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Immigration Litigation Bulletin

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LITIGATION HIGHLIGHTS

Inside

Supreme Court Holds That An Alien Who Files A Motion To Reopen Can Unilaterally Withdraw Prior Request For Voluntary Departure But That Motion Does Not Toll Departure Period

In ***Dada v. Mukasey***, __S. Ct.__, 2008 WL 2404066 (June 16, 2008), the Supreme Court held, 5-4, that an alien who has been granted voluntary departure and subsequently files a motion to reopen "must be permitted an opportunity to withdraw the motion for voluntary departure, provided the request is made before the departure period expires." However, the court rejected petitioner's contention that the filing of a motion to reopen tolls the voluntary departure period pending the motion's disposition.

The petitioner, Dada, a Nigerian citizen, entered the United States as a nonimmigrant. He failed to depart when his visa expired. Instead, he claimed that in 1999 he married a U.S. citizen who filed an I-130 visa petition. That petition was denied in 2003 because of a lack of required documentary evidence. In 2004, DHS instituted removal proceedings against Dada for overstaying his visa. Dada then sought a continuance of the hearing on the basis that his wife had filed a second I-130 visa petition. The Immigration Judge denied the request, found Dada eligible for removal, and granted his request for voluntary departure under INA § 240B(b), 8 USC §1229c (b). The BIA affirmed and ordered Dada to depart within 30 days or suffer statutory penalties. Two days before the end of the 30-day period, Dada sought to withdraw his voluntary departure request and filed a motion to reopen removal proceedings under INA § 240(c)(7), 8 USC

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"Torture" Requires Specific Intent To Inflict Severe Harm Or Suffering, Not Mere Knowledge It Is Likely To Occur

In ***Pierre v. Attorney General***, 528 F.3d 180 (3d Cir. June 9, 2008) (en banc), the Third Circuit, sitting en banc, restored uniformity to its case law by overruling *Lavira v. Attorney General*, 478 F.3d 158 (3d Cir. 2007), and holding that "torture" requires specific intent to harm, not mere knowledge that harm is likely to occur or would be the practical consequence of a government official's actions. On this basis the court held that the pain and suffering a criminal deportee with medical problems is likely to experience in Haitian prisons due to the lack of special medical care for his condition does not constitute "torture."

The petitioner was a permanent resident alien from Haiti who broke into the home of his ex-girlfriend, stabbed her repeatedly with a meat cleaver, and then drank battery acid in a suicide attempt. The attempt was unsuccessful. It left him with an esophageal condition limiting him to a liquid diet administered through a feeding tube, which must be replaced monthly, and the need for daily medical care. Following a trial by jury the petitioner was convicted of various

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Alien Can Unilaterally Withdraw VD Request

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§1229a(c)(7), contending that new and material evidence demonstrated a bona fide marriage and that his case should be continued until resolution of the second I–130 petition. After the voluntary departure period had expired, the BIA denied the request, reasoning that an alien who has been granted voluntary departure but does not depart in a timely fashion is statutorily barred from receiving adjustment of status. It did not consider Dada's request to withdraw his voluntary departure request.

"To safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period."

The Fifth Circuit, relying on *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (2006), affirmed the BIA, finding that its interpretation of the statute was reasonable. *Dada v. Gonzales* 207 Fed. Appx. 425 (2006). The Fifth Circuit joined the First and Fourth Circuit in finding that there is no automatic tolling of the voluntary departure period. *See Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006). Four other courts of appeals have reached the opposite conclusion. *See, e.g., Kanivets v. Gonzales*, 424 F.3d 330 (CA3 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. United States Atty. Gen.*, 453 F.3d 1325 (11th Cir. 2006).

In his petition for certiorari, Dada argued that the filing of a motion to reopen should toll the voluntary departure period as the majority of the courts who had addressed that issue had found. In the absence of tolling, he argued, aliens granted voluntary departure would be presented with a "Hobson's choice" of foregoing reopening their case because the BIA would not necessarily issue a ruling before the expiration of the voluntary departure period and because under 8 CFR 1003.2(d), a departure has the effect of withdrawing the motion to reopen. The government argued that adopting an automatic tolling rule would simply invite aliens to "manipulate the voluntary departure process" but acknowledged that a no-tolling rule could prevent some aliens from reopening their case. However, the government also argued that because voluntary departure is "entirely voluntary", it is "commonplace that a party's choice to seek one remedy may sometimes foreclose his ability to obtain another." Following the grant of certiorari, the Department of Justice published a proposed rule which, *inter alia*, would provide that the filing of a motion to reopen or reconsider automatically terminates the grant of voluntary departure. After the case was argued, the Court requested supplemental briefing on the question of whether an could, as the petitioner had attempted to do in this case, withdraw an earlier request for voluntary departure.

Writing for the majority of the court, Justice Kennedy framed the issue to be whether Congress had intended the statutory right to reopen to be qualified by the voluntary departure process. The Court explained that the INA "guarantees to each alien the right to file 'one motion to reopen proceedings,'" and that an alien may also seek voluntary departure. "Without some means, consistent with the Act, to reconcile the two commands—one directing voluntary departure and the other directing termination of the motion to reopen if an alien departs the United States—an alien who seeks reopening has two poor choices: The alien can remain in the United States to ensure the motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date; or the alien can avoid penalties by prompt departure but abandon the motion to reopen."

The Court rejected Dada's contention that the filing a motion to reopen should toll voluntary departure finding that such interpretation would "reconfigure the voluntary departure scheme in a manner inconsistent with the statutory design." But the Court also found "unsustainable" the government's contention that essentially the cost of seeking voluntary departure may be in certain cases the surrendering of the opportunity to seek reopening. Accordingly, the Court held that the "appropriate way to reconcile the voluntary departure and motion to reopen provisions is to allow an alien to withdraw the request for voluntary departure before expiration of the departure period." The Court noted that the government had already proposed a rule that prospectively would permit such withdrawal before the expiration of the departure period and that such proposal warranted "respectful consideration."

Accordingly, the Court held that "to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen. As a result, the alien has the option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure; or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion." The Court observed that in the absence of a stay an alien may be removed pending a motion to reopen but noted in dicta that the BIA could abuse its discretion in denying a request for a stay "where the motion states nonfrivolous grounds for reopening." Finally,

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Will The Ban On "Offshore" Motions To Reopen Go The Way Of The *Dada*?

As immigration practitioners sort out the Supreme Court's recent decision addressing the issue of whether filing a motion to reopen tolls a voluntary departure period, a related issue looms on the horizon. The issue is post-departure or "offshore" motions to reopen – motions to reopen filed after the alien has left or been removed, or motions to reopen that are filed, after which the alien leaves or is removed.

Regulations have long provided that an alien cannot file a motion to reopen after departing or being removed, and that removal or departure constitutes withdrawal of any pending motion to reopen. 8 C.F.R. § 1003.2(d) (addressing motions before the Board); 8 C.F.R. § 1003.23(b)(1) (addressing motions before the immigration court). The language in the two regulations is the same; this article will refer to the regulation addressing motions before the Board - 8 C.F.R. § 1003.2 (d). The regulations were consistent with the goal of bringing finality to immigration cases.

As discussed below, until recently, the regulation prohibiting offshore motions had not been successfully challenged. Now, one court has explicitly found the regulation invalid, and another court has limited the regulation. Meanwhile, other courts have explicitly upheld the regulations. And then came *Dada*, the Supreme Court's recent foray into motions to reopen and voluntary departure. While explicitly *not* ruling on the offshore motion issue, the majority opinion offered some pointed dicta on the issue.

The History - How Did We Get Here

Since 1962, aliens have been able to file motions to reopen their immigration proceedings. Initially, motions to reopen were creatures of regulation only. As part of this regulatory scheme, 8 C.F.R. § 3.2 (predecessor to 8 C.F.R. § 1003.2 (d)) provided a motion to reopen or reconsider shall not be made subsequent to the alien's departure from the United States, and that any departure occurring after the making of a motion constitutes a withdrawal of such motion.

The regulation was a logical counterpart to a statutory provision, 8 U.S.C. § 1105a(c) (1962), which barred the federal courts from exercising jurisdiction over final orders of deportation when the alien had departed the country. In 1996, Congress made major changes to immigration law through enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Among other things, IIRIRA (1) repealed the statutory bar to judicial review of deportation orders when the alien had departed the country, and (2) codified and enacted procedures governing the filing of motions to reopen. Specifically codifying motions to reopen, Congress provided: "An alien may file one motion to reopen proceedings under this section," subject to certain limitations (including a 90-day deadline) and exceptions. 8 U.S.C. § 1229a(c)(7)(A)-(C). The statute is silent regarding offshore motions.

Regulations have long provided that an alien cannot file a motion to reopen after departing or being removed, and that removal or departure constitutes withdrawal of any pending motion to reopen.

After Congress' codification of the motion to reopen in IIRIRA, the Attorney General repromulgated, in essentially the same form, the regulation imposing the bar to review of offshore motions. 8 C.F.R. § 3.2 (later redesignated 8 C.F.R. § 1003.2(d)).

Cases

Several cases have upheld the prohibition on offshore motions to reopen. *See Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675-76 (5th Cir. 2003) (upholding Board's application of 8 C.F.R. § 1003.2(d) to find that it lacked jurisdiction to review deported alien's removal order); *Vargas v. INS*, 938 F.2d 358, 361 (2d Cir. 1991) (observing that the regulation (formerly at § 3.2(d)) "terminates an alien's ability to move to reconsider or reopen upon physical deportation"); *Singh v. Gonzales*, 468 F.3d 135, 140 (2d Cir. 2006) ("One consequence of complying with a voluntary departure order is forfeiture of the right to file a motion to reopen, because the alien has already left the United States"); *Matter of Okoh*, 20 I&N Dec. 864 (BIA 1994) (finding that once the Board's order of deportation was executed, the proceedings were brought to finality, and the Board lacks jurisdiction to act on a motion to reopen). The First Circuit also sided with the government in *Pena-Muriel v. Gonzales*, 489 F.3d 438 (1st Cir. 2007), holding (1) statutory amendment did not curtail Attorney General's authority to enforce regulation barring consideration of motion to reopen by or on behalf of alien who was subject of removal proceedings, after alien's departure from United States; (2) deference was warranted to Attorney General's reasonable interpretation of statutory amendment as not signaling congressional intent to end enforcement of regulation barring consideration of post-departure motion to reopen removal proceedings. The Tenth and Third Circuits have denied petitions for review in unpublished cases involving offshore motions, upholding the regulation or at least positively noting its existence in dicta. *Men-*

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"Offshore" Motions To Reopen

diola v. Mukasey, 2008 WL 2222018 (May 30, 2008) (finding petitioner waived any challenge to the validity of 8 C.F.R. § 1003.2(d)); *Balane v. Mukasey*, 2008 WL 695523 (March 14, 2008); *Grewal v. Attorney General of U.S.*, 251 Fed. Appx. 114, 2007 WL 3037002 (3d Cir. Oct. 18, 2007); *Marsan v. Attorney General of U.S.*, 199 Fed. Appx. 159, 2006 WL 2786994 (3d Cir. Sept. 27, 2006). The Sixth Circuit also appeared to note the validity of the regulation in dicta. *Mansour v. Gonzales*, 470 F.3d 1194, 1198 (6th Cir. 2006) ("An alien is generally precluded, then, from filing a motion to reopen his or her deportation proceedings once the alien has left the country.")

Two courts have ruled against the government. In the more emphatic rebuff to the government position, the Fourth Circuit found the regulation invalid in *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). The Fourth Circuit held that 8 U.S.C. § 1229a(c)(7)(A) "unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country. This is so because, in providing that 'an alien may file,' the statute does not distinguish between those aliens abroad and those within the country-both fall within the class denominated by the words 'an alien.'" *Id.* at 332. The court noted that "one of IIRIRA's aims is to expedite the removal of aliens from the country while permitting them to continue to seek review of their removal orders from abroad." *Id.* at n.3. The court found the regulation "conflicts with the statute by restricting the availability of motions to reopen to those aliens who remain in the United States." *Id.* at 334.

In addition, the Ninth Circuit limited the applicability of the regulation, holding that by its own terms, the regulation only prohibits reopening if the alien "*is* the subject of removal proceedings," so the bar did not apply where the alien's proceedings had been completed and he had been removed. *Lin v. Gonzales*, 473 F.3d 979, 981-82 (9th Cir. 2007); *Singh v. Gonzales*, 412 F.3d 1117 (9th Cir. 2005).

And Then Came *Dada*

The regulatory prohibition on offshore motions to reopen was not specifically challenged in *Dada*. Rather, *Dada* addressed the question of whether the filing of a motion to reopen tolled the period of voluntary departure. The Court noted the prohibition on offshore motions (specifically, that departure withdraws a pending motion) and that an alien who fails to comply with a voluntary departure order renders the alien ineligible for certain forms of relief for ten years. Because a motion to reopen would generally not be resolved by the Board before the expiration of the voluntary departure period, the Court found that the alien who was granted voluntary departure and then seeks reopening has "two poor choices: The alien can remain in the United States to ensure the motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date; or the alien can avoid penalties by prompt departure but abandon the motion to reopen." *Dada v. Mukasey*, __S. Ct.__, 2008 WL 2404066, *3 (2008). The *Dada* majority held that in order to "safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before the departure period expires, without regard to the motion to reopen's underlying merits." *Id.* at *12.

The Fourth Circuit held that 8 U.S.C. § 1229a(c)(7)(A) "unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country.

What's Next After *Dada*?

Based on *Dada*, it is unclear how the Supreme Court would rule if asked to consider the validity of the ban on offshore motions to reopen. On the one hand, the *Dada* majority was careful not to rule on the validity of the ban, and it could be argued that the Court presumed the validity of the ban in fashioning its holding. On the other hand, the majority repeatedly emphasized the plain language of the INA guaranteeing an alien the right to file one motion to reopen ("It is necessary, then, to read the Act to preserve the alien's right to pursue reopening," *id.*). To the extent that this reliance on the plain language of the statute echoes the Fourth Circuit's holding in *William*, it could be an indicator that the Court would find that the statutory guarantee of the right of every alien to file his or her one motion to reopen would trump the regulatory ban on offshore motions.

As a practical matter, the Board can often deny an offshore motion on timeliness grounds. But the option of denying a motion as untimely would not be available where the motion was timely filed and the alien was removed after filing.

Notwithstanding its explicit caution that it was not ruling on the validity of the offshore motion ban, the Supreme Court noted that a " more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen post-departure, much as Congress has permitted with respect to judicial review of a removal order." *Id.* at *13. Such a remains a possibility.

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FURTHER REVIEW PENDING: Update on Cases & Issues

Asylum — Persecutor Bar

On March 17, 2008, the Supreme Court granted certiorari in ***Negusie v. Gonzales***, 231 Fed. Appx. 325, No. 06-60193 (5th Cir. May 15, 2007) (per curiam), *cert. granted sub nom.* ***Negusie v. Mukasey***, No. 07-499, 2008 WL 695623 (U.S. Mar. 17, 2008). The question presented is: Does "persecutor exception" prohibit granting asylum to, and withholding of removal of, refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution?

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GMC - Family Unity Waiver

On June 2, 2008, the government filed a petition for en banc rehearing in ***Sanchez v. Mukasey***, 521 F.3d 1106 (9th Cir. 2008), on the issue of whether the "family unity" alien-smuggling waiver of inadmissibility under 8 U.S.C. § 1182 (d)(11) may also be applied to waive the good moral character requirement for cancellation of removal, where the alien would otherwise be barred from cancellation because of alien smuggling involving a spouse, child or parent. On June 23, 2008, the court ordered the alien to respond.

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Criminal Alien — Conviction Modified Categorical Approach

The Ninth Circuit granted the government petition for rehearing en banc in ***United States v. Snellenberger***, 480 F.3d 1187 (9th Cir. 2007), *reh'g en banc granted*, 519 F.3d 908 (2008), and ordered that the prior opinion no longer be cited. The question raised is whether a minute order can be considered under the modified categorical approach. Oral argument was heard on June 23, 2008.*

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*During the same week, the Ninth Circuit also heard oral argument in two other modified categorical approach cases, ***Marmolejo-Campos v. Mukasey***, 519 F.3d 907 (9th Cir. 2008), and ***Estrada-Espinoza v. Mukasey***, 525 F.3d 821 (9th Cir. 2008).

Coercive Family Planning Spouses — Lin/S-L-L- Issue

On May 28, 2008, the Third Circuit submitted ***Lin-Zheng v. Attorney General of the U.S.***, No. 07-2135, without oral argument to the en banc court. Prior to the Attorney General's decision in Matter of J-S-. 24 I. & N. Dec. 540 (AG 2008), the court had sua sponte ordered en banc hearing based on the issue of whether spouses of those subjected to forced sterilization or other family planning practices in China should be entitled to eligibility as refugees under 8 U.S.C. § 1101(a)(42)(B) for purposes of asylum, specifically including whether the court should adopt the reasoning of the Second Circuit in Lin v. U.S. Dept. of Justice, 494 F.3d 296 (2d Cir. 2007), which conflicts with Chen v. Attorney General of the U.S., 491 F.3d 100 (3d Cir. 2007).

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Removal — Blake issue

The en banc Ninth Circuit heard oral arguments March 25, 2008 in ***Abebe v. Gonzales***, 493 F.3d 1092 (9th Cir. 2007), *reh'g en banc granted sub nom.* ***Abebe v. Mukasey***, 514 F.3d 909 (2008) (also ordering that the panel decision cannot be cited as a precedent). The issue is whether an alien who is charged with deportability on a ground that does not have a comparable ground of inadmissibility is ineligible for § 212(c) relief. The BIA had held that the agency's long-standing "statutory counterpart" rule, as applied in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), rendered petitioner ineligible for § 212(c) relief because there is no statutory counterpart in INA § 212(a) to the sexual abuse of a minor ground of deportability.

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Jurisdiction– Denial of Continuance

On June 26, 2008, the court granted petitioner's petition for rehearing en banc in ***Potdar v. Gonzales,*** __F.3d__, 2007 WL 2938378 (7th Cir. Oct. 10, 2007) (Ripple, Manion, Kanne) (*per curiam), where* the Seventh Circuit had held that petitioner's motion to reopen, based upon pending adjustment and legalization applications filed with the DHS was effectively a continuance motion, and the court accordingly dismissed the petition for lack of jurisdiction to review decisions on such motions. The government had acquiesced to the *en banc* petition. The court limited rehearing on the issue of whether it had jurisdiction to review a denial of a motion to reopen under *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004)

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Summaries Of Recent Federal Court Decisions

SUPREME COURT

■ **Supreme Court Holds That Under EAJA Recovery For Paralegal Fees May Be At Prevailing Market Rates**

In *Richlin Security Service Co. v. Chertoff*, __S. Ct.__, 2008 WL 2229175 (June 2, 2008), the Supreme Court unanimously held that under the Equal Access to Justice Act a plaintiff is entitled to recover fees for the paralegal services at the market rate for such services, not at the actual cost of the services to plaintiff's counsel, reversing the Transportation Board of Contract Appeals and a published decision of the Federal Circuit (472 F.3d 1350 (Fed. Cir. 2006)).

■ **Supreme Courts Holds That Guantanamo Detainees Can Seek Habeas Corpus**

In *Boumediene v. Bush*, __S. Ct.__, 2008 WL 2369628 (U.S. June 12, 2008) the Supreme Court held (5-4) that (1) detainees at Guantanamo who are not United States citizens and have been designated enemy combatants have the constitutional right to habeas corpus; (2) the Military Commissions Act operates as an unconstitutional suspension of habeas because the procedures of the Detainee Treatment Act ("DTA") on its face are not an adequate and effective substitute for habeas.

The Court holds that among the constitutional infirmities from which the DTA potentially suffers are the absence of provisions allowing detainees to challenge the President's authority to detain them indefinitely, to contest the findings of fact of the Combatant Status Review Tribunals ("CSRTs"), to supplement the record on review with exculpatory evidence discovered after the CSRTs proceedings, and to request release from detention.

The Chief Justice, joined by Justices Scalia, Thomas, and Alito, dissented. The Chief Justice stated that he regards the issue of whether "the Guantanamo detainees are entitled to the protections of habeas corpus . . . as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay." He would not decide that issue because in his view, "the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy." He also stated that certiorari "should never have been granted . . . until the D.C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case." In addition, for him, "the Court's opinion fails on its own terms" because it "strikes down the statute because it is not an 'adequate substitute' for habeas review, . . . but fails to show what rights the detainees have that cannot be vindicated by the DTA system." He added, "The Court today invents a sort of reverse facial challenge and applies it with gusto: If there is any scenario in which the statute might be constitutionally infirm, the law must be struck down."

"The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires."

Justice Scalia, joined by the Chief Justice and Justices Thomas and Alito, also dissented. In his view, "The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires."

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FIRST CIRCUIT

■ **Alien Bears The Burden Of Proving That His Conviction For Distributing Marijuana Was Not An Aggravated Felony For Purposes Of Cancellation Of Removal**

In *Julce v. Mukasey,* __F.3d__, 2008 WL 2469196 (*Lynch*, Lipez, Howard) (1st Cir. June 20, 2008), the First Circuit held that the alien bears the burden of proving that his state-law conviction for distributing marijuana was not an aggravated felony so as to establish eligibility for cancellation of removal. The court noted that this position was consistent with federal criminal law, under which the defendant has the burden to show that an offense should be reduced to a misdemeanor. The petitioner, who had entered the United States as an LPR, plead guilty to the controlled substances offense in 2003. When placed in proceedings as an alien convicted of an aggravated felony, petitioner sought cancellation of removal. His application for cancellation was pretermitted and the BIA found that his conviction qualified as an aggravated felony because the CSA treats possession of marijuana with intent to distribute as a felony.

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■ **First Circuit Reaffirms The Comparable Grounds Test For Alien To Be Eligible For A Section 212(c) Waiver of Inadmissibility**

In *Gonzalez-Mesias v. Mukasey*, __F.3d__, 2008 WL 2444497 (*Lynch*, Torruella, Lipez) (1st Cir. June 18, 2008), the First

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Circuit, held that an alien could not obtain a discretionary waiver under former INA § 212(c) where there was no comparable statutory ground of inadmissibility for the ground upon which he had been found removable. The court declined to follow the Second Circuit's rationale in overruling the comparable grounds test, as urged by the alien, concluding that it was bound by its own precedent decisions that have upheld the comparability test.

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■ **First Circuit Reaffirms No Jurisdiction To Review Untimely Asylum Claim; Holds Police Beating Is Not "Persecution;" Political Volatility Does Not Show Future Persecution**

In *Jamal v. Mukasey*, __F.3d__ , 2008 WL 2553338 (1st Cir. June 27, 2008) (Boudin, *Campbell*, Stahl (Senior Judges)) upheld an IJ's and BIA's denial of asylum and withholding of removal in the case of a petitioner from Pakistan who claimed past political persecution by the Government and fear of future political persecution because of civil unrest. The First Circuit reaffirmed that under the REAL ID Act, courts do not have jurisdiction to review the decision that an asylum application was untimely for failure to show changed or extraordinary circumstances excusing late filing. The court rejected the petitioner's attempt to circumvent the jurisdictional bar by constitutional challenge to the IJ's denial of the untimely application. The court ruled that petitioner's claim that the IJ violated due process because she did not adequately consider that the petitioner was disabled due to his inability to read or write was a "frivolous" constitutional claim, and nothing more than "a disguised challenge to factual findings."

On the merits of the denial of withholding of removal, the court that evidence that the petitioner was beaten by police after attending a meeting advocating democracy does not compel a finding of past "persecution." The court reasoned that the petitioner walked home after the beating, engaged in further political activism, was never convicted for his part in meeting, left area and resumed work without incident, and traveled freely out of Pakistan using government-issued documents. The court held that the evidence did not establish a likelihood of future persecution or torture by the government, because the applicant's wife and six children lived safely in Pakistan, and although there was corruption and political turmoil in Pakistan, there was no evidence that these conditions would affect applicant more than other Pakistani citizens.

The court held that the evidence did not establish a likelihood of future persecution or torture by the government, because the applicant's wife and six children lived safely in Pakistan.

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■ **First Circuit Rules That Bullying, Robberies, And Discrimination Against Chinese Christian Indonesian Does Not Establish Persecution; IJ Cutting Off Testimony Does Not Violate Due Process**

In *Santosa v. Mukasey*, 523 F.3d 88 (1st Cir. June 11, 2008) (*Lynch*, Merritt, Howard), the First Circuit affirmed the agency's denial of asylum and withholding in the case of a Chinese Christian claiming religious and ethnic persecution in Indonesia. The court held that the petitioner failed to prove past persecution based on isolated bullying incidents by students or others when he was a child and four robberies over many years that were likely to have been random acts of violence or ordinary crime. The court also ruled that the applicant did not show a reasonable, individualized fear of future persecution because nothing indicated that the applicant's family members who remained in Indonesia has experienced any persecution. Observing that "an alien is entitled to a fair hearing, not necessarily a perfect one," and that a petitioner must show prejudice to succeed on a due process claim, the court rejected the petitioner's contention that the IJ violated due process in cutting short the petitioner's testimony. The court reiterated its ruling in an earlier case that "[w]hen a due process claim is aimed at a trial-management ruling, [we] must keep in mind the tension that exists" between "an alien's . . . right to present evidence on his own behalf . . . and an immigration judge['s] . . . right to regulate the course of the hearing."

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SECOND CIRCUIT

■ **Second Circuit Upholds Adverse Credibility Finding In Pre-REAL ID Case Based On Implausibilities Regarding Chinese Falun Gong Claim And Acknowledges Its Inconsistent Case Law On Implausibilities**

In *Ying Li v. Bureau of Citizenship and Immigration Services*, 529 F.3d 79 (2d Cir. June 10, 2008) (*Jacobs*, Kearse, Katzman), the Second Circuit upheld an IJ's adverse credibility finding in an asylum case involving a Chinese woman who claimed government persecuted her for supporting Falun Gong. The court concluded that implausibilities in the petitioner's testimony cited by the IJ were sufficient to support the finding that she was not credible. In so doing, the court observed that "'the decisions of our court have not been entirely consistent'" when "'an IJ has

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supported an ultimate finding that an applicant's testimony was not credible by concluding that significant aspects of the testimony were implausible'." 529 F.3d at 82, *quoting Ming Xia Chen v. BIA*, 435 F.3d 141, 145 (2d Cir. 2006). "For example," the court observed, "we have cited approvingly the BIA's view that an adverse credibility finding may be based on 'inherently improbable testimony.'" *Id.*, *quoting Diallo v. INS*, 232 F.3d 279, 287-88 (2d Cir.2000)) "But we have also said that an 'IJ must point to valid, or specific, cogent reasons for rejecting an applicant's testimony and may not reject testimony based on speculation.'" *Id., quoting Ming Xia Chen*, 435 F.3d at 145). Affirming that under Second Circuit case law the "'line between reasonable inference-drawing and speculation is imprecise'," quoting *Quo-Le Huang v. Gonzales*, 453 F.3d 142, 147 (2d Cir. 2006)), the court concluded that implausibilities in Li's case fell on the side of reasonable inference-drawing in the court's "blurry divide" regarding implausibilities.

"We have cited approvingly the BIA's view that an adverse credibility finding may be based on inherently improbable testimony.'

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Briefing Note: If you have an adverse credibility case in the Second Circuit involving implausibilities, this case is useful. For another useful case, see *Jibril v. Gonzales,* 423 F.3d 1129, 1138 (9th Cir. 2005) (acknowledging the Ninth Circuit has logically "irreconcilable precedents" regarding implausibilities, sometimes rejecting them as speculation, and other times acknowledging they are based on common sense). *Jibril* takes the position that "relief is on the way" under the REAL ID Act, which permits an adverse credibility findings to be based on "the inherent plausibility of the applicant's or witnesses' account." *Id. See also* OIL's supplemental en banc brief filed in May 2007 in *Suntharalinkam* (discussing unsound court rules discounting implausibilities as speculation and conjecture rather than appropriate inference drawing based on common sense).

■ **Second Circuit Holds That Immigration Judge's Reliance On Preconceived Assumptions About Homosexuals Rendered Immigration Hearing Fundamentally Unfair.**

In ***Ali v. Mukasey***, __F.3d__, 2008 WL 2437646 (Kearse, *Calabresi*, Katzmann) (2d Cir. June 18, 2008), the Second Circuit concluded that the Immigration Judge violated fundamental fairness by relying on stereotypes about homosexuals. The court found the Immigration Judge's comments to be prejudicial, and remanded the case to the BIA, instructing it to assign the case to a different Immigration Judge. The court rejected the alien's argument that collateral estoppel and law of the case doctrine precluded the Department of Homeland Security from moving to terminate the previous grant of Convention Against Torture protection.

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■ **Second Circuit Rejects *Matter Of A-T-*'s Construction That Past FGM Rebuts Claim Of Future Persecution, And Remands For Social Group Assessment And Rebuttal Of The Past Persecution Presumption**

In ***Bah v Mukasey***, 529 F.3d 99 (2d Cir. June 11, 2008) (*Straub*, Pooler, Sotomayor) and combined cases, the Second Circuit reversed the denial of withholding of removal for three women who claimed past FGM, and remanded the cases to the BIA, holding: (1) the fact that a woman has undergone past FGM cannot, in and of itself, be used to rebut presumption that their lives or freedom will be threatened in future; (2) the BIA was required to determine whether each petitioner was a member of a "particular social group" within the meaning of our laws; (3) the BIA erred in assuming categorically that FGM was a "one-time" act; and (4) the BIA erred in assuming that FGM was the only type of persecution relevant to analysis of whether applicants were entitled to withholding of removal. The decision effectively rejects *Matter of A-T-,* 24 I&N Dec. 296 (BIA 2007) (agreeing with Seventh Circuit case law, and holding that a woman cannot qualify for withholding of removal or automatically establish a presumption of future persecution based on past FGM, since FGM is a one time event that rebuts the presumption of future persecution).

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■ **Second Circuit Holds That It Lacks Jurisdiction To Review Determination That Alien Did Not Timely File His Asylum Application, But Remands Withholding And Torture Convention Claims For Additional Findings**

In ***Leng v. Mukasey***, __F.3d__, 2008 WL 2311590 (2d Cir. June 6, 2008) (Cabranes, Katzmann, B.D. Parker) (*per curiam*), the Second Circuit held that it lacked jurisdiction to review the BIA's finding that the petitioner's asylum application was untimely because the petition raised neither a constitutional claim nor a question of law. The court further held that substantial evidence supported the Immigration Judge's adverse credibility finding. However, the court concluded that the petitioner's application for withholding of removal and Torture Convention protection did not rest on his testimony alone, and the Immigration Judge failed to make any specific finding as

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to whether other evidence in the record supported the alien's claim.

Petitioner, a citizen of the PRC, entered the U.S. as J-1 nonimmigrant in 1995. When he applied for asylum in 2004, he claimed persecution based solely on activities undertaken after his arrival in the United States. The court remanded the case to the IJ to consider whether petitioner's documentary evidence and his witness's testimony established that the authorities of the People's Republic of China were (1) aware or (2) likely to become aware of the his activities in the United States.

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Briefing Note: If you have a case involving a claim of asylum or withholding based on past FGM where the IJ or BIA rely on *Matter of A-T-*, contact Charles Canter (202-616-9132), who is handling defense of *Matter of A-T-* in the Fourth Circuit.

■ **Second Circuit Recalls Mandate And Clarifies That Alien's Lawyer Engaged In Unacceptable, Prejudicial Fee-Charging Acts Against The Client's Interests**

In ***Bennett v. Mukasey***, 525 F.3d 222 (2d Cir. 2008) (*Newman*), the Second Circuit granted the alien's motion to recall the mandate and reinstate petition for review, that had been dismissed one year earlier for his attorney's failure to comply with local procedural rules. The court clarified that this situation merited a published chambers opinion to make clear that a lawyer's practice of accepting an initial retainer fee and then deliberately failing to take required action because of non-payment of additional fees, thereby permitting his client's petition to be dismissed, is unacceptable. The court noted that it had previously stated that "[n]on-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation." *United States v. Parker*, 439 F.3d 81, 104 (2d Cir. 2006).

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THIRD CIRCUIT

■ **Pendency Of Post-Conviction Motions Or Other Forms Of Collateral Attack Does Not Vitiate Finality Of Convictions For Immigration Purposes**

In ***Paredes v. Att'y Gen. of United States***, __F.3d__, 2008 WL 2331386 (3d Cir. June 9, 2008) (Barry, Stapleton, *Restani*), the Third Circuit, deciding an issue of first impression, held that the pendency of post-conviction motions or other forms of collateral attack does not vitiate finality, unless and until the convictions are overturned as a result of the collateral motions. The court found support for its holding in the "well-reasoned decisions" from the other circuits that have addressed this issue. *See United States v. Garcia-Echaverria*, 374 F.3d 440, 445-46 (6th Cir. 2004; *Grageda v. INS*, 12 F .3d 919, 921 (9th Cir. 1993); *Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982); *Will v. INS*, 447 F.2d 529, 533 (7th Cir. 1971).

"The term 'persecution' has gray boundaries where ambiguity may legitimately be found."

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■ **Third Circuit Affirms That Nazi Concentration Camp Guard's Actions Unambiguously Constitute Personal Assistance In Persecution**

In ***United States v. Geiser***, __ F.3d __, 2008 WL 2350630 (3d Cir. June 10, 2008) (Scirica, *Fisher*, Roth), the Third Circuit held that a naturalized United States citizen's actions when serving as Nazi concentration camp guard "personally advocated or assisted in the persecution" or others on account of a protected ground and thus was ineligible for a visa under the Refugee Relief Act (RRA) of 1953. The court rejected the naturalized citizen's argument that the word "persecution" as used in the RRA is ambiguous, noting that an undefined word is not necessarily ambiguous. The court acknowledged that "the term 'persecution' has gray boundaries where ambiguity may legitimately be found." However, certain conduct, such as guarding a concentration camp or forcing a woman to undergo an abortion fall squarely within the definition of "persecution" said the court. The court declined to assess the legislative history of the RRA under the *Chevron* step two analysis and instead affirmed the district court's decision to revoke citizenship.

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■ **Third Circuit Holds That Administrative Closure Does Not Re-Start Continuous Presence For Suspension Of Deportation**

In ***Arca-Pineda v. Att'y Gen. of United States***, 527 F.3d 101 (3d Cir. May 28, 2008) (McKee, *Garth*, Rodriguez), the Third Circuit held that because administrative closure does not terminate removal proceedings, the alien's physical presence did not renew upon administrative closure of the proceedings. The petitioner, a citizen of Peru who had entered the United States without inspection in 1986, sought suspension of deportation. However, her case was administratively closed when she did not appear at her hearing scheduled for March 13, 1987. On August 2001, petitioner sought recalandering to apply for adjustment of status. That application was denied for failure to appear. Petitioner then sought suspension of deportation under former INA 244(a)(1). The IJ denied that application finding

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that the "stop-time" rule applied to her case. The court held that treating closure aliens differently than returning aliens (whose physical presence re-starts on returning) was rationally related to the purpose of preventing delay in removal proceedings and thus not an equal protection violation. The court distinguished its ruling from that in *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007), where it had found that the "statutory counterpart" requirement for waiver violated equal protection. The court also held that application of the stop-time rule to cases pending as of the date of the enactment of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 was not a due process violation, and noted that it had previously rejected such challenge in *Pinho v. INS*, 249 F.3d 183 (3d Cir. 2001).

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■ **Asylum Applicant Has A Well-Founded Fear Of Persecution On Account Of Membership In Particular Social Group Of Women Who Escaped Involuntary Servitude**

In *Gomez-Zuluaga v. U.S. Atty Gen.*, 527 F.3d 330 (3d Cir. 2008) (*Fisher*, Hardiman and Stapleton), the Third Circuit held that although the alien had not demonstrated past persecution on account of any protected grounds, she nonetheless had demonstrated a well-founded fear of persecution based on her membership in a particular social group of "women who have escaped involuntary servitude after being abducted and confined by the FARC." The court's decision was based largely on its precedent in *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003). The court remanded for the BIA to address whether internal relocation would be reasonable, eligibility for withholding of removal, and whether the government would acquiesce to torture.

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FOURTH CIRCUIT

■ **Fourth Circuit Holds That 8 U.S.C. § 1252(f)(2) Applies To Requests To Stay Removal**

In *Teshome-Gebreegziabher v. Mukasey*, __F.3d__, 2008 WL 2406146 (4th Cir. June 16, 2008) (Williams, *Shedd*, Hilton (by designation)), the Fourth Circuit held that the standard at 8 U.S.C. § 1252(f)(2), rather than the traditional preliminary injunction test, applies to requests for stays of removal. Section 1252(f)(2) prohibits the courts from enjoining an alien's removal unless the alien shows by clear and convincing evidence that his removal is prohibited as a matter of law. The court concluded that the plain meaning of the term "enjoin" includes requests to stay removal, given the two terms' ordinary and common judicial and legislative usage. The court stated that this reading of section 1252(f)(2) reflected Congress' intent in enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to expedite the removal of aliens subject to a final order of removal, but to allow pursuit of petitions for review from abroad.

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SIXTH CIRCUIT

■ **Sixth Circuit Determines That Alien's Second Conviction For Drug Possession Was Not An Aggravated Felony Offense.**

In *Rashid v. Mukasey*, __F.3d__, 2008 WL 2520455 (Merrit, Clay, *Gilman*) (6th Cir. June 26, 2008), the Sixth Circuit held that because the alien's second state misdemeanor drug possession conviction did not refer to his first conviction for a similar offense, he had not been convicted of a recidivist offense under state law. Consequently, the alien had not committed an aggravated felony under the immigration statute and was therefore eligible to apply for cancellation of removal.

The petitioner, a citizen of Pakistan and an LPR, pled guilty in 2000 in a Michigan court to the criminal possession of a small quantity of marijuana, a misdemeanor offense. Five years later, he again pled guilty to the misdemeanor offense of marijuana conviction. The IJ found petitioner ineligible for cancellation because he had committed an aggravated felony under the INA, finding that petitioner's second conviction became a felony drug-trafficking offense under federal law. The IJ also determined that the case was controlled by *United States v. Palacios*, 418 F.3d 692 (6th Cir. 2005). The BIA affirmed, and petitioner was removed to Pakistan.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds No Jurisdiction To Review Untimely Asylum Application; No Due Process Administrative Notice Of Country Conditions; No Due Process Violation In Cutting Off Tangential Questioning**

In *Ogayonne v. Mukasey*, __F.3d __, 2008 WL 2437597 (7th Cir. June 18, 2008) (Bauer, Ripple, *Williams*), a case involving a female asylum and withholding applicant from the Central African Republic (CAR), the Seventh Circuit reiterated that it has no jurisdiction to review the denial of an untimely asylum application, or claim that bad advice and ignorance about the change in immigration status should excuse the late filed application. In regard to the denial of withholding of removal, the court held that the IJ did not err in introducing documents on his own at the removal hearing concerning current events in the Central African Republic. The court reasoned that the documents

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merely stated commonly acknowledged facts of which the IJ properly could take administrative notice. The petitioner also did not object to the documents or claim that they were inaccurate. The court rejected a due process challenge to the IJ cutting off a tangential line of questioning, disagreeing that this deprived the petitioner of a meaningful opportunity to be heard. The court held that an IJ can limit the extent of some testimony or frequently interrupt the alien's presentation without violating due process. The court also held that the IJ's questioning of the petitioner about country conditions was reasonable and specific and did not violate due process.

The court held that an IJ can limit the extent of some testimony or frequently interrupt the alien's presentation without violating due process.

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Briefing Note: Several Circuits hold that it violates due process to take administrative notice without prior notice and opportunity to respond. For a list of the circuit case law on this question, *see Board of Immigration Appeals: Procedural Reforms To Improve Case Management*, 67 FR 54878, 54892 (Aug. 26, 2002). This is an excellent discussion of the current state of the law. The only change to the discussion in the federal register is that last fall, the Second Circuit joined several other circuits in holding that an alien must be given notice and an opportunity to rebut administrative noticed facts.

■ **A Conviction For Domestic Battery Under Illinois Law Is A Crime Of Violence**

In ***LaGuerre v. Mukasey***, 526 F.3d 1037 (7th Cir. 2008) (Bauer, Kanne, Rovner)(*per curiam*), the Seventh Circuit held that a conviction of domestic battery in violation of one subsection of Illinois law (720 ILCS 5/1-3.2(a)(1)) is a crime of violence under 18 U.S.C. § 16(a) and thus, an aggravated felony. The court limited its analysis to the elements of the offense and held that the state statute has as an element, the use of physical force. The court further ruled that it lacked jurisdiction to address the alien's challenges to the BIA's findings on his CAT claim because he failed to raise a constitutional claim, and his only purported question of law was a request that the court review the correctness of the BIA's factual findings.

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■ **Case Remanded-Where The Immigration Judge Misunderstood Alien's Claim Of Imputed Political Opinion**

In ***Hamdan v. Mukasey***, 528 F.3d 986 (7th Cir. 2008) (*Kanne*, Flaum, Evans), the Seventh Circuit held that the IJ misconstrued petitioner's claim of future persecution based on imputed political opinion as a claim based on political neutrality. The court held that due to the misunderstanding, the IJ failed to properly address the claim as presented and, thus, remanded to the agency to make an initial determination on the alien's claim that Palestinian militant groups would persecute him on account of his imputed political affiliation with the Israeli government.

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■ **Member Of Afghan Army Who Failed To Seek Military Protection Is Eligible For Asylum**

In ***Oryakhil v. Mukasey***, 528 F.3d 993 (7th Cir. 2008) (*Kanne*, Sykes, Tinder) the Seventh Circuit held that a member of the Afghan army was eligible for asylum even though he failed to seek protection or relocation assistance from the Afghan military after he was threatened by the Taliban. The court acknowledged that petitioner bore the burden of proving that he could not reasonably relocate within Afghanistan to avoid persecution, but concluded that there was not substantial record evidence that it would be possible or reasonable for him to seek relocation assistance.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds That It Lacks Jurisdiction To Review Denial Of Criminal Alien's Asylum Application**

In ***Mocevic v. Mukasey***, __F.3d__, 2008 WL 2485319 (Gruender, Bright, Benton) (*per curiam*) (8th Cir. June 23, 2008), the Eighth Circuit held that the court did not have jurisdiction to review a criminal alien's challenge of the Immigration Judge's adverse credibility determination where the alien failed to raise a colorable constitutional or legal question. The petitioner, a citizen of Yugoslavia, entered the U.S. in 1996 as a refugee. In 2002, he was convicted of felony attempted stealing and later admitted to immigration officials that he sought entry into the U.S. by submitting false information. DHS instituted removal proceedings against petitioner on the basis that he had been convicted to a crime involving moral turpitude. The court rejected the pettitioner's claim that the Immigration Judge violated due process by failing to consider the totality of the evidence when making the credibility determination, noting that the IJ had explicitly provided factors for the disbelief sufficient to establish that he had considered the evidence.

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■ **Alien Who Falsely Checked The "Citizen Or National" Box On A Form I-9 Is Unable To Meet His Burden Of Establishing That He Is Admissible**

In ***Kirong v. Mukasey***, __F.3d__, 2007 WL 5256871 (8th Cir. June 20, 2008) (Bye, Beam, *Gruender*), the Eighth Circuit upheld the BIA's decision that petitioner did not satisfy his burden of proving clearly and beyond doubt that he did not falsely represent himself as a United States citizen where, on four occasions, he marked the "citizen or national of the United States" box on Form I-9s to obtain private employment. Consequently, he was unable to prove that he was admissible to be eligible for adjustment of status.

Judge Bye urged the government to revise form I-9, and noted that the ambiguous nature of the "citizen or national" box on had "spawned needless litigation."

The petitioner, a native of Kenya, entered the U.S. in 2001 on an F-1 student visa. At the removal hearing petitioner testified that he simply marked the I-9 form to obtain employment. The IJ found him statutorily ineligible for adjustment and, alternatively, would have denied the application as a matter of discretion. The court held that the alien was an applicant for admission because he was seeking to adjust his status to be admitted as a lawful permanent resident Therefore, he was required to prove clearly and beyond doubt that he did not make a false claim of U.S. citizenship for a purpose or benefit under the INA.

Judge Bye filed a concurring opinion, "for purpose of urging the government to revise form I-9," and noted that the ambiguous nature of the "citizen or national" box on Form-I-9 had spawned needless litigation.

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NINTH CIRCUIT

■ **Ninth Circuit Reverses Adverse Credibility Finding In Iraqi Asylum Case, Discounting Discrepancies And Omissions About A Claim Of Past Rape During Detention**

In ***Morgan v. Mukasey***, __F.3d__, 2008 WL 2552687 (9th Cir. June 27, 2008) (*Pregerson*, Hawkins, Fisher), the Ninth Circuit reversed an adverse credibility and denial of asylum and withholding of removal in a case involving a woman who was an Iraqi Chaldean Christian. The court held that substantial evidence did not support the IJ's determination that the petitioner's testimony in support of asylum application was not credible because (1) IJ's reasoning that alien's years of resistance to joining Ba'ath party in Iraq was irreconcilable with the party's reputation for ruthless recruitment tactics was speculative; and (2) discrepancies between the petitioner's asylum application and testimony, and between her testimony and her brother's testimony about an alleged rape while she was detained could be explained by her reluctance to disclose the rape to her family or immigration officials. The court also held that at the IJ hearing shortly after the U.S. intervention in Iraq, the DHS failed to show changed country conditions in Iraq rebutting the presumption of well-founded fear of future persecution by the former Ba'ath party of Saddam Hussein, by submitting only a single newspaper article describing coalition attacks on Iraqi intelligence. The court reasoned that the (outdated) article in no way suggested that Chaldean Christians would be safe from religious persecution in Iraq as a result of efforts shown in the 2003 newspaper article to remove Saddam Hussein from power.

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Briefing Note: This case contains broad language suggesting that discrepancies or omissions regarding a claim of rape may not be a basis for an adverse credibility finding. This language is *dictum*, since each case must be decided on the evidence and explanations in the particular case. This is also a pre-REAL ID credibility case. It's discounting of omissions and discrepancies about the alleged rape appears to be inconsistent with the new credibility statute enacted by the REAL ID Act. This is a matter the Board may need to construe. The court's determination that DHS failed to show changed country conditions is distinguishable in future cases. The one newspaper article was stale due to the timing of the IJ hearing (April 2003).

■ **Ninth Circuit Revises Opinion Addressing Whether Evading Officer Is Crime Of Violence**

In ***Penuliar v. Mukasey***, 2008 WL 2345234 (9th Cir. June 10, 2008) (Browning, *Pregerson*, Berzon), the Ninth Circuit revised its opinion (reported at 523 F.3d 963) holding that a conviction for evading an officer in violation of California Vehicle Code § 2800.2(a) is not a "crime of violence" aggravated felony, to clarify that offenses that include a recklessness *mens rea* do not constitute "crimes of violence" as a categorical matter. The revisions do not address the court's judgment that the alien's conviction for unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a) is not an aggravated felony "theft offense" under 8 U.S.C. § 1101(a)(43)(G), a holding to which the court adhered on remand from the Supreme Court for further proceedings in light of *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007) (holding that a generic "theft of-

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fense" includes the crime of aiding and abetting). The government has petitioned for rehearing of that latter judgment.

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■ **Ninth Circuit Denies Petition For Review In Part, Holding That Notice To Appear Was Sufficient To Vest Jurisdiction**

In ***Lazaro v. Mukasey***, __ F.3d __, 2008 WL 2264589 (9th Cir. June 9, 2008) (*Larson*, Canby, Smith), the Ninth Circuit denied, in part, a petition for review holding that the IJ had jurisdiction because, although the Notice to Appear (NTA) failed to specify fully the statutory provisions alleged to have been violated, the NTA satisfied statutory requirements allowing the Judge to exercise jurisdiction over the case. The court remanded the case, in part, to determine whether Immigration Judges are permitted to amend an NTA *sua sponte*.

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■ **Ninth Circuit Holds That Identity Theft Is Not Categorically A Theft Offense**

In ***Mandujano-Real v. Mukasey***, 526 F.3d 585 (9th Cir. 2008) (*Reinhardt*, McKeown, W. Fletcher), the Ninth Circuit held that the alien's conviction for identity theft under Oregon Revised Statute § 165.800 was not categorically an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). The court found that the Oregon's identity theft statute plainly encompasses conduct not comprehended within the scope of a generic theft offense. The Oregon statute is broader than the generic definition of a theft offense because it extends to the creation and use of fictitious identities and Oregon law criminalizes the obtaining, possession, transfer, creation, utterance or conversion of the personal identification of "an imaginary person." The court gave as an example that an individual could be convicted under the Oregon law if he possesses a fake social security card containing a fabricated social security number. The court denied the government's request for remand, concluding that it owed no deference to the BIA's interpretation of state criminal statutes.

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The Ninth Circuit held that it was within the court's jurisdiction, under the REAL ID Act, to review the non-discretionary question of law presented by the alien's claim that extraordinary circumstances excused the untimely filing of his asylum application.

■ **Ninth Circuit Holds That It Has Jurisdiction To Determine Whether Alien Presented Extraordinary Circumstances For Failure To Timely File Asylum Application**

In ***Husyev v. Mukasey***, __F.3d__, 2008 WL 2405682 (9th Cir. June 16, 2008) (*Canby*, B. Fletcher, Rawlinson), the Ninth Circuit held that it was within the court's jurisdiction, under the REAL ID Act, to review the non-discretionary question of law presented by the alien's claim that extraordinary circumstances excused the untimely filing of his asylum application. The court concluded that the alien's delay of 364 days following the expiration of his lawful nonimmigrant status, without any explanation, was unreasonable.

The court further held that the Immigration Judge's adverse credibility determination, which went to the heart of the alien's claim, was supported by substantial evidence.

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■ **Withdrawal Of A Frivolous Asylum Application Does Not Prohibit An Immigration Judge From Making A Frivolousness Finding**

In ***Chen v. Mukasey***, 527 F.3d 935 (9th Cir. 2008) (*Trott*, Callahan, Clifton), the Ninth Circuit held that the withdrawal of a frivolous asylum application before a final order is issued does not preclude the IJ from finding that a frivolous asylum application was filed. The court remanded for the BIA to determine: (1) whether the language of 8 U.S.C. § 1158(d)(6) requires the IJ to make a final determination on the merits of the asylum application, or whether the language requires only that the judge make a final determination that the application itself was frivolous; and (2) whether the withdrawal of an application for asylum after it is filed renders a subsequent frivolousness finding moot.

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TENTH CIRCUIT

■ **Tenth Circuit Holds That Agency Construction Of 8 U.S.C. § 1184(m)(2) Was Impermissible**

In ***Lee v. Mukase***, 527 F.3d 1103 (10th Cir. June 3, 2008) (Kelly, *McKay*, Hartz (dissenting)), the Tenth Circuit held that the agency's statutory construction of 8 U.S.C. § 1184(m)(2) was incorrect. The petitioner came to the United States as a twelve-year-old in 1999 with her parents on a B-2 nonimmigrant visitor visa. She subsequently applied for and received a change in visa status to the F-1 nonimmigrant student category, allowing her to attend a private school approved by the Attorney General of the United States. The last approved private school petitioner attended was Riverview Christian Academy in Colorado. After her sophomore year, when she was sixteen, the school ceased operations. The

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Court Finds Specific Intent Is Needed To "Torture"

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crimes including attempted murder and was sentenced to 20 years imprisonment with a mandatory 10 years without parole. After he served his minimum sentence the former INS put him in removal proceedings for having been convicted of an aggravated felony. He applied for protection from removal to Haiti under the CAT regulations. Country reports show that as a matter of public safety, Haiti detains its citizens deported because of prior convictions in a foreign country. These detentions may last several months. Because of lack of resources, Haitian prisons are overcrowded, poorly maintained, unsanitary, and rodent infested. Prisoners suffer from malnutrition, inadequate health care, and a lack of basic hygiene. The petitioner claimed that he would die for lack of medical care while in prison in Haiti and that the "expected failure of Haitian authorities . . . to provide [him with] adequate medical attention" was "tantamount to torture." He did not attribute this expected failure to provide him with adequate medical care to any ill will on behalf of the Haitian authorities. Rather, he claimed that "Haiti does not have the means to care for [his] medical condition" either in jail or outside of it.

"A petitioner cannot obtain relief under the CAT unless he can show that his prospective torturer will have the goal or purpose of inflicting severe pain or suffering."

The IJ found that the petitioner was seeking relief for humanitarian reasons based on his special medical needs and concluded that this does not qualify as "torture." This was consistent with *Auguste v. Ridge*, 396 F.3d 123 (3d Cir. 2005), which held that "torture" requires the specific intent to harm and does not refer to severe pain or suffering that is the unintended consequence of an intentional act, such as detention in Haitian prison facilities. The BIA affirmed the IJ's decision. The petitioner filed a review petition in the Third Circuit.

Subsequent to initial briefing in the case, the Third Circuit decided *Lavira v. Attorney General*, *supra*. *Lavira* was a Haitian prison case, in which the petitioner was being removed from the United States as a criminal, and faced future detention in Haitian prison as a criminal deportee. He applied for CAT protection claiming he had a heightened risk of harm in prison because he was above-the-knee amputee, who was HIV-positive, and a longtime political affiliation with the former, exiled president of Haiti. The Third Circuit in *Lavira* granted the CAT claim based on its conclusion that severe pain was the "only plausible consequence" of the petitioner's imprisonment in a Haitian prison, because of his special political affiliations. In granting CAT protection the panel in *Lavira* suggested that a Haitian prison official's "willful blindness" or "deliberate indifference" to a prisoner's harm might satisfy the specific intent requirement for "torture." The Second Circuit issued a decision in *Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007), rejecting *Lavira's* suggestion that an Haitian prison official's willful blindness or indifference to harm may cause Haitian prison conditions to constitute "torture." The Third Circuit then voted to sit en banc to resolve any conflict between *Auguste* and *Lavira.*

After examining the CAT and regulations, the Third Circuit overruled *Lavira*'s discussion that a prison official's "willful blindness" to harm may or mere knowledge of severe harm is enough to show the specific intent required for conduct to constitute "torture." The court affirmed its holding in *Auguste* that "for an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of [the CAT]." The court concluded that "[k]nowledge that pain and suffering will be the certain outcome of conduct may be sufficient for a finding of general intent but it is not enough for a finding of specific intent [required for 'torture']." Summarizing its position, the court stated: "a petitioner cannot obtain relief under the CAT unless he can show that his prospective torturer will have the goal or purpose of inflicting severe pain or suffering." The court concluded that under this standard the petitioner did not qualify for CAT protection, "because he failed to show that Haitian officials will have the purpose of inflicting severe pain or suffering by placing him in detention upon his removal from the United States." The court therefore affirmed the denial of CAT protection. Three judges disagreed with the majority's construction of the intent required for "torture," taking the position, among others, that this was inconsistent with a 2004 internal Department of Justice memorandum on U.S. torture policy prepared for Deputy Attorney General James B. Comey.

Briefing Note: *The Third Circuit joins three other circuits that have addressed the question of intent, all of which hold that specific intent to inflict severe suffering or harm is required for "torture." See Villegas v. Mukasey, 523 F.3d 984 (9th Cir. 2008) (suffering that may be experienced by a mentally disabled person in Mexican mental institutions is not "torture, because "a petitioner must show that severe pain or suffering [would be] specifically intended"); Pierre, 502 F.3d at 113-119 (2d Cir.) (suffering that may occur in Haitian prisons because of a criminal deportee's diabetic condition does not constitute torture, because CAT regulations have a specific intent requirement); Majd v. Gonzales, 446 F.3d 590, 597 (5th Cir. 2006) (holding that harm inflicted by Israeli forces in West Bank did not constitute "torture", because "[m]ost of the suffering [the petitioner] descried was inflicted without any specific intent on part of Israeli forces").*

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Dada Finds Alien Can Withdraw VD Grant

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the Court noted that "A more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen post-departure, much as Congress has permitted with respect to judicial review of a removal order."

The Court remanded the case to the BIA to grant Dada's request to withdraw his request for voluntary departure and to adjudicate the motion to reopen. Incidentally, the Court was informed, and noted in its decision that the second I-130 petition had been denied because the marriage was a sham, contracted solely to obtain immigration benefits.

In a dissenting opinion joined by the Chief Justice and Justice Thomas, Justice Scalia criticized the majority opinion as resting on a false premise that Dada had found himself between Scylla and Charybdis. "Litigants are put to similar voluntary choices between the rock and the whirlpool all the time, without cries for a judicial rewrite of the law. It happens, for example, whenever a criminal defendant is offered a plea bargain that gives him a lesser sentence than he might otherwise receive but deprives him of his right to trial by jury and his right to appeal. It is indeed utterly commonplace that electing to pursue one avenue of relief may require the surrender of certain other remedies. "

In a separate dissent, Justice Alito agreed with majority ruling that a motion to reopen does not toll voluntary departure but would have remanded the case to the BIA because the INA does not address whether aliens can unilaterally withdraw from grants of voluntary departure.

By Francesco Isgro, OIL

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Summaries Of Federal Courts Decisions

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school's closure required her to seek an alternative for schooling. The other private schools were too far from her residence, and petitioner understood it would be difficult for her to achieve admittance. Therefore, petitioner attended a local public high school, graduating in May 2005. An Immigration Judge determined that, even though it was not petitioner's fault for terminating her studies at Riverview Christian Academy, she nonetheless became a student visa abuser under 8 U.S.C. § 1184(m)(2) for terminating her course of study and for undertaking a course of study at a public school.

The court ruled that the agency erred by concluding that petitioner had "terminated" her course of study. "We hold that Congress intended to penalize only an alien who acts affirmatively to terminate or to abandon such course of study at such school," said the court. Accordingly the court reversed and remanded without reaching the question of petitioner's attendance at a public school placed her in violation of her student status.

In a dissenting opinion, Judge Harts would have found the government's interpretation more reasonable, and in any event, would have remanded the case to the BIA for an authoritative construction.

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MARK YOUR CALENDAR

OIL's 12th Annual Immigration Litigation Conference will be held at the National Advocacy Center on August 4-8, 2008.

OIL 14th Annual Immigration Law Seminar will be held in Washington, DC on October 20-24. This is the basic immigration law course open to all government attorneys. Contact Francesco Isgro at francesco.isgro@usdoj.gov for additional information.

INSIDE OIL

A warm welcome to the following new attorneys who joined OIL in June 2008:

Scott Marconda has a B.A. in Rhetoric from the University of California at Berkeley and a JD from Santa Clara University. He started his career as a judge advocate in the Marine Corps and remains a reserve Lieutenant Colonel practicing operational law. Prior to joining OIL he litigated product defect and trade secrets cases with Hennelly & Grossfeld in Marina del Rey, CA.

Erik R. Quick received his B.A. from the College of William & Mary, and is a graduate of West Virginia University College of Law. Prior to joining OIL, he was for ten years a partner at Rubenstein, Cogan & Quick, P.C., where he focused on the defense of financial institutions, creditors and third party debt collectors in U.S. District Courts.

Adam Goldman is a graduate of Boston University and the Tulane University School of Law. Prior to joining OIL he served as an ICE Assistant Chief Counsel in Arlington, and was the supervisor of the Detained Docket and a designated attorney for National Security, Worksite Enforcement and Customs Law cases. He also served as a Special Assistant United States Attorney for the Western District of Virginia. After law school he served as an Assistant District Attorney in Bronx County, NY and as the Law Clerk for New York State Supreme Court Justice Dominic R. Massaro.

Christopher Dempsey is a graduate of the University of Iowa and Creighton University School of Law. Prior to joining OIL, he served in the Army JAG Corps where he provided both trial and appellate criminal defense representation. He deployed to Afghanistan in 2006.

Erik Quick, Adam Goldman, Christopher Dempsey, Scott Marconda

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.

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.

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