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Immigration Litigation Bulletin

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WOMEN IN CHINA WHO ARE SOLD INTO MARRIAGE ARE PARTICULAR SOCIAL GROUP

In an issue of first impression, the Second Circuit has held that "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable" constitute a particular social group and qualify for asylum. ***Gao v. Gonzales***, __F.3d__, 2006 WL 509429 (2d Cir. March 3, 2006) (Calabresi, *Straub*, Wesley). The court also found that the petitioner's boyfriend was the persecutor and that the Government of China was unable or unwilling to protect her.

> "Forced marriage is a form of abuse that rises to the level of persecution."

According to petitioner's testimony, she grew up in a rural village in the Fujan Province, a region where parents routinely sell their daughters into marriage, a practice sanctioned by society and by the local authorities. When she was nineteen years old, her parents, through a broker, sold her to a man with a promise that she would marry him when she turned twenty-one. Petitioner's parents used the money to pay off previous debts.

At first petitioner acquiesced to this arranged marriage. However the boyfriend "soon proved to be bad-tempered, and gambled, and beat her when she refused to give him money." Petitioner then decided that she did not want to marry him. When she tried to break the engagement she was threatened by the boyfriend who told her that his uncle, "a powerful local official," would arrest her. Petitioner then "escaped" and moved "a hour away by boat and took a job in the Mawei district of Fuchou." The boyfriend sought to find her whereabouts, and when her parents refused to tell him, he vandalized their home. He, however, found out where petitioner had moved by following her after she had returned home to visit her family. About six months later, "out of fear that, if she remained in China she would be forced to marry" the boyfriend, petitioner "fled to the United States." The decision of the

(Continued on page 2)

DHS NOT COLLATERALLY ESTOPPED FROM RELITIGATING ALIENAGE ISSUE

In ***Duvall v. Attorney General***, __F.3d__, 2006 WL 278861 (3d Cir. February 6, 2006) (Rendell, Fisher, Greenberg), the Third Circuit held that the doctrine of collateral estoppel did not bar the government from relitigating the issue of alienage.

In 1993, the former INS commenced deportation proceedings against the petitioner on the basis that she had been convicted of two or more crimes involving moral turpitude. However, at the hearing, she asserted a privilege against self-incrimination under the Fifth Amendment and she neither confirmed nor denied any of the allegations in the Order to Show Cause. Because the INS was unable to prove alienage, the IJ terminated the proceedings. In

(Continued on page 19)

10TH ANNUAL IMMIGRATION LITIGATION CONFERENCE TO BE HELD AT THE NAC APRIL 18-21

The Tenth Annual Immigration Litigation Conference, sponsored by the Civil Division's Office of Immigration Litigation will be held on April 18-21, 2006, at the National Advocacy Center, in Columbia, South Carolina. The theme for this year's conference is "Immigration Litigation in the National Interest: Old Issues, New Reforms." 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.

The agenda for the conference will reflect the impact of the significant increase in immigration litigation faced by the Department, and the

(Continued on page 19)

Highlights Inside

WOMEN FORCED INTO MARRIAGE ARE A PARTICULAR SOCIAL GROUP UNDER OUR ASYLUM LAWS

(Continued from page 1)

court does not indicate when and how petitioner entered the United States, and when she was placed in removal proceedings.

At the removal hearing, following petitioner's testimony, and the consideration of the 2001 State Department Country Report on China, the IJ concluded that petitioner's "predicament did not arise from a protected ground such as membership in a particular social group, but was simply 'a dispute between two families.'" The IJ also found that the record did not establish that the Government of China would not protect petitioner from the boyfriend. Finally, the IJ found that since petitioner "was able to relocate safely to another city," she did not need asylum in the United States. The BIA affirmed without opinion.

The court rejected the IJ's finding that petitioner's claim arose from a dispute between two families.

Preliminarily, the court stated that although it gives *Chevron* deference to the BIA's interpretation of ambiguous statutory language, such as the meaning of "particular social group," it gives no deference to summary BIA affirmances of IJ interpretations. However, the court will uphold IJ's findings if supported by "substantial evidence." This standard is slightly stricter than the clear-error standard, said the court, and it require "more than a mere scintilla of evidence, or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

On the merits the Second Circuit made several significant findings. First it found, without any analysis, that "forced marriage is a form of abuse that rises to the level of persecution."

Second, the court held that petitioner belongs to a particular social group of "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable." The court explained that the BIA in *Matter of Acosta* determined that a particular social group could be composed of persons who shared a "common, immutable characteristic . . . such as sex." The court noted that courts have deferred to *Matter of Acosta*'s broad interpretation "as encompassing any group, however populous, persecuted because of shared characteristics that are either immutable or fundamental." As an example, it recited the reasoning in *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), where the Third Circuit had implicitly suggested that a particular social group could be composed of women in Iran who are subject to persecution based solely on their gender.

That issue was not decided in *Fatin* because there was no record evidence that women in Iran were systematically persecuted for being women. Instead, the Third Circuit found that Fatin *could* belong to a cognizable social group of Westernized Iranian women who refused to conform to fundamentalist Islamic norms. However, Fatin was unable to demonstrate that she was part of such a social group because, *inter alia,* she was not politically active and would not take any necessary risks if removed to Iran. The court interpreted *Fatin* "to suggest that the proper balance to strike is to interpret 'particular social group' broadly (requiring only one or more shared characteristics that are either immutable or fundamental) while interpreting 'on account of' strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution)." The court also noted that a broad definition of "particular social group" has been accepted by DHS in a brief filed in the case of *Matter of R_A_*, 23 I&N Dec. 694 (AG 2005) (remanding case to DHS), where it took "the position that 'married women in Guatemala who are unable to leave the relationship' are a particular social group under the law."

The court acknowledged that its own circuit law on particular social groups was "less clear." It noted that in *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991), it had denied asylum to an applicant who argued that she belonged to a particular social group of "women who have been previously battered and raped by Salvadoran guerillas." In so doing, the court stated that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." However, the court explained that *Gomez* can be interpreted as limited to a situation where the applicant fails to show a risk of future persecution, something Gomez failed to show, "rather than setting *a priori* a rule for which social groups are cognizable." The court, however, declined to decide the exact scope of *Gomez*, because here it found that petitioner "belonged to a particular social group that shared more than a common gender."

The court rejected the IJ's finding that petitioner's claim arose from a dispute between two families and that the boyfriend was angry because the contract had been violated. "While [the boyfriend] may have a legitimate financial claim against [petitioner's] parents, the possibility remains that if they continue to be unable to repay his money, [the boyfriend] will force [petitioner] to marry him," said the court. The court also found that it did "not make any difference that [the boyfriend] is the only person likely to claim [petitioner] as his

(Continued on page 18)

212(c) SAGA – *BLAKE* AND *BRIEVA* COMPARABILITY ANALYSIS

In *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005), and *Matter of Brieva*, 23 I. & N. Dec. 766 (BIA 2005), the BIA determined that aliens, who pled guilty to crimes prior to IIRIRA's elimination of 212(c) relief and who were found removable subsequent to IIRIRA, were not eligible for 212(c) relief. In both cases, the BIA determined that the aliens were not eligible for 212(c) relief because, with respect to the grounds for their removability, there were not comparable grounds of inadmissibility under section 212(a) of the INA.

In *Matter of Blake*, the alien pled guilty in 1992 to sexual abuse in the first degree under New York state law. In 1999, the INS charged the alien with removability as an alien convicted of an aggravated felony in that he was convicted of sexual abuse of a minor. The immigration judge sustained the charge and pretermitted the alien's request for 212(c) relief based on his determination that such relief was not available in removal proceedings. Following the Supreme Court's determination in *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), that IIRIRA's elimination of 212(c) relief cannot be applied retroactively to aliens who pled guilty at a time when they would have been eligible for 212(c) relief, the BIA remanded the case to the immigration judge for consideration of the alien's eligibility for 212(c) relief.

On remand, the immigration judge granted the alien 212(c) relief. The immigration judge concluded that the moral turpitude ground of inadmissibility under section 212(a) of the INA was comparable to the alien's ground of removability because almost all statutes involving sexual abuse of a minor would necessarily involve moral turpitude. The BIA, however, sustained DHS's appeal, concluding that the "aggravated felony offense of sexual abuse of a minor has no statutory counterpart in the section 212(a) grounds of inadmissibility."

In rendering its decision, the BIA discussed its long-standing precedent on the comparability test. The BIA explained that a 212(c) waiver has been available only for those charges of deportability for which there is a comparable ground of inadmissibility. Additionally, the BIA discussed the new regulation, 8 C.F.R. § 1212.3(f), setting forth this same principle. Ultimately, the BIA determined that, "although there may be considerable overlap between offenses categorized as sexual abuse of a minor and those considered crimes of moral turpitude, these two categories of offenses are not statutory counterparts." The BIA explained that, pursuant to its precedent decisions and the regulation, "the test for comparability is not met merely by showing that some or many of the offenses included in the charged category could also be crimes involving moral turpitude." Rather, "whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses."

> "Whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses."

In *Matter of Brieva*, the BIA applied the analysis set forth in *Matter of Blake* and determined that the "crime of violence" aggravated felony ground of removability does not have a statutory counterpart of inadmissibility under section 212(a) of the INA. In concluding that the moral turpitude ground of inadmissibility is not a statutory counterpart, the BIA noted that, "[a]lthough there need not be perfect symmetry in order to find that a ground of removal has a statutory counterpart in section 212(a), there must be a closer match than that exhibited by the incidental overlap between" a crime of violence and a crime involving moral turpitude. The BIA indicated that "[t]he distinctly different terminology used to describe the two categories of offenses and the significant variance in the types of offenses covered by the[] two provisions, [led it] to conclude that they are not 'statutory counterparts.'"

Notably, the First and Second Circuits also have applied the comparability analysis in post-*St. Cyr* decisions. In *Sena v. Gonzales,* 428 F.3d 50, 53-54 (1st Cir. 2005), the First Circuit upheld the retroactive application of an expanded aggravated felony definition and concluded that the alien could not obtain a 212(c) waiver because there was no comparable ground of inadmissibility under 212(a) for the aggravated felony ground on which he was deported -- encouraging or inducing an alien to reside in the United States, knowing or in reckless disregard of the fact that such residence would be in violation of law. Similarly, in *Drax v. Reno*, 338 F.3d 98, 107-110 (2d Cir. 2003), the Second Circuit upheld the retroactive application of an expansion of deportable offenses and determined that 212(c) relief was not available to the alien because there was not a comparable excludability offense under section 212(a) of the INA for the alien's weapons conviction ground of deportability.

The decisions by the BIA and the First and Second Circuits are in accord with the Supreme Court's decision in *St. Cyr*. In *St. Cyr*, the Supreme Court determined that IIRIRA's elimination of 212(c) relief

(Continued on page 4)

Blake and *Brieva*

(Continued from page 3)

cannot be applied retroactively to aliens who pled guilty at a time when they would have been eligible for 212 (c) relief, but the Supreme Court also recognized that Congress "unambiguously" indicated its intention that its amended definition of aggravated felony, as well as other amendments to the INA, were to be applied retroactively. 533 U.S. at 318-19, 326. Thus, in determining whether an alien is eligible for 212(c) relief, one must determine, consistent with long-standing Board precedent, whether there is a comparable ground of inadmissibility for the ground of removability, even when such ground of removability exists only by virtue of the amended definition of aggravated felony in IIRIRA or other retroactive amendments to the INA.

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DHS Extends TPS for El Salvador, Honduras, and Nicaragua

In a continuing effort to assist El Salvador, Honduras, and Nicaragua in recovering from the natural disasters that affected the Central American region, DHS has announced a decision to extend Temporary Protected Status (TPS) for an additional 12 months for all three countries. Under this extension nationals of El Salvador, Honduras, and Nicaragua who have already been granted and remain eligible for TPS will be able to continue living and working in the United States for an additional 12 months.

This extension covers approximately 225,000 Salvadorans, 75,000 Hondurans, and 4,000 Nicaraguans. This extension of these TPS designations will expire on September 9, 2007, for El Salvador and on July 5, 2007, for Honduras and Nicaragua.

ASYLUM LITIGATION UPDATE

Effect Of The REAL ID Act: Do You Have A Potential REAL ID Act Case With An Application Made On Or After May 11, 2005? Is It Complete Or Should It Be Remanded?

On May 11, 2005, the REAL ID Act became law. *See* Division B of Title VII of H.R. 1268, 109 Cong. (2005), Pub. L. No. 109-13, 119 Stat 231. It made several favorable changes in the law regarding litigation of asylum cases before the agency and the courts. Some of the changes took place immediately, while others took place for applications for relief or protection "made on or after" the REAL ID Act's enactment. When you have an asylum case assess it to see if the changes made by the REAL ID apply. If a case is covered by the REAL ID Act and the Immigration Judge or Board of Immigration Appeals (BIA) did not address and apply that Act, the case should be remanded to the BIA to decide the case based on the changes in the law made by the REAL ID Act.

> The ability to apply twice for asylum creates ambiguity as to when the new provisions of the REAL ID Act apply.

Immediate Change In Review Standard Where Alien Failed To Reasonably Corroborate His Claim

The Board of Immigration Appeals (BIA) has held that an alien ordinarily must provide corroborating evidence to prove that he is credible and to meet his burden of proof in an asylum case. If he fails to provide corroboration, he must show why such evidence was not reasonably available. *Matter of S-M-J-*, 21 I & N Dec. 722 (BIA 1997). Section 101(e) of the REAL ID Act, codified at 8 USC § 1252(b)(4)(D), provides that: "No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence. . . unless the court finds, . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." This adds to the Immigration and Nationality Act a specific standard of judicial review for the agency's decision concerning the availability of corroborating evidence. *See* Conference Report on REAL ID Act, H.R. 1268, Congressional Record H2813, H2871 (May 3, 2005) ("Conf. Rpt.").

Congress made this change to make clear that the deferential substantial-evidence standard of review applies to determinations about the availability of corroborating evidence. *Id.* at H2871. This amendment took effect immediately upon enactment. *See* Section 101(h)(3) of the REAL ID Act. This means that if you have an asylum case in which an Immigration Judge or the Board of Immigration Appeals ("BIA") found the alien failed to provide reasonably available corroborating evidence, this new deferential review provision applies and should be cited and argued. Under this review standard the Court is required to affirm the agency unless the alien can show that the evidence compels a finding that corroboration was unavailable, which is a heavy burden to meet.

Other Changes For Asylum Applications "Made On Or After" May 11, 2005

The REAL ID Act makes five important substantive changes in asylum law favorable to the Government. First, the Act adds a new "central reason" requirement, which requires an alien to prove that his or her race, religion, nationality, membership in a particular social group, or political opinion "was or will be one central reason" for persecution. *See* new 8 U.S.C. 1158(b)(1)(B); Conference Report on REAL ID Act H.R. 1268, 151 Cong. Rec. H2813, H2869-70 (May 3, 2005).

Second, the REAL ID Act codifies the BIA's "Corroboration Rule" in *Matter*

(Continued on page 5)

ASYLUM LITIGATION UPDATE

(Continued from page 4)

of S-M-J-, supra. This means that for the first time, the asylum statute requires aliens to submit corroborating evidence to prove their claims if the Immigration Judge considers corroboration necessary, and permits the Immigration Judge to find an alien not credible, or ineligible for failure to meet his burden of proof, if the alien does not corroborate. *See* new 8 U.S.C. § 1158 (b)(1)(B)(ii); 151 Cong. Rec. H 2869, H2871.

Third, to correct abuses by the courts (particularly the Ninth Circuit) in reviewing adverse credibility findings against aliens, the REAL ID Act provides that the agency may find aliens not credible based on a "totality of the circumstances" including internal inconsistencies, external inconsistencies with other evidence or prior statements, problems with demeanor, candor, and responsiveness, and the implausibility of an alien's testimony. *See* new 8 U.S.C. § 1158(b)(1)(B)(iii); 151 Cong. Rec. H 2870-71.

Fourth, the REAL ID Act directs that the agency may find aliens not credible based on inconsistencies or problems without regard to whether they go to the heart of the applicant's claim. *See* new 8 U.S.C. § 1158(b)(1)(B)(iii); 151 Cong. Rec. H 2870-71. This supercedes the case law of the Ninth Circuit and some other circuits which have prevented the agency from finding aliens not credible based on inconsistencies that do not go to the heart of the asylum claim. *Id*.

Fifth, the REAL ID Act does away with a "presumption of credibility" created by the Ninth Circuit, which presumed and found an alien to be credible unless the agency made a specific adverse credibility finding. *Id.* Under the REAL ID Act, "[t]here is no presumption of credibility." 8 U.S.C.§ 1158(b)(1)(B)(iii). However, if no adverse credibility finding is made by the agency, the applicant "has a rebuttable presumption of credibility on appeal." *Id.*

> If a case is covered by the REAL ID Act and the Immigration Judge or Board of Immigration Appeals (BIA) did not address and apply that Act, the case should be remanded to the BIA to decide the case based on the changes in the law made by the REAL ID Act.

All of these important changes – which make it easier to defend asylum denials – apply to "applications for asylum, withholding, or other relief *made on or after* [the date of enactment ([May 11, 2005)]." *See* Section 101(h)(2) of the REAL ID Act (emphasis added).

The meaning of "applications . . . made on or after" May 11, 2005 is unclear and needs to be interpreted by the BIA. This is because depending on their circumstances, aliens may have two opportunities to make an application for asylum. First, they may apply for asylum by filing an application with the Department of Homeland Security Asylum Office (this is called an affirmative application). 8 C.F.R. § 208.3, .4(b). If asylum is not granted, the alien is put in removal proceedings. Once in removal proceedings, the alien can again apply for asylum before an Immigration Judge as relief from removal (this is called a defensive application). *Id.*

The ability to apply twice for asylum creates ambiguity as to when the new provisions of the REAL ID Act apply. One view is that if an alien applies for asylum with the DHS Asylum Office and renews the application before an Immigration Judge, the REAL ID Act only applies to applications made to DHS on or after May 11, 2005. Another reading construes the REAL ID Act to apply all asylum applications filed before Immigration Judges on or after May 11, 2005, regardless of when they were filed before DHS. But these questions must be resolved by the BIA in the first instance. Courts cannot decide these questions without an articulated decision by the BIA. *See INS v. Ventura*, 537 U.S. 12, 16-17 (2002).

Screen Incoming Asylum Cases To See If They Involve Applications Made On Or After May 11, 2005

Given the ambiguity about which applications trigger the REAL ID Act's amendments and the need for the BIA to decide this question in the first instance – be on the lookout for asylum cases in which the asylum application was filed with the Immigration Judge on or after May 11, 2005. These cases raise an issue about whether the REAL ID Act applies and its meaning that must be construed by the BIA. If there is no agency decision discussing the REAL ID Act issues, the case should be remanded for such a decision. *See generally Ventura*, 537 U.S. at 16-17.

OIL Director Thomas Hussey has advised that OIL will be remanding cases if there are REAL ID Act issues that the agency has not addressed.

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If you have an unusual asylum issue you would like to see discussed, you may contact Margaret Perry at:

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SUMMARIES OF RECENT BIA DECISIONS

■ **A Victim Of Sexual Abuse Who Is Under The Age Of 18 Is A "Minor" For Purposes Of A Conviction For An Aggravated Felony Offense**

In Matter of V-F-D-, 23 I. & N. Dec. 859 (BIA 2006), the Board held that, for purposes of determining whether an alien has ben convicted of sexual abuse of a minor within the meaning of INA § 101(a)(43)(A), a victim who is under the age of 18 is a "minor." The alien, a native and citizen of Egypt, was convicted in 2000 of unlawful sexual activity with certain minors in violation of section 794.05 of the Florida Statutes, which provides that any individual who is 24 years of age or older and who engages in sexual activity with anyone 16 or 17 years of age commits a second degree felony. On the basis of that conviction, the DHS charged him with removability as an alien convicted of a crime involving moral turpitude. The Immigration Judge found him inadmissible, but granted his application for cancellation of removal over DHS's objections that his conviction constituted an aggravated felony offense which rendered him ineligible for that form of relief. The IJ ruled that, because 8 U.S.C. § 2243 (a)(1) defines sexual abuse of a minor as involving a child who "has attained the age of 12 years but has not attained the age of 16 years," and the victim in this case was 16 years old, the alien had not been convicted of sexual abuse of a minor under INA § 101(a)(43)(A). The IJ also denied the alien's application for withholding of removal. DHS appealed the grant of cancellation of removal to the Board, and the alien appealed the denial of his application for withholding of removal. In granting DHS's appeal, the Board relied on its previous holding in *Matter of Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (BIA 1999), which recognized that the broad definition of "sexual abuse" employed in 18 U.S.C. § 3509(a) best captured the intent of Congress to provide a comprehensive scheme in the INA to cover crimes against children. Similarly, the Board found that the broader age limitation in that federal statute, over other federal provisions, best reflected the diverse state laws that punish sexually abuse behavior toward children, the common usage of the word "minor," and the intent of Congress in expanding the definition of an aggravated felony to protect children. The Board also affirmed the IJ's finding that the mistreatment allegedly suffered by the alien over 20 years ago in Egypt did not rise to the level of past persecution for purposes of withholding of removal. However, because the IJ did not address the alien's application for protection under the Convention Against Torture, the Board remanded the case for a determination on that issue. Board Member Cole filed a concurring opinion.

The broad definition of "sexual abuse" employed in 18 U.S.C. § 3509(a) best captured the intent of Congress to provide a comprehensive scheme in the INA to cover crimes against children.

■ **An Alien Who Unlawfully Reenters The U.S. After Having Previously Been Removed Is Inadmissible, Even Where A Waiver Of Inadmissibility Is Obtained Prior To The Unlawful Entry**

In *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006), the Board held that an alien who reenters the United States without admission after having previously been removed is inadmissible under INA § 212(a)(9)(C)(i)(II), even if the alien obtained the Attorney General's permission to reapply for admission prior to reentering unlawfully. The Board further held that an alien is statutorily ineligible for a waiver of inadmissibility under the first sentence of INA 212(a)(9)(C)(ii), unless more than ten years have elapsed since the date of the alien's last departure from the United States. In November 1998, the alien was removed to Mexico. One month later, while in that country, he filed an application with the DHS requesting permission to reapply for admission after removal. In February 2000, while the alien was still in Mexico, the DHS approved his request for permission to reapply for admission. Rather than seeking admission, the alien reentered the United States without being admitted or paroled in May 2000. The alien subsequently filed an application for adjustment pursuant to INA § 245(i). In affirming the IJ's conclusion that the alien was ineligible for adjustment of status because of his unlawful reentry, the Board noted that the fact he was given permission to reapply for admission as of February 2000 did not mean that he was authorized to be admitted in fact, nor authorized to reenter without permission, because the approved request does not constitute a valid visa or entry document. Moreover, the Board concluded that the regulatory provision at 8 C.F.R. § 212.2, addressing consent to reapply for admission after removal and implementing statutory provisions that were repealed by the 1996 amendments, could not reasonably be construed as implementing the provision for consent to reapply for admission at INA § 212(a)(9)(C)(ii). In so holding, the Board expressly disagreed with the holding in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

■ **Conviction Vacated Because Of Trial Court's Failure To Advise Defendant Of Possible Immigration Consequences Of A Guilty Plea Is Not A Conviction For Immigration Purposes**

On February 8, the Board issued its precedent decision in ***Matter of Adamiak***, 23 I. & N. Dec. 878 (BIA 2006). The alien was a lawful permanent resident who was charged with removability as an alien convicted of aggravated felony based on his September 1997 guilty plea to a drug trafficking offense in violation of Ohio criminal laws. During the course of his immigration proceedings, the state criminal court granted the alien's mo-

(Continued on page 7)

BIA SUMMARIES

(Continued from page 6)

tion that he be permitted to withdraw his guilty plea and that his conviction be vacated as a result of the criminal court's failure to comply with section 294.031 of the Ohio Revised Code, under which a court is required to give an "advisement" with respect to the potential immigration consequences of a guilty plea. The Board held that the Ohio court's order permitting withdrawal of the alien's guilty plea – which resulted in a new trial on the underlying drug trafficking charge – was based on a defect in the underlying proceedings such that it did not constitute a conviction for immigration purposes.

■ **When Board Remands For Background Checks, The IJ May Consider New Evidence That Affect The Alien's Eligibility For Relief**

Following a remand from the Board for appropriate security checks related to his eligibility for adjustment of status, the background checks revealed that during the pendency of the appeal, the alien had been convicted of a domestic violence crime against his wife, who was the petitioner of an immediate relative visa petition filed on his behalf, and that an active order of protection restraining him from having any contact with his wife was in effect. In ***Matter of Alcantara-Perez***, 23 I. & N. Dec. 882 (BIA 2006), the Board held that the new information revealed on remand constituted evidence relevant to his adjustment application; that pursuant to 8 C.F.R. § 1003.47(h), the IJ was permitted to consider the new evidence; and that the IJ may, in his discretion, conduct an additional hearing to consider the new evidence before entering an order granting or denying relief. The Board also held that when a proceeding is remanded for background and security checks, but no new information is presented as a result of those checks, the IJ should enter an order granting relief.

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Recent Federal Court Decisions

FIRST CIRCUIT

■ **First Circuit Finds Lack Of Jurisdiction To Review Denial Of Cancellation Of Removal**

In ***Elysee v. Gonzales***, __F.3d __, 2006 WL 390456 (1st Cir. February 21, 2006) (Selya, *Lynch*, Howard), the First Circuit dismissed the petition for review for lack of jurisdiction. The petitioner, a citizen of Haiti and an LPR since 1987, was place in proceedings on May 16, 2000, because he had been convicted of two or more crimes involving moral turpitude and because he had violated a protection order. At the hearing petitioner applied for cancellation of removal. The IJ denied cancellation as a matter of discretion, due to the recent nature and severity of the petitioner's crimes, his lack of credibility about the underlying incidents, and lack of proof of rehabilitation. The BIA affirmed. The court held that "[c]ancellation of removal is a form of discretionary relief over which we generally have no appellate jurisdiction." The court noted that although the REAL ID Act allows possible review of discretionary determinations like cancellation of removal, a petition for review "must raise at least a colorable constitutional claim or question of law before we will exercise jurisdiction to review such a claim or question." Here, petitioner only attacked the factual findings but did not present a colorable constitutional issue or question of law.

"Cancellation of removal is a form of discretionary relief over which we generally have no appellate jurisdiction."

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■ **Asylum Denied Where Government Rebuts Presumption Of Well-Founded Fear Of Future Persecution**

In ***Waweru v. Gonzales,*** __F.3d__, 2006 WL 321172 (1st Cir. February 13, 2006) (*Boudin*, Selya, Stahl), the First Circuit upheld the BIA's denial of asylum, withholding of removal, and CAT protection to an applicant from Kenya. The applicant alleged persecution from the former Kenyan government and claimed that he had fled that country shortly before the former government lost the general elections to a different political group. The court held that any presumptive well-founded fear of future persecution that the applicant had was rebutted by the changed country conditions. In so holding, the court noted that some of its decisions suggest that changed country conditions cannot suffice without a more particularized showing. and some suggest to the contrary. "The reconciling (and most accurate) proposition is that changed country conditions 'do not automatically trump' the applicant's specific evidence," said the court. As an illustration the court stated that, "the surrender of the British at Yorktown n 1781 did not negate the potential threat to Tories; it probably did as to the Patriots."

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■ **First Circuit Rejects Collateral Attack On Earlier Deportation, Holding That Defendant Failed To Show Prejudice**

In ***United States v. Luna***, __F.3d__, 2006 WL 301083 (1st Cir. February 9, 2006) (*Lipez*, Campbell, Carter), the First Circuit rejected a collateral attack to defendant's prior deportation under INA § 276(d), 8 U.S.C. § 1326(d). The defendant had been last removed from the United States in 1999, following an unsuccessful attempt to get 212(c) relief. Following his third or so illegal reentry,

(Continued on page 8)

Summaries Of Recent Federal Court Decisions

(Continued from page 7)

defendant was indicted for illegally reentering under INA § 276(a) and ((b)(2). He then filed a motion to dismiss collaterally challenging the prior removal order. The district court denied the motion for failure to demonstrate prejudice. On appeal, the First Circuit held that the defendant had failed to show prejudice because it was unlikely that the IJ would have granted his request for discretionary relief under former section 212(c), given his prior criminal record (which included a brutal assault on a young boy), his lack of an employment history, and other factors.

Newly-created evidence regarding pre-existing issues is not "new evidence" that warrants the grant of a motion to reopen.

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■ **First Circuit Affirms BIA Denial Of Motions To Reopen For Consideration Of New Evidence And Claims Of Ineffective Assistance Of Counsel**

In ***Jin Dong Zeng v. Gonzales,*** __F.3d__, 2006 WL 199462 (1st Cir. January 27, 2006) (Boudin, *Stahl*, Lynch), the First Circuit affirmed the BIA's denial of a motion to reopen for consideration of new evidence and a motion to reopen based on ineffective assistance of counsel. The court concluded that the BIA did not abuse its discretion in denying petitioner's motion to reopen asylum proceedings based on ineffective assistance of counsel where counsel offered only unauthenticated documents and failed to present a physician's report that corroborated petitioner's claim that his wife was forcibly sterilized. The court also held that newly-created evidence regarding pre-existing issues is not "new evidence" that warrants the grant of a motion to reopen.

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■ **Asylum Denial Upheld To Applicant From China Who Alleged Forced Sterilization Of His Wife**

In ***Huang v. Gonzales***, __F.3d __, 2006 WL 336216 (1st Cir. February 15, 2006) (Torruella, *Cyr,* Stahl), the First Circuit affirmed the BIA's denial of asylum on the basis of adverse credibility. The applicant initially sought asylum in 1992. His application was denied when he failed to appear at his hearing. In reopened hearings ten years later, he alleged for the first time that his wife had undergone forced sterilization and that he had fled China after a violent confrontation with a government official. The IJ denied the asylum claim based on inconsistent statements that the applicant had made in 1992 and those made in 2002. The BIA AWO'd the IJ's decision. The court determined that the IJ properly relied on the applicant's divergent statements between his past and current persecution claims in determining his testimony to be not credible.

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SECOND CIRCUIT

■ **Second Circuit Rules That Immigration Judge's Errors Were Harmless And Affirms Adverse Credibility Determination**

In ***Singh v. BIA***, __F.3d__, 2006 WL 330306 (2d Cir. February 14, 2006) (Winter, Cabranes, B.D. Parker) (*per curiam*), the court affirmed the BIA's denial of asylum and withholding of removal to an applicant from India. The applicant had testified that he left that country because of abuse by Indian authorities stemming from political activity associated with his Sikh religion. The court held that two errors by the IJ in evaluating the applicant's credibility were insufficient to justify remand because the adverse credibility determination was supported by other grounds that were error-free and would lead to the same result even if the case were remanded.

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■ **General Statements In A State Department Report Are Insufficient To Establish A Prima Facie Showing Of Eligibility For Asylum**

In ***Adjin v. USCIS***. __F.3d__, 2006 WL 305447 (2d Cir. February 9, 2006) (Winter, Cabranes, Sack) (*per curiam*), the Second Circuit affirmed the BIA's denial of a motion to reopen removal proceedings based on changed country conditions. Noting that motions to reopen are disfavored generally, the court determined that general statements in a Department of State country report that describe worsened country conditions are, standing alone, insufficient to establish a prima facie showing of eligibility for asylum.

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■ **Second Circuit Determines That It Lacks Jurisdiction To Review A Discretionary Denial Of A Request For A Waiver Of Inadmissibility**

In ***Saloum v. USCIS***, __F.3d__, 2006 WL 265518 (2d Cir. February 6, 2006) (Cabranes, B.D. Parker, Preska) (*per curiam*), the court held that the REAL ID Act amendments did not override the jurisdiction-denying provisions of the immigration statute where petitioner challenged a purely discretionary determination of the IJ, and did not raise any colorable constitutional claims or questions of law. The petitioner, a citizen of Syria, and an LPR since 1993, had been denied admission at a port of entry when he attempted to smuggle his infant

(Continued on page 9)

Summaries Of Recent Federal Court Decisions

(Continued from page 8)

daughter into the United States. Petitioner subsequently entered the United States but was later placed in proceedings and charged under INA § 212(a)(6)(E)(i) on the basis of his smuggling attempt. Petitioner then sought a discretionary waiver of that charge under INA § 212(d)(11). The IJ denied the waiver based on petitioner's pattern of immigration violations. The BIA summarily affirmed that decision.

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■ **Denial Of Asylum, Withholding Of Removal And CAT Protection Upheld-Notwithstanding IJ's Errors**

The petitioners in ***Qyteza v. Gonzales***, __F.3d__, 2006 WL 242613 (2d Cir. February 2, 2006) (Winter, Cabranes, Parker) (*per curiam*), a husband, his wife, and daughter, sought asylum, withholding, and CAT, claiming persecution in their native country of Albania on the basis of their political opinion. They testified that they had been imprisoned in internment camps until the 1991 collapse of the Communist regime in Albania. They subsequently became active members of the Democratic Party. The principal petitioner stated that his family had been threatened following his written promise to testify that he had witnessed voter intimidation during the October 2000 local elections. The IJ did not find petitioners credible, found no well-founded fear of future persecution given the changed country conditions, and denied CAT protection. The BIA summarily affirmed.

Preliminarily, the Second Circuit stated that when an IJ's decision contains errors, it may nevertheless deem remand futile and deny the petition for review if "(1) substantial evidence supports the error-free findings that the IJ made, (2) those findings adequately support the IJ's ultimate conclusion that petitioner lacked credibility, and (3) despite [the] errors-considered in the context of the IJ's entire analysis-we can state with confidence that the IJ would adhere to his decision were the petition remanded." *Xiao Ji Chen v. U.S. Dept. of Justice*, 434 F.3d 144, 158 (2d Cir. 2006). Here, the court found that the IJ had erred in part of her analysis of petitioner's credibility concerning the story of voter intimidation, but held that remand would be futile because the court was able to "'confidently predict' that the IJ would render the same decision in the absence of error." Accordingly, the court denied the petition for review.

> "Due process does not insulate a petitioner from the consequence of his own dishonest acts."

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■ **Second Circuit Applies "Totality Of The Circumstances" Test To Firm Resettlement Analysis**

In ***Sall v. Gonzales,*** __F.3d__, 2006 WL 258281 (Winter, Cabranes, B.D. Parker)(*per curiam*) (2d Cir. February 3, 2006), the Second Circuit agreed with the other circuits that have concluded that the "totality of the alien's circumstances" test applies to the determination of whether an alien had "firmly resettled" in a third country and hence is ineligible for asylum. In this case, the IJ found that the petitioner, purportedly from Mauritania, had "firmly resettled" in Senegal prior to seeking asylum in the United States due largely to his five-year stay in Senegal.

The Second Circuit remanded the case because the IJ failed to consider the totality of petitioner's circumstances and focused only on the alien's length of stay in Senegal.

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■ **Second Circuit Affirms BIA's Denial Of Alien's Untimely Motion To Reopen Where Alien Failed To Demonstrate Changed Country Conditions**

In ***Chen v. Gonzales***, __F.3d__, 2006 WL 322228 (2d Cir. February 13, 2006) (Newman, Jacobs, Hall) (per curiam), the Second Circuit held that petitioner's untimely filed motion to reopen could not be excused based on changed country conditions, because the information he sought to submit was previously available and because the evidence did not reflect changed conditions in China that would have an impact on his particular situation. The court also concluded that the BIA was not compelled to toll the time limit for asylum application based on ineffective assistance of counsel where the petitioner repeatedly lied. "[D]ue process does not insulate a petitioner from the consequence of his own dishonest acts. Moreover, it is unreasonable to think that an applicant who actually suffered such outrages as a forced abortion or involuntary sterilization would fail to mention it when asked what has driven him to flee his home country."

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■ **Second Circuit Reverses "Safe Haven" Determination And Adverse Credibility Finding**

In ***Tandia v. Gonzales,*** __F.3d__, 2006 WL 280796 (2d Cir. February 7, 2006) (Winter, Cabranes, B.D. Parker) (*per curiam*), the Second Circuit reversed the IJ's determination that an applicant's one-month stay in France after allegedly fleeing Mauritania was sufficient grounds for a discretionary denial of asylum because the alien had found a "safe haven" in a third

(Continued on page 10)

Summaries Of Recent Federal Court Decisions

(Continued from page 9)

country before coming to the United States. The "safe third country" regulation allowing for a discretionary denial of asylum had been repealed three days prior to the IJ's decision. The court also reversed the IJ's adverse credibility finding because it "involved impermissible speculation and conjecture."

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■ **IJ Must Give Asylum Applicant Notice Of Inconsistencies And An Opportunity To Explain Where Inconsistencies Are Not "Dramatically Different"**

In ***Ming Shi Xue v. BIA***, __F.3d__ 2006 WL 391705 (2d Cir. February 21, 2006) (*Calabresi*, Katzmann, Parker), the Second Circuit vacated the BIAs' affirmance of the IJ's adverse credibility determination. The IJ found the applicant not credible because of inconsistencies about his account of the alleged persecution. The court concluded that an IJ has an obligation to bring perceived inconsistencies not based on dramatically different accounts of alleged persecution to the applicant's attention and to allow him the opportunity to explain or reconcile them. This obligation arises from the "affirmative role" the IJ plays "in developing, along with the parties, a complete and accurate record on which to decide an applicant's asylum claims."

The court concluded that an IJ has an obligation to bring perceived inconsistencies not based on dramatically different accounts of alleged persecution to the applicant's attention and to allow him the opportunity to explain or reconcile them.

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■ **Second Circuit Determines That Petitioner Filed Colorable Motion To Reopen And Remands For Further Consideration**

In ***Chen v. Ashcroft***, 436 F.3d 76 (2d Cir. 2006) (McLaughlin, Cabranes, Raggi), the court reversed a BIA decision to dismiss as untimely petitioner's "motion to reconsider or reopen." The BIA had initially dismissed petitioner's appeal because he had not timely filed his brief. Petitioner then filed his motion after the deadline for bringing a motion to reconsider but before the deadline for bringing a motion to reopen. He contended that he had filed his brief via "Express Mail" a day before it was due and that he had no control over any delay caused by the Postal Service. The BIA treated the motion as a motion to reconsider and dismissed it as untimely. The court found that under the regulations, petitioner's motion could reasonably have been deemed – at least in part – as a motion to reopen because he had presented evidence of his efforts to timely file the brief. The court remanded the matter to the BIA to either (1) review the petitioner's motion to reopen on the merits, or (2) determine that, pursuant to regulations, the petitioner's claims may properly be raised only in a motion to reconsider.

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■ **Court Lacks Jurisdiction Over Discretionary Denial Of Cancellation Where Alien Raised No Constitutional Claims**

The Second Circuit has held that the BIA's discretionary determinations concerning whether to grant cancellation of removal and a finding of no "exceptional and extremely unusual hardship" are discretionary judgments that are not subject to judicial review under INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). ***De La Vega v. Gonzales,*** __F.3d__,2006 WL 201497 (2d Cir. January 27, 2006) (Meskill, *Cabranes*, Nevas (D. Conn)).

The petitioner is a Mexican citizen who had illegally entered the U.S. in 1986, and placed in proceedings in 1998. He is married to a citizen of Mexico and has a USC child. The IJ had granted cancellation but, following an appeal by the INS, the BIA reversed finding that the petitioner had not met the hardship requirement.

The court's holding that it lacked jurisdiction is consistent with the holdings of all the circuit courts which have addressed these issues. *See Ekasinta v. Gonzales*, 415 F.3d 1188 (10th Cir. 2005); *Rueda v. Ashcroft*, 380 F.3d 831 (5th Cir. 2004); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003); *Iddir v. INS*, 301 F.3d 492, 497 (7th Cir. 2002); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir.2002); *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331 (11th Cir. 2003).

The court also rejected petitioner's contention that it had jurisdiction to review the denial under section 106 of the REAL ID Act. "Challenges to the exercise of routine discretion by the Attorney General (or the BIA as his designee) do not raise 'constitutional claims or questions of law,'" said the court. Here, the court noted that petitioner had not sought review of any constitutional claims or questions of law.

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THIRD CIRCUIT

■ **Third Circuit Determines That Repeal Of Suspension Of Deportation Does Not Have An Impermissible Retroactive Effect**

The petitioner in ***Hernandez v. Gonzales***, __F.3d__, 2006 WL 330328 (3d Cir. February 14, 2006) (Barry, *Ambro*, Pollak), contended that the repeal of suspension of deportation under the former INA § 244(a) has an impermissible retroactive effect on

(Continued on page 11)

Summaries Of Recent Federal Court Decisions

(Continued from page 10)

aliens like him who pled guilty to a deportable offense and who would have been eligible for suspension of deportation relief but for the repeal.

The petitioner, a citizen of the Dominican Republic, entered the United States as visitor in 1974 and never departed. In 1984 he pled guilty to a controlled substance violation and as a result was sentenced to five years probation. In 1997, petitioner married a USC who filed a visa petition on his behalf. Petitioner then applied for adjustment but did not disclose his prior conviction. The application was denied and petitioner was placed in removal proceedings as an overstay. At the hearing he applied again for adjustment and also cancellation. The IJ denied both reliefs because of the 1984 conviction. Subsequently, the BIA remanded the case to clarify petitioner's identity . The INS then lodged an additional charge based on the 1984 controlled substance conviction. The IJ again determined that petitioner was ineligible for relief due to his conviction of an aggravated felony. The BIA summarily affirmed. Petitioner then filed a habeas petition but the district court dismissed on the basis that petitioner failed to satisfy the relief criteria.

On appeal, the Third Circuit held that under the REAL ID Act and *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005), it had to vacate the district court opinion and address petitioner's claims as if they were presented in the first instance in a petition for review. On the merits, petitioner argued that he had a due process right to a hearing on the merits of his discretionary relief application. The court held that while aliens within the United States may not be deprived of liberty or property without due process, "[a]liens who seek only discretionary relief from deportation have no constitutional right to receive that relief." Accordingly, petitioner was not deprived of a liberty or property interest. The court also rejected petitioner's contention that the repeal of suspension of deportation had an impermissible retroactive effect particularly because he pled guilty to a deportable offense, and became eligible for that form of relief, prior to its repeal. The court distinguished *INS v. St. Cyr*, 533 U.S. 289 (2001), which held that the 1996 repeal of discretionary relief for certain criminal aliens under former INA § 212(c) was impermissibly retroactive.

"Aliens who seek only discretionary relief from deportation have no constitutional right to receive that relief."

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■ **Third Circuit Reverses Denial Of Asylum As Not Supported By Substantial Evidence**

In ***Caushi v. Attorney General,*** __F.3d__, 2006 WL 156829 (3d Cir. January 23, 2006) (Barry, *Ambro*, Pollak (U.S. Dist. Ct. East. Dist. Penn.)), the Third Circuit reversed an IJ's denial of asylum to an applicant from Albania who claimed persecution on account of political opinion. The petitioner claimed that as a member of the youth movement of the Democratic Party of Albania (DP), he had been arrested and beaten by the police on a couple of occasions. He also claimed that his brother-in-law was shot to death in front of a police station following his participation at a DP rally. Petitioner's sister also testified that petitioner and his father were members of the DP and that she was familiar with the story of why his brother had left Albania.

The IJ denied asylum finding that the adverse treatment suffered by the petitioner did not amount to past persecution and that petitioner's sister was not credible. Petitioner appealed to the BIA and subsequently also filed a motion to reopen based the evidence that his sister had been granted asylum. The BIA affirmed the IJ's decision also finding that petitioned had failed to show past persecution and denied the motion because there was no evidence regarding the basis on which his sister had been granted asylum. Petitioner then filed a petition for review. While that petition was pending, he filed another motion to reopen, this time providing additional evidence regarding her sister's grant of asylum. The BIA also denied this motion finding that the evidence petitioner sought to introduce was previously available. Petitioner then filed another petition for review which the court subsequently consolidated it with the first pending petition pursuant to 8 U.S.C. § 1252(b)(6).

In reversing the denial of asylum, the Third Circuit found that the IJ had dismissed or failed to address critical evidence. "[A]n IJ must consider the complete record, analyzing the evidence both pro and con," said the court. In particular the court noted that the IJ's factual discussion omitted evidence which tended to establish past persecution. "The IJ's failure to give specific cogent reasons for rejecting these allegations [of persecution] in light of all the record evidence falls significantly short of the requirement that his factual findings be supported by substantial evidence," concluded the court. The court also found that the IJ's determination that petitioner's sister was not credible was "unsupported by any explanation or citation to specific instances where her testimony was deficient." The court, however, acknowledged that there was some evidence that weighed against petitioner's credibility and that on remand the IJ "must carefully examine the complete record" to determine whether on balance the evidence supports petitioner's eligibility for asylum.

(Continued on page 12)

Summaries Of Recent Federal Court Decisions

(Continued from page 11)

Finally, the court found that the BIA did not abuse its discretion in denying the two motions to finding that the evidence presented was not new and previously unavailable.

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Third Circuit Holds That Use Of Interstate Facilities In The Commission Of A Murder-For-Hire Is A Crime Of Violence Regardless Of Intent

In ***Ng v. Gonzales,*** __F.3d__, 2006 WL 278879 (3d Cir. February 7, 2006) (Barry, Ambro, *Aldisert*), the Third Circuit held that the alien's conviction for use of interstate commerce facilities in the commission of a murder-for-hire was a conviction for a crime of violence, and hence an aggravated felony, even where the putative hit man became a government informant and never intended to nor attempted to follow through with the scheme. Using the "formal categorical approach," which looked only to the elements of the statute, the court reasoned that the intent of the putative hit man was irrelevant and concluded that the offense was a crime of violence under 8 U.S.C. § 16(b) because it posed a "substantial risk that physical force will be used against another," even if "some violations . . . will never culminate in an actual agreement or the commission of a murder."

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FOURTH CIRCUIT

■ **Court Lacks Jurisdiction To Review Denial Of Motion To Reconsider Discretionary Denial of 212(h) But Finds Jurisdiction To Review Denial of Cancellation Based On Good Moral Character**

In ***Jean v. Gonzales***, 435 F.3d 475 (4th Cir. 2006) (Wilkinson, Williams, *Traxler*), the Fourth Circuit held that it lacked jurisdiction to review a denial of a motion to reconsider a denial of a waiver of inadmissibility under INA § 212(h). The petitioner, a citizen of Haiti, was placed in proceedings in 1987 as an alien present in the United States without being admitted or paroled. The petitioner originally applied for cancellation of removal, but following the enactment of Haitian Refugee Immigration Fairness Act (HRIFA), she also applied for adjustment under HRIFA. However, because petitioner had been convicted of a crime involving moral turpitude, thus rendering her inadmissible and ineligible under HRIFA, she also applied for a 212(h) waiver.

> The "good moral character" determination under INA § 101(f), 8 U.S.C. § 1101(f), is "essentially a legal determination involving the application of law to factual findings."

An IJ denied cancellation because petitioner had given false testimony to obtain an immigration benefit, thus lacking good moral character, and alternatively because she had failed to meet the hardship requirement. The IJ denied the 212(h) waiver in the exercise of discretion. The BIA affirmed both decisions. Petitioner did not seek judicial review of the BIA decision. Instead, she filed a motion to reconsider The BIA denied the motion, finding that petitioner had essentially restated the argument in her original appeal.

The Fourth Circuit first held that it lacked jurisdiction to review the denial of the 212(h) waiver. When the BIA refuses to reconsider the discretionary denial of relief under one of the provisions enumerated in § 1252 (a)(2)(B) - a decision which is not subject to review in the first place - the court will not have jurisdiction to review that same denial merely because it is dressed as a motion to reconsider," held the court. Second, the court found that it had jurisdiction to review the denial of cancellation because it was not based on a discretionary decision. The court reasoned that the "good moral character" determination under INA § 101(f), 8 U.S.C. § 1101(f), is "essentially a legal determination involving the application of law to factual findings." Here, the court concluded that the BIA's observation that it had "found no new legal argument or particular aspect of the case which was overlooked" constituted a rational and permissible basis for denying reconsideration. Finally, the court held that the BIA had properly denied the motion to reconsider its affirmance of the IJ's denial of a continuance.

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FIFTH CIRCUIT

■ **IJ Did Not Abuse His Discretion In Denying Alien's Eighth Request For A Continuance To Pursue Labor Certification**

In ***Ali v. Gonzales***, __ F.3d__, 2006 WL 337456 (5th Cir. February 15, 2006) (Higginbotham, Benavides, Dennis) *(per curiam)*, the Fifth Circuit determined that the IJ did not abuse his discretion in denying petitioner's eighth request for a continuance to pursue a labor certification. The petitioner, a Pakistani national, was placed in removal proceedings as an overstay following his registration under the National Security Entry/Exit Registration System (NSEER).

Preliminarily, the court noted that it has repeatedly held that in claims relating to labor certification, "to show a cause for continuance an alien must, at a minimum, 'make some showing before the IJ' that the application was filed on or before April 30, 2001." The court also rejected

(Continued on page 13)

Summaries Of Recent Federal Court Decisions

(Continued from page 12)

petitioner's claim that any evidence obtained through NSEER should have been suppressed. The court held that, even if NSEER is a violation of equal protection, "the exclusionary rule does not ordinarily apply to removal proceedings," and that petitioner failed to demonstrate prejudice because he admitted his removability before the IJ.

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■ **Fifth Circuit Holds That Petitioner Cannot Collaterally Challenge Prior Removal Order Because He Failed To Show A Gross Miscarriage Of Justice**

In ***Ramirez-Molina v. Gonzales,*** __F.3d__, 2006 WL 62862) (5th Cir. January 12, 2006) (Garwood, *Smith,* DeMoss), the Fifth Circuit held that lacked jurisdiction to review the alien's statutory challenge to his previously-executed removal order. The petitioner, an LPR since 1991 was removed from the United States in 1999 on the basis of a conviction for DWI. Two weeks after his removal, petitioner reentered illegally. Subsequently, the INS reinstated the prior order of removal. Petitioner then brought an habeas corpus action challenging the reinstatement on due process grounds, in light of *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001), where the court held that a conviction for DWI was not an aggravated felony. The district court granted habeas relief finding that *Chapa-Garza* applied retroactively. The government appealed.

The Fifth Circuit first held that, under the REAL ID Act, the habeas appeal would be converted into a petition for review and consequently the district court's finding of jurisdiction was reversed. Second, the court noted that under the REAL ID Act it had jurisdiction to review constitutional and legal claims regarding removal orders even where the Act renders an order unreviewable. However, the court found that "the REAL ID Act does not, however, foreclose the applicability of two other jurisdictional barriers: the requirement that administrative remedies be exhausted before an alien seeks judicial review of a removal order and the fact that the initial removal proceedings must constitute a gross miscarriage of justice for this court to entertain a collateral attack on a removal order."

Here the court found that petitioner was collaterally attacking the 1999 order and consequently had to establish a gross miscarriage of justice in that initial proceeding. *Lara v. Trominski*, 216 F.3d 487 (5th Cir. 2000). The court, while noting that it had not developed a precise standard for what constituted a gross miscarriage of justice, stated that in this case there was none because petitioner had failed to contest his removability.

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■ **Fifth Circuit Determines That Immigration Judge Mischaracterized Hearing As *In Absentia***

In ***Williams-Igwonobe v. Gonzales,*** __F.3d__, 2006 WL 147415 (5th Cir. January 20, 2006) (*Benavides*, Reavley, Garza), the court found that an IJ improperly denied petitioner's motion to reopen proceedings to challenge an order of removal entered in absentia, because the IJ deemed petitioner's application for relief to have been abandoned. The court held that, where the merits of the application were not considered but rather considered abandoned, no "in absentia hearing" was held, and thus, the rule that in absentia determinations may only be reopened upon a showing of "reasonable cause" was inapplicable. Because this error was not harmless, the court granted the petition and remanded the case to the BIA.

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SIXTH CIRCUIT

A motion to reopen for consideration of an independent asylum application based upon the divorce of a derivative applicant must be filed within 90 days of the final administrative decision.

■ **A Derivative Asylum Beneficiary Who Divorces Has Ninety Days After BIA Decision To Request Reopening For Consideration Of Independent Asylum Application**

In ***Haddad v. Gonzales***, --- F.3d ---, 2006 WL 300438 (6th Cir. February 9, 2006) (*Moore*, McKeage and Polster (N.D. Ohio, by designation)), the Sixth Circuit upheld the BIA's denial of petitioner's motion to reopen as untimely. Petitioner sought to reopen the denial of her derivative asylum claim to request consideration of her independent application for asylum. The motion to reopen, however, was filed nineteen months after the BIA decision on the derivative asylum claim. The court determined that a motion to reopen for consideration of an independent asylum application based upon the divorce of a derivative applicant must be filed within 90 days of the final administrative decision.

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■ **Sixth Circuit Holds That It Has Jurisdiction To Review Denial Of Continuance But Finds That IJ Properly Exercised Her Discretion**

In ***Abu-Khaliel v. Gonzales***, __F.3d__, 2006 WL 229513 (6th Cir. Feb. 1, 2006), (Keith, *Kennedy*, Batchelder), the Sixth Circuit held that it had jurisdiction to review an IJ's denial of a continuance. The peti-

(Continued on page 14)

Summaries Of Recent Federal Court Decisions

(Continued from page 13)

tioner, a native of Israel and a citizen of Jordan, entered the U.S. as a non-immigrant visitor for pleasure on September 20, 1995, but did not depart when his visa expired. Instead, in January 1997 he married a USC. In April 1997, petitioner was convicted of five counts of criminal simulation in violation of Ohio state law. As a result, the INS commenced removal proceedings against the petitioner because he had overstayed his visa and had been convicted of crimes involving moral turpitude. Petitioner admitted that he was an overstay, but sought and was granted a continuance based on a pending I-130 visa petition filed by his wife. Subsequently, the hearing was continued for a second time to permit petitioner to obtain a labor certification which never materialized. Five days before his May 2, 2003 hearing, petitioner finalized a divorce from his first wife, and married a second USC who dutifully filed an I-130 visa petition. The IJ found denied petitioner's request for a third continuance, found him removable as an overstay, and denied voluntary departure. Subsequently, the BIA affirmed the IJ's decision and denied petitioner's motion to remand.

On appeal, the government contested the court's jurisdiction over petitioner's claims. The court held that under INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i), it lacked jurisdiction to review the IJ's denial of voluntary departure. However, the court found that it could review a denial of a motion to remand relying on *Pilica v. Ashcroft*, 388 F.3d 941 (6th Cir. 2004), where it had held that it had jurisdiction to review a denial of a motion to reopen that did not involve consideration of relief on the merits. Finally, after a thorough analysis on the conflicting federal circuits case law, the court held that it had jurisdiction to review an IJ's denial of a continuance based on the plain language of INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). The court reasoned that Congress gave to immigration judges, and not the Attorney General, the authority to conduct removal proceedings and implicitly authority grant/deny continuances. "[W]e do not believe that an IJ and the Attorney General are the same when the IJ is carrying out duties conferred by statute as opposed to when the IJ is performing duties delegated by the Attorney General," said the court. Therefore, the court concluded that the IJ's authority over continuances is not covered by the jurisdictional bar over matters specified by the statute to be within the Attorney General's discretionary authority.

> "We do not believe that an IJ and the Attorney General are the same when the IJ is carrying out duties conferred by statute as opposed to when the IJ is performing duties delegated by the Attorney General."

On the merits, the court found that the IJ properly exercised her discretion to deny petitioner's motion for a continuance on the basis of the length of the prior continuances and because he had violated the laws of the United States. Similarly, the court found that the BIA did not abuse it discretion in denying the motion to remand, even though it found that its explanation was "vague."

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SEVENTH CIRCUIT

■ **Court Lacks Jurisdiction Over The Denial Of A Motion To Reopen Proceedings Where It Lacks Jurisdiction Over The Underlying Claim**

In ***Martinez-Maldonado v. Gonzales,*** __F.3d__, 2006 WL 307209 (7th Cir. February 10, 2006) (*Cudahy*, Ripple, Kanne), the Seventh Circuit, dismissed two consolidated petitions for review for lack of jurisdiction. The court held that under INA § 242(a)(2)(B)(I) it lacked jurisdiction over the discretionary denial of cancellation of removal. Consequently, it also held that where the court lacks jurisdiction to review the underlying order, it also lacks jurisdiction over motions to reopen and reconsider arising out of that order. Similarly, the court rejected petitioner's contention that it could review the BIA's decision to affirm without opinion the IJ's order. "Because we lack jurisdiction to review the IJ's decision on the merits of the hardship claim, we necessarily lack jurisdiction to review the BIA's decision to affirm without opinion, " said the court.

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■ **An Alien's Guilty Plea And Admission Of Loss Are Sufficient Evidence To Determine That Conviction Constitutes An Aggravated Felony**

In ***Iysheh v. Gonzales***, __F.3d__2006 WL 230735 (7th Cir. February 1, 2006) (Easterbrook, *Evans*, Williams), the Seventh Circuit dismissed the petition for review for lack of jurisdiction after determining that the evidence supported a finding that the alien was convicted of an aggravated felony. The petitioner, an LPR since 1987 and a native of Jordan, was involved in a conspiracy to sell automobiles that had been bought with bad checks at an auto auction. Following his conviction Petitioner was placed in removal proceedings and ordered removed for having been convicted of an aggravated felony. On appeal petitioner claimed that he had not been convicted of an aggravated felony.

Preliminarily, the court rejected the government's contention that it lacked jurisdiction, finding that under

(Continued on page 15)

Summaries Of Recent Federal Court Decisions

(Continued from page 14)

the REAL ID Act, petitioner had raised a question of law. The court then found that the record of conviction clearly showed that the petitioner had pled guilty to the entirety of count one of the indictment, a count of defrauding a financial institution. Petitioner, in his plea agreement had admitted that the amount of loss involved exceeded $10,000. Consequently, the court held that the BIA properly determined that petitioner had been convicted of an aggravated felony, to wit, an offense involving fraud causing a loss greater than $10,000.

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■ **Seventh Circuit Holds That Divorced Man Qualifies For Asylum Based On An Abortion Performed On His Former Wife During The Marriage**

In ***Zhang v. Gonzales***, 434 F.3d 993 (7th Cir. 206) (Manion, *Rovner*, Williams), the court reversed an adverse credibility finding in an asylum case involving a male applicant from the PRC who claims opposition to the Chinese birth control policy. The petitioner sought to enter the United State in 1995 with a fraudulent passport. When placed in exclusion proceedings he applied for asylum based on the abortion his underage wife was forced to undergo pursuant to the PRC's coercive population control policy. The IJ found petitioner credible but denied asylum under Matter of Chang, 20 I&N Dec. 38 (BIA). Subsequently, following the amendment to the refugee definition to include forced abortion or involuntary sterilization as a ground of persecution, the BIA reopened and remanded petitioner's case. Another IJ conducted a new hearing and disbelieved, *inter alia*, petitioner's testimony that he was married and that his wife had been subject to a forcible abortion, because of a lack of corroborating evidence. Accordingly, the IJ denied asylum and alternatively determined that petitioner did not merit asylum as a matter of discretion based partly on the use of the use of the fraudulent passport.

"Persons who have suffered involuntary sterilization have a well-founded fear of future persecution because they will be persecuted for the remainder of their lives due to that sterilization."

Preliminarily, the court held that the law of the case doctrine applies in immigration proceedings and that the IJ had based his ruling on an issue unrelated to the remand order. "The IJ's mere difference of opinion regarding credibility is not enough to overcome law of the case concerns, and the prior determinations should have been given deference," said the court. Additionally, the court found that the IJ's adverse credibility determinations were "unsupportable." The court explained that under the REAL ID Act an IJ's determination concerning corroborating evidence is due deference. However, a precondition to deference is that the IJ explain why corroborating evidence would have been available to the alien. The court found that the IJ's determination that an affidavit from petitioner's former wife was available was not supported by the record. Nor was there record support for the availability of corroborating evidence regarding the former wife's forced abortion.

On the merits, the court held, following BIA precedents, that "persons who have suffered involuntary sterilization have a well-founded fear of future persecution because they will be persecuted for the remainder of their lives due to that sterilization." The court explained that "in addition to being permanently denied the existence of that son or daughter with his wife, [petitioner] remains subject to the same population control measures. That his wife has remarried does nothing to eliminate that risk. There is nothing in this record to indicate that [petitioner] has no desire to marry and have children, or that he now agrees with China's population control measures. He is still subject to all of China's population control measures, including the ban on underage marriages and early births, which are still problematic if he marries a woman under that age limit." Accordingly, the court held that petitioner had been subject to past persecution and that the government had failed to rebut the presumption of a well-founded fear of future persecution as a matter of law. The court granted withholding and remanded to the BIA to exercise his discretion whether to grant asylum.

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■ **Denial Of Motion To Reopen Upheld In Chinese Family Planning Case Because Evidence Was Previously Available**

In ***Lin v. Gonzales***, __F.3d__, 2006 WL 156739), (Posner, Coffey, *Kanne)* (7th Cir. January 23, 2006), the Seventh Circuit ruled that because petitioner did not appeal the order of removal and denial of asylum, she could not challenge that decision when seeking review of the denial of her motion to reopen. Petitioner was placed in removal proceeding in September 2000, when she sought to enter the United States without travel documents. A year later, petitioner gave birth to a child and as a result claimed that she would be subject to persecution if returned to China. The IJ denied the asylum request on credibility grounds and the BIA affirmed that decision. Petitioner did not seek judicial review, choosing instead to file a motion to reopen based on an expert's affidavit suggesting that re-

(Continued on page 16)

Summaries Of Recent Federal Court Decisions

(Continued from page 15)

turning Chinese citizens with U.S.-born children were not exempt from China's one-child, family planning policy. The BIA denied the motion because she had explained why the affidavit could not have been offered earlier.

The alien submitted as new evidence a second affidavit from Aird relating to Chinese family planning policies and Chinese citizens who have children abroad. The court found that the affidavit from John Aird, the expert, dated prior to the BIA's decision, relied on information that was available and reasonably discoverable at the time of the removal hearing and certainly by the time the BIA rendered its final decision. Because petitioner gave no reason for the delay in submitting Aird's affidavit, the court ruled that the BIA acted within its discretion in denying the motion to reopen.

Because petitioner gave no reason for the delay in submitting Aird's affidavit, the court ruled that the BIA acted within its discretion in denying the motion to reopen.

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■ **Seventh Circuit Reverses Adverse Credibility Finding And Declines To Fault Albanian For Producing Unreliable Corroborating Documents**

In ***Gjerazi v. Gonzales***, 435 F.3d 800 (7th Cir. 2006) (*Coffey*, Ripple, Kanne) the Seventh Circuit, found that the IJ's conclusion that petitioners' experiences in Albania were unrelated to a statutorily protected ground was not supported by substantial evidence. The principal petitioner claimed persecution because of his active membership in the Democratic Party and his election as the secretary of that party in the Albanian city of Fier. The IJ did not believe petitioner's testimony because of his finding that the corroborating documentary evidence was fabricated. The IJ also disbelieved that the kidnapping of petitioner's son was politically motivated. Instead the IJ concluded that the attacks were motivated by financial gain because petitioner owned a family store.

The court rejected the adverse credibility finding, and specifically rejected the conclusion that the principal petitioner's unreliable corroborating documents cast doubt on his credibility. The court remanded to the BIA for further proceedings consistent with its opinion, and suggested that the BIA consider assigning the matter to another immigration judge on remand.

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EIGHTH CIRCUIT

■ **Denial Of Application For Cancellation Of Removal Affirmed Where Petitioner Was Convicted Of A Drug Offense**

In ***Tostado v. Carlson,*** __F.3d__, 2006 WL 250257 (*Smith*, Heaney, Benton) (8th Cir. February 3, 2006), the Eighth Circuit affirmed the BIA's denial of an application for cancellation of removal and the district court's denial of the alien's habeas petition. The petitioner was convicted in Illinois state court for unlawful possession of cocaine and unlawful possession of cannabis. The BIA upheld the IJ's finding of removability as an aggravated felon (even though his crime would have been a misdemeanor if prosecuted under federal law) and denial of cancellation of removal. The day before his removal, the petitioner filed a habeas petition in district court. The district court denied the petition because petitioner's offense was an aggravated felony. The Eighth Circuit affirmed both the BIA's order and the district court's denial of the habeas petition based on its recent holding in *Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005) (a state felony possession offense that would be a federal misdemeanor is an aggravated felony), and its holding in *United States v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997).

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■ **Eighth Circuit Reverses Itself On Panel Rehearing And Affirms In Absentia Removal Order**

In ***Dominguez-Capistran v. Gonzales***, __3d__, 2006 WL 408059) (8th Cir. February 23, 2006) (*Bye*, Melloy, Heaney concurring), the Eighth Circuit affirmed the decision of the BIA, which held that the alien had not shown "exceptional circumstances" which would warrant rescinding her in absentia removal order. The petitioner asserted that she had not received proper notice of her hearing, in part because her counsel's office failed to remind her of the date. Initially, the court remanded to the BIA, directing it to permit petitioner to present her cancellation claim. On panel rehearing, the court affirmed the BIA's decision, but, at the government's suggestion, stayed the removal order for 90 days to allow the alien to seek new counsel and file a motion to reopen based on ineffective assistance.

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■ **Reinstatement Of Prior Removal Order Upheld Against Alien Who Challenged Identity Finding**

In ***Ochoa-Carrillo v. Gonzales,*** __F.3d__, 2006 WL 335457 (8th Cir. February 15, 2006) (*Loken*, Gruender, Benton), the Eighth Circuit affirmed ICE's decision to reinstate a prior order of removal under INA § 241(a)(5). The petitioner, following her marriage

(Continued on page 17)

Summaries Of Recent Federal Court Decisions

(Continued from page 16)

to a USC, applied for adjustment of status. Her application was denied because when her fingerprints were checked the FBI determined that they matched those of an alien identified as Ivette Tevizo-Frias, who had made a false claim to U.S. citizenship and had been summarily removed in 1998. Subsequently, when petitioner sought to renew her employment authorization, she was detained and served with a Notice of Reinstatement, and ultimately the order of removal was reinstated.

On appeal petitioner challenged reinstatement on grounds of identity, arguing that she was not the individual who had previously been removed. The court concluded that the alien had failed to challenge her identity when given an opportunity to do so prior to reinstatement of the previous order, and that substantial evidence supported the holding that she had been previously removed. The court also rejected petitioner's contention that under the INA she was entitled to a hearing before an IJ. The court also found that the implementing reinstatement regulation, 8 C.F.R. § 241.8, "is a valid interpretation of the Immigration and Nationality Act." Finally, the court rejected a due process challenge to the reinstatement procedures finding that petitioner had been given the opportunity to examine the relevant records and contest the identity issue. Additionally, petitioner failed to show any prejudice.

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■ **Eighth Circuit Upholds Denial Of Asylum But Reverses Determination On Crime Involving Moral Turpitude**

In ***Reyes-Morales v. Gonzales***, 435 F.3d 937 (8th Cir. 2006) (Wollman, *Lay*, Melloy), the Eighth Circuit) found the denial of asylum supported by substantial evidence but remanded the case for consideration of petitioner's application for suspension of deportation. The court upheld the IJ's finding that petitioner did not have a well-founded fear of future persecution despite past persecution stemming from tensions between El Salvador's military and guerilla fighters during the civil war, and held that the IJ's failure to expressly consider petitioner's eligibility for asylum based on the severity of his past persecution was harmless since the BIA addressed that claim. Nevertheless, the court concluded that petitioner's conviction for making harassing telephone calls was not a crime involving moral turpitude and should not bar him from relief under NACARA, because the statute lacked the necessary *mens rea* requirement.

> Petitioner's conviction for making harassing telephone calls was not a crime involving moral turpitude, because the statute lacked the necessary *mens rea* requirement.

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■ **Eighth Circuit Declines To Consider Challenges To Denial Of Adjustment Of Status Based On Finding That Mauritanian Had Made Frivolous Asylum Request**

In ***Frango v. Gonzales,*** __F.3d__, 2006 WL 287957 (8th Cir. February 8, 2006) (*Arnold*, Bowman, Murphy), the Eighth Circuit held that petitioner had failed to exhaust his contentions that the law-of-the-case doctrine and Due Process prevented the IJ from denying his adjustment application based on a prior finding that the alien had made a frivolous request for asylum. While petitioner's appeal of the asylum denial was pending before the BIA, petitioner became the beneficiary of a visa petition, and successfully moved to remand the case for consideration of his request for adjustment of status, but he did not present his contentions during the proceeding on remand.

The court based its holding on the prudential exhaustion doctrine. "Even though we would not defer to the BIA were these matters of law properly before us, . . . presenting these issues first to the BIA would have served 'very practical notions of judicial efficiency,' and the exhaustion requirement serves to preserve the autonomy and effectiveness of federal agencies," said the court.

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■ **Petitioner Failed To Raise Reviewable Constitutional Challenge To Agency's Discretionary Denial Of Cancellation Of Removal**

In ***Meraz-Reyes v. Gonzales,*** __F.3d__, 2006 WL 229910 (8th Cir. February 1, 2006) (Melloy, Colloton, Benton) (*per curiam*), the court found that it lacked jurisdiction to review a denial of cancellation of removal to a Mexican citizen based on a finding of no "extraordinary and extremely unusual hardship" to his eight-year-old, United States-citizen child. The court rejected the petitioner's argument that the court could review substantial constitutional challenges to the INA, noting that he did "not argue that the BIA failed to recognize its discretionary authority or that the BIA relied upon an unconstitutional, discriminatory factor when exercising its discretion." "'A petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb,'" said the court, quoting *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001)).

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(Continued on page 18)

Summaries Of Recent Federal Court Decisions

NINTH CIRCUIT

■ **Ninth Circuit Reverses Adverse Credibility Determination, Grants Withholding And Remands For Asylum Determination Of Chinese Applicant Who Brought Falun Gong Articles To Friend In China**

In ***Zhou v. Gonzales***, __F.3d__, 2006 WL 278903 (9th Cir. February 7, 2006) (B. Fletcher, Bea, *Thompson*), the Ninth Circuit reversed the IJ's adverse credibility finding and held that petitioner's fear of arrest and punishment in China was subjectively genuine and objectively reasonable. The court found that the evidence compelled a finding that the treatment petitioner feared constitutes persecution even though she is not a member of Falun Gong but brought newspaper articles pertaining to Falun Gong into China for a friend who was a Falun Gong member. The court determined that the evidence established that the arrest and punishment she feared was on account of an anti-governmental political opinion imputed to her by the Chinese government. The court found her ineligible for CAT protection.

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ELEVENTH CIRCUIT

■ **Second-Degree Arson Under Florida Law Is A Crime Involving Moral Turpitude**

In ***Vuksanovic v. U.S. Attorney General***, __F.3d__, 2006 WL 358659 (11th Cir. Feb 17, 2006)(Black, Hull, Farris) (*per curiam*), the court dismissed for lack of jurisdiction an IJ's determination that petitioner's conviction for second-degree arson was a crime involving moral turpitude. The petitioner is a citizen of the former Yugoslavia who entered the U.S. as a visitor in 1989 but overstayed his visa. In 2002 petitioner was denied asylum by an Asylum Officer. When placed in proceedings he applied for special rule cancellation under NACARA. The IJ found that petitioner was ineligible because of his commission of a crime involving moral turpitude, because he lacked good moral character, and for failure to show extreme hardship. Petitioner appealed the moral turpitude finding to the BIA. The BIA AWO'd.

Applying the categorical approach, the Eleventh Circuit held that a second-degree arson conviction in violation of § 806.01(2), Florida Statutes is a crime involving moral turpitude. Consequently, because petitioner raised no substantial constitutional question, the court found that under INA §242(a)(2)(C) it lacked jurisdiction to review the petition.

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■ **Eleventh Circuit Rejects Challenges To Reinstatement Procedures**

In ***Guijosa De Sandoval v. Attorney General***, __F.3d__, 2006 WL 452600 (11th Cir. Feb. 27, 2006), the Eleventh Circuit rejected petitioner's arguments raising four issues of first impression in the circuit. The court held that the Attorney General did not exceed his authority in promulgating 8 C.F.R. § 241.8, which empowers an immigration officer, rather than an immigration judge, to reinstate the previous removal order of an alien who illegally reenters the United States; (2) § 1231(a)(5) is not impermissibly retroactive as applied to her, because she illegally reentered the United States after that statute took effect; (3) she is subject to § 1231(a)(5) despite her assertion that it conflicts with and was superseded by § 1255(i); and (4) 8 C.F.R. § 241.8 does not violates her procedural due process rights.

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FORCED MARRIAGE

(Continued from page 2)

property. The law does not distinguish between single persecutors and mobs, provided that the persecution is based on a specified ground and that the government is unable or unwilling to protect the victim(s)."

Third, the court held that the IJ's finding that petitioner did not establish that the Chinese government would not protect her was without "substantial basis." The court noted that the State Department Country Report indicates that in China trafficking in women, for marriage and prostitution, is widespread, and that official efforts to combat the problem have been hampered by corruption and by active resistance by village leaders. Additionally, said the court, petitioner's boyfriend had threatened to have his uncle, a powerful government official, arrest petitioner and there was no evidence that the local officials in petitioner's village would protect her.

Finally, the court held that the IJ's finding that petitioner could relocate within another city is China was contradicted by the record because petitioned moved from her village but was discovered by the boyfriend. However, the court declined to make a finding on this issue remanding to the BIA to apply the language under 8 C.F.R. §208.13(b)(2)(ii), to determine whether considering all the circumstances it would be reasonable to require petitioner to relocate to another part of China. The court also remanded the CAT claim since it had not been addressed by neither the IJ nor the BIA.

By Francesco Isgro, OIL

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Contributions To The ILB Are Welcomed!

DHS CAN RELITIGATE ALIENAGE ISSUE

(Continued from page 1)

1995 and 2001, the petitioner was convicted of felony retail theft. The INS again sought her removal as an alien convicted of an aggravated felony and of crimes involving moral turpitude. The IJ initially collaterally estopped the INS and terminated the proceedings based on the prior determination of insufficient evidence of alienage. However, following the BIA's reversal and remand, the IJ found petitioner deportable as charged. Petitioner then filed a habeas corpus petition renewing her argument that INS was collaterally estopped from raising the alienage issue. The district court granted the writ in September 2004, and the government appealed.

Preliminarily, the court converted, under the REAL ID Act, the habeas corpus appeal to a petition for review, and thus vacated the district court's decision. On the merits, the court found that because the judge-made doctrine of collateral estoppel is a well-established common-law adjudicatory principle, Congress is presumed to have intended its application in removal proceedings in the absence of any contrary indication in the INA. Additionally, the court noted that the BIA has applied the doctrine in immigration proceedings. *See Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984). The court rejected the government's contention that collateral estoppel should bar the relitigation of an issue only in subsequent proceedings in the federal courts, not in proceedings within the agency itself. The court explained that the doctrine has long been understood to apply in "adjudicative" proceedings and that the adversarial system of dispute resolution under the INA is "plainly adjudicatory in character and susceptible to full application of common law principles of preclusion."

In this case, the court held that while the doctrine would normally preclude relitigation of the petitioner's alienage, her subsequent convictions for new crimes permitted the government to bring new removal proceedings because precluding those proceedings would run contrary to Congress's intent that aliens convicted of serious crimes should be removed from the country. "Legislative policy dictates that the bar against relitigation must drop when the alien continues to commit criminal acts after initial immigration proceedings," said the court.

By Francesco Isgro

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IMMIGRATION LITIGATION CONFERENCE

(Continued from page 1)

federal courts' response to their increased caseload. The conference will present various panels to address topics of current interest, including litigation under the REAL ID Act, credibility determinations in asylum cases, the detention and removal of criminal aliens, litigation of national security cases, and relief under the Convention Against Torture.

Speakers will include senior officials from Department of Justice, the Executive Office for Immigration Review, the Board of Immigration Appeals, and officials from the various components of the Department of Homeland Security. The preliminary agenda will be posted on the OIL web sites (http://10.173.2.12/civil/MiniOLIV and https://oil.aspensys.com/) and will be updated regularly.

Registration procedures will be shortly announced by the Office of Legal Education (OLE). Unlike prior years, participants will be asked to register directly with OLE through the JUSTLearn system.

Questions regarding the conference agenda should be directed to Francesco Isgro, at francesco.isgro@usdoj.gov. All other questions should be directed to Tami Buckingham, Program Manager (OLE) at Tami.Buckingham@usdoj.com.

INDEX TO CASES SUMMARIZED IN THIS ISSUE

INDEX TO FEDERAL COURTS*

*See p. 19 for the Cases Index

OF NOTE

■OIL is now uploading immigration briefs into the DOJ private database in WESTLAW called "DOJBRIEFS." As this project continues, DOJ attorneys will be able to search in WESTLAW for the most current briefs on a point of immigration law using the same search they use to find case law simply by changing the database.

■The Supreme Court will hear argument *in Fernandez-Vargas v. Gonzales* on March 22, addressing a conflict among the circuits on the issue of whether INA § 241(a)(5) , which provides for the reinstatement of a previous order of removal against an alien who has illegally re-entered the United States, applies to an alien whose illegal re-entry predated the effective date of the provision.

INSIDE OIL

A warm welcome to the following two new OIL Attorneys:

Siu Wong received her B.A. in Chinese Literature from George Washington University and her J.D. from University of Minnesota. Hired under DOJ's Honor Program, she was an INS Trial Attorney at the Los Angeles, Arlington, and Baltimore Districts. She then joined the U.S. Attorney's Office for D.C. as a criminal prosecutor.

Sarah Maloney is a graduate of Temple University, in Philadelphia, and the Georgetown University Law Center where she earned a J.D. and an L.L.M. in International and Comparative Law. Prior to joining OIL she was an Attorney-Advisor with the Board of Immigration Appeals.

OIL also welcomes two new paralegals, **Michelle Alameda** and **Juliet Mazer-Schmidt**.

Sarah Maloney and Sieu Wong

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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