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# Immigration Litigation Bulletin

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## LITIGATION HIGHLIGHTS



## Inside



## Physical force is not necessary to show that asylum applicant was "forced" to have an abortion in China

In ***Yuqing Zhu v. Gonzales***, __F.3d__, 2007 WL 2083712 (5th Cir. July 23, 2007) (Higginbotham, *Wiener*, Clement), the court reversed the BIA's finding that the threat of government imposed fines and sanctions to an asylum applicant from China did not constitute a "forced" abortion. The court then found that petitioner's forced abortion, while not "a particular form of persecution [] susceptible of repetition," was a permanent and continuing act of persecution establishing a reasonable fear of future persecution that the government failed to rebut.

**The term "force" does not entail only physical compulsion, but also "threats for refusing an abortion [that], if carried out, would rise to the level of persecution."**

The petitioner, a citizen of China, claimed she was persecuted when she underwent an abortion. She testified that she had an abortion when she found out the government-imposed consequences of failing to have the procedure, i.e., loss of employment and its benefits, loss of housing, and that illegitimate children are denied admission in school and not recognized as citizens. An IJ denied her asylum application as untimely, then denied withholding and CAT protection because he found that she had not been "forced" to have the abortion, but instead had it voluntarily and therefore was not persecuted. The BIA affirmed. The Fifth Circuit then remanded the case so that the BIA, among other things, could define what constituted "force." In its subsequent decision, the BIA did not explicitly define "force," but held that petitioner's abortion was voluntary.

In its second decision, the court first declined to consider petitioner's failure to file her asylum application within one year of her arrival due to lack of jurisdiction. The court stated that "[e]ven after the passage of the REAL ID Act [] we do not have jurisdiction to review determinations of timeliness that are based on findings of fact," and that "the IJ's rejection of [petitioner]'s extraordinary circumstances claim was based on an evaluation of the facts and circumstances of her case."

The court then reversed the BIA's decision on withholding and CAT

*(Continued on page 2)*

## Ninth Circuit reverses discretionary denial of asylum to Iraqi national who had been granted withholding

In ***Gulla v. Gonzales***, __F.3d__, 2007 WL 2296769 (9th Cir. Aug. 13, 2007) (*Pregerson,* Siler*;* Fernandez (*dissenting*)), a divided panel on the Ninth Circuit held that the IJ abused his discretion when he denied asylum as a matter of discretion to an otherwise eligible Iraqi finding that "the IJ's balancing of the various factors was arbitrary and irrational." The IJ, however, had granted withholding of removal to Iraq.

Petitioner sought asylum in the U.S. claiming he was persecuted in Iraq due to his Christian beliefs, his refusal to join the Ba'ath party, and

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# No physical force needed to shoe "forced" abortion in China

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protection, criticizing the BIA for failing to follow its explicit instruction to define "force" upon remand. The court held that the term "force" does not entail only physical compulsion, but also "threats for refusing an abortion [that], if carried out, would rise to the level of persecution," citing the BIA's decision in *Matter of T-Z*, 24 I&N Dec. 163 (BIA 2007) for support. The court rejected the government's arguments that petitioner was not forced to have an abortion because it was actually petitioner's boyfriend who forced her to have it. The court stated that the fact that petitioner's boyfriend "may have wanted her to have an abortion does not keep the abortion from having been *compelled* by the government."

**The fact that petitioner's boyfriend "may have wanted her to have an abortion does not keep the abortion from having been *compelled* by the government."**

The court then rejected the government's second argument that the Chinese authorities could not have forced her to have an abortion when they were not even aware of the pregnancy until she came forward. The court found reasonable petitioner's belief that the government would inevitably discovered her pregnancy.

The government lastly argued that even if past persecution occurred, petitioner could not have a reasonable fear of future persecution because the abortion had already occurred and could not be repeated and, moreover, that China no longer had a policy to force abortions. The court rejected these arguments as well. The court analogized a forced abortion to *In re Y-T-L-*, 23 I&N Dec. 601 (BIA 2003), where the BIA found that forced sterilization, while not capable of repetition, is "a permanent and continuing act of persecution." The court then found that China's country conditions have not changed as to "unplanned pregnancies occurring in China," distinguishing the case from *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006), because that case involved a finding of changed country conditions as to a Chinese petitioner "with two children, one of whom was born outside of China."

By Tim Ramnitz, OIL

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# USCIS announces replacement of I-551

USCIS has published a proposed rule to require lawful permanent residents to apply for a new Permanent Resident Card (Form I-551), commonly referred to as a "green card," during a 120-day filing period. 72 *Fed. Reg.* 46922 (Aug. 22, 2007).

Permanent Resident Cards are issued as evidence of the holder's authorization to live and work in the United States. In August 1989, the Immigration and Naturalization Service (INS) began issuing new cards with a 10-year expiration date and required residents to apply periodically for a new card. Between 1979 and 1989, however, the cards were issued without expiration dates. These are the cards that are the subject of the proposed rule.

The rule proposes that affected lawful permanent residents file an Application to Replace Lawful Permanent Residence Card (Form I-90) in order to replace their current "green card." The Form I-90 requires applicants to provide current biographic and biometric (photographs and fingerprint) information. Application Support Centers across the United States and new automated filing procedures would give USCIS the ability to process a large number of applications during a short period of time.

In addition to proposing a 120-day filing period, the rule also proposes to remove all references in the regulations to outdated Form I-90 application procedures and correct the title and edition date of Form I-90. Finally, the rule proposes a mechanism for terminating "green cards" without an expiration date. Under the rule, USCIS would be able to terminate permanent resident cards without an expiration date via notice in the Federal Register.

## REAL ID Act Practice Tip

In all briefs in non-REAL ID asylum cases (case where application was filed before May 11, 2005), put the following footnote in your discussion of the controlling law to make sure the Court understands what law governs burden of proof:

> "The asylum application was made before May 11, 2005. A.R. ____. Therefore the burden of proof statute for asylum at 8 U.S.C. § 1158(b)(1)(B) does not apply. See REAL ID § 101(h)(2); *Matter of S-B*, 24 I&N Dec. 42 (BIA 2006). Instead, the regulation at 8 C.F.R. § 1208.13(a) governs burden of proof in this case."

This footnote is needed because in several recent pre-REAL ID cases the courts have miscited 8 U.S.C. § 1158(b)(1)(B) as the law governing burden of proof, when this provision does not apply. We need to be alert to ensure that courts do not continue to make this mistake.

# *Fernandez* and Motions to reopen cancellation cases

In *Fernandez v. Gonzales*, 439 F.3d 592 (9th Cir. 2006), the Ninth Circuit joined its sister circuits in finding that it lacks jurisdiction to consider a petition for review of a denial of a motion to reconsider or a motion to reopen, where the sole issue is the agency's prior discretionary determination that the petitioner did not establish exceptional and extremely unusual hardship after a full hearing on the merits. Other courts have reached a similar conclusion. *See Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2004) ("if the decision is to withhold certain discretionary remedies, that's the end. Otherwise there would be no jurisdiction if the agency is right, but jurisdiction when it errs; that would be a back door assertion of jurisdiction to review every decision, and an effective nullification of the statute"); *Rodriguez v. Ashcroft*, 253 F.3d 797, 800 (5th Cir. 2001) ("It is axiomatic that if we are divested of jurisdiction to review an original determination of the Board that an alien has failed to establish that he would suffer extreme hardship if deported, we must also be divested of jurisdiction to review the Board's denial of a motion to reopen on the ground that the alien has still failed to establish such a hardship."); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1362 (10th Cir. 2004) (only where judicial review of the underlying order is precluded is denial of a subsequent motion to reopen also precluded); *Patel v. U.S. Att'y Gen.*, 334 F.3d 1259, 1261 (11th Cir. 2003) (holding that when jurisdiction over final order is precluded, the court lacks jurisdiction to review orders denying motions to reopen such final orders); *Nwaokolo v. I.N.S.*, 314 F.3d 303, 306 (7th Cir. 2002) (*per curiam*) ("Ms. Nwaokolo's motion to reopen is part and parcel of her deportation proceedings"); *Chow v. I.N.S.*, 113 F.3d 659, 664 (7th Cir. 1997) (an order of deportation includes "orders denying motions to reconsider and reopen"), abrogated on other grounds by *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998).

Although the Ninth Circuit reinforced the general principle that it lacks jurisdiction to consider a petition for review of a denial of a motion to reconsider or a motion to reopen, where the sole issue is the agency's prior discretionary determination that the petitioner did not establish exceptional and extremely unusual hardship, it also added in some extraneous comments which practitioners should note when drafting their responses. After finding that it lacked jurisdiction to review Fernandez's petition for review, the court addressed whether it retains jurisdiction in other circumstances not present in the case before it. In *dicta*, the *Fernandez* court set out an additional narrow ground where it claims to retain jurisdiction to review the Board's denial of a motion to reopen.

**In *dicta*, the *Fernandez* court set out an additional narrow ground where it claims to retain jurisdiction to review the Board's denial of a motion to reopen.**

The court determined that it retains jurisdiction to review the denial of a motion to reopen in the limited circumstance "[w]here the relief sought is formally the same as was previously denied but the evidence submitted with a motion to reopen is directed at a *different basis for providing the same relief*." 439 F.3d at 601. The court stated that this exception is intended to "cover cases in which the newly-submitted evidence is *not* cumulative, and thus directed at collaterally attacking the agency's initial decision on the same basis as it was originally made, but does seek the same *type* of discretionary relief as was originally sought." *Id*. In providing context to this exception, the court used the example of the "submission of evidence, subsequent to a denial of cancellation of removal, concerning a newly-discovered, life-threatening medical condition afflicting a qualifying relative." *Id.* at 601-02. The court determined that if the Board denied reopening to make a hardship determination in this situation:

> it would not be making a 'judgment regarding the granting [of cancellation of removal],' within the ambit of § 1252(a)(2)(B)(i), but rather making a decision, under the removability provision at issue, whether to reopen for new proceedings . . . ."

*Id.* at 602.

This additional exception set forth by the court is *dicta* because it was incidental to and not necessary to the ultimate disposition of the case. The *Fernandez* court specifically based its jurisdictional holding on the finding that the "evidence Fernandez presented was not so different in kind from what was before the Immigration Judge as to constitute an application for new relief rather than a request for reconsideration." *Id.* at 603.

Consequently, the opinion's discussion of other circumstances not then before the court is *dicta* and therefore not binding. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990) ("the language was dicta and therefore not binding"); *Barapind v. Enomoto*, 400 F.3d 744, 750 (9th Cir. 2005) (finding that evidence which is incidental to and not necessary to the ultimate disposition of the case is *dicta*). Accordingly, it is not binding precedent in the Ninth Circuit. *Id*; *see Dyer v. Calderon*, 151 F.3d 970, 991 (9th Cir. 1998) (authority that supports point "in dictum" does not

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## *Fernandez* and MTRs to seek cancellation

"'control[]' or 'dictate[]' the result."); *Exp. Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995) (explaining that statements not necessary to the decision are *dicta* and thus are not binding precedent).

On a more fundamental level, the *dicta* has no persuasive value because the court's reasoning is flawed. There is no reason why the Board's discretionary determination that an alien has not shown "exceptional and extremely unusual hardship" should be reviewable in the context of a motion to reopen simply because the evidence presented at that stage is "new" and arguably "distinct" from evidence previously presented. Such a discretionary determination would not be reviewable on direct appeal, *see Romero-Torres v. Ashcroft,* 327 F.3d 887 (9th Cir. 2003), and a different rule should not apply where the BIA makes the same type of discretionary determination in denying a motion to reopen. Accordingly, courts should decline to adopt the exception to the jurisdictional bar stated in the *Fernandez dicta.*

In conclusion, *Fernandez* further reinforces the principle that courts lack jurisdiction over discretionary decisions. In reaching this conclusion, the Ninth Circuit attempts to restrict what it considers to be a "discretionary decision". Practitioners should avoid giving the dicta found in *Fernandez* any credence and emphasize the fact that a discretionary determination is exactly the type of decision that Congress intended to be in the sole jurisdiction of the agency and courts generally lack jurisdiction to review these decisions.

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## Key conspirator in marriage fraud sentenced

Tina Tran, 47, one of the key conspirators in an elaborate Orange County-based marriage fraud scheme, has been sentenced to 37 months in prison. Tran's sentencing is the latest development in "Operation Newlywed Game," a landmark investigation by ICE targeting a marriage fraud scheme involving hundreds of Chinese and Vietnamese nationals. Tran, who recruited participants for as many as 70 sham marriages and filed more than 100 bogus visa petitions on behalf of fake spouses and stepchildren, was arrested in November 2005. According to court documents, the marriage fraud scheme, which has so far resulted in more than 50 suspects being charged, involved a loose-knit network of "facilitators," "recruiters," and "petitioners" based in Orange County's Little Saigon. At the heart of the conspiracy were the facilitators, including Tran, who charged up to $60,000 to orchestrate sham marriages for foreign nationals with U.S. citizens for the purpose of submitting fraudulent immigrant visa petitions on behalf of the aliens.

Since the foreign nationals often resided in Vietnam or China, the facilitators would make arrangements for the U.S. citizen petitioners to go overseas to marry the aliens. After the sham marriage, the facilitators assisted the petitioners and aliens with filing bogus immigration petitions. The facilitators would also coach the petitioners and the aliens on what to say at subsequent adjustment of status interviews to persuade the U.S. Citizenship and Immigration Services officer that the couple had a legitimate marriage. According to investigators, the suspects went to elaborate lengths to make the sham marriages appear legitimate, posing for wedding pictures, fabricating love letters, and even creating fraudulent joint tax returns.

## USCIS to publish U-visa interim rule

The U.S. Citizenship and Immigration Services announced on September 5, 2007, that it would publish an interim rule that grants temporary immigration benefits to certain victims of crimes who assist government officials in investigating or prosecuting the criminal activity. USCIS invites public comments on the rule that has been submitted to the *Federal Register* for publication and currently is available for public review at www.uscis.gov.

The interim final rule establishes procedures for applicants seeking U nonimmigrant status and will take effect 30 days after publication in the *Federal Register*. The "U" classification was created by Congress in the *Victims of Trafficking and Violence Protection Act* and offers not only protection and temporary benefits to alien victims but also bolsters law enforcement capabilities to investigate and prosecute criminal activity.

"Many immigrant crime victims fear coming forward to assist law enforcement because they may not have legal status," explained USCIS Director Emilio Gonzalez. "We're confident that we have developed a rule that meets the spirit of the Act; to help curtail criminal activity, protect victims, and encourage them to fully participate in proceedings that will aid in bringing perpetrators to justice."

Eligibility for the U nonimmigrant classification is set aside for victims of criminal activity who: suffered substantial mental or physical abuse because of the activity; has information regarding the activity; and is willing to assist government officials in the investigation of the crime. Additionally, the crime must have violated U.S. law or occurred in the United States (including its territories and possessions).

# FURTHER REVIEW PENDING: Update on Cases & Issues

### Asylum – Particular Social Group

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

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

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### Asylum – Particular Social Group

On July 20, 2007, the Government filed a petition for panel rehearing in ***Hassan v. Gonzales***, 484 F.3d 513 (8th Cir. 2007). The court's decision could be construed as deciding, in the first instance and without prior resolution of the question by the Attorney General, that all Somali women constitute a "particular social group" and that the alien, who underwent female genital mutilation in Somalia as a child, suffered persecution "on account of" that status so as to qualify for asylum.

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### Asylum — Adverse Credibility

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

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### Asylum — Disfavored Group

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

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

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

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

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### Jurisdiction — Sua Sponte Reopening

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

On July 19, 2007, the court ordered that the case be submitted to the *en banc* court without oral argument.

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

On November 29, 2005, the government filed a petition for rehearing en banc in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), where the Ninth Circuit held that the denial of § 212(c) relief violated equal protection because the INS made "212(c) relief available to permanent residents who retroactively became aggravated felons, but who had committed deportable offenses at the time of their conviction, and not to those permanent residents who retroactively became aggravated felons, but who had not committed deportable offenses at the time of their convictions."

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### BIA — Power to Issue Removal Order

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

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### Crime Involving Moral Turpitude

The question presented to the *en banc* court in ***Cordes v. Gonzales***, 421 F.3d 889 (9th Cir. 2005), is whether a conviction for accessory after the fact is a crime involving moral turpitude. The case was argued on December 13, 2006.

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# Summaries Of Recent Federal Court Decisions

## FIRST CIRCUIT

■ **First Circuit Reverses Adverse Credibility Determination**

In *Heng v. Gonzales*, 493 F.3d 46 (1st Cir. July 12, 2007) (*Howard*, Selya, Close), the First Circuit held that it lacked jurisdiction to address the petitioner's challenge to the agency's ruling that her asylum application was untimely. As to the balance of the petitioner's claims, the court held that the Immigration Judge's adverse credibility determination was not supported by substantial evidence because it was based upon an inaccurate description of petitioner's testimony, possible translation errors, and a minor omission in the asylum application.

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## SECOND CIRCUIT

■ **Second Circuit Holds That Immigration Judge's Analysis Was So Deficient That Court Could Not Conduct Meaningful Judicial Review**

In *Manzur v. U.S. Dep't of Homeland Security,* __F.3d__, 2007 WL 2028135 (2d Cir. July 16, 2007) (Kearse, Sotomayor, *Koeltl*), the court held that the IJ's analysis of the aliens' claims of persecution was deficient and remanded the case for further proceedings. The court held that the IJ erred when he failed, *inter alia*, (1) to consider probative circumstantial evidence that the aliens' detention was because of their imputed political opinion or membership in a particular social group, and (2) to recognize that asylum can be based on persecution that is motivated in part on a protected ground. The court also ruled that the IJ erred when he determined that government surveillance could not constitute persecution. The court held that remand was proper because the IJ failed to engage in the "complex and contextual factual inquiry" necessary to determine whether the threats from the aliens' persecutors were motivated by the aliens' opposition to the government.

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■ **Second Circuit Holds That BIA Must Provide An Alien With Notice That It Intends To Use Administratively Noticed Facts To Deny The Alien's Appeal**

In *Burger v. Gonzales,* __F.3d__, 2007 WL 2331944 (2d Cir. August 17, 2007) (*McLaughlin*, Calabresi, Sotomayor), the court held that the BIA violated due process by failing to provide petitioner with advance notice that it intended to take administrative notice of commonly known changed country conditions as the sole basis for denying her appeal. The court rejected the government's argument that a motion to reopen cured any procedural defect.

> In order to satisfy due process the BIA must provide aliens with notice and an opportunity to be heard before the BIA denies an application on the basis of administratively noticed facts.

Petitioner, a native of Yugoslavia and citizen of Serbia-Montenegro, sought asylum claiming she was persecuted for her anti-Milosevic political views. An IJ granted asylum, but the BIA reversed. The BIA, taking administrative notice of the fact that Milosevic was no longer in power and was currently being prosecuted in the European Court of Justice, denied petitioner's asylum application on the basis of changed country conditions. Petitioner then filed a motion to reopen presenting evidence that some of Milosevic's old regime may still be in place. The BIA denied this motion as well.

Petitioner challenged the BIA's denial of her appeal and the denial of her motion to reopen. She argued that in denying her original appeal, the BIA improperly took administrative notice of changed country conditions and further that her due process rights were violated because the BIA failed to warn her of the administratively noticed facts. The court disagreed with the former argument, but accepted the latter. Of the former, the court held that "the ouster and subsequent trial of Milosevic were commonly known facts whose accuracy [petitioner] herself has not disputed." Of the latter, the court joined the Ninth and Tenth Circuits in holding that in order to satisfy due process the BIA must provide aliens with notice and an opportunity to be heard before the BIA denies an application on the basis of administratively noticed facts. The court rejected the Fifth, Seventh and D.C. Circuits' approach that a motion to reopen satisfies due process in this context. The court stated that a motion to reopen is an inadequate procedural cure because the decision to grant a motion to reopen is purely discretionary and because an alien's removal is not automatically stayed upon filing of a motion to reopen. The court then remanded the case so that the BIA could consider petitioner's evidence that lingering elements of Milosevic's regime may still pose a threat to petitioner's safety, even though the BIA had already addressed this evidence when it denied petitioner's motion to reopen.

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■ **Second Circuit Remands For BIA To Determine Whether Forced Insertion Of IUD Constitutes Persecution**

In *Zheng v. Gonzales,* __F.3d__, 2007 WL 2282731 (2d Cir. August 10, 2007) (Sack, *Sotomayor*, Katzmann), the court held that the because the BIA has taken contrary positions in unpublished cases on whether the forced insertion of an IUD constitutes persecution, it was remanding the case to allow the BIA to articulate its

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position on whether and under what conditions the forced insertion of an IUD constitutes persecution. The court stated that the BIA had been "unable to conclude" that the forced insertion of an IUD "rises to the level of persecution in terms of the harm inflicted," in part because the alien experienced "no significant degree of pain or restriction as a result of the procedure." Because the BIA's decision in the instant case was non-precedential and was signed by a single member, the court accorded no deference to the agency's decision.

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■ **Second Circuit Holds That Asylum Applicant Failed To Present Evidence Of Long-Lasting Physical Effect Or Mental Trauma Needed For Grant Of Humanitarian Asylum**

In ***Jalloh v. Gonzales***, __F.3d__, 2007 WL 2331938 (2d Cir. August 17, 2007) (Sack, Sotomayor, Hall) (*per curiam*), the court held that petitioner failed to present sufficient evidence to qualify for a grant of humanitarian asylum in a case in which the evidence established a substantial change in country conditions. Petitioner testified credibly that opposition forces had beaten him, raped his wife, and burned his house to the ground during the civil war in Sierra Leone. While the court acknowledged the gravity of mistreatment that petitioner suffered, it ruled that he had not presented evidence of long-lasting physical or mental effects of his persecution in support of his claim for humanitarian asylum.

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The court affirmed the denial of humanitarian asylum because the applicant had not presented evidence of long-lasting physical or mental effects of his persecution.

## FOURTH CIRCUIT

■ **Fourth Circuit Holds That District Court Has Exclusive Jurisdiction Over Naturalization Application Once An INA § 336(b), Petition Is Filed**

In ***Etape v. Chertoff***, __F.3d__, 2007 WL 2200286 (4th Cir. August 2, 2007) (*Motz*, Shedd, Hamilton), the Fourth Circuit held that, pursuant to statutory language and legislative history, the proper filing of a petition under INA § 336(b), 8 U.S.C. § 1447 (b), seeking a hearing in district court on a naturalization application provides the court with exclusive jurisdiction over the application. The court concluded that USCIS did not have jurisdiction when it denied the aliens' naturalization applications subsequent to their filing a § 1447(b) petition in district court, and remanded the cases to that court with instructions either to "determine the matter" or to remand to USCIS. The court also directed that its holding be applied retroactively to § 1447(b) petitions "still open on direct review."

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## SIXTH CIRCUIT

■ **IJ Abused His Discretion By Providing Irrational Explanations For Denying Petitioner's Request To Continue Proceedings Until He Could Obtain Evidence Of An Oral Divorce From Jordan**

In ***Badwan v. Gonzales***, __F.3d__, 2007 WL 2049004 (6th Cir. July 18, 2007) (Norris, Gilman, *Sutton*), the court held that an IJ abused his discretion by denying a motion to continue. Petitioner had sought additional time to obtain documents from Jordan evidencing his divorce for the purposes of adjustment of status based on marriage to an LPR. The court held that the IJ's stated reasons for denying the continuance - that he needed to expedite the proceedings and that petitioner should have included the documents in his original adjustment of status application - lacked a rational explanation.

Petitioner, a citizen of Jordan, was in the U.S. as a non-immigrant worker. When his wife applied for adjustment of status based on a visa petition filed by her father, petitioner also sought to adjust status as a beneficiary to his wife's application. While his wife's application was granted, DHS denied petitioner's application because he failed to submit sufficient evidence that he divorced his first wife 23 years prior. Specifically, petitioner failed to obtain a proper translation of a Jordanian divorce document issued after petitioner ended his previous marriage via an oral declaration of divorce pursuant to Islamic law. In removal proceedings, petitioner again sought adjustment of status but still had not obtained the documents requested by DHS. When DHS pointed this out, petitioner asked the IJ for a continuance to obtain the documents. The IJ denied the motion because he found that petitioner failed to submit a properly documented application for adjustment of status and because the IJ felt compelled to handle the case "as expeditiously as possible." The BIA affirmed and denied a subsequent motion to reopen.

The court reversed, finding that the IJ abused his discretion in denying the continuance and that the IJ's stated reasons for the denial were irrational. First, the court found that because continuances are sought in order to obtain evidence that had previously been lacking, it did not make sense to deny the continuance on the ground that petitioner's application was lacking the proper evidence.

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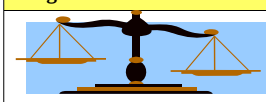

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"Why else, indeed, would an applicant seek a continuance but to obtain additional time to supply the necessary evidence and argument in support of his application?" the court rhetorically asked. Further, the court found nothing in the record cast doubt on petitioner's ability to obtain the evidence, especially in light of the fact that petitioner did eventually submit the evidence with his motion to reopen. The court also noted that the evidence in question was unlike a labor certification or visa petition in that it was not "out of his control." The court then rejected the IJ's second explanation for judicial efficiency, stating that this was merely petitioner's first request for a continuance and that the case couldn't have gone forward anyway because DHS had not yet completed its background check. Finally, the court rejected the government's argument that petitioner failed to exhaust the issue before the BIA finding that the government's brief acknowledged just the opposite.

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## SEVENTH CIRCUIT

**■ Petitioner's Alleged Status As "Stateless" Irrelevant To The Decision To Grant Or Deny Asylum**

In ***Fedosseeva v. Gonzales***, __F.3d__, 2007 WL 1932479 (7th Cir. July 5, 2007) (Coffey, *Flaum*, Williams), the court held that petitioner's claim she was stateless was not a grounds for asylum, and affirmed an IJ's adverse credibility determination and finding that the events described did not amount to persecution.

Petitioner, prior to entering the U.S., was a resident of Latvia. However, she was not born in Latvia, but had Soviet citizenship based on her birth in Russia. After the Soviet Union collapsed and Latvia gained independence, petitioner did not seek Latvian citizenship or reapply for Russian citizenship. Instead, she came to the United States and sought asylum on the claim that the Latvian government had persecuted her as an ethnic Russian. An IJ denied her asylum, finding petitioner's testimony inconsistent with her prior written statements and thus not credible. The IJ also found that the events described only amounted to harassment. Furthermore, the IJ found that even if the events had risen to the level of persecution, the events had been perpetrated by private parties or were the result of punishment for civil disobedience. Finally, the IJ found that the most recent country reports in Latvia indicated an improvement in treatment of ethnic Russians. The IJ then ordered her removed to Latvia or, in the alternative, Russia. The BIA affirmed.

> "Questions about whether the designated county will accept the alien are to be dealt with by the Attorney General after, and independent of, the asylum case."

Before the Seventh Circuit petitioner argued that the IJ erred in denying her asylum claim due to the fact she was stateless; because she could not return to Russia as she never became a Russian citizen after the collapse of the Soviet Union, and that she could no longer return to Latvia because she no longer had a "residence permit." The court rejected her argument. The court held that petitioner's argument was "irrelevant because, even assuming that she is stateless, that fact is not a ground for asylum" and that "even a stateless person must show persecution." The court then stated that "[q]uestions about whether the designated county will accept the alien are to be dealt with by the Attorney General after, and independent of, the asylum case." "Nothing in the record, and nothing in the legal authorities cited in her brief, supports her assertion that she must return to Latvia to apply for Russian citizenship" or that Russia would refuse her citizenship, said the court. Turning to the merits of petitioner's asylum claim, the court upheld the IJ's findings as to credibility, lack of persecution, and improved country conditions.

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**■ IJ Erred By Considering Petitioner's Accounts Of Government Abuse in Cameroon As Separate, Isolated Incidents, Rather Than Considering The Incidents As A Whole**

In ***Tchemkou v. Gonzales***, __F.3d__, 2007 WL 2177968 (7th Cir. July 31, 2007) (*Ripple*, Rovner, Sykes), the court reversed a finding by the IJ and BIA that a Cameroonian petitioner had not met her burden of proof for asylum, withholding of removal, and protection under CAT.

Petitioner claimed she was persecuted by the Cameroonian government for her political opinion. She described three incidents where a government official beat or detained her for protesting various different government policies. First, she testified that in 1993 the police beat her for participating in a school protest and detained her for three days without food, water, or sanitation facilities. Second, she testified that in 1998 the police came to her home in the middle of the night, dragged her to a wooded area, beat her and cut her ear, due to her involvement in what the government perceived as an anti-establishment department of her school. Third, she stated that she was again beat by police in 2001 for participating in a protest following the arrest of several citizens. Petitioner then fled to the U.S. while the police in Cameroon continued to issue summons for her arrest. While the IJ found her credible, he denied relief

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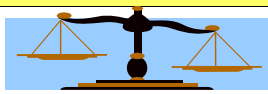

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because "[t]he incidents, although united by detention and beating in two of three cases, and by government security forces either administering the beating or arresting the respondent or pursuing her, do share that theme. However, otherwise they're very different [and] involve different places [and] different activities." The BIA affirmed.

The Seventh Circuit reversed. The court held that the IJ had failed to consider the evidence provided by petitioner as a whole and "what kind of patterns they composed," and instead "employ[ed] the erroneous technique of addressing the severity of each event in isolation." The court found that the events described, if taken as a whole, "mirror the types of abuse that we previously have held to constitute persecution." The court rejected the government's argument that the incidents did not constitute persecution because the police didn't specifically target petitioner and that petitioner only suffered experiences common to all Cameroon citizens. The court stated that the petitioner was "singled out for abuse because of her political opposition," and that she "did not suffer the general deprivations and danger of individuals living in a war-ridden nation." The court also rejected the government's additional argument that petitioner was able to live without incident in the times between the incidents, finding that the only times petitioner did not experience abuse were the result of her going into hiding. Finally, the court found that petitioner had a reasonable fear of future persecution because summons from the Cameroonian police continued to issue even after her departure for the U.S.

**The court held that the IJ erred in assessing the persecution claim because he "employ[ed] the erroneous technique of addressing the severity of each event in isolation."**

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## SEVENTH CIRCUIT

■ **Seventh Circuit Holds That The Five-Year Limitations Period For The Crime Of Being Found In The U.S. After Deportation Does Not Begin To Run Until Actual Discovery Of The Alien's Illegal Presence**

In *United States v. Are*, __F.3d__, 2007 WL 2265118 (7th Cir. Aug. 9, 2007) (Kanne, Evans, *Sykes*), the court held that the 5 year statute of limitations for non-capital offenses found in 18 U.S.C. § 3282(a) does not start to run for the crime of illegal reentry under 8 U.S.C. § 1326(a)(2) until DHS has actual knowledge of an alien's illegal reentry. The court declined to adopt a constructive knowledge interpretation of 8 U.S.C. § 1326(a)(2).

Petitioner, a native and citizen of Nigeria, had previously been deported in 1996 for attempting to smuggle heroin into the U.S. Then, in May of 1998, he attempted to reenter the U.S. but was discovered and immediately returned to Nigeria. In September of 1998, petitioner succeeded in reentering the U.S. and remained undetected by immigration authorities until sometime between late 2003 and 2004, when an arrest by the Chicago police resulted in fingerprinting revealing petitioner's identity. In 2005, he was again arrested and this time charged with the immigration offense of being an illegal alien that is "at any time found in" the U.S. after a prior deportation. However, a district court dismissed the charge as barred by the 5 year statute of limitations. In so holding, the district court calculated the start of the statute of limitations from 1998, when the government "should have found" the petitioner. The district court read a constructive knowledge interpretation into 8 U.S.C. § 1326(a)(2), and then reasoned that the government could have discovered petitioner's illegal presence back in 1998 because the government had opened a file on petitioner after his first attempt at illegal reentry and had received a tip from an informant that petitioner was in Chicago. The government appealed, arguing that only actual - not constructive - knowledge by immigration authorities starts the running of the statute of limitations.

The Seventh Circuit agreed with the government. The court held that the "'found in' variation of the § 1326(a)(2) crime is a continuing offense; the statute of limitations generally does not begin to run for continuing offenses until the illegal conduct is terminated." Thus, the court said, "the date on which the immigration agency 'should have discovered' the alien is simply irrelevant" and that a constructive knowledge interpretation "is inconsistent with the straightforward text and obvious purpose of the statute." The court then held that whether measuring from the date when petitioner's fingerprints revealed his identity, or from the date of arrest by immigration authorities, the charge was timely.

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## EIGHTH CIRCUIT

■ **Eighth Circuit Finds That Petitioner's Claim Of Persecution By Guatemalan Guerillas Lacked The Required Nexus**

In *Bartolo-Diego v. Gonzales*, __F.3d__, 2007 WL 1827479 (8th Cir. June 27, 2007) (*Wollman*, Gibson, Murphy), the court held that there was an insufficient nexus between petitioner's evidence of past persecution and the protected classes set forth in INA § 241(b), 8 U.S.C. § 1231(b), to warrant with-

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holding of removal. The court also ruled that political conditions in Guatemala had changed so as to render petitioner's fear of future persecution objectively unreasonable. Finally, the court held that petitioner did not qualify for CAT protection because the guerillas he feared were not acting at the behest of, or with the acquiescence of, the Guatemalan government.

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■ **Eighth Circuit Affirms BIA's Finding That Petitioner Did Not Experience Persecution In Indonesia On Account Of His Albinism**

In ***Makatengkeng v. Gonzales***, __F.3d__, 2007 WL 2214486 (8th Cir. August 3, 2007) (Loken, *Melloy,* Schiltz), the court affirmed the BIA's denial of petitioner's asylum application on the grounds that petitioner failed to show the threats and discrimination he encountered on account of his albinism constituted persecution.

Petitioner, a citizen of Indonesia, sought asylum claiming that he was persecuted on account of his membership in a particular social group, albinos, and his Christian faith. To support his application, he testified that everywhere he went in Indonesia people threw rocks at him and called him names because of his albinism. He further testified that discrimination due to his albinism made it very difficult for him to gain employment and, as a result, he had to support his family by repairing electronics out of his home. As for persecutory acts resulting from his Christian faith, petitioner merely claimed that he had a cousin that was killed in another part of Indonesia.

An IJ denied the asylum application. The IJ quickly dismissed the religious prosecution claim, and instead focused "the main issue" of petitioner's albinism. First, the IJ found that albinos were a particular social group because "albinism is an immutable characteristic." Second, the IJ found that the incidents described amounted to only harassment. Petitioner appealed to the BIA and quickly filed a motion to reopen attaching evidence that he was at risk for skin cancer in tropical areas. The BIA denied both the appeal and the motion. The BIA found that the evidence of mistreatment did not rise to the level of persecution. Further, the BIA found that the evidence submitted with the motion to reopen was irrelevant to persecution.

> The court was "troubled by the IJ's determination that [petitioner]'s 'medical condition' - his albinism and the medical disabilities that come with it - is a particular social group."

The Eighth Circuit affirmed. While the court was "troubled by the IJ's determination that [petitioner]'s 'medical condition' - his albinism and the medical disabilities that come with it - is a particular social group," it held that petitioner had not experienced persecution in Indonesia on account of albinism. The court found that petitioner had experienced neither threats or injuries rising to the level of persecution nor experienced economic persecution. While petitioner claimed no one would hire him, he had testified that he was able to support his family by repairing electronics out of his home. The court did not expressly adopt the BIA's recent decision in *In re T-Z-*, 24 I&N Dec. 163 (BIA 2007), defining economic persecution as a "total deprivation of livelihood," but noted that petitioner's evidence certainly didn't rise to this standard. As for threats and injuries, the court held that name calling and throwing rocks was mere harassment. The court also noted that petitioner's claim lacked a nexus to government activity as "nothing in the record indicat[ed] that the Indonesian government inflicted the harm" or was unwilling to control those who did harass petitioner. Finally, the court agreed that petitioner's motion to reopen was irrelevant to his claim of persecution.

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■ **Eighth Circuit Affirms Statutory Counterpart Rule For Determining Eligibility For § 212(c) Relief And Expressly Refuses To Adopt The Second Circuit's *Blake v. Carbone***

In ***Vue v. Gonzales***, __F.3d__, 2007 WL 2239286 (8th Cir. August 7, 2007) (Bye, Riley, *Benton*), the court held that petitioner's equal protection rights were not violated by the BIA's refusal to grant reopening in order to pursue relief under former § 212(c). In so holding, the court rejected the Second Circuit's opinion in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

Petitioner, an LPR, was ordered removed for having committed a crime of violence. He then filed two motions to reopen to seek relief under § 212(c). The BIA denied both motions finding petitioner ineligible for the requested relief because a conviction for a crime of violence lacked a comparable ground of inadmissibility under § 212(a), as per the statutory counterpart rule.

Before the Eighth Circuit, petitioner argued that the denial of § 212 (c) relief violated his equal protection rights, and urged the court to adopt the Second Circuit's opinion in *Blake*. However, the court explicitly refused to adopt *Blake* and affirmed the statutory counterpart rule. The court held that because petitioner was not similarly situated to an inadmissible alien eligible for § 212(c) relief - i.e., application of the statutory counterpart rule to a "crime of violence" - there was not an equal protection violation. Therefore, the court held that petitioner was ineligible for § 212(c) relief because his conviction for a crime of violence did not have a comparable

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ground of inadmissibility under § 212 (a).

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## NINTH CIRCUIT

■ **Ninth Circuit Holds That BIA Failed To Address Petitioner's Evidence Of Non-Receipt When Denying Motion To Reissue**

In ***Singh v. Gonzales***, __F.3d__, 2007 WL 2050954 (9th Cir. July 19, 2007) (Kozinski, *Fisher*, Block), the court granted petitioner's request for rehearing because the BIA failed to address petitioner's evidence of non-receipt of the BIA's prior decision and instead issued only a cursory statement of dismissal.

Following the expiration of the 30-day time limit in which to file a PFR of the BIA's dismissal of his appeal, petitioner asked the BIA to reissue its decision on the grounds that neither he nor his attorney received notice of the dismissal. In support of his motion, petitioner submitted affidavits from himself and his counsel testifying as to non-receipt. The BIA refused to reissue the decision, however, and held that the record showed the prior decision was correctly mailed to petitioner's attorney.

The Ninth Circuit reversed. The court stated that while properly mailing a decision creates a presumption of receipt, "we have never held that such a presumption cannot be rebutted by affidavits of non-receipt by both a petitioner and his counsel of record." Because the BIA's decision did not expressly address petitioner's evidence of non-receipt, the court held that a remand was necessary because it "did not know from the BIA's cursory denial of [petitioner]'s motion whether or not it did consider the affidavits, or what process it would have followed assuming the affidavits were sufficient to rebut the presumption of mailing."

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■ **Record Compels Conclusion That Former Soldier Would Face Torture In Armenia**

In ***Muradin v. Gonzales***, __F.3d__, 2007 WL 2080219 (9th Cir. July 23, 2007) (*Bright*, Pregerson, McKeown), the court reversed the BIA's decision to deny petitioner protection under CAT because his credible testimony and the State Department reports on Armenia compelled the conclusion that he would face torture by the Armenian military. The court also remanded petitioner's claim that he had been persecuted on account of membership in a particular social group because the BIA rejected this claim without the IJ having addressed it first.

> The court found that petitioner's credible testimony, coupled with the State Department reports on Armenia, compelled the conclusion that petitioner would face torture as an Armenian military conscript, prisoner, or deserter.

Petitioner claimed that the Armenian military tortured him throughout the course of his mandatory service in the military. He further claimed that he feared the military would continue to torture him if returned to Armenia based on his status as a former serviceman and his mother's membership in an organization supporting the rights of soldiers. An IJ denied asylum, finding petitioner credible but not persecuted on the basis of any of the five statutory grounds. The IJ granted CAT protection, however, based in large part on a State Department report describing the torture of conscripted soldiers in Armenia. The BIA adopted and affirmed the IJ's finding as to asylum, but reversed the grant of CAT protection because, while there was evidence of past torture, nothing in the record proved that petitioner would continue to face torture by the Armenian military as he was discharged.

The Ninth Circuit reversed the BIA's denial of CAT protection. The court found that petitioner's credible testimony, coupled with the State Department reports on Armenia, compelled the conclusion that petitioner would face torture as an Armenian military conscript, prisoner, or deserter. The court found that petitioner's testimony recounting various beatings he received while in the military and the Report's confirmation that military conscripts are physically abused - sometimes fatally - constituted "substantial evidence support[ing] eligibility" for CAT relief. The court also remanded petitioner's asylum claim for a determination of whether petitioner's status as a former soldier constituted membership in a particular social group because the IJ only addressed petitioner's imputed political opinion claim.

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■ **Ninth Circuit Holds That California's Prosecution Of Petitioner As An Adult Precludes Treating The Resulting Conviction As A Juvenile Adjudication**

In *Vargas-Hernandez v. Gonzales*, __F.3d __, 2007 WL 2215796 (9th Cir. August 3, 2007) (Hall, *Callahan*, Robart), the Ninth Circuit held that because California prosecuted petitioner as an adult, his conviction could not qualify for treatment as a juvenile adjudication. The court also held that because discretionary grants of adjustment of status and relief under former § 212(c) of the INA involve the same equitable balancing, the petitioner could not show prejudice from the denial by the BIA of a remand to pursue adjustment of status because the BIA upheld the denial of § 212(c) relief. Finally, the court held that, although

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the IJ and the petitioner's counsel exchanged words, the record showed that her decision was not based on improper bias.

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■ **Ninth Circuit Holds That Immigration Judge Erred In Designating Country Of Removal Where Petitioner's Citizenship In The Country Of Removal Was In Question**

In ***Hadera v. Gonzales,*** __F.3d__, 2007 WL 2044249 (9th Cir. July 18, 2007) (Pregerson, *Ferguson*, Ikuta), the Ninth Circuit held that the IJ failed to abide by *Jama v. ICE*, 543 U.S. 335 (2005), by designating Ethiopia as the country of removal. The court found substantial evidence supported the IJ's determination that it was unlikely Ethiopia would consider petitioner an Ethiopian citizen. However, the IJ erred by designating Ethiopia as the country of removal because, where petitioner's citizenship in the country of removal is in question, the IJ should designate a country under Step 3 of *Jama* rather than presume citizenship without a factual finding.

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■ **Ninth Circuit Holds That IJ Committed Legal Error By Finding That Alien's Time As A Prison Guard Constituted Participation In Acts Of Persecution**

In ***Im v. Gonzales***, __F.3d__, 2007 WL 2296778 (9th Cir. Aug. 13, 2007) (*Fletcher*, Siler, Hawkins), the court held that the IJ committed legal error by finding petitioner ineligible for asylum and withholding of removal due to participation in acts of persecution.

Petitioner, a native and citizen of Cambodia, claimed he was persecuted for his involvement with the Sam Raimsy political party. However, because petitioner had testified that he had previously been a guard at a prison in Phnom Penh that routinely tortured its inmates, an IJ found that petitioner was ineligible for asylum and withholding of removal as an alien who had participated in acts of persecution. Specifically, petitioner testified that in addition to his duties of feeding, bathing, and overseeing the prisoners' fitness and hygiene, he lead prisoners to and from interrogation rooms where they were tortured - though he never actually witnessed the torture while it was happening. Consequently, the IJ found that petitioner's role as a prison guard rendered him a former persecutor. The BIA affirmed.

The Ninth Circuit reversed. The court held that petitioner's job leading prisoners back and forth from torture sessions was "hardly integral to the persecution of prisoners." The court explained that under *Fedorenko v. United States*, 449 U.S. 490 (1981), and its own precedent *Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006), "the touchstone of the 'assistance' analysis [] is the degree to which petitioner's conduct was central, or integral, to the relevant persecutory acts." Citing *Fedorenko*, the court said that "[i]n the same way that cutting the hair of female concentration camp inmates before their execution was a trivial, albeit ghastly, administrative task that necessarily preceded the persecutory act, so too were [petitioner's] acts of opening an assigned cell door prior to interrogation. While this action necessarily preceded the interrogation, it was not 'integral' to them." The court rationalized that "[i]f [petitioner] was not there, the same individuals would have been interrogated on the same days by the same interrogators." The court then remanded the case to an IJ for a determination of whether petitioner merited asylum as a matter of discretion.

The court held that petitioner's job leading prisoners back and forth from torture sessions was "hardly integral to the persecution of prisoners."

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**IIRIRA's Repeal Of Suspension Of Deportation Has An Impermissibly Retroactive Effect As Applied To Applicant For Naturalization**

In ***De Anderson v. Gonzales***, __F.3d__, 2007 WL 2264698 (9th Cir. Aug 9, 2007) (Graber, *Fletcher,* Tallman), the court held that IIRIRA's repeal of suspension of deportation had an impermissibly retroactive effect as to the petitioner because she had an objectively reasonable reliance on the existence of such relief at the time she filed her petition for naturalization.

Petitioner, an LPR, had been convicted of manslaughter in 1981 and sent to prison. She was released from prison in 1985. Petitioner applied for naturalization in 1995, disclosing her criminal record. By then, she had accrued the requisite 10 years of good moral character necessary for establishing prima facie eligibility for suspension of deportation. In 2005, the agency commenced removal proceedings against petitioner due to her manslaughter conviction and consequently denied her naturalization application under 8 U.S.C. § 1429, which states that no application for naturalization shall be considered if removal proceedings are pending. Petitioner then asked an IJ to terminate the proceedings under an exception to that rule found in 8 C.F.R. § 1239.2(f), which allows a hearing on a naturalization hearing despite removal proceedings when, for one, the alien has established prima facie eligibility for naturalization. The IJ denied termination, however, because petitioner could not show that she was prima facie eligible for naturalization, as interpreted by the BIA in *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975). The IJ held that under *Matter of Cruz,* petitioner could only show

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prima facie eligibility for naturalization through an affirmative communication from the agency or a declaration by a federal district court that she would be eligible for naturalization. Because petitioner did not have such a communication, the IJ denied termination. The IJ also denied petitioner's request for suspension of deportation because IIRIRA had repealed that form of relief prior to the start of her removal proceedings. The BIA affirmed.

Before the Ninth Circuit, petitioner argued that the language of 8 C.F.R. § 1239.2(f) does not require a communication from the agency affirming her eligibility for naturalization, and that IIRIRA's repeal of suspension of deportation was impermissibly retroactive as applied to her. The court rejected the first argument, but accepted the latter. The court held that the BIA's interpretation of 8 C.F.R. § 1239.2(f) as requiring an affirmative communication of naturalization eligibility was reasonable. First, the court noted that the BIA had recently affirmed *Matter of Cruz* in *In re Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007), and properly found that because neither an IJ nor the Board have jurisdiction to determine an alien's eligibility for naturalization, it is appropriate to require affirmation from DHS. Second, the court found the BIA's interpretation reasonable because if "the DHS has already declined to state that an alien is prima facie eligible for naturalization, terminating the removal proceedings [] is likely to produce unwarranted delay." On petitioner's latter argument that IIRIRA's repeal of suspension of deportation had an impermissible retroactive effect because petitioner had relied on having that form of relief available to her when she applied for naturalization, the court first clarified its prior case-law on what type of reliance *Landgraf* analysis requires. The court held that *Landgraf*'s impermissible retroactive analysis requires only objectively reasonable reliance on the form of relief repealed, and not a specific factual showing as the court had previously suggested. Next, the court held that petitioner had demonstrated objective reasonable reliance on the continued existence of suspension of deportation because it was reasonable to "assume that a lawful permanent resident applying for naturalization is, like an alien engaged in plea bargaining, 'acutely aware of the immigration consequences' of her action. [citing *St. Cyr*]. In petitioner's case, those immigration consequences included placing a risk the life she had established as a lawful permanent resident" not by bringing her "criminal convictions to the INS's attention by applying for naturalization." The court found further support for objective reasonable reliance as petitioner waited an additional five years after becoming eligible for citizenship to also wait for eligibility for suspension of deportation. In so holding, the court noted that unlike other cases where the court had not found an impermissibly retroactive application of IIRIRA, petitioner had an objectively reasonable reliance, no "fair notice" of the change in law, and "unlike aliens who were present illegally" had more of a settled expectation of relief.

The court held that *Landgraf*'s impermissible retroactive analysis requires only objectively reasonable reliance on the form of relief repealed, and not a specific factual showing as the court had previously suggested.

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■ **Ninth Circuit Holds That It Has Jurisdiction To Review Whether A Criminal Alien Acted With Due Diligence In Pursing His Ineffective Assistance Of Counsel Claim**

In ***Ghahremani v. Gonzales***, __F.3d__, 2007 WL 2332069 (9th Cir. Aug 17, 2007) (Pregerson, Silverman, *Tallman*), the court held that the BIA's determination that petitioner had not acted with due diligence in pursing his ineffective assistance of counsel claim was a mixed question of law and fact reviewable under the court's decision in *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007).

Petitioner, an LPR, was placed in removal proceedings for having committed an aggravated felony and two crimes involving moral turpitude. An IJ found petitioner removable and ultimately declined to grant § 212(c) relief as a matter of discretion. Petitioner then filed a motion to reconsider challenging the denial of § 212(c) relief and then a motion to reopen claiming ineffective assistance of counsel. Meanwhile, petitioner had gone through four different attorneys and had fourteen hearings over the course of five years (the reader may also note that the docket now reflects a new, fifth attorney as well). The BIA denied both motions. Specifically, as to the motion to reopen, the BIA rejected petitioner's claim that his first attorney was ineffective because petitioner had not shown due diligence. The BIA reasoned that petitioner had not been diligently pursuing his claim if he had gone through three other attorneys before claiming ineffective assistance of the first attorney.

Petitioner challenged the BIA's denial of his motion to reopen in the Ninth Circuit. The court began by addressing the government's argument that the court lacked jurisdiction to review the BIA's denial of the motion to reopen under INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), because petitioner was a criminal alien. The court disagreed. The court found that under *Ramadan*, the court retained jurisdiction under INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), to review questions of law, and the application of law to undisputed facts - i.e., mixed questions of law and fact. The court noted opinions

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of the First and Seventh Circuit holding to the contrary, but reasoned that because those courts had made their rulings prior to, and without the "benefit of our holding in *Ramadan*," those cases were inapplicable. Next, the court found that because the BIA had never disputed petitioner's testimony that he did not discover his first attorney's ineffective assistance until his fourth attorney informed him of it, the court held petitioner had acted with due diligence in pursing his claim and reversed the BIA.

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## ELEVENTH CIRCUIT

■ **Eleventh Circuit Finds That Attack On Asylum applicant Was On Account Of Her Political Opinion**

In ***Lopez v. U.S. Attorney General***, 490 F.3d 1312 (11th Cir. July 6, 2007) (*Carnes*, Wilson, Stagg), the court held that petitioner's credible testimony compelled the conclusion that she was attacked on account of her political opinion rather than having experienced a random criminal act. The court noted that the attack occurred after petitioner had been warned to stop her community activities on behalf of a political party, had just left a community event, and had nothing stolen from her during the attack. The court remanded the case to determine whether the harm suffered rose to the level of persecution and whether the petitioner established that the Colombian government would be unable or unwilling to protect her.

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## Discretionary denial of asylum reversed

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because of his father's political activities. Petitioner testified that he fled Iraq in 2000 to Turkey, where he lived and worked for one year before traveling to Greece. Petitioner then testified that he left Turkey because he did not feel safe there, only to then leave Greece for the same reason. After Greece, petitioner stated that he went to Mexico and then sought asylum by presenting himself at the U.S. border. All the while, petitioner had used various fake documents to procure his travel.

**"It would be anomalous for an asylum seeker's means of entry to render him ineligible for a favorable exercise of discretion."**

The IJ found that petitioner had testified credibly and was eligible for asylum. However, the IJ denied asylum as a matter of discretion because he found that while petitioner had shown positive factors for granting asylum - such as the fact that he did not attempt to illegally enter the U.S. and that he had family ties to the U.S. - negative factors outweighed the granting of asylum. Specifically, the IJ found that petitioner's use of multiple false documents in fleeing Iraq and the fact that he never sought asylum in either the U.S. consulates in Turkey, Greece, or Mexico while in those countries, weighed against granting asylum. The IJ also found it significant that two of petitioner's U.S. citizen sisters lived in Iraq as well as his LPR parents. The BIA affirmed without opinion.

The Ninth Circuit found that the IJ abused his discretion by arbitrarily weighing the facts. The IJ "appear[ed] to have misunderstood some of the underlying facts" and gave "little weight" to petitioner's fear of persecution, said the court. First, the court explained that petitioner's "use of false documents in his fleeing Iraq is not a proper reason for denying asylum. . . . We have recognized that, to secure entry to the United States and to escape their persecutors, genuine refugees may lie to immigration officials and use false documentation." "[I]t would be anomalous," the court said, "for an asylum seeker's means of entry to render him ineligible for a favorable exercise of discretion."

Second, the court explained that using the petitioner's failure to apply for asylum in either Turkey, Greece, or Mexico as an adverse factor "ignores the complexity of balancing the discretionary factors." "Additionally," the court said, "circumvention of [asylum] procedures is insufficient to require the unusual showing of countervailing equities." The court noted that "petitioner has no ties to Turkey, Greece, or Mexico" and was "uncertain about their friendliness to Iraqis." Finally, the court stated that the IJ misconstrued petitioner's family ties to the U.S. as while his parents are now in Iraq, petitioner testified that they plan to return to the U.S. sometime in the future.

Judge Fernandez dissented. He would have found that "on the facts of this case" the BIA did not abuse its discretion. "As I see it, the majority's decision to the contrary is another example of our picking apart the opinions of the agency, while purporting to apply an abuse of discretion standard," he said. "It is just another chapter in our divide-and-conquer strategy . . . . That strategy can make it seem that we are deferring when we are not actually doing so. It is not appropriate."
Judge Fernandez also noted that unlike the asylum applicant in *Matter of Pula* who had been denied both asylum and withholding, the petitioner here was granted withholding and thus would not be returned to Iraq his country of persecution. "We should not vastly expand our review by ignoring that crucial difference," he noted.

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# Inside OIL

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an aircraft technician for a U.S. Customs Service's drug interdiction fleet, and then an Immigration Inspector with the former INS.

Among others positions held, he was Associate Director of the University of Puerto Rico Law Review, Law Clerk at the Supreme Court of Puerto Rico, and performed several legal counseling duties for the executive branch of the government of Puerto Rico.

**Elizabeth Greczek** is a graduate of James Madison University and Cleveland-Marshal College of Law. Before coming to OIL she worked for the National Disability Rights Network, the D.C. Protection & Advocacy Program and private practice focusing on special education and disability rights law. In addition, she is an adjunct professor at American University Washington College of Law.

**Jaesa Mclin** is a graduate of Millsaps College in Jackson, MS where she earned a double major in Political Science and Spanish. She attended law school at the University of Mis-

sissippi and has just completed an LLM in International Law at American University Washington College of Law. Prior to joining OIL, Jaesa was a law fellow at the Center for International Environmental Law. She will be working remotely in Oxford, MS.

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# OIL SCHEDULED TO MOVE TO LIBERTY SQUARE

The Office of Immigration Litigation is scheduled to move from its present location in November. OIL will thereafter be located at 450 Fifth Street, NW, in the Liberty Square Building. The move is scheduled to take place over three weekends, starting November 9, and continuing on the weekends November 16 and 30.

OIL has been in its present location (National Place) since 1994, but also currently occupies space in the National Press Building and on New York Avenue in downtown Washington, DC. Before moving in 1994, OIL was located in the Patrick Henry Building, at 6th and D Streets, NW. Liberty Square is located directly across 6th street from the Patrick Henry Building, and was formerly occupied by the Securities and Exchange Commission.

# INSIDE OIL

Welcome onboard to the following attorneys who joined OIL in July:

**Julie Pfluger** is a graduate of Illinois State University, received a master degree in social work from the University of Illinois Chicago, and a JD from the University of Michigan. After law school she clerked in the Eastern District of Michigan. She joined DOJ through the honor's program as a judicial law clerk in the Miami Immigration Court for one year, and then worked at the office of the Chief Immigration Judge for a year before joining OIL.

**Carmel Morgan** received a JD from the University of Washington School of Law, an MA in Asian Studies (Japan) from the University of Pittsburgh, and BAs in Psychology and Asian Studies from the University of Tennessee, Knoxville. Most recently, she served for as the senior judicial law clerk for the Honorable Janice M. Holder of the Tennessee Supreme Court and worked for a law firm in Memphis, Tennessee doing general civil litigation, including assisting artists from abroad in obtaining O-1B visas.

**John Inkeles** graduated from Yale University in 1997 and received his JD from Cornell Law School in 2000. He subsequently clerked for the Hon. Mary Catherine Cuff in the New Jersey Superior Court -- Appellate Division. He spent three years as a litigation associate at Lowenstein Sandler PC in Roseland, NJ and most recently was a litigation associate at Brown Rudnick Berlack Israels LLP in New York City.

**Carlos Ruiz** has a degree in Aviation Maintenance Science from Embry-Riddle Aeronautical University; a B.B.A. from the University of Puerto Rico; a J.D., magna cum laude, from the University of Puerto Rico School of Law, and a Master of Laws, with a Certificate on National Security Law, from Georgetown University Law Center. Prior to entering law school Carlos was

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**L to R: Carlos Ruiz, Elizabeth Greczek, Carmel Morgan, Julie Pfluger, and John Inkeles**

The ***Immigration Litigation Bulletin*** is a monthly publication of the Office of Immigration Litigation, Civil Division, U.S. Department of Justice. This publication is intended to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com.

Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

If you have any suggestions, or would like to submit a short article, please contact Francesco Isgrò at 202-616-4877 or at francesco.isgro@usdoj.gov.

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