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# Immigration Litigation Bulletin

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## First Circuit bypasses thorny jurisdictional question raised by USCIS denial of renewal of H-1B visa petition

In *Royal Siam Corp. & Surasak Srisang v. Chertoff*, __F.3d__, 2007 WL 1228792 (1st Cir. April 27, 2007) (Torruella, *Selya*, Lynch), the First Circuit affirmed the USCIS denial of an H-1B visa petition, but avoided the government's contention that under the INA as amended by the REAL ID Act, the district court lacked jurisdiction to review the denial because such determination was committed to agency discretion.

> ***"In the immigration context, we have bypassed enigmatic jurisdictional questions in circumstances in which precedent clearly adumbrates the result on the merits."***

Mr. Srisang, the beneficiary of the H-1B visa had married a U.S. citizen in 1995 and on that basis obtained conditional lawful permanent resident status. However, when he applied to have the condition removed the INS discovered that the marriage was fraudulent and he was placed in removal proceedings. Being subject to removal presented a problem for Mr. Srisang, because Royal Siam had filed (or filed subsequently) a visa petition on his behalf. The predecessor to USCIS approved the visa petition in November 1999, even though, noted the court, "the marriage fraud finding was brought to the CIS's attention in connection with the 1999 specialty occupation visa." "This comedy of errors," said the court, "allowed Srisang to depart voluntarily from the United States on January 23, 2000 (thus mooting the removal proceedings []) and return three weeks later" pursuant to the approved H-1B visa petition.

An H-1B visa is valid for three years but can be extended for an additional three years. In 2002, Mr. Srisang's employer applied to renew the H-1B visa. CIS then sought additional evidence because it doubted that the job held by Mr. Srisang was a "specialty occupation." On January 27, 2003, USCIS denied the renewal of the visa petition and on May 21, 2004, the Administrative Appeals Unit affirmed that denial. The employer and Mr. Srisang then filed an APA styled action in the district court contending that the USCIS denial was arbitrary, capricious, and otherwise not in accordance with

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## REAL ID Act does not deprive court of appeals of jurisdiction over motions for bail

In *Elkimya v. Gonzales*, __F.3d__, 2007 WL 1097870 (2d Cir. April 16, 2007) (Feinberg, *Sotomayor*, Katzmann), the court held that it has jurisdiction to consider motions for bail made by aliens detained by DHS and whose appeals are pending in the court of appeals.

Petitioner had been placed in removal proceedings for abandonment of his LPR status. An IJ ordered him removed as charged and the BIA affirmed without opinion. Petitioner then filed a writ a habeas corpus which was subsequently con-

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# Renewal of H-1B visa properly denied

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the law. On December 29, 2004, the district court remanded the case to the AAO because it had failed to explain why it had denied the visa petition after it had been previously granted for the equivalent position. On February 2005, the AAO again denied the petition to extend the H-1B visa, concluding that the proffered position of restaurant manager did not qualify as a specialty occupation and that the USCIS Director had erred when he had initially approved the visa petition in 1999, because Mr. Srisang had engaged in marriage fraud. On March 24, 2006, the district court granted the government's motion for summary judgment finding that the AAO denial of the visa renewal was supported by substantial evidence. The appeal to the First Circuit followed.

> The court found that there was nothing the record that would compel a finding that a bachelor degree is a necessary credential for restaurant manager.

On appeal, the government argued that under the INA as amended by the REAL ID Act, the district court lacked jurisdiction under INA § 242 (a)(2)(B)(ii), because the denial of an H-1B visa petition is fully committed to agency discretion. The court said that "there may be reasons to think that the jurisdiction of the district court seems suspect." It explained that even though the "jurisdiction–stripping provisions of section 242 apply outside the removal context," noted the court, "the question remains whether the statutory scheme places the authority to grant H-1B visa petitions sufficiently within CIS's discretion as to engage the gears of the jurisdictional bar." However, after reviewing the case law of other circuits, and its recent decision in *Alsamhouri v. Gonzales,* __F.3d__ (1st Cir. 2007), the court decided to bypass the jurisdictional question while acknowledging at the same time that "federal courts cannot ordinarily exercise hypothetical jurisdiction." The principle that courts cannot assume jurisdiction to decide the merits of a case, said the court, "admits to an area of elasticity. In mapping the contours of this narrow crevice, we have distinguished between Article III jurisdiction (which may never be bypassed) and statutory jurisdiction (which may occasionally be bypassed.)" Here the court found that the jurisdictional question fits within that crevice because not only the question was thorny but "also a matter of statutory, not constitutional, dimension; and its proper resolution is uncertain." Additionally the court found that the outcome of the merits of the case was "foreordained."

On the merits, the court reviewed *de novo* the district court's findings. It rejected the plaintiffs' contention that the USCIS had improperly relied on the Department of Labor Occupational Outlook Handbook to determine that the duties of the position as a restaurant manager were not more complex that those associated with similar, nonspecialty positions in the general economy. In particular, the plaintiffs challenged the USCIS characterization that a restaurant manager position was a species of the generic food service manager position, and that the position is not one that by its nature demands a bachelor degree. The court found that there was nothing in the record that would compel a finding that a bachelors degree is a necessary credential for restaurant manager. The court further rejected the contention that the employer here needed a restaurant manager with a degree in business administration. The court noted that other courts have stated that even though a bachelor degree may be a legitimate prerequisite, without more, it will not justify the granting of an H-1B visa. "This is as it should be: elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic and (and essentially artificial ) degree requirement," said the court. Finally, said the court, in the absence of an error of law, the "case comes down to straight abuse-of-discretion review. Under that standard, the outcome is foreordained . . . Because CIS's exercise of discretion here is untainted by either legal or factual error, we discern no basis for disturbing its denial of RSC's petition."

The court found it unnecessary to consider whether CIS had correctly applied the marriage fraud bar and whether, as the government suggested, the APA itself may foreclose judicial review of a nonimmigrant visitor's request for an extension of stay.

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## WHAT'S AN H-1B?

The H-1B is a nonimmigrant visa category established by the Immigration Act of 1990. It is reserved for foreign workers who will be employed in a "specialty occupation" or as a fashion model of distinguished merit and ability. A specialty occupation requires theoretical and practical application of a body of specialized knowledge along with at least a bachelor's degree or its equivalent. For example, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts are specialty occupations.

Unlike other nonimmigrant visas, Congress placed a cap on the number of H-1B visas. The current cap is 65,000 visas per year, 20,000 of which are be reserved for foreign workers with a masters or higher degree from a U.S. academic institution. The cap for FY 2008 was reached on the first day, when the USCIS received more than 150,000 applications.

# REMOVAL OF SEX OFFENDERS UNDER THE WALSH ACT

On July 27, 2006, the President signed into law the Adam Walsh Child Protection and Safety Act of 2006. See Pub. L. No. 109-248, 120 Stat. 602. The Act was signed on the 25th anniversary of the abduction of 6-year-old Adam Walsh from a shopping mall in Florida. Adam was found murdered 16 days after his abduction. His father is John Walsh, host of the television series America's Most Wanted.

The Act's principal purposes include (1) to establish a comprehensive national system for the registration of sex offenders, known as the National Sex Offender Registry, to be maintained at the Federal Bureau of Investigation; (2) to expand federal jurisdiction and increase federal penalties over crimes against children; (3) to create new substantive crimes directed at persons who are required to register as sex offenders; and (4) to institute a publicly available, internet-based community notification program.

At the time of passage of the Act, at least 100,000 of more than a half million sex offenders in the United States were missing and unregistered with their local jurisdictions, as required under state law. It is not known how many of them were aliens; however, the Department of Homeland Security reported that 1,889, or 2.1 percent, of all criminal aliens removed in Fiscal Year 2005 were sex offenders.

Two particular provisions of the Act are significant to our immigration law practice. The first provision, Section 401 of the Act, makes failure to register with the National Sex Offender Registry a felony and a deportable offense. Section 401 amends Section 237(a)(2)(A)(v) of the Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(v)) by adding a ground of removability which provides that "any alien who is convicted under section 2250 of title 18, United States Code, is deportable." Section 2250 of Title 18 U.S.C., a provision added by the Adam Walsh Act, criminalizes failure to register with the National Sex Offender Registry. It provides that a sex offender who knowingly fails to register or update a registration shall be fined or imprisoned not more than 10 years, or both. *Id.*

The new ground of removability complements the existing INA provisions governing removal of aliens who commit crimes against children. Two other grounds of removability were added in 1996 through the passage of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 110 Stat. 3009. Section 305 of IIRIRA created the removal ground at INA § 237(a)(2)(E), which mandates removal of aliens convicted of child abuse, child neglect, or child abandonment. *See* 8 U.S.C. § 1227(a)(2)(E). Section 321 of IIRIRA amended the definition of "aggravated felony" at INA § 101(a)(43)(A) to include rape and sexual abuse of a minor, thereby rendering aliens convicted of such offenses deportable as aggravated felons under INA § 237(a)(2)(A)(iii). *See* 8 U.S.C. §§ 1103(a)(43)(A) & 1227(a)(2)(A)(iii)). *See also Sharashidze v. Gonzales*, --- F.3d ---, 2007 WL 777666 (7th Cir. Mar. 16, 2007) (holding that alien's conviction for indecent solicitation of a sex act involving a minor constituted an aggravated felony conviction); *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7th Cir. 2005) (same). Some alien sex offenders are also subject to removal for having committed crimes involving moral turpitude. See INA § 237(a)(2)(A)(i) & (ii), 8 U.S.C. § 1227(a)(2)(A)(i) & (ii). *See also Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007) (holding that alien's conviction for communicating with a minor for immoral purposes was a crime involving moral turpitude); *Maghsoudi v. INS*, 181 F.3d 8 (1st Cir. 1999) (holding that alien's conviction for indecent assault and battery on a person 14 or older was for a crime involving moral turpitude). Most recently, the Board of Immigration Appeals determined that failure to register as a sex offender, as required under a California statute, is a deportable crime involving moral turpitude. *See In Re Tobar-Lobo*, 24 I. & N. Dec. 143 (BIA 2007). The BIA has not yet decided whether failure to register under a federal statute such as the Adam Walsh Act is a crime involving moral turpitude.

> Section 401 of the Act, makes failure to register with the National Sex Offender Registry a felony and a deportable offense.

The determination of removability under new INA § 237(a)(2)(A)(v) is a fairly simple one. The government need only show that the alien has been convicted under 18 U.S.C. § 2250 for failure to register as a sex offender. No administrative or judicial inquiry into the underlying nature of the crime is necessary. However, an alien removable for having failed to register as a sex offender may be eligible to apply for certain forms of relief that aliens removable for having committed aggravated felonies are not. For instance, an alien removable for sexual abuse of a minor which is an aggravated felony offense cannot apply for cancellation of removal (or any other form of discretionary relief), but an alien who fails to register as a sex offender is not so barred, because his crime is not considered an aggravated felony. *See* INA § 240A(a), 8 U.S.C. § 1229b (a). As a practical matter, however, alien sex offenders are likely to be charged with multiple grounds of

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# DEPORTATION OF SEX OFFENDERS

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removability, which would have the effect of making them ineligible for most, if not all, forms of discretionary relief.

The second provision pertinent to our practice, Section 402 of the Adam Walsh Act, bars convicted sex offenders from having family-based visa petitions approved. *See* INA § 204(a)(1)(A)(viii) & (B)(i), 8 U.S.C. § 1154(a)(1)(A)(viii) & (B)(i). The bar applies to any petitioning U.S. citizen or lawful permanent resident who has been convicted of a "specified offense against a minor," unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the petitioning citizen or lawful permanent resident poses no risk to the alien with respect to whom such a visa petition is filed. Id. Section 111 of the Act defines the term "specified offense against minor" generally to mean "all offenses by child predators." Id. Section 111 also provides a more specific definition, one that includes offenses involving kidnapping or false imprisonment (unless committed by a parent or guardian); solicitation to engage in sexual conduct; use in a sexual performance; solicitation to practice prostitution; video voyeurism as described in 18 U.S.C. § 1801; possession, production, or distribution of child pornography; criminal sexual conduct involving a minor, or the use of the internet to facilitate or attempt such conduct; and any conduct that by its nature is a sex offense against a minor. *Id.*

> Section 402 of the Act, bars convicted sex offenders from having family-based visa petitions approved.

The obvious purpose of Section 402 is to protect children of sex offenders who are U.S. citizens or lawful permanent residents from further, potential harm by disallowing family unity through family-based immigration. However, such children are not necessarily left without a means of immigrating to the United States. Under INA § 204(a)(1)(A) & (B), the other parent may self-petition for an immigrant visa on the child's behalf, provided that the child satisfies the eligibility requirements, including establishing that the child was a victim of severe abuse or "extreme cruelty" perpetrated by the citizen or lawful permanent resident parent. See 8 U.S.C. § 1154(a)(1)(A) & (B) (as amended by Section 1503(b)(1), Title V [Battered Immigrant Women Protection Act of 2000], div. B [Violence Against Women Act of 2000], of the Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000)). Additionally, under Section 240A(b)(2)(A), children who are victims of sex offenses may be eligible to apply for cancellation of removal if they are physically present in the United States for a minimum of three years and can satisfy the other eligibility requirements, including establishing that they are or were victims of "extreme cruelty" perpetrated by a citizen or lawful permanent resident parent. *See* INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (as amended by Section 204(b), Pub. L. No. 105-100, 111 Stat. 2201 (Nov. 19, 1997), and by Section 1504(a), Title V [Battered Immigrant Women Protection Act of 2000], div. B [Violence Against Women Act of 2000], of the Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000)). For this purpose, the definition of "extreme cruelty" includes such acts of violence as sexual abuse or exploitation, rape, molestation, incest, or forced prostitution. *See, e.g.*, 8 C.F.R. § 204.2(c)(6) (2006). The acts of violence must have been committed by the citizen or lawful permanent resident parent against the child. *Id.*

The Adam Walsh Act will have a greater impact on criminal prosecutions than on immigration enforcement, given the relatively small percentage of sex offenders who are aliens. Nevertheless, the Act affords significant protections to young children, by providing an additional basis for removal of sex offenders and limiting their eligibility to participate in the family-based immigration process.

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# REGULATORY UPDATE

**DHS Issues Notice of Name Change for ICE and CBP**

The Bureau of Immigration and Customs Enforcement has officially changed its name to U.S. Immigration and Customs Enforcement. The Bureau of Customs and Border Protection has changed its name to U.S. Customs and Border Protection. Both changes took effect on March 31, 2007. *See* 72 *Fed. Reg.* 20131 (April 23, 2007).

**Final Rule on RFE and NOID Response Times**

The final rule allows USCIS "flexibility" in setting the length of time in which applicants must respond to a Request for Information ("RFI") or a Notice of Intent to Deny ("NOID"). The rule becomes effective on June 18, 2007. *See* 72 *Fed. Reg.* 19100 (April 17, 2007).

**DHS Amends Regulations for Certain Detained Aliens Prior to Order of Removal**

The final rule updates the list of countries at 8 C.F.R. 236.1(e), which requires immediate communication with consular or diplomatic officers when nationals of the listed countries are detained in the U.S. See 72 *Fed. Reg.* 1923 (April 17, 2007).

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# SUMMARIES OF BOARD OF IMMIGRATION APPEALS DECISIONS

**Immigration Judges Have No Authority To Reinstate A Prior Deportation Or Removal Order**

In *Matter of W-C-B-*, 24 I&N Dec 118 (BIA 2007), the alien challenged the Immigration Judge's decision granting the government's motion to terminate removal proceedings so that it could instead reinstate a prior deportation order. The Board held that under the plain language of INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (governing reinstatement of prior orders against aliens illegally reentering), an immigration judge has no authority to reinstate a prior order of deportation or removal. Further, the Board rejected the alien's argument that an alien subject to reinstatement of a prior order of deportation or removal pursuant to § 241(a)(5) has a right to a hearing before an immigration judge, relying on the en banc Ninth Circuit's holding in *Morales-Izquierdo v. Gonzales*, 477 F.3d 691 (9th Cir. 2007).

With respect to the alien's claim that the Immigration Judge erred by granting the government's motion to terminate proceedings, the Board determined that because a valid regulatory reason existed for cancelling the Notice to Appear (*i.e.*, it was improvidently issued because removal proceedings were not necessary to remove the alien from the United States since he could have been removed by reinstatement of his prior deportation order), the Immigration Judge did not err when he granted the government's motion. To the extent the alien asserted that his former deportation could not reinstated because the government did not meet its burden of proving that he was deported and reentered the United States, the Board declined to address that issue, finding that whether or not the criteria for reinstating the prior order have been met is an issue for the immigration officer – and not the Board or the Immigration Judge – to decide.

**The Offense Of Trafficking In Counterfeit Goods Or Services In Violation Of 18 U.S.C. § 2320 Is A Crime Involving Moral Turpitude**

In *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007), the government appealed the Immigration Judge's decision to terminate removal proceedings against the alien on the ground that his conviction under 18 U.S.C. § 2320 did not constitute a crime involving moral turpitude. In 1987, the alien was convicted of the offense of grand theft, in violation of section 487.1 of the California Penal Code, and in 2001, he was convicted in the United States District Court of the offense of trafficking in counterfeit goods, in violation of 18 U.S.C. § 2320. On the basis of those convictions, the government charged the alien with removability under 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

> The Board concluded that the federal offense of trafficking in counterfeit goods was also a crime involving moral turpitude because it was tantamount to commercial forgery.

First, the Board noted that there was no dispute that the alien's 1987 conviction was a crime involving moral turpitude given that it was a crime involving theft. Second, the Board concluded that the federal offense of trafficking in counterfeit goods was also a crime involving moral turpitude because it was tantamount to commercial forgery and involved the theft of someone else's property in the form of a trademark, even if conviction for the offense did not involve deceiving the purchasers of the counterfeit goods and services. The Board determined that the offense was inherently immoral because it entailed dishonest dealing and deliberate exploitation of the public and the mark owner. The Board also found it significant that for purposes of federal criminal sentencing, trafficking in counterfeit goods was classified as a crime involving theft or fraud. Accordingly, the Board agreed with the government that the Immigration Judge erred when she concluded that the offense of trafficking in counterfeit goods or services under 18 U.S.C. § 2320 did not qualify as a crime involving moral turpitude, and remanded the case to consider whether the alien was eligible for any relief from removal.

**The North Korean Human Rights Act Precludes Aliens From Establishing Eligibility For Asylum As To North Korea Where They Have Resettled In South Korea**

In *Matter of K-R-Y- and K-C-S-*, 24 I&N Dec. 133 (BIA 2007), the Board considered, on remand from the Ninth Circuit, whether the North Korean Human Rights Act ("NKHRA") provides an independent basis for granting asylum to the aliens. The aliens were natives of North Korea, who were each granted South Korean citizenship approximately five or six months after arrival in South Korea. Upon reaching the United States, each alien filed an application for asylum, contending that under the NKHRA, South Korean citizenship did not disqualify North Koreans from asylum or refugee status, that is, such applicants would be excepted from the firm resettlement bar.

The Board concluded that the NKHRA – which provides that North Koreans cannot be barred from eligibility for asylum on account of any legal right to citizenship they may enjoy under the Constitution of South Korea – did not apply to those aliens who have already availed themselves of the right to citizenship in South

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# SUMMARIES OF RECENT BIA DECISIONS

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Korea. In so holding, the Board noted that the NKHRA expressly stated that it was not intended to apply to former North Koreans who have taken advantage of the opportunity to seek and accepted South Korean citizenship. The Board further observed that the aliens had significant ties to South Korea, and that they had been employed, moved freely about, made speeches, and raised families in that country. There was also no evidence that the aliens would be unable to return to South Korea. Accordingly, the Board found that the aliens were precluded from establishing eligibility for asylum as to North Korea on the basis of their firm resettlement in South Korea.

**Board Clarifies That When A Case Is Remanded For Appropriate Background Checks, The Immigration Judge Reacquires Jurisdiction Over The Proceedings**

In *Matter of M-D-*, 24 I&N Dec. 138 (BIA 2007), the Board held that when a case is remanded to the Immigration Judge for completion of the appropriate background checks pursuant to 8 C.F.R. § 1003.47(h), the Immigration Judge is required to enter a final order granting or denying the requested relief once the checks are completed. The Board further held that although the Immigration Judge may not reconsider the prior decision of the Board when a case is remanded for background checks, the Immigration Judge may consider additional evidence regarding new or previously considered relief if it meets the requirements for reopening of the proceedings. In this case, the Board initially found that the alien was eligible for withholding of removal, and remanded the record for the appropriate background checks and entry of an order.

On remand, the alien sought to introduce new evidence pertaining to her application for adjustment of status on the basis of her marriage to a United States citizen that had taken place while her appeal was pending before the Board, but the Immigration Judge declined to consider the application, finding that jurisdiction continued to rest with the Board.

The Board ruled that because the background check had not been completed when it sustained the alien's appeal, it was unable to issue a final order, and the Immigration Judge should have done so once informed that the background check had cleared. In addition, because on remand there is no final order until the background check clears and the Immigration Judge so orders, the Immigration Judge has authority to consider new evidence if the proffered evidence would support a motion to reopen the proceedings, and may conduct further proceedings to address the evidence as it relates to the relief requested before entering a new decision.

> The Board concluded that the alien's conviction for failure to register as a sex offender, in violation of section 290(g)(1) of the California Penal Code, qualified as a crime involving moral turpitude.

**Willful Failure To Register By A Sex Offender Who Has Been Previously Apprised Of The Obligation To Register Is A Crime Involving Moral Turpitude.**

In *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), the Board concluded that the alien's conviction for failure to register as a sex offender, in violation of section 290(g)(1) of the California Penal Code, qualified as a crime involving moral turpitude. The Immigration Judge had terminated proceedings against the alien, ruling that the level of evil intent needed to find that a crime involves moral turpitude was not required to convict the alien of failure to register as a sex offender. In sustaining the government's appeal of that decision, the Board observed that acts of baseness or depravity may qualify as crimes involving moral turpitude, even in the absence of an element of fraud, and further, that offenses such as statutory rape, child abuse, and spousal abuse have been considered to be categorically turpitudinous crimes.

The Board also noted that a principal purpose of the statute under which the alien was convicted is to safeguard children and other citizens from exposure to danger from convicted sex offenders, a high percentage of whom are recidivists. Given the serious risk involved in a violation of that duty owed by this class of offenders to society, the Board determined that the crime was inherently base or vile and therefore met the criteria for a crime involving moral turpitude.

The Board further held that even when the failure to register is not willful, but rather a result of "forgetfulness," an offense based on a failure to fulfill the offender's duty to register contravenes social mores to such an extent that it is appropriately deemed turpitudinous. Board member Filppu filed a dissenting opinion.

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Contributions To The ILB Are Welcomed!

# FURTHER REVIEW PENDING: Update on Cases & Issues

### Asylum – Particular Social Group

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

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

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### Asylum — Population Control Policy

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

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

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### Asylum – Disfavored Group

***Lolong v. Gonzales,*** 400 F.3d 1215 (9th Cir. 2005) was argued *en banc* before the Ninth Circuit on October 5, 2006. On May 7, 2007, the *en banc* court overruled *Molina-Camacho v. Ashcroft,* 393 F.3d 937 (9th Cir. 2004), and affirmed the BIA's denial of asylum. *Lelong v. Gonzales,* __F.3d __, 2007 WL 1309564 (9th Cir. May 7, 2007).

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### Asylum – Persecutor, *Ventura*

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

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### Asylum—Adverse Credibility

On December 14, 2006, the government filed a petition for rehearing en banc in ***Suntharalinkam v. Gonzales,*** 458 F.3d 1634 (9th Cir. 2006), The question presented is whether numerous minor discrepancies cumulatively add up to support an adverse credibility determination, and were those discrepancies central to the asylum claim of a Sri Lankan alien suspected as being a Tamil Tiger terrorist.

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

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

The 9th Circuit has *sua sponte* requested the parties to file supplemental briefs on whether the case should be heard *en banc*. The revised decision upon panel rehearing had stated that no further petitions for rehearing or rehearing en banc will be entertained. The government brief is due on May 22, 2007.

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### Jurisdiction — Sua Sponte Reopening

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

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

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

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

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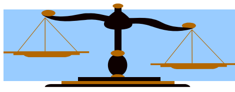

# Summaries Of Recent Federal Court Decisions

## FIRST CIRCUIT

### ■ Court Affirms That Congress Has No Duty To Provide A Review Process To Criminal Aliens And Rejects Petitioner's Argument That His Untimely PFR Should Be Excused For Lack Of A Legal Remedy

In ***Fontes v. Gonzales***, __F.3d__, 2007 WL 949590 (1st Cir. March 30, 2007) (Selya, *Campbell*, Lynch), the court held that *res judicata* did not bar DHS from bringing a subsequent removal proceeding against petitioner despite the fact that the subsequent proceeding was based on the same conviction that was the subject of his first removal proceeding which ended in a favorable termination of removal. The court also affirmed petitioner's denial of a § 212(c) waiver because the ground of removal did not have a statutory counterpart.

Petitioner was placed in removal proceedings in 1993 as an alien convicted of an aggravated felony for having committed a crime of violence. Because petitioner's conviction occurred in 1985 and the then-applicable IMMACT provisions did not make a crime of violence committed before 1990 a ground for removal, the IJ terminated the proceedings. After passage of IIRIRA, petitioner was again placed in removal proceedings for having committed a crime of violence. Petitioner sought a § 212(c) waiver, but it was denied on April 21, 2005. A subsequent petition for review was dismissed for lack of jurisdiction.

Petitioner then filed a motion to reopen with the BIA which was denied as untimely. He filed a petition for review of this decision as well, but it was also denied for lack of jurisdiction. Undaunted, petitioner asked the BIA to reconsider the denial of his motion to reopen arguing that his conviction was not an aggravated felony, that he was eligble for § 212(c) relief, and that his removal was barred by res judicata. The BIA rejected the first two arguments, and ultimately denied the third. Petitioner then filed another motion to reopen based on *St. Cyr*. The BIA denied this motion as well because petitioner's crime of violence lacked a statutory counterpart, thus making him ineligible for 212(c) relief despite *St. Cyr*. Petitioner then filed his third petition for review raising *inter alia* his res judicata argument.

The court first agreed with the government that it lacked jurisdiction to consider petitioner's *res judicata* argument because he had failed to timely file an appeal when the BIA first rejected that claim. The court disagreed with petitioner's argument that at the time BIA denied his *res judicata* claim he lacked a means to petition the court for review because of the INA's former review-bar for aliens convicted of aggravated felonies. The court said, "[t]he short answer to [petitioner]'s contention regarding the absence . . . of any review process in our court, is that Congress was under no obligation to have provided him with one. The fact that, effective May 11, 2005, Congress for the first time allowed criminal deportees in [petitioner]'s shoes to file petitions for review in this court does not establish that Congress somehow intended to afford [petitioner] an earlier opportunity."

> "The fact that effective May 11, 2005, Congress for the first time allowed criminal deportees in [petitioner's] shoes to file petitions for review in this court does not establish that Congress somehow intended to afford [petitioner] an earlier opportunity."

Second, the court affirmed the BIA's denial of § 212(c) relief because petitioner's crime of violence lacked a statutory counterpart in § 212(a). Petitioner had argued that his conviction for sexual assault could also be considered a crime involving moral turpitude, which had a counterpart in § 212(a). The court found this argument already precluded by its decision in *Kim v. Gonzales*, 468 F.3d 151 (1st Cir. 2006), and further noted that accepting this argument would allow that "almost anyone [to] argue that . . . waiver authority should be interpolated because the crime was also one of moral turpitude."

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### ■ BIA Properly Denied An Untimely And Numerically Barred Motion To Reopen Asylum By A Pakistani Shia Convert

In ***Raza v. Gonzales***, __F.3d__, 2007 WL 1153040 (1st Cir. April 19, 2007) (Torruella, *Selya*, Stahl), the court upheld the BIA's determination that petitioner's untimely and numerically barred motion to reopen based on changed country conditions did not present exceptional circumstances.

Petitioner, a native and citizen of Pakistan, filed an untimely and numerically barred motion to reopen with the BIA claiming that he feared persecution from his Sunni Muslim family in Pakistan because of his recent conversion to Shia Islam. In support of his motion, petitioner attached a series of internet articles describing contemporaneous country conditions in Pakistan. The BIA denied the motion stating that petitioner had failed to proved exceptional circumstances or make out a *prima facie* case for asylum.

Before the First Circuit, petitioner asserted that the BIA failed to address the proffered evidence of changed country conditions and improperly determined that he was ineligible for asylum. The court rejected petitioner's arguments, holding that BIA had explicitly "observed that the 'country conditions information' did not specifically refer to the petitioner and that in several critical aspects the motion was 'based upon mere speculation about what may happen upon his return' to Pakistan." The court explained that

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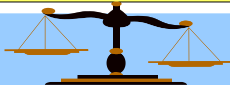

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"[a]n agency is not required to dissect in minute detail every contention that a complaining party advances." Finally, the court agreed that petitioner's internet articles failed to establish his prima facie eligibility for asylum and that his fear of persecution was from his family, thus lacking a government nexus.

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### ■ First Circuit Holds That It Has Jurisdiction To Review An IJ's Denial Of A Continuance

In ***Alsamhouri v. Gonzales***, __F.3d__, 2007 WL 1153033 (1st Cir. April 19, 2007) (Boudin, *Lynch*, Lipez), the court held that it had jurisdiction to review an IJ's denial of a petitioner's motion for a continuance to prepare an asylum application, but found substantial evidence supported the IJ's decision.

Petitioner, a native and citizen of Jordan, had applied for asylum. When he first appeared before an IJ, petitioner was given a continuance, at first six months and eventually nine months, in order to obtain counsel. Petitioner then sought another continuance, through counsel, asking for an additional three months to prepare his asylum application. The IJ granted the continuance, setting a hearing date for July 7, 2004. On May 28, 2004, petitioner's counsel filed a motion to withdraw as counsel based on petitioner's request to terminate the representation. Attached to the motion was a copy of a letter signed by petitioner and his counsel confirming that he wanted to terminate the representation and warning petitioner of the timetables set by the IJ to file his asylum application. The motion to withdraw was not granted until the July 7, 2004, hearing where petitioner asked for another continuance, stating that his newly obtained counsel required time to prepare his application. Petitioner initially testified that he had never received any letter from his former counsel and that he didn't understand the filing deadlines. Petitioner changed his testimony when the IJ confronted him with the signed letter, and admitted to receiving the letter but continued to claim he didn't understand its contents. Based on petitioner's testimony, the IJ found him not credible and denied the continuance, determining that petitioner was well aware of the deadlines but had simply ignored them. The BIA affirmed without opinion.

The court explained that the bar to judicial review does not apply to discretionary powers derived from regulations, to wit, an IJ's authority to grant a continuance under 8 C.F.R.§ 1003.29.

The court first determined that it had jurisdiction over the petition for review because an "immigration judge's authority to continue a case is not 'specified under' the subchapter [8 U.S.C. §§ 1151-1381; INA §§ 201- 295] to be in the discretion of the Attorney General." The court explained that the bar to judicial review does not apply to discretionary powers derived from regulations, to wit, an IJ's authority to grant a continuance under 8 C.F.R. §1003.29. On the merits, the court found that the IJ did not abuse his discretion because substantial evidence supported the decision. The court stated that "[h]aving found [petitioner] not to be credible, the IJ was entitled to credit the evidence that [petitioner] told his original counsel. . . that he had retained new counsel. . . and that [petitioner] did delay in hiring an attorney, and the delay was entirely of his own making." The court rejected petitioner's argument that because the IJ failed to grant his prior counsel's motion to withdraw until the hearing date, prior counsel remained ethically bound to prepare the asylum application for the hearing. The court stated that petitioner's prior attorney "bears no responsibility for [petitioner]'s failure to retain a new attorney until a few days before the hearing." The court also found that petitioner's due process claim was precluded by its finding that the IJ did not abuse his discretion.

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## SECOND CIRCUIT

### ■ Massachusetts Conviction For Assault And Battery Of A Police Officer Constitutes A Crime Of Violence

In ***Blake v. Gonzales***, __F.3d__, 2007 WL 914865 (2d Cir. March 28, 2007) (Kearse, *Sotomayor*, Cedarbaum), the court held that a Massachusetts conviction for assault and battery against a police officer constituted a crime of violence, and thus an aggravated felony rendering petitioner removable.

Before the court petitioner argued that the Massachusetts statute under which he was charged, Mass. Gen. Laws ch. 265, § 13D, did not encompass solely crimes of violence because in addition to punishing assault and battery on police officers, it also punished assault and battery on other public officials, which petitioner argued did not involve a risk of violence as assaulting a police officer. Moreover, petitioner argued, his conviction was not for a crime of violence because the statute could be read as also punishing an "offensive touching" to a police officer, which would not involve a substantial risk of physical force as required for a crime of violence "finding" under 18 U.S.C. § 16(b). The court rejected both arguments. First, the court found that the criminal statute was divisible under its precedent *Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006), and thus it was irrelevant that the statute pun-

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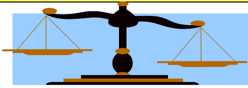

# Summaries Of Recent Federal Court Decisions

ished attacks on other public officials besides police officers. Second, the court found that petitioner's conviction for assault and battery met the definition for a crime of violence under § 16(b) because there was a substantial risk that an offender may use force when intentionally preventing a police officer from performing his or her duties.

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**■ Second Circuit Reverses Adverse Credibility Determination Because IJ Relied On Testimony That Was Not Part Of The Administrative Record**

In ***Gao v. Gonzales***, __F.3d__, 2007 WL 914633 (2d Cir. March 28, 2007) (Leval, Straub, *Underhill*), the court reversed an IJ's adverse credibility determination because the IJ improperly relied on misstatements of fact and testimony from a previous hearing that could not be found in the record.

Petitioners, a married couple and natives and citizens of China, claimed persecution due to China's population control policy. The husband entered the U.S. in 1998 and sought asylum based on the forced sterilization of his wife upon birth of the couple's second child. After a hearing before an IJ, his claim was denied. In 2000, while the husband's appeal was pending before the BIA, the wife entered the U.S. and sought asylum. The two cases were consolidated when the BIA remanded the husband's case due to missing transcripts. At their hearing on their consolidated asylum applications, an IJ denied relief solely on an adverse credibility determination. Specifically, the IJ identified three inconsistencies in their testimony: the birthplace of the couple's first child, the problems encountered during the wife's second pregnancy, and the duration of her hospital stay following forced sterilization. The BIA upheld the adverse credibility determination, but accepted as credible petitioner's testimony as to the duration of her hospital stay.

The court reversed the IJ's adverse credibility determination. First, the court found the petitioners' testimony as to the birth place of their first child was internally consistent and that the IJ had misstated the facts of their testimony. Specifically, the court found that the IJ had confused the petitioners' second child, a son, with the petitioners' first child, a daughter. Moreover, said the court, the IJ had relied on testimony from the husband's first asylum application hearing which was nowhere in the record. For the same reason, the court held that the IJ could not use the previous, missing testimony to discredit the petitioners' testimony concerning the problems encountered during the wife's second pregnancy.

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**■ District Court Improperly Transferred A Habeas Petition Pursuant To The REAL ID Act Because The Writ Was Filed After May 11, 2005, And Because The Petition For Review Would Have Been Untimely**

In ***Wang v. Gonzales***, __F.3d__, 2007 WL 1148716 (2d Cir. April 19, 2007) (Kearse, *Cabranes*, Katzmann), the court found that it lacked jurisdiction over a petition for review because the petition was improperly transferred from a district court under the REAL ID Act. Further, the court held that because no other court had jurisdiction over the petition, it had to dismiss the case.

Petitioner, a native and citizen of China, had applied for asylum but had the claim denied by an IJ. The BIA affirmed without opinion on June 7, 2002. On May 21, 2006, petitioner filed a writ of habeas corpus. The district court transferred the case to the Second Circuit pursuant to the REAL ID Act. The government moved the Second Circuit to dismiss the case because the petition for review was not filed within 30 days of the BIA's denial of petitioner's appeal and that retransfer to the district court would be improper because the REAL ID Act has eliminated habeas corpus review of orders of removal. Petitioner argued on the other hand, that the transfer was proper because no statute imposes a time limitation on filing a writ of habeas corpus.

> The REAL ID Act allows district courts to transfer a habeas petition only if the petition was pending in the district court on May 31, 2005.

The court agreed with the government, and held that the transfer was improper because the REAL ID Act allows district courts to transfer a habeas petition only if the petition was pending in the district court on May 11, 2005. Further, the court held that transfer was not permissible under 28 § U.S.C. 1631, permitting the filing court "in the interest of justice, [to] transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed." The court stated that "[b]ecause we would have lacked jurisdiction over [petitioner]'s petition for review had it been filed in this Court 'at the time it was filed or noticed' in the District Court, transfer under § 1631 was not permitted."

Finally, the court held the that it could not retransfer the case to the district court because the REAL ID eliminated habeas review. The court noted that "[i]t is possible that in come future case, the particular circumstances that prevented a petitioner from seeking review with the 30-day time limit of § 1252(b)(1) would require us to reexamine

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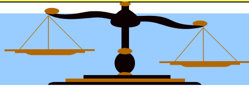

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whether that limit ought to be treated as jurisdictional now that the petition for review is the exclusive means of obtaining 'judicial intervention in deportation cases.' This is not such a case. [Petitioner] failed to challenge his final order of removal for almost four years . . . [and] offer[ed] no excuse for his untimely filing."

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## THIRD CIRCUIT

### ■ Third Circuit Holds That It Lacks Jurisdiction To Consider One-year Asylum Bar

In ***Jarbough v. Gonzales***, __F.3d__, 2007 WL 1063146 (3d Cir. April 11, 2007) (Scirica, Fuentes*, Chagares*), the court held that it lacked jurisdiction to review an IJ's determination that petitioner had failed to file his asylum application within one year of entry in the U.S. The court also held that substantial evidence supported the IJ's denial of petitioner's claim of persecution by the Syrian government on account of his Druze religion and that the IJ's behavior did not violate due process.

Petitioner, a native and citizen of Syria, was placed into removal proceedings for overstaying his visa. He then filed an untimely asylum application claiming that the Syrian government had persecuted him on account of his Druze religion and imputed pro-Israeli opinion. Specifically, petitioner claimed that he had twice been detained by Syrian intelligence officers and threatened with the use of electric cables, and on the second detention, beaten with fists. At the hearing petitioner's attorney had asked the IJ for a continuance to obtain the testimony of a Druze expert and sought to introduce the testimony of another Syrian Druze similarly situated to petitioner. The IJ denied both requests, instead accepting affidavits by the two individuals. When questioned as to why his untimeliness in filing his application should be excused, petitioner stated that his prior counsel had never informed him of the one-year deadline. The IJ did not find this explanation constituted extraordinary circumstances and denied the asylum application as untimely. The IJ also held that the events described to rise to the level of persecution. The BIA affirmed.

Before the Third Circuit, petitioner argued that the IJ had violated his due process rights by failing to allow his witnesses to testify, for appearing bias, and for making factual errors in denying petitioner's excuse for untimely filing his asylum application. Additionally, he challenged the IJ's finding that the events described did not amount to persecution. The court rejected these arguments. First, the court held that it lacked jurisdiction to consider the one-year bar to filing for asylum and refuted petitioner's attempt to clothe the argument in due process terms, stating that "[g]arden-variety allegations of factual error such as those presented here provide no colorable basis for a constitutional challenge, and [petitioner]'s due process label is insufficient to shield him from the strictures of § 1158(a)(3)."

> "Garden-variety allegations of factual error. . . provide no colorable basis for a constitutional challenge, and [petitioner]'s due process label is insufficient to shield him from the strictures of § 1158(a)(3)."

The court also held that the IJ's refusal to hear the witnesses was likewise not a violation of due process as the IJ accepted affidavits in lieu of testimony and petitioner failed to show how in-court testimony would have materially differed from the affidavits. Additionally, the court did not find the IJ biased but only that he rebuked what amounted to leading questions by petitioner's counsel. Finally, while the court disagreed with the IJ's conclusion that petitioner did not suffer persecution, it found that it was not compelled to reverse the decision under the substantial evidence standard.

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### ■ Third Circuit Reverses An Adverse Credibility Determination And Holds That The REAL ID Act Does Not Excuse An IJ From Allowing Petitioner To Explain The Unavailability Of Corroborating Evidence

In ***Chukwu v. Gonzales***, __F.3d__, 2007 WL 1096890 (3d Cir. April 13, 2007) (Rendell, Roth, *Gibson)* the court reversed an IJ's adverse credibility determination and held that the REAL ID Act did not change the rule that an IJ's demand for corroborating evidence requires an explanation for the corroboration and for the applicant an opportunity to provide the evidence or a chance to explain its unavailability.

Petitioner, a citizen of Nigeria, entered the U.S. in 2001 signing a sworn statement at the Miami airport stating that he was a resident of Ghana, that he had never been arrested, and that he had come to the U.S. only because "life was difficult." In 2002, he applied for asylum claiming persecution in Nigeria because of his membership in MASSOB and support for creation of the State of Biafra. An IJ denied the application for lack of credibility, finding that petitioner had inconsistently testified as to the date he abandoned his wife, petitioner's ability to cross back and forth over the border despite his claim that Nigerian police were searching for him, and the address listed on his MASSOB membership card. The IJ also found that petitioner's testimony that he had been arrested five times (and beaten on two of the arrests) for MASSOB activi-

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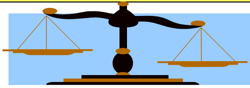

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ties was in conflict with his sworn statement from the Miami airport that failed to mention these events. Finally, the IJ also based his adverse credibility determination on the fact that petitioner had failed to provide corroborating evidence of medical and police reports. The BIA affirmed the adverse credibility determination.

The Third Circuit reversed the IJ's adverse credibility determination. The court preliminarily noted that the REAL ID Act amendments to review of credibility findings did not apply in this case. The court then explained that the corroboration rules under the REAL ID Act applied but that under *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001) an applicant must be given an opportunity to explain the lack of corroboration. "The REAL ID Act does not change our rules regarding the IJ's duty to develop the applicant's testimony, and in particular, to develop it in accord with *Abdulai* steps."

"The REAL ID Act does not change our rules regarding the IJ's duty to develop the applicant's testimony, and in particular, to develop it in accord with *Abdulai* steps."

The court then found that petitioner had adequately explained all of the inconsistencies and had not be given an opportunity to explain his failure to present corroborating evidence. First, the date petitioner testified he abandoned his wife was not in conflict with his wife's divorce complaint because the complaint stated petitioner had "intermittently" abandoned her for a period of about two years. Second, petitioner had explained his ability to cross over the border by the fact that the Nigerian police lacked a computer database to track people. Third, the MASSOB membership card listed the address of the MASSOB HQ, and need not list petitioner's home address. Fourth, while the sworn statement from the Miami airport certainly conflicted with petitioner's testimony, this standing alone could not support an adverse credibility determination. Finally, the court held that the IJ failed to explain why medical and police reports would be available to petitioner when he testified that he had only been arrested and never convicted of any crimes and had never sought treatment for his injuries.

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### ■ Third Circuit Holds That It Has Jurisdiction Over Challenges to "Asylum-Only" Proceedings Conducted Under The Visa Waiver Program

In ***Shehu v. Gonzales***, __F.3d__, 2007 WL 1039629 (3d Cir. April 9, 2007) (*Smith*, Fisher, Dowd), the court held that it had jurisdiction to consider an IJ's denial of petitioner's asylum application despite the fact that petitioner was in "asylum-only" proceedings under the Visa Waiver Program and had forfeited his right to challenge the final order of removal. The court cited *Foti v. INS*, 375 U.S. 217 (1963), to reason that the term "final order of removal" included not only actual orders of removal, but also all orders closely related to the removal proceedings such as "asylum-only" proceedings. The court joined the Second and Eleventh circuits whom reached the same conclusion in *Kanacevic v. INS*, 448 F.3d 129 (2d Cir. 2006), and *Nreka v. Att'y Gen.*, 408 F.3d 1261 (11th Cir. 2005), respectively. On the merits of petitioner's asylum claim, the court found that substantial evidence supported the IJ's determination that petitioner was not targeted by a criminal gang on account of a protected ground and that petitioner had lived safely in Albania for the last few years.

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## FIFTH CIRCUIT

### ■ Fifth Circuit Holds That Alien Smuggling Encompasses Those Aliens That Have Participated In A Scheme To Aid Other Aliens In Illegal Entry Even If Not Present At The Point Of Entry

In ***Soriano v. Gonzales***, __F.3d__, 2007 WL 1020462 (5th Cir. April 5, 2007) (*Reavley*, Garza, Benavides), the court held that substantial evidence supported the IJ's finding that petitioner was inadmissable because he had participated in alien smuggling. Further, the court held that the smuggling statute, INA § 212(a)(6)(E)(i); 8 U.S.C. § 1182(a)(6)(E)(i), encompasses aliens who participate in a scheme to aid other aliens in illegal entry and does not require the alien to be present at the point of entry.

Petitioner was placed in removal proceedings after his application for adjustment of status was denied and charges of alien smuggling had been levied. At the removal hearing, DHS introduced an I-213 form detailing the smuggling. The form stated that DHS had received an anonymous tip that illegal aliens were waiting for transportation at a McDonald's in El Paso, TX, and that DHS agents then saw petitioner pick up the illegal aliens from the same McDonald's and then drive them to a gas station where they met petitioner's friend. Petitioner testified that he did not know the aliens, but happened to meet them at the McDonald's and agreed to give them a ride to the border because he was nice. An IJ found petitioner's story not credible and held that petitioner had participated in an alien-smuggling scheme. The BIA affirmed.

On appeal, petitioner argued that he did not fall within the statutory definition of alien smuggling because the I-213 form showed only that he had transported aliens within the U.S.,

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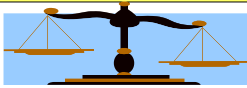

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rather than assisting those aliens during their actual entry into the U.S. The court rejected this argument, holding that "[w]e agree with the other circuits, which have held that '[a]n individual may knowingly encourage, induce, assist, abet, or aid with illegal entry even if he is not present at the point of illegal entry.' Any alien seeking admission to the United States who participates in a scheme to aid other aliens in an illegal entry is inadmissible under the language of § 1182, regardless of whether the assisting individual was present at the border crossing." Further, the court found that it was not compelled by the facts to find that petitioner had innocently offered the aliens a ride because he was nice.

> "Any alien seeking admission to the United States who participates in a scheme to aid other aliens in an illegal entry is inadmissible under the language of § 1182, regardless of whether the assisting individual was present at the border crossing."

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**■ Fifth Circuit Holds That BIA Failed To Follow Its Own Precedent By Not Providing An Explanation Why Counsel's Erroneous Instruction To An Alien Not To Appear At His Removal Hearing Did Not Constitute Ineffective Assistance**

In ***Galvez-Vergara v. Gonzales***, __F.3d__, 2007 WL 1113912 (5th Cir. April 16, 2007) (*Garzo,* Prado, Owen), the court held that the BIA abused its discretion by failing to apply its own precedent decision in *In re Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996), to petitioner's claim that his counsel provided ineffective assistance by instructing him that he need not appear at his removal proceeding.

Petitioner was placed into removal proceedings when it was discovered that he had fraudulently obtained adjustment of status. Petitioner retained counsel who subsequently moved for a change of venue from Dallas, TX, to Provo, UT, where petitioner resided. Petitioner's counsel assured him that the motion would be granted and that his presence in Dallas would not be required. However, an IJ denied the motion and petitioner failed to appear in Dallas, resulting in in absentia removal. Consequently, petitioner sought to reopen his case for ineffective assistance of counsel. The IJ denied the motion to reopen stating that petitioner had not demonstrated exceptional circumstances due to ineffective assistance of counsel because it was not reasonable for petitioner to rely on his attorney's assurance that his motion for a change in venue would be granted. The IJ reasoned that petitioner should have followed the instructions on the NTA. The BIA affirmed without opinion.

On appeal, petitioner argued that an attorney's erroneous instruction not to appear at an immigration hearing constituted exceptional circumstances justifying rescission of an *in absentia* removal order. To support his argument, petitioner's brief cited to *In re Grijalva-Barrera*, a decision of the BIA that found exceptional circumstances where an alien was ordered removed *in absentia* after an employee of his prior attorney "erroneously" called to inform him that there had been a continuance and that he should not appear at his removal proceedings. In that case, the BIA had determined that an alien had no reason not to rely on the representations of his lawyer's employees and remanded the case to an IJ. Because neither the IJ nor the BIA addressed whether the reasoning of *In re Grijalva-Barrera* applied to petitioner's case, the court held that the BIA had abused its discretion. The court, citing 8 C.F.R. § 1003.1(g), noted that "[t]his is especially troubling given that the BIA's regulations require it to follow its own precedent unless overruled."

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**■ Sixth Circuit Declines To Decide Whether Equitable Tolling Applies to Numerical Limitations On Motions To Reopen Based On Ineffective Assistance Of Counsel**

In ***Tapia-Martinez v. Gonzales***, __F.3d__, 2007 WL 627822 (6th Cir. February 27, 2007) (*Suhrheinrich*, Sutton, McKeague), the court affirmed the BIA's denial of petitioner's second motion to reopen as numerically barred. The court declined petitioner's request to apply the doctrine of equitable tolling to numerical limitations on motions to reopen because petitioner had not established the prerequisite showing of due diligence.

After a merits hearing, an appeal, a motion to reopen, and an unsuccessful trip to the Sixth Circuit, petitioner filed a second motion to reopen with the BIA claiming that both her prior attorneys had provided ineffective assistance in presenting her application for cancellation of removal. The BIA denied the second motion as numerically barred, resulting in the petitioner's current and second trip to the Sixth Circuit.

Before the court, petitioner argued that the BIA should have applied equitable tolling to her ineffective assistance of counsel claim. The court noted that it had never decided the question of whether equitable tolling applies to numerical limitations on motions to reopen, but found that it "need not resolve this question because Petitioner has not established due diligence in pursuing a complaint against either her former or current counsel." Specifically, the court found that petitioner did not file a motion

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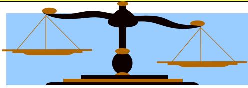

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alleging ineffective assistance by her first attorney until fifteen months after filing a complaint with that attorney's state bar and did not allege ineffective assistance against her second attorney for nearly three years.

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## SIXTH CIRCUIT

■ **Sixth Circuit Rejects Government's Argument That *Matter of Velarde* Requires DHS To Consent In A Motion To Reopen For Adjustment Of Status**

In *Sarr v. Gonzales*, __F.3d__, 2007 WL 1146465 (6th Cir. April 19, 2007) (*Daughtery,* Cook, Weber), the court upheld an IJ's adverse credibility determination and denial of asylum and affirmed the BIA's denial of a motion to reopen in order to adjust status. In ruling on the denial of the motion to reopen, however, the court rejected the government's argument that *In re Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002), requires government stipulation to a motion to reopen to adjust status.

Petitioner, a native and citizen of Senegal, first applied for asylum in 1991 claiming political persecution. This application was denied. Petitioner then filed a second application for asylum in 1999, this time detailing all sorts of beatings and torture that were not mentioned in his previous application. When asked to explain the omissions, petitioner testified that he had simply forgotten to include them and had not previously had the assistance of an attorney. Petitioner was also unable to offer any corroborating evidence with the exception of an affidavit from an alleged political comrade that, because of its similarity to petitioner's own affidavit, appeared to have been prepared by his attorney. Based on petitioner's testimony and the evidence presented, an IJ found that he was not credible. Further, the IJ found that conditions had changed in Senegal to a point where petitioner could no longer reasonably fear persecution. Petitioner appealed the decision to the Board, in addition to requesting that the Board reopen the case so that he could adjust status on the basis of a marriage. The Board upheld the IJ's adverse credibility determination and denied the motion to reopen because the government opposed the motion and because petitioner had given false testimony.

The Sixth Circuit affirmed the adverse credibility determination, citing the petitioner's failure to include the "various arrests or detentions mentioned by the petitioner in either his 1999 application or his oral testimony." The court also upheld the IJ's conclusion of changed country conditions. However, the court rejected the government's contention that the factors for granting a motion to reopen listed in *Matter of Velarde-Pacheco* require that DHS join in the motion to reopen for adjustment of status, stating that *Velarde* identified many factors to consider in granting a motion to reopen and that "affording such importance to that single consideration would effectively remove all authority over the granting or denial of such motion by the Board and place it solely within the hands of the adversarial parties." Though the court upheld the Board's second ground for denying the motion - that petitioner's false testimony precluded adjustment of status.

> The court rejected the government's contention that the factors for granting a motion to reopen listed in *Matter of Velarde-Pacheco* require that DHS join in the motion to reopen for adjustment of status.

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## SEVENTH CIRCUIT

■ **Seventh Circuit Criticizes IJ For Religious Intolerance And Remands Romanian Claim For Religious Persecution Against Seventh-day Adventists From Romania**

In *Floroiu v. Gonzales*, __F.3d__, 2007 WL 957528 (7th Cir. April 2, 2007) (Ripple, Rovner, Williams) (*per curiam*), the court reversed the denial of petitioners' application for withholding of removal because the IJ manifested a clear bias which deprived them of their right to a fair hearing.

Petitioners claimed persecution in Romania on account of their Seventh-day Adventist religion. Specifically, petitioners claimed that as a result of proselytizing their religion, Romanian authorities and Orthodox clergy had threatened the husband with death and arrested him. An IJ found that the events described did not rise to the level of persecution and added the following: "[petitioner]s are essentially zealots, that is people who practice their religion in a way which is very often offensive to the majority and that they have deliberately forced their religious expression on that majority." The IJ stated that petitioners offensive proselytizing was partly responsible for their persecution. The BIA upheld the decision, noting the IJ's odd choice of words but ultimately finding the IJ impartial.

The court strongly rejected the decision of the BIA, stating that "[t]he bias reflected in the use of this language of intolerance taints the proceedings, erodes the appearance of fairness and creates substantial uncertainty as to whether the record below was fairly and reliably developed. [cite omitted]. We find it ironic that the IJ - who is charged with protecting asylum applicants from religious persecution . . . spoke in the unacceptable language of religious intolerance." The court remanded the case, encouraging the BIA to assign a

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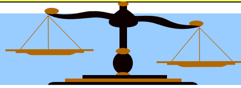

# Summaries Of Recent Federal Court Decisions

different IJ to the proceedings and sent a copy of its opinion to the Attorney General for a determination of whether or not the IJ warranted discipline.

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■ **DHS Does Not Have Authority To Determine The Requirements For A Job When Deciding A Labor Certification**

In ***Hoosier Care, Inc. v. Chertoff***, __F.3d__, 2007 WL 1062912 (7th Cir. April 11, 2007) (*Posner*, Rovner, Sykes), the court held that when deciding an alien's eligibility for a labor certification, DHS does not have the authority to determine the requirements of the job, but only to determine whether the alien satisfies the job's requirements.

Plaintiff, the employer, had submitted labor certification requests on behalf of two Filipino citizens that it wanted to employ as staff members in their care facility for the mentally-disabled. In its applications for labor certification, plaintiff stated that the jobs required people with bachelors degrees in any field. The two Filipino citizens had bachelors degrees in agriculture and maritime transportation. While the Department of Labor granted the certifications, DHS denied the employment based visa petitions (I-140). DHS explained that the aliens' bachelor's degrees were not relevant to the care of the mentally-disabled. Plaintiff appealed the decision, arguing that 8 C.F.R. 204.5(l)(4) imposes on the Department of Labor the duty of determining whether the aliens have the proper training for the job, and that DHS merely determines if the aliens have that training. The court agreed with the plaintiff, holding that "the determination of what *kind* of training is required to classify an alien as a 'skilled' worker is made by the Labor Department upon consideration of the submission by the alien's prospective employer . . . and [DHS] then determines whether the alien whom the employer wants to hire satisfies those requirements - that is, whether he *has* the training that the Department of Labor believes is required for the job."

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■ **IJ Did Not Violate Petitioner's Right To Present Evidence And Had No Obligation To Continue Proceedings In Order To Allow Time For DHS To Answer A Subpoena**

In ***Skorusa v. Gonzales***, __F.3d__, 2007 WL 1017018 (7th Cir. April 5, 2007) (Easterbrook, *Flaum*, Sykes), the court held that petitioner's due process right to present evidence was not violated by an IJ's denial of a continuance and alleged failure to enforce a subpoena.

Petitioner, a native and citizen of Poland, sought adjustment of status to lawful permanent resident, but DHS opposed it because petitioner had previously attempted to bribe an immigration official during a government sting operation. The sting went as follows: INS officer Robinson would pose as a corrupt immigration official selling benefits, videotaping each interview and making sure to inform each alien that it was an illegal operation. In preparation for the removal hearing, petitioner requested the videotapes, so the IJ issued a subpoena asking DHS to produce them. At the hearing, petitioner's counsel argued that the videotapes had never been produced and that it would affect his ability to cross examine officer Robinson. The IJ noted counsel's concern and said that after testimony he would decide whether or not to grant a continuance. Ultimately, the IJ balanced the equities and denied adjustment of status. On appeal to the BIA, petitioner argued that his right to present evidence was violated by the IJ's failure to grant a continuance so that DHS could answer the subpoena. The BIA rejected this argument, finding that because officer Robinson had testified that the FBI had the videotapes - not DHS - DHS had complied with the subpoena by not producing the tapes and thus the IJ did not err in failing to grant a continuance.

> "The determination of what *kind* of training is required to classify an alien as a 'skilled' worker is made by the Labor Department upon consideration of the submission by the aliens' prospective employer."

The Seventh Circuit agreed with the BIA and found that the IJ had not violated petitioner's due process right to present evidence by failing to grant the continuance. First, the court pointed out that the IJ never specifically denied a continuance. "Rather," the court said, "the IJ recognized the possibility that a continuance might be necessary if Robinson and [petitioner] provided completely different accounts of what happened." Second, the court found that petitioner was given the opportunity to cross-examine Robinson and submitted numerous documents, and thus was afforded due process. The court also found that the IJ did not have a statutory obligation to continue proceedings because Robinson did not violate the terms of the subpoena, that is, Robinson didn't have the videotapes, the FBI did, and thus could not produce them.

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■ **BIA Abused Its Discretion By Failing To Adequately Explain Why It Rejected Petitioner's Evidence Of Changed Country Conditions In Ethiopia**

In *Gebreeyesus v. Gonzales*, __F.3d__, 2007 WL 1029433 (7th Cir. April 6, 2007) (Ripple, Manion, *Kanne*), the court reversed the BIA's determination that petitioner had not

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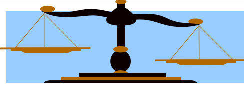

# Summaries Of Recent Federal Court Decisions

demonstrated changed country conditions in Ethiopia which would warrant reopening. In so holding, the court found that the BIA had failed to consider the new evidence submitted by petitioner and did not explain why the new evidence was insufficient to change the outcome of proceedings.

Petitioner, a native and citizen of Ethiopia, claimed persecution on account of her participation in a government opposition group and her Amhara ethnicity. An IJ found petitioner not credible and denied the claim. The BIA affirmed. Petitioner then filed an untimely motion to reopen based on marriage to a U.S. citizen, but this too was denied. Subsequently, petitioner filed a second motion to reopen arguing that conditions in Ethiopia had changed in that the controlling political party had begun to crack down on opposition parties and their members. With her motion, petitioner submitted the 2005 State Department Country Report on Ethiopia confirming the government crackdown on political opposition parties and two letters: one from her brother stating that another brother had been arrested, and one from the Chairman of the Chicago Chapter of the Ethiopian National Congress stating that petitioner's activities in the U.S. would place her in jeopardy in Ethiopia. The BIA denied the motion finding no evidence of changed conditions and that neither letter was properly authenticated such that it would overturn the IJ's previous adverse credibility determination.

The court reversed and remanded, holding that the BIA failed to give a reasoned explanation for why it found no evidence of changed country conditions. Specifically, the court stated that the BIA's rejection of the 2005 Country Report was highly questionable in light of its recent decision in *Kebe v. Gonzales*, 473 F.3d 855 (7th Cir. 2007), holding that the BIA had abused its discretion by failing to find changed country conditions in Ethiopia in part because it ignored the very same country report submitted by petitioner. While the government attempted to distinguish *Kebe* on the grounds that *Kebe* dealt with a political opposition party different from petitioner's party, the court rejected this argument stating that the Country Report did not single out any particular opposition party as the main target.

> The Seventh Circuit found that the IJ had not violated petitioner's due process right to present evidence by failing to grant a continuance.

The court further found that the letters submitted by petitioner did not require authentication because they were not official documents. Finally, the court held that because the petitioner's new evidence was based on a different factual basis for persecution, the BIA was wrong to use the IJ's previous adverse credibility determination to undermine her motion. The court noted that while the government may have correctly argued that the evidence did not show that petitioner herself would be targeted for persecution, this was not one of the grounds on which the BIA based its decision.

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■ **Seventh Circuit Holds That It Lacked Jurisdiction Over CIS's Denial Of Petitioner's U Visa Because She Failed To Raise The Issue In Her Administrative Removal Proceedings**

In ***Fonseca-Sanchez v. Gonzales***, __F.3d__, 2007 WL 1094347 (7th Cir. April 13, 2007) (Ripple, *Manion*, Williams), the court held it lacked jurisdiction over the denial of petitioner's U visa because she had failed to raise the issue in response to the notice of administrative removal and thereby failed to exhaust her administrative remedies.

Petitioner, a native and citizen of Mexico, was placed into administrative removal because she been convicted of an aggravated felony. ICE served petitioner with a Notice of Intent to which petitioner never responded. Consequently, ICE issued a Final Administrative Removal Order ("FARO"). Nine days later, petitioner requested a U visa from USCIS. Five days later, petitioner filed a petition for review challenging ICE's final order of removal. Subsequently, USCIS denied the U visa, which petitioner contested with USCIS only to have it denied once again.

In her brief to the Seventh Circuit, petitioner only challenged USCIS's denial of the U visa. The court held that it lacked jurisdiction to review the denial of the U visa. The court explained that its review was limited to final orders of removal and matters decided by ICE in the course of removal proceedings. Because petitioner's brief was not challenging ICE's final order of removal, the court stated it lacked jurisdiction to hear her claim. The court also held that petitioner had failed to exhaust the issue with ICE, pointing out that while ICE does not have the authority to grant U visas, ICE does have the authority to stay the proceedings or decline to issue an order of removal should petitioner have raised the U visa issue. The court noted that petitioner further failed to exhaust her administrative remedies by filing her petition for review before USCIS denied her U visa.

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■ **Seventh Circuit Vacates Streamlined Decision Holding That Salvadoran Army Officer Participated in Persecution**

In *Doe v. Gonzales*, __F.3d__, 2007 WL 1120300 (7th Cir. April 17, 2007) (*Posner*, Kanne, Rovner), the

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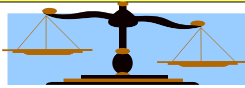

# Summaries Of Recent Federal Court Decisions

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court held a remand was required for reconsideration of the IJ's determinations that petitioner had participated in persecution in El Salvador, that his subsequent conviction for murder by an El Salvadoran court constituted a particularly serious crime, and that petitioner did not have a well founded fear of persecution.

Petitioner, a native and citizen of El Salvador, had been a soldier in the Salvadoran army during its civil war. Specifically, petitioner had been part of a army unit that had raided a Jesuit mission. The raid resulted in the murder of Jesuit priests and women. While petitioner was not directly involved in the killings, a statement by another officer in the army unit claimed that petitioner had told a soldier to make sure that the women didn't leave the mission. Petitioner also helped to cover-up the raid by burning logbooks. Subsequently, petitioner and other soldiers were tried for the murders and a jury found him guilty. The Salvadoran government later gave him amnesty. When a U.N. commission sought to investigate the trials for corruption, petitioner turned informant. As a result, petitioner feared he would be killed for his role as an informant and sought asylum in the U.S. An IJ found petitioner ineligible for asylum because he had participated in persecution by assisting in the raid and then covering it up. Second, the IJ found that petitioner was ineligible for withholding because the murder conviction constituted a particularly serious crime. Third, the IJ held that the political climate in El Salvador had changed enough to where petitioner's fear of persecution was no longer reasonable. The BIA affirmed without opinion.

The Seventh Circuit reversed the decision of the IJ because the BIA failed to address what the court found to be novel issues of law inappropriate for a streamlined opinion. First, the court held that neither the BIA nor the courts have ever articulated whether mere presence constitutes participation in persecution. Granted, the court said, it had previously held that presence equaled assistance to persecution, citing *United States v. Kumpf*, 438 F.3d 785 (7th Cir. 2006). However, the court noted that *Kumpf* dealt with active presence, that is, presence that functioned to discourage escape. Because the IJ had not addressed the statement of the other army officer claiming petitioner told the officer not to let the women leave, the court held that the IJ had not sufficiently addressed the issue of participating in persecution. Further, the court held that no BIA decision had yet to address whether someone who helps cover-up persecution actually participates in it. Second, the court held that the IJ erred by declining to consider the legitimacy of petitioner's murder conviction, characterizing the court of conviction as the "kangaroo court to make kangaroos blush." Finally, the court held that the IJ failed to address the fact that many of the former members of the high command who petitioner helped to expose now occupied senior positions in the governing party, and also remanded the case for a reconsideration of petitioner's reasonable fear of persecution.

The Seventh Circuit reversed the decision of the IJ because the BIA failed to address what the court found to be novel issues of law inappropriate for a streamlined opinion.

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## EIGHTH CIRCUIT

■ **Court Reverses BIA's Decision Upholding IJ's Determination That Petitioner's Claim of Homosexual Persecution Failed Because Petitioner Neither Dressed, Acted, Nor Spoke Like A Homosexual**

In ***Shahinaj v. Gonzales***, __F.3d__, 2007 WL 958144 (8th Cir. April 2, 2007) (Wollman, *Riley*, Shephard), the court reversed a decision of the BIA affirming an IJ's determination that petitioner's claim of persecution in Albania due to his homosexual orientation was not credible.

Petitioner had testified that Albanian police officers had beat and sodomized him and made repeated derogatory references to his homosexuality. An IJ found the testimony incredible, stating that "[n]iether [petitioner]'s dress, nor his mannerisms, nor his style of speech give any indication that is a homosexual . . . He never reported the abuse . . . the sexual assault to any homosexual organization which one would suppose would have reported it and provided counseling at least to him." The BIA affirmed and petitioner filed a Petition for review. Upon the Attorney General's own motion, however, the case was remanded to the BIA for reconsideration. The BIA reconsidered and again affirmed the IJ's adverse credibility, though explicitly rejecting the IJ's findings as to petitioner's dress, mannerisms, and style of speech.

The court vacated the decision of the BIA as not supported by substantial evidence. The court stated that "[b]eyond excising portions of the IJ's credibility findings regarding [petitioner]'s homosexual orientation, the BIA did not explain how the IJ's remaining findings and credibility determination as a whole were not tainted by the IJ's bias. Nor did the BIA explain . . . how the balance of the record could adequately support the IJ's credibility determination, which went to the heart of [petitioner]'s asylum claim."

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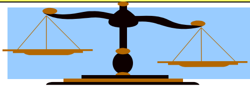

# Summaries Of Recent Federal Court Decisions

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**■ BIA Properly Found That Petitioner Could Safely Relocate In Indonesia To Avoid Persecution Of His Christian Beliefs**

In ***Poniman v. Gonzales***, __F.3d__, 2007 WL 957526 (8th Cir. April 2, 2007) (Wollman, Beam, *Riley*), the court affirmed the BIA's decision denying petitioner's motion to reopen his asylum application because petitioner could reasonably relocate in Indonesia to avoid persecution.

Petitioner sought asylum because he feared Muslims in Indonesia would persecute him account of his Christian beliefs. An IJ denied petitioner's asylum application as untimely in addition to holding that he was ineligible for withholding of removal and protection under CAT because petitioner could safely relocate to other parts of Indonesia. Subsequently, petitioner moved the BIA to reopen his case arguing that increased violence in Indonesia against Christians in portions of Sulawesi Island caused him to fear persecution. He submitted numerous articles and affidavits discussing the persecution of Christians in his home region of Mamasa and the surrounding Sulawesi Islands. The BIA denied the motion because petitioner failed to address the IJ's determination that he could safely relocate in Indonesia. The Eighth Circuit agreed, finding that "our review of the record reveals no evidence the North Sulawesi region (which is characterized as being 'mainly Christian' in at least one article submitted by [petitioner] in support of his motion) is unsafe for Christians such as [petitioner]." The court added, "[a]bsent a showing that relocation to North Sulawesi or other regions within Indonesia would be unreasonable, we are left to speculate about the potential violence [petitioner] might endure, a standard insufficient to satisfy [petitioner]'s burden under 8 C.F.R. § 1208.16(b)(3)(i)."

> "Absent a showing that relocation [ ]would be unreasonable, we are left to speculate about the potential violence [petitioner] might endure, a standard insufficient to satisfy [petitioner]'s burden under 8 C.F.R. § 1208.16(b)(3)(i)."

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**■ Possession Of Firearms And Ammunition By An Unlawful User Of A Controlled Substance Is An Aggravated Felony**

In *Alvarado v. Gonzales*, __F.3d__, 2007 WL 1120335 (8th Cir. April 17, 2007) (Murphy, Bright, Benton) (*per curiam*), the court held that petitioner's conviction for possession of a firearm and ammunition by an unlawful user of a controlled substance constitutes an aggravated felony for which petitioner was removable and statutorily ineligible for cancellation of removal.

Petitioner had pled guilty to a violation of 18 U.S.C. § 922(g)(3) for possession of firearms and ammunition by an unlawful user of a controlled substance. An IJ found, and the BIA affirmed, that petitioner was removable for having committed an aggravated felony and ineligible for cancellation of removal. In his brief to the Eighth Circuit, petitioner argued that his conviction was not an aggravated felony because he possessed the firearms for sporting purposes, an exception to 18 U.S.C. § 922(g)(3). However, because the plain text of INA 101(a)(43)(E)(ii) specifically states that an aggravated felony is an offense described in 18 U.S.C. § 922 (g)(3), the court held that petitioner had committed an aggravated felony.

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## NINTH CIRCUIT

**■ Ninth Circuit Reaffirms That It Lacks Jurisdiction To Review An IJ's Exceptional And Extremely Unusual Hardship Determination.**

In *Memije v. Gonzales*, __F.3d__, 2007 WL 881507 (9th Cir. March 26, 2007) (Pregerson, Tallman, Callahan), the court held that it lacked jurisdiction to review an IJ's discretionary determination that petitioners had failed to show exceptional and extremely unusual hardship for purposes of cancellation of removal. The majority noted a dissenting opinion by Judge Pregerson, stating that "we empathize with [his] heartfelt sentiments, [but] Congress had delegated to the Attorney General the discretion to consider [hardship] and it has restricted our power to overturn them." In his dissent, Judge Pregerson repeated his belief that the jurisdictional bar to review the IJ's exceptional and extremely unusual hardship determination violates the constitutional rights of the United States citizen children of the parents applying for cancellation of removal, stating "[o]ur government's refusal to grant the children's undocumented parents cancellation of removal tramples on the children's substantive due process rights - rights our government routinely ignores."

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## TENTH CIRCUIT

**■ Tenth Circuit Finds Impermissibly Retroactive The Reinstatement of A Removal Order Against Alien who Had Adjusted His Status Prior To IIRIRA's Enactment**

In ***Valdez-Sanchez v. Gonzales*** __F.3d__, 2007 WL 1180413)(10th Cir. April 23, 2007) (Baldock, O'Brien, Holmes), the Tenth Circuit joined the

(Continued on page 19)

## Summaries court decisions

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First, Seventh, and Eleventh Circuits in holding that reinstatement under INA § 241(a)(5) of an alien's prior deportation order is an impermissible retroactive application of the statute where the alien had applied for, and been granted, adjustment of status prior to the 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The court declined, however, to order that the alien be readmitted to the United States as a lawful permanent resident.

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## ELEVENTH CIRCUIT

■ **Adjustment Of Status Under INA 245(i) Is Discretionary Even After Statutory Eligibility Has Been Established**

*Usmani v.* Attorney *General of U.S.*, __F.3d__, 2007 WL 1051775 (11th Cir. Apr. 10, 2007)(Tjoflat, Hull, Kravitch) (*per curiam*), the Fifth Circuit held, in an issue of first impression, that the Attorney General retains his authority to deny adjustment as a matter of discretion even after he finds that an alien is statutorily eligible for adjustment under INA § 245(i). The court found jurisdiction to review this issue because it raised a question of law.

Petitioner contended that unlike the adjustment language under INA § 245(a), where the Attorney General is granted authority to deny adjustment "in his discretion," INA § 245(i) does not contain the same language. The court determined that the word "may" used in INA § 245(i) implies some degree of discretion and if Congress intended a mandatory action once statutory eligibility had been established, Congress would have used the word "shall" to convey that intent.

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## OIL'S 11TH ANNUAL IMMIGRATION LITIGATION CONFERENCE DRAWS LITIGATORS TO THE NAC

About 190 attorneys from various components of the Department, including about 65 AUSAs, and attorneys from OIL and client agencies, participated at the Eleventh Annual Immigration Litigation Conference, sponsored by the Civil Division's Office of Immigration Litigation. The conference was held on April 9-13, 2006, at the National Advocacy Center, in Columbia, South Carolina.

The theme for this year's conference was "Immigration Litigation Defining and Protecting our Community" and drew attention to the ongoing debate to reform our immigrations laws and the continuing impact of IIRIRA and developing law under the REAL ID Act of 2006. Among the speakers were Ryan Bounds, Chief of Staff, Office of Legal Policy, Thomas Dupree, Deputy Assistant Attorney General for the Civil Division, Lynden Melmed, Chief Counsel of the United States Citizenship and Immigration Services, Barry O'Mellin, Deputy Principal Legal Advisor of the Immigration and Customs Enforcement, and Juan Osuna, Acting Chairman of the Board of Immigration Appeals, Mary Catherine Malin, Assistant Legal Adviser for the Department of State, Immigration Judge, John Gossart from Baltimore, and Tenth Circuit Court of Appeals Judge Harris Hartz. Also participating at the Conference were representatives from the Department of Justice of Canada.

***L to R: Ryan W. Bounds, Lynden D.Melmed, Hugh G. Mullane***

***Papu Sandhu and Mary Catherine Malin***

***Elizabeth Amory and Barry O'Mellin***

***L to R: Thomas Hussey, Hon. Harris Hartz, David MConnell, Francesco Isgro, Judge John Gossart, Acting Board Chairman Juan Osuna, Thomas Dupree.***

# REAL ID Act — frequently asked questions

**Question: How do we brief the application of the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(C) to the denial of criminal aliens' applications for withholding of removal and protection under the Convention Against Torture in the Ninth Circuit in light of its decisions in *Unuakhaulu v. Gonzales*, 416 F.3d 931 (9th Cir. 2005), and *Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007)?**

### Background

In *Unuakhaulu*, *supra*, the Ninth Circuit held that 8 U.S.C. § 1252(a)(2)(C) does not apply to preclude jurisdiction to review a denial of withholding of removal or protection under CAT unless the agency: (1) "order[ed]" the alien removed on the basis of the criminal offense; or (2) predicated its denial of the application for protection on the criminal offense. *Id.* at 937. The court stated that for purposes of the first category, *i.e.,* whether the agency has "order[ed]" the alien removed on the basis of the criminal conviction, it is not enough that the immigration judge determined that Unuakhaulu "was removable on the basis" of the conviction if the judge did not specifically "order him removed on that basis." *Id.* at 936-37. In concluding that the immigration judge had not "order[ed] Unuakhaulu removed" based on the conviction, the court reasoned that: "the IJ neither specified the basis upon which Unuakhaulu was removed nor stated that Unuakhaulu was ordered removed based on the charges in the Notice to Appear." *Id.* at 937.

In its subsequent decision in *Morales*, *supra*, the court appeared to further narrow the application of Section 1252(a)(2)(C) to the denial of withholding or CAT by stating: "when an IJ does not rely on an alien's conviction in denying CAT relief and instead denies relief on the merits, none of the jurisdiction-stripping provisions . . . apply." *Supra*, at 980. This sentence might be read as precluding the government from arguing that Section 1252(a)(2)(C) applies if the alien is "order[ed] removed on the basis of the criminal conviction" by focusing the inquiry only on whether the withholding or CAT denial was based on the conviction. In other words, it appears to eliminate Category #1 (agency "order[ed]" alien removed on the basis of the criminal offense). But we should not adopt this reading of *Morales* for two reasons. First, the court's statement is dicta in light of its preceding conclusion that Morales had presented a question of law in challenging the denial of CAT. *Id.* Because Morales raised a question of law, the court had jurisdiction to review that claim under 8 U.S.C. § 1252(a)(2)(D), even if Section 1252(a)(2)(C) did apply. Second, in its analysis, the *Morales* Court appeared to recognize Category #1 when it summarized the *Unuakhaulu* decision, *including Unuakhaulu's* finding that Section 1252(a)(2)(C) was not applicable because the immigration judge did not order Unuakhaulu removed on the basis of his conviction. *Id.* In these circumstances, *Morales* should not be read as narrowing the applicability of Section 1252(a)(2)(C) by eliminating Category #1 where the court has not provided express language purporting to do so, and where the *Morales* panel is bound by prior precedent.

> In most cases, we will have to establish that the facts of our case fit within Category #1— i*.e.,* the agency "order[ed]" the alien removed on the basis of the criminal offense.

### Answer

(1) We should make every effort to distinguish the decisions in *Unuakhaulu* and *Morales* by arguing that the facts in our case fall within one of the two categories set forth in *Unuakhaulu*, such that Section 1252(a)(2)(C) is applicable: (1) the agency "order[ed]" the alien removed on the basis of the criminal offense; or (2) the agency predicated its denial of the application for protection on the criminal offense. *Note 1*

(2) Category #2 is somewhat problematic because most CAT and withholding denials are premised on the merits rather than on a criminal conviction. In fact, Category #2 will never apply to CAT because there is no criminal ground of ineligibility for CAT. And as to withholding of removal, while a conviction resulting in a term of five years or more is a ground of ineligibility, *see* 8 U.S.C. § 1231(b)(3)(B), in many cases that will raise a question of law that is reviewable pursuant to 8 U.S.C. § 1252(a)(2)(D).

(3) Accordingly, in most cases, we will have to establish that the facts of our case fit within Category #1 -- i*.e.,* the agency "order[ed]" the alien removed on the basis of the criminal offense. We should take an expansive view of this category. If the immigration judge's or BIA's decision contain *any language* ordering the alien removed on the basis of the conviction or "specify[ing] the basis upon which [the alien] was ordered removed," *see Unuakhaulu, supra,* at 937, we should distinguish *Unuakhaulu* on this ground. Indeed, we should use the Ninth Circuit's own example to advance our arguments in this regard. In *Morales*, the court concluded that there was no conflict between *Unuakhaulu* and its prior decision in *Ruiz-Morales v. Ashcroft*, 361 F.3d 1219 (9th Cir. 2004), where it applied Section 1252(a)(2)(C) to dismiss a CAT claim, because in *Ruiz-Morales* the immigration judge ordered the alien removed based on his aggravated felony. *Morales, supra*, at 980-81. The court seized on language in *Ruiz-Morales*, which stated: "The Immigration Judge (IJ) agreed with the INS that the mayhem conviction was an aggravated felony, *and ordered Ruiz-Morales removed from the United States*." *Ruiz-Morales, supra*, at 1220-21 (emphasis added).

(4) Even if we find no language in the agency decisions that appear to satisfy Category #1, we should distinguish *Unuakhaulu* and *Morales* in

*(Continued on page 21)*

## Second Circuit finds jurisdiction over motions for bail

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verted to a petition for review pursuant to the REAL ID Act and transferred to the Second Circuit. While in detention, petitioner filed a motion for bail in the Second Circuit.

The court *sua sponte* raised the issue of whether it had jurisdiction over the motion. Expanding on its holding in *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), which held that the court had inherent authority to hear admissions for bail in the immigration habeas context, the court applied *Mapp* to petitions for review. The court explained that "the REAL ID Act made no mention of federal courts' inherent authority to admit to bail those individuals detained by the INS . . . If Congress sees fit to deprive federal courts of their authority to admit to bail those detained aliens awaiting consideration of their petitions for review, as we noted in *Mapp*, 'the burden lies on the political branches explicitly to instantiate such a system of detention, and to do so through the law.'" Turning to petitioner's motion, the court held that he had failed to show extraordinary circumstances making the grant of bail necessary, because he had "proffered none other than convenience, why his continued detention by the INS would affect this Court's ultimate consideration of the legal issues presented in his petition for review."

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## REAL ID Act

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cases where all of the grounds of removability fall within Section 1252 (a)(2)(C). In both *Unuakhaulu* and *Morales*, the alien was charged with both a criminal *and a non-criminal* ground of removability. Unuakhaulu, supra, at 933; Morales, *supra*, at 977. The Ninth Circuit appeared to attach significance to the fact that the immigration judge's decision was unclear as to which ground the alien was being ordered removed. *See Unuakhaulu*, *supra*, at 934 ("The IJ did not state the basis upon which Unuakhaulu was being ordered removed and did not refer to either of the two charges in the Notice to Appear").

If, however, you have a case where the *only basis of removal* is a criminal ground that falls within Section 1252(a)(2)(C), then it is clear that the alien is being ordered removed pursuant to such a ground even though it is not specifically stated as such in the agency's decisions. Accordingly, this is another potential way to distinguish *Unuakhaulu* and *Morales.*

1. Note, this REAL ID Act issue concerns *only* the *applicability* of 8 U.S.C. § 1252(a)(2)(C). Once you convince the court that Section 1252(a)(2)(C) applies, you will need to argue that 8 U.S.C. § 1252(a)(2)(D) does not restore jurisdiction to review a withholding or CAT denial because that denial does not raise a "question or law" or constitutional claim. As such, you will have to address the Ninth Circuit's decision in *Ramadan v. Gonzales,* 479 F.3d 646 (9th Cir. 2007). In this regard, please note that the Ninth Circuit recently issued an order announcing that a *sua sponte en banc* call had been made in *Ramadan* and directed the parties to file supplemental briefs on whether the case should be heard *en banc*. The government's supplemental brief is due May 22.

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### NOTICE REGARDING SECOND CIRCUIT ORAL ARGUMENTS

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

## ANNUAL OIL-DHS-EOIR PICNIC

The annual **OIL-DHS-EOIR Picnic** will be held at the June 7th Washington Nationals game versus the Pittsburgh Pirates. The Picnic will begin at 11:30 a.m. and the game at 1:05 p.m.

For additional information contact Katrina Brown (202-616-7804) or Stacy Paddack (202-353-4426).

# INSIDE OIL

OIL welcomes the following two new attorneys:

**Tim Ramnitz** graduated from the University of Colorado, Boulder, with a degree in economics. He later attended Pepperdine School of Law. He joined OIL shortly after graduating from law school, but his previous legal experience included an internship with the San Diego Public Defender and an internship for Judge Alex Kozinski of the Ninth Circuit.

**Christina Parascandola** graduated from American University's Washington College of Law and School of International Service and attended the American University in Cairo, Egypt. Before joining OIL, she was a trial attorney in the DOJ Environment and Natural Resources Division.

Senior Litigation Counsel **John C. Cunningham**, was recently awarded a 35-year service pin by Deputy Director David McConnell. Mr. Cunningham joined OIL in January 1997. Prior to joining OIL, he held several legal positions at the Federal Maritime Commission.

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.

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

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

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