U.S. Department of Justice
Washington, D.C. 20530

Immigration Litigation Bulletin

Vol. 10, No. 12 **VISIT US AT: https://oil.aspensys.com** *December 2006*

SUPREME COURT HOLDS THAT DRUG POSSESSION CRIMES ARE NOT NECESSARILY AGGRAVATED FELONIES

In ***Lopez v. Gonzales***, 127 S. Ct. 625, 2006 WL 3487031 (Dec. 5, 2006), the Supreme Court held that an alien convicted in state court of a controlled substance offense punishable only as a misdemeanor under the Controlled Substances Act (CSA) has not been convicted on a "drug trafficking crime" aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)43(B). "A state offense constitutes a 'felony punishable under [CSA] only if it proscribes conduct punishable as a felony under that federal law," said the Court.

"A state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."

Section 101(a)(43)(B) of the INA lists as an aggravated felony "illicit trafficking in a controlled substance … including a drug trafficking crime (as defined in 18 § 924(c))," but does not define "illicit trafficking." Title 18 U.S.C. § 924(c)(2) defines "drug trafficking crime" to include "any felony punishable under the CSA."

The petitioner, a legal permanent resident alien, pleaded guilty in 1997 to South Dakota charges of aiding and abetting another person's possession of cocaine, which state law treated as the equivalent of possessing the drug, a state felony. On the basis of that conviction, the former INS began removal proceedings. The Immigration Judge ultimately ruled in light of *Matter of Yanez-Garcia*, 23 I&N Dec.390 (2002), that despite the CSA's treatment of petitioner's crime as a misdemeanor, see 21 U.S.C. § 844(a), it was an aggravated felony under the INA owing to its being a felony under state law. Consequently, the IJ found him statutorily ineligible for cancellation of removal under INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3), which provides that the Attorney General's discretion to cancel the removal of a deportable lawful permanent resident alien does not apply to aliens convicted of an aggravated felony, and ordered petitioner removed. The BIA affirmed,

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FIRST CIRCUIT TO REHEAR EN BANC ASYLUM CASE OF ALLEGED PERSECUTOR

On December 28, 2006, the First Circuit granted the government's petition for rehearing *en banc*, and withdrew and vacated the court's September 29, 2006 published decision in ***Castaneda-Castillo v. Gonzales***, 464 F.3d 112 (1st Cir. 2006).

The case concerns the asylum claim of a former officer in the Peruvian army who had been involved with his patrol in an army operation that in 1985 killed sixty-nine civilians in Llocllampa, a Peruvian village that the army suspected had Shining Path guerrillas. The BIA found, *inter alia*, that petitioner was statutorily ineligible for asylum because he had assisted in the persecution of others.

In a split opinion, a First Circuit

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REHEARING SOUGHT IN ADVERSE CREDIBILITY ASYLUM CASE INVOLVING SUSPECTED TERRORIST

On December 14, 2006, in response to a request by the court, the government filed a letter brief recommending rehearing *en banc* in ***Suntharalinkam v. Gonzales***, 458 F.3d 1054 (9th Cir. 2006) (*Wardlaw,* Cebull (D. Mont.), and Rawlinson (dissent)) .

In that decision, the court reversed the decision of an immigration judge finding an alien from Sri Lanka, with suspected ties to Tamil terrorists, not credible in regard to his asylum claim. The court held, *inter alia*, that where the IJ did not give the petitioner the opportunity to explain discrepancies, he should not have relied upon them in making the adverse credibility determination.

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and the Eighth Circuit affirmed the BIA.

Prior to the Court's ruling, there was a conflict among the circuits as to whether conduct treated as a felony by the State that convicted the alien, but treated as a misdemeanor under the CSA, was a "felony punishable under" the CSA. A majority of the circuits – the First, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits – had ruled that a state crime whose essential elements constitute a misdemeanor offense under federal law satisfy the "felony punishable" requirement, but the Third, Sixth and Seventh Circuits ruled that a state crime must be subject to felony punishment under federal law to constitute an aggravated felony.

The Second and Ninth Circuits had followed one approach in criminal sentencing cases and the other approach in civil immigration enforcement cases. Until its June 2003*Matter of Yanez-Garcia* decision, the BIA had followed the minority approach except where binding precedent required a different rule, but then changed course to follow the majority approach in the absence of binding precedent.

The Court's 8-1 decision in *Lopez*, with Justice Thomas dissenting, essentially ratifies the minority approach. *Lopez* rejected the government's position – in line with the majority view – that the phrase "felony punishable under" permits the characterization of an offense under state law as an aggravated felony as long as the offensive conduct is punishable (whether as a misdemeanor or felony) under federal law. Justice Souter, writing for the majority, explained that reading the statute as suggested by the government would "divorce a noun from the modifier next to it," in violation of rules of ordinary English usage and the canon of statutory construction that language must be read in context. He added that "our interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them," to avoid such departures from Congressional intent.

Reading the statute as suggested by the government would "divorce a noun from the modifier next to it," in violation of rules of ordinary English usage and the canon of statutory construction that language must be read in context.

The Court also pointed to the fact that the government had not previously brought a criminal prosecution based on the majority interpretation of "drug trafficking crime," and the apparent anomalies that would result from permitting the State's view of the seriousness of a criminal offense to determine the immigration consequences of the crime as further undermining that interpretation. .

The Court's opinion includes two additional points of significance. First, a crime is a felony if the relevant federal statute assigns a punishment exceeding one year's imprisonment. The Court ruled that 21 U.S.C. § 802(13), which defines the term "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony," is not relevant in this context. The government had previously argued, and some courts had ruled, that it was.

Second, in a footnote, the Court expressly recognized that state possession crimes that correspond to felony violations of a relevant federal statute "clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2)," and are aggravated felonies even if the offenses do not "constitute 'illicit trafficking in a controlled substance' or 'drug trafficking' as those terms are used in ordinary speech." But "this coerced inclusion of a few possession offenses . . . does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning."

In a dissenting opinion, Justice Thomas would have found that petitioner's state felony offense qualifies as a "drug trafficking crime" under the plain meaning of 18 U.S.C. § 924(c)(2).

In a separate action, the Court dismissed the writ of certiorari issued in the companion case, *Toledo-Flores v. United States*, which presented the same issue in the criminal sentencing context, as improvidently granted, 127 S. Ct. 638, 2006 WL 3487254 (Dec. 5, 2006).

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Ed. Note: OIL has released guidance for handling petitions for review in the wake of the *Lopez* decision. That guidance, available on OIL's website, indicates that attorneys should review cases involving the application of 8 U.S.C. § 1101(a)(43)(B), as soon as possible to determine whether they are affected by the *Lopez* ruling, and should seek to remand them to the Board of Immigration Appeals for further consideration unless the Board decision remains correct after *Lopez* and includes all rulings necessary to defend the decision. Attorneys should consult the guidance for more detailed information, and should follow the established procedures for obtaining approval of a remand.

OIL GUIDANCE IN LIGHT OF SUPREME COURT'S DECISION IN LOPEZ

On December 5, the Supreme Court decided *Lopez v. Gonzales*, 2006 WL 3487031, which involved whether a state drug conviction is a "felony punishable under the Controlled Substances Act" and, consequently, an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). This notice includes guidance to ensure that cases impacted by the decision are handled consistently. As soon as possible, you should review your cases involving the application of 8 U.S.C. § 1101(a)(43)(B), and take the steps requested herein. If you have any questions, please contact Donald Keener and Bryan Beier by e-mail.

Lopez holds that an alien has not been convicted of a "felony punishable under the Controlled Substances Act" if the Controlled Substances Act punishes the conduct encompassed within the statute of conviction as a misdemeanor.

I. THE SUPREME COURT'S DECISION

Lopez holds that an alien has not been convicted of a "felony punishable under the Controlled Substances Act" if the Controlled Substances Act punishes the conduct encompassed within the statute of conviction as a misdemeanor. The Court's opinion indicates that a conviction entered under a state illegal drug law can constitute an aggravated felony under 8 U.S.C. § 1101 (a)(43)(B) if the offense of conviction (1) constitutes "illicit trafficking," as that term is understood; or (2) is punishable as a felony if prosecuted under the Controlled Substances Act (21 U.S.C. 801 *et seq*.), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq*.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). The Court expressly noted that violations of state statutes outlawing the possession of cocaine base and state recidivist statutes plainly count as aggravated felonies because Congress' included "a few possession offenses in the definition of 'illicit trafficking.'"

II. STEPS TO TAKE

A. No "drug trafficking crime" determination: no action needed. If the Board decision holds only that the alien's conviction is "illicit trafficking in a controlled substance," typically because the offense includes a trafficking element, and does not include a ruling that the alien's conviction is a "drug trafficking crime," you do not need to do anything. If you wish, you may file a Rule 28(j) letter apprising the reviewing court of the decision. The attached sample Rule 28(j) letter is not suitable for this purpose.

B. *Lopez* otherwise immaterial to decision: 28(j) letter. If you have been directed to brief your case notwithstanding the pendency of *Lopez* before the Supreme Court, you should file a 28(j) letter (1) advising the court of the decision, (2) stating that the Board decision should be affirmed for reasons independent of the *Lopez* issue, and that (3) the Court should remand for further consideration by the Board in the light of *Lopez* if the court does not agree. A sample is included. If, upon your review of the case, you conclude that this course of action is not appropriate, you should take whatever steps are appropriate under part C, below.

C. Paras. II.A. and B. do not apply: "drug trafficking crime" determination. If the Board decision includes a "drug trafficking crime" ruling, and neither of the above paragraphs apply, please do the following.

1. Convictions for possession of cocaine base or a state recidivist statute. If the drug conviction underlying the "drug trafficking crime" ruling is entered under a state statute outlawing the possession of cocaine base or a state recidivist statute, you should urge the reviewing court to affirm the decision of the Board on the basis of *Lopez*. There is no need for a remand because the *Lopez* opinion, at footnote 6, clearly indicates that convictions entered under those statutes are aggravated felonies. If additional briefing is not necessary, please file a 28(j) letter. If appropriate, the letter should include a request for a summary disposition. If additional briefing is necessary, you should request a briefing schedule. Note that, unless you believe that the relevant circuit has binding on-point precedent that is not undermined by *Lopez*, you should file a motion to remand to the Board for further consideration if the "drug trafficking crime" ruling depends on the application of a recidivist provision of the Controlled Substances Act, but not a recidivist state statute of conviction, so that the Board can state its view as to whether, in the light of *Lopez*, the alien should be considered convicted of an aggravated felony.

2. Other cases. Except for cases covered by a prior paragraph, please file a motion to remand for further consideration in the light of *Lopez*, unless *Lopez* clearly confirms that the Board's interpretation of law and conclusion is correct. The Board may have to remand for a hearing on the alien's request for cancellation of removal or other relief. Our motion should urge the court to permit the Board to apply *Lopez* in the first instance, rather than deciding any issues itself. If *Lopez* confirms that the interpretation of law applied by the Board is correct, you should file a motion adapting the 28(j) letter for the preceding paragraph.

Ed. Note: Sample motions are available on the OIL web site and on the intranet.

MENTAL COMPETENCY IN REMOVAL PROCEEDINGS

The Supreme Court has "repeatedly and consistently recognized . . . [that the criminal prosecution] of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). In order to be tried, a criminal defendant must have the ability to reasonably consult with his attorney about his case, and must have a rational and factual understanding of the proceedings against him. *See id.* at 368 ("The test for competence to stand trial . . . is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel."); *see also Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). To protect this right, a criminal defendant is entitled to a hearing on mental competency whenever there is sufficient evidence of incompetency. *See Pate v. Robinson*, 383 U.S. 375, 385-86 (1966). However, these constitutional guarantees do not apply outside of criminal proceedings and have no corollary in the immigration context. *See U.S. v. Mandycz*, 351 F.3d 222, 225 n.1 (6th Cir. 2003) ("[A]t present, mental incompetency is only recognized as a defense to trial in criminal proceedings . . . .").

To be sure, criminal cases offer many due process protections that civil actions—including immigration proceedings—do not. *See, e.g., U.S. v. Mandycz*, 447 F.3d 951, 962 (6th Cir. 2006). As the Supreme Court has recognized, aliens in removal proceedings are not necessarily entitled to the full panoply of due process protections afforded to criminal defendants. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *see also Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977) ("Deportation . . . is not a criminal proceeding, and the full trappings of procedural protections that are accorded criminal defendants are not necessarily constitutionally required for deportation proceedings."). Rather, the procedural safeguards in immigration proceedings are minimal because aliens do not have a constitutional right to enter or remain in the United States. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 586-89 (1952); *see also* S. Rep. No. 104-249, at 7 (1996) ("The opportunity that U.S. immigration law extends to aliens to enter and remain in this country is a privilege, not an entitlement."); *accord INS v. Yeuh-Shaio Yang*, 519 U.S. 26, 30 (1996). Accordingly, aliens in removal proceedings are entitled only to procedural due process under the Fifth Amendment, which provides the opportunity to be heard at a meaningful time and in a meaningful manner. *See Reno v. Flores*, 507 U.S. 292, 306 (1993); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Contrary to the substantive due process protection from trial and conviction to which a mentally incompetent criminal defendant is entitled, the immigration laws specifically contemplate that removal proceedings may go forward against incompetent aliens. *See Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006); *Wong*, 550 F.2d at 523; *cf. O.K. v. Bush*, 344 F. Supp.2d 44, 56 (D.D.C. 2004) ("[T]he prohibition on the prosecution of an incompetent defendant, and the accompanying right to a determination of mental competence, cannot be said to extend to habeas proceedings."). An alien's lack of competency does not prevent an immigration judge from determining either removability or whether to grant relief. Certainly, an alien can obtain a full and fair hearing despite being incompetent. *See Wong*, 550 F.2d at 523. Thus, the agency has no obligation under either the statute or the regulations to conduct an evidentiary hearing on the issue, or otherwise consider an alien's mental competency during removal proceedings. *See Mohamed v. Gonzales*, __F.3d__ , No. 05-3357, 2006 WL 3392088, at *3 (8th Cir. Nov. 27, 2006); *Brue*, 464 F.3d at 1233.

The immigration laws specifically contemplate that removal proceedings may go forward against incompetent aliens.

Removal proceedings against mentally incompetent aliens, however, are not without constraint. *See Brue*, 464 F.3d at 1233. Indeed, Congress has provided that "[i]f it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien." 8 U.S.C. § 1229a(b)(3) (2006). Pursuant to this statutory directive, the Attorney General promulgated regulations to protect the due process rights of incompetent aliens. In particular, the regulations provide that:

> *When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.*

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MENTAL COMPETENCY

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8 C.F.R. § 1240.4 (2006); *accord* 8 C.F.R. § 1240.43; *see also* 8 C.F.R. §§ 1240.2(b) and 1240.10(c).

These protections are similar to those provided to incompetent litigants in other federal civil judicial proceedings, and do not require an immigration judge to make an independent assessment of each alien's mental competence to proceed. *See* Fed. R. Civ. P. 17(c) ("The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent."); *see also Ferrelli v. River Manor Health Care Center*, 323 F.3d 196, 200-01 (2d Cir. 2003) (holding that, under Fed. R. Civ. P. 17(c), district courts are under no obligation "to inquire sua sponte into a pro se plaintiff's mental competence, even when the judge observes behavior that may suggest mental incapacity"). Thus, whereas due process protects incompetent criminal defendants by imposing an outright bar to their prosecution, it protects incompetent aliens only by permitting the courts to appoint guardians to protect the aliens' interests and by judicially ensuring that the guardians protect those interests. *See Mandycz*, 447 F.3d at 962.

Accordingly, if an incompetent alien appears with counsel at his removal hearing, or if he is otherwise adequately represented, the procedural safeguards contemplated by the statute and regulations have been provided. *See Brue*, 464 F.3d 1233. Notably, the statute and regulations do not indicate what circumstances, if any, would warrant a competency inquiry, and they ostensibly appear to require no additional procedural safeguards if an unrepresented, mentally incompetent alien is able to be physically present at his removal hearing. This is in keeping with the general principle that incompetence to stand trial is not a defense in immigration proceedings, and due process simply does not protect incompetent aliens from removal. *See Wong*, 550 F.2d at 523.

Despite widespread recognition that incompetent aliens may be subject to removal, the law is fairly undeveloped with regard to the particular demands of "fundamental fairness" in removal proceedings against such aliens. Earlier this year, however, the Tenth Circuit expressly considered (and rejected) an alien's claim that his removal proceedings violated his Fifth Amendment right to due process because he is mentally incompetent. *See Brue*, 464 F.3d at 1230-34. Recognizing that "[a]liens are not necessarily entitled to the full range of due process protections afforded to criminal defendants," the court concluded that the immigration judge's failure to consider Brue's mental competency did not render the proceedings fundamentally unfair. *See id*. at 1233. The court held that because Brue was represented by counsel, his apparent incompetency was irrelevant, insofar as the procedural safeguards guaranteed by the statute and regulations were already in place. *Id.* Moreover, the court found that Brue could not sustain a due process claim because he failed to show that his removal proceedings caused him any prejudice, where the record revealed that Brue—although arguably incompetent—was provided with the opportunity "to be heard at a meaningful time and in a meaningful manner." *Id.* at 1234.

Similarly, in a more recent published opinion, the Eighth Circuit rejected an alien's claim that the immigration judge's failure to hold a competency hearing violated his due process rights. *See Mohamed, supra*. The court found that the petitioner was not deprived of a full and fair hearing where he "answered the charges against him, testified in support of his claim[s] . . . and arranged for two witnesses to appear on his behalf." *Id.* at *3. Because the record evidence showed "an individual who [was] aware of the nature and object of the proceedings and who vigorously resist[ed] removal," the court found that the failure to conduct a competency hearing did not violate the alien's procedural due process rights. *Id.*

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PERSECUTOR CASE TO BE REHEARD EN BANC

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panel held that petitioner, was not a "persecutor" because he had not "assisted or otherwise participated" in the persecution of others where the massacre of civilians had occurred several miles away from petitioner's patrol and the army unit had acted independently from petitioner whose assigned duty was to watch a trail to intercept Shining Path guerillas. The court also reversed the BIA's adverse credibility findings.

The government's petition requested rehearing on: (1) the panel's violation of *INS v. Ventura*, 537 U.S. 12 (2002), by defining the scope of the persecutor bar, making findings of fact related to that bar, and finding the alien to be credible after reversing the agency's adverse credibility determination, instead of remanding for the agency to make findings on those matters; (2) the panel's failure to accord proper deference to the BIA's judgment regarding the weight to be given to a Peruvian court-martial's dismissal of charges against the petitioner; and (3) the panel's failure to apply the proper standard of review for credibility determinations by re-weighing the evidence and making alternative findings that could support the petitioner's credibility.

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UPDATE ON PRECEDENT DECISIONS OF THE BIA

Ed. Note: This is part 2 of a two part article by BIA Chairman Juan Osuna. Part 1 appeared in the November issue.

OTHER GROUNDS OF REMOVABILITY/ INADMISSIBILITY

Two decisions considered the inadmissibility provisions of section 212 (a)(9) relating to aliens previously removed. In *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), the Board interpreted the provisions of inadmissibility in section 212(a)(9)(C)(i)(II), which provide that an alien is inadmissible if he or she has previously been ordered removed and attempts to reenter. In this case, the alien had previously been removed, applied for permission to reapply for admission after removal based upon an approved I-130 filed by his United States citizen wife, and the permission was granted. Rather than apply for admission, however, the respondent reentered without being admitted or paroled, and then applied for adjustment of status.

The narrow issue addressed in this case is the effect of the grant of permission by the DHS, and whether that insulates the respondent from the ground of inadmissibility under section 212(a)(9)(A)(ii), which provides that an alien who has been ordered removed may not seek admission for 10 years unless he or she is granted permission by DHS. The Board found that the grant of permission to reapply for admission does not mean an alien is authorized to be admitted, as an alien must still have a valid entry document. The grant of permission means that section 212(a)(9)(C)(i)(II) is no longer an obstacle to the acquisition of an entry document, but the alien must still follow the procedures to obtain the visa. Furthermore, inadmissibility under section 212(a)(9)(C)(i)(II) has no temporal limitations, and no request for permission to reapply may be granted less than 10 years after departure from the United States.

The Board rejected the Ninth Circuit's reasoning in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), which permitted retroactive consent to inadmissibility under 8 C.F.R. § 212.2 (2004). The Board found that 8 C.F.R. § 212.2 was not promulgated to implement current section 212(a)(9), but was published in response to a statutory section repealed by IIRIRA, and contradicts the clear language of section 212(a)(9)(C).

> The grant of permission to reapply for admission does not mean an alien is authorized to be admitted, as an alien must still have a valid entry document.

Grounds of inadmissibility under section 212 (a)(9)(B)(i)(II), which mandate temporal restrictions in applying for admission after various periods of unlawful presence in the United States, were at issue in *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006). In that case, the respondent entered the United States without inspection in 1993, and remained unlawfully until May 3, 1997, when he departed. In August 1997, he reentered without being admitted or paroled and was apprehended in December 1997 and placed in proceedings. He sought adjustment based upon an immediate relative visa petition filed on his behalf under section 245(i) of the Act. The issue presented was whether the respondent was inadmissible under section 212(a)(9)(B)(i)(II) due to one year or more of unlawful presence and seeking admission within 10 years of his last departure. The Immigration Judge had found that the respondent was inadmissible due to the accumulation of unlawful presence after his May 1997 departure.

The Board began with the principle that section 212(a)(9) is designed to prevent recidivism, not just unlawful presence. It is reasonable to conclude that Congress sought to condition inadmissibility on immigration violations that preceded the alien's departure from the United States. The Board concluded that the respondent's departure triggered the 10-year inadmissibility period specified in section 212 (a)(9)(B)(i) only if that departure was preceded by unlawful presence of at least one year. Put another way, the departure must fall at the end of a qualifying period of unlawful presence. In this case, the period that counted was the time before his May 1997 departure, which was only two months of unlawful presence due to the effective date of this provision. Thus, the respondent was not inadmissible under section 212(a)(9)(B)(i)(II).

In *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005), the Board found that removal proceedings may be commenced against an alien who was admitted to the United States as a refugee under section 207 of the Act, 8 U.S.C. § 1157, without prior termination of the alien's refugee status. In this case, the alien was admitted as a refugee, and adjusted his status thereafter. Following two convictions for theft offenses, he was placed in removal proceedings and charged as an alien convicted of two crimes involving moral turpitude. The Board found that the statutory framework for admission of refugees reveals that Congress did not consider termination of refugee status to be a prerequisite to initiating removal proceedings. Sections 207 and 209 of the Act do not distinguish between aliens admitted as refugees and others, and the provisions of section 209 relating to adjustment of status of refugees provides for initiation of removal proceedings in certain circumstances without prior termination of adjustment.

The Board published its first case interpreting provisions of the Real ID Act of 2005, Div. B of Pub. L. no. 109-13, §§ 103(b), 104, 119 Stat. 231, 302 307-9. In *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006), the Board ad-

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PRECEDENT DECISIONS OF THE BIA

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dressed the inadmissibility ground and bar to relief under section 212(a)(3)(B)(i)(I) of the Act for aliens who provide "material support" to terrorist organizations. The respondent in this case was a native and citizen of Burma who feared persecution based upon her religion and ethnicity. The respondent donated $1100 (Singapore dollars) and attempted to donate materials to the Chin National Front (CNF).

The Board first addressed whether the CNF was a terrorist organization as defined by 212(a)(3)(B)(vi). The respondent argued that the CNF's goals are democratic, it uses force only in self defense, and the government of Burma is an illegitimate regime. The Board found that the CNF is a terrorist organization within the meaning of the Act, and there is no exception for cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime. The Board reasoned that Congress did not give the Board the authority to determine whether a regime is illegitimate, the provision was broadly drafted, and a waiver is available, though the Board does not have authority to exercise the waiver.

The Board also found that neither an alien's intent in making a donation to a terrorist organization nor the intended use of the donation by the recipient may be considered when assessing whether the alien provided material support to a terrorist organization under section 212(a)(3)(B)(iv)(VI). The legislation is clearly drafted, no legislative history exists to require otherwise, and any contrary interpretation would be against the intent of the provision since terrorist organizations could easily solicit funds for a benign purpose, but use them for another. The Board did not reach the issue of whether the term "material" excludes *de minimus* support, as the respondent's donations in this case were substantial.

Neither an alien's intent in making a donation to a terrorist organization nor the intended use of the donation by the recipient may be considered when assessing whether the alien provided material support to a terrorist organization under section 212(a)(3)(B)(iv)(VI).

A concurring opinion agreed with the result given the language of the statute, but questioned whether Congress intended this result. The concurrence highlighted the incongruity present in this case where the respondent, who acted in a manner arguably consistent with the foreign policy of the United States in opposing one of the most repressive regimes in the world, who faces clear persecution in her home country, and poses no danger whatsoever to the national security of the United States, cannot be granted asylum.

In a case of first impression, the Board considered the "purely political offense" exception to the ground of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act in *Matter of O'Cealleagh*, 23 I&N Dec. 976 (BIA 2006). The respondent was convicted in 1990 in Northern Ireland of aiding and abetting the murders of two British corporals in 1988, causing grievous bodily harm, and false imprisonment. The incident leading to the conviction occurred during a funeral of another murder victim who had been killed by a loyalist gunman at an Irish Republican Army (IRA) funeral. The conviction was rendered by a court established to try political-type crimes, and the respondent was released from prison under the Good Friday Accord, which was an agreement between the British Government and the IRA.

The Board concluded that the offense must be totally or completely political, and here there was substantial evidence that the offense was not fabricated or trumped-up. The Board found that the circumstances surrounding the respondent's conviction in Northern Ireland for aiding and abetting the murder of two British corporals reflected a sincere effort to prosecute real lawbreakers and thus the conviction did not fall under the "purely political offense" exception.

DERIVATIVE CITIZENSHIP

In *Matter of Rowe,* 23 I&N Dec. 962 (BIA 2006), the Board had occasion to revisit its decision in *Matter of Goorahoo*, 20 I&N Dec. 782 (BIA 1994), in considering whether the respondent, who was born out of wedlock in Guyana and whose natural parents were never married, established paternity by legitimation which would render him ineligible to obtain derivative citizenship under former section 321(a)(3) of the Act, 8 U.S.C. § 1432(a)(3) (1994). The Board held that under the laws of Guyana, the sole means of legitimation of a child born out of wedlock is the marriage of the child's natural parents, overruling *Matter of Goorahoo*, 20 I&N Dec. 782 (BIA 1994).

BOND

In the bond context, the Board looked at what evidence an Immigration Judge can consider when making a custody redetermination under section 236(a) of the Act, 8 U.S.C. § 1226(a). *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). A criminal complaint introduced in the record alleged that the respondent in this case was facing criminal charges for his involvement in a controlled trafficking scheme. The Board found that when determining whether an alien poses a danger to the community, an Immigration Judge may consider, among the factors set forth in *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000), unfavorable evidence of conduct even if the alleged conduct has not resulted in a criminal conviction.

PROCEDURAL

In response to a request from the Eighth Circuit Court of Appeals, the Board considered whether it had au-

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PRECEDENT DECISIONS OF THE BIA

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thority to extend the 30-day time limit for filing an appeal with the Board. *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006). The Second and Ninth Circuits had found that an overnight delivery service's failure to timely deliver a Notice of Appeal (NOA) can constitute an extraordinary circumstance excusing an alien's failure to comply with the 30-day time limit. *See Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005), and *Zhong Guang Sun v. U.S. Dep't of Justice*, 421 F.3d 105 (2d Cir. 2005). The Board held that it does not have the authority to extend the filing deadline, and while the Board may certify a case to itself in exceptional circumstances, short delays by overnight delivery services are not in and of themselves rare or extraordinary, in particular when the appealing party waits until the last minute before mailing the NOA.

In *Matter of Alcantara-Perez*, 23 I&N Dec. 882 (BIA 2006), the Board provided guidance regarding how an Immigration Judge should treat a case when the Board has remanded it for completion of background and security checks. Consistent with 8 C.F.R. § 1004.47(h), when a case is remanded and new information that may affect the alien's eligibility for relief is revealed, the Immigration Judge has discretion to determine whether to conduct an additional hearing to consider the new evidence before entering an order granting or denying relief. The Board also instructed that when a proceeding is remanded for background and security checks, but no new information is presented as a result of those checks, the Immigration Judge should enter an order granting relief.

ATTORNEY DISCIPLINE

Lastly, the Board ruled on attorney discipline regulations in *Matter of Ramos*, 23 I&N Dec. 843 (BIA 2005). In this case, the attorney was disbarred from the practice of law by the Supreme Court of Florida in 1997. The referee's report, upon which the Supreme Court based its decision, cited insufficient funds in the trust account, forgery of client signatures on settlement drafts, lying to the tribunal and other misdeeds. In 2005, the attorney was expelled from practice before the Immigration Courts, the Board and the DHS.

The Board found expulsion to be appropriate in this case. The Board held that under the attorney discipline regulations, a disbarment order issued against a practitioner by the highest court of a State creates a rebuttable presumption that disciplinary sanctions should follow, which can only be rebutted upon a showing that the underlying disciplinary proceeding resulted in a deprivation of due process, that there was an infirmity of proof establishing the misconduct, or that discipline would result in injustice.

■By Juan Osuna, Acting Chairman of the Board of Immigration Appeals, and Jean C. King, Senior Legal Advisor to the Chairman of the Board

REHEARING SOUGHT IN ADVERSE CREDIBILITY ASYLUM CASE

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The petitioner attempted to enter the United States illegally with a group of twenty-three other aliens who were being smuggled from Sri Lanka via Mexico. The petitioner claimed that the Sri Lankan government had persecuted him for the mistaken belief that he was a Tamil Tiger, a member of an organization designated as a foreign terrorist organization under U.S. laws. The IJ did not find petitioner credible and identified "a tapestry of inconsistency that simply strains credulity to the breaking point." The majority opinion reviewed each of the findings underlying the IJ's determination and held that they were not supported by substantial evidence. Judge Rawlinson, in a dissenting opinion, said "I simply cannot agree that we are compelled to find [petitioner] credible."

The government recommended rehearing en banc on the grounds that the court's decision (1) creates a conflict with several Ninth Circuit cases; (2) invokes credibility rules with no basis in the statute, regulations, or Board precedent; (3) misapplies the standard of review by picking apart agency findings and ignoring the cumulative impact of the evidence; (4) conflicts with *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and the law of other circuits by finding the alien credible, rather than remanding for the agency to decide that question in the first instance; and (5) if left undisturbed, may lead to a terrorist remaining in the United States.

In particular, the government noted that, in the last eight months alone, the Ninth Circuit has overturned an adverse credibility determination in at least 60 cases. "The sheer number of adverse credibility decisions and the panel's undaunted interference with the immigration judge's ability to apply simple common sense render this case en banc worthy. Indeed, many of this court's credibility decisions find no support whatsoever in the Immigration and Nationality Act, the governing regulations, or Board precedent. With respect, this Court should rehear this case en banc and clarify that the Board is not hamstrung by artificial rules in credibility cases, and that the standard of review is substantial evidence."

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Summaries Of Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Holds That Current Country Conditions in Cambodia Rebut Petitioner's Claim of Future Political Persecution**

In ***Chreng v. Gonzales***, __F.3d__, 2006 WL 3717367 (1st Cir. December 19, 2006) (Boudin, *Campbell*, Lipez), the First Circuit held that DHS had effectively rebutted the petitioner's presumption of future political persecution, finding that the 2003 Department of State report on country conditions in Cambodia demonstrated fundamental changes in government that allowed for more political freedom and rights of association.

"Asylum is a matter committed in major degree to the immigration agencies, which are entitled within reasonably broad parameters to make their assessments."

Petitioner was a member of the Sam Rainsy political party of Cambodia. The Sam Rainsy party advocates democratic principles and the eradication of corruption. In 1998 and 2000, petitioner had run into violent or potentially violent situations in connection with his political activities - specifically, his opposition to the reigning political party of Hun Sen. The violent or potentially violent situations included a demonstration in 1998 that was suppressed by Hun Sen and an arrest and detention of three days in 2000. In removal proceedings, an IJ found petitioner's story credible, holding that petitioner had suffered past persecution based on his arrest in 2000. However, the IJ found that DHS had effectively rebutted the presumption of future persecution through the Department of State's 2003 report on country conditions in Cambodia. On appeal to the BIA, petitioner argued that the IJ erred in finding that he would not face persecution if returned to Cambodia, and also that he was never put on notice of the need to rebut evidence of present country conditions. The BIA affirmed the IJ's denial of asylum and held that agency regulations detailing the asylum process served as adequate notice of evidentiary procedure.

In his petition for review petitioner again argued that his testimony established a reasonable fear of future persecution and that his case should be remanded for lack of notice. In rejecting both arguments, the court agreed with the BIA that agency regulations served as notice that further evidence would be needed in the event the IJ determined that the country conditions report rebutted the presumption of future persecution, and that the State Department's report "demonstrates fundamental changes in the specific circumstances that form the basis of petitioner's presumptive fear of future persecution." In its conclusion, the court noted that "[a]sylum is a matter committed in major degree to the immigration agencies, which are entitled within reasonably broad parameters to make their assessments, provided there is substantial evidentiary support."

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SECOND CIRCUIT

■ **Second Circuit Holds That It Lacks Jurisdiction To Review An Extraordinary Circumstances Exception To The One-year Bar To Filing For Asylum**

In ***Chen v. Gonzales***, __F.3d__, 2006 WL 3690954 (2d Cir. December 7, 2006) (Newman, Leval, *Cabranes*), the Second Circuit declined to "determine the precise outer limits of the term 'questions of law' under the REAL ID Act," but held that the court remained "deprived of jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's fact-finding or the wisdom of his exercise of discretion and raises neither a constitutional question nor a question of law." In this case, the petitioner's challenge to an IJ's decision to reject her argument that changed or extraordinary circumstances excused the untimeliness of her petition for asylum was "just the kind of quarrel with fact-finding determinations and with exercises of discretion that courts continue to have no jurisdiction to review."

Petitioner had untimely filed for asylum but claimed persecution on account of her opposition to China's family planning policy and claim that she had undergone a forced abortion and would face sterilization if returned to China. An IJ denied the asylum application as filed more than one year after her arrival in the United States and further found petitioner's account of her persecution incredible. The BIA affirmed.

On appeal to the Second Circuit, petitioner argued that her untimeliness should have been excused because she had proven changed or extraordinary circumstances. Specifically, petitioner claimed that she was excused from the one year bar to asylum applications because of the birth of her second child in the United States, the failure of the INS to implement an operating procedure permitting detained aliens to preserve a request for asylum, and the IJ's "failure to apply the law." Dismissing the first two arguments for failure to exhaust, the court focused on petitioner's third claim that the IJ "failed to apply the law" and discussed whether or not this could be construed as a question of law which would invoke the court's jurisdiction. The court began its analysis by refusing to adopt a broad definition of the term "question of law" that would essentially repeal the jurisdiction stripping provisions of the REAL ID Act.

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Second, the court looked to the House Conference Report and Supreme Court's decision in *St. Cyr* to find that habeas review of questions of law is not expressly limited to issues of statutory construction, but instead encompasses "detentions based on errors of law, including the erroneous application or interpretation of a statute," and fact-finding which is flawed by error of law, such as an incorrectly stated material fact. "But when analysis of the arguments raised by the petition for judicial review reveals that they do not in fact raise any reviewable issues, the petitioner cannot overcome this deficiency and secure review by using the rhetoric of a 'constitutional claim' or 'question of law' to disguise what is essentially a quarrel about fact-finding or the exercise of discretion." This was the case in the current petition, and thus the court held petitioner did not challenge a question of law, but merely the discretion of the IJ. Finally, the court upheld the IJ's adverse credibility determination - despite parts of it being in error - because of what it perceived as the futility of a remand.

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■ **Second Circuit Clarifies *Restrepo* By Holding That Alien Asserting A *Restrepo*-Based Reliance Interest Must Rest Upon An Individualized Showing Of Reliance**

In ***Wilson v. Gonzales***, 471 F.3d 111 (2d Cir. 2006) (Jacobs, *Oakes*, Walker), the Second Circuit granted the petition for review and remanded the case to the BIA to determine whether the alien can make a requisite individualized showing of reliance. In *Restrepo v. McElroy*, 369 F.3d 627 (2004), the Second Circuit held that a criminal alien's decision to forgo the immediate filing of an affirmative § 212(c) application after his trial conviction in order to build greater equities with the passage of time, sufficiently alleged a reliance interest that might support a finding that the repeal of § 212(c) was impermissibly retroactive. The court, however, had left open the question of whether an alien must establish such reliance individually or whether a categorical presumption of reliance should apply to all similarly situated aliens, *i.e.* to the class of aliens who were convicted after trial and prior to § 212(c)'s repeal. In *Wilson*, the court held that an alien asserting a *Restrepo*-based reliance interest cannot benefit from a categorical presumption of reliance and instead "must make an individualized showing of reliance" before being eligible for a § 212(c) merits hearing.

The Federal Rules of Evidence do not apply in removal proceedings; rather, "evidence is admissible provided that it does not violate the alien's right to due process of law."

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■ **Second Circuit Holds That Use Of A Petitioner's Passport To Establish Removability Based On Overstay Of A Nonimmigrant Visa Does Not Violate Due Process**

In ***Zerrei v. Gonzales***, __F.3d__, 2006 WL 3626321 (2d Cir. December 12, 2006) (Kearse, Straub, Keenan) (*per curiam*), the Second Circuit rejected a petitioner's due process challenge to the DHS's use of his passport to establish clear and convincing evidence of his removability for overstay of his nonimmigrant visa. In so holding, the court noted that the Federal Rules of Evidence do not apply in removal proceedings; rather, "evidence is admissible provided that it does not violate the alien's right to due process of law," for which the standard is whether the evidence is probative and its use is fundamentally fair. In this case, DHS had presented the petitioner's passport and the stamps contained therein to show that the petitioner had overstayed his visa. Though petitioner argued that the passport was insufficient evidence of his alienage, the court pointed out that petitioner had presented no objection to the admission of the passport into evidence. Moreover, the petitioner's counsel had stated to the IJ that petitioner intended to file for an extension of his expired passport. Thus, the admission of the passport was fundamentally fair and did not violate due process. Petitioner had additionally argued that the NSEERS program violated his equal protection rights, but nothing in the record supported this conclusion and, in any event, a favorable ruling would not prevent petitioner's removal as an alien who overstayed his visa.

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■ **IJ Failed To Properly Address Petitioner's Claim Of Non-Receipt And Exceptional Circumstances And Claim Of Prima Facie Eligibility For Relief Sought In Denying Petitioner's Motion To Reopen *In Absentia* Order**

In ***Alrefae v. Chertoff***, __F.3d__, 2006 WL 3685625 (2d Cir. December 14, 2006) (Straub, *Sotomayor*, Katzman), the Second Circuit reversed an IJ's denial of a petitioner's motion to rescind and reopen his *in absentia* removal order because the IJ failed to adequately explain his reasons for doing so.

Petitioner, a citizen of Yemen, entered the United States in 1992 on a nonimmigrant visa, and never departed. In 1995, he married a United States citizen. Also in 1995, the INS initiated removal proceedings against petitioner, causing him to seek conditional permanent residence status on the basis of his marriage. Conditional resident status was granted, but then terminated in 1999 when petitioner

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failed to file a joint petition with his wife to remove the conditions on that status. In 2003 petitioner obtained a divorce. That same year he registered for NSEERS, catching the eye of the INS and resulting in a notice to appear. Notice of the hearing date was mailed to petitioner's residence, but he failed to appear at the hearing and was ordered removed in absentia. Petitioner filed a motion to rescind and reopen based on non-receipt of notice, exceptional circumstances, and the fact that his divorce made him eligible for a waiver of the joint filing requirement. As evidence of non-receipt, the petitioner submitted a police report that his home had been burglarized and that soon thereafter he began receiving mail at the address of a friend - a friend who subsequently lost the mail, but would not sign an affidavit to that effect. Petitioner also asserted that under BIA precedent he was entitled to request a continuance pending finalization of his divorce. An IJ rejected petitioners claims, finding that notice of the hearing had been sent to petitioner's address giving rise to a presumption of delivery. Without discussing it, the IJ held that no exceptional circumstances had been established and that petitioner had not presented any new, unavailable evidence showing prima facie eligibility for waiver of the joint filing requirement. The BIA affirmed.

On appeal to the Second Circuit, the government first argued that the court lacked jurisdiction to consider the merits of petitioner's eligibility for the joint filing requirement. The court agreed, but held that it maintained jurisdiction to determine whether or not petitioner had received notice of the hearing or was excused by exceptional circumstances, which in turn required it to determine the petitioner's prima facie eligibility for waiver as an element of his motion to reopen based on new evidence. On this issue, the court held the IJ erred in rejecting petitioner's claim of non-receipt because the IJ failed to explain why the petitioner had not rebutted the presumption of receipt. "Although the IJ was correct that there was no evidence of misdelivery, [the petitioner] [had] claimed that the mail was lost after it was delivered" and the IJ did not address this. Further, it was error for the IJ not to assess the petitioner's claim of exceptional circumstances separate from his claim of non-receipt. Finally, the court also held that the IJ erred by failing to address in any way petitioner's argument regarding his eligibility for waiver of the joint filing requirement under BIA precedent and why evidence of his divorce was not considered previously unavailable evidence.

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■ Second Circuit Holds That IIRIRA's Stop-Time Rule Is Retroactively Applicable To Petitioners

In ***Tablie v. Gonzales***, 471 F.3d 60 (2d Cir. 2006) (Jacobs, Wesley, Hall), the Second Circuit held that pursuant to the "stop-time" rule, INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2000), the petitioner's period of continuous physical presence in the United States terminated upon the commission of his crime, thereby rendering him ineligible for suspension of deportation. The court determined that IIRIRA's "transitional rule with regard to suspension of deportation," as amended by NACARA, is unambiguous in rendering IIRIRA's stop-time rule retroactively applicable to petitioners who were issued an order to show cause prior to IIRIRA's enactment. For purposes of determining eligibility for suspension of deportation, the stop-time rule thus ends a petitioner's period of continuous residence upon either the service of the charging document or the commission of a deportable criminal offense.

The stop-time rule thus ends a petitioner's period of continuous residence upon either the service of the charging document or the commission of a deportable criminal offense.

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■ Second Circuit Reverses Findings Of Firm Resettlement And No Clear Probability Of Persecution Based On Improper Failure To Shift Burden To Government

In ***Makadji v. Gonzales***, 470 F.3d 450 (2d Cir. 2006) (*Leval*, Katzmann, Raggi), the Second Circuit held that: (1) the IJ improperly failed to shift the burden to the government to establish whether petitioner had firmly resettled in Mali after his forced deportation from Mauritania based on his race; (2) substantial evidence did not support the finding that petitioner had firmly resettled, given that petitioner had testified that he lived "underground" in Mali; and (3) the IJ improperly failed to shift the burden to the government, upon a finding of past persecution, to demonstrate that there was not a clear probability of persecution if he were returned to Mauritania.

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■ BIA Applied Wrong Legal Standard When Conducting Its Review Of Alien's Asylum Application

In ***Chen v. CIS,*** 470 F.3d 509 (2d Cir. 2006) (Miner, *Pooler*, Rakoff (District Judge)), the Second Circuit, reversed and remanded the BIA's denial of asylum. Although the BIA correctly stated it was reviewing the immigration judge's factual findings for clear error, the court found that the BIA nevertheless conducted an improper *de novo* review when it reversed the judge's grant of asylum

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and found that the alien was not credible. The court reversed and remanded for application of the correct standard of review.

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■ **Second Circuit Holds That Pre-Conviction Detention Counts Toward Accrual Of Five Years Of Custody That Bars 212(c) Relief For Aggravated Felons.**

In ***Spina v. DHS***, 470 F.3d 116 (2d Cir. 2006) (Oakes, Straub, *Raggi*), the Second Circuit held that the time an aggravated felon spends in pre-conviction detention counts toward his five years in custody, which bars § 212(c) relief. The court also addressed two jurisdictional issues, holding (1) that 8 U.S.C. § 1252(d)(2)'s bar on review where "another court has . . . decided the validity" of a removal order is not triggered by a district court's habeas ruling, when an appeal from that ruling is converted to a petition for review by the REAL ID Act; and (2) that the alien's deportation under post-IIRIRA law does not deprive the court of statutory or constitutional subject matter jurisdiction.

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THIRD CIRCUIT

■ **Third Circuit Reverses An IJ's Determination That Petitioner Did Not Receive Threats Based On His Membership In The Albanian Democratic Party**

In ***Celaj v. Gonzales***, __F.3d__, 2006 WL 3803378 (3rd Cir. December 28, 2006) (Fuentes, *Van Antwerpen*, Padova), the Third Circuit affirmed an IJ's denial of petitioners' asylum applications for failure to establish persecution, but reversed a finding that certain threats made to petitioner were not on account of his political opinion.

Petitioner and his wife, both citizens of Albania and members of the Albanian Democratic Party, entered the United States in 2002 and filed for asylum. In their applications, they cited three instances of past persecution: numerous threatening telephone calls in which the caller demanded that he stop participating in Democratic Party activities, his dismissal from the police department for replacement by police officers loyal to the Socialist Party, and two robberies of his house where threatening, but vague words were written on the walls. An IJ denied the petitioners' applications, holding that the evidence presented to show persecution on account of political opinion was based on pure conjecture and speculation rather than objective facts. Significantly, the IJ noted that the petitioners could not establish the identity of the threatening callers or their motivation for making threats, and that no nexus existed between the cited instances and the Albanian government. The BIA affirmed.

> An alien seeking admission to the United States through asylum requests a privilege and has no constitutional rights regarding his application for the power to admit or exclude aliens is a sovereign prerogative."

The Third Circuit agreed with the IJ in that it found substantial evidence to support the conclusion that the petitioners had not presented any evidence that rose to the level of persecution. However, the court disagreed with the IJ's finding that the anonymous phone calls were not made on account of the petitioners' political opinion. The petitioner had testified that the callers had said the following: "don't get involved in the elections. Don't be a body guard to members of parliament. We're going to execute you or shoot you." According to the court, these threats directly referenced the petitioners' activities with the Democratic Party. However, the court held that these anonymous threats were not sufficiently imminent or menacing to rise to the level of persecution.

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■ **Third Circuit Holds That Due Process Rights Do Not Arise In Conjunction With Applications For Discretionary Relief**

In ***Mudric v. U.S. Attorney General***, __F.3d__, 2006 WL 3390432 (3d Cir. November 24, 2006) (Fuentes, *Fisher*, McKay), the Third Circuit rejected petitioner's claim that delays in processing his application for immigration benefits resulted in a due process violation. The court held that "an alien seeking admission to the United States through asylum requests a privilege and has no constitutional rights regarding his application for the power to admit or exclude aliens is a sovereign prerogative." Therefore, the various discretionary privileges and benefits conferred by our federal immigration laws do not vest in petitioner a constitutional right to have their immigration matters adjudicated in the most expeditious manner possible.

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FOURTH CIRCUIT

■ **BIA's Determination That An Asylum Petitioner Could Reasonably Relocate Within The Republic Of The Congo Was Not Supported By Substantial Evidence**

In ***Essohou v. Gonzales***, __F.3d__, 2006 WL 3691456 (4th Cir. December 15, 2006) (King, Gregory, *Shedd*), the Fourth Circuit held

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that no reasonable adjudicator could find that petitioner was able to relocate within the Republic of the Congo and escape persecution, and thus reversed a decision of the BIA finding that DHS had effectively rebutted a presumption of future persecution.

Petitioner, a citizen of the Republic of the Congo, was a member of the Congolese Movement for Democracy and Integral Development ("MCDDI") and helped to organize efforts to educate young people about MCDDI's presidential candidate. Following the outbreak of civil war in 1997, the "Cobras," a paramilitary group aligned with the sitting president, began to persecute members of the MCDDI. Because she was a member of MCDDI, the Cobras abducted the petitioner, beat and raped her, and placed her in detention. Petitioner eventually escaped from the Cobras and begin hiding in various places within and without the Republic of the Congo for a period of four years. But every which way she went, the Cobras were not far behind. Her last hideout before coming to the United States was a village called Banzandouga, where she hid for 20 months until the Cobras came there too.

An IJ denied the petitioner's application for asylum, finding that she had not suffered persecution on the basis of a protected ground. On appeal, the BIA reversed this finding and held that petitioner had, in fact, established past persecution on the basis of her political opinion, but could not establish future persecution because she was able to live undisturbed in the village of Banzandouga for 20 months; was able to reasonably relocate internally.

The Fourth Circuit reversed the BIA, holding that "the only reasonable reading of [petitioner's] testimony reveals a four-year period in which she was in hiding, constantly fearing for her life. Any intermittent period in which [petitioner] was not specifically troubled by the Cobras was not due to a reasonable, internal relocation; rather, it was due to her efforts to hide in conjunction with the timing of the Cobras' forays." Accordingly, the court found that the government had not rebutted the presumption of future persecution and tha the BIA dismissal of her appeal was manifestly contrary to law.

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■ **Fourth Circuit Holds That Military Oath Did Not Confer Nationality On Haitian Petitioner**

In ***Dragenice v. Gonzales,*** 470 F.3d 183 (4th Cir. 2006) (Niemeyer, Traxler, Shedd) (*per curiam*), the Fourth Circuit held that petitioner, a citizen of Haiti and a lawful permanent resident, was not a national of the United States by virtue of his taking an oath of allegiance to the United States when he enlisted in the United States Army Reserve. The court ruled that the oath did not establish permanent allegiance to the United States, the defining characteristic of national in 8 U.S.C. § 1101(a)(22), because the oath only lasts as long as the military service, which necessarily has a limit and so is temporary by nature.

A citizen of Haiti and a lawful permanent resident, was not a national of the United States by virtue of his taking an oath of allegiance to the United States when he enlisted in the United States Army Reserve.

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■ **Fourth Circuit Holds That Foreign Divorce While Domiciled In Virginia Was Ineffective For Purposes Of Automatic Naturalization Of Child**

In ***Jahed v. Acri***, 468 F.3d 230 (4th Cir. 2006) (Williams, *King*, Denver), the Fourth Circuit held that petitioner did not automatically naturalize by virtue of his father's naturalization before petitioner was eighteen years old. The court held that, under 8 U.S.C. § 1432(a), repealed by Pub. L. 106-395, § 104 (providing, *inter alia*, for the automatic naturalization of a child under the age of eighteen upon the naturalization of the parent having legal custody of the child where there has been a legal separation of the parents) petitioner's parents' 1991 divorce in Pakistan was ineffective for immigration purposes because the marriage was entered in Afghanistan, not Pakistan, and the Commonwealth of Virginia, where petitioner's parents were domiciled at the time, would not recognize the divorce as a matter of comity.

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FIFTH CIRCUIT

■ **Fifth Circuit Holds That The Stop-Time Rule For Cancellation Applies Retroactively To Convictions Arising Before Enactment Of IIRIRA**

In ***Heaven v. Gonzales***, __F.3d__, 2006 WL 3627342 (5th Cir. December 14, 2006) (Smith, Benavides, *Prado*), the Fifth Circuit upheld the BIA's retroactive application of the stop-time rule to deny petitioner's application for cancellation of removal due to two convictions for drug offenses in 1991 and 1992. The court also dismissed petitioner's argument that he could simultaneously apply for § 212(c) relief and cancellation of removal because of failure to exhaust.

An IJ found, and the BIA affirmed, that petitioner was ineligible for INA § 240A cancellation of removal because his two convictions had interrupted his continuous, physical presence, as per the stop-time rule under IIRIRA. On appeal to the Fifth Circuit, petitioner argued that his

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convictions did not render him ineligible for cancellation because they had occurred prior to the enactment of IIRIRA. Therefore, petitioner contended that application of IIRIRA to his convictions would be impermissibly retroactive and in violation of his due process rights.

The court followed the Ninth Circuit's opinion in *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 941 (9th Cir. 2005) where that court held that the language of IIRIRA clearly stated that the stop-time rule had retroactive application to cases pending at the time IIRIRA became effective, thus it would be "incongruous" to not apply the stop-time rule to aliens whose proceedings were initiated after IIRIRA took effect. The court joined the Ninth Circuit and concluded that Congress had expressed its intent that the stop-time rule should apply retroactively to convictions arising before enactment of IIRIRA.

The court concluded that Congress had expressed its intent that the stop-time rule should apply retroactively to convictions arising before enactment of IIRIRA.

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■ **Fifth Circuit Finds That An Attorney's Admission Of The Charges Against His Client Was Not Tactical In Nature And Thus Could Be Used To Demonstrate Prejudicial Ineffective Assistance of Counsel**

In ***Mai v. Gonzales***, __F.3d__, 2006 WL 3616557 (5th Cir. December 12, 2006) (*Jolly*, Davis, Benavides), the Fifth Circuit reversed a Board decision holding that petitioner's claim to ineffective assistance of counsel failed for lack of prejudice, and remanded the case for further consideration.

Petitioner is a citizen of Vietnam who acquired LPR status in 1987. In 1992, he pled guilty to a felony burglary charge. In 2001, petitioner was stopped at the border where he allegedly made a false claim to be a naturalized citizen. Consequently, he was charged as being removable for having been convicted of a crime of moral turpitude and for making a false claim to citizenship. When petitioner initially appeared before an IJ, his counsel admitted all allegations against him. In a subsequent hearing, however, petitioner was questioned directly and asserted that he never made a false claim to citizenship and his counsel attempted to withdraw the prior admission. The IJ refused to allow the withdrawal and issued an order of removal. The BIA affirmed. When petitioner sought to reopen his case for ineffective assistance of counsel, the Board denied reopening, finding that while petitioner meet the *Lozada* requirements, he failed to show that the decision made by counsel to admit the allegations was "egregious" and not "strategic," as would be required to excuse petitioner from the representations of his attorney.

The Fifth Circuit disagreed with the BIA's finding, holding that no plausible explanation existed for how counsel's admissions resulted in any possible tactical advantage for petitioner. On the contrary, "if [petitioner's] counsel had admitted only the previous burglary conviction . . . he would have been eligible to apply for a discretionary waiver of inadmissibility from the Attorney General under the former INA § 212(c). This possibility was foreclosed, however, when [petitioner's] counsel admitted both charges."

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■ **Fifth Circuit Affirms Denial Of Petition For Asylum, Withholding Of Removal, And CAT Relief**

In ***Chen v. Gonzales***, 470 F.3d 1131 (5th Cir. 2006)(*King*, Garwood, Jolly), the Fifth Circuit held that petitioner did not have an objectively reasonable fear of persecution if returned to China based on her religious beliefs. The court further ruled that petitioner would likely not face torture if returned to China as a result of leaving China illegally, and that he would not be subject to torture, at the hands of money lenders with the acquiescence of public officials, if returned to China.

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SIXTH CIRCUIT

■ **Petitioners' Failure to Challenge The Underlying Order Of Removal And Improper Amendment Of Their Prior Pleading Leads Court To Dismiss Their Petitions For Lack of Jurisdiction**

In ***Kellici v. Gonzales***, __F.3d__, 2006 WL 3740795 (6th Cir. December 21, 2006) (Siler, Gilman, *Griffin*), the Sixth Circuit found the it lacked jurisdiction to consider petitioners' multiple habeas petitions because the first petition was improperly transferred to the court pursuant to the REAL ID Act and the second petition was improperly amended.

Petitioners' first habeas petition was filed in district court and challenged only the constitutionality of their arrest and detention, and not the underlying administrative order of removal, the latter being a requirement of the REAL ID Act's provision transferring habeas petitions to the circuit courts. Thus, the court dismissed the first petition for lack of jurisdiction. Petitioners' second ha-

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beas petition was an amended version of the first. While the amended petition did challenge the underlying removal order, the amendment was improper. Federal Rule of Civil Procedure 15(a) states that a party may amend its pleading "once as a matter of course at any time before a responsive pleading is served or . . . within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or written consent of the adverse party." Because the petitioners' had not met any of the requirements of Rule 15(a), the amended pleading was not properly before the court and the court lacked jurisdiction to consider the second petition as well.

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■ **Petitioner's Brief Foray Into Mexico Self-Executes His Final Order Of Removal**

In *Mansour v. Gonzales*, __F.3d__, 2006 WL 3627187 (6th Cir. December 14, 2006) (*Gilman*, Griffin, Gwin), the Sixth Circuit upheld the BIA's determination that a brief trip over the border to Mexico self-executed a petitioner's final order of removal, rendering him ineligible to apply for a special motion to reopen under 8 C.F.R. § 1003.44 due to the fact that once he crossed the border, he became an alien illegally attempting re-entry into United States.

Petitioner entered the United States as an LPR in 1981. In 1988 he began to serve a five year prison sentence for what was later categorized as an aggravated felony by the INS. In removal proceedings, petitioner attempted to argue that he qualified for § 212(c) relief, but his aggravated felony prevented him from doing so. After the BIA affirmed the IJ's order of removal, a petition for review was subsequently dismissed by the Sixth Circuit for lack of jurisdiction under the AEDPA. Subsequently, petitioner filed a motion to reopen under *Soriano*. The motion was denied because petitioner had never been eligible for 212(c) relief. Thus, petitioner's original order of deportation by the BIA remained final.

In 2000, petitioner made an appearance at an engagement party in El Paso, got drunk, and went to Mexico. When he attempted reentry, he was stopped by border officials whereupon he falsely claimed to be a U.S. citizen. Petitioner was paroled into the United States and it wasn't until 2005 that he filed a special motion to reopen pursuant to 8 C.F.R. § 1003.44, a regulation allowing eligible aliens who pled guilty to certain crimes before April 1, 1997 to apply for relief. Excepted from this regulation, however, are aliens issued a final order of removal who then illegally returned to the United States. Before the BIA, DHS argued that petitioner's brief trip into Mexico self-executed his order of removal, thus rendering him ineligible for special relief. The BIA agreed.

On appeal, petitioner sought to characterize his trip to Mexico as a "casual, innocent departure," under *Fleuti*. The court distinguished *Flueti* as applying to excludable aliens only, while petitioner was a deportable one. Thus, while petitioner's trip to Mexico was indeed brief, it still acted as a self-execution of his order of removal, making his subsequent return to the United States an illegal reentry. "It is well-settled that when an alien departs the United States while under a final order of deportation, he or she executes that order pursuant to law," said the court. Thus, the court found petitioner ineligible for relief.

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"It is well-settled that when an alien departs the United States while under a final order of deportation, he or she executes that order pursuant to law."

■ **Sixth Circuit Affirms Denial Of Asylum But Remands For Ruling On Whether Alien Is Entitled To Voluntary Departure**

In ***Patel v. Gonzales***, __F.3d__, 2006 WL 3475571 (6th Cir. December 4, 2006) (*Moore*, Clay, Bell), the Sixth Circuit held that the petitioner, a Hindu from India who was active in nationalist organizations, had waived the argument that the IJ erred in denying discretionary asylum. However, the Sixth Circuit remanded to the BIA to determine whether the petitioner was entitled to voluntary departure. The BIA had affirmed the decision of the IJ other than the finding that the petitioner was a persecutor of others. The Sixth Circuit opinion highlighted that the IJ had specifically found that the petitioner was not worthy of a favorable exercise of discretion on his asylum claim, but had denied the voluntary departure claim solely on the ground that he was a persecutor of others.

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SEVENTH CIRCUIT

■ **Seventh Circuit Holds That Vacatur Of Convictions Must First Be Presented To BIA**

In ***Padilla v. Gonzales,*** __ F.3d__, 2006 WL 3512479 (7th Cir. December 7, 2006) (Flaum, Williams, *Sykes*), the Seventh Circuit held that it lacked jurisdiction to consider a vacatur of two convictions because the petitioner failed to exhaust his administrative remedies by first presenting the issue to the BIA. The petitioner, a

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Mexican citizen and an LPR since 1986, had been previously ordered removed on the basis of having been convicted of two crimes involving moral turpitude - criminal sexual abuse and obstruction of justice. The removal order was subsequently affirmed by the Seventh Circuit in *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005). Petitioner then persuaded an Illinois court to vacate his two convictions that supplied the basis for his removal. Rather than asking the BIA to reopen his case, petitioner sought a writ of habeas corpus asking the district court. The district court denied the habeas petition and petitioner appealed.

The Seventh Circuit converted the appeal into a petition for review under the REAL ID Act. The court then court agreed with the government's argument that petitioner had not exhausted all administrative remedies with respect to the issues raised on his appeal because he never asked the BIA to reopen his case to consider his vacated convictions. "The principle underlying this policy is that courts should not address an immigration issue until the appropriate administrative authority has had the opportunity to apply its specialized knowledge and experience to the matter," said the court. The court explained that even though reopening was not available "as of right," to petitioner, the BIA had the authority and the ability to grant meaningful relief. In particular, the BIA had the authority to reopen petitioner's case *sua sponte* "at any time," and had the ability to vacate the removal order.

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■ Seventh Circuit Rules That Uncorrupt Prosecutors In Ukraine Are Not A Particular Social Group

In ***Pavlyk v. Gonzales***, __F.3d__, 2006 WL 3477863 (7th Cir. December 4, 2006) (Easterbrook, Cudahy, *Manion*), the Seventh Circuit ruled that the petitioner had not established that "uncorrupt" prosecutors in Ukraine constitute a particular social group, because "being a prosecutor is not an unchangeable or fundamental attribute."

The petitioner a citizen of Ukraine, alleged persecution because as a prosecutor in Ukraine, he had pursued some controversial investigations. In particular, he claimed that while investigating the murder of a leader in an organized criminal group, he detained a suspect who had served as an undercover informant for the KGB. However, higher officials arranged for the release of the suspect and warned petitioner not to proceed further with the case. Petitioner was also removed from another controversial case involving the beating of two detained men by police officers. Petitioner claimed that as a result of these incidents he and his family received threats, and on one occasion shots were fired at his car as he left the office. Concerned about these threats, petitioner advised is wife who was attending a conference in the United States not to return home. He also arranged for his daughter to reside with her grandparents. Petitioner then went into hiding. Subsequently, Ukraine charged petitioner with accepting bribes and a warrant for his arrest remain outstanding. In 1998, using a passport under an alias, petitioner entered the United States and reunited with his wife. Later their daughter joined them, too. Subsequently petitioner was detained for overstaying his visa an charged with removal. It's unclear whether petitioner's detention was prompted by a request of the Ukrainian government.

Regardless of the precise contours of the particular group of Ukranian prosecutors, "being a prosecutor is not an unchangeable or fundamental attribute"

At his removal hearing petitioner applied for asylum, withholding an CAT protection claiming persecution on account of membership in a particular social group and political opinion. The IJ determined that petitioner's asylum request was untimely and that he had failed to show persecution on account of protected statutory ground. The BIA affirmed that decision with additional reasoning.

Preliminarily, the Seventh Circuit held that it lacked jurisdiction to consider the timeliness of the asylum application. Turning to the withholding claim, the court explained that petitioner asserted that he was a member of a particular group of Ukranian prosecutors, and more specifically a member of a group of uncorrupt prosecutors who were subjected to persecution for exposing government corruption. "Regardless of the precise contours of the group, being a prosecutor is not an unchangeable or fundamental attribute," said the court. The court noted that petitioner had resigned from his position and has subsequently worked as a carpenter and a painter in this country. "It is [petitioner's] particular conduct as a prosecutor and not his status as a member of such a purported social group that caused the alleged persecution." The court distinguished petitioner's case from the decision in *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006), noting, *inter alia*, that petitioner had not defined his social group as that of former prosecutors. Even assuming, that petitioner was part of a particular social group of prosecutors, the court found that petitioner did not demonstrate that the various threats and actions against him were on account of that membership. Rather, said the court, the evidence suggested that the threats arose from his conduct in two investi-

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gations and not because of his status as a member of a group of prosecutors.

The court also rejected petitioner's claim of persecution based on his political opinion, namely his whistle-blowing about public corruption. The court found that petitioner's claim fell short because he did not take his evidence of public corruption "to the public quest of a political decision." Moreover, the court noted that the Supreme Court recently held in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), that public employees are not insulated from employer discipline when they make statements pursuant to their official duties. "It would be implausible to offer broader protection for speech to an alien under the immigration laws than it is provided to citizens under the First Amendment," said the court.

"It would be implausible to offer broader protection for speech to an alien under the immigration laws than it is provided to citizens under the First Amendment."

Finally, the court affirmed the denial of CAT protection, noting that the regulations excluded lawful sanctions from the definition of torture and that there was insufficient evidence to conclude that the threats he received was inflicted by or with acquiescence of public officials.

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■ **Seventh Circuit Rules Applicant Ineligible For Adjustment Of Status Because He Cannot Reacquire His Refugee Status**

In ***Gutnik v. Gonzales***, __F.3d__, 2006 WL3423144 (7th Cir. November 29, 2006)(Rovner, *Evans*, Sykes), the Seventh Circuit granted Chevron deference to the BIA's holding that the petitioner was ineligible for adjustment of status under 8 U.S.C. § 1159 (a) because he had already acquired permanent status and lost that status. The petitioner a Ukranian citizen, had entered the United States in 1993 with his family as a refugee under the Lautenberg Amendment. He later adjusted his status under INA § 209. Petitioner, unlike his parents and brother never naturalized. Instead, beginning in early 1999, he was convicted of several crimes which brought him to the attention of the former INS. The INS placed in removal proceedings and charged him under three separate grounds of removal, including an allegation that he had been convicted of an aggravated felony. Petitioner then applied for asylum, cancellation, withholding, CAT protection, and for a waiver under INA § 209(c) relief. An IJ terminated petitioner's permanent resident status, denied the requested reliefs except that he granted withholding of removal. The IJ did not address the CAT claim in light of the grant of withholding. On appeal, the BIA affirmed under 8 C.F.R. § 1003.1 (e)(5), supplementing the IJ's reasoning that petitioner was ineligible for a § 209(c) waiver.

The Seventh Circuit held, and the government conceded, that under the court's "hypothetical federal felony approach" case law, petitioner's felony conviction under Illinois state law was not an aggravated felony. Consequently, petitioner was not barred from pursuing his asylum claim, which the court noted he had already been found eligible for in light the grant of withholding of removal. The court declined to decide, even though argued by the parties, whether petitioner had been convicted of law relating to a controlled substance abuse, since petitioner had already conceded his ineligibility for cancellation or removal based upon two crimes involving moral turpitude. The court rejected petitioner's contention that he continued to maintain his formal refugee status and consequently he would be eligible for the refugee waiver of inadmissibility under § 209(c). The court instead deferred to the BIA's interpretation that petitioner's refugee status ended when he adjusted his status to that of a lawful permanent resident and that adjustment under INA § 209(a) only applies to aliens who have not acquired permanent resident status.

The court rejected petitioner's contention that the BIA was not entitled to Chevron deference to interpretation made under the streamlined procedures. The court noted, however, that in this cases the determination was made under 8 C.F.R. § 1003.1(e)(5), meaning that the BIA provided some reasoning, albeit brief, permitting the court to apply deference. Finally, the court also rejected the petitioner's argument that his appeal should have been reviewed by a three-member BIA panel because 8 C.F.R. § 1003.1(e)(5) does not expressly prevent a single BIA member from resolving novel issues.

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EIGHTH CIRCUIT

■ **Eighth Circuit Holds That A Certificate Of Nonexistence Of Record Is Nontestimonial**

In ***United States v. Urqhart***, 469 F.3d 745 (8th Cir. 2006) (Loeken, *Beam*, Gruender), the Eighth Circuit held that admission of a Certificate of Nonexistence of Record (CNR), without a showing of unavailability of a witness or a prior opportunity for cross-examination, did not violate the Sixth Amendment's Confrontation Clause because a CNR is similar enough to a business record so that it is nontestimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). The

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court further held that the fact that the CNR was prepared for use at a criminal trial did not make the CNR testimonial.

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■ Eighth Circuit Holds That Albanian Asylum Applicant Was Not Credible

In ***Celaj v. Gonzales***, 468 F.3d 1094 (8th Cir. November 27, 2006) (*Wollman*, Bowman, Benton), the Eighth Circuit held that the IJ reasonably determined that the State Department report submitted into evidence tended to discredit petitioner's claim of past persecution and that certain documentary evidence submitted by petitioner was either unreliable or contradicted his testimony. The petitioner, a citizen of Albania entered the United States using a false German passport. He claimed that he had been persecuted in Albania by individuals affiliated with the ruling Socialist party because of his support of the Democratic Party.

"An applicant may not submit documents to the immigration court and then disassociate himself from them in the wake of an adverse ruling," said the court.

The court also found that inconsistencies in the evidence supported the IJ's adverse credibility determination and undermined petitioner's claim of past persecution and of a well-founded fear of future persecution. The court rejected petitioner's contention that because the documents he presented were written by others, any infirmities in the documents should not undermine his claim. "An applicant may not submit documents to the immigration court and then disassociate himself from them in the wake of an adverse ruling," said the court.

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NINTH CIRCUIT

■ Ninth Circuit Rejects Ineffective Assistance Of Counsel Claim

In ***Serrano v. Gonzales***, __F.3d__, 2006 WL 3489684 (9th Cir. December 5, 2006) (*Graber,* McKeown, Tallman), the Ninth Circuit rejected a petitioner's claim of ineffective assistance of counsel holding that he had failed to establish prejudice because he had no plausible ground for relief. The BIA had originally denied petitioner's cancellation application but had granted him voluntary departure. Petitioner failed to comply with his voluntary departure order, and instead filed an untimely motion to reopen claiming that new evidence concerning his recent child's birth and medical condition was sufficient to demonstrate an "exceptional circumstance" warranting reopening, and that his counsel was ineffective because he had failed to file a timely petition for review of the original BIA order and to seek a stay pending review thereof.

The court upheld the BIA's denial of the motion to reopen ruling that the petitioner had failed to demonstrate prejudice because he had not shown any "plausible ground for relief" as Congress had eliminated the "exceptional circumstance" justification for failure to depart. The court concluded that it lacked jurisdiction to consider petitioner's claim that exceptional circumstances were sufficient to equitably toll the voluntary departure deadline as he had failed to exhaust that claim before the BIA.

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■ Ninth Circuit Upholds CIS' Denial Of Change Of Status To Multinational Manager

In ***Family, Inc. v. USCIS***, 469 F.3d 1313 (9th Cir. 2006) (*Goodwin*, Kozinski, Shadur ([N.D.Ill.)), the Ninth Circuit affirmed the district court's determination that the petitioner Oh, owner of Family, Inc., a family-run dry-cleaning establishment with six employees, was not engaged in "managerial" duties as opposed to ordinary operational activities, and thus did not qualify for an immigrant visa or change of status to "multinational manager."

The petitioner had entered the United States as a temporary nonimmigrant visitor in 1995. In 1996 he changed his status to that of a nonimmigrant E2 treaty investor. In 2003, Family Inc. filed an I-140 on behalf of Oh, the president of the corporation, seeking to classify him as a multinational manager. The company's organizational chart showed Oh as president, his wife as the manager, and four other employees. The organization included one corporate shareholder in Korea, qualifying this small-scale operation as an international business. The court found that the facts in the record did not compel the conclusion that Oh was primarily engaged in managerial duties, as opposed to ordinary operational activities alongside Family's five other employees. Furthermore, the agency did not err by considering Family's size as one factor in its determination.

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■ Ninth Circuit Upholds Board's Denial Of Reopening To Reissue Its Decision Where Alien Claimed Non-Receipt Of The Decision Within The Time For Appeal

In ***Singh v. Gonzales***, 469 F.3d 863 (9th Cir. 2006) (Kozinski, *Fisher*, Block (S.D.N.Y)), the Ninth Circuit determined that the BIA did not abuse its discretion when it declined to re-

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open and reissue its decision where the petitioner claimed that he did not receive the BIA's decision before the time for appeal expired. The court held that the sworn affidavits by the petitioner and his counsel, which claimed non-receipt of the BIA's decision, were insufficient to overcome the BIA's finding that the decision was properly mailed to counsel of record, as evidenced by the transmittal sheet with the BIA's decision.

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■ **Ninth Circuit Holds That Alien May Be Removed Without Terminating Refugee Status**

In ***Kaganovich v. U.S. Attorney General,*** __F.3d__, 2006 WL 598535 (9th Cir. December 12, 2006) (*Graber*, Ikuta, Cudahy), the Ninth Circuit held that a petitioner who arrives in the United States as a refugee pursuant to 8 U.S.C. § 1157 may be removed, even if his refugee status has never been terminated pursuant to 8 U.S.C. § 1157(c)(4). The petitioner, a citizen of Ukraine, had been admitted as a refugee in 1994. In early 2001, he was stopped at the San Ysidro port of entry as a attempted to smuggle in the United States a Ukranian citizen. At his removal hearing he contended that he could not be removed because he had entered as a refugee and his status had never been terminated. In affirming the BIA, the court stated that "whether under our reading of the plain text of the statute or in deferring to the BIA's interpretation in *[Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005)], the outcome is the same," and, thus, "join[ed] the Third Circuit" in *Romanishyn v. Attorney General of U.S.*, 455 F.3d 175, 185 (3d Cir. 2006).

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ELEVENTH CIRCUIT

■ **Eleventh Circuit Holds Immigration Judge Should Have Granted Continuance**

In ***Haswanee v. U.S. Attorney General***, __F.3d__, 2006 WL 524139 (11th Cir. December 8, 2006) (Black, Marcus, and Fay) (*per curiam*), the Eleventh Circuit determined that the IJ abused his discretion by denying the petitioner's request for a continuance to seek adjustment of status where the petitioner had an approved labor certification, a pending petition for an employment based visa, and an immediately available visa number, but had yet to file the actual application for adjustment of status. The court distinguished its decision from that in *Zafar v. U.S. Att'y Gen.*, 426 F.3d 1330 (11th Cir. 2005), where the court had found no abuse of discretion in the denial of motions for continuances where the petitioners did not have an approved labor certification and had not filed an I-140 or I-485.

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■ **Eleventh Circuit Holds That, Under The REAL ID Act, It Lacks Jurisdiction Over A Challenge To The Existence Of A Final Removal Order, But That The District Court Has Jurisdiction Over Such A Challenge In Habeas**

In ***Madu v. U.S. Attorney General,*** __F.3d__, 2006 WL 3456692 (11th Cir. December 1, 2006) (*Birch*, Pryor, Fay), the Eleventh Circuit held that it lacked jurisdiction under the REAL ID Act over the alien's habeas petition challenging his detention and impending removal on the ground that he is not subject to a removal order. The court held that an alien's assertion that he is not subject to an order of removal is distinct from a challenge to a final order of removal, and accordingly that the district court had improperly transferred the petition under RIDA § 106(c). The court further held that the district court did have habeas jurisdiction over the alien's challenge to the existence of a removal order against him, and remanded the case to the district court.

> The court held that the district court did have habeas jurisdiction over the alien's challenge to the existence of a removal order.

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D.C. CIRCUIT

■ **D.C. Circuit Vacates Grant Of Summary Judgment In FOIA Request For State Criminal Alien Assistance Program Data; Remands For Further Factual Development**

In ***CEI Wash. Bureau, Inc. v. Department of Justice,*** __F.3d__, 2006 WL 3359322, (D.C. Cir. November 21, 2006) (Randolph, Garland, Griffith), the D.C. Circuit vacated the district court's grant of summary judgment in a FOIA request for funding applications under the State Criminal Alien Assistance Program ("SCAAP").

The court held that the applicability of FOIA's privacy exemptions to certain SCAAP data – the names, birthdates, and law enforcement identification numbers of inmates potentially eligible for SCAAP funding – turned on disputed issues of material fact, and that summary judgment was therefore not warranted. The court remanded the case for further factual development on whether the records in question would misidentify individuals as undocumented aliens; whether such records could be redacted; and whether private data could be exposed through the release of the law enforcement numbers at issue.

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OIL WELCOMES RECORD NUMBER OF NEW LAWYERS

OIL welcomes the following new attorneys who joined the office this month:

John Amaya received his B.A. and his J.D. from the University of Washington. Prior to joining OIL, John clerked for the 13th Judicial District Court of Montana. During law school, he was a fellow in the United States Senate and clerked for the U.S. Small Business Administration.

Jesse Busen recently graduated from the George Washington University Law School. Prior to earning his law degree, Jesse received a Bachelor's degree from Florida State University in Religion and Western Antiquity, and a Master's degree from Florida State University in Religion, Ethics, and Philosophy.

John Devaney is a graduate of Colgate University and the George Washington University Law School. During law school, John worked as a summer law clerk for the New York County District Attorney's Office.

Corey Farrell is a graduate of Oklahoma State University and American University, Washington College of Law. She previously clerked at the law firm of Hall Estill in Oklahoma City and was an intern at the Department of the Interior, Office of Congressional and Legislative Affairs.

Lauren Fascett is a graduate of Clemson University and Boston College Law School. During law school, Lauren interned with the Executive Office for Immigration Review at the Boston Immigration Court.

Sheri R. Glaser is a graduate of the University of Pittsburgh and the American University, Washington College of Law. Throughout law school, Sheri worked for the Central European & Eurasian Law Institute and the Public International Law & Policy Group.

Lindsay Glauner is a graduate of Michigan State University and DePaul University College of Law. After law school, Lindsay served as a Judicial Law Clerk at the Los Angeles Immigration Court. Prior to joining OIL, she worked at the American Bar Association as the Senior Project Attorney for the Death Penalty Moratorium Implementation Project.

Samuel Go is a graduate of Brown University and Cornell Law School. Before joining OIL, he clerked for the Hon. James E. Gates in the U.S. District Court, Eastern District of North Carolina and served as partner for the law firm of Nguyen, Chang & Go in Los Angeles, CA.

Ashley Han is a graduate of James Madison University and American University, Washington College of Law. After law school, she clerked for the Honorable Edward Smith, Court of Common Pleas, Northampton County, Pennsylvania. Prior to joining OIL, she was an Assistant District Attorney for the city of Philadelphia.

Brendan Hogan received a BA from St. Joseph's University and J.D. from Penn State. Prior to joining OIL, he worked in Philadelphia for a securities litigation firm.

James Hurley is a graduate of the University of Virginia and the Catholic University, Columbus School of Law. While in law school, James worked in the Narcotics and Dangerous Drug Section, the Counterterrorism Section, and the U.S. Attorney's Office for the District of Columbia.

Brooke Maurer is a graduate of University of San Diego School of Law and Ferris State University. During law school, Brooke worked on appellate projects for the University's Environmental Law Clinic.

Chris McGreal is a graduate of New York University and Southern Methodist University Dedman School of Law. During law school, Chris worked as an intern at the U.S. Department of Labor, the Texas Attorney General's Office in its Consumer Protection and Public Health Division, and the Dallas District Attorney's Office as part of the

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From L to R: Jesse Busen, Brendan Hogan, Jeffrey Robins, Jonathan Robbins, Ashley Han, Benjamin Zeitlin, Rosanne Perry, Debora Gerads, Lauren Fascett, Kate DeAngelis, Brooke Maurer, Rebecca Niburg

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Criminal Prosecution Clinic.

Rebecca Niburg received her B.A. from the University of North Carolina at Chapel Hill and her J.D. and M.A. from Washington University in St. Louis. After law school, she clerked with Judge Ellen Hollander of the Maryland Court of Special Appeals. Prior to joining OIL, she worked as a litigation and immigration associate for Tuggle Duggins & Meschan, P.A. in Greensboro, N.C.

Andrew Oliveira is a graduate of California State University, Sacramento (B.A. Government) and Georgetown University Law Center. While in law school, he clerked for the Department of Interior, Board of Land Appeals.

Rosanne Perry is a graduate of the University of Florida and Notre Dame Law School. Prior to joining OIL, she worked as a Contract Attorney.

Jeffrey S. Robins is a graduate of the George Washington University, and the American University, School of International Service and Washington College of Law. He comes to OIL following two-years as a Presidential Management Fellow with DHS, U.S. Citizenship and Immigration Services. He teaches legal rhetoric and writing at American and is actively involved in the Jessup International Moot Court Competition.

Jonathan Robbins is a graduate of the University of Rochester and Washington and Lee University School of Law. During law school he interned as a legal clerk for a solo practitioner in Friendship Heights, working in general civil litigation.

Dave Schor is a graduate from the University of Maryland at College Park and the George Washington University School of Law. Prior to joining OIL, he served as a law clerk for the Federal Communications Commission and a personal injury/criminal defense attorney in Rockville, Maryland.

Max Weintraub is a 1987 graduate of Syracuse University, where he received a BS in broadcast journalism, and he went to law school at George Mason University School of Law. Prior to coming to OIL, Max spent six years as the lead writer/editor of LitWatch, a litigation news service based in Northern Virginia. In addition, he has been an associate with two small private law firms and has been executive director of two local bar associations.

Benjamin Zeitlin graduated from St John's University School of Law and the State University of New York at Albany. Prior to joining OIL, he worked at a civil litigation firm in White Plains, NY.

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MARK YOUR CALENDAR

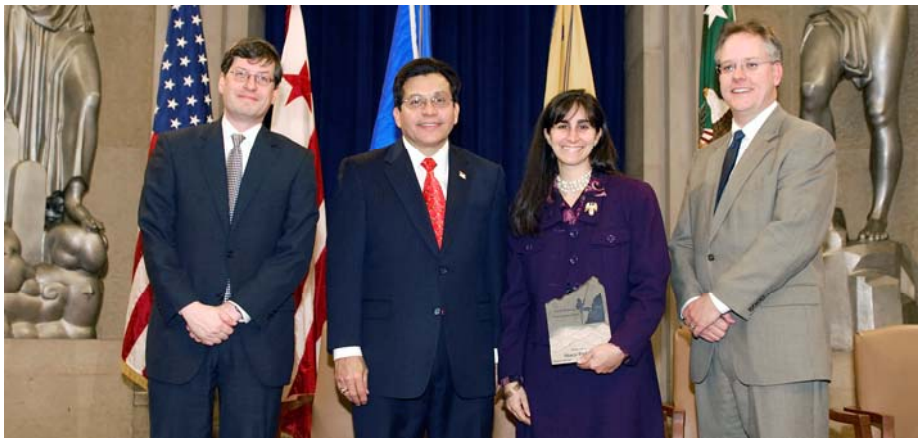
The Office of Immigration Litigation will be holding its Eleventh Annual Immigration Litigation Conference at the National Advocacy Center in Columbia, South Carolina, on April 10-13, 2007.

The theme for this year's conference is "Immigration Litigation: Defining and Protecting Our Community." This annual conference is designed for AUSAs who have some experience in immigration law, either as district court litigators or as immigration brief writers, and for agency counsel who advise AUSAs on immigration matters.

Contact Francesco Isgro at OIL for additional information.

INSIDE OIL

Attorney General **Alberto Gonzales**, Acting Associate Attorney General **William Mercer**, and Assistant Attorney General **Peter D. Keisler**, presented awards to a number of OIL attorneys at the Annual Civil Division Awards Ceremony held in the Great Hall on December 7, 2006. Deputy Director **Donald Keener**, received the Dedicated Service Award in recognition of his record of outstanding actions and accomplishments. Trial Attorney **Melissa Neiman-Kelting** received the Rookie of the Year Award in recognition of her contributions towards the Division's mission by an employee with fewer than three years of service. Trial Attorney **Stacy Paddack** received the Perseverance Award in recognition of her resolving lingering administrative records issues created principally by the dramatic increase in case filings in the federal courts. Senior Litigation Counsel **Victor Lawrence** and **Papu Sandhu** received Special Commendation Awards in recognition of their litigation of cases that have materially contributed to the successful advancement of Division objectives. A Special Commendation Award was also presented to the team that designed and implemented the new OIL Case Tracking system including Trial Attorney **Kurt Larson** and paralegals **Michael Green** and **Anthony Messuri**.



From L to R: Peter Keisler, Alberto Gonzales, Stacy Paddack, William Mercer

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

Office of Immigration Litigation

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

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