreign enemies who are captured and detained abroad.

"The three branches of our government have been asked to think further about the availability of habeas corpus—not just for Americans, but for foreign enemies who are captured and detained abroad."

Congress and the President, acting within the scope of their constitutional authority, have addressed this question. The Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 created a regime allowing for review of the detention of alien enemy combatants — a regime that would fully satisfy the constitutional right to habeas corpus even if those detainees were entitled to it — which they are not according to the Supreme Court. Now the courts are being asked to rule that Congress and the President cannot restrict statutory habeas rights for alien enemy combatants detained outside the United States.

On this issue, as with every other, the Judiciary must remain faithful to the principles of restraint I have described above.

The entire text of the Attorney General's remarks at the SMU Law School can be found on the USDOJ website.

Contributions To The ILB Are Welcomed!

FURTHER REVIEW PENDING
Update on Cases & Issues

Asylum – Particular Social Group

The Solicitor General has authorized the filing of a petition for certiorari in ***Gao v. Gonzales***, 440 F.3d 62 (2d Cir. 2006). One of the questions to be presented is whether women in arranged marriages in China are members of a particular social group for purpose of asylum.

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Asylum — Population Control Policy

The Second Circuit *en banc* will hear 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. The court had asked the parties to address the following questions:

1. Whether the provisions in IIRIRA § 601(a) are ambiguous, so that the BIA's reasonable construction of the definition of "refugee" should be accorded *Chevron* deference.

2. 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 – Disfavored Group

Lolong v. Gonzales, 400 F.3d 1215 (9th Cir. 2005) was argued *en banc* before the Ninth Circuit on October 5, 2006. The government raised the question of whether the BIA has statutory authority to issue order of removal.

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Asylum – Persecutor, *Ventura*

Oral argument has been scheduled for April 4, 2007, in ***Castaneda-Castillo v. Gonzales***, 464 F.3d 112 (1st Cir. 2007), where the government suggested that the panel's decision violated *Ventura* by (1) deciding that petitioner had not assisted in persecution where BIA did not decide this issue, and (2) affirmatively deciding that petitioner was credible after vacating the BIA's adverse credibility finding.

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Asylum—Adverse Credibility Determination

On December 14, 2006, the government filed a petition for rehearing en banc in ***Suntharalinkam v. Gonzales,*** 458 F.3d 1634 (9th Cir. 2006), The question 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 Tamil Tiger terrorist.

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Asylum—Country Reports

On December 13, 2006, the government filed a petition for rehearing en banc in ***Ornelas-Chavez v. Gonzales***, 458 F.3d 1052 (9th Cir. 2006). The issue presented is whether country reports can be used to decide eligibility for asylum/withholding as well as credibility.

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ASYLUM LITIGATION UPDATE

Board Further Construes Meaning Of "Particular Social Group"

The question what constitutes "membership in a particular social group" is perhaps the most significant question in the area of asylum law today. Depending on its construction, it has the potential to swallow, or render superfluous, the other four grounds. It also has the capacity to expand our asylum laws to require protection for, and prevent the United States from removing, illegal aliens who experienced or may face a variety of social problems in their home countries that traditionally have not been a basis for asylum, such as: prostitution, trafficking in women, gang violence, poverty, violence against street children, or arranged marriages. As shown below, since 1985 the Board has been silent about the requirements for what constitutes a particular social group. Courts stepped into the void and created a number of different approaches. In 2006, the Board reasserted its primacy in this area of the law and issued two new decisions further fleshing out the meaning of a "particular social group." This is one of the most significant developments in the area of asylum law in the past several years.

Background

An alien may be granted asylum in the Attorney General's discretion if "the Attorney General determines that such alien is a refugee," which is defined as a person who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). In addition, mandatory withholding of removal from a particular country is available if the alien's "life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In 1985, the Board of Immigration Appeals in *Matter of Acosta*, 23 I. & N. Dec. 211, 233-34 (BIA 1985), used an immutable/fundamental characteristic approach to define the meaning of a "particular social group" as:

> group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.

Acosta, 19 I&N Dec. 233. The group characteristic must be one which "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.* With this construction the Board created the principle that refuge "is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required to, avoid persecution." *Id. Acosta's* immutable-fundamental approach strikes a balance between rendering "particular social group" a catch-all for any persecuted group, which would make the other four grounds in the statute meaningless, and rendering "particular social group" a nullity by making its requirements too stringent. *Castillo-Arias v. U.S. Atty. Gen.* 446 F.3d 1190, 1193-95 (11th Cir. 2006).

In 2006, the Board reasserted its primacy in this area of the law and issued two new decisions further fleshing out the meaning of a "particular social group." This is one of the most significant developments in the area of asylum law in the past several years.

The Courts' Approaches To Social Group

Since *Acosta* the Board has been silent about what requirements other than an immutable or fundamental characteristic are necessary to establish a "particular social group." And the law has been in a state of flux. Several circuits adopted the Board's immutability test. *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003); *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Meguenine v. INS*, 139 F.3d 28 (1st Cir. 1998); *Sarafie v. INS*, 23 F.3d 636 (8th Cir. 1994); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). But there were also a number of variations or alternatives to the *Acosta* test. The Ninth Circuit concluded that a "particular social group" requires either an immutable or fundamental trait, or a voluntary associational relationship or group "actuated by some common impulse or interest." *Hernandez-Montiel*, 225 F.3d at 1093 and n.6; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). The Third, Eighth, and Ninth Circuits concluded that in addition to immutability, a "particular social group" cannot be too large, diverse, or broadly defined. *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005); *Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003); *Sarafie*, 25 F.3d at 640; *Fatin*, 12 F.3d at 1240-41.

The Second Circuit adopted its own variant of the immutable-fundamental approach that emphasized group perception or visibility, meaning a group of "individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor – or in the eyes of the outside world in general." *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Saleh v. INS*, 962 F.3d 234, 240 (2d Cir. 1992). Under this approach, "[p]ossession of broadly-based characteristics such as youth and gender"

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Board fleshes out the meaning of a "particular social group"

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was not sufficient to establish a social group. *Gomez*, 947 F.2d at 664; *Saleh*, 962 F.3d at 240. This approach was adopted internationally. *See, e.g.*, *A. v. Minister for Immigration and Ethnic Affairs and Another* (Australia 1997) 142 A.L.R. 331, 358, per McHugh J.("*A v. Minister*") (Australia 1997) (concluding that "[t]he existence of [a particular social group] depends in most, perhaps all, cases on external perceptions of the group," and what distinguishes members of a social group from other persons in their country "is a common attribute and a societal perception that they stand apart"); United Nations High Commissioner of Refugees, *Guidelines on International Protection: "Membership of a particular social group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*," para. 11, U.N. Doc. HCRGIP/02/02 (May 7, 2002) ("UNHCR Guidelines") (recommending that a "particular social group" is "[a] group of persons . . . who are perceived as a group by society."). And the Third Circuit ruled that a "particular social group" cannot be circularly defined by the persecution and must exist independently of it. *Lukwago v. Ashcroft*, 329 F.3d 157, 171-72 (3d Cir. 2003). This echoed an international approach rejecting circular or tautological social groups defined by the claimed or feared persecution. *A. v. Minister*, 142 A.L.R. at 358 (to define a social group by the persecution "would mean persons who had a well founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group[,] which means that the group must exist independently of, and not be defined by the persecution"); *Islam v. Sec'y of State for the Home Department and R. v. Immigration Appeal Tribunal and Sec'y of State for the Home Department ex parte Shah* (House of Lords, 1997), 2 W.R. 1015 (1999) (Lord Craighead) ("[T]he persecution cannot be used to define a particular social group. . . To define the social group by reference to the fear of being persecuted would be to resort to circular reasoning."); UNHCR Guidelines, para. 11 (recommending that a "particular social group" is "a[] group of persons who share a common characteristic other than their risk of being persecuted").

The "social group" question is not class action litigation, where attorneys or courts can artificially devise a group to fit the harm, with no evidence that the persecutor understood the applicant to be a member of the group, or sought to persecute the applicant on that account.

The Board's 2006 Decisions

In 2006 the Board reasserted its primacy in this area of the law and issued two new decisions refining the requirements for a "particular social group." *Matter of C-A-*, 23 I. & N. Dec. 951, 956 (BIA 2006); *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2006). The Board reasserted that an immutable or fundamental characteristic is the core requirement. But drawing from the decisions of the courts of appeals and from international law, the Board construed that in addition to common immutable or fundamental characteristics, there are other requirements for a "particular social group." First, it must have "social visibility" and be "recognizable and discrete" as a group by others in the community. *A-M-E-*, 24 I. & N. Dec. at 74; 2). Second, a social group requires "particularity," and cannot be defined exclusively by broad characteristics like wealth, *A-M-E-*, 24 I. & N. Dec. at 74-75, or presumably youth or gender. Third, a social group requires "'a group of persons who share a common characteristic other than their risk of being persecuted,'" and "'cannot be defined exclusively by the fact that [the group] is targeted for persecution." *C-A-*, 23 I. & N. Dec. at 956, 960; *see also A-M-E-*, 24 I. & N. Dec. at 74. The Board also indicated that in cases where an alien claims persecution on account of membership in a group of persons who share a common past experience – which, since the experience is in the past, is unchangeable or immutable – an applicant may have to show something more than simply a common past, unchangeable experience. *C-A-*, *supra; see* David A. Martin, "Major Developments in Asylum Law Over The Past Year," 83 No. 34 Interpreter Releases (Sept. 1, 2006) [Westlaw: TP-All Database; 38 No. 34 Interpreter Releases 1889)] ("Martin"). The Board suggested an "assumption of the risk" concept, *see* Martin, that would preclude a social group based on acquired status or characteristics, such a police officers or military, where group members assumed the risk of harm. *C-A-*, *supra*. ("we do not afford protection based on social group membership to persons exposed to risks normally associated with employment in occupations such as the police or the military").

With these new decisions the Board has established several important principles in the ongoing effort to refine the meaning and requirements for a "particular social group": 1) that what constitutes a social group is a question not just of law, but also of fact rooted in the conditions and perceptions of the society in question; 2) that "social group" does not mean "persecuted" group, *i.e.*, a circular compilation of persons exclusively defined by, or sharing, the same persecution or harm; and 3) that the "social group" question is not class action litigation, where attorneys or courts can artificially devise a group to fit the harm, with no evidence that the persecutor understood the applicant to be a member of the group, or sought to persecute the applicant on that account.

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SUMMARIES OF RECENT BIA DECISIONS

Board Clarifies Standards For Motions To Reconsider A Previously Issued Decision

In ***Matter of O-S-G-***, 24 I&N Dec. 56 (BIA 2006), the Board clarified its requirements for a motion to reconsider filed pursuant to 8 C.F.R. § 1003.2 (b). Specifically, such motions must include: 1) an allegation of material factual or legal errors in the prior decision that is supported by pertinent authority; 2) in the case of an affirmance without opinion, a showing that the alleged errors and legal arguments were previously raised on appeal and a statement explaining how the Board erred in affirming the IJ's decision under the regulations governing affirmance without opinion; and 3) if there has been a change in law, a reference to the relevant statute, regulation, or precedent and an explanation of how the outcome of the Board's decision is materially affected by the change.

Here, the alien sought reconsideration of the Board's summary affirmance order in light of a completely new legal claim relating to his asylum application, contending that this additional legal argument may properly be presented in a motion to reconsider. The Board rejected that contention, finding that the motion to reconsidered failed to identify a material issue that was overlooked by the Board in affirming the decision of the IJ, because such claim had never previously been raised, nor did he allege that there was a new precedent or a change in law affecting its prior decision. Accordingly, the Board concluded that the alien's motion failed to assert any factual or legal error errors in its prior decision and denied the motion.

Statutory Exception To Deportability Under INA § 237(a)(2)(A)(i), Does Not Apply Where Alien Is Convicted For Possession Of Marijuana In Prison

In ***Matter of Moncada***, 24 I&N Dec. 62 (BIA 2007), the Board determined that the exception to deportability under INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(B)(i), for an alien convicted of possessing 30 grams or less of marijuana for his own use does not apply to an alien convicted under a statute that has an element requiring that possession of the marijuana be in a prison or other correctional setting. The Board observed that the most natural, common-sense reading of the "personal-use" exception, viewed in its statutory context, is that it was directed at ameliorating the potentially harsh immigration consequences of the least serious drug violations only – that is, those involving the *simple possession* of small amounts of marijuana. The personal-use exception was not intended or understood by Congress to apply to offenses that were significantly more serious than simple possession by virtue of other statutory elements that greatly increase their severity.

Alien convicted of possessing marijuana for his own use in prison cannot invoke exception to deportability under INA § 237(a)(2)(A)(i)

Here, the alien was convicted of possessing marijuana in prison, an offense that was significantly more serious than "simple possession" because of the inherent potential for violence and the threat of disorder that attends the presence of drugs in a correction setting. The Board also noted that the offense was designated as a felony under California law, that the alien received a two-year prison sentence for his crime, and that the same offense is also a federal felony punishable by up to five years in prison. The Board determined that the alien's conviction was neither a "minor" offense nor a "simple possession" offense, and therefore did not qualify for the "personal-use" statutory exception. However, the case was remanded to the IJ for further consideration of whether the alien was also removable as an aggravated felon in light of his conviction for theft and the Supreme Court's recent decision in *Duenas-Alvarez v. Gonzales*, __ S. Ct. __, 2007 WL 135700 (U.S. Jan. 22, 2007).

"Affluent Guatemalans" Are Not Members Of A Particular Social Group

In ***Matter of A-M-E & J-G-U-***, 24 I&N Dec. 69 (BIA 2007), the Board considered, on remand from the Second Circuit, whether "affluent Guatemalans" are members of a particular social group within the definition of a "refugee" under 8 U.S.C. § 1101(a)(42)(A). The Board noted that factors to be considered in determining whether a particular social group exists include whether the group's shared characteristics give the members the requisite social visibility to make them readily identifiable in society and whether the group can be defined with sufficient particularity to delimit its membership. Because the aliens in this case failed to establish that their status as affluent Guatemalans gave them sufficient social visibility to be perceived as a group by society or that the group was defined with adequate particularity to constitute a particular social group, the Board concluded that they failed to demonstrate eligibility for asylum or withholding of removal.

Alien Not Required To Have Adjustment Application Pending As Of Date of Enactment Of CSPA To Receive The Statute's Benefits

In ***Matter of Avila-Perez***, 24 I&N Dec. 78 (BIA 2007), the Board concluded that section 8(1) of the Child Status Protection Act ("CSPA"), as enacted, did not require an individual whose visa petition was approved before the statute's effective date to have an adjustment application pending as of the date of its enactment. In

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August 1996, the alien's mother filed a visa petition on his behalf as the child of a United States citizen. That petition was approved in November 1996, with a priority date of August 29, 1996. However, when the alien applied for adjustment on October 15, 2003, DHS denied his application and placed him in removal proceedings, contending that he was ineligible to be classified as a child because he had reached the age of 21 (and therefore "aged out") prior to the CSPA's August 6, 2002, enactment date. According to the DHS, the CSPA only applied to an individual who "aged out" before August 6, 2002, if his visa petition remained pending on that date or, if his visa petition had been previously approved, an adjustment application had been filed on or before the enactment date, on which no final determination had been made as of that date. The Board rejected that interpretation of the CSPA after reviewing the plain language and the legislative history of the statute, finding instead that the alien retained his status as a child, and therefore an immediate relative, because he was under the age of 21 when the visa petition was filed on his behalf and there was no statutory requirement that the corresponding application for adjustment of status be filed prior to the CSPA's effective date.

Alien Does Not Fail To Comply With A VD Order When, Through No Fault Of Her Own, She Is Unaware Of Such Order

In ***Matter of Zmijewska***, 24 I&N Dec. 87 (BIA 2007), the Board determined that the alien did not voluntarily fail to depart within the period granted to her for voluntary departure where she did not depart because her accredited representative failed to inform her of the Board's order until after the expiration of her voluntary departure period. Under the statute an alien, who through no fault of her own, remains unaware of the grant of voluntary departure until after such period has expired, or is physically unable to depart within the granted period, cannot be said to have "voluntarily" failed to depart within the period of voluntary departure. The Board, however, emphasized that the "voluntariness" exception was not a substitute for the repealed "exceptional circumstances" exception. Further, the Board concluded that it lacked authority to apply an "exceptional circumstances" or other general equitable exception to the penalty provisions for failure to depart within the time period afforded for VD under INA § 240B(d)(1).

Money Laundering In Violation Of Section 470.10(1) Of The New York Penal Law Is A CIMT

In ***Matter of Tejwani***, 24 I&N Dec. 97 (BIA 2007), the Board held that money laundering, as defined in the New York statute under which the alien was admittedly convicted, constitutes a crime involving moral turpitude. The Board applied the categorical approach, focusing on the statute and the record of conviction rather than on the specific act committed by the alien, and concluded that it does. The Board noted that the crime of money laundering under section 470.10(1) of the New York Penal Law involves the exchange of monetary instruments that are known to be the proceeds of "any criminal conduct" with the intent to conceal those proceeds. A person who deliberately takes affirmative steps to conceal or disguise the proceeds of criminal conduct acts in an inherently deceptive manner and impairs government function, specifically the ability to detect an combat criminal activity. The Board found that such interference in governmental function was inherently dishonest and contrary to accepted moral standards. Because the statutory provision under which the alien was convicted required proof of a deliberate act to conceal illegal activity, the Board determined that a violation of that statute was categorically a crime involving moral turpitude.

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Inside EOIR

Immigration Judge Howard Rose Takes Oath of Office In Houston

Howard E. Rose was sworn on January 26, 2007, as an immigration judge for the Houston Immigration Court. Acting Chief Immigration Judge David L. Neal, from the Executive Office for Immigration Review (EOIR) in Falls Church, Va., administered the oath of office.

Howard E. Rose was appointed as an immigration judge in September 2006. He received a bachelor of arts degree in 1966 from Gannon University and a juris doctorate in 1974 from Cleveland Marshall College of Law, Cleveland State University. From 1982 to September 2006, Judge Rose served with the Department of Homeland Security, Bureau of Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service) in several capacities: From 1987 to September 2006 as a Special Assistant U.S. Attorney with the U.S. Attorney's Office for the Southern District of Texas; from 1983 to 1987 as District Counsel in Miami; and from 1982 to 1983 as a trial attorney in Miami. From 1976 to 1978, and 1980 to 1982, Judge Rose served as an assistant county prosecutor for the Cuyahoga County (Ohio) Prosecutor's Office. He served as an assistant attorney general in the Attorney General's Office, Territory of Guam, from 1978 to 1980. Judge Rose served as a law clerk and assistant director of law in the City of East Cleveland Law Director's Office from 1972 to 1976. He served in the U.S. Army from 1966 to 1971 and in the U. S. Army Reserve from 1971 to 1994. Judge Rose is a member of the Ohio Bar.

Judge Rose joins the ranks of more than 200 immigration judges located in 54 immigration courts throughout the nation.

Summaries of Recent Federal Court Decisions

FIRST CIRCUIT

■ Asylum Application Fails To Establish Objective Fear Of Persecution On Account Of Opposition To China's Coercive Birth Control

In ***Zheng v. Gonzales***, 475 F.3d 30 (1st Cir. 2007) (Boudin, *Lynch*, Lipez), the First Circuit upheld the BIA's determination that petitioner failed to meet her burden of proof for asylum, withholding of removal and CAT protection because she did not prove she had an objective fear of persecution in China. The court did not reach the issue of petitioner's credibility.

Petitioner, a native and citizen of China, claimed that she feared persecution because of her opposition to China's coercive birth control policy. Petitioner claimed that she had opposed the policy in three ways: (1) she attempted to get married in China while underage, (2) she failed to attend a government ordered gynecological exam, and (3) she had written statements on the blackboard of her junior high school opposing China's coercive birth control policy, resulting in her expulsion. However, petitioner did not know what kind of persecution she feared, telling an IJ that she may "be thrown in jail . . . b]ecause I was smuggle[d] out of the country and it's against law [sic]." An IJ found her testimony incredible, and further found that even if credible, petitioner had not shown an objective fear of persecution because now that she was old enough to marry, "she would be in the same position as anybody else in China." The BIA affirmed.

The First Circuit upheld the reasoning of the IJ and denied the PFR. In so holding, the court found that because the petitioner was now old enough to get married and have children, it was unclear why she should reasonably fear persecution if returned to China. Furthermore, petitioner did not prove an objective fear of persecution based on her opposition to China's coercive birth control policy because the evidence of record only pertained to persecution of individuals who have unauthorized pregnancies, or assist others in having unauthorized pregnancies - circumstances not present in the case at bar. Thus, nothing in the record showed that petitioner personally faced persecution. Because the court found that petitioner failed to meet her burden of proof for asylum, it did not reach the adverse credibility issue.

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■ First Circuit Holds That A Petitioner's Removal Does Not Violate The Constitutional Rights Of His United States Citizen Child

In ***Payne-Barahona v. Gonzales***, 474 F.3d 1 (1st Cir. 2007) (*Boudin*, Torruella, Howard), the First Circuit held that a parent's otherwise valid removal does not violate his United States citizen child's constitutional rights. The court noted that, were there such a right, one would expect children to be able to object to a parent's being sent to prison or drafted into the military.

The petitioner, a citizen of Honduras and a United States legal permanent resident, was placed in removal proceedings following his conviction for felony domestic assault in Rhode Island, an aggravated felony and a crime of domestic violence. He applied for cancellation of removal and voluntary departure. The IJ, later affirmed by the BIA, denied both reliefs because, as an alien convicted of an aggravated felony, petitioner was statutorily ineligible for cancellation of removal and voluntary departure under 8 U.S.C. §§ 1229b(a)(3), 1229c(b)(1)(C).

In his petition for review, petitioner, who had two children born and living in the United States, claimed that his removal would violate his children's Fifth Amendment right to have both parents residing in the country. In support of his claim, he relied on various studies on the effect on children of separation from their parents, international treaties such as the U.N. International Covenant on the Rights of the Child, and Supreme Court cases recognizing parents' rights to raise their own children. The court denied the petition for review holding that "valid removal did not infringe children's constitutional rights." The court noted that all the circuits have uniformly held that a parent's valid deportation did not violate a child's constitutional right, and that deportation did not necessarily mean separation since children can relocate during their minority. Noting the lack of precedent in the First Circuit as to this issue, the court stated "if what were happening here was conscience shocking by contemporary American standards, the lack of precedent would not bar a new departure by a lower court; but deportations of parents are routine and do not of themselves dictate family separation. If there were such a right, it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service." Finally, the court declined to consider the treaties because they were either non-self executing, in the instance of the International Covenant on Civil and Political Rights, or non-ratified in the instance of the Convention on the Rights of the Child.

"If what were happening here was conscience shocking by contemporary American standards, the lack of precedent would not bar a new departure by a lower court; but deportations of parents are routine and do not of themselves dictate family separation."

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■Notwithstanding Jurisdictional Bar, Second Circuit Holds That It Has Jurisdiction To Determine The Timeliness Of An Asylum Application

In ***Liu v. INS,*** 475 F.3d 135 (2d Cir. 2007) (Oakes, Calabresi, Straub) (*per curiam*), the Second Circuit vacated and remanded an IJ's decision finding petitioner's testimony incredible and asylum application untimely.

Petitioner entered the United States in 1999 and sought asylum based on his wife's forcible sterilization by Chinese government officials. When the IJ questioned petitioner about the details of his wife's sterilization procedure, petitioner stated that he did not know the details because he was not present during the procedure. Because of petitioner's failure to explain the details of the alleged sterilization procedure and his generally non-responsive demeanor, the IJ found petitioner's testimony incredible. Further, the IJ found that petitioner failed to file his asylum application within one year of arriving in the United States because a Chinese police record did not conclusively show that petitioner was in China prior to 1999. The BIA affirmed without opinion.

The Second Circuit first determined that it had jurisdiction to review the timeliness of the filing of the asylum application, notwithstanding the jurisdictional bar under INA § 208(a)(3), 8 U.S.C. § 1158(a)(3), barring review of such determination. The court explained that under INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), it retained jurisdiction over "questions of law." "'Questions of law' encompass the same issues traditionally reviewed by courts in habeas petitions challenging executive detentions," said the court. "Because the scope of habeas review traditionally encompassed the application of law to fact, including what evidence may satisfy a party's burden of proof," the court held that it had "jurisdiction to review whether any rational trier of fact would be compelled to conclude that [petitioner] proved by clear and convincing evidence that he timely filed his asylum application." "Moreover," added the court, "while we lack jurisdiction to consider 'mere disagreement[s] with the IJ's factual findings and exercise of discretion,' a reviewable issue of law may arise in the case of 'fact-finding which is flawed by an error of law, such as might arise where the IJ states that his decision was based on petitioner's failure to testify to some pertinent fact when the record of the hearing reveals unambiguously that the petitioner did testify to that fact.'" Here, the court found that the IJ had "unambiguously mischaracterized a central element of the record: [petitioner's] record with the Chinese police." This "mischaracterization of the record raises a question of law," said the court.

The court held that it had "jurisdiction to review whether any rational trier of fact would be compelled to conclude that [petitioner] proved by clear and convincing evidence that he timely filed his asylum application."

The court then held that petitioner's failure to recite the details of his wife's sterilization procedure was not a proper grounds for an adverse credibility determination because "there [was] nothing in the record to indicate that [petitioner] should have been expected to know the details of the procedure," as petitioner had testified that he was not present at the procedure. Accordingly, the court remanded the case for a redetermination of the timeliness and the credibility issue.

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■ A Petitioner Who Raises The Issue Of Changed Country Conditions Before The BIA Does Not Thereby Exhaust The Issue Of Internal Relocation

In ***Steevenez v. Gonzales***, __ F.3d__, 2007 WL 415173 (2d Cir. February 6, 2007) (Straub, Hall, Trager) (per curiam), the Second Circuit held that petitioner failed to exhaust administrative remedies regarding whether relocation in his native country was a proper ground to deny his claim for withholding of removal. The court ruled that when a petitioner addresses only changed country conditions before the BIA, he does not implicitly raise the issue of his ability to relocate safely.

Petitioner claimed that Muslim extremists in Indonesia sought to persecute him for his Chinese ethnicity and Christian beliefs. An IJ denied the claim, finding, among other things, that conditions in Indonesia had dramatically improved for ethnic Chinese and that petitioner could not show why he could not safely internally relocate within Indonesia. When petitioner appealed to the BIA, he argued only that he still believed he would face persecution in Indonesia and that country conditions had not changed enough to prevent his persecution. The BIA denied the appeal, holding that petitioner failed to challenge the IJ's finding that he could safely relocate within Indonesia.

In the Second Circuit, petitioner sought to challenge the IJ's finding that he could internally relocate within Indonesia, arguing that he implicitly raised this issue before the BIA when he challenged the IJ's finding of changed country conditions. The court disagreed, stating that "[w]hile, in many instances, the facts relevant to the issue of changed country conditions may also be relevant to the issue of safe relocation, the two issues are nonetheless distinct." The court

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explained that under 8 C.F.R. § 1208.16(b)(1)(i), the ability to relocate constitutes a distinct ground on which an IJ may base a denial of withholding of removal and "[t]hus, we cannot hold that where . . . an alien addresses only the issue of changed country conditions in his brief to the BIA, he somehow raises by implication the issue of his ability to relocate in safety."

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The Second Circuit determined that brief, innocent lateness does not constitute a failure to appear within the meaning of INA § 240(b)(5).

■ **Alien Who Arrived Fifteen Minutes Late For His Removal Proceeding Did Not Fail To Appear Under INA § 240(b)(5)**

In ***Abu Hasirah v. Department of Homeland Security***, __F.3d__, 2007 WL 532584 (2d Cir. February 22, 2007) (Leval, Straub, Underhill) (*per curiam*), the Second Circuit held that it was legal error to order removal *in absentia* of a petitioner who appeared fifteen minutes late for his hearing. Citing *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005), and *Cabrera-Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006), the Second Circuit determined that brief, innocent lateness does not constitute a failure to appear within the meaning of INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5). The court therefore vacated the BIA's order affirming denial of the motion to reopen and remanded the case for further proceedings.

In his appeal to the court, petitioner contended that the *in absentia* order should be rescinded because his briefly delayed appearance did not amount to a failure to "attend a proceeding" under 8 U.S.C. § 1229a(b)(5)(A) and argued in the alternative, that the IJ abused his discretion in refusing to reopen proceedings because the confusion regarding his attorney's whereabouts, and the delay caused by the security checks, constituted "exceptional circumstances" as defined by the statute.

The court agreed with the petitioner's argument that his fifteen-minute delay was not a failure to appear, which is a prerequisite for entry of an order of removal *in absentia*. The court noted that this was "a matter of first impression" in the Second Circuit and held "that the IJ erroneously found that Abu Hasirah "[did] not attend" his proceeding, and therefore erroneously ordered him removed *in absentia*". The court further noted that the provision that an *in absentia* removal order can only be rescinded in "exceptional circumstances," was not applicable here and concluded that the BIA abused its discretion when it denied the motion to reopen because the IJ's decision was premised on legal error, a misinterpretation of the governing statute.

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■ **District Court Holds That Defendants' Asylum Claim Does Not Bar Government From Prosecuting Offenses Related To Defendant's Use Of False Passport**

In ***United States v. Malenge***, __F. Supp. 2d__, 2007 WL 332677 (N.D.N.Y. Feb. 6, 2007) (*Sharpe*), the court held that nothing in the United States' treaty obligations precludes criminal prosecution of an alien because the alien wishes to seek asylum. Thus, the court denied a Congolese defendant's motion to dismiss her indictment for false personation, misuse of a passport, and false use of a passport even though she sought asylum in the U.S.

Defendant entered the United States from Canada by train while carrying a fraudulent Canadian passport. When found with the false documents and arrested, the defendant did not tell immigration officers of her intention to seek asylum, but merely wrote the word "yes" in response to a written question asking her if she intended to seek asylum. Subsequently, the government sought to prosecute defendant for false personation, misuse of a passport, and false use of a passport. Defendant argued that as a signatory to the 1967 Protocol Relating to the Status of Refugee, the U.S. could not criminally prosecute her until her asylum application had been decided. In support for this argument, defendant cited Article 31(1) of the U.N. Convention Relating to the Status of Refugees which states that "Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present . . .without authorization, provided they present themselves without delay to the authorities." Defendant also cited a Memorandum of the United Nations High Commissioner arguably stating that no refugee should be criminally prosecuted until his asylum status is determined.

The court held that the government is free to prosecute petitioners who illegally enter the country. First, the court found that the language of the U.N. Convention refuted her argument, as defendant failed to immediately notify authorities that she was seeking asylum. Further, it said, "[e]ven if the court construed her check mark on the post-arrest form as an asylum request, that request never surfaced until after criminal proceedings had begun." Second, the court found that while the language of the Convention advocates restraint in criminal prosecution, it does not *preclude* it. Third, the court noted that

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signatories had agreed that all disputes arising between contracting parties be referred to the International Court of Justice if they could not be settled by other means, and defendant had cited no International Court decisions in support of her position. Finally, the court found it significant that even though criminal proceedings had begun, no legal impediment precluded defendant from continuing to seek asylum.

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■ **New York District Court Dismisses INA § 276 Charge Because Previously Deported Defendant Did Not Re-Enter The United States After Denial Of Admission To Canada**

In *United States v. Ayala Ayala*, __F. Supp. 2d__, 2007 WL 172211 (W.D.N.Y. January 24, 2007)(Scott) a Magistrate Judge held aliens who are denied entry into the U.S. at one of the ports-of-entry can not be considered to have entered the U.S. for purposes of prosecution under INA § 276. The defendant had been previously deported from the U.S. On January 15, 2007, defendant was still present in the U.S. and attempted to cross over into Canada via a commercial bus. Upon investigation by Canadian border officials, defendant's previous order of deportation was discovered and his entry into Canada was refused. Subsequently, defendant was charged as a previously deported alien found in the U.S. under INA § 276(a) and (b)(1). Defendant argued that being turned away at the border did not constitute being "found in" the U.S., citing decisions by the Eleventh and Fifth Circuits and the court as support for his argument. The court then held that an alien who arrives at a port-of-entry, but who does not enter the country free from official restraint, cannot be "found in" the United States. The court rejected the government's argument that a petitioner who leaves the U.S., but is denied admission to a foreign country, has not departed from the United States and therefore can be found in the United States even at a port-of-entry.

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THIRD CIRCUIT

■ **Denial Of § 212(c) Upheld Because Petitioner's Ground Of Removal, A Crime-Of-Violence Aggravated Felony, Has No Statutory Counterpart In § 212(a)**

In *Caroleo v. Gonzales*, __F.3d__, 2007 WL 399855 (3d Cir. Feb.7, 2007) (Sloviter, Weis, *Garth*), the Third Circuit, upheld the BIA's denial of relief under former INA § 212(c), concluding that the crime of violence/aggravated felony for which the petitioner was removable had no statutory counterpart in INA § 212(a). The petitioner argued he was eligible for a § 212(c) waiver because his criminal convictions constituted crimes involving moral turpitude, and they therefore had statutory counterparts under § 212(a). The court rejected the argument, holding that the statutory-counterpart inquiry looks not to the underlying criminal conviction but to the ground of removal contained in § 237 and whether it has a counterpart among the grounds of inadmissibility appearing in § 212(a). "While it is true that the underlying crime of attempted murder can be characterized as a crime involving moral turpitude for the purposes of determining removability, the statutory counterpart prerequisite for 212 (c) relief from removal focuses, quite differently, upon the statutory ground for removal - here an aggravated felony 'crime of violence,'" said the court. The court also noted that in *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005), the BIA also held that a crime of violence does not have a statutory counterpart as a crime involving moral turpitude.

The court upheld the BIA's denial of relief under former INA § 212(c), concluding that the crime of violence/aggravated felony for which the petitioner was removable had no statutory counterpart in INA § 212(a).

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■ **Third Circuit Holds That Record Does Not Compel Overturning BIA's Denial Of Asylum**

In *Kibinda v. Gonzales*, __F.3d__, 2007 WL 512509 (3d Cir. February 20, 2007) (*Fisher*, McKee, Ambro), the Third Circuit upheld the BIA's conclusion that the petitioner had not suffered past persecution while he served in the Angolan Army because he was never seriously harmed, was promoted, and was selected for training and educational opportunities. The court rejected the petitioner's argument that he might be forced to fight against his own ethnic group of Cabindans if he returned to Angola, holding that the record did not compel the conclusion either that he would be required to fight Cabindans or that he would be persecuted if he refused.

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■ **Third Circuit Holds Evidence Insufficient To Prove Criminal Conviction Was Aggravated Felony**

In *Jeune v. Attorney General*, __F.3d__, 2007 WL 512510 (3d Cir. February 20, 2007) (*Smith*, Roth, Irenas), the Third Circuit held that evidence was insufficient to prove that the alien had been convicted of a drug trafficking aggravated felony as defined in INA § 101(a)(43)(B). The court held that the case was controlled by *Garcia v. Attorney General*, 462 F.3d 287 (3d Cir. 2006), which

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held that a violation of a Pennsylvania statute proscribing the "manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance," 35 Pa. Cons. Stat. Ann. § 780-113(a)(30), is not categorically an aggravated felony because it punishes conduct other than drug trafficking. No record evidence supported a conclusion that the alien engaged in drug trafficking, and absent such evidence the conviction did not constitute an "aggravated felony" as charged.

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FOURTH CIRCUIT

■Immigration Judge Has Jurisdiction To Determine Validity Of Approved Employment-Based Visa Petition When Alien Changes Job

In ***Perez-Vargas v. Gonzales***, __F.3d__, 2007 WL 529357 (4th Cir. February 22, 2007) (King, *Shedd*, Duncan), the court held that an Immigration Judge has jurisdiction to determine whether an approved employment-based visa petition remains valid, pursuant to INA § 204(j), 8 U.S.C. § 1154(j), after the alien beneficiary has changed jobs. The court overturned a contrary conclusion by the BIA in *Matter of Vargas*, 23 I & N Dec. 829 (BIA 2005).

Section 204(j) extends the validity of an approved visa petition if the alien's adjustment of status application has been pending for 180 days and if his new job is in the same or a similar occupational classification. The court concluded that jurisdiction to make § 204(j) determinations is part of the IJ's jurisdiction to adjudicate the alien's adjustment application when the alien is in removal proceedings.

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FIFTH CIRCUIT

■ Fifth Circuit Dismisses Indictment As Barred By Statute Of Limitations

In ***United States v. Gunera***, __F.3d__, 2007 WL 456732, (5th Cir. February 13, 2007) (Reavley, Jolly, Benavides), the Fifth Circuit held that the government had actual notice of the petitioner's presence in the United States for purposes of applying the statute of limitations to an illegal reentry prosecution under 8 U.S.C. § 1326. The court found that the petitioner had used his correct name, date of birth, and country of origin to apply for Temporary Protected Status, although the application omitted his alien registration number, his prior deportation, and a conviction. In 1999, the Government's "NAILS" database linked the TPS applicant to his prior deportation, but the petitioner was not indicted until more than five years later.

The court held that "[t]he deadline for filing a motion for reconsideration is not tolled by filing a motion a petition for review."

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SIXTH CIRCUIT

■ Filing Of Petition For Review Does Not Toll Deadline For Filing Motion For Reconsideration

In ***Randhawa v. Gonzales***, __F.3d__, 2007 WL 220171 (6th Cir. January 30, 2007) (Keith, *Clay,* Mays), the Sixth Circuit upheld the BIA's denial of a petitioner's untimely motion for reconsideration and rejected her argument that filing a petition for review of an earlier BIA decision tolls the statutory 30-day filing deadline for reconsideration motions. The Sixth Circuit reasoned that the only way to give effect to the consolidation provision of INA § 242(b)(6), 8 U.S.C. § 1252(b)(6), was to interpret the respective time limits for filing petitions for review and motions for reconsideration as running concurrently.

Petitioner, a native and citizen of India, married a U.S. citizen and entered the U.S. as a permanent resident on a conditional basis. The marriage was judicially annulled six months later and petitioner was placed in removal proceedings. Petitioner then sought a waiver of the joint filing requirement to remove the conditions on her residency. An IJ denied the waiver and the BIA affirmed. Petitioner then filed a petition for review. Subsequently, petitioner filed a motion to reopen with the BIA, which was dismissed as untimely. Petitioner then filed a petition for review of the denial of the motion to reopen. The court denied both petition. Following the court's denial, petitioner undaunted, filed a motion to reconsider the denial of her motion to reopen with the BIA. The BIA denied the motion as untimely, and petitioner filed a third petition for review.

On appeal, petitioner argued that the BIA should have found her motion to reconsider timely because the filing of her first petition for review tolled the 30 day time limit for filing. The court disagreed, stating "[t]he deadline for filing a motion for reconsideration is not tolled by filing a motion a petition for review." The court explained that "the existence of 8 U.S.C. § 1252(b)(6) demonstrates Congress's intent that petitions for review and motions for reconsideration be filed concurrently." The court reasoned that "construing the time limits in 8 U.S.C. § 1229a(c)(6)(B) to allow a motion for reconsideration to be filed after a decision is rendered by

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the court of appeals would render § 1252(b)(6) in effect a nullity, as motions for reconsideration generally would not be filed until after a decision was rendered on the petition for review." The court also relied on *Stone v. INS*, 514 U.S. 386 (1995), where the Supreme Court held that Congress's intent in enacting § 1252(b)(6) was that deportation orders are to be reviewed in a timely fashion after issuance, irrespective of the later filing of a motion to reopen or reconsider.

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SEVENTH CIRCUIT

■ Seventh Circuit Upholds Adverse Credibility Determination Against Albanian Asylum Applicant

In ***Sina v. Gonzales***, __F.3d__, 2007 WL 397498 (7th Cir. February 7, 2007) (Flaum, *Kanne*, Evans), the Seventh Circuit upheld an IJ's finding that petitioner, an asylum applicant from Albania, was not credible. The court found that the judge had properly relied on: (1) the petitioner's submission of false documents; (2) inconsistencies between his testimony and declaration, and among those statements, newspaper articles, and an embassy report concerning his employment history and political party membership; and (3) the petitioner's inability to provide corroborating evidence once his credibility was questioned.

Petitioner sought asylum based on his membership in the Democratic Party of Albania. Specifically, he claimed that because he assisted a judge in imprisoning the former socialist Prime Minister of Albania, socialists threatened and attacked him when he refused to help obtain the former Prime Minister's release from prison. To support his claim, petitioner submitted documents attesting to his membership in the Democratic Party and his employment for the judge and newspaper articles. The IJ then sought to verify the documents and the U.S. Embassy in Albania later reported that the documents were fraudulent. The IJ then determined petitioner's claim to be unconvincing and his testimony incredible and denied the application. The BIA affirmed.

The Seventh Circuit upheld the adverse credibility determination, finding that the "evidence supporting this conclusion includes the submission of false documents, inconsistencies between [petitioner]'s testimony and the Embassy report, inconsistencies between [petitioner]'s testimony and the newspaper articles . . . [and] inconsistencies between [petitioner]'s asylum declaration and his testimony and [petitioner]'s inability to provide corroborating evidence after his credibility was questioned."

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■ Seventh Circuit Upholds Adverse Credibility Determination And Exclusion Of Therapist's Testimony

In ***Shmyhelskyy v. Gonzales***, __F.3d__, 2007 WL 475829 (7th Cir. February 15, 2007) (*Flaum*, Manion, Sykes), the Seventh Circuit upheld the denial of asylum based on an adverse credibility finding. The petitioner, a citizen of Ukraine, sought to enter the United States on August 27, 2000, at San Ysidro, California, without a valid entry document. When placed in removal proceedings he claimed fear of persecution on account of his membership in the Rukh Party, which advocated Ukranian independence and democracy, and his participation in unauthorized rallies. The IJ did not find him credible because he had made a false claim to United States citizenship, he was unable to explain why he continued to fear persecution even though his political party now governed, and he had failed to mention the most significant beating and detention in his asylum application and his inability to explain the omissions. The IJ also found that petitioner had failed to provide corroborating evidence once his credibility was questioned. The IJ also refused to allow petitioner's therapist to testify as an expert. The BIA adopted and affirmed that decision.

The Seventh Circuit upheld the adverse credibility determination. The court also rejected petitioner's contention that his due process rights were violated because the IJ refused to allow his therapist to testify. The court noted that under its case law, "in the context of asylum, due process requires, among other things, that an applicant receive a meaningful opportunity to be heard." "To warrant a new hearing" petitioner had to show "prejudice, which occurs when the due process transgression is 'likely to impact the result of the hearing,'" said the court. Here, petitioner could not show prejudice by the exclusion of live testimony because the IJ had admitted the expert's affidavit.

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■ Seventh Circuit Concludes That IJ Failed To Consider Probative Evidence In Support Of Asylum Claim

In ***Mema v. Gonzales***, 474 F.3d 412 (7th Cir. 2007) (Bauer, Kanne, *Rovner*), the Seventh Circuit held that an IJ failed to consider evidence relevant to the petitioner's fear of future persecution. The petitioner claimed that he and his siblings, including an identical twin brother, were persecuted in Albania on account of his father's political activities, and presented evidence that his siblings had previously been granted asylum. The IJ denied asylum, finding that the petitioner failed to show either that he had suffered past persecution himself or had a well-founded fear of future persecution. The Seventh Circuit concluded that the IJ failed to consider evidence that the alleged persecutors believed that the alien was his identical twin

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brother, and that they had imputed his brother's political activities to him. The court remanded the case for further consideration.

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EIGHTH CIRCUIT

■ REAL ID Act Does Not Violate The Suspension Clause And IJ's Failure To Hold A Competency Hearing Does Not Violate Due Process

In ***Mohamed v. Gonzales***, __F.3d__, 2007 WL 284337 (8th Cir. February 2, 2007) (Wollman, Bowman, *Benton*), the Eighth Circuit held that the REAL ID Act does not violate the Suspension Clause by denying a writ of habeas corpus, and that petitioner's due process rights were not violated by an IJ's failure to hold a competency hearing or by an interpreter's inability to twice translate the word "schizophrenia." On the merits, the court found that petitioner's general ostracism and abuse at the hands of other Somalis did not constitute torture, and that his challenge to the IJ's factual findings was barred from review.

Petitioner, a native and citizen of Somalia, was granted asylum but never became a lawful permanent resident. In 2001 he was ordered removed as an alien convicted of a crime of moral turpitude. Petitioner sought protection under CAT, but was denied by an IJ. The BIA affirmed without opinion, but later *sua sponte* reopened the proceedings to determine whether the IJ should have held a competency hearing. The BIA found that because petitioner seemed to fully comprehend the nature of the proceedings, the IJ did not err by failing to measure petitioner's competency. Subsequently, petitioner filed for a writ of habeas corpus, which was transferred to a petition for review via the REAL ID Act.

On appeal to the Eighth Circuit, petitioner argued that the REAL ID Act violated the Suspension Clause of Article II because a court of appeals can only decide a petition for review based on the evidence of record, while habeas review allows a court to consider evidence outside of the record. However, the court held that a petition for review offers the same scope of review as a writ of habeas corpus.

The court stated that removal proceedings, appeals to the BIA, and motions to reopen under INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7), allow a petitioner the same broad opportunities to submit evidence as a habeas petition. The court also held that petitioner suffered no violations of due process by the IJ's failure to hold a competency hearing or by an interpreter's inability to twice translate the Somali word for "schizophrenia" into English. The court found that the transcripts of the proceedings showed that petitioner was very aware of the nature of his proceedings and vigorously objected to removal. Further, the court read the record as replete with references to petitioner's illness, thus two mistranslations did not prejudice his case.

The court held that petitioner suffered no violations of due process by the IJ's failure to hold a competency hearing or by an interpreter's inability to twice translate the Somali word for "schizophrenia" into English.

On the merits of petitioner's asylum claim, the court found that beatings and general ostracism at the hand of other Somalis did not constitute torture. Finally, the court found that it lacked jurisdiction to consider petitioner's argument that the IJ erred in determining that he had not provided credible evidence that he was part of the Midgan clan and suffered torture because those were challenges to factual findings.

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■ Eighth Circuit Holds That DHS Must Show Fraud To Terminate Asylum

In ***Ntangsi v. Gonzales***, __F.3d__, 2007 WL 220193 (8th Cir. January 30, 2007) (*Melloy*, Benton, Shepard), the Eighth Circuit ruled that under 8 C.F.R. § 208.24(a)(1) and (f) DHS has the burden of proving fraud when it seeks to terminate asylum. Because the IJ and the BIA improperly placed the burden on the petitioner to prove her asylum eligibility anew, the court remanded the case.

Petitioner, a native and citizen of Cameroon, had previously been granted asylum in 2001 on the basis that she had an objective fear of persecution due to her political activities in the Social Democratic Front. At that time the IJ found petitioner credible, but noted the lack of strong corroborating evidence and warned petitioner that the government was still investigating her claim for possible fabrication. Eighteen months after the grant of asylum, the IJ granted the government's motion to reopen after it submitted a report showing petitioner's testimony may have been inconsistent. Specifically, petitioner had claimed that her father was fired from his job for political activities, while a government report showed that her father had only been demoted. In response, petitioner asked the IJ for the opportunity to cross-examine the investigator behind the report and to have the IJ take telephonic testimony from her father from the U.S. Embassy in Cameroon. The IJ denied petitioner's requests and held that, in light of the new evidence, petitioner's testimony was incredible and terminated her grant of asylum.

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On appeal to the BIA, petitioner argued that her due process rights were violated by the IJ's refusal to take testimony from her father and inability to cross-examine the government's reporter. Petitioner also challenged the adverse credibility determination and denial of asylum. The BIA rejected these claims ruling that the new evidence supported an adverse credibility determination and that any violation of due process was harmless error.

The court held that once the government succeeds in reopening the proceedings of an alien who has previously been granted asylum, the government carries the burden of proving the grounds for terminating asylum.

The Eighth Circuit reversed the BIA's decision because the IJ and BIA had improperly placed the burden of proving asylum eligibility on the petitioner. Citing to 8 C.F.R. § 208.24(f), the court held that once the government succeeds in reopening the proceedings of an alien who has previously been granted asylum, the government carries the burden of proving the grounds for terminating asylum. Here, the government had the burden of proving that petitioner knowingly submitted fraudulent evidence to the IJ. The court concluded that "[a]fter examining the record of the reopened proceedings in this case, it is clear that neither the IJ nor the Board placed the burden of proving fraud upon the government." Rather, "the language of the written decisions . . . shows that they placed the burden on [petitioner] to prove her asylum eligibility." Therefore, the court remanded the case to the BIA to apply the proper standard for terminating asylum.

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■ Visa-Fraud Conviction Based On Material Misrepresentation Affirmed

In ***United States v. Katkhordeh,***__F.3d__, 2007 WL 528076 (8th Cir. February 22, 2007) (Smith, Bowman, *Colloton*), the Eighth Circuit affirmed an alien's conviction under 18 U.S.C. § 1546(a) for falsely claiming he was single and for omitting the fact he had a child. The jury found that the alien had made material misrepresentations of fact when applying for, and obtaining, a specialty preference visa as the unmarried son of a lawful permanent resident under 8 U.S.C. § 1153 (a)(2)(B), INA § 203(a)(2)(B).

The Eighth Circuit held that the alien's statement that he was single, when contrasted with an Iranian marriage certificate he had supplied to his reserve Army unit, was a material misrepresentation. The court also rejected the alien's argument that the relationship in question was merely a "sigeh" (that is, a formal relationship but not a marriage).

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■ Eighth Circuit Holds It Has Jurisdiction To Review BIA's Decision Not To Reopen Sua Sponte, But Finds No Abuse Of Discretion

In ***Tamenut v. Gonzales***, __F.3d__, 2007 WL 473274 (8th Cir. February 15, 2007) (Wollman, *Beam*, Riley), 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. The court ruled, however, that the BIA's decision was not an abuse of discretion. The panel invited *en banc* review to consider further the jurisdictional issue.

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■ IJ Abused Her Discretion By Granting Government's Motion To Reopen

In ***Ivanov v. Gonzales,*** __F.3d__, 2007 WL 438767 (8th Cir. Feb. 12, 2007) (Smith, *Bowman*, Colloton), the Eighth Circuit held that the IJ abused her discretion by granting a motion to reopen filed by the Department of Homeland Security ("DHS") where DHS delayed initiating an embassy investigation into document fraud during the removal hearing, did not request a continuance, and presented no evidence that foreign records were unavailable or undiscoverable. The court found that DHS had "failed to establish that the information submitted in support of its motion to reopen was not only material, but was also unavailable and undiscoverable prior to the conclusion of [petitioners'] removal proceedings." The court noted, however, that DHS could initiate new proceedings seeking termination of the grant of asylum based on petitioners' allegedly fraudulent asylum application.

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NINTH CIRCUIT

■ Ninth Circuit Upholds Adverse Credibility Finding, Noting Implausibility Of Claims

In ***Don v. Gonzales***, __F.3d__, 2007 WL 430585 (9th Cir. Feb. 9, 2007) (Wardlaw, *Rawlinson*, Cebull (district court judge)), the Ninth Circuit held that the record did not compel a conclusion contrary to the IJ's adverse credibility finding and that substantial evidence supported the determination that petitioner's claimed fear of the Terrorist Detective Bureau was implausible.

Petitioner, a native and citizen of Sri Lanka, claimed that he feared persecution by the Terrorist Detective Bureau (TDB), a special unit of the Sri

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Lankan government used to combat terrorism, and by the Tamil Tigers (LTTE), a rebel terrorist group. Petitioner claimed that because the restaurant he owned in Sri Lanka employed a cook who was a member of the LTTE, the TDB wanted to arrest him because they believed he was a political associate of the cook, and the LTTE wanted to harm petitioner because they believed he was the informant that lead to the cook's arrest. However, when testifying about the cook's arrest by the TDB, petitioner gave inconsistent dates for when he hired the cook. Petitioner also testified that the LTTE had threatened petitioner with harm if he didn't attempt to get the cook out of jail. Thus, petitioner stated, he had contacted relatives in the police department who he thought could influence the TDB into releasing the cook. Citing the inconsistency in the dates given for the cook's employment, an IJ found petitioner's testimony incredible and petitioner's fear of persecution by the TDB implausible. The BIA affirmed.

The Ninth Circuit upheld the adverse credibility determination and agreed that petitioner's fear of persecution by the TDB was implausible. The court explained, that petitioner's "inability to state as to when it was that this man who was the source of him having to flee his country started to work for him went to the heart of [petitioner]'s claim because it involved the very event upon which he predicated his claim for asylum." While trivial inconsistencies cannot support an adverse credibility determination, "the lack of details regarding the event that allegedly spurned the LTTE and the TDB to threaten [petitioner] goes to the heart of his persecution claim." The court also noted that substantial evidence supported the IJ's determination that petitioner's story was generally implausible, finding that petitioner's "interactions with the TDB undermined [his] claim that he was evading the TDB." Finally, the court refuted petitioner's claim that the IJ did not adequately consider a newspaper article about the cook's arrest and the country reports he submitted, finding that the IJ specifically acknowledged the documents in his opinion.

In a lengthy dissent, Judge Wardlaw would have reversed the IJ's adverse credibility finding.

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■Failure To Lodge Additional Charge In Prior Proceedings Bars DHS From Initiating A Second Deportation Case Based On That Charge

In ***Bravo-Pedroza v. Gonzales***, __F.3d__, 2007 WL 329142 (9th Cir. February 6, 2007), (*Noonan*, Clifton, Schiavelli (district court judge)), the Ninth Circuit held that *res judicata* barred DHS from initiating new removal proceedings based on a charge of removability that could have been brought in prior proceedings.

Petitioner, a native and citizen of Colombia and an LPR, was convicted of robbery in 1985 and burglary in 1986. Based on these convictions, petitioner was placed into removal proceedings as an alien convicted of crimes involving moral turpitude. However, an IJ granted petitioner 212 (c) relief. Petitioner was again placed into removal proceedings in 2001 as an alien removable for having committed an aggravated felony as a result of a 1996 conviction for petty theft with priors. This time, an IJ found petitioner removable, the BIA affirmed, and petitioner sought review in the Ninth Circuit. While his petition was pending, the Ninth Circuit decided *United States v. Corona-Sanchez,* 291 F.3d 1201 (9th Cir. 2002) (*en banc*), which held that a conviction for petty theft did not qualify as an aggravated felony. Consequently, the court remanded petitioner's case to the BIA, and the BIA terminated proceedings. DHS then commenced new proceedings charging petitioner with removability for three crimes of moral turpitude based on his 1985 and 1986 convictions, and his conviction for petty theft. An IJ upheld the charges and the BIA affirmed.

The court held that because DHS could have lodged the multiple CIMT charges in the prior proceeding but did not do so, *res judicata* prevented it from bringing the charge in new proceedings.

The court held that because DHS could have lodged the multiple CIMT charges in the prior proceeding after *Corona-Sanchez* issued but did not do so, *res judicata* prevented it from bringing the charge in new proceedings. The court noted that 8 C.F.R. § 3.30 "[p]lainly [] states that new charges may be brought *during the pendency of immigration proceedings*. It says nothing about new charges after one proceeding is open." The court rejected the government's argument that *res judicata* is relaxed in the context of administrative law and that the decision to bring new charges was an exercise of discretion.

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■ Proper Service Of Order To Show Cause Requires Evidence Of Certified Mail Receipt Signed By Alien Or Responsible Person At Alien's Address

In ***Chaidez v. Gonzales***, __F.3d__, 2007 WL 465707 (9th Cir. February 14, 2007) (B. Fletcher, *Berzon*, Trager (district court judge)), the Ninth Circuit held that the governing statute in the case, former 8 U.S.C. § 1252b(c)(1) (repealed), required the government to establish service of an Order to Show Cause by clear, unequivocal, and convincing evidence that the alien or a responsible person at the

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alien's address signed the certified mail receipt. The court concluded that the record did not show proper service where the alien's uncontradicted sworn declaration showed that the alien did not know the person who signed the receipt and that the person was not authorized to sign on the alien's behalf. Without completely defining the meaning of a "responsible person," the court ruled that evidence that the same person signed for certified mail on two occasions was not sufficient to show that the individual was a "responsible person."

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Rules That BIA Erred In Finding Cumulative Evidence Insufficient To Establish Persecution**

In ***Ruiz v. Gonzales***, __F.3d__, 2007 WL 510147 (11th Cir. February 20, 2007) (Pryor, *Fay*, Reavley), the Eleventh Circuit *sua sponte* reconsidered and vacated its prior opinion reported at 472 F.3d 1323 (11th Cir. 2006). The court preliminarily held that it lacked jurisdiction to review the denial of an untimely asylum application. However, it then determined that the record – which indicated that Columbia guerillas beat the alien on two occasions, telephoned threats to him, and held him against his will for 18 days – compelled the conclusion, when considered cumulatively, that petitioner had suffered past persecution and therefore had a rebuttable presumption of a reasonable fear of future persecution upon removal to Colombia. The court also found that the record also compelled the conclusion that petitioner could not safely relocate within Columbia. The court therefore granted the petition with respect to the claim for withholding of removal.

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PRESIDENT'S PLAN FOR IMMIGRATION REFORM

Ed. Note: part 1-3 of the President's proposal appeared in the last issue.

4. We Must Bring Undocumented Workers Already In The Country Out Of The Shadows

Comprehensive Immigration Reform Must Account For The Millions Of Immigrants Already In The Country Illegally. Illegal immigration causes serious problems, putting pressure on public schools and hospitals and straining State and local budgets. People who have worked hard, supported their families, avoided crime, led responsible lives, and become a part of American life should be called in out of the shadows and under the rule of American law.

The President Opposes An Automatic Path To Citizenship Or Any Other Form Of Amnesty. Amnesty, as a reward for lawbreaking, would only invite further lawbreaking. Amnesty would also be unfair to those lawful immigrants who have patiently waited their turn for citizenship and to those who are still waiting to enter the country legally.

The President Supports A Rational Middle Ground Between A Program Of Mass Deportation And A Program Of Automatic Amnesty. It is neither wise nor realistic to round up and deport millions of illegal immigrants in the United States. But there should be no automatic path to citizenship. The President supports a rational middle ground founded on the following basic tenets:

No Amnesty. Workers who have entered the country illegally and workers who have overstayed their visas must pay a substantial penalty for their illegal conduct.

In Addition To Paying A Meaningful Penalty, Undocumented Workers Must Learn English, Pay Their Taxes, Pass A Background Check, And Hold A Job For A Number Of Years Before They Will Be Eligible To Be Considered For Legalized Status. Any Undocumented Worker Seeking Citizenship Must Go To The "Back Of The Line." The program should not reward illegal conduct by making participants eligible for citizenship ahead of those who have played by the rules and followed the law. Instead, program participants must wait their turn at the back of the line.

5. We Must Promote Assimilation Into Our Society By Teaching New Immigrants English And American Values Those Who Swear The Oath Of Citizenship Are Doing More Than Completing A Legal Process – They Are Making A Lifelong Pledge To Support The Values And The Laws Of America.

Americans are bound together by our shared ideals, our history, and the ability to speak and write the English language. Every new citizen has an obligation to learn the English language and the customs and values that define our Nation, including liberty and civic responsibility, appreciation for our history, tolerance for others, and equality. When immigrants assimilate, they advance in our society, realize their dreams, and add to the unity of America.

New Citizens Need Guidance To Succeed. The Office of Citizenship is creating new guides for immigrants and introducing a new pilot civics examination designed to foster a deeper understanding of civic virtues and the founding ideals. The President's Task Force on New Americans is fostering volunteerism through volunteer.gov and exploring partnerships with local organizations. Public libraries and faith-based and community groups will be encouraged to offer English language and civics instruction to immigrants who are seeking to make America their home.

Additional information about the Administration's position on immigration reform can be found on the web sites of the White House and the Department of Homeland Security.

Post-Ramadan REAL ID Guidance

Question

How do we brief the REAL ID Act's jurisdictional bars in the Ninth Circuit after its recent decision in *Ramadan*?

Background

In ***Ramadan v. Gonzales***, __ F.3d __, 2007 WL 528715 (9th Cir. Feb. 22, 2007), the Ninth Circuit interpreted the REAL ID Act as restoring jurisdiction over applications of law to undisputed facts. Specifically, the court held that it has jurisdiction to review whether an alien has demonstrated changed circumstances excusing the one-year asylum application deadline despite the jurisdictional bar at 8 U.S.C. § 1158(a)(3). The court found that such an issue presented a "question of law" for purposes of 8 U.S.C. § 1252(a)(2)(D).

Answer

1. **Distinguish Ramadan if possible.**

For example, we should take the position that *Ramadan* does not affect the jurisdiction-precluding statute at 8 U.S.C. § 1252(a)(2)(B). That provision continues to apply to preclude jurisdiction over *discretionary* determinations. *Ramadan* does not purport to assert jurisdiction over a discretionary determination.

2. We should take the position that *Ramadan* does not affect the application of the jurisdiction-precluding statute at 8 U.S.C. § 1252(a)(2)(C) (criminal review bar) over the agency's factual findings regarding persecution and torture.

First, the agency's adverse credibility finding is unreviewable because it clearly involves disputed facts. Second, we should argue that the agency's assessment of the merits of a CAT or withholding claim does not involve undisputed facts but *does* involve a factual dispute as to whether or not the alien was persecuted or tortured; that such factual issues have historically been reviewed for substantial evidence as the Supreme Court has held; that the legislative history of the REAL ID Act indicates that Congress precluded review over substantial evidence questions; and thus, review of the BIA's CAT and withholding findings is precluded because no question of law is raised. In making this argument, we should cite any cases in which the Ninth Circuit has applied the criminal alien review bar to find that it lacked jurisdiction over factual issues.

We should take the position that *Ramadan* does not affect the application of the jurisdiction-precluding statute at 8 U.S.C. § 1252(a)(2)(C) (criminal review bar) over the agency's factual findings regarding persecution and torture.

Note that we will also have to distinguish Ninth Circuit case law holding that when an immigration judge does not cite to the criminal ground of removal in his decision or rely on that ground in denying CAT protection, and instead denies the application on the merits, 8 U.S.C. § 1252(a)(2)(C) does not apply to the petition. *See Morales v. Gonzales*, 472 F.3d 689, 697 (9th Cir. 2007); *Unuakhaulu v. Gonzalez*, 416 F.3d 931, 936-37 (9th Cir. 2005).

If you think the BIA's finding *does raise* a question of law (*i.e.*, is indefinite detention torture?; do criminal deportees constitute a social group?), please contact Papu Sandhu or Bryan Beier.

3. We should take the position that *Ramadan* does not affect the application of the jurisdiction-precluding statute at 8 U.S.C. § 1158(a)(3) over the agency's findings regarding the one-year bar by arguing that the case involves *disputed* facts.

In so doing, we should argue that there is a presumption that the facts are disputed *unless* the agency finds that they are not or the record unequivocally establishes they are not. For example, if there is a question as to when the alien entered the country for purposes of the one-year bar, we should argue that the case involves a disputed fact, and therefore is not a question of law. *See, e.g., Yakovenko v. Gonzales*, __ F.3d __, 2007 WL 542233 (8th Cir. Feb, 23, 2007). We should also distinguish *Ramadan* if the case involves the issue of "extraordinary circumstances" rather than "changed circumstances" by arguing that the assessment of the former is within the broad discretion of the Attorney General.

4. If we cannot distinguish the facts in *Ramadan*, we should determine if we can make an argument that the court does not need to address the jurisdictional issue regarding the one-year bar because the court may review, in any event, the BIA's withholding determination and that review will resolve the asylum claim (note: this argument is applicable only where the BIA denied the withholding claim on an issue *not involving* burden of proof).

Whether we can or cannot make such an argument, we should preserve our position by noting our disagreement with *Ramadan*, and briefing the merits.

5. In any case where *Ramadan* is discussed, include a footnote that the Government disagrees with *Ramadan*, and is considering further review.

By Papu Sandhu, OIL

If you have any questions on *Ramadan* contact:

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If you have any questions on the REAL ID Act in general also contact Papu Sandhu.

Ramadan pierces REAL ID Act

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law" in section 106 of the REAL ID Act, referred to a narrow category of issues regarding statutory construction. *Ramadan v. Gonzales*, 427 F. 3d 1218 (9th Cir. 2005). The court also held that "changed circumstances" claim was essentially a factual question and not a question of law within the meaning of the REAL ID Act. Accordingly it had dismissed for lack of jurisdiction petitioner's appeal challenging the IJ's determination that she had failed to show changed circumstance to excuse the late filing of the asylum application. However, following petitioner's suggestion for rehearing and the intervention of *amici,* including the ACLU and the American Immigration Law Foundation, the panel granted rehearing and reversed itself.

The court, following rehearing, held that questions of law, as it is used in section 106 of the REAL ID Act, "extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." Further, it held that the "'changed circumstances' question presented by [the petitioner] is a question of the application of a statutory standard to undisputed facts, over which we have jurisdiction."

The court, after noting the legislative and judicial developments that has led to the current "constraints on judicial review of immigration decisions" concluded that Congress intended to tailor the REAL ID Act to the constitutional requirements of the Suspension Clause as announced by the Supreme Court in *St. Cyr*. The court interpreted *St. Cyr*, as standing for the proposition that "mixed questions of fact and law – those involving an application of law to undisputed fact – should be provided meaningful judicial review, lest serious constitutional questions be raised." Consequently, the court said that it was "compelled by principles of constitutional avoidance," to interpret the REAL ID Act as permitting jurisdiction over a mixed question of law and fact, so as to preclude[] a constitutional suspect alternative."
The court rejected the government's contention that the "changed circumstance" finding was predominately a discretionary determination. The court explained that the statutory requirement that changed circumstance be established "to the satisfaction of the Attorney General" "is a phrase specification of who is to make that decision, rather than a characterization of that decision itself."

Here, the court found that petitioner's claim raised a question of law because the "factual basis of [petitioner's] petition is undisputed; we only review whether the IJ appropriately determined that the facts did not constitute 'changed circumstances' as defined by immigration law." On the merits, the court then found that the record did not compel the conclusion that petitioner had shown "changed circumstances" to excuse her late filing.

By Francesco Isgro, OIL

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Ed. Note: See *Post-Ramadan* OIL guidance at p. 18 *infra.*

INSIDE OIL

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the U.S. Attorney's Office for Northeastern Illinois. Prior to joining OIL he was employed by the Central Intelligence Agency.

Stuart Nickum is a recent graduate of George Washington University Law School. He received his B.A. in political science from Western Washington University. During law school, Stuart worked as a summer law clerk for the Montgomery County Public Defender's Office, and the ACLU of Washington.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

NOTICE REGARDING SECOND CIRCUIT ORAL ARGUMENTS

Please be aware that the video argument option remains unavailable for Second Circuit cases. Assistant US Attorneys assigned to Second Circuit arguments should therefore continue to notify OIL Deputy Director David McConnell if they are unable to travel to New York for these cases. Mr. McConnell will assign OIL attorneys to attend these arguments. If you receive notice of a Second Circuit argument and require assistance, please email him at *david.mcconnell@usdoj.gov*. You may also contact Mr. McConnell for assistance with arguments in other circuits, or if you need guidance with respect to any immigration case.

OIL establishes email box for court pleadings

OIL has established a new e-mail box where AUSAs and our agency clients can email new district court pleadings. The email address is called "Filings, Imm" and it is accessible from your US DOJ address book. The full email address is: imm.filings@usdoj.gov.

This email box is monitored daily by OIL and should alleviate the increased mailing of hard copies of pleadings among our offices. It is not necessary to continue to email copies of pleadings sent to this mailbox to OIL Director Hussey or Deputy Directors Kline and McConnell. Please feel free to contact Mr. Kline or Mr. McConnell directly, however, if any matter is particularly urgent or requires special attention.

If you have any questions or problems in using this email box please contact Greg Hicks, OIL at 202-514-0629.

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INSIDE OIL

OIL welcomes the following new attorneys:

Nehal Kamani received her B.S. and J.D. from Cornell University. During law school, she interned with the Tompkins County Family Court. Prior to joining OIL, she worked at McKee Nelson, LLP in Washington, DC.

Matt Crapo is a graduate of the University of Utah College of Law. Prior to joining OIL, he worked for a Department of Justice contractor, providing litigation support for the Commercial Litigation branch in various Winstar-related cases, and worked as a contract attorney here at OIL for the past six months.

Jason Hamilton is a graduate of Michigan State University and Loyola University Chicago, School of Law. During law school he was an extern at the Bankruptcy Court for the Seventh Circuit and was a law clerk at

From L to R: Stuart Nickum, Hehal Kamani, Jason Hamilton, Matt Crapo

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

Office of Immigration Litigation

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

If you are not on our mailing list or for a change of address please contact karen.drummond@usdoj.gov

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