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Immigration Litigation Bulletin

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SUPREME COURT DECISION LIMITS POST-ORDER DETENTION OF UNADMITTED ALIENS

On January 12, the Supreme Court handed down its order in *Clark, et al. v. Suarez-Martinez*, — U.S. —, 2005 WL 50099 (2005), which was consolidated on certiorari with the petition in *Benitez v. Rozos*, No. 03-7434. In a 7-2 decision, the Court affirmed the judgment of the Ninth Circuit in *Clark*, and reversed the Eleventh Circuit's order in *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003) (*per curiam*), *cert. granted*, _ U.S. _, 124 S.Ct. 1143 (2004). The majority opinion, delivered by Justice Scalia, extended the Court's holding in *Zadvydas v. Davis*, 533 U.S. 678 (2001), to inadmissible aliens. Justice O'Connor filed a separate concurring opinion, and Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist joined in part.

Supreme Court holds that § 1231(a)(6) can have only one meaning.

The issue in *Suarez Martinez* involves the authority to detain inadmissible aliens with final orders of removal after the statutory removal period has expired when their own country, and other countries, refuse to accept them. The two aliens before the Court were both criminal aliens, inadmissible Mariel Cubans, whose parole was revoked because of their criminal convictions in this country for theft, weapons offenses, and crimes against other persons. Specifically, the Court addressed whether its previous holding in *Zadvydas*, 533 U.S. at 696-99, construing section 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6) (2000), applied to both admitted and unadmitted aliens. Section 1231 was enacted by Congress in 1996 as section 305(a) of the Illegal Immigration Reform and Immigrant Responsibility Act. Section 1231(a)(6) authorizes the Secretary of Homeland Security to detain inadmissible aliens, certain deportable aliens, and aliens who are a danger to the community or flight risk, beyond the 90-day removal period established by § 1231(a)(1)(A). The text of the statute at § 1231(a)(6) imposes no limit on the duration of post-order detention, but provides that the described classes of aliens "may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in [§ 1231(a)(3)]."

In *Zadvydas*, the Supreme Court closely divided over the government's authority to detain deportable criminal aliens who cannot be promptly removed to their own country or a third country. The majority opinion in *Zadvydas* questioned but did not decide whether the indefinite detention of admitted aliens (in that case, former lawful permanent

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US WINS SOMALI REMOVAL CASE

On January 12, 2005, the Supreme Court brought to an end a debate over the government's authority to remove aliens to a country that is unwilling or unable to provide its consent to the alien's return. In *Jama v. Immigration and Customs Enforcement*, — U.S. —, 2005 WL 49257 (U.S.) (No. 03-674), the Supreme Court held that 8 U.S.C. § 1231(b)(2)(E)(iv) did not require the United States to obtain explicit, advance assent to an alien's return, where the destination country lacks a functioning government to provide or withhold approval of the alien's return. Therefore, the Supreme Court affirmed the Eighth Circuit's decision that Keyse Jama could be removed to Somalia, despite the absence of a central, functioning government in that country. The Supreme Court's holding is grounded in the plain language of the statute, the structure of the statute, the Supreme Court's customary policy of deference towards the Executive Branch in matters of foreign affairs, and a concern that if it adopted Jama's interpretation of the statute, aliens who could not be removed would some day be entitled to release from detention under the Court's decisions in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark, et al v. Suarez Martinez*, — U.S. —, 2005 WL 50099. In addition, the Court rejected Jama's claim that an acceptance require-

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Highlights Inside

Supreme Court Limits Post-Order Detention of Unadmitted Aliens

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resident aliens) violated the Constitution. Instead, it found that § 1231(a)(6) was not conclusive as to congressional intent, which enabled it to narrowly construe the statute to contain an implicit time limitation and avoid deciding the constitutional question. *Zadvydas* thus held that the post-order detention statute at 8 U.S.C. § 1231(a)(6) only authorized detention of admitted aliens for a period reasonably necessary to remove them -- presumptively six months absent evidence to show that deportation is likely to occur in the reasonably foreseeable future beyond that time. *See* 533 U.S. at 701 (citing repealed six month ceiling formerly applicable to deportable aliens); *see also Suarez Martinez*, *supra* at *4 ("In light of that perceived ambiguity and the 'serious constitutional threat' the Court believed to be posed by indefinite detention of aliens who had been admitted to the country, the Court interpreted the statute to permit only detention that is related to the statute's 'basic purpose of effectuating an alien's removal.'" (quoting *Zadvydas*, 533 U.S. at 696-99)).

The *Zadvydas* majority reserved the same question with respect to unadmitted or excludable aliens "who have not yet gained initial admission to this country," which, it observed, "would present a very different question." 533 U.S. at 682. It distinguished but did not overrule or otherwise disturb its precedent concerning aliens refused admission or excluded on arrival, including *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which held that indefinite detention of an excludable alien did not violate the Constitution. *Id.* at 692-94; *see also id.* at 695-96 ("Nor do the cases before us require us to consider the political branches' authority to control entry into the United States. Hence we leave no 'unprotected spot in the Nation's armor.'" (citation omitted)). Accordingly, regulations implementing the decision in *Zadvydas* reflected this "critical distinction" between admitted and unadmitted aliens, as well as the Court's observation that "special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches" with respect to terrorism, national security and "other special circumstances" (*id.* at 696). See 66 Fed. Reg. 56967 (Nov. 14, 2001) (codified at 8 C.F.R. §§ 241.4, 241.13, 241.14). The question also divided the courts, although the majority, like the Eleventh Circuit in *Benitez*, 337 F.3d 1289, rejected renewed challenges to the authority to detain unadmitted aliens that were brought in the wake of *Zadvydas*. *See Sierra v. Romaine*, 347 F.3d 559, 571-72 (3d Cir. 2003) (collecting cases), *pet'n for cert. filed* (Jan. 27, 2004) (No. 03-8662).

The Court limits post-order detention of aliens to six months, absent special circumstances.

In *Suarez Martinez*, 2005 WL 50099, however, the Court held that, while the question presented is different, and the statute is susceptible to different interpretations, the same statute can only have one meaning. Therefore, the same construction adopted in *Zadvydas* applies to both admitted and unadmitted aliens. The Court explained:

> The operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one. As the Court in Zadvydas recognized, the statute can be construed 'literally' to authorize indefinite detention, [533 U.S.] at 689, or (as the Court ultimately held) it can be read to 'suggest [less than] unlimited discretion' to detain, id., at 697. It cannot, however, be interpreted to do both at the same time. * * * [T]he question we answer today is indeed different from the question decided in *Zadvydas*, but because the statutory text provides for no distinction between admitted and nonadmitted aliens, we find that it results in the same answer.

Id. at *4-5.

In the Court's decision, this explanation is followed by a more general discussion of the canon of constitutional avoidance that the Court employed in *Zadvydas*, and its implication for other circumstances that may be covered by the same statute – – including here unadmitted aliens whose detention did not present the same "statutory purpose and the constitutional concerns that influenced" the outcome in *Zadvydas*. *Id.* at *6 ("Be that as it may, it cannot justify giving the same detention provision a different meaning when such aliens are involved.").

Notably, like *Zadvydas*, the *Suarez Martinez* decision is a statutory ruling construing current § 1231(a)(6). The Court also concluded that if Congress is not satisfied with the Court's

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Suarez Martinez cont.

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interpretation of the existing law, which will result in releasing illegal aliens into this country who cannot be deported, Congress can attend to the issue by enacting or amending the statute to address it. *Id.* at * 9 & n.8. At the time of drafting this article, approximately 920 inadmissible aliens were detained more than six months, including over 700 criminal aliens who, like the two aliens in *Suarez Marttinez*, were originally paroled into the United States following their arrival in the 1980 Mariel boatlift from Cuba, and returned to custody only after committing further serious crimes in the United States. Both the Office of Immigration Litigation and the Department of Homeland Security will be providing guidance respecting the implementation of *Suarez Martinez*.

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Jama continued

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ment applied to all removals, and that this allegedly settled construction of the statute was adopted when Congress enacted section 1231(b)(2) in 1996. Specifically, the Supreme Court concluded that this construction of the statute was not settled in terms sufficient to find that Congress had adopted that construction.

At the outset, the Supreme Court noted that section 1231(b)(2) contained "four consecutive removal commands." First, an alien shall be removed to the country of his choice, absent a decision by the Attorney General to disregard the alien's selection (section 1231(b)(2)(A)). Second, in the event the first removal option is not available, an alien shall be removed to the country of which he is a citizen, unless the government of the country of removal is not willing to accept the alien or, within 30 days of the Attorney General's inquiry or another period of time within which the Attorney General deems reasonable, the government of the country of removal does not inform the Attorney General or the alien whether the government is willing to accept the alien into the country (section 1231(b)(2)(D)). Third, in the event the second removal option is not available, an alien shall be removed to one of the countries which with he has a lesser connection (section 1231(b)(2)(E)(i) - (vi)). Fourth, in the event the preceding removal options are impracticable, inadvisable, or impossible, an alien shall be removed to another country whose government will accept the alien into that country (section 1231(b)(2)(E)(vii)).

Somali Removal Case Decided

The omission of an acceptance requirement in the statute had great import.

Regarding the plain language of the statute, the Supreme Court stated that it would not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." Section 1231(b)(2) imposed an acceptance requirement regarding certain removals, which were not relevant to Jama's circumstance. Accordingly, the Court concluded that the omission of an acceptance requirement in the provision under which the government sought to remove Jama — section 1231(b)(2)(E)(iv) — had great import because where there were "[e]ffects attached to nonacceptance throughout the rest of paragraph (2), . . . the failure to specify any such effect in most of subparagraph (E) [made the omission] conspicuous — and more likely intentional."

The structure of the statute also militated in favor of rejecting Jama's argument that an acceptance requirement had to be imposed on all of section 1231(b)(2)(E) because subparagraph (E)(vii) states that the government may remove an alien to another country who government will accept the alien into that country, where removal of the alien under subparagraphs (E) (i) through (vi) was impracticable, inadvisable, or impossible. In Jama's view, if the country of last resort in subparagraph (E)(vii) was another country that had to provide acceptance, the countries in the preceding subparagraphs must also be countries whose governments will accept the alien's return. In rejecting that interpretation the Supreme Court relied on "the grammatical rule of the last antecedent," stating that the term "another" pertained only the phrase that it immediately followed, and therefore it could not be imported into the subparagraphs that preceded the term. Further, the Supreme Court noted that each subparagraph in section 1231(b)(2)(E) was "distinct and end[ed] with a period," e.g., "The country in which the alien was born." (§ 1231(b)(2)(E)(iv)). This "strongly" suggested to the Supreme Court that each subparagraph could be "understood completely without reading any further." In short, each subparagraph could rise and fall on its own terms without reference preceding or succeeding language. In addition, the Supreme Court stated that Jama's reading of the statute would abridge the "exercise of Executive judgment" because absent advance, explicit acceptance of the alien's return, the Executive would have to deem the removal of "an alien to any country to be per se 'impracticable, inadvisable, or impossible[,]'" when, in fact, an alien could be removed, as was the case regarding Jama, where there was no practical impediment to his removal to Somalia. The Supreme Court also rejected Jama's claim that the government could circumvent the acceptance requirements in other parts of section

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1231(b)(2) if it had authority to remove an alien without acceptance under subparagraphs (E) (i) through (vi) of section 1231(b)(2). The premise underlying Jama's claim was that an alien's country of birth in section 1231(b)(2)(E)(iv) might also be an alien's country of citizenship under section 1231(b)(2)(A) or (D), which, in Jama's view, impose an acceptance requirement. The Supreme Court stated that there was an "imperfect overlap" of countries in, for example, section 1231(b)(2)(D) and 1231(b)(2)(E), and that the reason section 1231(b)(2)(E) "exists at all is that it will not always be true" that there will be a perfect overlap of the countries. Moreover, the Supreme Court rejected Jama's blanket assertion that the government was compelled to impose an acceptance requirement on removals under section 1231(b)(2)(A) and (D), stating that section 1231(b)(2)(C) states that the Attorney General "may disregard" the alien's designation of a country of removal under section 1231(b)(2)(A) "if the country's government proves unwilling to accept the alien or fails to respond within 30 days" of an inquiry about the alien's return, and that the term "may" connotes discretion in this context, which means that the Attorney General may decide to accept the alien's designation of a country of removal, notwithstanding the lack of acceptance of the alien's return from the designated country. The Supreme Court pointedly and rhetorically asked: "Would Congress really have wanted to preclude the Attorney General from removing an alien to his country of choice, merely because that country took 31 days rather than 30 to manifest its acceptance?"

The possibility that aliens might be released under *Zadvydas* and *Suarez Martinez* because they could not be removed, absent acceptance from their country of removal, led the Supreme Court to reject Jama's reading of section 1231(b)(2). Where "the alien is left in the same removable-but-unremovable limbo as the aliens in" *Zadvydas* and *Suarez Martinez*, then they "must presumptively be released into American society after six months. If this is the result that obtains when the country-selection process fails, there is every reason to refrain from reading restrictions into that process that do not clearly appear – particularly restrictions upon [section 1231(b)(2)(E)(i) through (vi)] which will often afford the Attorney General his last realistic option for removal."

In the absence of express language imposing an acceptance requirement on section 1231(b)(2)(E)(iv), the Supreme Court declined to adopt Jama's construction of the statute, as it "would run counter to [the Court's] customary policy of deference to the President in matters of foreign affairs." Relying on *Matthews v. Diaz*, 426 U.S. 67, 81 (1976), the Supreme Court explained that removal decisions, including the country-selection process, "'implicate[s] our relations with foreign powers' and require[s] consideration of 'changing political and economic circumstances.'" Further, the Supreme Court refused to include an acceptance requirement in section 1231(b)(2)(E) in order to account for, and protect against, the possibility that the absence of a government in a country of removal the alien might result in persecution or other mistreatment of the alien. Jama and his *amici* had claimed that an acceptance requirement was necessary in order to ensure that a government willing and able to protect its citizens, including aliens expelled from the United States, existed in a country of removal. The Supreme Court held that individualized determinations under provisions concerning asylum, withholding of removal, and protection under the Convention Against Torture were far better suited to ensure the humane treatment of aliens who feared returning to their countries of birth than adopting Jama's "suggestion that silence from Mogadishu inevitably portends future mistreatment and justifies declining to remove anyone to Somalia."

Jama's construction of the statute "would run counter to [the Court's] customary policy of deference to the President in matters of foreign affairs."

Finally, the Supreme Court rejected Jama's claim that the courts of appeals and the Board of Immigration Appeals had imposed an acceptance requirement on all removals under section 1231(b)(2)'s predecessor, 8 U.S.C. 1253(a), and therefore this allegedly settled construction was adopted by Congress when it enacted section 1231(b)(2) in 1996. First, the Supreme Court explained that a new procedure was created in 1996, to wit, removal proceedings, which combined previously separate deportation and exclusion proceedings. The Supreme Court noted that two courts of appeals, the Second Circuit in *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959), and the D.C. Circuit in *Rogers v. Lu,* 262 F.2d 471 (D.C. Cir. 1958) (per curiam), had imposed an acceptance requirement on section 1253(a) in the case of deportable aliens, but the Second Circuit in another case had refused to read, and other courts were skeptical about imposing, an acceptance requirement for the removal of excludable aliens into 8 U.S.C. § 1227 (1952), the corollary to section 1253(a), which pertained to deportable aliens. In Jama's case, he would be subject to exclusion proceedings, and thus, according to the Supreme Court, cases like *Tom Man* and *Lu* did not apply. Second, the Supreme Court stated that the Board of Immigration Appeals' in this area were in conflict. In *Matter of Niesel*, 10 I&N Dec. 57 (1962), the Board held that there was no preliminary inquiry required at the time of the designation of a country of deportation. On the other hand, the Board in *Matter of Linnas*, 19 I&N Dec. 302 (1985), stated that acceptance of the alien's return was

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required. *Linnas*, however, arose from proceedings in New York, and the Supreme Court concluded that "[w]ith rare exceptions, the [Board] follows the law of the circuit in which an individual case arises," which, in *Linnas* that circuit was the Second Circuit, which had held in *Tom Man* that acceptance was required. Given the implementation of a new procedure (removal), the disparate judicial treatment of deportable and excludable aliens on the question of acceptance by their destination country, and the divergent views expressed by the Board on acceptance requirement, the Supreme Court, quoting *United States v. Powell*, 379 U.S. 48 (1964), concluded that there was "neither a settled judicial construction nor one which [the Court] would be justified in presuming Congress, by its silence, impliedly approved." In addition, the Supreme Court noted that the D.C. Circuit's opinion in *Lu* was a two-sentence *per curiam* decision. Accordingly, the Supreme Court added that Jama's "Circuit authority [was] too flimsy to justify presuming that Congress endorsed it when the text and structure of the statute are to the contrary."

This case was decided by a 5-4 vote of the Supreme Court. The dissent took issue with the majority's conclusion that section 1231(b)(2) contained four consecutive removal commands, stating that the government had described the statute as containing a progressive, three-step process. The majority responded, "[w]e think not" because section 1231(b)(2)(E)(vii) "applies only after the options set out in the third step [(section 1231(b)(2)(E)(i) - (vi))] are exhausted; it is nothing if not a discrete, further step in the process." The dissent also asserted that the "fair conclusion is that when Congress [enacted section 1231(b) in 1996][,] it understood the law to require a country's consent and chose language suited to that understanding." The dissent stated that the majority's conclusion to the contrary was built on a mistake of fact, in that the merger of deportation and exclusion provisions into one removal proceeding in 1996 incorporated language from former section 1253(a) into current section 1231(b)(2), which, in the dissent's view was "language unchanged in any way helpful to the government from the text of the prior law, with its settled judicial and administrative construction." The majority stated that dissent's conclusion was "erroneous" because while the "former exclusion provision [at section 1227] [had] its own exclusive descendant in section 1231(b)(1)," but that provision ((b)(1)) "applies only to aliens placed in removal proceedings immediately upon their arrival at the border, and would not apply to aliens like Jama, who were paroled or otherwise allowed into the United States. "Whereas previously some aliens who had been allowed into the country were excluded and some deported, see section 1227(a)(1) and 1253(a), now all are removed and their destination chosen under section 1231(b)(2), not (b)(1). The dissent also stated that whether or not the removal provision enacted in 1996 constituted a new statutory regime was "beside the point[,]" as the issue before the Court was the process by which certain aliens are sent out of the country, and the "[t]ext, statutory history, and legislative history support reading [section 1231(b)(2)(E)(vii)'s] language, 'another country whose government will accept the alien,' as providing that any 'country' mentioned in the six preceding clauses in [section 1231(b)(2)(E)(i) - (vi))], must also be willing to accept the alien before deportation thence may be ordered."

This decision preserves the government's removal options in those cases where the government of a country is unwilling or unable to assent to the return of its citizens and nationals. By rejecting an explicit, advance acceptance requirement on the removal of aliens in the context of removal to Somalia, which lacks a central, functioning government, the Supreme Court's decision provides the government with flexibility in resolving troublesome removal situations. In addition, the case's impact flows beyond the removal of Jama. The decision will impact the Ninth Circuit's decision to affirm the United States District Court for the Western District of Washington's order certifying a nationwide class of aliens subject to removal to Somalia and enjoining their removal, as well as numerous habeas petitions filed by Somali aliens who challenged their detention on the ground that they could not be removed to Somalia because of the injunction.

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Safe Third Country Rules

The *Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* ("Agreement") was signed on December 5, 2002. Subject to several exceptions, the Agreement provides that aliens attempting to travel from Canada to the United States, or vice versa, will be allowed to seek asylum or other protection in one country or the other, but not both.

On November 29, 2004, the Department of Homeland Security and the Executive Office for Immigration Review both issued final rules to implement the Agreement. A complete discussion of the DHS final rule is found at 69 Fed. Reg. 69480. A complete discussion of the EOIR final rule is found at 69 Fed. Reg. 69490. The final rules bar certain aliens from pursuing protection claims in the United States if they are either arriving from Canada at land border ports-of-entry or are being removed from Canada in transit through the United States. The barred aliens will be returned to Canada to have their claims adjudicated by Canada.

The implementation of the Agreement permits asylum officers to conduct a threshold screening interview. The purpose of the screening interview is to determine whether an alien qualifies for one of the several exceptions provided for in the rules. Where an asylum officer determines that the alien does not qualify for an exception under the rules, the alien will be returned to Canada. Where an asylum officer determines that an alien qualifies for an exception, the officer will proceed to a determination of whether the alien has a credible fear of persecution or torture, as provided under existing law.

The exceptions provided in the rules reflect the three underlying principles of the Agreement. First, to the extent possible, the rules will not act to separate families. Second, the rules will ensure that persons subject to it will have their claims adjudicated in the United States or in Canada. Third, the rules will only apply where it is indisputable that the alien arrived from Canada.

To achieve these principles, an alien who arrives at a land boarder port-of-entry is exempt from being returned to Canada under the Agreement if the alien:

(1) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

(2) Has a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States, except visitor status;

(3) Has a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and who has an asylum application pending in the United States;

(4) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

(5) Is applying for admission at a United States land border port-of-entry with a validly issued visa or other valid admission document, other than for transit, issued by the United States, or being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

(6) Has been permitted, as an unreviewable exercise of discretion by DHS, to pursue a protection claim in the United States because it was determined that it is in the public interest to do so.

The rules apply to aliens who are subject to expedited removal under section 235(b) of the INA, which provides a specific removal mechanism for aliens who are inadmissible under section 212(a)(6)(C) (fraud or willful misrepresentation) or 212(a)(7) (failure to have proper documents) of the INA. The rules do not apply to aliens who are charged with grounds of removability after being found in the United States, even if the alien had previously come from Canada.

The new rules modify the expedited removal process for aliens subject to the agreement. The threshold question for asylum officers is whether the alien should be returned to Canada or, if the alien qualifies for an exception, whether the alien should be allowed to pursue claims in the United States. Only after this threshold screening interview and where the asylum officer finds that the alien qualifies for an exception, would a credible fear determination be made.

The alien will bear the burden of proof to establish by a preponderance of the evidence that an exception applies. The asylum officer may use all available evidence, including testimony, affidavits, and available records, to determine whether the alien qualifies for an exception. Credible testimony, alone, may be sufficient if there is a reasonable explanation for why corroborative documentation is not available.

The rules provide that an immigration judge would not have jurisdiction to review an asylum officer's threshold determination that an alien is to be returned to Canada because she or he does not qualify for an exception. The asylum officer's threshold determination, however, will be reviewed by a supervisory asylum officer to ensure proper decisions are made on this limited issue. If the arriving alien does not qualify for an exception, there will be no need for a credible fear determination because the alien will be returned to Canada to pursue protection claims there. Accordingly, there is no right to seek review of the merits of the asylum claims by an immigration judge.

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Safe Third Country

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The threshold determination for aliens who are subject to the Agreement is very different from a credible fear determination. In the credible fear process, asylum officers consider the merits of the claimed fear of persecution or torture. If the asylum officer makes a negative credible fear determination, the alien has the right to have an immigration judge review the merits of that determination. In contrast, in the case of an arriving alien from Canada who is subject to the Agreement and who does not meet any of the exceptions, the merits of the alien's claims would not even arise in any proceedings before an immigration judge, and there would be no occasion for an immigration judge to consider or determine whether or not the alien in fact has a credible fear of facing persecution or torture if returned to the country of his or her nationality or habitual residence.

When DHS chooses to put an alien who is subject to the Agreement into regular removal proceedings, the immigration judge will make the threshold determination of whether the alien qualifies for an exception. Under the rules, an alien in regular removal proceedings who is subject to the Agreement will not be able to pursue an application for asylum, withholding of removal, or protection under the Convention Against Torture, unless she or he can establish by a preponderance of the evidence that she or he qualifies for an exception. Because the public interest exception is solely within the discretion of DHS, the regulation provides for DHS to file a written notice with the immigration judge of its decision to allow an alien to pursue a claim for asylum or withholding of removal.

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Board Holds That A Guilty Finding Of A "Violation" Under Oregon Law Does Not Constitute "Conviction" Under The INA.

On October 19, the Board issued a precedent decision in ***Matter of Eslamizar***, 23 I&N Dec. 684 (BIA 2004), holding that an alien found guilty of a "violation" under Oregon law does not have a "conviction" for immigration purposes. In the case, the alien was charged with the offense of third-degree theft. Although the offense qualified as a misdemeanor and was initially charged as such, Oregon law allowed the prosecuting attorney to amend the accusatory pleading so as to "treat" the offense as a "Class A violation" – with a maximum punishment being a $600 fine – rather than as a misdemeanor. The alien's trial was therefore tried under a provision of the Oregon statute which provided for proceedings that differed from conventional criminal prosecution in that, among other things, the State needed only to prove guilt "by a preponderance of the evidence," rather than "beyond a reasonable doubt." At the conclusion of his trial, the alien was found "guilty" under this lower standard.

At his removal hearings, the Immigration Judge concluded that the judgment issued against him did not qualify as a "conviction" for immigration purposes because the proceeding resulting in his guilty determination did not afford the alien with many of the constitutional safeguards generally required for criminal prosecutions. The government appealed the case to the Board, which initially sustained the appeal and remanded the case to the Immigration Judge to determine whether the alien qualified for any forms of relief. The alien then filed a motion to reconsider, alleging errors of both fact and law. The Board held that because the burden of proving an offender's guilt in a violation proceeding was only by a preponderance of the evidence, rather than beyond a reasonable doubt, and Oregon did not consider the adjudication to be a criminal prosecution, the alien's judgment of guilt was not entered in a true criminal proceeding. The Board therefore concluded that the Oregon court's finding of guilt in a violation proceeding did not fall within the meaning of the term "conviction" under the INA.

Recent BIA Decisions

The Attorney General the INS certification request in C-Y-Z-.

Attorney General Declines To Certify For Review The Board's Holding In *Matter of C-Y-Z-*, 23 I&N Dec. 693 (A.G. 2004).

On December 1, 2004, the Attorney General denied the request of the Commissioner of the former Immigration and Naturalization Service to certify for review the decision of the Board in the above captioned case. In that decision, the Board held that: 1) an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the meaning of the INA; and 2) the regulatory presumption of a well-founded fear of future persecution may not be rebutted in the absence of changed country conditions, regardless of the fact that the sterilization of the alien's spouse negates the likelihood of future sterilization to the alien.

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ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Newsletter, or if you have any ideas for improving this publication, please contact Julia Doig Wilcox at:

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Summaries Of Recent Federal Court Decisions

ASYLUM

In ***Ali v. Ashcroft***, 394 F.3d 780 (9th Cir. Jan. 19, 2005) (*Nelson*, Thomas, Ezra), the Ninth Circuit granted petitioner's petition for review of the Board's denial of her applications for asylum, withholding of removal, and CAT protection. Petitioner, a native of Somalia and member of the Musse Diriiye clan, alleged that she was raped by three armed members of the militia while her husband and brother-in-law were forced to watch. While they were raping her, the persecutors called her and her family "Midgan traitors" and were getting what they deserved for being Musse Diriiye. When petitioner's brother-in-law cursed at the men, he was shot and killed and her husband was captured. Upon her husband's release, petitioner and her family fled to Ethiopia where she was able to obtain work as a maid. Petitioner claimed that she lived in constant fear and could not move freely in Ethiopia. When her employer moved, petitioner and her sons fled to the United States. The IJ dismissed petitioner's asylum claim, finding that she failed to establish that her past persecution was on account of an enumerated ground, and that petitioners had firmly resettled in Ethiopia prior to entering the United States. The Board affirmed without opinion.

The attackers' words indicated their motive for the attack was based on petitioner's clan membership.

The court held that while the militia was not the ruling government, its actions against petitioner could be considered persecution on account of her social group. The court found that the attackers' words indicated their motive for the attack was based on petitioner's membership in the Musse Diriiye clan. Furthermore, the court found that petitioner had not been offered permanent resident status or other permanent resettlement in Ethiopia; in fact she had to evade detection while living illegally there. Accordingly, the court remanded for further proceedings.

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In ***Lau v. Ashcroft***, — F.3d —, 2005 WL 119846 (8th Cir. Jan. 21, 2005) (Wollman, *McMillian*, Riley), the Eighth Circuit denied petitioner's petition for review of the Board's decision denying her requests for asylum, withholding of removal, and CAT protection. Petitioner, a citizen of China, sought relief on the grounds that she had been pressured into an abortion, fired from jobs for failing to enforce her employer's family planning practices, and was threatened with eviction if she was not sterilized. The IJ denied relief and protection, and the Board affirmed without opinion.

On appeal, petitioner argued that the Board abused its discretion in affirming without opinion and that her past persecution and fear of torture qualified her for relief. The court held that because petitioner identified no intervening legal development that might have materially affected the issues, it did not have jurisdiction to review the Board's decision to affirm without opinion. The court found that while petitioner was pressured into having an abortion, a reasonable factfinder could nonetheless conclude that she was not "forced" to have an abortion. Similarly, the court found that a reasonable factfinder could conclude that petitioner did not have an objectively well-founded fear of involuntary sterilization. Accordingly, the court denied her petition for review.

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The Third Circuit, in ***Leia v. Ashcroft***, 393 F.3d 427 (3rd Cir. Jan. 4, 2005) (*Sloviter*, Becker, Stapleton), vacated the Board's order denying petitioner's application for asylum and withholding of removal. Petitioner's claim was based on his association with the Ukranian United National Front. He alleged that he had been arrested and beaten by the police, and that the authorities never responded to his complaints. The IJ found petitioner's testimony to be incredible, citing the lack of objective facts in support of his application and the fact that the State Department's country report indicated that petitioner could relocate within Ukraine. The IJ based her credibility finding on internal inconsistencies concerning the date of the beatings and petitioner's failure to obtain original documents or authenticated copies. The IJ refused to admit the nonauthenticated documents into evidence.

On appeal, the Board held the IJ erred in refusing to admit these documents and remanded for additional hearings to allow petitioner an opportunity to authenticate the documents. On remand, Petitioner provided the testimony of an expert on Ukranian politics who described why it would be difficult for petitioner to authenticate his documents. However, the IJ dismissed this testimony as irrelevant and again denied petitioner's application for asylum and withholding. The Board dismissed petitioner's appeal, holding petitioner failed to demonstrate that it would be unreasonable to expect authentication of corroborating documentation.

The court, following its decision in *Liu v. Ashcroft*, held that petitioner had the right to present evidence explaining why authentication was impossible and that it was thus an abuse of discretion for the IJ to refuse to consider the testimony. Furthermore, the court found that the IJ erred in finding petitioner's testimony not credible. The court held that discrep-

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ancies in dates cannot be the basis of an adverse credibility finding, and that the government failed to show that petitioner could safely relocate in Ukraine. Accordingly, the court vacated the Board's order and remanded for further proceedings.

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In ***Prela v. Ashcroft***, 394 F.3d 515 (7th Cir. Jan. 7, 2005) (*Bauer*, Ripple, Kanne), the Seventh Circuit affirmed the Board's decision denying petitioner's application for asylum, withholding of removal, and CAT protection. Petitioner, an ethnic Albanian and native of Yugoslavia, sought asylum on the grounds that he was persecuted by the Serbian police and the Albanian population due to his mother's Serbian heritage. Petitioner testified that when he accidentally shot himself with an illegally owned firearm, Serbian police confiscated his passport and would not return it until he surrendered the firearm. He alleged that when he surrendered the weapon, he was interrogated about his political opinions. Petitioner testified that police surrounded and searched his house and detained him and his brother for twenty-four hours until their mother paid a bribe and they were released. Petitioner also stated that the police stopped him while he was driving, interrogated him, demanded a bribe, injured his hands, and told him they would kill him if they saw him again. Petitioner also claimed that while living in Switzerland, people associated with the Kosovo Liberation Army came to his house and threatened to kill him if he didn't join them. The IJ denied petitioner's application, finding he failed to prove that the alleged persecution was on the basis of his political opinion or nationality. The Board summarily affirmed, adding that petitioner's claims did not rise to the level of persecution or torture.

Judicial notice is appropriate to ensure that administrative or judicial ignorance is not insulated from review through hyper-technical application of the general rule that the court can consider only evidence considered by the Board.

On appeal, the Seventh Circuit affirmed the Board's decision. The court held that the incidents petitioner alleged were not severe enough to constitute persecution. While the events could have qualified as harassment or intimidation, they were not so extreme as to constitute persecution. The court further held that changed country conditions refuted petitioner's claim of a well-founded fear of future persecution, and that petitioner failed to demonstrate that he would more likely than not be tortured if returned to Yugoslavia.

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In ***Singh v. Ashcroft***, 393 F.3d 503 (9th Cir. Dec. 23, 2004) (Fletcher, *Noonan*, Thomas), the Ninth Circuit held that the Board's adverse credibility determination was not supported by substantial evidence. Petitioner, a native and citizen of India, applied for asylum on the grounds that he worked for the Research and Analysis Wing (RAW) of the Indian government, an agency he alleged was similar to the CIA. Petitioner testified that he made reports on individuals believed to be Sikhs working to establish a separate Sikh state. He testified that he quit RAW after he was ordered to aid in the assassination of a religious person he had investigated. The IJ found petitioner incredible and denied his application. On appeal, the Board affirmed, finding petitioner provided no corroborative evidence that RAW existed or that he was in its employ.

The court disagreed. After performing a Lexis search, the court found numerous articles describing the existence and activities of RAW. The court noted that it was "nonsense" to argue that it could not take notice of facts that were beyond dispute because it was limited to a record review. The court argued that judicial notice is appropriate in exactly this circumstance—to ensure that administrative or judicial ignorance is not insulated from review through hyper-technical application of the general rule that the court can consider only evidence considered by the Board. Accordingly, the court reversed the Board's decision.

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In ***Unuakhaulu v. Ashcroft***, 392 F.3d 1024 (9th Cir. Dec. 20, 2004) (Tashima, *Fisher*, Tallman), the Ninth Circuit denied petitioner's petition for review of the Board's decision denying withholding of removal and CAT protection. Petitioner, a native of Nigeria, was convicted of conspiracy to traffic in counterfeit credit cards and sentenced to 18 months in prison. INS initiated removal proceedings, charging petitioner as removable for having been convicted of an aggravated felony. Petitioner applied for withholding and CAT protection. Petitioner failed to demonstrate he would more likely than not be tortured due to his Ogoni ethnicity. The Board dismissed petitioner's appeal without opinion.

The court held a conviction for an aggravated felony does not preclude judicial review of an otherwise reviewable removal order where the record establishes that the individual could have been *but was not* ordered removed for having committed a covered criminal offense. Because the Board did not base its denial of withholding and CAT protection on petitioner's aggravated felony conviction, the court had jurisdiction to review the petition and held that there was substantial evidence to support the IJ's decision to deny petitioner's application for withholding and CAT protection. The court also held that petitioner's concession that the Nigerian government could not identify him as Ogoni, coupled with his admis-

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sion that he was not persecuted in the past demonstrated that he had not met his burden of proof that it was more likely than not that he would be persecuted or tortured.

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In ***Wu v. Ashcroft***, 393 F.3d 418 (3rd Cir. Jan. 4, 2005) (Nygaard, Ambro, *Van Antwerpen)*, the Third Circuit granted the petition for review of the Board's denial of asylum and withholding of removal. Petitioner, a native of China, told the DHS officer that she feared returning to China because she might be incarcerated for being a Christian. The IJ, while finding petitioner credible, found that she failed to establish that she had suffered persecution by the Chinese government and denied her requests for relief. The Board affirmed without opinion.

Merely impregnating one's girlfriend alone is not an act of resistance and insufficient to show eligibility for relief or protection.

The court held that the Board's determination that it was local villagers, and not government officials, who were persecuting petitioner was not supported by substantial evidence, pointing to numerous instances when petitioner referred to the police. The court held that when an IJ finds a witness credible, but then renders a decision to the contrary without explaining why, it cannot be said that such a decision was supported by substantial evidence.

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In ***Zhang v. Ashcroft***, — F.3d —, 2004 WL 3001165 (5th Cir. Dec. 29, 2004)(*Jones*, Barksdale, Prado), the Fifth Circuit affirmed the Board's denial of relief and denied a stay of deportation. Petitioner sought asylum, withholding of deportation and CAT protection because his "live-in" girlfriend, a Chinese national living in China, was fined and forced to have an abortion pursuant to China's population control program. The Board denied relief on the basis of its decision in *Matter of C-Y-Z-,* which limits relief for refugees seeking asylum from a foreign country's coercive population control program to *spouses*. Petitioner and his girlfriend were not married. The court affirmed, finding that petitioner exhibited no legally cognizable "resistance" to China's population control program — merely impregnating one's *girlfriend* alone is not an act of resistance.

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CANCELLATION

In ***Moran v. Ashcroft***, — F.3d —,, 2005 WL 107079 (9th Cir. Jan. 20, 2005) (*Fletcher*, Rymer, Paez), the Ninth Circuit affirmed the Board's denial of cancellation of removal. Petitioner, a native and citizen of Mexico, was placed in removal proceedings as an alien present in the United States without admission. At his removal hearing, petitioner conceded removability and testified that he agreed to pay smugglers to help his future wife and their son enter the United States illegally from Mexico. After the hearing, petitioner applied for cancellation of removal. The IJ denied petitioner's application, finding petitioner failed to meet the good moral character requirement based on his involvement with smuggling. The Board summarily affirmed.

The court held that, while the statutory scheme governing the requirements for cancellation of removal preserves eligibility for individuals whose involvement in "alien smuggling" is limited to helping family members, including spouses and children, the statutory provisions make clear that for acts of smuggling occurring after May 5, 1988, the "family member" waiver does not apply to a spouse who was not a spouse at the time of the smuggling. Because petitioner and his wife were married *after* he helped her enter the country illegally, he did not fall within the exception to the alien smuggling provision, and his involvement in helping his son and his future wife cross the border in 1993 rendered him ineligible for cancellation of removal.

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In ***Reyes-Vasquez v. Ashcroft***, — F.3d —, 2005 WL 147116 (8th Cir. Jan. 25, 2005) (*Wollman*, Heaney, Holmes), the Eighth Circuit granted the petition for review of the Board's determination that petitioner was not entitled to cancellation of removal. Petitioner, a native and citizen of Mexico, entered the United States illegally in 1984. In 1990, he returned to Mexico for two weeks to attend to his ailing grandfather and was apprehended trying to reenter the U.S. on September 15, 2000. He testified that he was locked in a cell for several hours and then put "back over the line again" without being told that he would otherwise have to go before a judge. Petitioner successfully reentered that same day. He was placed in removal proceedings on March 20, 2000, conceded removability, and sough cancellation of removal. The IJ denied him that relief, finding that his voluntary return to Mexico in 1990 interrupted the period of continuous presence and that he lack the requisite ten years. The Board summarily affirmed.

On appeal, petitioner challenged the Board's streamlining procedure, arguing it violated the principle of separation of powers, as well as its decision finding him ineligible for cancellation. The court held that petitioner's separation of powers claim failed because the regulation did not change the relationship between the branches of government, but rather adjusted intra-agency procedures. Furthermore, the court held that petitioner was

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not out of the country more than ninety days and that his encounter at the border did not constitute voluntary departure under threat of deportation. Because the threat of deportation was not expressed and understood by petitioner, he was simply released back over the border, and his continuous presence was not broken. Accordingly, the court remanded for further proceedings.

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CONVENTION AGAINST TORTURE

In ***Mostafa v. Ashcroft***, —, F.3d —, 2005 WL 129725 (6th Cir. Jan. 24, 2005) (Martin, Moore, Bunning), the Sixth Circuit vacated the Board's decision denying petitioners' claim for CAT protection. Petitioners, natives and citizens of Iran, overstayed their visas and were denied asylum and withholding of removal. The Board affirmed, and on appeal the Sixth Circuit denied their petition for review. Petitioners then filed a motion to reopen to apply for CAT protection. At the hearing, lead petitioner testified that while in the United States on business, he was subpoenaed concerning his employer's role in trading banned materials. As a result, the Iranian government seized all of the company's Iranian assets Petitioner testified that as a result of these events, he is viewed as a traitor who "gave all the information to the U.S. Government." Petitioner also testified that when he tried to renew his passport, he was told he was on a list of people who had applied for asylum and that his passport could not be renewed until he completed a form. The IJ denied CAT protection and the Board affirmed, holding that Petitioner failed to prove that he more likely than not to face torture in Iran.

0 The court disagreed, holding that the Board failed to analyze petitioner's CAT claim in light of relevant country conditions and the legal precedent set forth in *Matter of G-A-,* which illustrates abuses inflicted by the government on Iranian citizens returning from abroad. Accordingly, the court vacated the Board's decision and remanded with instructions to analyze the claim in light of the country conditions.

Even though petitioner's mother was a U.S. citizen, he did not qualify for the CCA because he was over the age of 18 at the time of its passage.

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CRIMES

In ***Ali v. Ashcroft***, — F.3d —, 2005 WL 43720 (7th Cir. Jan. 11, 2005) (Easterbrook, Rovner, *Williams*), the Seventh Circuit affirmed the Board's citizenship determination, its CAT determination, and its denial of petitioner's motion to reconsider. Petitioner, a native and citizen of Afghanistan, was convicted of possession with intent to distribute THC and receiving stolen property. Petitioner was placed in removal proceedings for having been convicted of an aggravated felony related to drug trafficking, a controlled substance violation, and two CIMTs The IJ denied petitioner's applications for relief, finding that he was not a U.S. citizen under the Child Citizenship Act of 2000 ("CCA"), his drug conviction rendered him ineligible for cancellation of removal, and was a "particularly serious crime" which rendered him ineligible for asylum and withholding of removal, and that he had not filed a CAT claim. The Board affirmed without opinion. Petitioner's drug conviction was later amended to simple possession. Petitioner filed a motion to reopen which was denied by the Board as untimely, and a motion to reconsider which was denied on the grounds that even though petitioner's conviction was amended to a misdemeanor, it remained an aggravated felony for immigration purposes.

On appeal, the Seventh Circuit affirmed. The court held that even though petitioner's mother was a U.S. citizen, he did not qualify for the CCA because he was over the age of 18 at the time of its passage. The court held that a conviction for possession with intent to distribute THC constituted an aggravated felony, and the conviction remained valid despite its later amendment to a misdemeanor. The court denied petitioner's CAT claim, finding that he failed to establish that he would be tortured if returned to Afghanistan.

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The Ninth Circuit in ***Carty v. Ashcroft***, — F.3d —, 2005 WL 95730 (9th Cir. Jan. 18, 2005) (Canby, Rymer, *Hawkins*), dismissed petitioner's petition for review of the Board's decision affirming the IJ's determination that willful failure to file state income taxes is a crime of moral turpitude. Petitioner, a native of Anguilla, pled *nolo contendre* to two counts of failure to file a state income tax return, and pled guilty to attempted bribery of a government official for attempting to buy a passport for a non-citizen. INS commenced removal proceedings for conviction of two or more CIMTs. The IJ ruled that petitioner's willful failure to file a return with the intent to evade taxes constituted a crime of moral turpitude. The Board affirmed. The court held that the intent to defraud is implicit in willfully failing to file a tax return with the intent to evade taxes and thus the crime constitutes a CIMT. Accordingly, the court dismissed the petition for review.

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In a *per curiam* decision in ***Espinoza-Franco v. Ashcroft***, 394 F.3d 461 (7th Cir. Jan. 3, 2005) (Ripple, Evans, Sykes), the Seventh Circuit held that sexual abuse of a minor constitutes an aggravated felony and dismissed the

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petition for review. Petitioner, a native of Ecuador, pled guilty in 1996 to aggravated criminal sexual abuse perpetrated against his eight year old daughter. He served three years' probation. The IJ ordered petitioner removed as an aggravated felon and denied his request for asylum, withholding of removal, and CAT protection. Petitioner sought reconsideration, arguing that in light of the court's decision in *United States v Cruz-Guevara*, which held that consensual sex between an eighteen year old alien and his sixteen year old girlfriend was not an aggravated felony, petitioner's crime was not an aggravated felony. Petitioner appealed to the Board, arguing that the term "sexual abuse of a minor" must be specifically defined. The Board dismissed petitioner's appeal, finding that petitioner's definition was unnecessarily restrictive, and his crime of abusing his daughter was far worse than consensual sex between teenagers in *Cruz-Guevara*.

It was self-evident that incarceration in county jail following a conviction constituted confinement in a penal institution.

On appeal, petitioner again argued that the term "sexual abuse of a minor" needs a single definition consistent with the majority of states and the federal law. The court, using the categorical approach, found that petitioner's crime fit squarely within the ordinary meaning of sexual abuse of a minor, and was particularly serious considering the victim's young age. Accordingly, the court dismissed the petition for review.

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In ***Gomez-Lopez v. Ashcroft***, 393 F.3d 882 (9th Cir. Jan. 3, 2005), the court denied Gomez's petition for review of the Board's decision, finding that incarceration in a county jail constitutes confinement in a penal institution. In January 1999, Gomez pled guilty to one count of vehicular manslaughter while under the influence of alcohol and was sentenced to 365 days in county jail. The INS then filed a Notice to Appear, charging Gomez with removability as an alien present in the United States without admission or parole. Gomez conceded removability and applied for cancellation of removal.

The IJ found that Gomez was statutorily ineligible for cancellation because his incarceration exceeded 180 days. The IJ also found that Gomez could not establish good moral character for voluntary departure, and that Gomez was ineligible for adjustment of status because he could not show that a visa was available to him. The Board affirmed without opinion.

Gomez appealed, arguing that his incarceration in a county jail did not constitute confinement in a "penal institution" under 8 U.S.C. § 1101(f)(7). The Ninth Circuit disagreed, holding it was self-evident that incarceration in county jail following a vehicular manslaughter conviction constituted confinement in a penal institution. The court noted that, even if the statute were ambiguous, it must defer to the interpretation given by the agency charged with administering the statute, and the IJ determined that incarceration in a county jail qualified as confinement in a penal institution.

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In ***Hernandez-Guadarrama v. Ashcroft***, 394 F.3d 674 (9th Cir. Jan. 10, 2005) (Nelson, *Reinhardt*, Thomas), the Ninth Circuit held that the government failed to establish petitioner's removability for alien smuggling by clear, unequivocal, and convincing evidence. Petitioner's pick-up truck was stopped by INS agents who discovered that seven of the occupants were illegal aliens. Petitioner, a native and citizen of Mexico, was charged in removal proceedings with alien smuggling. He moved to suppress evidence obtained as a result of the traffic stop, alleging it was based on his race. The IJ rejected petitioner's claim and refused to allow him to cross-examine the arresting officers regarding the basis for the stop. The IJ held that the government had demonstrated by clear and convincing evidence that petitioner had aided in the illegal entry of seven illegal aliens. The Board affirmed, finding petitioner was part of a smuggling plan and that his Fourth Amendment rights had not been violated.

The court held that the evidence introduced by the government was not subject to cross-examination and was insufficiently reliable to support a decision to remove the petitioner. The court held than neither an I-213 form (which did not contain a statement from petitioner) nor a statement from one of the smuggled aliens who had since been deported satisfied the clear, convincing, and unequivocal standard and accordingly reversed the Board's decision.

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In ***Medina v. Ashcroft***, 393 F.3d 1063 (9th Cir. Jan. 4, 2005) (*Canby*, Rymer, Hawkins), the Ninth Circuit held that the statutory removability exception for a single conviction involving marijuana possession for personal use includes an implicit exception for a single conviction of actual personal use of marijuana. Petitioner, a native of Cuba, was convicted of attempting to be under the influence of a controlled substance, marijuana. The IJ ordered petitioner removed and the Board affirmed without opinion.

The court held that petitioner was not removable because the government failed to establish that his conviction was for "other than a single offense involving possession for one's use of

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thirty grams or less of marijuana." The court held that it "defied reason" that Congress wanted to protect a person who possessed marijuana in small amounts for his own use, but then wanted to remove him from the country if he did so use it. Accordingly, the court found that petitioner's conviction could not be used as a basis for removal and reversed the Board's decision.

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The Court found that it "defied reason" that Congress wanted to protect a person who possessed marijuana for personal use, but then wanted to remove him from the country if he did use it.

The Seventh Circuit, in ***Mei v. Ashcroft***, 393 F.3d 737 (7th Cir. Dec. 29, 2004) (*Posner*, Kanne, Wood), held that the crime of aggravated fleeing is a CIMT. In 1998, petitioner, who had been admitted as an LPR three years earlier, was convicted of unlawful possession of a motor vehicle and sentenced to thirty months' probation. Three years later, he was convicted of aggravated fleeing from a police officer and sentenced to one year in prison. The IJ found the petitioner removable for having been convicted of a CIMT for both convictions. However, the Board based its order of removal on the sole ground that aggravated fleeing is a CIMT.

The court held that a person who deliberately flees at a high speed from an officer is deliberately engaged in seriously wrongful behavior. While he may not want to endanger anyone, a perpetrator has to know that his actions greatly increase the risk of an accident, and that his actions are a consequence of his deliberate and improper decision to ignore a lawful order of the police. The court therefore concluded that aggravated fleeing is indeed a crime involving moral turpitude, and denied the petition to review.

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In ***Penuliar v. Ashcroft***, — F.3d —, 2005 WL 74093 (9th Cir. Jan. 12, 2005) (Browning, *Pregerson*, Berzon), the Ninth Circuit granted petitioner's petition for review of the Board's finding that petitioner's convictions for unlawful driving or taking of a vehicle and evading an officer constituted aggravated felonies. Petitioner, a citizen of the Philippines, pled guilty to two counts of unlawful driving or taking of a vehicle and one count of evading an officer, and was sentenced to three years imprisonment. Petitioner was placed in removal proceedings for having been convicted of an aggravated felony. The IJ concluded that petitioner's two convictions for unlawful driving or taking of a vehicle were "theft offenses" and petitioner's conviction for evading an officer was a "crime of violence." Accordingly, the IJ found petitioner removable as an aggravated felon and found him ineligible for cancellation and voluntary departure. The Board summarily affirmed.

The court disagreed, finding that the evidence concerning petitioner's guilty plea was insufficient to establish that petitioner pled guilty to reckless conduct constituting a "crime of violence." Furthermore, the court held that the charging documents concerning the unlawful driving or taking of a vehicle were unclear as to whether petitioner pled guilty to the activity of a principal or to that of an aider and abettor. Accordingly, the court found that the IJ and Board erred in finding petitioner's convictions to be aggravated felonies and granted his petition for review.

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In a *per curiam* decision in ***Taylor v. United States***, —- F.3d —, 2005 WL 100731 (11th Cir. Jan. 19, 2005) (Edmonson, Pryor, Fay), the Eleventh Circuit affirmed the district court's dismissal of petitioner's habeas petition. Petitioner, a native of Jamaica, plead guilty to soliciting sexual activity with a minor and was placed in removal proceedings. The IJ found petitioner removable as an alien convicted of a CIMT and denied petitioner's request for cancellation of removal. Petitioner appealed to the Board, and while the appeal was pending, filed a habeas petition challenging his removal. The district court dismissed the petition for lack of jurisdiction. The Board dismissed petitioner's appeal, holding that the solicitation of sexual activity with a minor constituted a CIMT. Petitioner appealed, and the court vacated the district court's dismissal and remanded the case to the district court. On remand, the district court dismissed the habeas petition with prejudice.

The court held that petitioner was ineligible for cancellation of removal for having committed an aggravated felony. The court held that soliciting sexual activity from a minor constituted "sexual abuse of a minor." While the IJ found petitioner removable for having committed a CIMT, the district court was not limited to the INS charge in determining petitioner's eligibility for relief, and thus did not err in concluding petitioner's conduct constituted an aggravated felony. Accordingly, the court affirmed the district court's decision.

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In ***United States v. Sadig***, — F.Supp.2d —, 2005 WL 94869 (W.D.N.C. Jan. 14, 2005) (Thornburg), the Western District of North Carolina denied defendant's motion for a new trial. Defendant, a native of Sudan, filed an Application for Naturalization on August 10, 2000. On November 14, 2000, defendant was arrested and later

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indicted on four counts of assaulting

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flight attendants. On August 7, 2001, he attended a naturalization interview, and when asked if he had ever been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking any law, defendant replied "no." defendant signed the application, signifying it was true to the best of his knowledge and belief. On September 6, 2001, defendant pled guilty to three counts of assault on flight attendants. On September 28, 2001, defendant was naturalized. In 2003, Defendant was arrested and charged with making a false statement under oath concerning citizenship, knowingly making a materially false statement, and knowingly attempting to procure citizenship contrary to the law. The jury acquitted defendant of the first two counts but convicted him of the third. Defendant filed a motion for a new trial, claiming the jury returned inconsistent verdicts, the government erroneously argued that defendant had a duty to volunteer the information about his arrest, and that the guilty verdict on the third count was not supported by substantial evidence.

The district court was not limited to the INS charge in determining petitioner's eligibility for relief.

The court held that defendant's acquittal of charges of knowingly making a false statement under oath in any matter relating to naturalization and willfully making a materially false statement did not preclude his conviction. Further, the court held that the defendant's knowledge that his arrest made him ineligible for naturalization when he failed to disclose the arrest during his naturalization interview established the requisite intent. Accordingly, the court denied defendant's motion.

DENATURALIZATION

In ***Jean-Baptiste v. United States***, 2005 WL 15059 (11th Cir. January 4, 2005) (Birch, Kravitch, *Cudahy*), the Eleventh Circuit held that a naturalized citizen who committed certain unlawful acts during the statutory period *prior* to taking the oath of allegiance, but for which he was indicted, arrested, and convicted *after* naturalization, stands to lose his citizenship. Petitioner, a native and citizen of Haiti, applied for naturalization on November 21, 1994. His application was approved on February 13, 1996 and he took the oath of allegiance on April 23, 1996. Unbeknownst to immigration officials, however, petitioner had become involved with a conspiracy to distribute crack cocaine at some point between March 17 and March 23, 1995. He was indicted for this crime on October 11, 1996 and convicted by a jury on January 8, 1997. Consequently, the government sought to revoke petitioner's citizenship on the grounds that he was barred from establishing "good moral character" because he committed unlawful acts during the statutory period. The district court granted summary judgment for the government, finding petitioner's commission of the acts negated a showing of good character.

The court followed 8 C.F.R. § 316.10(b)(3)(iii) which states that applicants who have committed acts that adversely reflecting on moral character during the statutory period cannot establish the requisite good moral character and accordingly affirmed the district court's finding that petitioner was barred from acquiring citizenship.

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HABEAS CORPUS

In ***Deng v. Garcia***, — F.Supp.2d —, 2005 WL 94643 (E.D.N.Y. Jan. 15, 2005) (Garaufis), the court held that it lacked jurisdiction over the habeas petition and transferred it to the M.D. Pa.. Petitioner, a native and citizen of China, was convicted of two armed robberies and sentenced to serve five to fifteen years. Petitioner was found to have committed an aggravated felony and ordered deported. The Board denied the appeal. When petitioner became eligible for parole, he was transferred to ICE custody in Pennsylvania. Petitioner filed the instant habeas petition. He argued that his continued detention violated *Zadvydas*, and that the Board's determination that he posed a risk to the community was unreasonable and should be overturned. The court held that the warden of the facility in Pennsylvania where petitioner was detained was the proper respondent, and since the court lacked jurisdiction over that warden, the petition must be transferred to the appropriate court. Accordingly, the petition was transferred to M.D. Pa..

In a *per curiam* decision in ***Esposito v. Ashcroft***, 392 F.3d 549 (2d Cir. Dec. 23, 2004) (Walker, Leval, Katzmann), the Second Circuit held that the "abuse of the writ" doctrine barred a second habeas proceeding brought by an alien who did not appeal the first writ. Petitioner appealed from the October 14, 2003, judgment of the district court dismissing his habeas petition, seeking review of his removal order. The petition was filed six years after an earlier habeas petition had been denied on the merits by the district court. The second petition, which sought to relitigate the same issues rejected in the first petition, was not filed until petitioner had been located by immigration officials and was facing imminent deportation.

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In a *per curiam* decision in ***Filsaime v. Ashcroft***, 393 F.3d 315 (2d Cir. Dec. 27, 2004) (Feinberg, Straub, Raggi), the Second Circuit vacated the

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district court's decision dismissing peti-

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tioner's petition for habeas relief and request for a stay of removal. Petitioner, a native and citizen of Haiti, entered the United States in 1967 on a visitor's visa. In 1989, he was granted an indefinite period of voluntary departure. In 1997, he pleaded guilty to conspiracy to launder money and was sentenced to fifty-seven months in prison. INS initiated removal proceedings and petitioner applied for asylum, withholding of removal, CAT protection, and cancellation of removal. The IJ denied these applications and the Board denied petitioner's appeal, as well as a subsequent motion to reopen. Petitioner filed a habeas petition in the Central District of California in 2001 which was denied for lack of jurisdiction. Petitioner then filed a habeas petition in the Eastern District of New York in 2002 which was transferred to the Western District of Louisiana. While that petition was pending, petitioner filed an "Emergency Petition for Stay of Removal" in the District of Connecticut. Petitioner's habeas petition in the District of Connecticut was denied on April 3, 2003, and his petition in the Western District of Louisiana was denied on April 14, 2003, following the reasoning of the District of Connecticut's decision. Petitioner appealed the District of Connecticut's decision.

The court held that the final order of removal had been upheld by the W.D. La's decision. In order to establish jurisdiction, petitioner had to establish that prior review of the final order in the Western District of Louisiana had been inadequate or ineffective. The court held that petitioner's claim that his request for CAT protection was not adequately reviewed satisfied this burden and remanded for further action.

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JURISDICTION

The Board acted ultra vires in issuing an of removal in the first instance, rather than remanding to the IJ.

In ***Garcia v. Ashcroft***, 394 F.3d 487 (7th Cir. Jan. 6, 2005) (Coffey, Manion, *Rovner*), the Seventh Circuit found it lacked jurisdiction over petitioner's claim and transferred to the district court. Petitioner entered the United States illegally and in 1988 pled guilty to possession of cocaine in an Illinois court. In 2000, INS charged petitioner as removable, alleging both that he had entered illegally and that he had been convicted of a controlled substance offense. The IJ agreed and ordered petitioner removed. In addition, the IJ concluded that petitioner's drug offense qualified as an aggravated felony, making petitioner ineligible for voluntary departure. Petitioner appealed, arguing that his Illinois conviction should not be characterized as an aggravated felony because the same offense if prosecuted in federal court would have resulted in a misdemeanor conviction. The Board affirmed without opinion.

The court held that it lacked jurisdiction to review a finding that an alien is removable on account of a conviction for a criminal offense included in INA § 212(a)(2). Following *Yanez-Garcia v. Ashcroft*, the court found that it lacked jurisdiction to decide whether the state felony conviction, punishable only as a misdemeanor under federal law, qualifies as an aggravated felony. Accordingly, the court construed the petition as a habeas and ordered it transferred to the district court.

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In ***Molina-Camacho v. Ashcroft***, 393 F.3d 927 (9th Cir. Dec. 28, 2004) (Pregerson, Kozinski, *Hawkins*), the Ninth Circuit transferred petitioner's petition for review to the district court. Petitioner, a native of Mexico, illegally entered the United States in 1984. In 1998, INS initiated removal proceedings. Petitioner conceded removability, but sought cancellation of removal on the grounds that if his family were forced to return to Mexico, it would severely impact the children's educational opportunities and would deprive petitioner's youngest son of health insurance as he was a U.S. citizen. The IJ concluded that petitioner was statutorily eligible for cancellation and granted him relief. INS appealed and the Board determined that petitioner had not met his burden for cancellation because he had not shown exceptional and extremely unusual hardship. Since petitioner had conceded removability, the Board ordered his removal to Mexico.

The issue was whether the Board's issuance of the removal order exceeded its authority. The court, following its decision in *Noriega-Lopez*, held that the Board acted *ultra vires* in issuing an order of removal in the first instance, rather than remanding to the IJ. Because the Board chose not to remand to the IJ for the issuance of the order, no final order of removal existed that would provide jurisdiction for this court under § 1252. Even though the Board's order is a legal nullity, the same defect that made it invalid prevented the court from invalidating it; however, the order could be reviewed under 28 U.S.C. § 2241. Accordingly, the court treated the petition as a petition for writ of habeas corpus and transferred it to the district court.

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MOTIONS TO REOPEN

In **Azarte v. Ashcroft**, — F.3d —, 2005 WL 89030 (9th Cir. Jan. 18, 2005) (Reinhardt, McKeown, Paez), the Ninth Circuit granted petitioners' petition for

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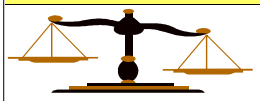
review of the Board's denial of their



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motion to reopen. Petitioners, natives and citizens of Mexico, entered without inspection in 1987 and had two children, both U.S. citizens. Petitioners were charged with removability as aliens present without admission, conceded removability, and sought cancellation of removal. The IJ found petitioners had established the ten-year continuous presence and had good moral character, but failed to establish exceptional and extremely unusual hardship to their citizen children. The Board affirmed without opinion and permitted petitioner to depart voluntarily. Petitioners timely filed a motion to reopen, requesting a stay and introducing evidence of their son's newly diagnosed mental *disability. The Board did not act* on the motion for six months, then issued a decision, concluding that because petitioners failed to voluntarily depart, they were ineligible for cancellation.

Repetition of claims previously rejected can be as abusive as raising new claims that could have been pursued before.

The court disagreed, holding that in cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period is tolled during the period the Board considers the motion. Accordingly, the court granted the petition for review and remanded to the Board.

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In ***Durant v. INS***, — F.3d —, 2005 WL 237636 (2nd Cir. Feb. 1, 2005) (Cardamone, Cabranes, *Sotomayor*), the Second Circuit dismissed a petition for review of the Board's denial of petitioner's motion to reopen. Petitioner, a citizen of Barbados and lawful permanent resident of the United States, was convicted in 1991 and 1995 for criminal possession of a controlled substance. Petitioner filed an application for asylum and withholding of removal, arguing that he would be subject to severe discrimination and would not receive medical care if removed to Barbados because of his HIV-positive status. The IJ granted petitioner's application for withholding of removal. INS appealed and the Board reversed and denied withholding. Petitioner moved to reopen the proceedings and the Board denied this motion.

The Second Circuit held that petitioner's 1991 and 1995 convictions for cocaine possession constituted controlled substance violations, therefore the court lacked jurisdiction to review the final order of removal under 8 U.S.C. § 1252(a)(2)(C). The court held that while final orders of removal and orders denying motions to reopen are treated as separate final orders and require separate petitions for review, these orders are sufficiently connected that permitting review of a motion to reopen when § 1252(a)(2)(C) bars review of the final order of removal would provide an improper backdoor method of challenging a removal order. A holding by the court that the Board abused its discretion in denying a motion to reopen and ordering that the case be remanded to the Board would have the effect of undermining the jurisdictional bar imposed by 8 U.S.C. § 1252(a)(2)(C). The court's decision is consistent with *Assaad v. Ashcroft*, 378 F.3d 471 (5th Cir. 2004),;*Dave v. Ashcroft*, 363 F.3d 649 (7th Cir. 2004); and *Patel v. U.S. Att'y Gen.*, 334 F.3d 1259 (11th Cir. 2003).

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In ***Korytnyuk v. Ashcroft***, — F.3d —, 2005 WL 147405 (3rd Cir. Jan. 25, 2005) (Rendell, Fuentes, *Smith*), the Third Circuit vacated the Board's denial of petitioner's motion to remand as an abuse of discretion and remanded for further proceedings. Petitioner, a native and citizen of Ukraine, requested asylum and withholding of removal on the basis of his involvement with a Ukranian police force. Petitioner claimed that after he quit the force, which he allegedly learned had been committing abuses against Ukranian citizens, he was threatened and beaten.. The IJ denied his requests for relief or protection, finding that petitioner was aware of the abuses of the force, and therefore guilty of a crime. While his appeal to the Board was pending, petitioner received an approved labor certification. He then filed a motion to remand to the IJ to apply for adjustment of status. In a one-page decision, the Board dismissed the direct appeal and denied the motion to remand. Petitioner petitioned for review of this decision and also filed a motion to reopen and a motion to reconsider the Board's denial of his motion to remand. The Board denied both motions.

The court held that it is an abuse of discretion to deny a motion to remand (or reopen) in an immigration case solely on the basis of a factual finding that lacks substantial evidence, for to do so is necessarily arbitrary. The court noted that in cases in which the ultimate grant of relief is discretionary, the Board may leap ahead, as it were, over the two threshold concerns (*prima facie* case and new evidence/ reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief. The court held that the IJ's finding that petitioner had participated in criminal activity was not supported by substantial evidence, and that while the IJ's conclusions might ultimately be the correct ones, the court could not affirm the findings and conclusions on the record as the reasons the IJ provided in support of his decision did not logically flow from the

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facts he considered. Thus, the court remanded the case to the Board to fur-

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ther develop and examine the record concerning petitioner's credibility and his alleged participation in criminal activities.

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In ***Movsisian v. Ashcroft***, — F.3d —, 2005 WL 107082 (9th Cir. Jan. 20, 2005) (Schroeder, Goodwin, *Tashima)*, the Ninth Circuit granted petitioner's petition for review of the Board's summary denial of his motion to reopen, and denied the petition as to the claims for asylum and withholding of deportation. Petitioner, a native and citizen of Armenia, sought asylum on the grounds that he wanted to avoid compulsory military service because the war was dangerous and there was no "law and order" in Armenia. He also testified that Armenian authorities do not allow Pentecostal Christians to practice their religion freely and he was unsure what would happen if he returned to Armenia and practiced his faith. The IJ denied asylum and withholding, finding that petitioner's fear of being drafted did not provide a basis for relief. The IJ also found that the evidence did not support petitioner's claim that he was a genuine conscientious objector, and that his fear of persecution on account of his religion was speculative. The Board summarily affirmed, and in a footnote denied petitioner's motion to reopen without explanation.

Permitting review of a motion to reopen when § 1252(a)(2)(C) bars review of the final order would provide an improper backdoor method of challenging that removal order.

The court held that substantial evidence supported the IJ's denial of asylum and withholding of removal, noting that forced conscription does not generally constitute persecution. Accordingly, the court denied the petition as to asylum and withholding. The court also held that the Board's summary denial of petitioner's motion to reopen was an abuse of discretion. Following its ruling in *Narayan v. Ashcroft*, the court held that the Board must rule upon remand motions, giving specific and cogent reasons for a grant or denial. Thus, the court remanded to allow the Board to provide specific and cogent reasons supporting its determination.

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In ***Sousa v. Ashcroft***, 393 F.3d 271 (1st Cir. January 3, 2005) (*Lynch*, Leval, Lipez), the First Circuit affirmed the Board's denial of petitioner's motion to reconsider his motions to reopen. Petitioner, a native of Cape Verde, overstayed, married a U.S. citizen, and applied for adjustment of status. In 1998, INS issued a Notice to Appear to the address petitioner listed on his application for adjustment. Petitioner failed to appear at his hearing and the IJ ordered him removed *in absentia*. The removal order was sent to the address listed on the application for adjustment. Neither the Notice to Appear nor the removal order were returned as undeliverable. Petitioner was arrested by DHS agents in 2003 and filed a motion to stay deportation and to rescind his *in absentia* order, alleging that since he never received notice of the hearing date or removal order, therefore the proceeding was improper. The IJ denied the motion without prejudice, and denied a subsequent motion to reopen and a motion to reconsider. The Board denied petitioner's motion to reconsider the denial of his second motion to reopen, finding that petitioner was barred from filing a second motion to reconsider, and that petitioner failed to identify any additional arguments that were overlooked.

On appeal, the court affirmed the Board's decision. The court held that petitioner had an affirmative duty to update his address with INS, and since neither the Notice to Appear nor the removal order were returned as undeliverable, petitioner was unable to prove he did not receive actual notice.

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REINSTATEMENT

In ***Fernandez-Vargas v. Ashcroft***, 394 F.3d 881 (10th Cir. Jan. 12, 2005) *(McConnell*, Holloway, Porfilio), the Tenth Circuit denied petitioner's petition for review. Petitioner, a native and citizen of Mexico, had been deported on several occasions, the last in October of 1981. In 2001, petitioner married a U.S. citizen and filed an application for adjustment of status. Petitioner was arrested and the government reinstated the 1981 deportation order. Petitioner filed his petition with the Tenth Circuit arguing that his prior order of deportation could not be reinstated without a decision being made on his adjustment application.

The court rejected the Ninth and Sixth Circuits' holdings that the reinstatement provision applied only to previously deported aliens who re-entered the country after the effective date of the statute. The court denied the petition, holding that the reinstatement statute barred petitioner's application to adjust status, and that, as the filing occurred after the effective date of the reinstatement statute, there was no impermissible retroactive effect.

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OIL can provide training for your office's specific needs. Contact Julia Doig Wilcox for more information.

CASES SUMMARIZED

2005 OIL CONFERENCE SET

OIL Director Thom Hussey is pleased to announce that the 2005 OIL Conference, Immigration Reform and Security: Litigating Service and Enforcement," is scheduled for the week of March 28, 2005, in San Diego, California. OIL's annual litigation conference brings together a broad spectrum of Government attorneys who are responsible for immigration policy and litigation, including Assistant and Special Assistant United States Attorneys, DHS attorneys, attorneys from the Executive Office for Immigration Review, and officials from the Department of State. We plan to hold the conference at the Wyndham San Diego at Emerald Plaza. The hotel is located in downtown San Diego, adjacent to Little Italy, and within walking distance to Seaport Village and the Embarcadero.

The plenary sessions will take place from Tuesday, March 29th through Thursday, March 31st. Attendees are asked to plan their travel schedules accordingly, with a suggested check-in on Monday and check-out on Friday. Expected topics include: Border Enforcement, Defending Immigration Cases in District Courts, Immigration Crimes, Emerging Issues in Asylum Law, and many more. Speakers are expected to include DOJ, DHS (ICE, CIS, and CBP), and DOS officials.

Registration is a two-step process. First, government attorneys who wish to attend should register for the Conference by emailing Julia Doig Wilcox at Julia.wilcox@usdoj.gov. It is very important that attendees advise Mrs. Wilcox at registration or anytime prior to the conference if they will be present for only part of the conference. Second, to receive the *per diem* rate, attendees must make their own hotel reservations. Specific room reservation information will be provided upon registration with Mrs. Wilcox.

ATTENTION READERS!

If you are interested in writing an article for the Immigration Litigation Newsletter, or if you have any ideas for improving this publication, please contact Julia Doig Wilcox at:

julia.wilcox@usdoj.gov

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 Julia Doig Wilcox at 202-616-4893 or at Julia.Wilcox@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"

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

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