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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Dismissal of *Suntharalinkam* following en banc argument draws sharp dissent

On October 19, 2007, the Ninth Circuit, sitting *en banc*, dismissed ***Suntharalinkam v. Keisler***, __F.3d__, 2007 WL 3171437 (9th Cir. October 31, 2007), a case where the government challenged a Ninth Circuit's panel reversal of an adverse credibility determination.

"We owe it to the judicial process, and to the litigants who appear before us in good faith, to preserve the integrity of the system by denying such an obvious effort at subverting the orderly development of the law."

Suntharalinkam was no ordinary immigration case from its beginning in late October 2001, when petitioner was apprehended together with twenty-two Sri Lankan nationals who sought to enter with fraudulent documents into the United States from Mexico, to its conclusion when, a month after hearing en banc argument, petitioner withdrew his petition for review. In between, an immigration judge had found petitioner not credible and a divided panel of the Ninth Circuit reviewing that decision had concluded that the IJ had "contrived the adverse credibility finding" to deny asylum out of concerns that petitioner had terrorist ties. 458 F.3d 1034 (9th Cir. 2006) (*vacated*).

The *en banc* decision granting petitioner's motion, and thus dismissing the case, provoked a vigorous dissent by Judge Kozinski, who, joined by three judges, was alarmed by the apparent "manipulation" of the judicial process "by parties unhappy with the questions at oral argument and fearful of the result they believe the court is going to reach." "We owe it to the judicial process, and to the litigants who appear before us in good faith, to preserve the integrity of the system by denying such an obvious effort at subverting the orderly development of the law through artful dismissal of the petition long past the eleventh hour," he added.

The dispute in the case involved the credibility of Suntharalinkam who sought protection under our asylum laws, claiming that the Sri Lankan government had incorrectly persecuted him for the mistaken belief that he was a member of the Tamil Tigers, an organization designated as a foreign terrorist organiza-

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OIL's Last Tango at National Place

On October 26, 2007, OIL hosted "The Last Tango at National Place" to celebrate its upcoming move to the Liberty Square Building. The event, a progressive party throughout each of OIL's buildings and suites, ran the course of the entire day.

To start the day off, the New York Avenue Building held a "Start Spreading the News, I'm Leaving Today Breakfast," followed by the "Welcome to the Jungle Brunch" in the National Press Building. The festivities then made their way back to the National Place Building, when

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Ninth Circuit *en banc* avoids addressing credibility rules

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tion under U.S. laws - the Liberation Tigers of Tamil Eelan (LTTE). An immigration judge was not convinced by petitioner's allegations of persecution – pointing to inconsistencies in his testimony and discrepancies between the testimony and his asylum application and supporting documentation. Among the documents submitted by the DHS attorney was the stipulated admission of a memorandum from a special agent from the Joint Terrorism Task Force (JTFF). That document indicated that petitioner and the 22 other detained Sri Lankans, had all sought to enter the United States using fraudulent documents and that they had all made "virtually the same statements in their asylum applications." He also determined that after leaving Sri Lanka, the group had transited through Bangkok, Thailand, South Africa, Brazil, and Mexico and not through Jordan where, they had originally claimed they boarded a ship to Mexico. He also reported that the Royal Canadian Mounted Police had advised him that the 23 Sri Lankans bound for Canada were controlled by a smuggling organization controlled by the LTTE and based in Toronto. Following the hearing the IJ did not find petitioner credible and identified "a tapestry of inconsistency that simply strains credulity to the breaking point." The denial of asylum, withholding, and CAT was summarily affirmed by the BIA.

Subsequently, a divided panel of the Ninth Circuit reversed the adverse credibility finding and speculated that the IJ had been "apparently convinced by the government's hypothesis" and that the denial of asylum "veiled his concerns about Suntharalinkam's terrorist ties, denying the application for relief based on a contrived adverse credibility finding." The panel then dissected at least eight of the IJ's findings and held that none supported the adverse credibility determination. It further found that because the "inconsistencies" were not "significant," "the totality of the purported inconsistencies [did] not add up to a sufficient basis for an adverse credibility finding." Finally, the panel also found that the IJ erred to the extent that he had relied on the testimony and report offered by the JTFF special agent noting that his conclusions were based on "speculations and conjectures." In a dissenting opinion, Judge Rawlinson, after finding the discrepancies adequate to sustain the adverse credibility finding, concluded that "under the deferential lens we must don . . . I simply cannot agree that we are compelled to find Suntharalinkam credible."

Judge Kozinski's dissent raises serious questions about the manipulation of the judicial system by parties who make strategic last-minute calls to avoid a possible adverse ruling.

On March 7, 2007, the Ninth Circuit granted the government's petition for rehearing en banc and set argument for June 18, 2007. In its supplemental brief, the government argued inter alia, that the Ninth Circuit had "created rules for reviewing adverse credibility determinations that depart from basic principles of administrative law and evidence, that exceed the standard of review specified by Congress, and that embody policy judgments that are not the court's prerogative to make. This case presents an opportunity for this Court to reexamine those rules."

However, on July 12, 2007, almost a month after the case had been argued, petitioner's counsel filed a nine-line motion to withdraw the petition for review noting that petitioner was in Canada seeking asylum – information that had been previously before the original Ninth Circuit panel. On October 18, the en banc court dismissed the petition – an amended decision issued on October 31, 2008. In his dissenting opinion, Judge Kozinski noted among other facts, that following the oral argument, the court had voted on the outcome of the case "and two drafts of an opinion were circulated, which a majority of the panel commented on." He further noted that when an en banc panel is deliberating "something like 100 people" within the Ninth Circuit will know the outcome of the decision shortly after the conference. Judge Kozinski also was critical of the fact that petitioner's motion to dismiss was "expressly based on questions asked at oral argument" by "a judge who is generally favorably disposed to immigration petitioners." He added, "the questions could reasonably be understood as suggesting that nothing good would likely come to petitioners or others similarly situated, if petitioner pressed on with his petition for review." As observed by one legal blogger, "without reading between too many lines, it looks like the en banc panel was poised to issue a significant ruling that would have given greater deference across the board to immigration judges." However, petitioner's attorney and his *amici* read "the tea-leaves or worse yet were tipped off to the outcome of the decision" and dropped the petition.

Judge Kozinski's dissent raises serious questions about the manipulation of the judicial system by parties who make strategic last-minute calls to avoid a possible adverse ruling, especially after the court has invested, as it did in this case, significant time and resources to resolve an issue that has so far avoided en banc review but which the various panel of the court confront regularly.

By Francesco Isgro, OIL

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Matter of R-D– and the problematics of legal fiction

On July 3, 2007, the Board of Immigration Appeals issued a precedent decision relating to when an alien returning to the United States from abroad would be deemed an "arriving alien" under the INA. *See Matter of R-D-*, 24 I&N Dec. 221 (BIA 2007). In that case the Board held that an alien who was returning to the U.S. from Canada, where she had been present and permitted to remain only for the purpose of applying for asylum, was an "arriving" alien within the meaning of the INA. This ostensibly permits the alien to apply for asylum in the United States.

The practical implications of this decision are clear. First, aliens may be able to take two bites from the proverbial apple, applying for asylum in Canada and the U.S. Second, the one-year time bar for the filing of asylum applications may be circumvented by a cross-border northern trek, so long as the purpose of that journey was to apply for asylum. The legal justification for the decision, and its impact on the bilateral agreement between the United States and Canada relating to asylum claims, is less certain. See Agreement for Co-operation in the Examination of Refugee Status Claims from Nationals of Third Countries, *available at* 2004 WL 3269854 ("STCA" or "Agreement"); Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69480 (Nov. 29, 2004).

"Entry" as a Term of Art

U.S. immigration laws have always embodied the legal fiction that, even if one is present in the country and subject to the jurisdiction thereof, they might not necessarily have effectuated an "entry" in the legal sense. *See Kaplan v. Tod*, 267 U.S. 228 (1925). The flip-side of this fictitious coin is the question of when one can be said to have made a legal departure from the country. To make a subsequent entry, one must have departed, and if one departs, they must make an entry to return. It is legal semantics that makes this situation complex.

In 1955 the Board was presented with the question of what constitutes a legal entry for purposes of section 101(a)(13) of the Act. A lawful permanent resident of the U.S. departed from the country on March 6, 1955 for Europe. In his possession, and *in lieu* of a passport, he had a reentry permit and an affidavit. While sailing across the Atlantic, and presumably passing the time on deck, these documents were torn from his hands by the wind. When the vessel arrived at Hamburg, he was not permitted to depart, as he had no valid travel documents. He was detained at all subsequent foreign ports, and was able to depart the ship only when it returned to New York on March 29. Unfortunately, this departure was a direct transfer from the ship to the U.S. Marine Hospital on Staten Island where the alien was deemed a mental defective, being afflicted with schizophrenia. He was deemed "excludable" under former section 212(a)(4) of the Act, as an alien afflicted with a mental disorder. The Board succinctly stated the parameters of its inquiry: "In order to sustain a finding of inadmissibility based upon the certification [of mental defect], it must first be found that the applicant's arrival at the port of New York . . . under the circumstances in the case constitutes an entry." *Matter of T-*, 6 I&N Dec. at 639.

Under *Matter of R-D-*, aliens may be able to take two bites from the proverbial apple, applying for asylum in Canada and the U.S.

Reviewing statutory language, as well as the legislative history and prior immigration jurisprudence, the Board stated that "one who, departing from the United States, seeks admission to another country but is denied the right of entry, should be considered as not having entered that country even if physically within the jurisdiction thereof[.]" *Id*. at 640. Thus, having been unable to effectively and legally depart from the jurisdiction of the U.S., the alien could not be said to be making an entry thereto, despite being outside the country for over three weeks. *Id.*

Yet the holding of *Matter of T-* is more expansive than its facts. A narrow reading may emphasize the fact that the alien never departed the ship and thus never entered a foreign country. But the Board does not so restrict its logic, stating that even physical presence inside a foreign jurisdiction will not necessarily mean an alien must then effectuate an "entry" upon her return to the U.S. However, as "entry," "arriving," "departure," and a whole litany of immigration terms are legal constructs, they can only be given definitive jurisprudential meaning by enactment.

The Safe Third Country Agreement and Its Implementation

On December 5, 2002, the STCA was signed by the governments of Canada and the U.S. The Agreement was precipitated by the recognition that the two countries share the world's most open land border – a particular concern when it comes to asylum seekers with easy access to two of the most liberal refugee systems. This, as well as other parametric principles, are stated in the Agreement's preamble. *See* STCA, Preamble. The STCA represents bilateral burden-sharing

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Matter of R-D-

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– allowing adjudication of refugee status in one country or the other, but not both (subject to certain exceptions). *See* STCA, at Arts. 3-6. Although the language of the Agreement is somewhat opaque, the terms in which the DHS implemented it are not. The Final Rule on implementation is explicit on the point of mutually exclusive adjudication: "The Agreement allocates responsibility between the United States and Canada whereby one country or the other (but not both) will assume responsibility for processing the claims of certain asylum seekers who are traveling from Canada into the U.S. or from the U.S. into Canada." 69 Fed. Reg. at 69,480.

In fact, asylum seekers who have had their claims rejected by Canada and have returned or been removed to the U.S., were the class of aliens thought to be most affected by the Agreement. *See id.* at 69,484. Because of this fact, the DHS stated explicitly how refugee seekers who departed the U.S. to apply for status in Canada, but were returned to the U.S., would be treated: "For purposes of U.S. immigration law, these returnees will be in the same position they would have been in had they not left the United States." *Id*. The main concern of commenters had been whether these aliens would be subject to expedited removal – yet the DHS assuaged these fears by stating, as a necessary corollary, that these aliens would not be subject to expedited removal, except in rare circumstances, because, having been characterized as never legally "departing" the U.S., they could not be deemed "arriving aliens" when returned. *See id*.

The final regulations adopted closely mirror these principles, and operate in connection with section 208(a)(2)(A) of the Act. Thus, prior to any determination relating to an alien's credible fear of persecution or torture, if that alien arrived at a U.S.-Canada land border entry point the asylum officer must conduct a threshold hearing to determine whether the alien is ineligible to apply for asylum in the U.S. and should be returned to Canada. 8 C.F.R. § 208.30(e)(6). If the alien is covered by the STCA, and no exceptions apply, he is ineligible to apply for asylum in the U.S., and must be returned to Canada. *See* 8 C.F.R. §§ 208.30(e)(6)(i) – (iii).

The Agreement with Canada permits the adjudication of *every claim*, and simply limits the chances for adjudication, making refugee status seeking in North America a one-stop shopping expedition, rather than a transnational exercise in stalling removal.

The Agreement and its implementation is a rational and just way to limit asylum seekers. It permits the adjudication of *every claim*, and simply limits the chances for adjudication, making refugee status seeking in North America a one-stop shopping expedition, rather than a transnational exercise in stalling removal.

Matter of R-D-: Two Bites of the Apple?

In *Matter of R-D-*, an alien was admitted to the U.S. as a nonimmigrant visitor on November 21, 1998, with an authorized stay not to exceed March 5, 1999. She left the U.S. for Canada on January 25, 1999, to seek refugee status, but was returned to the U.S. on July 13, 2000. Nonetheless, she was granted voluntary departure until November 13, 2000, yet again traveled to Canada to seek refugee status. She was permitted to remain in Canada during the pendency of her application, but was never granted any status there. Her application was ultimately denied, and on July 8, 2004, she was returned to the U.S. where the DHS promptly issued a Notice to Appear charging her with removability pursuant to section 237(a)(1)(B) of the Act.

The immigration judge determined that the alien could not be charged as removable, as she had made a departure from the U.S. and should be deemed an arriving alien. Thus, the only issue before the Board was whether the alien had made a departure from the U.S. and was thus an arriving alien, or whether she never legally left, and was therefore removable as charged.

First, the Board had to address *Matter of T-*. The Board found *Matter of T-* distinguishable from the present case because, whereas the alien in that case never departed the vessel at any foreign port, the alien in this case had remained in Canada for almost four years, out of detention, and free to move about the country. To bolster this distinction, the Board cited to the regulations: "The term depart from the United States means depart by land, water, or air: (1) From the United States for any foreign place[.]" *Matter of R-D-*, 24 I&N Dec. At 223 (*citing* 8 C.F.R. § 215.1(h)).

Having disposed of any impact *Matter of T-* may have had, the Board turned its attention to the STCA. Noting the explicit language of the DHS's implementation, relating to the status of aliens as having never left the U.S., the Board stated that this language rested on an erroneous reading of *Matter of T-* and an impermissibly speculative reading of Canadian law – the DHS argued aliens entering Canada for the sole purpose of applying for refugee status were in a position similar to parolees in the U.S., but the Board did not believe that the DHS had affirmatively proven this fact of foreign law. *See Matter of R-D-* 24 I&N Dec. at 224 & n.4. As the alien made a departure from the U.S., and the implementation of the STCA did not mandate a particular status for aliens returning to the U.S., she must be characterized as an arriving alien.

Board Member Patricia Cole dissented. She believed that *Matter of T-* controlled the outcome in the case.

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SUMMARIES OF RECENT BIA DECISIONS

The Board of Immigration Appeals continued its prodigious rate of precedent decisions through October, issuing five precedent decisions since OIL's last Bulletin. Three of the decisions related to criminal aliens, one addressed successive asylum applications based on changed personal circumstances, and one interpreted the relationship between the statute and the regulation regarding the waiver applications by conditional permanent residents.

Categorical approach rejected in determining "loss to victim"

The most significant holdings in these cases relate to the evidence that may be considered to characterize criminal offenses. In ***Matter of Babaisakov***, 24 I&N Dec. 306 (BIA 2007), the Board considered whether the amount of "loss to the victim," for an offense involving "fraud or deceit" to be an aggravated felony under INA § 101(a)(43)(M)(i), can be found by reference to evidence outside the record of conviction.

The Board found that the categorical and modified categorical approaches are not applicable in determining loss to the victim because loss to the victim is not intended to describe an element of the crime, but rather is related to the impact of an alien's offense, and that Congress employed the limitation as a means of excluding some minor offenses from the aggravated felony definition. The Board articulated a general rule that when a removal charge depends both on elements leading to a conviction and on nonelement facts, the nonelement facts may be determined from reliable evidence beyond the record of conviction. Citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Board specifically left "for another day any questions that may arise with respect to circuit law that may be in tension with this decision, as we ordinarily follow circuit law in cases arising within the particular circuit and the grounds for any departure would need to be developed in the context of specific cases."

Meaning of "particularly serious crime"

In ***Matter of N-A-M-***, 24 I&N Dec. 336 (BIA 2007), the Board considered the meaning of the term "particularly serious crime" in INA § 241(b)(3)(B)(ii), as well as what evidence may be considered to determine whether an offense of conviction meets the definition. First, the Board determined that INA § 241(b)(3)(B)(ii) does not require that an offense be an aggravated felony under INA § 101(a)(43) to be a particularly serious crime. The Board held that "[a] plain reading of the Act indicates that the statute does not require an offense to be an aggravated felony in order for it to be considered a particularly serious crime[,]" and that the fact that Congress established that aggravated felonies with certain sentences are particularly serious crimes "creates no presumption that the Attorney General may not exercise discretion on a case-by-case basis to decide that other nonaggravated-felony crimes are also 'particularly serious.'" *Matter of N-A-M-*, 24 I&N Dec. at 338 (*citing Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006), *cert. granted*, __S. Ct.__, 2007 WL 1090399 (U.S. Sep 25, 2007); *but see Alaka v. Att'y Gen.*, 456 F.3d 88, 104-05 (3d Cir. 2006). In this context, the Board noted that its decision raised no *Brand X* issue because the Tenth Circuit had no precedent on this issue. 24 I&N Dec. at 341 n.5.

"Once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination."

On the issue of what evidence may be considered, the Board held that "once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction." 24 I&N Dec. at 342.

The Board held that "the inherently discretionary determination of whether a conviction is for a particularly serious crime" did not require application of the categorical approach, and that "there is no reason to restrict the use of reliable information to that used in sentencing once the strictures of the categorical approach are deemed not to apply[,]" rejecting the analysis of the Ninth Circuit in *Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007), because the *Morales* decision, which was based on an interpretation of Board precedent, had misread that precedent. 24 I&N Dec. at 344-45.

"Loss to victim" based on a conspiracy

In ***Matter of S-I-K***, 24 I&N Dec. 324 (BIA 2007), the Board addressed the issue of how to assess the "loss to the victim" requirement of INA § 101(a)(43)(M)(i) in the context of a charge of removability under INA § 101(a)(43)(U) based on a conspiracy conviction that required only an overt act and not a completed offense. The Board held that an alien convicted of conspiracy is removable as an alien convicted of an aggravated felony within the meaning of INA § 101(a)(43)(M)(i) and (U) where the substantive crime that was the object of the conspiracy was an offense that involved "fraud or deceit" and the potential loss to the victim exceeded $10,000.

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KEVIN A. OHLSON APPOINTED DIRECTOR OF EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Kevin A. Ohlson has been appointed as the Director of the Executive Office for Immigration Review (EOIR). He had been EOIR's Deputy Director since September 2003. Mr. Ohlson previously served as a Board Member with the Board of Immigration Appeals since March 2001.

Mr. Ohlson graduated from Washington and Jefferson College and the University of Virginia School of Law in 1985. Mr. Ohlson was commissioned as an officer in the U.S. Army where he served as both a judge advocate and as a paratrooper. In 1989, he was appointed as a federal prosecutor, but in 1990 he was recalled to active duty and was awarded the Bronze Star for his actions overseas during the Persian Gulf War. At the conclusion of his military service, Mr. Ohlson resumed his duties as an Assistant U.S. Attorney. Then, in 1997, he was appointed as the chief of staff to the Deputy Attorney General, at the end of which the Attorney General presented him with the Edmund J. Randolph award for his service to the Department of Justice.

BIA precedent decisions on the rise

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Successive asylum application

Matter of C-W-L-, I&N Dec. 346 (BIA 2007), had been remanded by the Second Circuit on a stipulated basis to address whether the INA § 208(a)(2)(D) "changed circumstances" exception to the one year time limit on asylum applications permitted a successive asylum application based on changed personal circumstances, outside of the context of a motion to reopen.

The Board had previously held that a successive asylum application based on changed personal circumstances is not within "changed country conditions arising in the country of nationality" exception to the time limit on a motion to reopen under INA § 240(c)(7)(C)(ii), but C-W-L- had filed a motion with the Board to accept a "new" but untimely asylum application, rather than an untimely motion to reopen. 24 I&N Dec. at 350. The Board compared the statutory provisions and concluded that, in context, Congress had not intended in INA § 208(a)(2)(D) to include changed personal circumstances within the phrase "changed circumstances which materially affect the applicant's eligibility for asylum" where there had been a prior asylum application. The Board found that to hold otherwise "would render [INA §] 240(c)(7)(C)(ii) (and 8 C.F.R. § 1003.2(c)(3)(ii)) superfluous and would negate the effect of regulations granting jurisdiction to this Board and the Immigration Courts." 24 I&N Dec. at 351. The Board therefore held that a successive asylum application cannot be considered, "except as part of a timely and properly filed motion to reopen or one that claims that the late motion is excused because of changed country conditions." 24 I&N Dec. at 354.

Matter of Singh, 24 I&N Dec. 331 (BIA 2007), had been remanded to the Board in *Singh v. U.S. Dep't of Justice*, 461 F.3d 290 (2d Cir. 2006). The Second Circuit had held that the Board's decision was based on 8 C.F.R. § 1216.5(e)(1), and that that regulation conflicted with the statute it implements, INA § 216(c)(4). Noting that it had not interpreted the regulation in its prior decision, the Board held that 8 C.F.R. § 1216.5(e)(1) is not in conflict with INA § 216(c)(4), because both provide the same start date for the circumstances to be considered in determining a conditional permanent resident's application for an extreme hardship waiver, and only the statute provides an end date for the relevant period.

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REAL ID Act Practice Tip

In the August *Immigration Litigation Bulletin*, OIL recommended that every asylum brief, as appropriate, either state that it is applying the REAL ID Act standard for burden of proof and credibility, or drop a footnote reminding the court that the statutory provisions at 8 U.S.C. § 1158(b)(1)(B)(i)-(iii) (West 2006) are not applicable.

The REAL ID Act also added completely new statutory burden of proof and credibility provisions in INA § 240(c)(4)(A)-(C) (West 2006) regarding other applications for relief "made after" May 11, 2005. See REAL ID Act § 101(d)(2) & (h). As a result, OIL attorneys should look at Board decisions involving cancellation or other applications for relief just as closely as they review asylum decisions to determine if the new standards are applicable, and if so, to determine whether the Board applied the new standards.

OIL pleadings should cite INA § 240(c)(4)(A)-(C) (West 2006) only if applicable, and if a case includes a burden of proof or credibility issue regarding non-asylum applications made prior to May 11, 2005, OIL pleadings should include a footnote reminding the court that the statutory provisions at INA § 240(c)(4)(A)-(C) (West 2006) are not applicable. As in asylum cases, courts have already cited INA § 240(c)(4)(A)-(C) in cancellation cases to which those provisions were not applicable.

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NOTE: If you have an asylum credibility issue arising under the REAL ID Act, please contact OIL's Senior Litigation Counsel, Margaret Perry, at 202-616-9310.

FURTHER REVIEW PENDING: Update on Cases & Issues

Voluntary Departure—Tolling

The Supreme Court has granted a petition for certiorari in ***Dada v. Keisler***, an unpublished Fifth Circuit. Decision. The question presented is:

> Does the filing of a motion to reopen removal proceedings automatically toll the period within which an alien must depart the United States under an order granting voluntary departure?

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Particularly Serious Crime

The Supreme Court has granted a petition for certiorari in ***Ali v. Achim***, 468 F.3d 462 (7th Cir. 2007). The questions presented are:

(1) Do only aggravated felonies count as particularly serious crimes under the withholding of deportation bar?
(2) Are PSC determinations (in the asylum and withholding context) discretionary under 8 U.S.C. 1252(a)(2)(B)(ii) and hence unreviewable?
(3) Does the REAL ID "question of law" exception to jurisdictional bars at 8 U.S.C. 1252(a)(2)(D) permit review of a claim that the BIA misapplied its precedent?

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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—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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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. The court reasoned that petitioner was similarly situated to an alien who pled guilty when the crime was a deportable offense, who was eligible for § 212(c) relief at the time he pled, and who therefore relied on the expectation of obtaining § 212(c) relief.

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REAL ID Act — Question of Law

The question raised in the petition for rehearing en banc in ***Gui Yin Liu v. INS***, 475 F.3d 135, 138 (2d Cir. 2007), is whether a court can review the factual basis of an IJ's untimely asylum applicant finding.

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Criminal Alien— Conviction
Modified Categorical Approach

The government has filed a petition for rehearing en banc in ***U.S. v. Snellenberger***, 480 F.3d 1187 (9th Cir. 2007). The question is whether a minute order can be considered under the modified categorical approach

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Constitution
Ineffective Assistance of Counsel
REAL ID Act

On November 8, 2007, the government filed a petition for rehearing en banc in ***Singh v. Gonzales***, 499 F.3d 969, 980 (9th Cir. 2007). The questions raised are: Does district court have jurisdiction over ineffective assistance of counsel claim that counsel failed to file timely petition for review or does 8 USC 1252(a)(5) & (b)(9) preclude district cout jurisdiction? Is there a 5th Amendment constitutional due process right to effective counsel in immigration removal proceedings?

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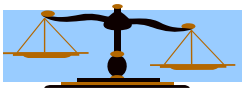

Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **Applying The Modified Categorical Approach, First Circuit Finds That Assault Was a Crime of Violence**

In ***Duarte Lopes v. Keisler***, __F.3d__, 2007 WL 3121593 (1st Cir. Oct. 26, 2007)(*Lynch*, Stahl, Oberdorfer (sitting by designation)), the court held that under Rhode Island law, a simple assault and battery is a crime of violence where the court record showed that petitioner committed assault "upon the body of [his girlfriend]." The court rejected petitioner's contention that because the statute in question refers to both assault and battery, the BIA was required to consider the conviction as a "battery" which involves unintentional touching. The court instead followed its prior precedent in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006) and applied a modified categorical approach to determine whether the predicate offense qualified as a crime of violence, hence an aggravated felony. The court then found that the record of conviction and the criminal docket report established that the alien had committed an assault which qualified as a crime of violence.

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■ **First Circuit Upholds Asylum Denial Because El Salvador Could Control Persecutor**

In ***Ortiz-Araniba v. Keisler***, __F.3d__, 2007 WL 2949290 (1st Cir. Oct. 11, 2007) (Torruella, *Lipez*, Fusté), the First Circuit upheld the denial of asylum to an applicant from El Salvador reaffirming the principle that when the claimed persecution is by a private actor, the applicant must show that the government is unwilling or unable to control the persecutor. The petitioner claimed fear of persecution as a member of a well-defined social group composed of "victims of gang-related crime who have provided crucial evidence against the perpetrators." The BIA found the designation of the group too broad and also that the petitioner had not shown that the government of El Salvador was unwilling or unable to control the alleged persecutors.

The First Circuit found it unnecessary to address the social group claim, deciding instead to affirm the BIA on the "unable or unwilling to protect" ground. The court found that the record demonstrated that the alleged persecutor had been imprisoned, and therefore substantial evidence supported the BIA's finding that the El Salvadoran government was willing and able to confront petitioner's potential persecutor.

> "An applicant must show the government's acquiescence in the persecutor's acts or its inability or unwillingness to investigate and punish those acts, and not just a general difficulty preventing the occurrence of particular future crimes."

The court rejected petitioner's contention that the government could not prevent future attacks on her because the police station was some distance from her home, and that she had no telephone. "This argument misunderstands the law," said the court. "An applicant must show the government's acquiescence in the persecutor's acts or its inability or unwillingness to investigate and punish those acts, and not just a general difficulty preventing the occurrence of particular future crimes."

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■ **First Circuit Rejects "Disfavored Group" And Presumed Credibility Doctrine**

In ***Kho v. Keisler***, __F.3d__, 2007 WL 2994609 (1st Cir. October 16, 2007) (*Lynch*, Boudin, Schwarzer), the First Circuit upheld the BIA's denial of withholding of removal to an applicant from Indonesia who is a Christian of Chinese ethnicity and rejected as contrary to law the "disfavored group" rule promulgated by the Ninth Circuit. Under that rule asylum applicants who have shown membership in a group that is disfavored are subject to a lower burden of showing an individualized risk of threats to their lives and freedom. In rejecting the Ninth Circuit's approach, the First Circuit explained that Congress has not delegated to the courts authority to establish asylum rules. "The disfavored group analysis works a subtle alteration of the usual standards of review. We are bound by the standards Congress set," said the court. Accordingly, the court joined the other circuit courts that have rejected the use of a lower standard and rejected the establishment of a disfavored group category.

The court also held, following its ruling in *Zeru v. Gonzales*, __F.3d__, 2007 WL 2725974 (1st Cir. Sept. 19, 2007), that it is not bound to accept an alien's statements as fact whenever an IJ has not made an express adverse credibility determination. "Such a presumption would confuse the roles of the court and the agency," it noted.

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■ **"Grandfathering" Provision Under INA § 245(i) Does Not Allow An Alien A Second Bite At The Apple**

In ***Echevarria v. Keisler***, __F.3d__, 2007 WL 2875145 (1st Cir. October 4, 2007) (Boudin, Torruella, *Lynch*), the First Circuit held that an Immigration Judge was not required to conduct a new review of an alien's marriage-based visa petition to determine whether it was meritorious in fact so as to fall within the scope of the grandfathering provision for adjusting status under INA § 245(i). The Department of Homeland Security had denied the alien's first visa petition because she failed to establish the bona

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fides of her marriage to an American citizen, and the alien failed to identify substantial evidence in her second visa petition that was unavailable at the time of the original decision and that was likely to alter the result.

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■ **First Circuit Upholds Denial Of Petitioner's Motion To Reopen To Apply For Adjustment Of Status**

In *Palma-Mazariegos v. Keisler*, __F.3d__,2007 WL 2845497 (Boudin, Selya, Schwarzer) (*per curiam*) (1st Cir. October 2, 2007), the First Circuit held that the BIA properly denied a Guatemalan petitioner's motion to reopen to apply for adjustment of status because the alien failed to submit a completed adjustment of status application (I-485) with his motion to reopen. The petitioner had also filed a motion to reconsider which included the I-485 and that too had been denied by the BIA. Petitioner, however, did not timely appeal that decision. The court noted the "harsh" result but said that "the Board is already overwhelmed and, lest its proceedings be further delayed, is entitled to insist that the required documents be supplied at the outset." "Even immigration proceedings must at some point come to an end," it concluded.

"The Board is already overwhelmed and, lest its proceedings be further delayed, is entitled to insist that the required documents be supplied at the outset . . . Even immigration proceedings must at some point come to an end."

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SECOND CIRCUIT

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■ **JRAD Protects Alien From Subsequent Removal As An Aggravated Felon**

In *Nguyen v. Chertoff*, __F.3d__, 2007 WL 2682230 (2d Cir. Sept. 13, 2007) (Pooler, *Raggi*, Sand), the court held that petitioner's 1989 JRAD protecting him from removal due to commission of a crime involving moral turpitude also protected him from removal as an aggravated felon when Congress subsequently broadened the definition of aggravated felony to encompass his crime, to wit, forcible rape of a minor.

Petitioner obtained LPR status in 1988. In 1989, he pled guilty to forcible rape of a minor and sentenced to ten years in prison. The sentencing judge also issued a JRAD pursuant to 8 U.S.C. § 1251(b)(2). The following year, 1990, Congress repealed 8 U.S.C. § 1251(b)(2), and later, with IIRIRA, retroactively expanded the definition of aggravated felony to include forcible rape of a minor. Consequently, the INS initiated removal proceedings against petitioner as an alien convicted of an aggravated felony. Petitioner argued that the JRAD prevented his removal. An IJ rejected this argument and the BIA affirmed, finding that IIRIRA's retroactive expansion of the definition of aggravated felony created a new ground for removal not covered by the JRAD.

The Second Circuit reversed the BIA's decision, finding that petitioner's JRAD also protected him from removal as an aggravated felon. The court explained that IIRIRA had not created a new ground of removability, but "rather, [the] retroactive application signals Congress's intent to have a single expanded definition for aggravated felony apply uniformly to all INA provisions." The court said that, "had Congress intended for 'aggravated felony' to have different meanings in these two contexts, one would expect it to have stated that IIRIRA's definitional amendments applied retroactively *except* to the extent such application expanded previously afforded JRAD relief." The court rejected the government's reliance on *United States v. Yacoubian*, 24 F.3d 1 (9th Cir. 1994), because that case relied on a ground of relief that JRADs had never been applicable to.

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■ **Second Circuit Affirms Denial Of A Continuance To Await Labor Certification**

In *Elbahja v. Keisler*, __F.3d__, 2007 WL 2935884 (2d Cir. Oct. 10, 2007) (Cabranes, Raggi, Berman) (*per curiam*), the Second Circuit held that the IJ did not abuse discretion in denying a motion for continuance where petitioner's application for labor certification was still pending. The court characterized petitioner as being at only the first step in a long discretionary process leading to lawful residency. Because petitioner could not demonstrate that an immigrant visa was available to him, or would become available at a certain time, his eligibility for adjustment of status was too tenuous to justify a protracted delay of proceedings.

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■ **Second Circuit Joins Third And Ninth Circuits In Holding That Refugee Status Does Not Have To Be Terminated Prior To The Commencement Of Removal Proceedings**

In *Maiwand v. Gonzales*, __F.3d__, 2007 WL 2593774 (2d Cir. Sept. 11, 2007) (*Sack*, Parker, Hall), the court affirmed the BIA's determination that petitioner's refugee status did not immunize him from removal on the basis of a drug trafficking offense.

Petitioner, an LPR, was placed in removal proceedings following a drug trafficking conviction. He filed a motion to terminate the proceedings on the basis that his refugee status was

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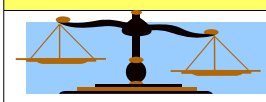

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never terminated pursuant to 8 U.S.C. § 1157(c)(4). The BIA denied the motion, reasoning that once petitioner adjusted his status from that of a refugee to that of an LPR, his previous refugee status provided no basis for terminating removal proceedings. The Second Circuit affirmed.

The court found § 1157(c)(4) to be silent on whether refugee status must be terminated prior to the commencement of removal proceedings, and thus looked to the agency's interpretation of the statute and whether the interpretation was reasonable. Citing the BIA's decision *In re Smirko*, 23 I&N Dec. 836 (BIA 2005), the court held that the agency reasonably determined that "refugee status does not afford complete immunity from removal. [citations omitted]. The fact that [petitioner]'s adjustment to LPR status did not terminate his refugee status is irrelevant. Even if he retained his refugee status, he would have remained subject to removal for committing a drug trafficking offense."

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■ Second Circuit Affirms Denial Of A Motion To Reissue Where BIA Found That Petitioner's Evidence Did Not Rebut The Presumption Of Proper Mailing

In ***Chen v. Gonzales***, __F.3d__, 2007 WL 2593775 (2d Cir. Sept. 11, 2007) (Jacobs, Wesley, Gibson) (*per curiam*), the court held that the BIA did not abuse its discretion by denying petitioner's motion to reissue its decision because the BIA considered petitioner's evidence of non-receipt but still found the evidence failed to rebut the presumption of proper mailing.

When deciding the issue of proper mailing, the BIA "may reasonably accord less weight to an affidavit of non-receipt than to its own records establishing that the order was in fact mailed."

The BIA issued its decision denying petitioner's appeal on February 17, 2006. Almost 4 months later, petitioner moved the BIA to reissue the decision, claiming she never received the decision at her address of record. Petitioner provided affidavits by herself and relatives as support. The BIA denied the motion, finding that a cover letter in the record showed that the decision was correctly mailed to petitioner's address of record.

In the Second Circuit, petitioner argued that the BIA failed to consider her evidence of non-receipt, citing *Lopes v. Gonzales*, 468 F.3d 81 (2d Cir. 2006), for support. The court rejected her argument, finding *Lopes* "not directly relevant" because that case turned on whether the BIA failed to consider evidence of non-receipt in *in absentia* proceedings, whereas here the BIA only had to prove proper mailing as petitioner had appeared at her hearing. "When the alien has had notice of the proceedings and the hearings, no statute grants a right to relief for failure to received notice of the BIA's decision," the court said. Rather, the BIA must only show that it has "performed its duty of serving the order, [] even if the order miscarries in the mail or the alien does not receive it for some other reason that is not the BIA's fault."

The court also stated that when deciding the issue of proper mailing, the BIA "may reasonably accord less weight to an affidavit of non-receipt than to its own records establishing that the order was in fact mailed," though taking into account relevant evidence that "could cast doubt on the accuracy of the BIA records." In petitioner's case, however, the court found that she did not present any evidence of irregularity in the BIA's records suggesting service of the order was not accomplished. Finally, the court noted the government's argument that it lacked jurisdiction to review the discretionary denial of an untimely motion to reissue, but found "both the jurisdictional and the substantive questions hinge on whether the BIA properly mailed the order."

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■ Second Circuit Defers To The BIA's Interpretation Of Torture In Denying CAT Protection To Applicant From Haiti

In ***Pierre v. Gonzales***, __F.3d__, 2007 WL 2597600 (2d Cir. Sept. 11, 2007) (*Jacobs*, Walker, Raggi), the court, deferring to the BIA's decision in *In re J-E-*, 23 I&N Dec. 291 (BIA 2002), held that failure to maintain standards of diet, hygiene, and living space in prison does not constitute torture under the CAT unless the deficits are inflicted with specific intent rather than as a result of poverty, neglect, or incompetence.

Petitioner claimed that if returned to Haiti, his status as a criminal deportee would result in his indefinite detention in a prison with such poor conditions that it would constitute torture under the CAT. Petitioner challenged the BIA's decision in *In re J-E-* finding the opposite - that poor prison conditions in Haiti did not constitute torture for lack of a specific intent to torture - as impermissibly interpreting the CAT and the CAT's implementing regulations, while advocating for a lesser general intent. He also argued that even if *In re J-E-* were applicable, his status as a diabetic distinguished his case from *In re J-E-*.

The Second Circuit deferred to the BIA's interpretation of the CAT, and affirmed *In re J-E-*'s holding that torture requires specific intent. The court found that *In re J-E-* was consistent with 8 C.F.R. § 208.18(a)(5)'s language that "in order to constitute

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torture, an act must be specifically intended to inflict severe physical or mental pain or suffering," and further, that 8 C.F.R. § 208.18(a)(5) was consistent with the Senate understandings that accompanied ratification of the CAT also stating that "an act must be specifically intended." In so holding, the court expressly disagreed with *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003), where the Third Circuit, in dicta, stated that the CAT regulations stopped short of requiring specific intent as "[8 C.F.R. § 208.18(a)(5)] bespeaks specific intent."

"In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering."

The court then dismissed petitioner's attempt to distinguish his case from *In re J-E-* on the basis of his diabetes as no evidence had been presented to show that prison officials specifically targeted people with diabetes or prevented them from obtaining medicine. Finally, the court declined to reach the second part of *In re J-E-* finding that Haiti's policy of indefinite detention of criminal deportees is a lawful sanction not constituting torture, but expressed concern that this holding was too expansive.

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THIRD CIRCUIT

Third Circuit Upholds Reinstated Deportation Order Because Legal Error In Original Order Was Not A "Gross Miscarriage Of Justice"

In ***DeBeato v. Attorney Gen. of the United States***, __F.3d__, 2007 WL 2916150 (3d Cir. Oct. 9, 2007) (*Chargares*, Hardiman, Tashima), the Third Circuit denied a petition for review of a reinstated order of deportation. Although the underlying 1997 order was based on the conclusion of the BIA that the repeal of relief under INA § 212(c) by the Antiterrorism and Effective Death Penalty Act applied retroactively, a proposition later rejected in *INS v. St. Cyr*, 533 U.S. 289 (2001), the BIA's decision was legally correct when it was issued. Therefore, there was no "gross miscarriage of justice," the standard the court applies to collateral attacks on orders of deportation.

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■ **Third Circuit Applies Less Stringent Presumption Of Receipt To Notices Sent By Regular Mail**

In ***Santana-Gonzalez v. Attorney Gen. of the United States***, __F.3d__, 2007 WL 3052783 (3d Cir. October 22, 2007) (Sloviter, Smith, *Garth*), the Third Circuit held that, for purposes of a motion to rescind an *in absentia* removal order, petitioner did not have to rebut the strong presumption of effective service of the notice to appear that would have applied if the notice had been sent to her by certified mail. Rather, petitioner had only to rebut a weaker presumption of effective service because her notice to appear had been sent by ordinary first-class mail.

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FOURTH CIRCUIT

■ **Fourth Circuit, Distinguishing Precedent, Accords *Chevron* Deference To The BIA's Interpretation Of A Nationality Provision**

In ***Puentes Fernandez v. Keisler***, __F.3d__, 2007 WL 2782013 (*Williams*, Motz, Shedd) (4th Cir. September 26, 2007), the Fourth Circuit rejected petitioner's argument that he is a "national" of the United States under *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996), where the court had concluded that a lawful permanent resident who applied for citizenship was a U.S. national. The court held that *Chevron* deference to the BIA's contrary, post-*Morin* interpretation of a nationality provision, 8 U.S.C. § 1101(a)(22), was warranted so long as it is a "permissible construction of the statute." More significantly, the court appied *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), and concluded that *Morin* did not foreclose a subsequent interpretation of the provision.

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FIFTH CIRCUIT

■ **IJs have Jurisdiction To Determine Portability Issues under INA § 204(j)**

In ***Sung v. Keisler***, __F.3d__, 2007 WL 3052778 (5th Cir. Oct. 22, 2007) (Garwood, Jolly, *Stewart*), the Fifth Circuit held that an IJ has the jurisdiction to determine whether an employment-based visa petition qualifies for portability under INA § 204(j). The petitioner, who entered the United States in 1989 on a student visa issued to her husband - who never attended school – was the beneficiary of an employment based visa petition. However, before her application for adjustment was adjudicated, the employer went out of business and withdrew the visa petition. USCIS then revoked the visa petition, denied the application for adjustment, and instituted separate removal proceedings against the petitioner and her husband. In the interim, petitioner obtained employment as a secretary with another employer. At the removal hearing, petitioner argued that her employment-based visa petition remained valid pursuant to INA 204(j) because her adjustment of status application had not been adjudicated within the

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180-day time frame and her new job was substantially similar to the job for which the visa petition had been granted. The IJ and BIA found that they lacked jurisdiction to make the portability determination under § 204 (j), and ordered the couple removed.

On appeal, the government argued that disputes over portability involve the adjudication of employment-based visa petitions and are within the jurisdiction of USCIS. Thus, petitioner should have appealed the visa revocation administratively as opposed to seeking review of that decision in the immigration court. The Fifth Circuit was not convinced by that argument because it found that the dispute involved an adjustment of status application – an issue clearly within the exclusive jurisdiction of an IJ one an alien is placed in proceedings. The court instead, adopted the reasoning in *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), where the Fourth Circuit also rejected the government's position. Accordingly, the court held that "IJs have jurisdiction to make § 204(j) determinations, including the jurisdiction to make the factual finding necessary to ascertain whether employment classifications are the same or similar as required by the statute," and remanded the case to the BIA.

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■ **Misuse of Social Security Number Is a CIMT**

In ***Hyder v. Keisler***, __F.3d__, 2007 WL 3105905 (5th Cir. Oct. 25, 2007) (Reavley, Barksdale, *Prado*), the court held that misuse of social security number is a CIMT. The petitioner, a citizen of Pakistan, entered the United States as a visitor in 1985 and never departed. In June 2003, he was convicted of misuse of a social security number obtained by fraud under 42 USC § 408(a)(7)(A). He had used the false social security number to obtain a Texas driver's license and Texas identification card. The IJ and later the BIA ordered his removal and found him ineligible for cancellation because his conviction of a CIMT rendered him ineligible for that relief.

On appeal the petitioner argued *inter alia* that he did not have a "vicious motive" or "corrupt mind" when he obtained the driver's license and therefore his crime was not one involving moral turpitude. The Fifth Circuit was not persuaded by his argument because the crime as defined by the statute required that he "willfully, knowingly, and with intent to deceive," used a social security number that had been assigned on the basis of false information. Therefore petitioner's particular circumstances were not relevant to the finding that the offense was a CIMT. Since petitioner "was convicted a crime that involves dishonesty as an essential element," the court found that circuit precedents make clear that the crime was within its understanding of the definition of CIMT. The court specifically disagreed with *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), where the Ninth Circuit had held that the use of a social security card to work and establish credit in the United States, did not constitute a CIMT.

The Fifth Circuit held that the term "examination" referred to the date the applicant for naturalization is interviewed, and not the date when the entire investigative process is complete.

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■ **120-day Period For USCIS To Adjudicate A Naturalization Application Begins To Run After Applicant Is Interviewed**

In ***Walji v. Gonzales***, __F.3d__, 2007 WL 2685028 (5th Cir. Sept. 14, 2007) (*Reavley*, Wiener, DeMoss), the court held that the 120-day period in which USCIS must adjudicate an application for naturalization pursuant to 8 U.S.C. § 1447(b) begins to run after the applicant has been interviewed on their application, rather than when the entire application process has finished.

Petitioner had been interviewed on his naturalization application on April 6, 2004. Two years later, petitioner filed a mandamus action seeking to compel USCIS to adjudicate his application pursuant to 8 U.S.C. § 1447(b)'s requirement that applications for naturalization be adjudicated within 120 days after the date of examination. The district court denied mandamus, finding that "examination" under § 1447(b) refers to the entire application process, including the FBI background check. Therefore, the district judge reasoned, it lacked jurisdiction over petitioner's application because the examination had yet to occur and the 120 days had yet to run.

The Fifth Circuit reversed. The court held that the term "examination" referred to the date the applicant for naturalization is interviewed, and not the date when the entire investigative process is complete. The court found this definition required by the plain language of § 1447(b), the regulatory scheme implementing the naturalization process, and legislative history. First, the court found that § 1447(b)'s language stating that the 120-day period begins to run after "the date on which the examination is conducted," suggests "that the examination is a distinct, single event [] and not an ongoing fluid process." Second, the court found their definition of "examination" also supported by the fact that 8 U.S.C. § 1446 and 8 C.F.R. § 335.2 (a),(c),(e) also refer to the "examination" as the interview of the applicant. Finally, the court stated that legislative history surrounding the implementation of time limits on natu-

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ralization examinations also supported their conclusion. In so holding, the court noted that "if the triggering date were the date on which the entire process was concluded, irrespective of the interview date, the applicant would have no recourse for delays and courts could do nothing to encourage or require the CIS and FBI to act in a timely fashion." "But," the court noted, "because there is currently no required period of time for CIS to conduct the initial interview, CIS could avoid the jurisdiction of the courts by following its own order of events."

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SIXTH CIRCUIT

■ **The Nature And Extent Of An Alien's Criminal Convictions Are Appropriate Basis For A Discretionary Denial Of Asylum**

In ***Kouljinski v. Keisler*** __F.3d__, 2007 WL 2989461 (6th Cir. Oct. 16, 2007) (*Moore*, Griffin, Graham), the Sixth Circuit upheld the IJ's discretionary denial of asylum based on the applicant's three convictions for drunk driving. The petitioner, a Russian Jew who entered the United States in October 1992, claimed persecution on account of his religion. Although the IJ found that petitioner had established a well-founded fear of future persecution, the IJ determined that because he had been convicted three times of driving under the influence of alcohol a favorable exercise of discretion was not warranted. The IJ also denied the request for withholding and CAT protection relying on the State Department country conditions report.

In upholding the IJ decision, the court noted that the courts of appeals have affirmed the agency's discretionary denial of asylum in cases involving offenses that are less severe than drunk driving.

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■ **Sixth Circuit Denies Petitioner's Claim That Collateral Estoppel Based On An IJ's Initial Approval Of His I-130 Visa Petition Precluded The Subsequent Termination Of His Conditional Permanent Residency Status**

In ***Bilali v. Gonzales***, __F.3d__, 2007 WL 2701081 (6th Cir. Sept. 18, 2007) (Daughtrey, Gilman, Adams) (*per curiam*), the court affirmed the BIA's decision that collateral estoppel did not apply to petitioner's claim that an IJ's initial approval of his I-130 visa petition based on marriage to a U.S. citizen precluded the INS from later denying his request to lift the conditions on his permanent residency.

The regulations "make exceptionally clear that notwithstanding a preliminary determination that a marriage is bona fide, a petitioner's status remains conditional until the government makes a final adjudication of the validity of the marriage."

Petitioner, a native of former Yugoslavia, sought to adjust his status on the basis of marriage to a U.S. citizen. In 1999, an IJ granted adjustment of status on a conditional status pending further investigation by the INS on the validity of the marriage. In 2001, when petitioner sought to remove the conditions on his LPR status, he appeared for a series of interviews before the INS. Because on the final interview petitioner's wife brought her lawyer with her and refused to answer any questions on the validity of the marriage, the INS concluded that her refusal to answer questions was the equivalent of a failure to appear and terminated petitioner's LPR status.

In subsequent removal proceedings, petitioner claimed that the IJ's grant of conditional status in 1999 constituted approval of the validity of his marriage and thus precluded the INS from relitigating the issue in 2001 when it found the marriage invalid. The IJ denied the claim, holding that collateral estoppel did not apply because the earlier decision of the immigration court was conditional rather than final. The BIA affirmed, stating "there was no final decision on the validity of the respondent's marriage; there was only a temporary decision to be reviewed and decided at a later time," and later, in denying a motion to reconsider, stated "the findings of the Immigration Judges in August 1999 and December 2004 were not factually or legally identical, the arguments concerning issue preclusion lack merit."

The Sixth Circuit upheld the reasoning of the BIA. The court found that "[petitioner] fails to acknowledge that this initial proceeding did not 'result[] in a final judgment on the merits' and, therefore, cannot have a preclusive effect." The court stated that the regulations "make exceptionally clear that notwithstanding a preliminary determination that a marriage is bona fide, a petitioner's status remains conditional until the government makes a final adjudication of the validity of the marriage."

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SEVENTH CIRCUIT

■ **Seventh Circuit Rules Harmless BIA's Failure To Address Motion To Supplement The Record**

In ***Tariq v. Keisler*** __F.3d__, 2007 WL 2915714 (7th Cir. Oct. 9, 2007) (*Ripple*, Evans, Sykes), the Seventh Circuit ruled that the BIA's failure to address petitioner's motion to supplement the record was harmless because, while the new evidence concerned a witness's credibility, the agency had denied restriction on removal ("withholding") primarily on other grounds not challenged by the petitioner. The court also concluded that it lacked jurisdiction to review an

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untimely filed asylum application in the absence of any legal errors in the IJ's application of INA § 208(a)(2(D) – providing for an exception where applicant shows changed and extraordinary circumstances. Finally, the court – following recent circuit precedent – held that it lacked jurisdiction to review the denial of a continuance, even where the continuance was requested to await eligibility to adjust status.

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■ **Court Retains Jurisdiction To Review Removed Alien's Petition Because He Was Deported Due To Unlawful Government Action**

In ***Peralta-Cabrera v. Gonzales,*** __F.3d__, 2007 WL 2566034 (7th Cir. September 7, 2007) (Ripple, *Evans*, Williams), the Seventh Circuit held that the alien's challenge to his *in absentia* deportation order remained justiciable despite his deportation because, under applicable law prior to the enactment of IIRIRA, the filing of his petition for review stayed his deportation order. The court therefore concluded that the alien was deported unlawfully. On this basis, the court also held that the case was not moot because the alien was hindered from adjusting his status. The court ultimately vacated the alien's deportation order, holding that his failure to notify immigration officials that all mail to him must be addressed "in care of" the resident with whom he was living did not make him "unreachable" when served with his hearing notice.

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■ **Seventh Circuit Holds That It Lacks Jurisdiction To Review Denial Of Continuance**

In ***Potdar v. Gonzales,*** __F.3d__, 2007 WL 2938378 (7th Cir. Oct. 10, 2007) (Ripple, Manion, Kanne) (*per curiam),* the Seventh Circuit held that petitioner's motion to reopen, based upon pending adjustment and legalization applications filed with the Department of Homeland Security was effectively a continuance motion, and the court accordingly dismissed the petition for lack of jurisdiction to review decisions on such motions.

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■ **Substantial Evidence Supported IJ and BIA's Determination That Chinese Petitioners' Testimony Lacked Credibility And Plausibility**

In *Wang v. Gonzales*, __F.3d__, 2007 WL 2727706 (7th Cir. Sept. 20, 2007) (*Bauer*, Ripple, Evans), the court found substantial evidence supported an IJ and BIA's determination that petitioners' claim of persecution under China's coercive birth control policy lacked credibility and failed to prove a well-founded fear of persecution.

The court found that the BIA and IJ properly determined the account of petitioners' second pregnancy implausible because "it simply does not make sense that petitioners would wait to flee the area until the day of the scheduled abortion."

Lead petitioner, a citizen of China, filed for asylum in 1993 claiming that he feared persecution because his wife was forcibly sterilized after they had an unauthorized child. In 1999, his wife and child came to the U.S. and also filed for asylum claiming that she had undergone a forced abortion, rather than sterilization. Petitioners testified that to hide the first pregnancy, they fled to a relative's house to avoid family planning authorities. When the authorities learned of the child's birth they levied fines against them. Subsequently, the family planning officials inserted an IUD into her which she later had removed. Petitioners testified that on the second pregnancy, however, they did not attempt to hide the pregnancy or flee until the day of the scheduled abortion. Lead petitioner also testified that during the abortion procedure, he got in a fight with the authorities at the hospital - though he did not mention the fight in his asylum application. Lead petitioner further testified that because of the fight, he feared for his life and fled to the U.S. six days later. An IJ found the petitioners' testimony not credible and denied asylum. The IJ cited the inconsistencies and omissions between petitioner's asylum application and his testimony, and his belief that the petitioners' failure to even attempt to hide the second pregnancy until the day of the operation implausible, to support his finding. Further, the IJ rejected petitioners' attempt to corroborate their testimony with an unauthenticated certificate of abortion and found that the Department of State Reports on China and the fact that petitioner had three times applied to return to China to visit ailing relatives refuted a well-founded fear of future persecution. The BIA affirmed.

The Seventh Circuit affirmed the adverse credibility determination. The court found that petitioner's failure to mention either the forced abortion or the fight in his asylum application supported the IJ's determination, in particular the latter event "which spurred his decision to leave China." "A fight with family planning officials outside the room in which his wife was undergoing a forced abortion would be highly relevant to [petitioner]'s claim," the court said. Further, the court found that the BIA and IJ properly determined the account of petitioners' second pregnancy implausible because "it simply does not make sense that petitioners would wait to flee the area until the day of the scheduled abortion." Additionally, the court affirmed the IJ's disbelief as to the "short lapse of time between [petitioner's] decision to flee, his informing [his wife] of this decision, and then his actual departure." The court then held that, adverse credibility determinations aside, the IJ

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reasonably relied on State Department Reports to find that petitioner's did not have a reasonable fear of future persecution under the family planning laws, citing *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007), and *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007) for support.

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EIGHTH CIRCUIT

■ **An Alien Has No Constitutionally Protected Property Or Liberty Interest In Voluntary Departure**

In ***Garcia-Mateo v. Keisler***, __F.3d__, 2007 WL 2873665 (8th Cir. October 4, 2007) (*Bowman*, Benton, Shepard), the Eighth Circuit rejected petitioner's assertion that the IJ's failure to inform her that she could request voluntary departure at the end of her hearing violated her due process rights and warranted reopening of her removal proceedings. The court held that because petitioner had "no constitutionally protected liberty or property interest in the discretionary relief of voluntary departure – whether pre- or postconclusional – she cannot establish that she had a right to due process in the proceedings to obtain that relief." Accordingly, the court denied the petition for review.

The court held that because petitioner had "no constitutionally protected liberty or property interest in the discretionary relief of voluntary departure – whether pre- or postconclusional – she cannot establish that she had a right to due process in the proceedings to obtain that relief."

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NINTH CIRCUIT

■ **Ninth Circuit Holds That Recklessly Setting A Fire Is Not A "Crime Of Violence"**

In ***Jordison v. Gonzales***, __F.3d__, 2007 WL 2472635 (9th Cir. September 4, 2007) (*Kozinski*, Brunetti, Rymer), the Ninth Circuit held that the alien's conviction under Cal. Penal Code § 452(c) for recklessly setting a fire was not a crime of violence under 18 U.S.C. § 16(b). The court concluded that because a crime of violence pursuant to § 16(b) requires a risk that physical force be used against the property of another, and that the state was not required to prove that someone else's property was set afire for a conviction under § 452(c), the alien's conviction was not categorically an aggravated felony. Regarding the modified categorical approach, the court first remarked that ordinarily it would remand so that the government would have an opportunity to produce the complete conviction record, but in this case the record was admittedly complete. The panel then determined that nothing in the record precluded the possibility that the alien set fire to his own property, and therefore the conviction could not be an aggravated felony.

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■ **Ninth Circuit Holds That Unlawful Sexual Intercourse With A Person Under Sixteen Is Not A Crime Involving Moral Turpitude**

In ***Quintero-Salazar v. Keisler***, __F.3d__, 2007 WL 2916162 (9th Cir. Oct. 9, 2007) (Kleinfeld, *Thomas*, Leighton), the Ninth Circuit held that an alien convicted of unlawful sexual intercourse by a person twenty-one years or older with a child under 16 in violation of Cal. Penal Code § 261.5(d) is not a crime involving moral turpitude. The court noted that contrary precedent predated the Supreme Court's categorical analysis for evaluating crimes. The court ruled that because the perpetrator and the victim could have met in high school and because it was a strict liability offense, the "evil" intent required for a crime involving moral turpitude was not necessarily present.

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■ **Ninth Circuit Holds That It Lacks Jurisdiction To Review A Prior Removal Proceeding That Underlies A Reinstated Removal Order**

In ***Martinez-Merino v. Keisler***, __F.3d__, 2007 WL 2936797 (9th Cir. Oct. 10, 2007) (Wallace, *Noonan*, Paez), the Ninth Circuit held that it lacks jurisdiction to review a due process challenge to a prior removal order following the alien's removal and reentry and the reinstatement of the original order. The court ruled that 8 U.S.C. § 1231(a)(5) specifically precludes aliens from seeking to reopen the previous removal order based on defective process or any other grounds, including the alien's claim that he had received inadequate notice of his rights. Because none of the challenges that the alien raised was germane to the reinstatement process, the alien was not prejudiced by the summary reinstatement process.

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■ **Ninth Circuit Holds That A Conviction For DUI While Without A License Is A Crime Involving Moral Turpitude**

In ***Marmolejo-Campos v. Gonzales***, __F.3d__, 2007 WL 2610788 (9th Cir. Sept. 12, 2007) (Nelson, *Callahan,* Carney), the court, giving due deference to the BIA's decision in *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), held that a conviction for aggravated DUI involving actual driving under Arizona Revised Statute § 28-1383(A)(1) constitutes a crime involving moral turpitude for which petitioner could be found removable.

Petitioner, an LPR, was convicted

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under § 28-1383(A)(1) for driving under the influence of alcohol while not possessing a license to drive. An IJ found the conviction constituted a crime involving moral turpitude and ordered him removed. The BIA affirmed, citing its decision in *Matter of Lopez-Meza* holding that although a DUI by itself is not a crime involving moral turpitude, a DUI combined with the individual's knowledge that he or she is prohibited from driving is a crime involving moral turpitude. The BIA also dismissed petitioner's reliance on *Hernandez-Martinez v. Ashcroft*, 329, F.3d 1117 (9th Cir. 2003), because the court in that case simply determined that § 28-1383(A)(1) was divisible and found that the BIA erred in not examining the underlying conduct to make sure the alien was not convicted of aggravated driving without actually driving a vehicle.

"Driving while intoxicated is despicable, and when coupled with the knowledge that one has been specifically forbidden to drive, it becomes a crime involving moral turpitude"

The Ninth Circuit upheld the decision of the BIA, distinguishing *Hernandez-Martinez* as ruling on the divisibility of § 28-1383(A)(1) and possibly involving a parked car. The court affirmed the reasoning in *Lopez-Meza*, concluding that "driving while intoxicated is despicable, and when coupled with the knowledge that one has been specifically forbidden to drive, it becomes a [crime involving moral turpitude]."

Judge Nelson dissented, finding it illogical that a person could have the requisite culpability of "knowing" that they're driving without a license, but at the same time not "knowingly" driving while drunk.

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■ **Ninth Circuit Holds That Providing A False Statement On A Tax Return Constitutes An Aggravated Felony**

In ***Kawashima v. Gonzales***, __F.3d__, 2007 WL 2702330 (9th Cir. Sept. 18, 2007) (*O'Scannlain*, Leavy, Callahan), the court held that lead petitioner's conviction for providing a false statement on a tax return in violation of 26 U.S.C. § 7206(1) constituted an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(M)(i) because it involved fraud or deceit and loss to the victim of $10,000 or more. In so holding, the court expressly rejected the Third Circuit's contrary conclusion in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004), holding that tax evasion is the only removable tax offense.

Petitioner argued that the BIA erred in finding that his 1997 conviction for making a false statement on his tax return in violation of 26 U.S.C. § 7206(1) constituted an aggravated felony by claiming that § 1101(a)(43)(M)(ii)'s specific reference only to tax offenses under 26 U.S.C. § 7201 indicated Congress's intent to exclude all other tax offenses from the definition of aggravated felony, despite subsection (M)(i) defining an aggravated felony as "an offense that involves fraud or deceit in which the loss to the victim exceeds $10,000." The court disagreed.

The court found that subsection (M)(i) "plainly categorizes an offense as an aggravated felony as long as it includes two elements, 'fraud and deceit' and loss to the victim in excess of $10,000. No further limitations are imposed." The court noted the Third Circuit's decision in *Ki Se Lee*, finding that reading subsection (M)(i) to include tax offenses would render subsection (M)(ii) superfluous, but found Judge Alito's dissent in that case more persuasive than the majority's opinion. "As the dissent in *Ki See Lee* emphasized," the court said, "'subsection (M)(ii) may have been enacted simply to make certain-even at the risk of redundancy-that tax evasion qualifies as an aggravated felony.'" The court then found that under the modified categorical approach the petitioner's plea agreement and record of conviction established the requisite specific intent to defraud the government and requisite loss in excess of $10,000 ($245,126, to be exact). However, the court found that the same evidence did not prove that petitioner's wife's conduct resulted in a loss in excess of $10,000, and denied the government's request for a remand in order to compile additional evidence because "the government should not have a second bite at the apple." Finally, the court dismissed petitioner's claim that a separate motion to reopen was a special motion to reopen under 8 C.F.R. § 1003.44 because he failed to follow the procedural requirements for such a motion.

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ELEVENTH CIRCUIT

■ **Motion to Reconsider Motion to Reopen Not Numerically Barred Under Regulation**

In ***Calle v. U.S. Att'y. Gen.***, __F.3d__, 2007 WL 3072380 (11th Cir. Oct. 23, 2007)(Dubina, Marcus, Coogler (sitting by designation)), the Eleventh Circuit held that under 8 CFR § 1003.2(b)(2), an alien may file one motion to reconsider as to each decision by the BIA that an alien is removable, including a decision to deny reopening.

The petitioner, who had entered as a visitor in 2002 had been denied asylum and CAT protection by an IJ and later the BIA. She then filed a motion to reopen, contending that the BIA had not considered all the evidence regarding changed country con-

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ditions in Colombia. When the BIA denied that motion petitioner filed a motion to reconsider also claiming that the changed country conditions should have excused her late filing of her asylum application. The BIA denied the motion to reconsider. Petitioner then filed a second motion to reopen the BIA's denial of the motion to reconsider, again asserting changed country conditions. The BIA denied that motion on the merits its finding that petitioner had failed to establish a prima facie case for asylum eligibility. Undaunted, petitioner then filed another motion calling it a "motion to reconsider denial of motion to reopen." Finally, the BIA denied this latest motion to reconsider because it was numerically barred under 8 C.F.R. § 1003.2(b)(2), which provides *inter alia* that in removal proceedings "an alien may file only one motion to reconsider a decision that the alien is removable."

> By its plain language 8 C.F.R. § 1003.2(b)(2), does not prohibit the filing of a second motion to reconsider. Rather, it "suggests that an alien may file a motion to reconsider as to each decision by the BIA that an alien is removable."

The Eleventh Circuit reversed the BIA's interpretation of 8 C.F.R. § 1003.2(b)(2), holding that its plain language does not prohibit the filing of a second motion to reconsider. "To the contrary" said the court, "the regulation use of the singular terms 'a decision' and 'any given decision' suggest that an alien may file a motion to reconsider as to each decision by the BIA that an alien is removable." After finding that the motion was not numerically barred, the court then decided the issue because it presented the "rare circumstances" where remand was unnecessary, notwithstanding the "ordinary remand rule" expressed by the Supreme Court in *Ventura* and *Thomas*. The court explained that the issue raised was legal not factual and the issue was not one where the BIA could bring its expertise to bear – rather it was "an objective procedural inquiry." The court then held that petitioner's arguments in her motion to reconsider were meritless and denied the petition.

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■ **Cumulative Effects of Discrimination and Beatings Amounted to Past Persecution**

In ***Niftaliev v. U.S Attorney General***, __F.3d__, 2007 WL 3002922 (11th Cir. Oct. 16, 2007) (Birch, *Fay*, Cudahy), the court held that an asylum applicant's detailed testimony and the cumulative effect of discrimination and beatings that he suffered because of his mixed ethnicity as an Azerbaijani in Ukraine, established that he had suffered past persecution on account of his nationality and/or political opinion.

The court noted that it was "troubled by the notion of condemning the petitioner for failing to obtain some sort of documentation from the same government that persecuted and imprisoned him concerning incidents that occurred approximately ten years ago."

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■ **Asylum Case Remanded To Consider Whether Applicant Established Futility Of Seeking Protection From Colombian Government**

In ***Lopez v. U.S. Atty. Gen.***, __F.3d__, 2007 WL 3119838 (11th Cir. Oct 25, 2007), *superceding*, *Lopez v. U.S. Atty. Gen.*, 490 F.3d 1312 (11th Cir. Jul 6, 2007) (*Carnes*, Wilson, Stagg), the court remanded the asylum claim to the BIA to reconsider the question of whether the petitioner's failure to seek protection from Colombian government was fatal to her claim of persecution by FARC. The court noted that it was not clear from the BIA's ruling whether failure to seek protection without more would be enough to defeat a claim of asylum. If so, said the court, such conclusion would conflict with prior BIA case law that has excused an applicant who "convincingly demonstrates that those authorities have been unable or unwilling to protect her, and for that reason she could not rely on them." *See Matter of S-A-*, 22 I&N Dec. 1328 (2000).

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DISTRICT COURTS

Western District Of Wisconsin Holds That Failure To Adjudicate Application For Adjustment Of Status Violates The Administrative Procedure Act

In ***Saleem v. Gonzales,*** __F. Supp.__, 2007 WL 3132233 (W.D. WI) (October 26, 2007)(*Crabb*), the District Court held that 8 U.S.C. § 1252(a)(2)(B) does not deprive the court of jurisdiction under 28 U.S.C. § 1331 to decide whether immigration officials should be compelled to adjudicate an alien's application for adjustment of status. The court held that the immigration officials violated the APA by failing to adjudicate the alien's application after almost five years had passed, and noted that they "had made no effort to show that special circumstances are present that would justify the delay. "The court granted summary judgment in favor of the alien and gave the immigration officials two months to adjudicate the application.

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Matter of R-D-

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Entry must be legal, and the Board had previously recognized that presence alone in a foreign country is not in itself adequate to create a legal entry. *See Matter of T-*, 6 I&N Dec. at 640. Although the majority placed emphasis on the fact that the alien remained in Canada for nearly four years, was not detained, and was permitted to work, Cole asserted that, although these facts establish presence in Canada, they do not address whether there was a lawful admission. As there were no facts alleged that established a legal admission to Canada, the alien never made a departure from the U.S., and cannot be deemed an "arriving alien" upon her return. Cole also examined the STCA and its implementation by the DHS, which explicitly states that aliens returned to the U.S. after seeking refugee status in Canada would not be deemed "arriving aliens," except in limited circumstances. 69 Fed. Reg. at 69,484. This is, in Cole's view, a logical interpretation and application of *Matter of T-*. Importantly, this interpretation also advances one of the main goals of the Agreement: limiting asylum seekers to adjudication in *either* Canada *or* the U.S. *Matter of R-D-*, 24 I&N Dec. at 229-30 (Cole, dissenting). The majority's decision, in Cole's view, allowed an alien who was already denied asylum in Canada to apply again in the U.S., in violation of section 208(a)(2)(A) of the Act.

The majority, however, noted that there is no limitation on the application of the Agreement in the implementing regulations relating to sections 240 and 235 of the Act. The Agreement should be deemed equally applicable to "arriving aliens" and aliens subject to removal, meaning that the characterization of the present alien as "arriving" had no impact on the ability of immigration officials to deny her eligibility to apply for asylum. *See Matter of R-D-*, 24 I&N Dec. at 226-27.

> It is axiomatic that, in the interests of efficiency and security, once given a chance at asylum in Canada, aliens, with limited exceptions, should be denied the same privilege in the U.S.

Assessing *Matter of R-D-* in Context

It is axiomatic that, in the interests of efficiency and security, once given a chance at asylum in Canada, aliens, with limited exceptions, should be denied the same privilege in the U.S. That's the principle that was enshrined in both the STCA and the DHS's implementation of it, and it is a necessary principle in light of our proximity to Canada and the ease of travel across our borders.

It's too early to determine what impact *Matter of R-D-* will have on refugee seekers attempting to steal that second bite. The majority was correct to note that nothing in the statute or regulations precludes the application of the Agreement to "arriving aliens." Yet the disagreement between the majority and dissent points to the fundamental difficulties inherent both in applying legal fictions and extrapolating from prior interpretations and circumstances in which such fictions have been applied. If the DHS applies the regulations to "arriving aliens," however, all this is moot. But it will arise again, even if in a decreasing number of situations. There are still circumstances where the proper classification of the alien as "removable" or "inadmissible" has significant consequences for immigration purposes. In these circumstances, it will be vitally important to retain the old fictions and apply them rigorously.

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OIL'S LAST TANGO

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the Front Office invited everyone to join them for, "The First and Last Tango Luncheon." Following the luncheon, the other National Place suites each hosted an open house. The 12th Floor had a "Bon Voyage! Party" and the Adverse Team had a "Raffle Giveaways," while their downstairs neighbors, the 11th Floor, invited people in for an "Aloha! Ice Cream Social Hour," and an erupting volcano. Recreating an Italian Bistro, the 9th Floor hosted a "Ciao! Baby Celebration." The 8th Floor, not to be outdone, celebrated the move with the "Three Amigos' Hasta La Vista Fiesta and Tex-Mex Hold 'Em Poker Tournament," and multiple piñatas. The action continued on the 7th Floor with two "Trick-or-Treat" suites, and a "Tournament Suite" with darts and basketball.

Finally, the day was rounded out with the official "Last Tango at National Place," and Mr. Hussey gave farewell remarks celebrating OIL's thirteen years in the building and the "Top Ten Reasons Why OIL Is Moving."

OIL extends special thanks to the Teams' party coordinators and to David Kline for their contributions to creating such a memorable event.

By Katrina Brown, OIL

LAST TANGO AT NATIONAL PLACE

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Last Tango pictures courtesy of Christina Parascadola and Nannette Anderson

INSIDE OIL

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her legal career in private practice at Dechert, and then spent 9 years in the Antitrust Division, specializing in both merger and non-merger civil enforcement in the banking, cable and satellite television sectors. Most recently, she has been at home raising her three sons.

Aaron Nelson received a B.A. from the University of Iowa and an M.A. from the University of North Carolina at Chapel Hill. He is a graduate of the Benjamin N. Cardozo School of Law (Yeshiva University). He worked as a summer law intern at OIL in 2006.

INSIDE OIL

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

Jem Sponzo is a graduate of Hamilton College and the University of Connecticut School of Law. Prior to joining OIL, she woked as a judicial law clerk at the New York Immigration Court through the Attorney General Honors Program.

Kristina Sracic graduated from the University of Pennsylvania in 2001 and from the Rutgers-Camden Law School in 2006. Between college and law school, she was a paralegal at Terris, Pravlik, & Millian, a small public interest law firm in D.C. During law school, she interned with the Honorable Jack M. Sabatino of the New Jersey Superior Court, Appellate Division. Prior to joining OIL, she clerked for D.C. Superior Court Judge Judith Bartnoff.

Craig Kuhn is a graduate of Allegheny College and the Thomas M. Cooley Law School. Prior to joining OIL, he worked for a Department of Justice contractor, providing litigation support for the Commercial Litigation branch in the A-12 and various Winstar-related cases, and worked as a contract attorney here at OIL for the past year.

Zoe J. Heller graduated cum laude from Pace University School of Law in White Plains, New York in 2004. Prior to starting OIL, she worked for a private New York law firm litigating personal injury and insurance claims arising in New York and Connecticut.

Craig Newell received his B.A. from the College of the Holy Cross in 2001, and graduated from Villanova University School of Law in 2005. Prior to joining OIL, Craig clerked for U.S. District Court Judge Robert F. Kelly, Eastern District of Pennsylvania. Craig has also clerked for former Pennsylvania Supreme Court Justice Russell M. Nigro.

Kate Balaban has a BA in History from Dartmouth College and a JD from the University of Chicago. She started

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L to R: Kate Balaban, Aaron Nelson, Kristin Sracic, Jem Sponzo, Craig Newel, Craig Kuhn

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